No. 23-__

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. 1330, 1602 *et seq*., provides that "foreign state[s]" and their instrumentalities are presumptively immune from suit and attachment. An instrumentality is presumptively independent from its parent government, and is independently entitled to FSIA immunity absent an alter-ego finding. The FSIA operates against the backdrop of the Executive Branch's exclusive authority to determine whether "a particular regime is the effective government of a state." *Zivotofsky ex rel. Zivotofsky* v. *Kerry*, 576 U.S. 1, 11 (2015).

The United States has recognized the Guaidó government as Venezuela's only legitimate government and derecognized the Maduro regime. The court below held that state oil company PDVSA is Venezuela's alter ego, principally based on the Maduro regime's actions after derecognition, and alternatively based on the Guaidó government's ordinary oversight. As a result, billions of dollars in PDVSA's shares of PDV Holding, the parent of CITGO, can be auctioned in a bankruptcy-style sale. The questions presented are:

1. Whether a court may assess the FSIA immunity of a "foreign state" and its instrumentalities from jurisdiction, and the immunity of their property from attachment, by relying on the actions of an illegitimate government that has been derecognized by the Executive Branch, where the Executive has chosen to recognize a different government of the state.

2. Whether a finding that a presumptively independent state instrumentality should be treated as the alter ego of the foreign state may be based on nothing more than the ordinary incidents of government supervision that are common to most state instrumentalities, rather than on extraordinary day-to-day control.

PARTIES TO THE PROCEEDING

Petitioner Bolivarian Republic of Venezuela was the defendant in the district court and the appellant and intervenor-appellant below.

Petitioner Petróleos de Venezuela, S.A. was the intervenor-defendant in the district court and the appellant below.

Respondents OI European Group B.V., Northrop Gruman Ship Systems, Inc. (now known as Huntington Ingalls Inc.), ACL1 Investments Ltd., ACL2 Investments Ltd., LDO (Cayman) XVIII Ltd., Rusoro Mining Limited, Koch Minerals Sàrl, Koch Nitrogen International Sàrl, and Gold Reserve Inc. were the plaintiffs in the district court and the appellees below.

RELATED PROCEEDINGS

The proceedings directly related to this petition are:

Crystallex Int'l Corp. v. *Bolivarian Republic of Venezuela*, No. 17-mc-151-LPS, 2023 WL 4826467 (D. Del. Jul. 27, 2023).

OI European Grp. v. *Bolivarian Republic of Venezuela*, Nos. 23-1647, 23-1648, 23-1649, 23-1650, 23-1651, 23-1652, 23-1781, 73 F.4th 157 (3d Cir. Jul. 7, 2023).

Koch Minerals Sàrl v. *Bolivarian Republic of Venezuela*, No. 22-mc-156-LPS, Dkt. 21 (D. Del. Mar. 31, 2023).

Gold Reserve Inc. v. *Bolivarian Republic of Venezuela*, No. 22-mc-453-LPS, Dkt. 27 (D. Del. Mar. 30, 2023).

OI European Grp. v. *Bolivarian Republic of Venezuela*, Nos. 19-mc-290-LPS, 20-mc-257-LPS, 21-mc-46-LPS, 21-mc-481-LPS, -- F. Supp. 3d --, 2023 WL 2609248 (D. Del. Mar. 23, 2023).

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Bolivarian Republic of Venezuela and Petróleos de Venezuela, S.A. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in these consolidated appeals.

OPINIONS BELOW

The opinion of the court of appeals is reported at 73 F.4th 157 and reprinted in the Appendix (App.) at 1a-32a. The opinion of the district court, App. 33a-99a, is unreported but is available at 2023 WL 2609248.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Pertinent provisions of the Foreign Sovereign Immunities Act are reproduced at App. 150a-164a.

INTRODUCTION

The court of appeals' decision erroneously resolves issues of enormous legal and practical importance. As a direct consequence of the decision below, billions of dollars of shares—representing a foreign sovereign instrumentality's principal asset in the United States—will be sold in a bankruptcy-style sale, raising significant foreign-relations and comity concerns. And the decision injects significant uncertainty into the application of the FSIA—an area where consistency and uniformity are critically important.

The court of appeals broke new ground in holding that the acts of an unrecognized government are the

sovereign conduct of a foreign state for purposes of determining FSIA immunity—notwithstanding that a different government recognized by the United States exists, is acting on behalf of that sovereign, and has deemed the unrecognized government to be unlawfully usurping sovereign assets. In so holding, the court of appeals departed from centuries of this Court's precedents upholding the Executive's exclusive constitutional authority to recognize foreign governments, and construed the FSIA in a manner that raises significant constitutional questions concerning the statute's application to foreign states with recognized and unrecognized governments—a situation that occurs frequently around the world.

The court of appeals also broke new ground in holding that a foreign-sovereign instrumentality could be treated as the alter ego of the sovereign under *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba* (*Bancec*), 462 U.S. 611 (1983), without any showing that the foreign sovereign exercised the kind of day-to-day control of the instrumentality that *Bancec* requires to establish alter-ego liability. That holding conflicts with *Bancec* itself and the decisions of every other court of appeals to address similar circumstances.

The practical consequences of the court's ruling are no less weighty. The decision creates a very real risk that petitioner PDVSA's principal asset in the United States—the shares through which it indirectly owns 100% of CITGO Petroleum Corporation—will be sold off by next summer, thereby inflicting a devastating economic penalty on PDVSA and the people of Venezuela and raising serious foreign-relations concerns.

STATEMENT OF THE CASE

1. ***The FSIA.*** The FSIA provides that a "foreign state shall be immune from the jurisdiction" of federal courts, with certain enumerated exceptions. 28 U.S.C. 1604; see 28 U.S.C. 1330(a), 1605-1607. Jurisdiction is proper only if a plaintiff establishes that one of those exceptions applies. See *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 488 (1983). The FSIA also provides that the "property in the United States of a foreign state shall be immune from attachment[,] arrest[,] and execution" unless an exception applies. 28 U.S.C. 1609; see 28 U.S.C. 1610-1611.

The FSIA does not exhaustively define the term "foreign state," specifying only that the term "includes" the political subdivisions and the "agenc[ies] or instrumentalit[ies]" of the state. 28 U.S.C. 1603(a). Whether a country or entity qualifies as a "foreign state" implicates the Executive Branch's exclusive recognition power under the Constitution. That authority encompasses determining whether the United States recognizes an entity as a state, and also determining the identity of the government that may speak and exercise sovereignty on behalf of that state. *Zivotofsky ex rel. Zivotofsky* v. *Kerry*, 576 U.S. 1, 11 (2015); *Guaranty Tr. Co. of N.Y.* v. *United States*, 304 U.S. 126, 137-138 (1938).

The FSIA defines a foreign state's "agency or instrumentality" as "any entity" that is a "separate legal person, corporate or otherwise," and (as relevant here) "a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof." 28 U.S.C. 1603(b). As this Court explained in *Bancec*, sovereigns routinely create government instrumentalities to effectuate the government's policies. 462 U.S. at 624. Such entities generally are

structured as juridically separate and enjoy day-to-day independence from the government. *Ibid*. Because those entities are *government* instrumentalities established to undertake "governmental activities," however, they are necessarily subject to government oversight, including governmental appointment of their managing boards, policy direction, and financial supervision. *Id*. at 624-626.

Bancec further held that enterprises bearing those typical indicia of sovereign supervision and support must presumptively be treated as "distinct and independent" from the sovereign. *Id*. at 627. The FSIA similarly recognizes instrumentalities' juridical independence. 28 U.S.C. 1603(b). Accordingly, an instrumentality's entitlement to immunity from suit and execution is independent of that of its parent foreign state. *E.g*., 28 U.S.C. 1605, 1609.

Because a foreign state's instrumentalities "are to be accorded a presumption of independent status," ordinarily a person who obtains a judgment against a foreign *state* cannot satisfy that judgment by executing against the property of that state's *instrumentalities*, which are entitled to their own FSIA immunity. *Bancec*, 462 U.S. at 626-627. *Bancec* held, however, that the presumption of separateness may be overcome in rare circumstances, if the instrumentality is "so extensively controlled by [the state] that a relationship of principal and agent is created" or if recognizing the instrumentality's separate juridical status would "'work fraud or injustice.'" *Id*. at 629 (citation omitted). If an instrumentality's presumptive independence is overcome, the instrumentality may be treated

as the state's alter ego for purposes of immunity from jurisdiction and execution.[1]

2. Venezuela, its instrumentalities, and its government. Petitioner PDVSA is a state-owned oil company that is an "instrumentality" of petitioner the Bolivarian Republic of Venezuela (Venezuela or the Republic) within the meaning of the FSIA. App. 3a; JA3476.[2] PDVSA owns the shares of PDV Holding (PDVH), a Delaware corporation, which is the holding company for CITGO Holding, Inc., which in turn owns CITGO Petroleum Corp., a leading U.S. refining company. App. 5a. CITGO has long served as an important foreign-trade conduit for Venezuelan oil.

In 2013, Nicolas Maduro succeeded Hugo Chávez as President of Venezuela. App. 49a. Both presidencies were marked by extensive corruption and maladministration, including with respect to PDVSA. JA5799-5800; *Crystallex Int'l Corp.* v. *Bolivarian Republic of Venezuela*, 333 F. Supp. 3d 380, 407-408 (D. Del. 2018) (*Crystallex I*).

In January 2019, Venezuela's National Assembly declared Maduro's presidency illegitimate. App. 49a. National Assembly President Juan Guaidó became the Interim President pursuant to Article 233 of the Venezuelan Constitution. *Ibid*. Shortly thereafter, the United States recognized the Guaidó government and withdrew recognition of the Maduro regime. App. 50a.

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[1] Only *Bancec*'s "extensive control" prong is at issue in this case. App. 28a.

[2] "JA" citations refer to the joint appendix filed in the court of appeals.

In 2022, the United States reaffirmed its recognition of Guaidó. JA5140-5141.[3]

The Guaidó government took extensive legal and practical steps to restore PDVSA's independence and end the Maduro regime's corrupt practices. As relevant here, in February 2019 the National Assembly enacted a statute governing the transition to democracy, which authorized Guaidó to "[a]ppoint *ad hoc* Administrative Boards" of state-owned corporations and other entities "for the purpose of * * * adopting the measures necessary to control and protect State company assets." App. 111a. Invoking that authority, Guaidó appointed an ad hoc administrative board of PDVSA, and the National Assembly ratified the appointments. JA6067.

In April 2019, Guaidó issued Presidential Decree No. 3, which granted PDVSA's Ad Hoc Board "new responsibilities and duties." JA6068; JA6688; JA6699; App. 126a. The Decree forbids the Ad Hoc Board from "follow[ing] political or partisan guidelines" and orders it to "exercise the powers conferred herein autonomously and independently." App. 132a. PDVSA's Ad Hoc Board has accordingly maintained strict independence from the Republic. JA6689-90.

Because the Guaidó government is the recognized government of Venezuela, its official actions—including the enactment of the statutes and decrees described above—are entitled to respect in U.S. courts as

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[3] In January 2023, the National Assembly dissolved Guaidó's government, and the United States subsequently reaffirmed its recognition of the National Assembly. The parties stipulated that the 2023 changes had no material effect on this case. JA61; JA6043; JA8576-8579. The United States continues to view Maduro as illegitimate, even though he controls assets located within Venezuela. JA6568-6575.

acts of state. *Oetjen* v. *Cent. Leather Co.*, 246 U.S. 297, 302-303 (1918). Thus, although the Maduro regime continues to assert de facto control over PDVSA in Venezuela, that regime lacks any *legal* authority to control PDVSA in Venezuela or the United States—and in fact lacks any practical control over the operations of PDVSA, PDHV, or CITGO in the United States, App. 51a—due to the enactments promulgated by the Guaidó government and U.S. recognition policy.

3. *The* Crystallex *litigation*. In 2016, Crystallex International Corporation (Crystallex) sued Venezuela to confirm a $1.4 billion arbitration award entered against the Republic based on an expropriation by then-president Chávez. No. 16-cv-661 (D.D.C.), Dkt. No. 1. Exercising jurisdiction under 28 U.S.C. 1605(a)(6), the court confirmed the award and issued a judgment, which Crystallex then registered in Delaware district court. To satisfy its judgment against the Republic, Crystallex asked the court to attach and sell PDVSA's U.S.-based assets. No. 17-mc-151, Dkt. Nos. 1-2.

In 2018, before Guaidó became Interim President and before the United States derecognized the Maduro regime, the district court ruled that PDVH shares owned by PDVSA could be attached to satisfy Crystallex's judgment. The court acknowledged that the Republic and PDVSA are legally separate and that PDVSA had no connection to the underlying dispute. *Crystallex I*, 333 F. Supp. 3d at 403. But the court concluded that PDVSA was Venezuela's alter ego—and therefore could be subjected to FSIA jurisdiction on the same basis as the Republic—on the ground that Venezuela exercised "extensive control" over PDVSA under *Bancec*. *Id.* at 401-403, 414. The court based its decision solely on the Maduro and Chávez regimes' day-to-day domination of PDVSA. *Id.* at 396, 401. The

court also ruled that PDVSA's shares in PDVH were not immune from execution and authorized the issuance of a writ of attachment. *Id.* at 425-426.

In July 2019, the Third Circuit affirmed, relying solely on the facts arising from the Maduro and Chávez regimes. Among other things, the court relied on Maduro's appointment of officials, including military officers, to be PDVSA's directors and officers; use of PDVSA to supply "cheap oil to Venezuela's strategic allies"; and imposition of extraordinary taxes on PDVSA to extract value from it. *Crystallex Int'l Corp.* v. *Bolivarian Republic of Venezuela*, 932 F.3d 126, 140, 146-149 (3d Cir. 2019) (*Crystallex II*).

On remand, the district court began a process to establish procedures for the sale of PDVH shares to satisfy Crystallex's judgment against the Republic. *Crystallex Int'l Corp.* v. *Bolivarian Republic of Venezuela*, 2021 WL 129803, at *1 (D. Del. Jan. 14, 2021) (*Crystallex III*).

4. ***Proceedings below.*** Respondents in this Court are additional judgment creditors who hold judgments against the Republic that collectively total approximately $2.7 billion and that arise out of various disputes, including expropriation of property by then-president Chávez. *Crystallex Int'l Corp.* v. *Bolivarian Republic of Venezuela*, 2023 WL 4826467, at *4 n.7 (D. Del. July 27, 2023). Like Crystallex, respondents seek to satisfy their judgments by executing against PDVSA's shares of PDVH. Because proceedings to determine the process for selling PDVH shares in the Crystallex matter had progressed substantially by the time the district court ruled on the writs of attachment—and because respondents and Crystallex all seek to satisfy their judgments by executing against

the same set of assets—the appeals in these cases have proceeded on an expedited basis.

a. In November 2019, certain respondents first moved for writs of attachment in the district court, with the others following later. Respondents contended that PDVSA was subject to the court's jurisdiction, and its property not immune from attachment, on the theory that PDVSA is Venezuela's alter ego under *Bancec* and thus PDVSA's property is *currently* the property of Venezuela.

Petitioners moved to dismiss the cases for lack of FSIA jurisdiction. Petitioners argued that (1) because respondents sought attachment after Guaidó became Interim President and the United States recognized the Guaidó government as Venezuela's sole legitimate government, only the actions of the Guaidó government, not those of the illegitimate Maduro regime, could be considered in the *Bancec* analysis; and (2) because the Guaidó government had taken significant steps to restore PDVSA's independence—with the result that Maduro exercises no control over PDVSA in the United States, including with respect to the property that respondents seek to attach—PDVSA no longer could be considered the alter ego of the Republic for purposes of these attachment actions.

b. In March 2023, the district court ruled that PDVSA remained the Republic's alter ego under *Bancec*, and therefore PDVSA was not immune from suit and its assets were not immune from execution. App. 33a-99a. The court agreed with petitioners that the *Bancec* analysis should focus on the Guaidó government because only the Guaidó government is recognized by the United States as acting for the Republic, App. 78a, and that the pertinent time for purposes of the analysis was the period between the filing of the

motions seeking writs of attachment and the issuance of the writs of attachment, App. 90a-91a. But the court deemed the Guaidó government to have exercised "extensive control" over PDVSA during that period. App. 77a. In the alternative, the court asserted that the result would be the same if the Maduro regime's actions were also considered. App. 81a-82a, 85a-87a, 91a-92a. In all six cases, the court entered orders "authorizing the issuance of a writ of attachment" upon the occurrence of certain conditions. App. 99a; JA84-86; JA87-89.

c. Petitioners appealed. The court of appeals entered an administrative stay with respect to the six at-issue district-court actions, consolidated the cases, and set an expedited briefing and argument schedule. See Order, No. 23-1647 (3d Cir. May 5, 2023).

The court of appeals affirmed. App. 1a-32a.

The court of appeals first rejected petitioners' argument that because the Executive has recognized the Guaidó government and withdrawn recognition of the Maduro regime, only the Guaidó government's actions are relevant to evaluating whether the Republic exercises sovereign domination over PDVSA. The court reasoned that the FSIA confers immunity on a "foreign state," and a "state" is the "body politic—the country or nation"—rather than any recognized regime. The court therefore held that it would consider "the actions of both the Guaidó and Maduro governments as the totality of the sovereign conduct of Venezuela." App. 19a.

The court of appeals next held that "knowing what facts to consider—the actions of both the Guaidó and Maduro governments as the totality of the sovereign conduct of Venezuela—similarly answers the 'when' issue," i.e., the pertinent time period for assessing the

alleged alter-ego relationship. App. 19a. The court accordingly held that the *Bancec* analysis should consider "all relevant facts up to the time of the service of the writ of attachment." App. 21a-22a. The court thus rejected the district court's conclusion that because jurisdiction must be assessed at the time of the attachment action, and immunity of property from attachment depends on who owns the property when attachment is sought, the *Bancec* analysis should evaluate alter-ego status when attachment was sought, not back when the alleged injury occurred (that is, during the pre-2019 regimes of Maduro and Chávez).

Finally, the court of appeals held that PDVSA "remains the alter ego of Venezuela and lacks sovereign immunity." App. 27a. That conclusion was based primarily on the court's consideration of the actions of the Maduro regime, including actions taken after the Executive recognized the Guaidó government and withdrew recognition of the Maduro regime—and despite the district court's finding that Maduro in fact has no control over PDVSA in the United States or the assets at issue in these cases. Those actions included "the Maduro Government's continued extreme control of PDVSA in Venezuela" even after Guaidó's election, and Maduro's post-2019 assignment of Maduro-regime officials "to restructure PDVSA and attend an OPEC meeting on behalf of both Venezuela and PDVSA." App. 23a-24a. The court also relied on pre-Guaidó conduct by Maduro. App. 22a, 24a-25a. As for the Guaidó government's conduct, the court observed that Ad Hoc Board members are appointed by the government, PDVSA complies with government policies, the government may receive some of PDVSA's profits, and the government offered to renegotiate PDVSA's bond debt. App. 23a-25a.

The court of appeals held in the alternative that "the result would not change" if it considered only the actions of the Guaidó government. App. 27a n.21. That conclusion evidently rested on the court's view that *Bancec* requires only "governmental management," not "absolute day-to-day control." App. 25a.

d. Meanwhile, the district court has pressed forward in the *Crystallex* action with preparations for auctioning PDVH shares.

On July 17, 2023, after the Third Circuit's decision, the district court set a schedule for sale proceedings. *Crystallex Int'l Corp.* v. *Bolivarian Republic of Venezuela*, 2023 WL 4561155, at *5 (D. Del. July 17, 2023). The Launch Date—the date on which the Special Master will begin marketing the shares to bidders—is October 23, 2023. *Ibid*.[4]

On July 27, 2023, the district court held that respondents qualify as "Additional Judgment Creditor[s]" under the sale process order and are eligible to participate in the sale to satisfy their judgments. *Crystallex Int'l Corp.*, 2023 WL 4826467, at *6. The court further held that other judgment creditors possessing writs of attachment (conditional or otherwise) by a yet-undetermined date may also participate in the sale. *Id*. at *4.

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[4] Because PDVSA's assets are subject to U.S. sanctions, the Office of Foreign Assets Control (OFAC) must authorize transactions with respect to those assets. In May 2023, OFAC authorized issuance of writs of attachment for "Additional Judgment Creditor[s]" named by the district court in the *Crystallex* action. Dkt. No. 481, No. 17-mc-151 (D. Del.). Any successful bidders for PDVH shares will require an OFAC license before the sale is consummated. *Crystallex*, 2023 WL 4561155, at *2.

Absent the decision below, the sale would pertain primarily to Crystallex's judgment. The decision below requires the sale of an additional $2.7 billion in shares to satisfy respondents' judgments. Additional creditors currently seeking to avail themselves of the decision below collectively hold another $11.5 billion in judgments.

e. Given the ongoing sale proceedings—and petitioners' position that the district court lacks jurisdiction to issue writs of attachment for respondents or other alter-ego creditors—petitioners moved to stay the court of appeals' mandate pending this Court's review. The Third Circuit denied that motion on July 28, 2023. Petitioners have expeditiously sought certiorari rather than seeking a stay from this Court, because if this Court were to grant certiorari and decide the case by June, it is likely that the additional creditors will not be improperly included in the sale. Delays in the certiorari process could, however, compel petitioners to seek a stay.

REASONS FOR GRANTING THE WRIT

The court of appeals' erroneous decision raises issues of exceptional importance that manifestly warrant this Court's review.

I. This Court should review the court of appeals' holding that the FSIA requires courts to disregard the Executive's recognition decision in cases where a foreign state has both a recognized and unrecognized government.

The court of appeals held that in determining whether an instrumentality of a "foreign state" is entitled to sovereign immunity, 28 U.S.C. 1604, the FSIA requires courts to contradict the Executive's official recognition policy by treating as "the sovereign conduct of Venezuela," App. 19a, not only the actions of

the state's *recognized* government, but also the conflicting, illegal actions of the state's *unrecognized*, usurping regime. The court thus construed the FSIA in a manner that raises significant constitutional doubt in cases where a foreign state has both recognized and unrecognized governments—a situation that has occurred routinely throughout history and that remains common today.

As a result of its erroneous construction, the Third Circuit held that Maduro's actions—taken *after* the Executive recognized the Guaidó government and withdrew recognition of the Maduro regime—demonstrated the Republic of Venezuela's *sovereign* domination over PDVSA. And the Third Circuit's conclusion that Guaidó and Maduro should both be treated as engaging in "sovereign conduct" on behalf of Venezuela, App. 19a, led it to further hold, equally erroneously, that the very pre-2019 Maduro actions that the Guaidó government took steps to remedy should be weighed in the *Bancec* analysis as though the Guaidó government had not remedied them. The decision below departs from centuries of this Court's precedent holding that the Executive's recognition decisions are binding on the Judiciary and raises severe foreign-relations and comity concerns.

A. The Third Circuit's decision conflicts with this Court's well-established precedent regarding the Executive's recognition power and construes the FSIA in a manner that raises constitutional doubts.

1. Recognition is a "formal acknowledgement" that a particular "entity possesses the qualifications for statehood" or "that a particular regime is the effective government of a state." *Zivotofsky ex rel. Zivotofsky* v. *Kerry*, 576 U.S. 1, 11 (2015) (citation omitted). This

Court has long held that the "exclusive prerogative" to recognize a foreign state, or to recognize the particular government of a foreign state, belongs to the Executive. *Id*. at 19; *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 410 (1964) ("Political recognition [of a foreign sovereign] is exclusively a function of the Executive.").

As a necessary corollary of that principle, where, as here, the Executive has recognized one government as the sole representative of a foreign sovereign, that determination "is conclusive on all domestic courts, which are bound to accept [it]." *Guar. Tr. Co. of N.Y.* v. *United States*, 304 U.S. 126, 138 (1938); see, *e.g.*, *United States* v. *Pink*, 315 U.S. 203, 230 (1942); *Oetjen* v. *Cent. Leather Co.*, 246 U.S. 297, 302 (1918); *Williams* v. *Suffolk Ins. Co.*, 38 U.S. 415, 420 (1839). Courts are therefore precluded from issuing any holding that expressly or implicitly contradicts the President's recognition decision. *Guar. Tr. Co.*, 304 U.S. at 137 (although state of Russia was recognized, Soviet government could not speak on behalf of Russia in U.S. courts until the Executive recognized it). And where a new government comes into being, "[t]he courts of the union must view the newly constituted government as it is viewed by the legislative and executive departments of the government of the United States." *United States* v. *Palmer*, 16 U.S. 610, 643 (1818).

The FSIA operates in tandem with those centuries-old recognition principles. Section 1604 provides that a "foreign state" "shall be immune from the jurisdiction" of federal courts, with certain exceptions. 28 U.S.C. 1604; see 28 U.S.C. 1330(a), 1605-1607. A "foreign state" is not further defined, except that the term includes political subdivisions and instrumentalities of the state. 28 U.S.C. 1603. That silence is most naturally understood to reflect Congress's assumption

that Executive recognition necessarily determines whether a country qualifies as a "foreign state" entitled to avail itself of the FSIA's immunity protections. See *Owens* v. *Republic of Sudan*, 531 F.3d 884, 892-893 (D.C. Cir. 2008) (only recognized states may invoke the FSIA); U.S. Statement of Interest 23-25, *O'Bryan* v. *Holy See*, 2007 WL 4963197 (6th Cir. Sept. 18, 2007). That accords with the well-established principle that one of the "[l]egal consequences [that] follow[s] formal recognition" is that recognized sovereigns "may benefit from sovereign immunity when they are sued." *Zivotofsky*, 576 U.S. at 11.

2. Disregarding those well-established recognition principles, the court of appeals construed the FSIA so as to create significant tension with the Executive's exclusive recognition power.

a. The question before the court was whether, under *Bancec*, the Republic—the "foreign state" under the FSIA—so dominated PDVSA that PDVSA should be treated as the Republic's alter ego for purposes of applying the FSIA's exceptions to immunity. Because a foreign state necessarily *acts through* its government, the relevant question under *Bancec* is whether the "foreign *government*" has extensively controlled the instrumentality. 462 U.S. at 628 (emphasis added). As with the question whether an entity qualifies as a state, the identification of the *government* that "speaks as the sovereign authority for the territory it purports to control" is exclusively the province of the Executive. *Sabbatino*, 376 U.S. at 410.

The court of appeals therefore should have treated Executive's recognition policy as "conclusive" as to *which* government's actions should be considered as the sovereign actions of Venezuela. *Guar. Tr. Co.*, 304

U.S. at 138. In light of the President's formal recognition of the Guaidó government "and explicit[] withdr[awal of] recognition of the Maduro Government," App. 7a, the court was required to consider only the actions of the recognized Guaidó government in the *Bancec* analysis—as other federal and state courts have correctly held. *PDVSA US Litig. Tr.* v. *LukOil Pan Americas LLC*, 65 F.4th 556, 563 (11th Cir. 2023); *Jiménez* v. *Palacios*, 250 A.3d 814, 831 (Del. Ch. 2019), *aff'd*, 237 A.3d 68 (Del. 2020).

The court of appeals nevertheless treated "the actions of both the Guaidó and Maduro governments as the totality of *the sovereign conduct of Venezuela*." App. 19a (emphasis added). And in its alter-ego analysis, the court treated as indicia of the Republic's sovereign control over PDVSA illegitimate actions such as the Maduro regime's purported appointment of Maduro-government officials to restructure PDVSA. *E.g.*, App. 24a. But the Maduro regime lacked any legal authority to take those actions—or to exercise any control over PDVSA's operations in Venezuela or the United States—under both U.S. recognition policy and Venezuelan law as promulgated by the recognized Guaidó government. See pp. 6-7, *supra*. The court was bound to respect the Guaidó government's enactments as official acts of state. *Oetjen*, 246 U.S. at 302. In nonetheless according Maduro's illegal actions great weight, the court denigrated the Guaidó government's sovereignty and departed from this Court's recognition and act-of-state precedents.

The Third Circuit emphasized that the Maduro regime exercises de facto control over territory and assets within Venezuela. App. 7a, 23a. But in light of the Executive's recognition of the Guaidó government as the sole legitimate government of Venezuela, the Maduro regime is no different, in the eyes of the

United States, from a private criminal enterprise that has wrongfully asserted control over Venezuelan assets or territory. This Court's decisions are therefore clear: even where an unrecognized regime—or paramilitary group, or private criminal enterprise—has usurped control over sovereign functions *as a practical matter*, courts may not give its actions *legal effect* where a recognized government does exist, because to do so is to bestow upon that unrecognized entity the authority to act on the state's behalf and displace the recognized government's authority to do so. See, *e.g.*, *United States* v. *Hutchings*, 26 F. Cas. 440, 442 (C.C.D. Va. 1817) (Marshall, C.J.); *The Maret*, 145 F.2d at 440. By the same token, the fact that the *recognized* government does not exercise complete de facto control over the foreign state's territory does not affect its entitlement to have its acts treated as the acts of the sovereign. See *Oetjen*, 246 U.S. at 302-303; *e.g.*, *Guar. Tr. Co.*, 304 U.S. at 137; *The Maret*, 145 F.2d 431, 440 (3d Cir. 1944). In ignoring those principles, the court of appeals departed from this Court's precedents and impinged on the Executive's exclusive recognition power.[5]

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[5] Unlike here, where a state has a single recognized government or no recognized government at all, there is no question about *which* regime's actions constitute the state's actions. In the latter scenario, courts may take account of the reality that a state acts through its only government for purposes of the *Bancec* analysis without undermining Executive Branch recognition policy. In that situation, the court is understood simply to accept as a factual matter that the unrecognized government exists and exercises de facto authority. See Restatement (Third) of Foreign Relations Law § 205, Reporters' Note 3. But where, as here, both an unrecognized and a recognized government exist, a court's determination that the unrecognized government's actions constitute the actions of the state and should be taken into account in the sovereign-immunity analysis necessarily expresses a view

b. The court of appeals incorrectly viewed its encroachment on the Executive's recognition authority as necessitated by the FSIA itself. The court reasoned that the FSIA's use of the term "foreign state" (rather than "government") requires the court to consider the entire "body politic—the country or nation"—in the *Bancec* analysis, regardless of the Executive's recognition policy. App. 16a. In such situations, in the court of appeals' view, the FSIA requires the court to accord equal sovereign status to the actions of the unrecognized government and those of the recognized government.

The term "foreign state" cannot bear the weight that the court of appeals placed on it. Congress was undoubtedly aware that a foreign state necessarily acts through its government—and that this Court has held repeatedly that the Executive's recognition policy conclusively establishes which government's actions are those of the state. See pp. 14-15, *supra*; *Zivotofsky*, 576 U.S. at 22; *Guar. Tr.*, 304 U.S. at 137. The FSIA's use of the term "state" therefore cannot be construed to direct courts to disregard the Executive's decision as to which government acts for the state in question. As the United States has observed in a similar context, "[n]othing in the text of the FSIA even hints at a Congressional desire to attempt to transfer recognition authority from the President to the courts, and no such intent can validly be inferred because to do so would raise serious constitutional questions." U.S. Statement of Interest 23-26, *O'Bryan*, 2007 WL 4963197 (arguing that for purposes of applying the FSIA, the court must accept Executive's conclusion that Holy

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about which government's actions are sovereign—and the court cannot take a view that contradicts the Executive Branch's decision about which government that is.

See is the government of the Vatican state). The court of appeals' construction of the FSIA raises just those serious constitutional doubts.

The court of appeals' construction also has destabilizing implications for the FSIA's broader statutory framework. Although this case arises in the context of *Bancec*'s gloss on when an instrumentality may be treated as the "foreign state" itself, the FSIA uses the term "foreign state" throughout, and there is no evident reason that the court of appeals' reasoning would be limited to *Bancec*'s alter-ego inquiry. For instance, Section 1605's exceptions to immunity are in many cases founded on actions taken by the "foreign state." 28 U.S.C. 1605. To take just one, Section 1605(a)(1) establishes an exception to immunity where the "foreign state" has explicitly or implicitly waived its immunity. Under the Third Circuit's interpretation of "foreign state," actions by the unrecognized government could result in waiver, even if the recognized government has no intention of waiving immunity—thus contradicting Executive recognition policy and giving rise to significant foreign-relations concerns. The decision below thus injects significant uncertainty into the FSIA's application and raises significant constitutional doubts whenever a state has both unrecognized and recognized governments.

3. The court of appeals' erroneous holding that both the Guaidó and Maduro governments should be treated as engaging in "sovereign conduct" on behalf of Venezuela led the court to commit a second error: it held that the Maduro regime's pre-Guaidó conduct with respect to PDVSA—conduct that the recognized Guaidó government took extensive concrete actions to remedy—must be considered in the *Bancec* analysis. That is, the court held that "[k]nowing [that] the actions of both the Guaidó and Maduro governments [are

relevant] as the totality of the sovereign conduct of Venezuela * * * *similarly answers the 'when' issue*" concerning the point in time at which PDVSA's alter-ego status should be measured. App. 19a (emphasis added). In the court's view, that status should be measured at "all relevant times," including both the time of alleged injury and the time when attachment is sought. That holding also conflicts with this Court's precedent and—because it followed from the court's erroneous recognition holding—must also be reversed.

Alter-ego status must be determined as of the time of the attachment suit, not the time of injury giving rise to the underlying judgment. As this Court has explained, "the jurisdiction of the Court depends upon the state of things at the time of the action brought." *Dole Food Co*. v. *Patrickson*, 538 U.S. 468, 478 (2003) (holding that instrumentality status under 28 U.S.C. 1603 is determined at the time of suit, not at the earlier time of injury) (quoting *Keene Corp*. v. *United States*, 508 U.S. 200, 207 (1993)). Although the Third Circuit asserted that *Dole Food* concerned only removal, App. 19a n.17, this Court's reasoning was not so limited: the Court held that because the FSIA's jurisdictional provisions are written in present tense and the purpose of foreign sovereign immunity is to protect foreign states from the inconvenience of suit, FSIA jurisdiction should be determined based on the facts at the time of suit. *Dole Food*, 538 U.S. at 478-479; 28 U.S.C. 1330(a) (jurisdiction exists if the foreign state "*is* not entitled to immunity" under the FSIA) (emphasis added). So too here.

The decision is also inconsistent with the fundamental logic of attachment. Respondents must establish that the property they seek to attach is subject to attachment at the time they seek to attach it. If, for instance, respondents sought to attach particular

property held by the Republic at the time of injury, but the Republic had sold the property before respondents sought to attach it, respondents could not proceed on the theory that the Republic *previously* owned it. So too here. Respondents contend that they may attach PDVSA's property to satisfy their judgments against the Republic because PDVSA is the Republic's alter ego and therefore its property should be viewed as the *Republic's* property in PDVSA's hands. If that characterization of the PDVH shares no longer held true when attachment was sought—that is, if PDVSA were no longer the Republic's alter ego—then the shares were no longer available to satisfy judgments against the Republic. Whether PDVSA was previously the alter ego of the Republic at the time of the alleged injuries is not relevant to whether PDVSA's property is subject to attachment *now*.

The court of appeals held, however, that courts must consider "how *a state* acts" at all times with respect to its instrumentality, because otherwise "a state" could engage in gamesmanship designed to evade the alter-ego analysis. App. 20a-21a (emphasis added). The court's view of the risk that a purportedly unitary "state" would engage in gamesmanship expressly followed from its conclusion that both Maduro and Guaidó should be treated as acting on behalf of the state at all times. App. 19a. In fact, where (as here) a state's conduct towards its instrumentality changes because a new *government* emerges, is recognized by the United States, and reverses the policies of the earlier government, that policy shift does not reflect gamesmanship at all. Instead, it represents the newly recognized government's effort—through official acts of state that must be respected by U.S. courts—to correct the abuses of the previous regime. But under the

Third Circuit's decision, whatever independence-fostering measures the newly recognized government institutes must be weighed against the repudiated policies and corrupt actions of the previous regime. That could prevent the recognized government from ever effectively reversing its predecessor's policies in the eyes of a U.S. court—a perverse result that undermines the foreign-policy objectives of recognition.

B. The question presented is exceptionally important.

This Court's review is urgently needed. The court of appeals construed the FSIA's use of the term "foreign state" to require courts to contradict Executive recognition decisions in cases involving states with competing recognized and nonrecognized regimes, thereby casting significant doubt on the FSIA's constitutionality. The decision also will give rise to severe foreign-relations and comity concerns in any case involving recognized and nonrecognized regimes.

Such situations arise with regularity. Since this Nation's founding, courts have repeatedly been confronted with the question of whose actions control when a new government has asserted its sovereignty in opposition to the existing regime. *Hutchings*, 26 F. Cas. at 442; *Williams* v. *Suffolk Ins. Co.*, 29 F. Cas. 1402, 1404 (C.C.D. Mass. 1838) (Story, J.); *Oetjen*, 246 U.S. at 302-303. The co-existence of recognized and unrecognized regimes persists today. In the past 40 years, the Executive has repeatedly instituted recognition policies paralleling its current Venezuela policy, recognizing governments in exile in (for instance) Panama and Haiti, despite the presence of nonrecognized regimes that exercised practical control over those

states' territories.[6] In Somalia—the state involved in FSIA litigation in *Samantar*—the Federal Government of Somalia is recognized by the United States, but swathes of Somalia's territory are controlled and functionally governed by al-Shabaab.[7] In Niger, a military regime currently claims control of the state in opposition to the U.S.-recognized government.[8]

The court of appeals' decision creates significant uncertainty about how the immunity of such states should be analyzed under the FSIA. When the potentially conflicting actions of both recognized and non-recognized governments can affect a state's entitlement to immunity, the recognized government will not be able to predict the outcome of the immunity analysis—or order its conduct to ensure immunity. But clarity and uniformity are exceptionally important when jurisdictional rules and international relations are at stake: foreign states and their recognized governments need certainty about the underlying rules, including with respect to how to order their corporate

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[6] https://www.nytimes.com/1988/04/28/world/us-said-to-weigh-change-in-strategy-on-exile-of-noriega.html (Panama, 1988); S. Talmon, *Who is a legitimate government in exile? Towards normative criteria for governmental legitimacy in international law* (1999), available at https://www.ilsa.org/Jessup/Jessup12/Talmon_Who%20is%20a%20legitimate%20government%20in%20exile.pdf (describing recognition of government in exile of Haiti in 1991).

[7] U.S. Dept. of State, *Somalia: Integrated Country Strategy*, at 7-8 (2022).

[8] N. Toosi & L. Seligman, *Biden Administration Unwilling to Call Niger Coup a 'Coup'* (July 31, 2023), https://www.politico.com/news/2023/07/31/biden-administration-unwilling-to-call-niger-coup-a-coup-00109035.

affairs in the United States. See, *e.g.*, *Bolivarian Republic of Venezuela* v. *Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1321-1322 (2017); see also *Verlinden B.V.*, 461 U.S. at 489.

The Third Circuit's decision will also produce foreign-relations harms. As *Zivotofsky* explains, "[r]ecognition is an act with immediate and powerful significance for international relations," including because of its sovereign-immunity consequences. 576 U.S. at 21. And what is at stake here is not merely recognition as such: the decision below requires courts to give sovereign effect to the nonrecognized regime's actions even where those actions directly contradict the official policy of the recognized government, and even where the consequence is to deprive the state or instrumentality of the immunity to which it would otherwise be entitled.

This case provides a stark illustration. The recognized Guaidó government took concrete actions with significant real-world effects—including enacting laws and decrees guaranteeing PDVSA's independence—to remedy the corruption and mismanagement that the Maduro regime had inflicted upon PDVSA. Yet the Third Circuit accorded sovereign weight to the past Maduro actions that the Guaidó government took steps to remedy, and to the present Maduro actions that, under Venezuelan law as promulgated by the Guaidó government, Maduro had no authority to take. In so doing, the court effectively nullified the sovereign acts of state of the sole recognized government. And the ultimate consequence of the court's improper treatment of the Maduro regime as sovereign is to deprive PDVSA of sovereign immunity and subject its assets to attachment. Such decisions are certain to cause significant international friction and undermine the Executive's conduct of the Nation's foreign relations.

For similar reasons, this Court has frequently reviewed cases involving the recognition power or the proper treatment of foreign sovereigns under the FSIA. See, *e.g.*, *Zivotofsky, supra*; *Rubin* v. *Islamic Republic of Iran*, 138 S. Ct. 816 (2018); *Fed. Republic of Germany* v. *Philipp*, 141 S. Ct. 703 (2021); *Guar. Tr. Co.*, *supra*. The Court's review is also warranted here.

II. This Court should review the Third Circuit's holding that an instrumentality can be deemed an alter ego under *Bancec* based on nothing more than the ordinary incidents of instrumentality status, rather than extraordinary day-to-day control.

The Third Circuit held in the alternative that even if it considered only the actions of the Guaidó government, PDVSA would still be the Republic's alter ego. App. 27a n.21. That alternative holding also warrants this Court's review, because it conflicts with this Court's decision in *Bancec* and departs from the decisions of every other court of appeals to address the degree of sovereign control sufficient to establish alter-ego status. The decision would support treating virtually every foreign instrumentality as an alter ego of a foreign sovereign that can be held responsible for paying the sovereign's judgment debts, thereby giving rise to the very foreign-relations and comity concerns that this Court's carefully crafted *Bancec* analysis was designed to avoid.

A. The decision below conflicts with *Bancec* and the decisions of other courts of appeals.

1. a. *Bancec* holds that "duly created instrumentalities of a foreign state are to be accorded a presumption of independent status," unless (as relevant here) the instrumentality is so "extensively controlled" by

the government as to justify disregarding its legal separateness. 462 U.S. at 627, 629. *Bancec* observes that government instrumentalities by definition carry out *governmental* policies under the supervision of the government; they are created and often financially supported by the government itself; their managing boards are usually chosen by the government; and they generally act in coordination with the government. *Id*. at 624-627.

But instrumentalities bearing those indicia of sovereign supervision are *nonetheless entitled* to a strong presumption of separateness. 462 U.S. at 629. Accordingly, the "extensive[] control[]" that must be present to justify disregarding an entity's juridical status must go well beyond that ordinary level of supervision and coordination. *Ibid*.

b. Until the decision below, the federal courts of appeals had uniformly recognized as much, holding that an alter-ego relationship exists only when the sovereign's control of an instrumentality "significantly exceeds the normal supervisory control exercised by any corporate parent over its subsidiary." *Transamerica Leasing* v. *La Republica de Venezuela*, 200 F.3d 843, 848 (D.C. Cir. 2000). Although the exact formulations used by different circuits have varied in nonsubstantive ways, the courts of appeals have uniformly required "complete domination of the subsidiary," *ibid.*, in the form of "significant and repeated control over the instrumentality's day-to-day operations," in order to overcome the presumption that an instrumentality is separate from the foreign sovereign that created it, *EM Ltd.* v. *Banco Cent. De La Republica Argentina*, 800 F.3d 78, 91 (2d Cir. 2015); see, *e.g.*, *First Inv. Corp. of Marshall Islands* v. *Fujian Mawei Shipbuilding*, 703 F.3d 742, 753 (5th Cir. 2012), *as revised* (Jan. 17, 2013); *Flatow* v. *Islamic Republic of Iran*, 308

F.3d 1065, 1073 (9th Cir. 2002); *Transamerica*, 200 F.3d at 852.

For instance, in *Gater Assets Ltd.* v. *AO Moldovagaz*, 2 F.4th 42 (2d Cir. 2021), the Second Circuit—relying on its prior decision in *EM Ltd.*, *supra*—held that "[t]o qualify as sufficiently extensive under *Bancec*, the sovereign's control over an entity must rise above the level that corporations would normally * * * expect from government regulators." *Gater*, 2 F.4th at 55-56. The court of appeals therefore expressly declined to consider "incidents of the [government's] due exercise of its ownership interest in or regulatory power over" its instrumentality as indicators of extensive control. *Id*. at 56. Instead, the Second Circuit looked to see whether there had been government "intru[sion]" into the instrumentality's affairs that was "arguably * * * atypical of a shareholder or government regulator"—and, notably, found even a few instances of arguably atypical intrusion insufficient to establish the "significant and repeated control over the instrumentality's day-to-day operations" that would be needed to "overcome the strong presumption in favor of * * * independent status," *id.* at 59 (citations and internal quotation marks omitted).

2. The decision below sharply departs from *Bancec* and from the decisions of the other courts of appeals.

a. The decision below cannot be reconciled with *Bancec*'s recognition that sovereign instrumentalities routinely enjoy day-to-day independence from the government even as they carry out governmental policies under supervision. See *Bancec*, 462 U.S. at 624.

The Third Circuit fashioned its own new standard under which alter-ego status is established whenever a foreign state exercises "a high degree of governmental management of [an instrumentality's] affairs."

App. 25a. Under that standard, "absolute day-to-day control over operations" is not "necessary." *Ibid*. It is also not necessary to assess whether the state exercises *more* control than is typical for a state-instrumentality relationship. See *ibid.* Indeed, in holding that PDVSA was the Guaidó government's alter ego, the Third Circuit necessarily relied almost exclusively on what *Bancec* identified as the ordinary incidents of sovereign control over an instrumentality, because that is the only "control" that the Guaidó government exercised. See 462 U.S. at 629. Specifically, the court relied on the Guaidó government's ownership interest in PDVSA, appointment of Ad Hoc Board members, certain government approvals, and alignment between the government and the instrumentality on legal and policy matters.[9] *Id.* at 23a-26a; see pp. 30-33, *infra*.

That approach flips the *Bancec* presumption on its head. Giving near-dispositive weight to what *Bancec* identified as ordinary attributes of government ownership and policy coordination essentially presumes that instrumentalities' separateness should *not* be respected—the opposite of what *Bancec* requires. And the Third Circuit certainly does not require the kind of "extensive[] control[]" by the state that this Court said

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[9] The Third Circuit asserted that the district court's conclusion that PDVSA was an alter ego of the Guaidó government was not "clearly erroneous." App. 27a n.21. The question, however, is not whether the district court's factual findings as to the relationship between the Guaidó government and PDVSA were erroneous; the question was and is whether those findings—accepted as true—are legally sufficient to overcome *Bancec*'s strong presumption of juridical separateness.

was the key to the inquiry into whether the presumption of separateness can be overcome. 462 U.S. at 627, 629.

b. i. The Third Circuit's decision also cannot be reconciled with the decisions of other circuits, including the Second, Fifth, Ninth, and D.C. Circuits. Those circuits disregard juridical independence only where control of an instrumentality "significantly exceeds the normal supervisory control exercised by any corporate parent over its subsidiary." *Transamerica*, 200 F.3d at 848. Those circuits accordingly disregard the instrumentality's separateness only where there is "complete domination of the subsidiary," *id.* at 848, in that the government exercises "significant and repeated control over the instrumentality's *day-to-day* operations," *EM*, 800 F.3d at 91 (emphasis added). By contrast, the Third Circuit minimized the importance of those considerations. App. 25a. The conflict could hardly be more stark.

ii. The decision below conflicts not only with other circuits' overall approach to the *Bancec* analysis but also, more granularly, with those courts' assessment of the significance of particular aspects of the relationship between an instrumentality and its sovereign. Other circuits have specifically concluded that the various factors on which the Third Circuit relied in finding PDVSA an alter ego do *not*, in fact, overcome the presumption of juridical separateness.

First, the court relied on the facts that the Venezuelan Constitution provides "that hydrocarbon deposits within Venezuelan territory are government property," App. 22a, and that the Guaidó government "considers PDVSA's property 'Venezuelan assets held abroad,'" App. 23a (citation omitted). Other courts of appeals have concluded that an instrumentality's

management of property that originated with the state does not render it an alter ego. See, *e.g.*, *EM*, 800 F.3d at 83-84, 92; *Mohammad Ladjevardian, Laina Corp.* v. *Republic of Argentina*, 663 F. App'x 77, 80 (2d Cir. 2016). That is because sovereign nations indisputably have the right to manage their natural resources, see *Sea Breeze Salt* v. *Mitsubishi Corp.*, 899 F.3d 1064, 1070 (9th Cir. 2018), and frequently do so through state-owned corporations.

Second, the court placed weight on the fact that the Guaidó government "manages (and offered to renegotiate) PDVSA's bond debt" and "sent PDVSA money earmarked for legal bills." App. 23a. The Second Circuit has ruled that "a government's intercession on behalf of" its instrumentality in debt and contract negotiations is not unusual, "especially where the government's efforts are related to promoting the company's interests vis-à-vis other entities rather than directing the company's day-to-day operations." *Gater*, 2 F.4th at 60; see *id.* at 56-58. The Fifth, Ninth, and D.C. Circuits, too, have recognized that "infusion of state capital" via appropriations is "a normal aspect of the relation between a government and a government-owned corporation." *Transamerica*, 200 F.3d at 852; see, *e.g.*, *Hester Int'l Corp.* v. *Fed. Republic of Nigeria*, 879 F.2d 170, 180-181 (5th Cir. 1989) (government's oversight over its instrumentality's borrowing is an unremarkable instance of "general supervis[ion]").

Third, the court below deemed highly significant the fact that Guaidó has authority to "appoint and remove an Ad Hoc Board of Directors" and that the "National Assembly requires PDVSA to obtain prior approval for 'national interest' contracts" and generally to coordinate with the Republic on policy matters. App. 24a-25a; see *id.* at 24a (noting that Venezuela is

"PDVSA's lone shareholder"). *Bancec* and circuit decisions following *Bancec* recognize that appointing a managing board is an ordinary incident of sovereign oversight that does not indicate the control necessary for alter-ego status. 462 U.S. at 624, 629; see, *e.g.*, *EM*, 800 F.3d at 92-93 ("an exercise of power incidental to ownership," such as "[t]he hiring and firing of board members," is "not synonymous with control over the instrumentality's day-to-day operations"); *Transamerica*, 200 F.3d at 849 (same); see also *Hercaire Int'l, Inc.* v. *Argentina*, 821 F.2d 559, 565 (11th Cir. 1987) (government's sole ownership of an instrumentality is not relevant to the *Bancec* analysis); *Flatow*, 308 F.3d at 1073 ("[A]n entity fully owned by a foreign state is still accorded the presumption that it is a separate juridical entity.").

As to policy alignment, the Second Circuit and other courts have concluded that because instrumentalities—like any other corporate subsidiaries—are formed to carry out their parents' goals, an instrumentality's pursuit of the public interest as defined by the government, without more, cannot prove that the government dominates the instrumentality's day-to-day operations. See, *e.g.*, *EM*, 800 F.3d at 94; *Gater*, 2 F.4th at 55 ("An entity does not become a sovereign's alter ego merely because it 'assist[s]' the sovereign in carrying out the sovereign's 'policies and goals.'" (quoting *EM*, 800 F.3d at 94)); *Seijas* v. *Republic of Argentina*, 502 F. App'x 19, 22 (2d Cir. 2012) (fact that wholly-owned bank's charter required it "to offer loans consistent with Argentina's national policy * * * does not demonstrate that [the bank] was an alter ego of Argentina").

In short, the conflict at issue here is more than just a broad conflict in approach—it is an unusually specific conflict in which certain factors are treated one

way in the Third Circuit and a different way in numerous other circuits. That kind of conflict is particularly likely to lead to forum-shopping, and the need for this Court to step in to ensure uniformity is therefore acute. *Cassirer* v. *Thyssen-Bornemisza Collection Found.*, 142 S. Ct. 1502, 1508 (2022).

B. The proper alter-ego standard is a matter of pressing importance with significant foreign-relations implications.

The Third Circuit's decision creates significant adverse foreign-relations consequences with respect to Venezuela itself, and will have similarly serious consequences for the United States' foreign policy more generally.

As *Bancec* recognized, treating a foreign instrumentality as the alter ego of its parent state—thereby eliminating its FSIA immunity—raises significant foreign-relations and comity concerns. 462 U.S. at 626. "[P]rinciples of comity between nations" mean "that government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." *Id.* at 626-27; see generally, *e.g.*, *National City Bank of N.Y.* v. *Republic of China*, 348 U.S. 356, 362 (1955).

On a more practical level, foreign sovereigns may be directly harmed when U.S. courts too lightly "ignor[e] the separate status of government instrumentalities." *Bancec*, 462 U.S. at 626. That approach creates "substantial uncertainty over whether an instrumentality's assets would be diverted to satisfy a claim against the sovereign, and might thereby cause third parties to hesitate before extending credit to a government instrumentality without the government's guarantee." *Ibid.* The result will be that "the efforts of

sovereign nations to structure their governmental activities in a manner deemed necessary to promote economic development and efficient administration would surely be frustrated." *Ibid.*

The decision below creates exactly that risk. The Third Circuit's approach threatens with alter-ego treatment any number of government instrumentalities, from state-owned corporations to financial agencies like central banks, based on nothing more than routine shareholder or regulatory control that has long been understood to be consistent with the presumption of separateness—even where a new government remediates previous corruption and mismanagement with respect to that instrumentality.

That uncertainty created by the Third Circuit's decision also may well produce foreign-relations harms. Cf. *Bancec*, 462 U.S. at 626. Too readily breaking down the separation between a foreign sovereign and its instrumentality may be understood as "an affront to [that sovereign's] dignity," and therefore may damage relations with that sovereign. *Republic of Mexico* v. *Hoffman*, 324 U.S. 30, 35-36 (1945). And because "some foreign states" rely heavily on principles of "reciprocity" in deciding how to treat other nations, *Persinger* v. *Islamic Republic of Iran*, 729 F.2d 835, 841 (D.C. Cir.) (1984), that may in turn lead to ill treatment of the United States and its instrumentalities in foreign courts.

CONCLUSION

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

Respectfully submitted,

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