20-3858-cv(L), 20-4127-cv(CON)

United States Court of Appeals

for the

Second Circuit

PETRÓLEOS DE VENEZUELA S.A., PDV HOLDING, INC., PDVSA PETRÓLEO S.A.,

Plaintiffs-Counter-Defendants-Appellants,

- v. -

MUFG UNION BANK, N.A. and GLAS AMERICAS LLC,

Defendants-Counter-Claimants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE BOLIVARIAN REPUBLIC OF VENEZUELA AS *AMICUS CURIAE* SUPPORTING APPELLANTS

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INTEREST OF *AMICUS CURIAE*

The Bolivarian Republic of Venezuela (the "Republic") respectfully submits this brief as *amicus curiae* in support of Appellants.[1] The Republic submits this brief to address matters of vital importance to the future of the Republic and its legitimate government.

In January 2019, following illegitimate elections administered by then-President Nicolas Maduro—who, among other things, banned opposition parties from participating—the National Assembly invoked Article 233 of Venezuela's Constitution and named Juan Guaidó as Interim President of the Republic.

As a result of the machinations of the illegitimate Maduro regime, Venezuela's national oil company Petróleos de Venezuela, S.A. ("PDVSA") issued the 2020 Notes and pledged a controlling interest in CITGO—the foreign "crown jewel" of the Venezuelan national oil industry—in defiance of the National Assembly's constitutional authority. As explained below, that purported pledge was invalid and the notes were unauthorized and void *ab initio* because Venezuela's Constitution unambiguously prohibits national

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E) and Circuit Rule 29.1(b), the Republic states that its counsel authored this brief in its entirety and that no party or its counsel, or any other person or entity other than the *amicus* or its counsel, has made a monetary contribution that was intended to fund the preparation or submission of this brief. Counsel for all parties consented in writing to the filing of this brief.

public interest contracts with foreign entities unless the National Assembly authorizes the contract prior to execution—an authorization that never took place here. Moreover, official acts of the National Assembly in 2016 reaffirmed the unconstitutional and unauthorized character of the pledge and the notes.

As a sovereign nation, the Republic has an interest in a correct understanding and application of Venezuela's Constitution and laws by the courts of the United States. The Republic also has a sovereign interest in United States courts' respectful deference to its acts of state.

The Republic also has an interest in this case because the decision below threatens to cripple the legitimate government's efforts—supported by the United States—to peacefully remove the illegitimate Maduro regime from power in Caracas, restore democracy in Venezuela, and bring desperately needed humanitarian relief to the Venezuelan people. Ensuring the recovery of the Venezuelan oil industry, in which CITGO plays a crucial strategic role, is indispensable to achieving these goals. While the Republic stands ready to resolve any legitimate claims of its creditors, it cannot recognize the unlawful Exchange Offer as creating valid obligations or pledging assets of public interest as collateral, and respectfully submits that

the United States courts should not do so either.[2] This Court should reject the Maduro regime's attempt to prop up its unconstitutional dictatorship by alienating a crucial part of Venezuela's national patrimony through a pledge that lacked the constitutionally required authorization of the National Assembly.

STATEMENT

Article 150 of Venezuela's Constitution provides that "[n]o municipal, state or national public interest contract shall be executed with foreign States or official entities, or with companies not domiciled in Venezuela, or shall be transferred to any of them without the approval of the National Assembly." JA2825.[3] Section 9 of Article 187 of the Constitution reiterates that "[i]t is the role of the National Assembly" to "[a]uthorize contracts of municipal, state and national public interest, with States or official foreign entities or with companies not domiciled in Venezuela." JA2825-26.[4] In Venezuela's civil law system, the National Assembly is the

[2] Except as otherwise stated, capitalized terms have the definitions set forth in Appellants' Brief.

[3] This brief quotes the English translations the parties provided the district court, which in some instances differ (but not materially) from the translations in a letter submitted to the district court by Venezuela's Ambassador to the United States.

[4] These absolute provisions are in contrast to provisions in the same Articles concerning public interest contracts with companies domiciled in Venezuela,

first-instance interpreter of the Constitution whenever it enacts laws, adopts resolutions, or performs other parliamentary acts in accordance with its constitutional authority. *See* Claudia Nikken, *Consideraciones sobre las fuentes del Derecho Constitucional y la interpretación de la Constitución* 85 (Editorial Jurídica Venezolana ed., 2018).

PDVSA was created shortly after Venezuela nationalized the oil industry in 1975. JA903. It is a "decentralized entity of the Public Administration" of Venezuela. JA905. The close relation of such entities with the State subjects them to the mandatory rules of public law in Venezuela, including those governing public contracting. *See Official Gazette* No. 6.154 (Nov. 19, 2014). The Republic's Constitution—adopted in 1999 to replace an earlier version—includes, in addition to the Articles discussed above, Articles 302 and 303, which recognize the special importance of the petroleum industry, and of PDVSA in particular. Article 302 reserves to the Republic, "for reasons of national expediency, the control over the petroleum industry and other public interest industries, operations and goods and services of a strategic nature." JA2826. Article

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as to which National Assembly approval or authorization is required only as "determined by law." JA2825.

303 provides that the Republic owns PDVSA for "reasons of economic and political sovereignty and national strategy." *Id.*

The Republic has long recognized that important contracts of PDVSA can constitute national public interest contracts. For example, in 2006, the National Assembly invoked its constitutional authority under Article 150 to authorize a joint venture agreement between a PDVSA subsidiary and foreign corporations. JA903 (Ambassador's letter citing Resolutions dated May 4, 2006, published in the Official Gazette No. 38430, May 5, 2006). Venezuela's Supreme Tribunal has also recognized that PDVSA is a state-owned enterprise in charge of national public interest activities. *Id.* (citing Supreme Tribunal of Justice, Political-Administrative Chamber, Ruling number 416 (May 4, 2004)).[5] The Supreme Tribunal has also recognized that contracts of state-owned enterprises can be national public interest contracts. *See, e.g.,* Supreme Tribunal of Justice, Constitutional Chamber, Ruling number 953 (Apr. 29, 2003) (contracts of C.V.G Electrificación del Caroní, C.A. (EDELCA) were national public interest contracts)); Supreme Tribunal of Justice, Political-Administrative Chamber, Ruling number 847 (Jul. 16, 2013) (same regarding contracts of Diques y Astilleros Nacionales

[5] The Ambassador's Letter erroneously stated that the decision issued in 2003 rather than in 2004.

(DIANCA)).[6] Until the pledge and issuance of the 2020 Notes that are at issue in this appeal, PDVSA had *never* attempted to pledge strategic assets without the prior authorization of the National Assembly. JA904.

PDVSA's ownership of CITGO Holding, the owner of the major oil refiner CITGO, is a "vital asset of Venezuela's most vital industry." *Id.* CITGO plays a key role in the marketing of Venezuelan crude. *See id.* Thus, the purported pledge of a controlling interest in CITGO "impacts *the economic and social life of the Nation*." CA1836. In the considered view of the Republic, discussed *infra*, the indenture and pledge at issue in this appeal and the 2020 Notes issued thereunder are national public interest contracts. JA904, JA911, CA1832.

Attempted usurpations of power by the Maduro regime in 2016 caused the National Assembly twice to assert its constitutional authority with respect to such contracts. In May 2016, Maduro issued a Presidential Decree claiming the power to enter into contracts of national public interest without the prior authorization of the National Assembly. JA904. The

[6] Defendants argued below that the decision *Andrés Velásquez* (Supreme Tribunal of Justice, Constitutional Chamber, Ruling number 2241 (Sept. 24, 2002)), supported the view that only contracts to which the Republic is a party can be national public interest contracts. That interpretation of *Andrés Velásquez* is incorrect, and is inconsistent with the later decisions involving EDELCA, DIANCA and other state-owned enterprises, and with the resolutions of the National Assembly regarding PDVSA.

National Assembly promptly "rejected this authoritarian measure" in a Resolution enacted May 26, 2016 (the "May 2016 Resolution"). *Id.* That Resolution (a) stated that Article 150 "categorically mandates, without exception, the approval of the National Assembly" for contracts of national, state, or municipal public interest with companies not domiciled in Venezuela; (b) rejected the portions of Maduro's decree that claimed the authority to enter into such contracts "without the approval of the National Assembly"; (c) "warn[ed] that any activity carried out by an organ that usurps the constitutional functions of another public authority is null and void and shall be considered non-existent"; and (d) resolved to disseminate the Resolution so that foreign governments and companies would know "about the nullity of the contracts that are concluded in contravention of Article 150." JA3514-16.

Maduro's second attempted usurpation—the Exchange Offer at issue in this litigation—was announced in September 2016. PDVSA, whose then-President, Eulogio del Pino, also served as Maduro's Minister of Petroleum, announced its offer to issue the 2020 Notes, secured by a first-priority lien on 50.1% of the capital stock of CITGO Holding, in exchange for previously issued unsecured notes (the "2017 Notes"). JA2848, JA2964-65. The National Assembly once again responded by asserting its constitutional

authority as first-instance interpreter of the Constitution and as the only branch of government charged with authorizing national public interest contracts. The President of the National Assembly's Comptroller's Commission (the organ responsible for monitoring the use of public funds) announced that the Assembly "will not acknowledge any national interest contract that does not come before this National Assembly" and that creditors "will not be able to ask us to honor the commitments of the irresponsible individuals who destroyed PDVSA." JA3557.

In a Resolution enacted September 27, 2016 (the "September 2016 Resolution"), the National Assembly expressly invoked Article 187, section 9—the constitutional provision that gives the National Assembly the exclusive power to "[a]uthorize contracts of . . . national public interest" with foreign companies, JA2826—as well as Articles 302 and 303, the provisions that emphasize the national importance of the petroleum industry and PDVSA. JA111. The September 2016 Resolution "reject[ed] categorically that, within the swap transaction, 50.1% of the shares . . . of Citgo Holding . . . are offered as a guarantee with priority, or that a guarantee is constituted over any other property of the Nation." *Id.* It summoned oil minister/PDVSA President Del Pino "to appear before this National Assembly to explain the terms of this bond swap transaction, based

on offering the majority of Citgo Holding Inc. shares as collateral." *Id.* It demanded an investigation "to determine if the current transaction protects the National Property." *Id.* And it urged PDVSA "to present the Country with a plan for the refinancing of its financial commitments." *Id.*

The National Assembly requested the opinion of the distinguished law professor Juan Cristóbal Carmona Borjas regarding the legality of the 2020 Notes, the Indenture, and the Pledge. On October 7, 2016, Professor Carmona opined that the Exchange Offer could not be effective without the National Assembly's approval under Article 150. JA2615-16. As he explained, the Exchange Offer was "without doubt . . . a national public interest contract" and "a type of contract [that] will always require the authorization of the National Assembly." Juan Cristóbal Carmona Borjas, 2 *Actividad Petrolera y Finanzas Públicas En Venezuela* [*Activity And Public Finance In Venezuela*] 425, 429 (2016).

Maduro defied the National Assembly's Resolutions and ignored the National Assembly's invocation of its constitutional authority and refusal to authorize the proposed transaction as structured. Instead, Maduro, working through the Minister of Petroleum he had installed as head of PDVSA, proceeded with the pledge and the Exchange Offer. With the publication of the news that the Maduro regime was making the Exchange Offer "without

the consent of the opposition-controlled National Assembly," JA1730, the holders of over 60% of the 2017 Notes elected to retain their unsecured notes rather than accept collateral offered without National Assembly authorization.

The 2020 Notes were issued on October 28, 2016, in exchange for the 39.43% of the 2017 Notes that were tendered by investors willing to take their chances on the Maduro regime's scheme. JA1937. The National Assembly never approved the issuance of the 2020 Notes or the pledge—not before, not during, and not after the Exchange Offer.

In 2019, after Interim President Guaidó became the Republic's legitimate chief executive, he received from Special Attorney General José Ignacio Hernandez an analysis of whether the indenture for the 2020 Notes was valid. In a thorough analysis filling 55 single-spaced pages, the Special Attorney General "*concluded that the indenture is a national public interest agreement that, as such, should have been previously authorized by the National Assembly pursuant to article 150 of the Constitution*. Owing to the lack of authorization, Petróleos de Venezuela, S.A. (PDVSA) did not have the legal capacity to sign that agreement, which is invalid under Venezuelan Law." CA1800 (emphasis in original). The Special Attorney General reported that "the defect is the violation of article 150 of the Constitution,

since PDVSA signed the issuing contract without prior authorization from the National Assembly." CA1848. In a section of his opinion devoted to whether bondholders were on notice of that defect, the Special Attorney General noted that the September 2016 Resolution had "questioned the issuance of the 2020 Bond and in particular, the establishment of the pledge agreement," and that although the National Assembly "did not declare the unlawfulness of that Bond," it had announced "the start of an investigation based on the questioning of the operation." Therefore, he wrote, "a conclusion that the Bond was invalid, is not a decision that can surprise those bond-holders in good faith." CA1847.

By resolution dated October 15, 2019 (the "October 2019 Resolution"), the National Assembly "ratif[ied] that the 2020 Bond indenture violated Article 150 of the Constitution . . . , since it concerned a national public contract, executed with foreign companies, which was not authorized by the National Assembly." JA120.

In June 2020, the Republic's Ambassador to the United States provided the district court with a letter setting forth the Venezuelan constitutional, legislative, and judicial authorities and principles summarized above. The Ambassador's Letter explained that the May 2016 Resolution rejected Maduro's claim to have power to enter national public interest

contracts without National Assembly authorization. JA904. The Letter also explained that "the absence of [the] National Assembly's authorization of the CITGO pledge," as well as the existence of the September 2016 Resolution and the October 2019 Resolution, meant that no such authorization ever occurred. JA911. The Letter asked the court to defer to those "official acts taken wholly within Venezuela by the National Assembly," which "vitiate the consent necessary for the Indenture and the Pledge to have come into valid legal existence in the first instance and therefore render these contracts and the 2020 Notes invalid, illegal, and null and void *ab initio*." *Id.*

The district court acknowledged its obligation under *Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co. Ltd.*, 138 S. Ct. 1865 (2018), to "accord respectful consideration" to the Ambassador's Letter as a foreign government's official statement on the interpretation and meaning of its own domestic law. SPA39. But the court rejected the Republic's view that the September 2016 Resolution "characterized the Exchange Offer as a contract of national public interest or declared the Exchange Offer as null and void." SPA40. In reaching that conclusion, the court did not engage in any analysis of Venezuelan law or of materials provided by the Ambassador and the parties' Venezuelan law experts. The court also failed to address

other aspects of the Ambassador's Letter, including the Republic's considered view that the absence of National Assembly authorization rendered the pledge and the 2020 Notes null and void *ab initio*. Instead, the district court opined that Venezuelan law is "ultimately irrelevant to this action." SPA65.

SUMMARY OF ARGUMENT

Under Articles 150 and 187 of the Republic's Constitution, any national public interest contract with any foreign company requires the approval and authorization of the Republic's National Assembly. The Exchange Offer, including the purported pledge by PDVSA of a controlling interest in CITGO, was a national public interest contract with foreign companies. The National Assembly did not authorize the 2020 Notes. To the contrary, it invoked its authority as the branch of government whose role is to authorize national public interest contracts, called for an investigation of the proposed Exchange Offer, and categorically rejected a pledge of the CITGO interest or "any other property of the Nation." The Exchange Offer was therefore unauthorized, unconstitutional, and void under Venezuelan law.

The district court ruled that Venezuelan law was "ultimately irrelevant" to this action. That was error. When determining whether a

state-owned enterprise exceeded its authority to enter into a contract, a court must look to the laws of the jurisdiction under which the enterprise was created and governed—in this case, Venezuela. The decision below, which gave effect to the unconstitutional acts of PDVSA under the Maduro regime, should be reversed for this reason.

The act of state doctrine provides a second and independent reason to reverse. The resolutions of the National Assembly in May and September 2016 asserted the Assembly's constitutional authority as the branch of government responsible for authorizing national public interest contracts, invoked that authority with respect to the proposed Exchange Offer, and categorically rejected the pledge of strategic national property on which the proposed Exchange Offer depended. The National Assembly thus considered and declined to authorize the proposed Exchange Offer. The district court erred by not recognizing that the National Assembly's Resolutions and decision not to authorize the Exchange Offer prevented the 2020 Notes from being validly issued, and by assuming (contrary to Venezuela's Constitution) that the burden was on the National Assembly to invalidate the Exchange Offer, rather than on the proponents of the Exchange Offer to obtain National Assembly authorization prior to execution of that offer. The court also erred by disregarding or rejecting the

views of the Republic regarding its own laws as expressed in a submission to the district court from the Republic's Ambassador to the United States.

ARGUMENT

I. The Exchange Offer Was Unauthorized and Void *Ab Initio* Under Articles 150 and 187 of Venezuela's Constitution.

A. The Exchange Offer was a National Public Interest Contract with Companies Not Domiciled in Venezuela.

Article 150 unambiguously provides that "[n]o municipal, state or national public interest contract shall be executed . . . with companies not domiciled in Venezuela, . . . without the approval of the National Assembly." JA2825. Article 187, section 9, reiterates that it is the National Assembly's role to authorize such contracts.

In September 2016, the National Assembly concluded that the documents that created the 2020 Notes, including the purported pledge, constituted a national public interest contract. That remains the Republic's considered view today. PDVSA is "a state-owned enterprise in charge of national public interest economic activities," and CITGO is "PDVSA's greatest strategic asset abroad." JA903-04. The National Assembly—which the district court rightly recognized as the "sovereign" for purposes of this action, SPA23—has consistently treated important contracts of PDVSA as national public interest contracts. JA903-05. The Maduro regime's attempt to pledge 50.1% of PDVSA's interest in CITGO, together with its purported

pledge of the remaining 49.9% to the Russian oil company Rosneft, have rightly been described by the National Assembly as an "attempt to conduct a *de facto* privatization of PDVSA." JA905. As the Republic's Ambassador puts it, the Indenture and Pledge for the 2020 Notes "are national public interest contracts under any possible definition." JA904.

Nor can there be any doubt that the contracts at issue were with companies not domiciled in Venezuela. The parties to the Indenture were PDVSA; its subsidiary PDV Petróleo, S.A.; Defendant MUFG Union Bank, N.A. ("MUFG"), a United States national banking association; Defendant GLAS Americas LLC ("GLAS"), a New York limited liability company; and other entities formed under the laws of New York and Luxembourg. JA3375. The Pledge and Security Agreement was entered among PDVSA, PDV Holding, Inc., MUFG, and GLAS. JA3479.

Because the Indenture and Pledge were national public interest contracts with companies domiciled outside Venezuela, under Article 150 those contracts could not be executed without the authorization of the National Assembly.

B. Venezuelan Law Places the Burden on the Proponent of a National Public Interest Contract to Obtain National Assembly Authorization—Not on Its Opponents to Obtain National Assembly Disapproval.

Because the district court believed questions of Venezuelan law to be "irrelevant," its opinion contains no explicit analysis of Venezuelan law. But the district court's decision nevertheless rests on the assumption that the notes and pledge must be considered presumptively valid unless the National Assembly took express actions "to affirmatively invalidate the Exchange Offer." SPA36. The law of Venezuela is precisely the opposite.

The plain language of Article 150 of the Constitution provides that "[n]o . . . contract . . . shall be executed . . . without the approval of the National Assembly." JA2825. That language places the burden on the proponent of a national public interest contract to obtain the National Assembly's approval prior to execution of the contract—not on the opponent of such a contract to have the National Assembly "affirmatively invalidate" it.

The National Assembly itself has affirmed this interpretation repeatedly. The Assembly's May 2016 Resolution, enacted in response to Maduro's announced intention to enter national public interest contracts without National Assembly authorization, "rejected" Maduro's claim to the authority to do so, "remind[ed]" the world of the need for National

Assembly approval, and "inform[ed]" foreign governments and companies "about the nullity of the contracts that are concluded in contravention of Article 150." JA3515-16. The September 2016 Resolution invoked Article 187, section 9, the provision that assigns to the National Assembly the authority to authorize national public interest contracts, and "reject[ed] categorically" PDVSA's attempted pledge of the CITGO Holding shares. JA111. The National Assembly reiterated the same understanding in its October 2019 Resolution.

C. The Republic's Explanation of Venezuelan Law Should Be Given Force by This Court.

When a foreign government submits a statement interpreting its own laws, a federal court must accord that interpretation "careful[]" and "respectful," though not "conclusive," consideration. *Animal Science Products*, 138 S. Ct. at 1869, 1873. That deferential approach honors "the spirit of 'international comity.'" *Id.* at 1873 (citations omitted).

In this case, the Republic confirmed, through a letter from the Republic's Ambassador, that the "2020 Notes were issued as a result of an illegal and unconstitutional transaction aimed to circumvent the political control of the National Assembly over the public national interest contract." JA907. The Republic also confirmed that the "2020 Notes, including the Pledge and Indenture, were therefore void *ab initio*." *Id.*

Those conclusions follow directly from the plain text of Venezuela's Constitution as discussed above—but in all events, the district court should have followed the Republic's official interpretation of Venezuelan law. Indeed, each of the considerations the Supreme Court identified in *Animal Science Products* supports deferring to the views of the Republic:

The statement's clarity, thoroughness, and support. The Ambassador's Letter clearly sets forth Venezuela's interpretation of its applicable law, discusses the reasoning underlying that interpretation thoroughly, and supports the interpretation by citing provisions of Venezuela's Constitution, resolutions of the National Assembly, and other authoritative sources.

The transparency of the foreign legal system. The authorities cited by the Ambassador are readily available for review, as the extensive discussions by the parties' expert witnesses below demonstrate.

The context and purpose of the statement. The Ambassador's Letter is transparent about its context and purpose: to vindicate the National Assembly's constitutional role in authorizing contracts in the national public interest, and to explain why the Maduro regime's pledge of a controlling interest in a strategic national asset, in defiance of the Venezuelan Constitution and the resolutions of the National Assembly, was void under

Venezuelan law. It is difficult to imagine an interest more deserving of comity than a sovereign's desire to enforce its Constitution and to ensure respect for the separation of powers that the Constitution reflects.

The district court discounted the Ambassador's Letter on the ground that it was offered specifically for purposes of this litigation. SPA41. But the relevant question is not whether the letter was offered to influence this litigation. That will always be the case when a foreign sovereign makes such a submission. What matters is whether the position expressed in such a submission was invented in order to influence the litigation. That is plainly not the case here. The legal principles set forth in the Ambassador's Letter are long-standing. They are unambiguously enshrined in Venezuela's Constitution; they were articulated and applied in the May and September 2016 Resolutions; and they were ratified in the October 2019 Resolution. Moreover, the National Assembly has applied the same principles to condemn other usurpations by the Maduro regime, such as the attempt to pledge 49.9% of CITGO to Rosneft and the purported creation of a PDVSA "litigation trust." JA905.

That the Republic and its citizens have an important economic and political interest in this litigation—as the Ambassador's Letter clearly disclosed—hardly makes the Republic's interpretation of its own laws less

worthy of respectful consideration. *See, e.g.*, *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70, 92 (2d Cir. 2002) (that Indonesia was "a party to the case does not blunt this comity concern"); *D'Angelo v. Petróleos Mexicanos*, 422 F. Supp. 1280, 1284 (D. Del. 1976) (deferring to Mexico's interpretation of its expropriation decree where a party was Mexico's national oil company), *aff'd*, 564 F.2d 89 (3d Cir. 1977) (Table).

The role and authority of the entity or official offering the statement. The U.S. Executive Branch, in the exercise of its exclusive power to "receive Ambassadors," U.S. Const., art. II, § 3, has accepted Carlos Vecchio as Venezuelan ambassador to the United States. "The 'political department['s] . . . action in recognizing a foreign government and in receiving its diplomatic representatives is conclusive on all domestic courts.'" *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 18-19 (2015) (citation omitted).

The consistency of the foreign government's positions. The Ambassador's Letter relies on long-standing provisions of Venezuela's Constitution, a decision of the Republic's Supreme Tribunal dating from 2003, and numerous resolutions of the Venezuelan National Assembly from 2006 to 2020. These include the May 2016 Resolution and the September

2016 Resolution, both of which issued before the Exchange Offer was consummated and had sharply in focus Maduro's attempted usurpations of the National Assembly's constitutional authority. Indeed, the Exchange Offer's unlawful character was public knowledge when investors made their decisions whether to take up the offer. That is doubtless why investors holding over 60% of the 2017 Notes declined to do so, notwithstanding the offer's pro-creditor purported pledge of the CITGO shares to secure a previously unsecured obligation.

D. United States Courts Should Enforce Venezuela's Laws Restricting the Authority of Its State Actors to Enter Contracts, Just As Those Courts Enforce Restrictions That Other States, Domestic or Foreign, Place on State Actors.

Whether state enterprises have constitutional authority to enter into contracts is determined by reference to the applicable law of the relevant state, whether domestic or foreign. In *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947), the Supreme Court held that federal law and regulations expressly limited the authority of the Federal Crop Insurance Corporation to enter into contracts and that such a limitation precludes liability under state law, even under circumstances in which a private corporation would be bound. *See id.* at 383-84. It made no difference that the federal government was doing business through a corporation: "Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority." *Id.* at 384 (citation omitted).

"The same concerns that animate the public-contracts doctrine in the context of state and federal entities . . . apply with equal force to foreign sovereigns." *Northrop Grumman Ship Sys., Inc. v. Ministry of Def. of Republic of Venezuela*, 575 F.3d 491, 501 (5th Cir. 2009). Thus, a foreign government "entity has the power to define how and when it enters a

contract, and, by extension, how and when its agents have authority to create contracts on its behalf." *Id*. at 500; *see also Velasco v. Gov't of Indonesia*, 370 F.3d 392, 395-96 & n.2 (4th Cir. 2004) (looking to Indonesian law to determine authority of agents of governmental entity to issue notes in foreign trade); *Aquamar, S.A. v. Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279, 1292 (11th Cir. 1999) (looking to Ecuadorian law to determine ability of government instrumentality to waive sovereign immunity in U.S. courts).

Courts applying New York law are in accord with that rule. For example, in *Republic of Benin v. Mezei*, No. 06 Civ. 870 (JGK), 2010 WL 3564270 (S.D.N.Y. Sept. 9, 2010), the court cited *Merrill* and declined to enforce a contract executed by a Benin foreign ministry official without the approval of Benin's Council of Ministers. *See id.* at *5-6. As the court explained, "New York law does not speak to the question of which officials have the actual authority to act on behalf of Benin." *Id.* Similarly, New York law sheds no light on the actual authority of PDVSA to consummate the Exchange Offer and pledge strategic assets. Only Venezuela's law can determine what branch of the Venezuelan government must authorize such a contract before PDVSA can execute it. *See also* Appellants' Br. 54-57 (citing cases).

Any contrary approach would seriously undermine international comity, including respect for other nations' constitutional allocation of powers. It would be equivalent to a foreign court enforcing a United States President's unconstitutional pledge to spend funds never appropriated by Congress—even after Congress had expressly registered its disapproval—and declaring that the United States Constitution was "ultimately irrelevant." The district court's decision in this case was no less inappropriate.

II. The District Court Should Have Recognized the Republic's Acts Under the Act of State Doctrine.

The district court also failed to accord appropriate respect to the sovereign acts of Venezuela's government in a second way that independently requires reversal. Specifically, the district court violated the act of state doctrine when it refused to give effect to the National Assembly's May and September 2016 Resolutions. Through those Resolutions, the National Assembly asserted its authority over national public interest contracts, categorically rejected the pledge on which the proposed Exchange Offer depended, and made clear that the transaction as structured was unauthorized and therefore void *ab initio*. The district court's misconceived interpretation of the Resolutions—and of the opinion of Special Attorney General Hernandez—nullified those acts of state.

A. The May and September 2016 Resolutions Are Acts of State That the District Court's Decision Effectively Invalidated.

Under the act of state doctrine, United States courts refrain from declaring invalid the public acts of a foreign sovereign power. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964). The doctrine requires U.S. courts to give effect to a foreign sovereign's official acts if they occurred within its territory or are aligned with the policy aims of the United States. *See, e.g.*, *Banco Nacional de Cuba v. Chem. Bank N.Y. Trust Co.*, 658 F.2d 903, 908 (2d Cir. 1981); *see also W.S. Kirkpatrick & Co. v. Env't Tectonics Corp., Int'l*, 493 U.S. 400, 406 (1990) (act of state doctrine is "a principle of decision binding on federal and state courts alike" (citation omitted)).

The National Assembly's May and September 2016 Resolutions confirming that the Exchange Offer was a national public interest contract requiring National Assembly authorization, refusing to authorize that contract, and categorically rejecting the pledge were all official acts of a foreign sovereign within its territory. If a foreign sovereign's promulgation of regulations may constitute an official act for purposes of the act of state doctrine, as this Court has held, *see Braka v. Bancomer, S.N.C.*, 762 F.2d 222, 225 (2d Cir. 1985), then *a fortiori* the duly enacted resolutions of the National Assembly also qualify.

If those acts of state are given effect here as they should be, the 2020 Notes are void and the purported pledge of PDVSA's shares is invalid. "[T]he outcome of the case turns upon . . . the effect of official action by a foreign sovereign," which is precisely the circumstance in which the act of state doctrine applies. *W.S. Kirkpatrick & Co.*, 493 U.S. at 406. The entire purpose and effect of the May and September 2016 Resolutions was to assert the National Assembly's constitutional authority to ensure that the Exchange Offer, including the pledge, could not validly be made without the Assembly's prior authorization. To refuse to give effect to those Resolutions is to "render nugatory the attempts by [Venezuela] to protect" its important national assets. *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1116 (5th Cir. 1985).

The National Assembly's exercise, in the May and September 2016 Resolutions, of its constitutional power to review and refuse to authorize the Exchange Offer under Article 150, like the exchange control regulations at issue in *Braka* and *Callejo*, govern the conduct and obligations of a state-owned entity subject to foreign law, which cannot give its contractual counterparties what they seek without running afoul of that law. *See Braka*, 762 F.2d at 225; *Callejo*, 764 F.2d at 1116. Appellees here, like the counterparties in those cases, argue that they seek only an order honoring

contractual commitments—but the very point is that honoring those commitments would violate Venezuelan law because the contract at issue is void *ab initio* as per the May and September 2016 Resolutions. The act of state doctrine therefore dictates that the district court's enforcement of the contract be reversed.

The district court necessarily engaged in what this Court has called an "impermissible inquiry" into whether the Resolutions validly apply to void the contracts. *Braka,* 762 F.2d at 225; *see also Callejo*, 764 F.2d at 1115-16 ("Here, although the specific act complained of by the Callejos was Bancomer's breach of contract, not Mexico's promulgation of the exchange control regulations, adjudication of the breach of contract claim would necessarily call into question the Mexican regulations."). Because courts may require the terms of the contract to be honored "only by discarding" the May and September 2016 Resolutions, the act of state doctrine prohibits such relief. *Callejo*, 764 F.2d at 1116.

This case is unlike *Allied Bank International v. Banco Credito Agricola*, 757 F.2d 516, 521 (2d Cir. 1985), because at the time of the National Assembly's acts of state, the 2020 Notes did not yet exist. "The test . . . adopted in *Allied* was whether the [act of state] was 'able to come to complete fruition within the dominion of the [foreign] government.'" *Braka*,

762 F.2d at 224 (citation omitted). The May and September 2016 Resolutions established, all within Venezuela, that without prior National Assembly authorization the pledge could not be made and the notes could not issue. The bondholders who chose to accept the unauthorized Exchange Offer never acquired valid property rights. To respect the Resolutions as acts of state does not bless an after-the-fact expropriation of foreign assets—it simply gives effect to the National Assembly's *ex ante* assertion of its constitutional authority to prevent the Maduro regime's usurpation.

B. The District Court's Interpretation of the May and September 2016 Resolutions Misconstrued the Resolutions' Text and Context as Well as the Views of the Special Attorney General.

The district court viewed the May 2016 Resolution as "very clearly cabin[ed]" to contracts "'concluded by and between the National Executive,'" and therefore inapplicable to "contracts entered into by PDVSA." SPA34-35. But the district court misread the Resolutions because it failed to take into account the context in which they were enacted. The May 2016 Resolution responded directly to a Maduro decree claiming unilateral authority to enter into national public interest contracts. The May 2016 resolution declares that Article 150 "categorically mandates, *without exception*," the Assembly's approval of such contracts with foreign companies, and warns that this constitutional responsibility "cannot be

relaxed by conventions, decrees or other legal acts." JA3514-15 (emphasis added).

The district court also overlooked the provisions of the Resolution that were *not* limited to contracts entered by the National Executive. Provision Two "warn[ed] that *any* activity carried out by an organ that usurps the constitutional functions of another public authority is null and void," and Provision Four informed foreign governments and companies "about the nullity of the contracts that are concluded in contravention of Article 150." *Id.* at 9 (emphasis added). Neither provision limited itself to contracts signed by the National Executive. As the Ambassador explained, the May 2016 Resolution "reiterate[ed] that any national interest contract entered with foreign companies must be previously authorized by the National Assembly." JA904.

The district court's parsing of the September 2016 Resolution was similarly misconceived. The district court, in a footnote, dismissed the National Assembly's decision to withhold authorization of the Exchange Offer as irrelevant to the act-of-state analysis on the ground that a "simple failure to act" was unworthy of treatment "as the act of a foreign sovereign." SPA33. But the decision to withhold an authorization that the Venezuelan Constitution requires is not merely a "simple failure to act." By "reject[ing]

categorically" the pledge of 50.1% of the shares of CITGO Holding or "any other property of the nation," by demanding an investigation and summoning the President of PDVSA to appear before it, and by urging PDVSA to come up with a new plan for refinancing its debt, the National Assembly in the September 2016 Resolution confirmed that it was refusing to authorize the Exchange Offer. JA111. That was not a failure to act. It was an affirmative choice to withhold the constitutionally required approval of the Exchange Offer, including its Pledge. As the authorities cited in Appellants' Brief at 27-28 establish, that sovereign act deserves deference under the act of state doctrine.

Equally to the point, the district court misconceived Venezuelan law when it declined to treat the Resolutions as acts of state on the ground that they did not expressly reject the Exchange Offer. As an initial matter, that characterization is simply wrong: the National Assembly expressly "reject[ed] categorically" the pledge of collateral that was the most damaging aspect of the Exchange Offer, and called upon PDVSA to come up with a new plan for "the refinancing of its financial commitments." JA111. Even if the National Assembly were required to affirmatively express disapproval, it unmistakably did so. More fundamentally, however, the district court's failure to treat the resolutions as acts of state rested on its

assumption that the Exchange Offer should be presumed valid unless the National Assembly expressly repudiated it. As discussed above (pp. 17-18, *supra*), that gets Venezuelan law backwards. At the time the National Assembly passed the Resolutions, the transaction itself was not final, but rather a proposal that could yet be withdrawn or modified. The National Assembly could scarcely have done more to make clear that the proposed transaction as structured, including the pledge, was unconstitutional, unauthorized, and void as a matter of Venezuelan law. As the Ambassador's Letter explains, by operation of Venezuelan law "the September 2016 Resolution should have prevented PDVSA from advancing the Exchange Offer and issuing the 2020 Notes." JA906.

Moreover, the National Assembly's explicit invocation of Article 187, section 9—the provision that allocated to the National Assembly the role of authorizing national public interest contracts—made clear the determination that the Exchange Offer could not be consummated without National Assembly authorization. That determination plainly qualifies as an act of state.

Also erroneous was the district court's statement that the Republic's views were "undermined by the Opinion . . . produced by Special Attorney General Juan [sic] Ignacio Hernández [that] expressly stated that, through

the September 2016 Resolution, 'the National Assembly did not declare the unlawfulness' of the 2020 Notes." SPA40-41. The district court relied on an out-of-context quotation of a fragment of a single sentence in the Special Attorney General's opinion. CA1847. That sentence appeared near the end of the opinion, in a section addressing whether investors were on notice of the invalidity of the 2020 Notes. The sentence continued, "but it did announce the start of an investigation based on the questioning of the operation." *Id.* The Special Attorney General concluded that investors "*should have been aware that the Bond was questioned by the National Assembly before being issued.*" *Id.* (emphasis in original). Therefore, he continued, "the fact that the National Assembly finishe[d] the investigation and concluded that the Bond was invalid, is not a decision that can surprise those bond-holders in good faith." *Id.* Earlier in his opinion, the Special Attorney General analyzed at length the validity of the Exchange Offer and concluded that the absence of National Assembly authorization rendered the indenture and pledge invalid. CA1800 (quoted at p. 10 *supra*); *see also* CA1831-43 (establishing that the "issuing contract" was a national public interest contract because it entailed the pledge of the CITGO shares, and was invalid because not authorized by the National Assembly); CA1848 ("[T]he defect is the violation of article 150 of the Constitution, since PDVSA

signed the issuing contract without prior authorization from the National Assembly."). A fair reading of the Special Attorney General's opinion leaves no doubt about his conclusion that the 2020 Notes were void *ab initio* because the indenture and pledge were never authorized by the National Assembly. The contrary inference drawn by the district court is simply unwarranted.

CONCLUSION

The judgment of the district court should be reversed.

DATED: March 22, 2021

MUNGER, TOLLES & OLSON LLP

By: /s/ Donald B. Verrilli, Jr.
DONALD B. VERRILLI, JR.

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Dated: March 22, 2021

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I certify that on March 22, 2021, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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/s/ Donald B. Verrilli, Jr.
DONALD B. VERRILLI, JR.