EFiled: Dec 16 2019 04:24PM EST
Filing ID 64530839
Case Number 399,2019

IN THE SUPREME COURT OF THE STATE OF DELAWARE

RODOLFO ENRIQUE JIMÉNEZ, ASDRÚBAL CHAVEZ, IRIS MEDINA, MARCOS ROJAS, JOSÉ ALEJANDRO ROJAS, and FERNANDO DE QUINTAL,	)	
Plaintiffs/Counterclaim Defendants Below/Appellants,	)	C.A. No. 399,2019
v.	)	
LUISA PALACIOS, EDGAR RINCÓN, FERNANDO VERA, ELIO TORTOLERO, ANDRÉS PADILLA, ÁNGEL OLMETA, JAVIER TROCONIS, LUIS URDANETA, and RICK ESSER,	)	Appeal from the Court Of Chancery of the State Of Delaware, C.A. No. 2019-0490-KSJM
Defendants/Counterclaim Plaintiffs Below/Appellees	)	

APPELLEES' CORRECTED ANSWERING BRIEF

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December 16, 2019

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NATURE OF THE PROCEEDINGS

This case concerns which Board of Directors controls the Delaware-incorporated subsidiaries of Petróleos de Venezuela, S.A. ("PDVSA"), the Venezuelan national oil company. The Chancery Court correctly denied Plaintiffs/Counterclaim Defendants Below/Appellants' (hereinafter, the "Purported Directors") motion for summary judgment and granted Defendants/Counterclaim Plaintiffs Below/Appellees' (hereinafter, the "Incumbent Directors") cross-motion for summary judgment. The Chancery Court's decision properly applied the political question and act of state doctrines to hold that it was bound by the Executive Branch's January 2019 recognition of Juan Guaidó's government in Venezuela (the "Guaidó Government"). Consequently, the court also correctly ruled that it was powerless to invalidate the Guaidó Government's appointment of directors to Venezuela's state-owned petroleum company and the subsequent written consents executed by the boards of three of its Delaware subsidiaries.

Remarkably, the Purported Directors now argue essentially that the United States has in fact not recognized the Guaidó Government (Opening Br. at 1) – a factual assertion rejected by the trial court in its Opinion ("Opinion" or "Op.") (Op. at 12, 23-25), and contrary to the undisputed record. *See* pp. 26-28, *infra*.

This dispute arises from the ongoing humanitarian and political crisis in Venezuela. The Purported Directors served as the Maduro-appointed directors of PDVSA and its Delaware subsidiaries before the Guaidó Government acted, under authority provided by legislation passed by the Venezuelan National Assembly, to replace them in February 2019. On June 25, 2019, the Purported Directors commenced litigation in the Delaware Court of Chancery ("Chancery Court") seeking a declaration, pursuant to Section 225 of the Delaware General Corporation Law, that they comprise the rightful boards of the three Delaware subsidiaries of PDVSA: PDV Holding, CITGO Holding, and CITGO Petroleum ("the CITGO Entities"). On July 9, the Incumbent Directors—the current directors of the CITGO Entities appointed through Guaidó's PDVSA Managing Board—filed an Answer and Counterclaim for a declaration that they compose the rightful boards of the CITGO Entities. On July 11, the Incumbent Directors and the Purported Directors filed cross-motions for judgment on the pleadings pursuant to Chancery Court Rule 12(c). On July 16, Venezuela requested and was granted leave to file a brief as a "non-party" *amicus curiae*. B1-B19.

On August 2, 2019, the Chancery Court issued an Opinion, as revised on August 12, 2019, correctly holding that the United States has recognized the Guaidó Government and that, pursuant to the political question and act of state

doctrines, Guaidó's appointment of directors to PDVSA's Managing Board is not subject to judicial challenge, and that the newly elected board members had authority to execute a consent reconstituting the board of PDV Holding. Because copies of the written consents reconstituting the CITGO Entities were not attached to the Incumbent Directors' counterclaims, the Court converted the cross-motions for judgment on the pleadings into cross-motions for summary judgment and stayed resolution of the cross-motions to allow the Purported Directors to submit a Rule 56(e) affidavit challenging the validity of the written consents. On August 21, after the Purported Directors filed a letter stating their intent not to challenge the validity of the written consents, the Court issued its Final Order and Judgment granting the Incumbent Directors' motion for summary judgment, ruling that effective February 18, 2019, the Incumbent Directors constitute the full boards of the CITGO Entities.

Plaintiffs appealed on September 19, 2019. On November 5, the Purported Directors filed their Opening Brief. This is the Answering Brief of the Incumbent Directors: Luisa Palacios, Edgar Rincón, Fernando Vera, Elio Tortolero, Andrés Padilla, Ángel Olmeta, Javier Troconis, Luis Urdaneta, and Rick Esser—the rightful board members of the CITGO Entities.

SUMMARY OF ARGUMENT

The question before this Court is who has authority to act on behalf of the Government of Venezuela—the Guaidó Government or the Maduro regime. The parties agree that whichever government has the authority to act on behalf of Venezuela is entitled to designate the directors of PDVSA, and through PDVSA, the directors of each of the CITGO Entities. The Court of Chancery correctly concluded that (1) the United States has recognized the Guaidó Government as the legitimate government of Venezuela; (2) the Guaidó Government has sole authority to act on behalf of Venezuela under the political question and act of state doctrines; and (3) the Guaidó Government lawfully and validly appointed the PDVSA Managing Board.

I. Denied. The political question doctrine requires the judiciary to accept as binding the Executive Branch's recognition of a foreign government. Here, the record establishes that the Executive Branch has recognized the Guaidó Government as the only legitimate government of Venezuela. No U.S. court, federal or state, can contradict this determination. For purposes of this case, this Court must recognize the Guaidó Government as sovereign.

II. Denied. The act of state doctrine mandates deference to the official acts of a recognized foreign sovereign undertaken within its own territory.

Because this Court must defer to the Executive Branch's recognition of the Guaidó Government, under the act of state doctrine it cannot invalidate the official acts of the Venezuelan National Assembly in passing the Transition Statute, or the Guaidó Government in implementing that law to reconstitute the managing board of PDVSA, a Venezuelan-owned entity. Accordingly, this Court should affirm the Guaidó Government's exclusive right to control PDVSA, and through PDVSA, any subsidiaries that own assets in the U.S., including each of the CITGO Entities.

STATEMENT OF FACTS

A. PDVSA And The CITGO Entities.

PDVSA is a Venezuelan state-owned company formed in 1975. (Op. at 7, Opening Br. Ex. A.) CITGO Petroleum Corporation ("CITGO Petroleum"), a Delaware corporation headquartered in Houston and one of the largest operating petroleum refiners in the U.S., is indirectly owned by PDVSA through two other Delaware corporations: PDV Holding, Inc. ("PDV Holding") and CITGO Holding, Inc. ("CITGO Holding"). (Op. at 7.) As depicted below, Venezuela owns PDVSA; PDVSA, in turn, is the sole stockholder of PDV Holding; PDV Holding is the sole stockholder of CITGO Holding; and, CITGO Holding is the sole stockholder of CITGO Petroleum:

Venezuela
↓
PDVSA (VEN)
↓
PDV Holding (DE)
↓
CITGO Holding (DE)
↓
CITGO Petroleum (DE)

All parties agree that the President of Venezuela has the sole power to appoint the members of PDVSA's Managing Board by decree. That Board, in turn, exercises indirect control over CITGO Petroleum through the corporate structure outlined above. (*See id*. at 8.)

B. 2018 Venezuelan Presidential Elections.

The Chancery Court Opinion concisely chronicles the political turmoil in Venezuela leading up to the May 2018 presidential election. (*See generally id*. at 4-6.) By the time of the 2018 presidential election, Venezuela was facing "a collapsing economy and growing humanitarian crises." (*Id*. at 6.) Prior to the vote, Nicolás Maduro disqualified the opposition parties from participating in the election and jailed or exiled many of his political rivals. (*Id*. at 5-6; *see also Factbox: Venezuela's Jailed, Exiled or Barred Opposition Politicians*, Reuters, February 19, 2018, *available at* https://www.reuters.com/article/us-venezuela-politics-factbox/factbox-venezuelas-jailed-exiled-or-barred-opposition-politicians-idUSKCN1G31WU). Without any meaningful opposition, Maduro claimed victory and swore himself in for a second term as President on January 10, 2019. (*Id*. at 6.)

C. Juan Guaidó Named Interim President Of Venezuela.

Five days after Maduro claimed the presidency, the Venezuelan National Assembly, led by its president, Juan Guaidó, declared Maduro's election illegitimate under the Venezuelan constitution. (*Id*. at 6.) On January 23, 2019, the National Assembly invoked Article 233 of the *Constitución de la República Bolivariana de Venezuela* (the "Venezuelan Constitution") and named Guaidó as

Interim President of Venezuela until Venezuela can hold fair elections. (*Id*. at 6). Guaidó has acted as Interim President of Venezuela since January 23, 2019.

D. The U.S. Recognizes The Guaidó Government.

The same day that Guaidó became the Interim President of Venezuela, the U.S. and a number of other countries granted official diplomatic recognition to the Guaidó Government. (*Id*. at 8.) Specifically, the U.S. President declared:

> Today, I am officially recognizing the President of the Venezuelan National Assembly, Juan Guaido, as the Interim President of Venezuela. In its role as the only legitimate branch of government duly elected by the Venezuelan people, the National Assembly invoked the country's constitution to declare Nicolas Maduro illegitimate, and the office of the presidency therefore vacant.
>
> * * *
>
> We encourage other Western Hemisphere governments to recognize National Assembly President Guaido as the Interim President of Venezuela, and we will work constructively with them in support of his efforts to restore constitutional legitimacy. We continue to hold the illegitimate Maduro regime directly responsible for any threats it may pose to the safety of the Venezuelan people.

(*Id*. at 8-9.) On the same day, U.S. Secretary of State Michael R. Pompeo stated unequivocally: "The United States stands with interim President Juan Guaido . . . . The United States does not recognize the Maduro regime as the government of

Venezuela."[1] Vice President Michael Pence declared on numerous occasions that "Juan Guaidó is the only legitimate President of Venezuela."[2]

Two days after recognizing the Guaidó Government, the U.S. President issued Executive Order 13857 clarifying that any pre-existing sanctions on Venezuela extended to members of the Maduro regime; reiterating the Guaidó Government's legitimacy; and referring to the Maduro regime as "illegitimate." A599.

In the days and weeks after U.S. recognition, the U.S. Department of State took additional actions to recognize and support the Guaidó Government. On

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1 Press Statement, U.S. Dep't of State, *Continuing U.S. Diplomatic Presence in Venezuela* (Jan. 23, 2019) (cited as "Sec. Pompeo Statement"), *available at* https://www.state.gov/continuing-u-s-diplomatic-presence-in-venezuela/.

2 *Remarks by Vice President Pence and First Lady Fabiana Rosales of the Bolivarian Republic of Venezuela Before Bilateral Meeting* (Mar. 27, 2019), *available at* https://www.whitehouse.gov/briefings-statements/remarks-vice-president-pence-first-lady-fabiana-rosales-bolivarian-republic-venezuela-bilateral-meeting/; *see also Remarks by Vice President Pence at Venezuela Solidarity Event* (Feb. 1, 2019) ("[t]he United States … was proud to be the first nation … to recognize the only legitimate President of Venezuela, President Juan Guaidó."), *available at* https://www.whitehouse.gov/briefings-statements/remarks-vice-president-pence-venezuela-solidarity-event-doral-florida/; *Remarks by Vice President Pence During Visit with Venezuelan Migrant Families* (Feb. 26, 2019) ("[W]e will also stand strong with the only legitimate President of Venezuela, President Juan Guaidó."), *available at* https://www.whitehouse.gov/briefings-statements/remarks-vice-president-pence-visit-venezuelan-migrant-families-bogota-colombia/.

January 27, 2019, the State Department accepted Interim President Guaidó's designation of Carlos Alfredo Vecchio as the Chargé d'Affaires of the Government of Venezuela and allowed the Guaidó Government to take control of Venezuelan property in the U.S., including the Venezuelan Embassy. (Op. at 9.) Additionally, the State Department authorized Interim President Guaidó to receive and control otherwise sanctioned Venezuelan property held by U.S. banks, acknowledging that under U.S. law the Guaidó Government is the only entity "recognized by the Secretary of State as being the accredited representative of [Venezuela] to the Government of the United States[.]" 12 U.S.C. § 632; U.S. Department of State, *Protecting Venezuela's Assets for Benefit of Venezuelan People* (Press Statement, Jan. 29, 2019), *available at* https://www.state.gov/protecting-venezuelas-assets-for-benefit-of-venezuelan-people/. In support of these actions, Secretary Pompeo again stated that the U.S. no longer views the Maduro regime as the Government of Venezuela:

> Today, the United States has taken necessary actions to prevent the *illegitimate former Maduro regime* from further plundering Venezuela's assets and natural resources. . . . The United States stands with interim President Juan Guaidó, the democratically elected National Assembly, and the people of Venezuela as they peacefully restore constitutional order to their country.

Sanctions Against PDVSA and Venezuela Oil Sector (Press Statement, Jan. 28, 2019) (emphasis added), *available at* https://www.state.gov/sanctions-against-pdvsa-and-venezuela-oil-sector/.

The U.S. Department of Treasury also acted to support recognition of the Guaidó Government. On January 28, 2019, the U.S. Treasury's Office of Foreign Asset Control ("OFAC") announced additional sanctions directed at the then-Maduro controlled PDVSA. (Op. at 10.) Specifically, OFAC added PDVSA to its Specially Designated Nationals and Blocked Persons List, thereby preventing any U.S. person from transacting business with or providing services to PDVSA in the absence of a license issued by OFAC. (*Id*. at 11.) On January 31, 2019, OFAC explained that its sanctions against PDVSA were intended to bring about the "transfer of control of the company to Interim President Juan Guaidó" and away from "*former* President Nicolas Maduro." A733 (emphasis added).

Thus, as the court below found, the Executive Branch has recognized Juan Guaidó as the President of Venezuela and derecognized the Maduro regime.

"Interim" refers to the duration of his incumbency, rather than some artificial limitation on the powers of the office he holds.[3] *See* A733.

E. The Guaidó Government Appoints Directors To The Managing Board Of PDVSA.

On February 5, 2019, the National Assembly approved and adopted a Statute to Govern a Transition to Democracy to Reestablish the Validity of the Constitution of the Republic of Venezuela (the "Transition Statute"). A349; A243. The Transition Statute was adopted to "end the dictatorial regime" of Maduro and "set up a provisional Government . . . to ensure that the democratic system is restored and free elections are called." A608; A245. The Transition Statute also decreed that Guaidó, as the President of the National Assembly, is "the legitimate President in Charge" of Venezuela. A609; A246.

Article 34 of the Transition Statute empowered Guaidó, "[i]n view of the risks faced by PDVSA and PDVSA subsidiaries" from Maduro's "usurpation" of power, to appoint an ad hoc Managing Board of PDVSA "to exercise PDVSA's rights as a shareholder of PDV Holding, Inc." A616-17; A253-54. The PDVSA

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[3] As the Chancery Court noted during oral argument, all democratically elected officials hold an "impermanent or somewhat durational" position. A974.

Managing Board was authorized to act as PDVSA's board of directors in order to appoint boards of directors for the CITGO Entities. A616; A253.

On February 8, 2019, pursuant to the authority granted him under the Transition Statute, Guaidó appointed five individuals to the PDVSA Managing Board "for the purpose of carrying out all necessary actions to appoint a Board of Directors" for PDV Holding. A620. On February 13, 2019, the National Assembly approved this action by resolution. A266-70.

F. The PDVSA Managing Board Reconstitutes The Boards Of The CITGO Entities.

On February 15, 2019, the Guaidó-appointed PDVSA directors executed a unanimous written consent as the sole stockholder of PDV Holding to elect a new board of PDV Holding. A623-29. That same day, the newly-elected PDV Holding board executed a unanimous written consent as the sole stockholder of CITGO Holding to elect a new board of CITGO Holding. A658-660. The newly-elected CITGO Holding board repeated the same steps to elect a new board of CITGO Petroleum. A691-93. All three written consents became effective on February 18, 2019, when they were delivered to their respective entities. A825; A827; A829.

G. The U.S. Acts To Recognize And Support Guaidó's Appointed PDVSA Board.

On February 8, 2019, the same day that Guaidó reconstituted PDVSA's board, OFAC licensed transactions with the Guaidó-appointed directors despite broad sanctions against PDVSA. *See* A767-68; *see also* A823; A762 (exempting transactions involving the CITGO Entities from certain sanctions). In explaining its actions, the Treasury Department explained that its goal was to transfer control to Interim President Guaidó and his government, and away from "former President Nicolas Maduro." A733.

On August 5, 2019, following the enactment of additional sanctions against the Maduro regime in Executive Order 13884, which were designed to combat the "continued usurpation of power by Nicolas Maduro" and his "ongoing attempts to undermine Interim President Juan Guaidó and the Venezuelan National Assembly's exercise of legitimate authority in Venezuela," OFAC issued General License 31 allowing U.S. persons to transact with the Guaidó-appointed PDVSA Managing Board and making clear that sanctions remained in place for any transaction with a member of the Maduro regime.[4]

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[4] E.O. 13884 and General License 31 were issued subsequent to the briefing below; however, the Court may take judicial notice of these authorities. Op. at 4 n.3; *Diesel & Equip. Specialists, Inc. v. Tull*, 1983 WL 473061, at *1 (Continued . . .)

H. Maduro's Constitutional Court Issues Sham Decision In An Effort To Undermine Guaidó's Appointment Of PDVSA's Managing Board.

While ultimately inconsequential to the political question and act of state doctrines at issue in this appeal, the Purported Directors cite the February 14, 2019, two-page "decision" by the Maduro-controlled Constitutional Court, a subdivision of Venezuela's Supreme Tribunal of Justice, which purported to declare the Transition Statute null and void, and further declared as unlawful the Guaidó Government's appointment of PDVSA's Managing Board. A284; A292. The cursory decision was rendered nine days after passage of the Transition Statute, apparently without notice, hearing, or argument. *See* A47; A284.

The Venezuelan Constitutional Court's decision is unworthy of any deference for a number of reasons, but chiefly because both the U.S. Government and the Venezuelan National Assembly had declared the Supreme Tribunal illegitimate. In the Transition Statute, the National Assembly expressly rejected the legitimacy of the Supreme Tribunal. A611. The U.S. has not only declared the

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(. . . continued)

(Del. Super. Dec. 7, 1983) (taking judicial notice of executive orders), *aff'd*, 494 A.2d 168 (Del. 1984). E.O. 13884 is available at https://www.treasury.gov/resource-center/sanctions/programs/documents/13884.pdf, and General License 31 is available at https://www.treasury.gov/resource-center/sanctions/Programs/Documents/venezuela_gl31.pdf.

Constitutional Court to be illegitimate, but has also taken the extraordinary step of sanctioning the members of that tribunal. *See* U.S. Department of The Treasury, *Treasury Sanctions Eight Members of Venezuela's Supreme Court of Justice* (May 18, 2017), *available at* https://www.treasury.gov/press-center/press-releases/Pages/sm0090.aspx. In so doing, the Treasury Department noted that the court had "usurped the authority of Venezuela's democratically-elected legislature, the National Assembly, including by allowing the Executive Branch to rule through emergency decree, thereby restricting the rights and thwarting the will of the Venezuelan people." *Id*.

ARGUMENT

I. THE CHANCERY COURT CORRECTLY APPLIED THE POLITICAL QUESTION DOCTRINE IN HOLDING THAT THE EXECUTIVE BRANCH'S RECOGNITION OF THE GUAIDÓ GOVERNMENT IS BINDING ON ALL DOMESTIC COURTS.

A. Question Presented

Did the Chancery Court properly apply the political question doctrine in holding that it was bound by the Executive Branch's recognition of the Guaidó Government in assuming the validity of Guaidó Government's appointments to the PDVSA board?[5]

B. Standard of Review

Summary judgment should be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Katten Muchin Rosenman LLP v. Sutherland*, 153 A.3d 722, 726 (Del. 2017). The Supreme Court reviews summary judgment determinations *de novo*. *Id*. There were no disputed material facts before the Chancery Court in this matter. (Opening Br. at 13; *see also* Op. at 2, 18-19.) The only disputes are questions of law, which are reviewed *de novo*. *Baker v. Long*, 981 A.2d 1152, 1156 (Del. 2009).

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[5] Preserved at A557-70.

C. Merits of Argument

The Chancery Court correctly applied longstanding U.S. Supreme Court precedent in holding that the Court was bound by the Executive Branch's recognition of the Guaidó Government. As such, the Guaidó Government's official acts to appoint directors to the PDVSA Managing Board are valid and are entitled to deference in U.S. courts.

The Purported Directors cannot dispute that recognition of a foreign state is a non-justiciable political question exclusively reserved for the Executive Branch. (Opening Br. at 15.) Nor do they contend that the Executive Branch's recognition of Guaidó and his government was improper or illegitimate. (*Id*. at 19.) Instead, they rely upon counterfactual and contradictory arguments in an effort to sidestep the Executive Branch's sole and unreviewable authority to recognize the sovereign of a foreign state.

The Purported Directors first contend, without support, that the Executive Branch only recognized the Guaidó Government in a limited fashion by using the term "Interim President" (*id*. at 14), and actually recognized the Maduro regime by leveling sanctions against it and participating in international acts where the regime was also present. (*Id*. at 21–26.) The undisputed record and the law are otherwise. The Executive's actions and statements have unambiguously

recognized the Guaidó Government as the "only legitimate" representative of the Venezuelan people, and expressly derecognized the Maduro regime.

The Purported Directors' second argument essentially contradicts their first. Contrary to their earlier acknowledgement that the recognition of a foreign sovereign "is exclusively reserved for the Executive Branch" (*id*. at 15), the Purported Directors next attempt to argue that the Executive Branch, in this case, was forbidden from recognizing the Guaidó Government until the Guaidó Government controls a "substantial amount" of Venezuelan territory. (*Id*. at 23–28.) But the Executive Branch is the only and final authority; the Purported Directors have not, and cannot, point to any authority in either domestic or international law that supports their proposed exception for governments that do not yet control a "substantial amount" of territory.

1. Under The Political Question Doctrine, The Executive Branch's Recognition Of A Foreign Sovereign Binds All U.S. Courts.

In his January 23, 2019 statement, the U.S. President officially recognized "the President of the Venezuelan National Assembly, Juan Guaido, as the Interim President of Venezuela" and the National Assembly as the "only legitimate branch of government duly elected by the Venezuelan people." A596. In the same statement, the U.S. President referred to the Maduro regime as

"illegitimate." *Id*. The Executive Branch has continually reiterated this official recognition through Executive Orders, licenses, guidance, acceptance of diplomats, and public statements. *See infra* pp. 26-28. The Executive Branch's unambiguous and unequivocal conclusion that Guaidó and the National Assembly are the only legitimate government of Venezuela is not subject to judicial review, because "recognition is a topic on which the Nation must speak . . . with one voice," and "neither the legislative nor the judicial branch possesses the constitutional power of recognition." *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2086 (2015) (citation and quotation marks omitted). As a result, the Chancery Court was correct in its conclusion that the "unambiguous" determination of the Executive Branch has been to recognize the Guaidó Government and that, as a result, the Courts are bound to defer to the acts of the Guaidó Government over the acts of the Maduro regime. (Op. at 24-25.)

The act of "[p]olitical recognition" of a foreign sovereign "is exclusively a function of the Executive." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964). The power to recognize (or not recognize) a foreign sovereign derives from the U.S. President's authority over foreign affairs under Article II of the Constitution. *See, e.g.*, U.S. Const. art. II, §3 ("he shall receive Ambassadors and other public Ministers"); *id*. at §2 ("The President shall be

Commander in Chief of the Army and Navy of the United States."). This doctrine accords with the earliest acts in U.S. history respecting foreign sovereigns, including President George Washington's decision to receive the new emissary of the French Republic in 1792. *Zivotofsky*, 135 S. Ct. at 2100-01.

"Recognition is a 'formal acknowledgment' . . . 'that a particular regime is the effective government of a state.'" *Id.* at 2084 (quoting Restatement (Third) of Foreign Relations Law of the United States § 203 cmt. a (1986); *see* Op. at 25). "The very purpose of the recognition by our government is that our nationals may be conclusively advised with what government they may safely carry on business transactions and who its representatives are." *Guar. Tr. Co. of New York v. U.S.*, 304 U.S. 126, 140 (1938). Recognition can be accomplished implicitly or, as here, expressly through a written or oral statement of the Executive Branch. *See Zivotofsky*, 135 S. Ct. at 2084.

Given the Executive Branch's exclusive recognition authority, the Supreme Court has long held that any decision to recognize (or not recognize) a foreign government is a non-justiciable political question that cannot be reviewed by federal or state courts. In *Oetjen v. Central Leather Co.*, the plaintiff, a Mexican citizen, alleged that the purchaser of a consignment of hides that were bought in Mexico lacked good title to the hides because they had been purchased

from General Francisco Villa after he seized them from the plaintiff on behalf of the revolutionary government of Venustiano Carranza. 246 U.S. 297, 301 (1918). After the state court trial ended in a judgment for the purchaser, the U.S. recognized the Carranza government. *Id*. On appeal, the Supreme Court held that:

> Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but is a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government. This principle has always been upheld by this court, and has been affirmed under a great variety of circumstances.

Id. at 302 (citation and quotation marks omitted). Applying that principle, the Court held that the Carranza government "must be accepted as the legitimate government of Mexico[.]" *Id.* at 303.

In several cases arising from President Franklin D. Roosevelt's recognition of the Soviet Union in 1933, the Supreme Court reaffirmed the principle cited in *Oetjen* that recognition "is a political rather than a judicial question, and is to be determined by the political department of the government." *Guar. Tr.*, 304 U.S. at 137–38. In *Guaranty Trust,* the Court explained that the Executive Branch's "action in recognizing a foreign government . . . is conclusive on all domestic courts, which are bound to accept that determination[.]" *Id.* at 138; *see also United States v. Belmont*, 301 U.S. 324 (1937) (deferring to the executive

branch's recognition of the Soviet Government); *United States v. Pink,* 315 U.S. 203 (1942) (same). Under *Oetjen*, *Guaranty Trust*, *Belmont*, and *Pink*, "when the executive branch of the government" assumes "a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department." *Zivotofsky*, 135 S. Ct. at 2088 (citation and quotation marks omitted).

These precedents have been applied consistently to control disputes involving state-owned entities. The most relevant of those precedents is *Republic of Panama v. Air Panama Internacional, S.A.*, 745 F. Supp. 669 (S.D. Fla. 1988), in which the court confronted a dispute over control of Air Panama, a corporation wholly owned by the Republic of Panama. In 1988, General Manuel Noriega caused the National Assembly of Panama to purportedly remove Panamanian President Delvalle from office. *Id*. at 670. Shortly thereafter, the Noriega regime took control of Air Panama's operations in the U.S. and replaced the top executives. *Id*. at 671–72. Representatives of the Delvalle government, on behalf of the Republic of Panama, filed suit seeking to enjoin Air Panama from making payments or transferring property to the Noriega regime and attorneys representing the Noriega faction sought to intervene to oppose the injunction. *Id*.

The district court granted the Republic's motion for a preliminary injunction, holding that the decision by the U.S. President to recognize the Delvalle government conclusively resolved the dispute over control of Air Panama:

> In the instant case it is undisputed that Air Panama is owned by the Republic of Panama. The Executive Branch has recognized the Delvalle government as the lawful government of the Republic of Panama. Therefore, under the political question doctrine, this Court accepts that recognition and consequently concludes that the Delvalle government is entitled to control Air Panama.

Id. at 672-73. The rationale and result of the *Republic of Panama* case are persuasive here. This court must accept the determination of the Executive Branch that the Guaidó Government is the current (Interim) President of Venezuela. Recognizing the Maduro regime, as opposed to the Guaidó Government, would impermissibly undermine and defeat the foreign policy preferences of the Executive Branch.[6]

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[6] Indeed, since the Executive Branch recognized Guaidó as Interim President of Venezuela, no U.S. court has held that representatives of the Maduro regime may act for either the Venezuelan government or a Venezuelan State-owned enterprise in litigation. *See, e.g.*, *Rusoro Mining Limited v. Bolivarian Republic of Venezuela,* No. 18-7044, Document #1785518 (D.C. Cir. filed May 1, 2019) (granting the Guaidó Government's motion to strike the Maduro regime's purported appearance, noting that "[t]he Executive Branch's action in recognizing a foreign government is conclusive on all domestic courts, which are bound to accept that determination[.]") (Continued . . .)

2. The Guaidó Government's Sovereignty Is Not Limited By The Term "Interim President."

As the Chancery Court found, the Purported Directors fundamentally misunderstand the nature of the decision by President Trump to recognize the Guaidó Government. (Op. at 24-25.) Although the Purported Directors concede that the President of Venezuela has the right to appoint the Board of PDVSA, the Purported Directors contend that because the Executive Branch recognized Guaidó as "the Interim President of Venezuela" it did not intend for him to invoke the powers that come with the title of President; rather, it intended on lending the Guaidó Government "prestige" without any "rights and obligations of the state[.]" (Opening Br. at 14–23.) This argument is plainly wrong.

The Executive Branch has unequivocally recognized Guaidó as the *current* President of Venezuela *on an interim basis—i.e.*, until there is a "subsequent, democratically elected government that is committed to taking

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(. . . continued)

(quotation marks omitted); *PDVSA U.S. Litig. Tr. v. Lukoil Pan Americas LLC*, 372 F. Supp. 3d 1353, 1362 (S.D. Fla. 2019) (denying standing to the Maduro regime to enforce the transfer of a litigation trust agreement that the Guaidó Government subsequently rejected as unconstitutional, explaining, in dicta, that "[t]he United States' recognition of the National Assembly, as opposed to the Maduro regime, is retroactive in effect and validates all the actions and conduct of the government so recognized from the commencement of its existence.") (citations and quotation marks omitted).

concrete and meaningful actions to combat corruption, restore democracy, and respect human rights." A733. Vice President Pence made that intent clear in numerous public statements in which he declared (without using the "Interim" title) that "Juan Guaidó is the only legitimate President of Venezuela." *See* p. 9 & n.2, *supra*. That intent is also evident from the Executive Branch's explicit reference to Article 233 of the Venezuelan Constitution—specifically, "[t]he U.S. recognizes Juan Guaido's courageous decision to assume the role of Interim President per Venezuela's Constitution Article 233." Michael R. Pompeo (@SecPompeo), TWITTER (Jan. 23, 2019, 10:56 AM), https://twitter.com/SecPompeo/status/1088145849035776001 (last visited December 5, 2019). Article 233 of Venezuela's Constitution states that an assumption of this type, although for a limited duration, is to the Presidency of the Republic, full stop: "[p]ending election and inauguration of the new President, the President of the National Assembly shall take charge of the Presidency of the Republic."

The Executive Branch has also been clear, through other statements and actions since formal recognition, that its intent is to unequivocally recognize the Guaidó Government and derecognize the illegitimate Maduro regime. As examples, the Executive Branch has issued:

- sanctions specifically designed to stop the "illegitimate Maduro regime" from efforts "to prevent the Interim President and the National Assembly from exercising legitimate authority in Venezuela" and to stop Maduro's "usurpation of power." A599; E.O. 13884;

- orders restricting all dealings with members of the Maduro regime, by blocking transactions with any Government of Venezuela property unless the entity involved in the transaction is the "Venezuelan National Assembly," "[t]he Interim President of Venezuela, Juan Gerardo Guaidó Marquez," or their representatives. *See* A759; E.O. 13884; OFAC, General License 31;

- guidance describing Maduro as the "former President." A733;

- statements reiterating that "the United States does not recognize the Maduro regime as the government of Venezuela" and considers Maduro to be the "former President." Sec. Pompeo Statement, pp. 8-9, *supra*; *see also* Sec. Pompeo, *Remarks at the Organization of American States* (Jan. 24, 2019) ("The regime of former president Nicolas Maduro is illegitimate. . . I repeat: The regime of former president Nicolas Maduro is illegitimate. We, therefore, consider all of its declarations and actions illegitimate and invalid."), *available at* https://www.state.gov/remarks-at-the-organization-of-american-states/;

- licenses allowing U.S. companies, like CITGO Petroleum, to recognize and support the Guaidó Government's voting control of PDVSA through the PDVSA Managing Board. *See* A444; A767-68; and

- actions to accept Guaidó's diplomats as representatives of the Government of Venezuela and allow the Guaidó Government to take control of Venezuelan property in the U.S., including the Venezuelan Embassy and other sanctioned property. (*See* Op. at 9.)

All of these Executive Branch actions and statements support the recognized Guaidó Government and are designed to assist it in wresting control of Venezuelan territory from the Maduro regime. As the Chancery Court properly found, the Executive Branch's recognition of the Guaidó Government is "unambiguous." (Op. at 24.)

The Purported Directors nevertheless argue that certain isolated efforts by Executive Branch officials to promote the peaceful transfer of power from Maduro to Guaidó somehow constitute recognition of the Maduro regime. The Purported Directors reference the fact that the U.S. has sanctioned the Maduro regime, recently signed a United Nations treaty that the Maduro regime also signed, and reportedly entered into negotiations in recent months with members of the Maduro regime. (Opening Br. at 21–23.) These actions may acknowledge that the Maduro regime continues to exert its will by force, but that is a far cry from diplomatic recognition, and it does nothing to undermine the Executive Branch's unequivocal recognition of the Guaidó government. *See* pp. 8-12, *supra*. The Purported Directors cite no authority for the proposition that any interaction with an unrecognized regime, despite U.S. recognition of an alternative governing body, results in the formal recognition of that regime. In any event, the Chancery Court

properly recognized that courts are ill equipped to second guess the Executive Branch's recognition determinations.[7]

The Purported Directors' reliance on *Williams v. Suffolk Ins. Co.* and *Zivotofsky* is misplaced. Both decisions reaffirmed that U.S. courts are bound by the Executive's recognition of a foreign sovereign. *Williams*, 38 U.S. 415, 418 (1839) ("When the executive branch of the government, which is charged with the foreign relations of the United States, shall, in its correspondence with a foreign nation, assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department."); *Zivotofsky*, 135 S. Ct. at 2094. In determining whether the Executive Branch had indeed recognized a state as sovereign, the Court has looked not only to the Executive Branch's express statements, but also to its subsequent actions. *See, e.g.*, *Zivotofsky*, 135 S. Ct. at

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[7] The Purported Directors also argue that the Chancery Court never reached the question of whether Guaidó was the recognized sovereign of Venezuela for purposes of the appointment of the PDVSA Managing Board, arguing that the Court only concluded that Guaidó was the "effective government of the state" and that this is somehow distinct from the Court's recognition of Guaidó as sovereign. (Opening Br. at 20.) But "[r]ecognition is a formal acknowledgment that a particular regime is the effective government of a state." *Zivotofsky*, 135 S. Ct. at 2084 (citation and quotation marks omitted). In any event, the Chancery Court held that "Guaidó is recognized, the National Assembly is legitimate, and neither Maduro nor the Constituent Assembly are legitimate parts of the Venezuelan government." (Op. at 24.)

2081–82 (relying on statements by current and past presidents, as well as State Department policy, in finding that the Executive Branch intended to withhold recognition). The same analysis controls here.

3. The Executive Branch's Recognition Power Is Not Contingent On A Sovereign's Control Of Territory.

The Purported Directors also implausibly claim that even if the Executive Branch intends to recognize Juan Guaidó as the President of Venezuela and derecognize Maduro, it cannot do so here under international law. (Opening Br. at 23–27.) The Purported Directors cite various law review articles and other sources for the proposition that "a government must control the State's territory . . . before it can be legally recognized[.]" (*Id*. at 24.) Similarly, the Purported Directors argue that even if Maduro is derecognized, his acts within the territory he controls must still be given effect by U.S. courts. (*Id*. at 26–28.) Each of these arguments is meritless.

The Purported Directors fail to offer any doctrinal basis for applying international law to the question presented in this appeal. Nor could they. The Supreme Court made clear in *Sabbatino* that the judiciary must defer to the actions taken by a foreign sovereign recognized by the Executive Branch, "even if the complaint alleges that the taking violates customary international law." 376 U.S.

at 428. Moreover, U.S. courts on numerous occasions have deferred to the Executive Branch's recognition of *de jure* foreign governments having no actual control over territory. *See, e.g.*, *Lehigh Valley R. Co. v. State of Russia*, 21 F.2d 396, 400 (2d Cir. 1927) (deferring to the executive's recognition of the provisional Russian government, which held no territory); *State of the Netherlands v. Fed. Reserve Bank*, 201 F.2d 455 (2d Cir. 1953) (deferring to the executive's recognition of the Netherlands' government-in-exile at a time when the Netherlands was occupied by Germany.); *see also Pink*, 315 U.S. at 233 ("[W]hen a revolutionary government is recognized as a *de jure* government, such recognition is retroactive in effect and validates all the actions and conduct of the government so recognized from the commencement of its existence.") (citation and quotation marks omitted). The relevant question is *not* the quantum of territory controlled by a sovereign, but rather, the position of the Executive Branch: "[w]ho is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but is a political question[.]" *Oetjen*, 246 U.S. at 302.

The Purported Directors rely upon a single, and inapposite, authority, *M. Salimoff v. Standard Oil Company,* 186 N.E. 679, 681 (N.Y. 1933). In *Salimoff*, the court gave effect to the acts of a non-recognized country specifically because doing so did *not* conflict with U.S. foreign policy. 186 N.E. at 682. In

fact, the court in *Salimoff* contrasted the facts in that case with the type of facts at issue in this case, namely where the decree of a non-recognized government is affecting corporations outside of its territory. *Id.* at 681. The court stated that in the latter situation, it could *not* give effect to the actions of the non-recognized government. *Id*. (noting that decrees of non-recognized countries invalidating corporations outside of their territory "had no extraterritorial effect and that the continued existence of such companies, wherever they were found to function outside of Russia, would be recognized").

Similarly, the Purported Directors have no support for their claim that U.S. courts must legitimize the acts of Maduro in Venezuela simply because he still exerts some control over the country. Each of the cases on which the Purported Directors rely (*see* Opening Br. at 26–27), held precisely the *opposite*. *Upright v. Mercury Business Machines Co.*, 13 A.D.2d 36, 41 (N.Y. App. Div. 1961) (stating that a corporation owned by a non-recognized government can only receive relief in U.S. courts if such relief was not "in violation of public or national policy"); *Sokoloff v. Nat'l City Bank of New York*, 199 N.Y.S. 355, 358 (N.Y. Sup. Ct. 1922), *aff'd*, 239 N.Y. 158 (1924) ("The Soviet government of Russia has never been recognized by our government; hence we may not ascribe any of the attributes of sovereignty to it. It follows that all the acts of that government in

contemplation of American courts are ineffective"); *Carl Zeiss v. V. E. B. Carl Zeiss, Jena*, 293 F. Supp. 892, 911 (S.D.N.Y. 1968), *aff'd* 433 F.2d 686 (2d Cir. 1970) (refusing to recognize the act of West Germany in East Germany *only* because "our Government made it clear that [its recognition of West Germany] was not intended to constitute recognition of West Germany as the *de jure* government of East Germany."). The Executive Branch is the sole arbiter of the nation's foreign policy and its recognition of foreign sovereigns, and the courts are bound to its determinations, even if the Executive Branch recognizes a government that has not yet fully taken control of a country's territory. The Purported Directors do not, and cannot, point to any support for their attempt to undermine that power.

II. THE CHANCERY COURT CORRECTLY APPLIED THE ACT OF STATE DOCTRINE IN DEFERRING TO THE GUAIDÓ GOVERNMENT'S OFFICIAL ACTS WITHIN VENEZUELA.

A. Question Presented

Did the Chancery Court correctly hold that the act of state doctrine required it to accept as valid the acts taken by the Guaidó Government within the territory of Venezuela to reconstitute the PDVSA Managing Board?[8]

B. Standard of Review

Summary judgment should be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Katten Muchin Rosenman LLP*, 153 A.3d at 726. The Supreme Court reviews summary judgment determinations *de novo*. *Id*. The application of the act of state doctrine involves a question of law, requiring a *de novo* review. *See D'Angelo v. Petroleos Mexicanos,* 331 A.2d 388, 391-92 (Del. 1974).

C. Merits of Argument

As set out in Section I, this Court must accept that the Guaidó Government is the recognized sovereign of Venezuela. As such, the official acts of the Guaidó Government within the territory of Venezuela, including the reconstitution of the PDVSA Managing Board, must be treated as valid by U.S.

[8] Preserved at A580-82.

courts. The acts taken to reconstitute the PDVSA Managing Board, which include the passage of the Transition Statute and subsequent official resolutions, are quintessential "acts of state" to which the Supreme Court has long applied the basic principle that: "the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory." *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897). Further, the Purported Directors improperly try to impose conditions on the applicability of the act of state doctrine: the act of state doctrine does not require that the foreign Government be in *de facto* control of territory, and it applies to acts of state that have extraterritorial effects.

1. The Chancery Court Correctly Applied The Act Of State Doctrine To Find That The Guaidó Government's Reconstitution Of The PDVSA Managing Board Was An Official Act Of State Taken Within Venezuela.

After finding that the Executive Branch had recognized the Guaidó Government as the legitimate government of Venezuela, the Chancery Court correctly determined that the acts taken by the Guaidó Government to reconstitute the PDVSA Managing Board were not subject to challenge in U.S. courts under the act of state doctrine. (Op. at 26, 30.) This doctrine precludes all U.S. courts from "inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory." *Sabbatino*, 376 U.S. at 401.

The act of state doctrine has been reaffirmed numerous times since its articulation in *Underhill*.[9] In *Oetjen*, for example, after determining that the Carranza Government had been recognized by the Executive Branch as the Government of Mexico, the Supreme Court held that such recognition validated "the action, in Mexico, of the legitimate Mexican Government when dealing with a Mexican citizen." 246 U.S. at 303. "To permit the validity of the acts of one sovereign state to be reexamined and perhaps condemned by the courts of another would very certainly imperil the amicable relations between governments and vex the peace of nations." *Id*. at 304 (quotation marks omitted); *accord Zivotofsky*, 135 S. Ct. at 2084 ("Legal consequences follow formal recognition . . . The actions of a recognized sovereign committed within its own territory also receive deference in domestic courts under the act of state doctrine.").

In *Sabbatino*, the Supreme Court identified the act of state doctrine's "constitutional underpinnings," which "arise[] out of the basic relationships between branches of government in a system of separation of powers," and

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[9] *See, e.g.*, *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909); *Ricaud v. American Metal Co.*, 246 U.S. 304 (1918); *Belmont*, 301 U.S. 324; *Pink*, 315 U.S. 203; *First National City Bank v. Banco Nacional de Cuba,* 406 U.S. 759 (1972); *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l*, 493 U.S. 400 (1990).

"express[] the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere." *Id*. at 423. The Court in *Sabbatino* also held that the act of state doctrine is a rule of decision binding on all state and federal courts that "must be treated exclusively as an aspect of federal law." *Id*. at 425; *see also W.S. Kirkpatrick*, 493 U.S. at 406 ("The act of state doctrine is not some vague doctrine of abstention but a principle of decision binding on federal and state courts alike.") (quotation marks omitted). Delaware courts have agreed. *D'Angelo*, 331 A.2d at 390 (Del. 1974) ("[T]he application of the act of state doctrine must be determined according to federal law binding on both federal and state courts. . .") (citation omitted); *Shanghai Power Co. v. Delaware Tr. Co.*, 526 A.2d 906, 913 (Del. Ch. 1987) (holding, based upon analogous principles, that an executive agreement settling claims against the People's Republic of China barred claims by a private Delaware corporation, recognizing that courts "cannot enforce a state law that impairs the policy behind an executive agreement[.]").

The Chancery Court correctly applied the act of state doctrine. (Op. at 25.) The Purported Directors have not disputed that the Guaidó Government's reconstitution of the PDVSA Managing Board stemmed from "official acts." (*Id*.

at 41.) To qualify as "official," an act of state "generally takes the form of an executive or legislative step formalized in a decree or measure." *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 718–19 (1976). Such "official acts" have included acts taken by individual officials of a recognized sovereign,[10] decrees,[11] laws,[12] resolutions,[13] and even a telegram.[14] It certainly includes acts by the Guaidó Government to enact and implement the National Assembly's

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10 *See, e.g.*, *Ricaud*, 246 U.S. 304 (seizure of lead bullion in Mexico by a revolutionary general); *Oetjen*, 246 U.S. 297 (confiscation of animal hides in Mexico by a revolutionary general).

11 *See, e.g.*, *Pink*, 315 U.S. 203 (a Russian decree declaring the business of insurance within Russia to be an exclusive monopoly of the State); *Belmont*, 301 U.S. 324 (a Soviet decree dissolving, terminating, liquidating, nationalizing, and appropriating all of the property of a Russian metal works company).

12 *See, e.g.*, *Pan-Am. Life Ins. Co. v. Blanco*, 362 F.2d 167 (5th Cir. 1966) (a Cuban law nationalizing and expropriating assets of American insurance companies having offices in Cuba); *E. States Petroleum Co. v. Asiatic Petroleum Corp.*, 28 F. Supp. 279 (S.D.N.Y. 1939) (a Mexican expropriation law expropriating certain oil lands and properties of a Mexican corporation located in Mexico).

13 *See, e.g.*, *Sabbatino*, 376 U.S. 398 (the issuance of a Cuban executive resolution permitting the forced expropriation of property in Cuba in which American nationals had an interest).

14 *The Adriatic*, 258 F. 902 (3d Cir. 1919) (a telegram sent by the British Government requisitioning a ship owned by a British company for government service during War I).

Transition Statute, including the appointment of PDVSA's Managing Board. The Purported Directors also do not dispute that these acts occurred within Venezuela. (Op. at 41.) Instead, the Purported Directors argue that the act of state doctrine does not apply because (1) the Guaidó government does not have control over territory; and (2) the reconstitution of the PDVSA Managing Board, despite taking place within Venezuela, had extraterritorial effects. The Chancery Court properly rejected each of these claims.

2. The Guaidó Government Must Be Treated As The Recognized Sovereign For Purposes Of The Act Of State Doctrine.

The Purported Directors' argument that "acts that emanate from any entity that has no control or authority over a territory cannot be given act of state treatment" (Opening Br. at 33), is unsupported by precedent and contrary to the rationale behind the doctrine. As the Chancery Court found, "[w]hile criteria such as territorial control may sometimes be relevant to evaluating the concept of *de facto* statehood, the principal and frequently dispositive question for purposes of the act of state doctrine is whether the foreign sovereign has received *de jure* recognition." (Op. at 36) (citing *Sabbatino*, 376 U.S. at 428 (1964); *Pink*, 315 U.S. at 233; Modern Status, 12 A.L.R. Fed. 707 § 8[a] (1972)).

"[W]hen a government which originates in revolution or revolt is recognized by the political department of our government as the *de jure* government of the country in which it is established, such recognition … validates all the actions and conduct of the government so recognized from the commencement of its existence." *Oetjen*, 246 U.S. at 302-03. "[T]he [judicial branch] will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and *recognized by this country at the time of suit*[.]" *Sabbatino*, 376 U.S. at 428 (emphasis added).

The Chancery Court relied upon an unbroken line of cases recognizing acts of a *de jure* government that lacked *de facto* control over its territory. (Op. at 36-38.) For example, for over a decade after the Soviet Union came to power, the U.S. continued to recognize the Provisional Government of Russia even though it held no territory. The decrees and actions of the Provisional Government were treated as valid by U.S. courts; decrees of the Soviet Union were not. *Lehigh Valley R. Co.*, 21 F.2d at 400; *Sokoloff*, 199 N.Y.S. at 358. After the Executive Branch extended *de jure* recognition to the Soviet Union, federal and state courts recognized the authority of its representatives as the government of Russia. *State of Russia v. Nat'l City Bank of New York*, 69 F.2d 44, 45 (2d Cir.

1934) (finding that post-recognition representatives of the Soviet Union now possessed the authority to assign claims on behalf of their government).

In another example, in *State of the Netherlands v. Fed. Reserve Bank*, the government of the Netherlands sued for possession of certain bearer bonds held in a New York bank account. 201 F.2d 455. The Netherlands claimed ownership of the bonds based on a Royal Decree issued by the Netherlands' government-in-exile shortly after the Netherlands was invaded and occupied by Germany in 1940, which vested in the government-in-exile protective title over securities belonging to persons domiciled in the Netherlands. At that time, the Netherlands government was located in England, where it was "recognized [by the U.S.] . . . as the Government of the Kingdom of the Netherlands." *Id.* at 456. In finding that the Netherlands could recover the bonds, the Second Circuit held that the Royal Decree was effective and rejected the argument that the German government's territorial control over the Netherlands divested the latter of sovereign authority. *Id.* at 462–63. The Purported Directors argue that *State of Netherlands* is not about the act of state doctrine because the court analyzed whether "the act did not 'conflict with any legitimate legislation or regulation of the occupant or with [the U.S.'] public policy," which it would not have done had the act of state doctrine applied. (Op. at 36.) This argument misses the point, which is that recognition of

the government-in-exile, not territorial control, was the key factor in the Second Circuit's decision to uphold the Royal Decree.

The Chancery Court also recognized that *Air Panama*, 745 F. Supp. 669, was on point, because:

> [i]n applying the act of state doctrine, the court did not evaluate the scope of territory actually controlled by the Delvalle government. Rather, the court explained that it must give "complete judicial deference" to and was "conclusively b[ou]nd" by the decision of the Executive Branch to recognize the Delvalle government. *Id.* at 672 (citing *Pfizer Inc. v. Gov't of India*, 434 U.S. 308, 320 (1978); *Pink*, 315 U.S. at 223). This principle governed all aspects of the court's analysis. *Id.* at 672–73.

(Op. at 37.) The Purported Directors try to diminish *Air Panama* on the grounds that it has "an absence of analysis and lack of appreciation for the elements of different concepts." (Opening Br. at 35.) But the *Air Panama* court did not analyze the Delvalle government's control over territory because, once it had concluded the Executive Branch had recognized the Delvalle Government as the *de jure* government, no further analysis was necessary.

Other authorities on which the Purported Directors rely confirm that *de jure* recognition by the U.S. is sufficient to invoke the act of state doctrine. A907. For example, in *Carl Zeiss*, 293 F. Supp. at 911 (cited in Opening Br. at 45-46), the court rejected the application of the act of state doctrine to acts taken by

the West German government that would have an effect within the territory of East Germany only because "West Germany is not recognized by [the U.S.] as having any territorial jurisdiction, *either de facto or de jure*, over East Germany" and "our government made it clear that [its recognition of West Germany] was not intended to constitute recognition of West Germany as the *de jure* government of East Germany." *Id*. (emphasis added). Again, the critical factor was the lack of *de jure* recognition, not the government's control over any territory. In fact, all the cases cited by the Purported Directors that "have applied the doctrine only to *de jure* governments that meet the definition of sovereign under the Restatement (Second)," arise in the context where the sovereign has *de jure* control. (Op. at 38, n.114.) As the Chancery Court observed, this "unsurprising correlation does not render *de facto* control a prerequisite to apply the act of state doctrine." (*Id*. at 38.)

3. The Act Of State Doctrine Applies To The Guaidó Government's Official Acts Committed Within Venezuela Regardless Of Their Extraterritorial Effects.

The Purported Directors also argue, without support, that the Chancery Court erred "by extending the [act of state] doctrine to acts affecting interests outside the acting state's territory," namely, control of CITGO, a company based in Houston, Texas. (Opening Br. at 36.) However, the Chancery Court's decision was consistent with federal and state decisions applying the act of

state doctrine where the *effect* of the act taken within the foreign territory was felt outside of that territory. These include decisions of the U.S. Supreme Court[15] and lower federal courts.[16] The court's opinion in *D'Angelo v. Petroleos Mexicanos* is also instructive. 317 A.2d 38, 40 (Del. Ch. 1973), *rev'd on other grounds*, 331 A.2d 388 (Del. 1974). There, the court applied the act of state doctrine in a case filed by the receiver of a dissolved Delaware corporation regarding royalties from oil wells that were expropriated by the Mexican Government. The court found that

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[15] *See, e.g.*, *Sabbatino*, 376 U.S. 398 (applying the act of state doctrine for an act that effected an American commodity broker's proceeds from Cuban sugar); *Belmont,* 301 U.S. 324 (applying the doctrine for an act that resulted in a private New York banker being forced to return a sum of money deposited by a nationalized Russian corporation); *Pink*, 315 U.S. 203 (applying the doctrine in the case of a Russian decree having the extraterritorial effect of nationalizing certain insurance assets held in the U.S.)

[16] *See, e.g.*, *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.* 307 F. Supp. 1291, 1292 (D. Del. 1970) (holding that regulating trade within one's borders qualifies as an act of state, even if the effect is compulsive and fell outside of the acting state's jurisdiction); *Carl Zeiss*, 293 F. Supp. at 911 ("the mere fact that the foreign state's act, in addition to regulating matters within its territorial jurisdiction, may have some indirect impact outside its territory, does not preclude our treatment of it as an 'act of state.'"); *Air Panama*, 745 F. Supp. at 673 n.4 (holding board and management appointments to be valid under the act of state doctrine where such appointments were made for the purpose of controlling assets located in the U.S., notwithstanding the significant extraterritorial effects).

the act of state doctrine applied even though the royalties at issue were located in Delaware:

> even if it be assumed that the sequestered property (the debt due from Mobil) has a Delaware situs, this makes no difference. Plaintiff's claim is for an accounting arising out of conduct ('appropriation'), in Mexico. . . And on this aspect of the case *Oetjen* is direct authority for the proposition that the place of the government's act, not the presence of property within the jurisdiction of the reviewing court, is controlling.

Id. at 41.

The authorities on which the Purported Directors rely involved actions taken with respect to property *located outside of the state at issue*. (Opening Br. at 38-41.) In such instances, courts have found that when the "the situs of the property *at the time of the purported taking*" is outside of the sovereign's territory, the acts of state will be given effect "only if they are consistent with the policy and law of the United States."[17] This line of cases does not apply here because the

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[17] *Allied Bank Int'l v. Banco Credito Agricola de Cartago*, 757 F.2d 516, 521 (2d Cir. 1985) (declining to apply the act of state doctrine because at the time of the act in question – a Costa Rican decree invalidating debt previously entered into with a New York bank – the debt was not in Costa Rica but in New York) (emphasis added); *Republic of Iraq v. First Nat'l City Bank*, 353 F.2d 47, 51 (2d Cir. 1965) (declining to apply the act of state doctrine where the legal situs of the intangible property at issue, debt and stock, was Canada and not Iraq); *Zwack v. Kraus Bros. & Co.*, 237 F.2d 255, 261 (2d Cir. 1956) (declining to apply the act of state doctrine where the (Continued . . .)

"act" at issue—the appointment of the PDVSA Managing Board—took place entirely on Venezuelan soil *and* the act (at the time it was taken) affected the board of a Venezuelan entity. It is irrelevant that the PDVSA Managing Board was expressly authorized to appoint a board of directors for PDV Holding, a U.S. entity, and subsequently exercised that authority—the point is that the Purported Directors cannot obtain relief without first invalidating the initial appointments to the PDVSA Managing Board, and no U.S. court has authority to invalidate the decree of the Venezuelan National Assembly expressly empowering Mr. Guaidó to appoint the PDVSA Managing Board.

Braka v. Bancomer, S.N.C., 762 F.2d 222 (2d Cir. 1985), is instructive. In *Braka*, the Second Circuit considered whether to apply the act of state doctrine in a case where the Mexican government's issuance of exchange controls resulted in plaintiffs located in the U.S. receiving less than the market exchange rate for their certificates of deposit ("CDs"). The court in *Braka* found

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(. . . continued)

legal situs of the intangible property at issue, a trademark, was the U.S.); *see also Banco Nacional de Cuba v. Chem. Bank New York Tr. Co.*, 658 F.2d 903, 908 (2d Cir. 1981) (citing *Belmont*, 301 U.S. 324) (recognizing the extraterritorial expropriation by Cuba of assets located in the U.S. as said taking did not violate U.S. policy); *Hausler v. JP Morgan Chase Bank, N.A.*, 127 F. Supp. 3d 17, 57 (S.D.N.Y. 2015) (same).

that Mexico was the situs of the Mexican CDs at the time of the official act and therefore the Mexican government's application of exchange controls to the CDs was an act of state because the act at issue was "able to come to complete fruition within the dominion of the [sovereign]." *Id.* Similarly, the decrees replacing the Board of PDVSA with the Incumbent Directors were passed in Venezuela and involved a Venezuelan entity. *Braka*, 762 F.2d at 224.

The Purported Directors' argument is also unworkable as a practical matter. In cases involving the act of state doctrine, fundamental jurisdictional and venue rules will generally require that the act giving rise to the suit had some effect on interests located in the U.S. The act of state doctrine would be severely limited if the acts of a foreign sovereign could be invalidated simply because those acts have effects outside of the foreign state.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Chancery Court.

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December 16, 2019

CERTIFICATE OF SERVICE

I hereby certify that on the December 16, 2019, a copy of Appellees' Corrected Answering Brief was caused to be served upon the following counsel of record via File & Serve*Xpress*:

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