No. 23-140

In the Supreme Court of the United States

BOLIVARIAN REPUBLIC OF VENEZUELA AND PETRÓLEOS DE VENEZUELA, S.A,

Petitioners,

V.

OI EUROPEAN GROUP B.V., ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONERS

JOSEPH D. PIZZURRO
KEVIN A. MEEHAN
JUAN O. PERLA
AUBRE G. DEAN
ALLESANDRA D. TYLER
CURTIS, MALLET-PREVOST, COLT & MOSLE LLP
101 Park Avenue
New York, NY 10178
(212) 696-6000

Counsel for Petitioner Petróleos de Venezuela, S.A.

DONALD B. VERRILLI, JR.
Counsel of Record
ELAINE J. GOLDENBERG
GINGER D. ANDERS
KATHLEEN FOLEY
MUNGER, TOLLES & OLSON LLP
601 Massachusetts Ave. NW
Suite 500E
Washington, D.C. 20001
(202) 220-1100
Donald.Verrilli@mto.com

Counsel for Petitioner Bolivarian Republic of Venezuela

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INTRODUCTION

The Third Circuit's decision subjects a foreign sovereign instrumentality's principal assets in the United States to a forced sale based on two critical legal errors that conflict with clear holdings of this Court and other courts of appeals. In arguing otherwise, respondents mischaracterize this Court's precedents and rewrite the decision below. Those efforts cannot obscure the reality that the decision misconstrues the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. 1602 *et seq*., disregards the Executive Branch's recognition policy, and threatens the comity and reciprocity interests that the FSIA is designed to further.

First, the Third Circuit construed the FSIA to require that the illegal actions of the unrecognized Maduro regime be treated as official "sovereign conduct of Venezuela," Pet.App.19, even though the Executive Branch had recognized only the Guaidó government. That holding places the FSIA in significant tension with the Executive's exclusive recognition power and contravenes centuries of this Court's precedents. Respondents' sole rejoinder is to insist that the recognition power, and the consequences of recognition, are far narrower than this Court has held. But respondents are wrong that recognition concerns only which government may speak for a state, or have its official "decrees" (Opp.17) respected, in U.S. courts. Rather, recognition determines which government may *act* for the state, through decree or otherwise. That point is of fundamental importance under the FSIA, and it is fatal to respondents' alter-ego arguments. Pursuant to U.S. recognition policy, only the Guaidó government's actions should have been relevant to evaluating Venezuela's control over PDVSA. The illegitimate Maduro regime's actions should have been treated no differently than those of a criminal cartel that has seized

de facto control of PDVSA. And PDVSA should not have been treated as Venezuela's alter ego and its assets deprived of FSIA immunity based on actions of a third party that does not lawfully act on behalf of Venezuela. The Third Circuit's contrary decision raises significant constitutional concerns and creates enormous uncertainty about how the FSIA applies when—as regularly occurs—a state has both recognized and unrecognized governments.

Second, the Third Circuit announced a new legal standard governing the alter-ego analysis under *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba (Bancec)*, 462 U.S. 611 (1983). Pursuant to that new standard, a sovereign instrumentality may be declared the state's alter ego without a showing of the day-to-day control required by both *Bancec* and every other circuit court to address the issue. Respondents attempt to minimize the conflict by rewriting the decision below, contending that its alter-ego finding did not rest solely on the ordinary incidents of instrumentality status. But the circumstances respondents highlight are just such ordinary incidents, and the Third Circuit expressly rejected the day-to-day control requirement that other circuits use as a touchstone to distinguish between routine governmental management and the complete domination that *Bancec* requires. That conflict creates further uncertainty and confusion about the FSIA's proper application and drastically lowers the bar for piercing the veil between a foreign state and its instrumentality.

This Court's review is warranted.

ARGUMENT

I. The Third Circuit's Holding That The FSIA Requires Courts To Disregard Executive Recognition Policy Conflicts With This Court's Longstanding Precedents And Raises Constitutional Concerns.

A. Respondents' attempt to reconcile the decision below with this Court's longstanding recognition precedents rests on pervasive mischaracterizations of those precedents. Contrary to respondents' contentions (Opp.16-17), those decisions do not hold that recognition concerns only who may speak for a foreign state, or have its *decrees* credited, in U.S. courts.

Rather, the Court's decisions more broadly establish that, for purposes of U.S. law, a foreign state may *act* only through its recognized government, not an unrecognized government—and that, as a corollary, courts may not issue decisions inconsistent with that principle. Specifically, the courts must treat the actions of a *recognized* government (whether or not they happen to take the form of decrees) as official acts of state entitled to the protection of the act-of-state doctrine, which holds that U.S. courts may not question the validity of a foreign sovereign's official acts. See *Oetjen* v. *Cent. Leather Co.*, 246 U.S. 297, 302-303 (1918) (recognized government's seizure of property must be treated as official act of state); *United States* v. *Palmer*, 16 U.S. 610, 643-644 (1818). Conversely, courts must treat the actions of an *unrecognized* government as no different from *private* acts for purposes of U.S. law—that is, courts may not treat the unrecognized government's actions as official acts of state. See *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 410 (1964); *The Maret*, 145 F.2d 431, 442 (3d Cir. 1944).

The Third Circuit's decision violates those basic principles. The question before the court was whether, under *Bancec*, the *state* of Venezuela so dominated PDVSA that PDVSA should be treated as Venezuela's alter ego for purposes of the FSIA. Respondents emphasize that point, but they ignore the conclusion that follows from it: in considering the unrecognized Maduro regime's actions to determine the degree of Venezuela's control over PDVSA, the Third Circuit necessarily held that the Maduro regime's actions may be treated as actions of the *state*. Pet.App.19a. That is exactly what this Court's decisions forbid: once the Executive has recognized one government and derecognized another, courts *must* hold the state in question can act, for purposes of U.S. law, only through its recognized government.

Respondents never grapple with that fundamental point. Respondents insist (Opp.20-21) that the *Bancec* analysis "asks whether the state" controls the instrumentality "as a factual matter." That reasoning skips the critical step of determining *who* acts for the state. Only a recognized government may be treated as acting for the state, even if (as here) a rogue actor has usurped de facto control over state territory or instrumentalities. See *Sabbatino*, 376 U.S. at 410 (unrecognized government may not be treated as sovereign acting for "territory it purports to control"). Therefore, only the Guaidó government's actions, not those of the Maduro regime, may be treated as acts *of Venezuela* for purposes of determining whether "the state in fact extensively controlled" (Opp.21) PDVSA.[1]

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[1] Respondents also rely (Opp.19) on the inapposite rule that an unrecognized government can create state obligations. That principle has nothing to do with recognition, which concerns whether the unrecognized regime's actions may be treated as the state's

Moreover, respondents are wrong (Opp.16) that the decision below merely acknowledged the Maduro regime's de facto control over PDVSA. The Guaidó government enacted statutes and decrees protecting PDVSA's independence and establishing that, as a matter of Venezuelan law, Maduro has no right to control PDVSA. Pet.6-7. Those enactments are acts of state entitled to respect in U.S. courts. *Oetjen*, 246 U.S. at 302-303. By nonetheless giving virtually dispositive weight to the Maduro regime's illegal exploitation of PDVSA in the *Bancec* analysis, the Third Circuit did not merely acknowledge de facto control. It improperly disregarded the Guaidó government's acts of state and accorded Maduro's actions the U.S. legal consequence of stripping PDVSA of its immunity in U.S. courts, despite the legitimate government's efforts to preserve that immunity. The Third Circuit thus unquestionably gave *legal effect* under U.S. law to the Maduro regime's actions.

B. The question presented is exceptionally important. Because the Third Circuit viewed its holding as compelled by the FSIA's use of the term "state," the decision below requires courts, in any situation involving both recognized and unrecognized regimes, to consider the actions of the *unrecognized* regime in determining the state's entitlement to FSIA immunity—even where the recognized government has taken contrary actions to preserve that very immunity. Re-

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under U.S. law. Restatement (Third) of the Foreign Relations Law of the United States § 203 (distinguishing the two concepts). The question here, where multiple governments claim to be the government of Venezuela, is which government's actions constitute Venezuela's. That question is conclusively determined by the Executive's recognition decision.

spondents do not dispute, moreover, that situations involving recognized and unrecognized regimes of a single state occur with regularity. See Pet.23-26. In those instances, the Third Circuit's decision places the FSIA on a collision course with the Executive's exclusive recognition power, raising significant constitutional concerns.

Respondents have no answer. Returning to their revisionist account of this Court's recognition precedents, respondents insist (Opp.22) that considering the actions of both recognized and unrecognized governments does not conflict with the Executive's authority to decide which government may "represent its nation in U.S. courts" or have its decrees credited. But the Executive's recognition authority—and the consequences of its determination—extend far more broadly, determining which government is entitled to *act* on the state's behalf. And because the FSIA's exceptions to immunity turn on the state's actions, every immunity determination involving rival regimes encompasses the antecedent question of which government is entitled to act on the state's behalf. Under the Third Circuit's reasoning, for instance, an unrecognized government could (contrary to respondents' argument, Opp.21 n.2) waive the state's immunity "by implication," 28 U.S.C. 1605(a)(1), by taking actions that implicitly consent to suit. The decision below thus will have profoundly destabilizing effects on the FSIA's application in a broad range of cases.[2]

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[2] Respondents barely defend (Opp.22 n.3) the Third Circuit's subsidiary holding that the alter-ego analysis should consider Maduro's actions *pre-dating* the Guaidó regime and the attachment motions. That holding is fairly included in the first question presented, and it squarely conflicts with *Dole Food Co.* v. *Patrickson*, 538 U.S. 468 (2003), which held—in reasoning not limited to its

C. Finally, respondents resort to mischaracterizing U.S. foreign policy, falsely asserting (Opp.23) that "the Executive expressly recognizes that the Maduro regime is part of the Government of Venezuela." In making that claim, respondents quote from Executive Orders imposing sanctions on Venezuela that define the "Government of Venezuela," for "purposes of this order," to "include[]" the "Maduro regime." But those very same orders explain that the United States views Maduro's actions as a "continued usurpation of power," and that only "Interim President Juan Guaidó and the Venezuelan National Assembly[] exercise * * * legitimate authority in Venezuela." JA5779 (E.O. 13884 (Aug. 5, 2019)); accord E.O. 13857 (Jan. 25, 2019). The orders thus define "government" expansively to ensure that *the sanctions* imposed run against the Maduro regime, while expressly reaffirming that the United States does not *recognize* that regime.[3]

Moreover, the United States has expressly agreed with *petitioners* on the precise question presented here. In 2020, the United States told the district court that the Executive's "recognition of the Guaidó government" required the court to perform the *Bancec* analysis based on the Guaidó government's actions rather than "the corrupt actions of the Maduro regime in connection with PDVSA." 17-mc-151 Dkt. 212, at 7-8 (D. Del.). Thus, there can be no question that the Third Circuit's decision sharply conflicts with U.S. recognition policy.

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removal-jurisdiction context—that the FSIA requires assessing jurisdiction at the time of suit. Pet.20-22.

[3] The United States continues to refuse to recognize Maduro. See U.S. Dep't of State, U.S. Relations with Venezuela (July 27, 2023), https://www.state.gov/u-s-relations-with-venezuela/.

The Executive's recent issuance of licenses facilitating the sales process of shares of CITGO's indirect parent company does not suggest otherwise. Once the district court rejected the Executive's position on the *Bancec* analysis, Pet.App.85a-86a n.19, and also rejected its request that the court not immediately pursue a sale, 17-mc-151 Dkt. 212, at 12, the government explained that it would issue licenses contemplated by the court's rulings to allow the court-ordered sale process to move forward, 17-mc-151 Dkt. 553-1, at 2-3. The government's acquiescence in the district court's adverse rulings should not be confused with an affirmative statement of U.S. foreign policy. Although the United States' position is clear, to the extent the Court has any doubts, it can and should invite the views of the Solicitor General.

II. The Third Circuit's Alter-Ego Holding Conflicts With The Decisions Of Other Courts Of Appeals And Raises Significant Comity And Reciprocity Concerns.

Respondents' attempt to downplay the clear conflict in authority on the legal standard governing when a foreign-sovereign instrumentality may be treated as the alter ego of the foreign sovereign is long on misdirection but short on substance.

A. One need only read the decision below side by side with decisions such as *Gater Assets Ltd.* v. *AO Moldovagaz*, 2 F.4th 42 (2d Cir. 2021), or *Transamerica Leasing* v. *La Republica de Venezuela*, 200 F.3d 843 (D.C. Cir. 2000), to see that the legal standard applied by the Third Circuit to decide whether the instrumentality's separate immunity should be vitiated conflicts directly with the legal standard applied in other circuits, both as a general matter and as applied to common factual scenarios. Pet.26-33. In those circuits, an instrumentality is a

sovereign's alter ego only where there is "complete domination of the subsidiary" due to "significant and repeated control over the instrumentality's day-to-day operations." *Transamerica*, 200 F.3d at 848; *accord EM Ltd.* v. *Banco Cent. de la Republica Argentina*, 800 F.3d 78, 91 (2d Cir. 2015). That test is faithful to *Bancec*'s requirement of "extensive control" beyond the normal incidents of a sovereign/instrumentality relationship to overcome the "presumption of independent status." 462 U.S. at 627, 629. In the Third Circuit, by contrast, "absolute day-to-day control over operations" is not "necessary," and any "high degree of governmental management of [an instrumentality's] affairs" is sufficient to erase the instrumentality's immunity. Pet.App.25a. That standard cannot be reconciled with *Bancec*'s recognition that something more than significant government involvement in an instrumentality's affairs is needed to establish alter-ego status. After all, a sovereign *virtually always* exercises significant control over an instrumentality, just as any parent company does with its wholly owned subsidiary. Pet.28-30.

Respondents try to avoid that straightforward conclusion by rewriting the relevant decisions. Respondents say (Opp.28) that the Third Circuit followed *Bancec*, but merely cite passages in which that court mentioned *Bancec* without adhering to this Court's command that only "extensive control" suffices. Respondents contend (Opp.32-33) that day-to-day control is only one of the factors around which the circuits have coalesced in applying *Bancec*, see *Rubin* v. *Islamic Republic of Iran*, 138 S. Ct. 816 (2018), and that petitioners are therefore ignoring other parts of the applicable test. But circuits other than the Third Circuit treat day-to-day control as an *overarching* requirement—one that informs the meaning of *every one* of

the factors relevant to determining whether to pierce an instrumentality's own immunity. Compare *Gater*, 2 F.4th at 55 ("In applying *Bancec*'s 'extensive control' prong, the touchstone inquiry is whether the sovereign state exercises significant and repeated control over the instrumentality's day-to-day operations."), with Pet.App.25a ("[N]either this Court nor the Supreme Court has ever held absolute day-to-day control over operations to be necessary or even the touchstone of the alter-ego inquiry."). And respondents insist (*e.g.*, Opp.34) that the Third Circuit looked beyond the normal incidents of sovereign control in finding alter-ego status here. Yet respondents list the same facts discussed in the petition, compare, *e.g.*, Pet.30-32, with Opp.33-34, which are facts that this Court and other circuits have deemed to be part of the normal operation of a sovereign/instrumentality relationship.

The Third Circuit's *actual* holding about the legal standard for the alter-ego analysis bears little resemblance to the holdings of the other circuits, to the analysis in *Bancec* itself, or even to the corporate law on parent-subsidiary relationships on which *Bancec* drew. 462 U.S. at 628. In the corporate realm, there is no question that piercing the veil requires, among other things, that the parent company exercised pervasive "control" over "the day-to-day operations of its subsidiary." *Pledger* v. *United States*, 236 F.3d 315, 321 (6th Cir. 2000); see, *e.g.*, *Ranza* v. *Nike, Inc.*, 793 F.3d 1059, 1073 (9th Cir. 2015). No laxer veil-piercing test should apply in the complex and sensitive realm of foreign-sovereign immunity.

B. Respondents muddy the waters by repeatedly insisting that the real dispute here is a factual one. *E.g.*, Opp.27-33. That is wrong. The Court can resolve this case by deciding whether the legal standard under

which the Third Circuit assessed the facts is incorrect, leaving application of the correct standard for remand.

In any event, respondents distort the facts found by the district court, under which it is plain that applying the correct legal standard would alter the outcome. For example, respondents state (Opp.30) that the Guaidó government used PDVSA's money for Venezuela's legal defense, but they refer to a standard loan that observed corporate formalities and that PDVSA's Board concluded was in PDVSA's interest (JA6695)—and the district court did not find otherwise, JA44; see *EM*, 800 F.3d at 93-94. Respondents emphasize (Opp.8-12, 31-35) that the National Assembly must approve PDVSA's national-interest contracts—but omit that such approval, which is a standard feature of sovereign/instrumentality relationships and is required only for particularly important policy initiatives, is a Venezuelan constitutional requirement that also existed during the pre-2003 period in which everyone agrees that PDVSA was not Venezuela's alter ego. *E.g.*, JA31, JA8349. And respondents assert (Opp.12, 31, 34) that the Guaidó government controlled membership of the boards of PDV Holding, CITGO, and other subsidiaries, whereas the district court correctly found only that the government appointed PDVSA's board—as a sovereign typically does, Pet.31-32—and did not have such power as to the other entities' boards. JA6103-6104, 6689.

C. Finally, respondents are unable (Opp.35-39) to minimize the serious foreign-relations consequences of the Third Circuit's decision to lower the standard for depriving foreign instrumentalities of immunity. As *Bancec* explains, enforcing a sufficiently rigorous legal standard is immensely important to U.S. foreign relations, as it discourages foreign jurisdictions from "disregard[ing] the juridical divisions between different

U.S. corporations," between "a U.S. corporation and its independent subsidiary," or between the United States and one of its "subsidiary" agencies. 462 U.S. at 628 (citation omitted). The Third Circuit's decision does not come close to showing sufficient respect for the separate identities of foreign-sovereign instrumentalities, and the result will be to undermine goodwill toward the United States and the interests of the United States more generally.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JOSEPH D. PIZZURRO
KEVIN A. MEEHAN
JUAN O. PERLA
AUBRE G. DEAN
ALLESANDRA D. TYLER
CURTIS, MALLET-PREVOST, COLT & MOSLE LLP
101 Park Avenue
New York, NY 10178
(212) 696-6000

Counsel for Petitioner Petróleos de Venezuela, S.A.

DONALD B. VERRILLI, JR.
Counsel of Record
ELAINE J. GOLDENBERG
GINGER D. ANDERS
KATHLEEN FOLEY
MUNGER, TOLLES & OLSON LLP
601 Massachusetts Ave. NW
Suite 500E
Washington, D.C. 20001
(202) 220-1100
Donald.Verrilli@mto.com

Counsel for Petitioner Bolivarian Republic of Venezuela