



**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/Appellant, )

v. )

LUISA PALACIOS, EDGAR )  
RINCÓN, FERNANDO VERA, ELIO )  
TORTOLERO, ANDRÉS PADILLA, )  
ÁNGEL OLMETA, JAVIER )  
TROCONIS, LUIS URDANETA, and )  
RICK ESSER, )

Defendants/Counterclaim- )  
Plaintiffs Below/Appellees. )

No. 399, 2019  
  
Court Below—Court of  
Chancery of the State of  
Delaware  
C.A. No. 2019-0490-KSJM

**CORRECTED BRIEF OF THE BOLIVARIAN  
REPUBLIC OF VENEZUELA, AS AMICUS CURIAE,  
IN SUPPORT OF AFFIRMANCE FOR APPELLEES**

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## IDENTITY AND INTERESTS OF AMICUS CURIAE

*Amicus curiae*, the Bolivarian Republic of Venezuela (“Venezuela”), is the recognized, legitimate government of the people of Venezuela. The country possesses the largest supply of proven oil reserves in the world. Opinion (“Op.”) at 7. Venezuela is the sole stockholder of Petróleos de Venezuela, S.A. (“PDVSA”), the Venezuelan state-owned oil and natural gas company. Over the past decade, PDVSA has generated hundreds of billions of dollars in revenue for Venezuela through its exploration, production, refining and exportation activities.<sup>1</sup> PDV Holding, Inc. (“PDV Holding,” a subsidiary of PDVSA), CITGO Holding, Inc. (“CITGO Holding,” a subsidiary of PDV Holding), and CITGO Petroleum Corporation (“CITGO Petroleum,” a subsidiary of CITGO Holding and, together with PDV Holding and CITGO Holding, the “CITGO Entities”) are Delaware corporations that are wholly-owned direct or indirect subsidiaries of PDVSA.

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<sup>1</sup> See Igor Hernández & Francisco Monaldi, *Weathering Collapse: An Assessment of the Financial and Operational Situation of the Venezuelan Oil Industry*, Growth Lab at Center for International Development at Harvard University 13 (November 2016), [https://growthlab.cid.harvard.edu/files/growthlab/files/venezuela\\_oil\\_cidwp\\_327.pdf](https://growthlab.cid.harvard.edu/files/growthlab/files/venezuela_oil_cidwp_327.pdf) (reporting total revenue of approximately \$95.3 billion in 2010, \$125.5 in 2011, \$127.6 in 2012, \$134 billion in 2013, \$128.4 in 2014, and \$88.5 billion in 2015); *Revenue generated by Petróleos de Venezuela (PDVSA) from 2015 to 2018 (in billion U.S. Dollars)*, Statista (2019), <https://www.statista.com/statistics/803918/revenue-petroleos-venezuela/> (reporting total revenue of \$88.55 billion in 2015, \$48 billion in 2016, \$28.87 in 2017, and \$23.32 billion in 2018).

In February 2018, pursuant to the *Statute that Governs the Transition to Democracy to Reestablish the Full Force and Effect of the Constitution of the Bolivarian Republic of Venezuela* (the “Democracy Transition Statute”) enacted by the Venezuelan National Assembly, Venezuela’s Interim President, Juan Gerardo Guaidó Márquez, appointed five individuals to serve as the *ad hoc* Managing Board of PDVSA (the “*Ad Hoc* Board”).<sup>2</sup> The Venezuelan government, headed by Interim President Guaidó and recognized by the United States, has an interest in ensuring that PDVSA, a wellspring of revenue for the Venezuelan government, can properly and effectively serve the interests of the Venezuelan people amidst a dire humanitarian emergency.

In the event this Court decides to reach questions of Venezuelan law, Venezuela, as *amicus curiae*, is uniquely well-positioned to assist the Court with its understanding of the foreign statutory and constitutional issues that bear on the questions before it.

### **ARGUMENT**

*Amicus curiae* Venezuela seeks to assist the Court by explaining why, under Venezuelan law, the *Ad Hoc* Board of PDVSA appointed by Interim President

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<sup>2</sup> Subsequently, the *Ad Hoc* Board was expanded and currently comprises eight members: Luis A. Pacheco (President of the Board), María Lizardo, Simón Antunes, Gustavo J. Velásquez, Carlos José Balza, Ricardo Alfredo Praga, Claudio Martínez, and Alejandro Grisanti.

Guaidó is the only body with authority to appoint the board of directors of PDV Holding. This explanation involves a two-part analysis: (i) the first part describes Interim President Guaidó’s legal authority to appoint the *Ad-Hoc* Board and, in turn, the legal authority of the *Ad Hoc* Board to appoint the board of directors of PDV Holding, and (ii) the second part explains the illegitimacy and invalidity of the Constitutional Chamber’s rulings purporting to declare the appointment of the *Ad Hoc* Board “null and void.”

**A. Under the Political Question Doctrine, Interim President Guaidó and Venezuela’s Democratically-Elected National Assembly Are the Official Government of Venezuela for All Relevant Purposes**

On January 23, 2019, President Donald J. Trump issued a statement officially recognizing the President of Venezuela’s National Assembly, Juan Gerardo Guaidó Márquez, as Interim President of Venezuela. A363. President Trump’s statement also rejected all claims to legitimacy of the regime headed by Nicolás Maduro.<sup>3</sup> On

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<sup>3</sup> Appellants argued below that the “Executive Statement does not de-recognize the Maduro Government[.]” A492, and they repeat that argument on appeal. *See* Appellants’ Opening Brief (“App. OB”) at 1-2, 26 (“Even if Mr. Maduro was de-recognized, *which he was not . . .*” (emphasis added)). That is incorrect. President Trump’s January 23, 2019 statement described the Maduro regime as “the illegitimate Maduro regime.” A363. Elsewhere, on January 29, 2019, the Trump administration referred to “Maduro and members of *his previous regime*.” *President Donald J. Trump Supports the Venezuelan People’s Efforts to Restore Democracy in their Country*, The White House (January 29, 2019) (emphasis added), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-supports-venezuelan-peoples-efforts-restore-democracy-country/>. Moreover, the National Assembly declared Maduro’s election illegitimate under the Venezuela Constitution. *See also* A396; A442; A602-05; Appellees’ Answering Brief at 7-12.



January 25, 2019, the U.S. Department of State accepted Interim President Guaidó's designation of Carlos Alfredo Vecchio as the Chargé d'Affaires of the government of Venezuela.<sup>4</sup> President Trump formally received Ambassador Vecchio as Ambassador of Venezuela to the United States on April 8, 2019, and Ambassador Vecchio continues to hold that title.<sup>5</sup>

In his statement "Recognizing Venezuelan National Assembly President Juan Guaidó as the Interim President of Venezuela," President Trump made clear that the Venezuelan National Assembly is the "**only legitimate branch of government duly elected by the Venezuelan people**" and that the predecessor Maduro regime is "**illegitimate.**" A363. As a result, the National Assembly is "**the only governing body in Venezuela recognized by the United States.**" *PDVSA U.S. Litig. Tr. v. Lukoil Pan Americas LLC*, 372 F. Supp. 3d 1353, 1357 (S.D. Fla. 2019) (emphasis added); *see also id.* n.5 (finding that, on January 23, 2019, "the United States withdrew its recognition of Nicolas Maduro as the president of Venezuela and

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<sup>4</sup> Press Release, *Representative of the Government of Venezuela to the United States*, U.S. Department of State (Jan. 27, 2019), <https://www.state.gov/secretary/remarks/2019/01/288609.htm> (recognizing that "Mr. Vecchio will have authority over diplomatic affairs in the United States on behalf of Venezuela" and "reaffirm[ing] the United States' strong support for interim President Guaidó's leadership of Venezuela.")

<sup>5</sup> *Standing Up for Democracy and Rule of Law in Venezuela*, U.S. Department of State, Official Blog (Apr. 11, 2019), <https://blogs.state.gov/stories/2019/04/11/en/standing-democracy-and-rule-law-venezuela>.

officially recognized the President of the National Assembly, Juan Guaidó, as the Interim President of Venezuela and affirmed its support of the National Assembly as ‘the only legitimate branch of government duly elected by the Venezuelan people.’”).

According to the political question doctrine enshrined in long-standing United States Supreme Court precedent, President Trump’s recognition of Interim President Guaidó and Venezuela’s democratically-elected National Assembly as the official government is binding on courts in the United States. *See Guaranty Tr. Co. of N.Y. v. U.S.*, 304 U.S. 126, 137-38 (1938); *see also, e.g., Baker v. Carr*, 369 U.S. 186, 212-13 (1962); *Underhill v. Hernandez*, 168 U.S. 250, 253-54 (1897). Critically, “[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.’” *PDVSA U.S.*, 372 F. Supp. 3d at 1362 (quoting *U.S. v. Pink*, 315 U.S. 203, 223 (1942)); *see also Underhill*, 168 U.S. at 254 (recognizing retroactive effect of United States’ recognition of foreign government).

Accordingly, this Court is bound to treat the actions of the National Assembly, led by Interim President Guaidó, as the official actions of the government of Venezuela. *See OI European Grp. B.V. v. Bolivarian Republic of Venezuela*, 2019 WL 2185040, at \*4-5 (D.D.C. May 21, 2019) (treating lawyers representing the

United States-recognized government of Venezuela “as the appropriate representatives of Venezuela” in light of the Trump administration’s designation); *Red Tree Investments, LLC v. Petróleos de Venezuela, S.A, et al.*, 19-cv-2519 (S.D.N.Y. May 6, 2019) (order recognizing the “United States-recognized government of Venezuela, led by Mr. Guaidó,” and granting stay to defendant PDVSA because the Guaidó administration did not have full access to the personnel and documents of the government and its instrumentalities, including PDVSA) (A851-52); *Dresser-Rand Company v. Petróleos de Venezuela, S.A, et al.*, 19-cv-2689 (S.D.N.Y. July 8, 2019) (order granting stay and recognizing Guaidó-appointed José Ignacio Hernández G. as Special Attorney General of Venezuela) (Ex. 1).

**B. Under the Act of State Doctrine, Delaware Courts Cannot Review or Modify Actions Taken by the Official Government of Venezuela**

Under the act of state doctrine, an “act within its own boundaries of one sovereign state cannot become the subject of re-examination and modification in the courts of another. Such action when shown to have been taken, becomes . . . a rule of decision for the courts of this country.” *Ricaud v. Am. Metal Co.*, 246 U.S. 304, 310 (1918); *see also W.S. Kirkpatrick & Co., Inc. v. Env’tl Tectonics Corp., Int’l*, 493 U.S. 400, 406 (1990) (“The act of state doctrine is not some vague doctrine of abstention but a ‘*principle of decision*’ binding on federal and state courts alike.” (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 (1964) (emphasis

added)); *Konowaloff v. Metropolitan Museum of Art*, 702 F.3d 140, 146 (2d Cir. 2012) (“When it is made to appear that the foreign government has acted in a given way . . . the details of such action or the merit of the result cannot be questioned but must be accepted by our courts as a rule for their decision.” (quoting *Ricaud*, 246 U.S. at 309)).

Here, the act of state doctrine requires this Court to accept as a rule of decision all validly enacted laws adopted by the only recognized governing body in Venezuela and implemented by the recognized head of the executive branch of the Venezuelan government. As explained herein, (i) the Guaidó administration, together with the Venezuelan National Assembly, is the sole recognized government of Venezuela; (ii) the National Assembly (the only legitimate duly elected branch of government), whose decisions cannot be questioned by this Court, enacted the Democracy Transition Statute approving the appointment of an *ad hoc* board for PDVSA by Interim President Guaidó; (iii) pursuant to Articles 15.a and 34 of the Democracy Transition Statute, Interim President Guaidó officially designated the *Ad Hoc* Board with his February 8 Decree (defined below), a decision subsequently approved by a special resolution of the National Assembly; and (iv) pursuant to Article 34 of the Democracy Transition Statute, the *Ad Hoc* Board in turn validly appointed the board of PDV Holding—a step that was ratified by Interim President Guaidó’s April 10 Decree (defined below), which the National Assembly also

approved. The act of state doctrine requires this Court to accept each of these actions as *rules of decision* that it can neither review nor modify.

**C. Interim President Guaidó is Legally Empowered to Appoint PDVSA's Ad Hoc Board**

As head of the Venezuelan government, Interim President Guaidó has the authority to appoint the *Ad Hoc* Board. This authority flows from two sources. The first is Venezuela's regular administrative and commercial law, and the second is the special power of "administrative intervention" (*intervención administrativa*), which is vested in the Venezuelan President.

Under Venezuelan commercial law, the board of directors of a corporation is typically appointed at a shareholder assembly. However, because PDVSA is a state-owned enterprise, it is subject both to commercial law and Venezuela's administrative law.<sup>6</sup> As the Court of Chancery observed, the parties "agreed that the President of Venezuela has the power to appoint the members of the board of PDVSA and, indirectly, determine the composition of the boards of the nominal defendants." Op. at 1.

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<sup>6</sup> See Decree No. 8,238, published in Official Gazette of the Bolivarian Republic of Venezuela No. 39,681, dated May 25, 2011 (amending bylaws by decree) (Ex. 2); Hernández G., José Ignacio, (2016), *El pensamiento jurídico Venezolano en el Derecho de los hidrocarburos*, Academia de Ciencias Políticas y Sociales, 66-67 (Ex. 3). Venezuela will provide the Court with certified translations of all non-English documents attached as exhibits hereto as soon as practicable.

Pursuant to Article 303 of the *Constitución de la República Bolivariana de Venezuela* (the “Venezuelan Constitution”), “[f]or reasons of economic and political sovereignty and national strategy,” the Venezuelan government shall retain all shares of PDVSA as the body created to manage Venezuela’s petroleum industry.<sup>7</sup> Under Article 226 of the Venezuelan Constitution, the President of Venezuela “is the Head of State and of the National Executive, in which latter capacity he directs the action of government.”<sup>8</sup> Furthermore, Article 8 of Venezuela’s Organic Hydrocarbons Law reinforces the function of PDVSA as the instrument to fulfill the oil policies of the executive branch.<sup>9</sup> As a result, Venezuela’s President enjoys the power to direct the policy of PDVSA, including by altering its board of directors, by decree.<sup>10</sup>

In addition to regular administrative and commercial law, the special power of “administrative intervention” found in the Democracy Transition Statute, enacted on February 5, 2019, independently affords the president the power to declare an

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<sup>7</sup> Constitución de la República Bolivariana de Venezuela, Title VI, Chapter I Art. 303 (Ex. 4) ([https://www.constituteproject.org/constitution/Venezuela\\_2009.pdf?lang=en](https://www.constituteproject.org/constitution/Venezuela_2009.pdf?lang=en)).

<sup>8</sup> Constitución de la República Bolivariana de Venezuela, Title V, Chapter II Art. 226.

<sup>9</sup> Ley Orgánica de Hidrocarburos, Artículo 8. Ex. 5.

<sup>10</sup> Decree No. 8,238 (amending PDVSA bylaws) at Article 17 (“Cláusula Décima Séptima) (explaining that the President of Venezuela appoints directors of PDVSA by decree) (Ex. 2).

intervention in the operation of PDVSA and other state-owned enterprises. A declaration of intervention empowers the President to create a special body to exercise all of the powers ordinarily vested in either the shareholder assembly or the board of directors of a state-owned enterprise.<sup>11</sup> Specifically, Article 15.a of the Democracy Transition Statute authorizes Interim President Guaidó to exercise the following powers:

Appoint *ad hoc* Managing Boards to manage public institutes, autonomous institutes, State foundations, State associations and organizations, *State companies, including companies established abroad*, and any other decentralized entity, for the purpose of appointing administrators and, in general, issuing and implementing the necessary measures to control and protect State company assets. *The decisions adopted by the President in Charge of the Republic shall be executed immediately, with full legal effect.*

A610 (emphasis added); A246-47.

Article 34 of the Democracy Transition Statute deals specifically with PDVSA, PDV Holding and the other CITGO Entities:

In view of the risks faced by PDVSA and PDVSA subsidiaries as a result of the usurpation referred to in Chapter II herein, and while such a situation persists, the President in Charge shall appoint an *ad hoc* Managing Board for Petróleos de Venezuela S.A. (PDVSA), in accordance with Article 15, Letter a, herein, to exercise PDVSA's rights as shareholder of PDV Holding, Inc., under the authoritative control of the National Assembly and in application of Article 333 of the Constitution. The foregoing shall take place based on the following principles:

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<sup>11</sup> See Brewer Carías, Allan R. (2013), *Tratado de Derecho Administrativo Iberoamericano, Volumen II*, Editorial Jurídica Venezolana, Caracas, 461 (Ex. 6).

1. The *ad hoc* Managing Board may be composed of persons domiciled abroad, and shall have power to act as PDVSA Shareholders' Assembly and Board of Directors, in order to take the necessary steps to appoint a Board of Directors for PDV Holding, Inc., in representation of PDVSA as the sole shareholder. The new directors of PDV Holding, Inc. shall proceed to appoint new Boards of Directors for PDV Holding, Inc.'s affiliates, including Citgo Petroleum Corporation.
2. This transitory provision shall prevail over any other applicable rule, and shall govern the interpretation of any other formality required by the Venezuelan legal system and corporate documents, in order to exercise the representation of PDVSA as sole shareholder of PDV Holding, Inc.
3. Based on the foregoing, PDV Holding, Inc.'s new Directors, and affiliates, shall guarantee that said companies, particularly PDVSA, are functionally autonomous:
  - a) The autonomous management of the business of PDV Holding, Inc. and its affiliates shall follow commercial efficiency criteria, subject only to the control and accountability mechanisms exercised by the National Assembly, and other applicable control mechanisms.
  - b) PDV Holding, Inc. and its affiliates shall have no relationship whatsoever with the people currently usurping the Presidency of the Republic. For as long as such usurpation persists, PDV Holding, Inc. and its subsidiaries shall make no payments, or capital distributions, to PDVSA.

A616-17; A253-54.

On February 8, 2019, pursuant to the authority vested in him by Articles 15.a and 34, Interim President Guaidó appointed five individuals (Simón Antunes,



Gustavo J. Velásquez, Carlos José Balza, Ricardo Alfredo Praga, and David Smolansky) to serve as the *Ad Hoc* Board of PDVSA (the “February 8 Decree”). A620. The February 8 Decree expressly authorized the *Ad Hoc* Board to exercise the right of PDVSA, as the sole stockholder of PDV Holding, to appoint PDV Holding’s board of directors, and it revoked any previous related designation made by PDVSA. *Id.* The National Assembly approved the February 8 Decree by a special resolution on February 13, 2019. A266-70. On February 15, 2019, the *Ad Hoc* Board took action by written consent pursuant to Section 228 of the Delaware General Corporation Law to elect a new board of PDV Holding. A623-29.

On April 9, 2019, the National Assembly authorized Interim President Guaidó to expand the powers granted to, and the number of members of, the *Ad Hoc* Board.<sup>12</sup> The following day, by Presidential Decree No. 3 (the “April 10 Decree”),<sup>13</sup> which the National Assembly also approved, Interim President Guaidó amended the February 8 Decree to add several new members to the *Ad Hoc* Board.<sup>14</sup> The April 10 Decree also ratified the *Ad Hoc* Board’s appointment of the PDV Holding board of directors. The April 10 Decree confirmed that only the *Ad Hoc* Board can

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<sup>12</sup> Legislative Gazette of the Bolivarian Republic of Venezuela No. 6, dated April 10, 2019 (Ex. 7).

<sup>13</sup> Legislative Gazette of the Bolivarian Republic of Venezuela No. 8, dated June 5, 2019 (Ex. 8).

<sup>14</sup> Legislative Gazette of the Bolivarian Republic of Venezuela No. 6, dated April 10, 2019 (Ex. 7).

represent PDVSA and exercise PDVSA’s rights as the sole stockholder of PDV Holding.

Both the February 8 and April 10 Decrees were lawful actions taken in Caracas, Venezuela by Interim President Guaidó in the exercise of his authority under the Venezuelan Constitution, Venezuelan administrative law, and the Democracy Transition Statute. Accordingly, these actions satisfy the principle of legality (*principio de legalidad*)—the rule of law—and are binding on this Court.<sup>15</sup>

**D. The Rulings and Statements of the Constitutional Chamber of The Supreme Tribunal of Justice are Illegitimate and Do Not Bind This Court**

On February 14, 2019, the Constitutional Chamber issued a ruling (Ruling Number 39) purporting to declare both the Democracy Transition Statute and Interim President Guaidó’s February 8 Decree creating the *Ad Hoc* Board “null and void.” A284-85; A291-92. Similarly, the day after the April 10 Decree, the Constitutional Chamber reinforced this purported annulment with “protective measures” by adopting Ruling Number 74 “specifically targeting the actions of the new boards of PDVSA and its entities as appointed by Mr. Guaidó, preventing them from exercising any authority over PDVSA, its subsidiaries, and their operations.” A51. “The Constitutional Court further declared null and void any acts that

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<sup>15</sup> See Moles Caubet, Antonio (1997), “El principio de legalidad y sus implicaciones”, en *Estudios de Derecho Público, Universidad Central de Venezuela*, Caracas, 1974, 277-283 (Ex. 9).

purported to appoint a new board of directors of PDVSA or any of its related entities.” A51-52. Appellants rely, wrongly, on these purported rulings.<sup>16</sup>

Neither of these statements by the Supreme Tribunal of Justice, which Appellants insist “remains the supreme interpreter of the Venezuelan Constitution,” App. OB at 7, are binding decisions representing the law of Venezuela. On the contrary, they are merely the coda to a set of arbitrary decisions issued by the same Supreme Tribunal of Justice that has endeavored for four years to usurp authority

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<sup>16</sup> Below, Appellants contended that Constitutional Chamber validly struck down both the Democracy Transition Statute and Interim President Guaidó’s appointment of the *Ad Hoc* Board as unconstitutional and enjoined further action of the *Ad Hoc* Board. *See* A488 (“The United States has not de-recognized the Constitutional Court of Venezuela. On February 14, 2019, the Constitutional Court in Venezuela struck down the [Democracy Transition] Statute as unconstitutional, rendering it void as well as the [National Assembly’s] Resolution [approving Interim President Guaidó’s appointment of the *Ad Hoc* Board].”); *see also* A474 (“The Constitutional Court overruled the appointment of an ad hoc administrative board for PDVSA and declared their appointment a nullity.”) (internal citations omitted); A47-48 (“Among other things, the Constitutional Court found that the Statute is null and lacks any legal effects, as well as ruling that all acts of the National Assembly are null, including any acts taken in contravention of the [Constitutional Court’s February 14] [d]ecision. Under Venezuelan law, the Decision is binding, final, and unappealable [*sic*].”). On appeal, Appellants repeat this argument:

On February 14, 2019, the Constitutional Court in Venezuela struck down the Statute and the Resolution as unconstitutional, rendering both void. The Constitutional Court, referring to acts taken by Mr. Guaidó, noted that ‘any decision of a body or an officer in contempt or in usurpation of functions who intends internal legal and/or international effects is absolutely void and will be considered nonexistent.’

App. OB at 8-9 (citing A47-48; A273-94).

from the National Assembly and erode the rule of law in Venezuela. Even if this Court finds it appropriate to examine the validity of the Democracy Transition Statute or Interim President Guaidó's appointment of the *Ad Hoc* Board (which the act of state doctrine forbids), Appellants' reliance on Ruling Number 39 and Ruling Number 74 of the Constitutional Chamber fails for at least four independent reasons:

*First*, the Constitutional Chamber was reconstituted by the Maduro regime in a clear violation of Venezuelan law. In December 2015, the National Assembly, then controlled by Maduro's lame duck United Socialist Party, illegally appointed thirteen principal justices and twenty-one substitute justices to the Supreme Tribunal of Justice in order to prevent the incoming the National Assembly (elected earlier that month by an opposition supermajority) from appointing justices who would have undergone the rigorous obligatory vetting process and enjoyed the support of the democratically-elected representatives of the people of Venezuela as required by Articles 264 and 270 of the Venezuelan Constitution.<sup>17</sup> Additionally, by failing to indicate particular judicial vacancies to be filled, the National Assembly violated the Organic Law of the Supreme Court of Justice.<sup>18</sup> Accordingly, *even if the White*

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<sup>17</sup> Constitución de la República Bolivariana de Venezuela, Title V, Chapter III arts. 264, 270.

<sup>18</sup> Venezuela: AN aprueba anular designacion de magistrados, Prodavinci (Jul. 15, 2016) <http://historico.prodavinci.com/2016/07/15/actualidad/venezuela-an-aprueba-anular-designacion-de-magistrados/> (Ex. 10).

*House had not declared the Maduro regime illegitimate*, the Constitutional Chamber, as currently constituted, has been acting *ultra vires* since 2015, because those purporting to act as its justices were appointed in violation of the Venezuelan Constitution and the Organic Law of the Supreme Court of Justice.<sup>19</sup>

*Second*, the National Assembly voted to nullify these severely flawed appointments on April 5, 2017.<sup>20</sup> Because the political question doctrine operates retroactively, this Court is bound to accept that the 2015 appointments were nullified by the National Assembly and, further, that those justices purporting to act pursuant to the 2015 appointments are acting *ultra vires*.

*Third*, because the Constitutional Chamber remains under the political control of the illegitimate Maduro regime, the Constitutional Chamber, as currently constituted, is not an autonomous tribunal making up part of Venezuela's official

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<sup>19</sup> See Venezuelan National Assembly, *Final Report of the Special Commission of the National Assembly for the Study and Analysis of the Selection Process of Senior and Substitute Magistrates of the Supreme Tribunal*, dated March 3, 2016. [http://www.asambleanacional.gob.ve/actos/\\_informe-final-de-la-comision-especial-para-el-estudio-y-analisis-del-proceso-de-seleccion-de-magistrados-principales-y-suplentes-del-tribunal-supremo-de-justicia](http://www.asambleanacional.gob.ve/actos/_informe-final-de-la-comision-especial-para-el-estudio-y-analisis-del-proceso-de-seleccion-de-magistrados-principales-y-suplentes-del-tribunal-supremo-de-justicia).

<sup>20</sup> Acuerdo Sobre La Activación Del Procedimientode Remoción De Los Magistrados De La Sala Constitucional Del Tribunal Supremo De Justicia, Por Su Responsabilidad En La Ruptura Del Orden Constitucional, Asamblea Nacional (Apr. 5, 2017), <http://www.asambleanacional.gob.ve/actos/detalle/acuerdo-sobre-la-activacion-del-procedimientode-remocion-de-los-magistrados-de-la-sala-constitucional-del-tribunal-supremo-de-justiciapor-su-responsabilidad-en-la-rupturadel-orden-constitucional-120>.

government, and its rulings must not be recognized by this Court. Since January 2016, the Constitutional Chamber has enacted rules that have impeded the exercise of legislative power by the National Assembly, *the only duly elected governing body in Venezuela recognized by the United States*. The actions of the Maduro loyalists putatively serving on the Constitutional Chamber, particularly their attempt to frustrate representative democracy, have facilitated the breakdown of the rule of law in Venezuela. For this reason, on May 18, 2017, the U.S. Department of the Treasury’s Office of Foreign Assets Control (“OFAC”), acting pursuant to Executive Order 13692, sanctioned eight Venezuelan justices of the Supreme Tribunal of Justice—all seven members of the Constitutional Chamber and the President of the Supreme Tribunal of Justice.<sup>21</sup> OFAC found that the sanctioned justices “are responsible for a number of judicial rulings in the past year that have 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.”<sup>22</sup>

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<sup>21</sup> See *Treasury Sanctions Eight Members of Venezuela’s Supreme Court of Justice*, U.S. Department of the Treasury (May 18, 2017), <https://www.treasury.gov/press-center/press-releases/Pages/sm0090.aspx>.

<sup>22</sup> See *id.*

The Constitutional Chamber even went so far as to find the National Assembly in “contempt,” declaring that all the laws and decisions thereafter adopted by the National Assembly should be deemed “null and void.” A284. The Constitutional Chamber purported to arrogate the legislative function to itself in an effort to carry out the political agenda of the Maduro regime.<sup>23</sup> However, the purported annulment of the Democracy Transition Statute was based on the repudiation of the National Assembly’s authority—in direct conflict with President Trump’s recognition, which enjoys retroactive effect—and the usurpation of the legislative function as part of the Maduro regime’s strategy to amass absolute power.

*Fourth*, these clear usurpation efforts violate Article 138 of the Venezuelan Constitution. The recent purported annulment of Interim President Guaidó’s appointment of the *Ad Hoc* Board by Ruling Numbers 39 and 74 was a political act of the illegitimate Maduro regime that cannot be described as judicial. Both rulings came in the form of “statements” by the Constitutional Chamber. Each followed decrees from Interim President Guaidó, and each Constitutional Chamber “decision” purported to invalidate a decree without any form of judicial procedure or

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<sup>23</sup> Brewer Carías, Allan R. (2016), *Dictadura judicial y perversión del Estado de Derecho. La Sala Constitucional y la destrucción de la democracia en Venezuela*, Editorial Jurídica Venezolana, Caracas, 410-414 (Ex. 11). See also Hernández G., José Ignacio (2016), “El asedio a la Asamblea Nacional”, in 145-146 *Revista de Derecho Público*, Caracas, 71-82 (Ex. 12).

deliberation. This demonstrates that the Constitutional Chamber continues to act as a partisan political body loyal to the illegitimate Maduro regime, and not as an impartial tribunal or court of law.<sup>24</sup> Under Article 138 of the Venezuelan Constitution, actions taken on the basis of usurped authority do not have binding effect.<sup>25</sup> Therefore, Rulings 39 and 74 are null and void and lack legal force. The legitimate National Assembly said as much when it declared that the Constitutional Chamber usurped the authority of the legislative branch in 2017.<sup>26</sup>

The General Assembly of the Organization of American States also reached this conclusion when it declared the breakdown of the constitutional order in

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<sup>24</sup> The Constitutional Chamber adopted Ruling No. 39 *sua sponte*, even though the Constitutional Chamber, if its decisions were to be recognized, which they must not be, can only act based on a specific claim. The Constitutional Chamber's Ruling No. 74 (Ex. 13) resulted from the Maduro regime's request for an injunction, but the Constitutional Chamber purported to ratify its earlier supposed annulment of the appointment of the *Ad Hoc* Board, even though no annulment was requested in a constitutional claim.

<sup>25</sup> Specifically, Article 138 provides that "usurped authority is of no effect, and its acts are null and void." Constitución de la República Bolivariana de Venezuela, Title IV, Chapter 1, art. 138.

<sup>26</sup> *Resolution for the removal of the Judges of the Constitutional Chamber for their responsibility in the breakdown of the rule of law*, Bolivarian Republic of Venezuela National Assembly (April 5, 2017, [http://www.asambleanacional.gob.ve/actos/\\_acuerdo-sobre-la-activacion-del-procedimientode-remocion-de-los-magistrados-de-la-sala-constitucional-del-tribunal-supremo-de-justiciapor-su-responsabilidad-en-la-rupturadel-orden-constitucional.](http://www.asambleanacional.gob.ve/actos/_acuerdo-sobre-la-activacion-del-procedimientode-remocion-de-los-magistrados-de-la-sala-constitucional-del-tribunal-supremo-de-justiciapor-su-responsabilidad-en-la-rupturadel-orden-constitucional.))



Venezuela due to the usurpation of the legislative power by the Supreme Tribunal of Justice.<sup>27</sup> OFAC agreed:

[The Constitutional Chamber (identified as “TSJ-C”)] has issued a number of rulings that interfere with or limit the National Assembly’s authority. For example, in January 2017, the TSJ-C ruled that Venezuelan President Nicolas Maduro would give his annual address to the TSJ and not the National Assembly, as it states in the Constitution. In December 2016, the TSJ-C appointed members of the National Electoral Council, a constitutional duty of the National Assembly. In October 2016, the TSJ-C declared that the Venezuelan Executive Branch was exempt from submitting the budget to the National Assembly, as required by the Constitution, and ruled that the budget would instead be submitted to the TSJ-C. In multiple rulings issued between July 2016 and January 2017, the TSJ-C, instead of the National Assembly, has repeatedly renewed an extension of a state of emergency, a function that allows for the temporary restriction of constitutional rights, at the request of the Executive Branch.<sup>28</sup>

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<sup>27</sup> See Resolution on the Recent Events in Venezuela, CP/RES. 1078 (2108/17) (Apr. 3, 2017) (declaring that “The **decisions of the Supreme Court of Venezuela to suspend the powers of the National Assembly and to arrogate them to itself are inconsistent with democratic practice and constitute an alteration of the constitutional order of the Bolivarian Republic of Venezuela.**” and resolving “[t]o urge action by the Venezuelan government to safeguard the separation and independence of powers and to restore full constitutional authority to the National Assembly”), [https://www.oas.org/en/media\\_center/press\\_release.asp?sCodigo=E-022/17](https://www.oas.org/en/media_center/press_release.asp?sCodigo=E-022/17); Resolution on the Situation in Venezuela, AG/RES. 2929 (June 5, 2018) (resolving, among other things, “[t]o urge the Government of Venezuela to take steps to guarantee the separation and independence of the constitutional branches of power and **restore the full authority of the National Assembly**, the rule of law, and the guarantees and liberties of the population.”), [http://www.oas.org/en/media\\_center/press\\_release.asp?sCodigo=S-032/18](http://www.oas.org/en/media_center/press_release.asp?sCodigo=S-032/18).

<sup>28</sup> Supra n. 22.

The challenged decisions of the Constitutional Chamber have no legal effect pursuant to Article 138 of the Venezuelan Constitution.

### **CONCLUSION**

If the Court determines that it must address the validity of the Democracy Transition Statute and the appointment of the *Ad Hoc* Board, which it need not do, it should find that both are valid. The rulings of the Constitutional Chamber and its attempted usurpation of legislative power at the behest of the Maduro regime are themselves invalid.

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