No. 20-4127

NO. 20-3858 (CONSOLIDATED)

United States Court of Appeals

FOR THE SECOND CIRCUIT

PETRÓLEOS DE VENEZUELA, S.A., PDVSA PETRÓLEO, S.A., and PDV HOLDING, INC.
Plaintiffs-Counter-Defendants-Appellants,

v.

MUFG UNION BANK, N.A. and GLAS AMERICAS LLC,
Defendants-Counter-Claimants-Appellees.

Appeal from the U.S. District Court for the Southern District of New York
Case No. 1:19-cv-10023 – Judge Katherine Polk Failla

BRIEF OF FOUR LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-COUNTER-DEFENDANTS-APPELLANTS

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Amici respectfully request leave of the Court to present the following points.[1]

STATEMENT OF INTEREST

Amici are recognized scholars who research, write, and teach in the field of comparative constitutional law. They are expert in the development of constitutional provisions designed to check the power and limit the rise of authoritarian regimes, particularly in Latin America. If it stands, the District Court's ruling would allow foreign dictators to sell off their countries' national assets despite the operation of such constitutional provisions. As such, it is of great concern to *amici*.

Professor Diego Zambrano is an Assistant Professor of Law at Stanford Law School. He has studied, taught, and published on legal developments related to Venezuela and has served as an advisor to political parties in the Venezuelan National Assembly. His scholarship has appeared in a variety of law journals, including the Stanford Law Review and University of Chicago Law Review.

Professor David Landau is a Professor of Law and the Associate Dean for International Programs at Florida State University's College of Law. His recent work has focused on issues such as constitutional change and constitution-making, and has been cited by the high courts of Israel, Canada, Chile, and Brazil.

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[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), *amici curiae* state that no party's counsel authored this brief in whole or in part; that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and that no person other than the *amici curiae* or its counsel contributed money that was intended to fund preparing or submitting the brief.

Professor Mila Versteeg is a Professor of Law at the University of Virginia's School of Law, where she serves as the Director of the Center for International and Comparative Law. She has published over 50 articles and book chapters addressing topics of comparative constitutional law and public international law.

Professor Nelson Camilo Sánchez Léon is an Assistant Professor of Law at the University of Virginia's School of Law, where he serves as Director of the International Human Rights Clinic. He has published eight books and taught on a range of international law topics, including transitional justice.

As demonstrated above, *amici*, through their scholarship and practice, have a substantial interest in the issues of constitutional interpretation presented by this appeal and therefore seek leave to present their views to the United States Court of Appeals for the Second Circuit of the United States.

SUMMARY OF ARGUMENT

The Venezuelan Constitution contains two provisions, Articles 150 and 187(9), that constitute an important legislative check on the abuse of executive power. These provisions require Venezuelan executive branch organs and entities to obtain prior approval from the National Assembly before entering into "national public interest" contracts with foreign companies. Provisions like this are common in developing countries that have attempted to confront and reign in a history of hyper-presidentialism. They are designed to prevent dictators from squandering

valuable national assets, by requiring any significant financial encumbrances to first receive the affirmative consent of a democratically elected body. In the case of Venezuela—where the National Assembly is the *only* democratic body recognized by the United States—these provisions create a critical limitation on the executive branch's ability to dissipate the country's most important asset, petroleum.

The district court's analysis failed to appreciate the historical and regional context of Articles 150 and 187(9). Instead of giving effect to these vital constitutional provisions, the district court instead relied on New York contract law and an incorrect application of the act of state doctrine. *Amici* submit that this approach was seriously flawed and that, if adopted by other courts, it could create a damaging loophole to anti-authoritarian constitutional provisions around the world.

ARGUMENT

I. Articles 150 and 187(9) Were Incorporated into the Venezuelan Constitution as Part of a Broader Move to Reassert Popular, Domestic Control Over Venezuela's Largest Asset.

Venezuela currently has the largest proven oil reserves of any country in the world, with 17.5% of aggregated global reserves.[2] According to OPEC, as of 2019, oil revenues accounted for approximately ninety-nine percent of Venezuela's export

[2] *Top Ten Countries with the World's Largest Oil Reserves, from Venezuela to Iraq*, NS Energy (Nov. 4, 2020), https://www.nsenergybusiness.com/features/newstop-ten-countries-with-worlds-largest-oil-reserves-5793487/.

earnings.[3] By 2015, oil revenues also accounted for more than sixty percent of total government revenues.[4] It is not an understatement to suggest that the petroleum industry is Venezuela's lifeblood.[5] Almost all of its economy is founded on it and its hopes and aspirations rise and fall with it.[6]

Like many Latin American countries, Venezuela's petroleum resources are owned, developed, and financially exploited by the State through PDVSA, its wholly-owned corporations and PDVSA's affiliates.[7] As a consequence, the country's most valuable assets are exposed to potential waste or dissipation by an overreaching executive branch willing to serve its own needs at the expense of the country's wellbeing. This is more than a theoretical risk. Like other countries in the

[3] *Venezuela Facts and Figures*, Organization of the Petroleum Exporting Countries, https://www.opec.org/opec_web/en/about_us/171.htm (last visited Mar. 21, 2021).

[4] Xian-Zhong Mu & Guang-Wen Hu, *Analysis of Venezuela's Oil-oriented Economy: From the Perspective of Entropy*, 15 Petroleum Sci. 200 (2018).

[5] Patrice M. Jones, *Venezuelan Oil Industry Says its Bouncing Back*, Chicago Trib. (Mar. 1, 2003), https://www.chicagotribune.com/news/ct-xpm-2003-03-01-0303010248-story.html.

[6] Nick Miroff, *Falling Oil Prices Put Venezuela's Nicolas Maduro in a Vice*, Wash. Post (Nov. 17, 2014), https://www.washingtonpost.com/world/falling-oil-prices-put-venezuelas-nicolas-maduro-in-a-vice/2014/11/16/5c157066-6602-11e4-ab86-46000e1d0035_story.html.

[7] Seth McNew, *Full Sovereignty over Oil: A Discussion of Venezuelan Oil Policy and Possible Consequences of Recent Changes*, 14 L. Bus. Rev. Am. 149 (2008).

region, Venezuela has a long history of executive abuse by autocratic strongmen (known as *caudillos*).[8]

During the 1990s, numerous Latin American countries focused on reigning in the hyper-presidentialism that had characterized many of their governance structures during the earlier part of the twentieth century. Those efforts focused on political and institutional reform, often through the vehicle of constitutional change. Brazil in 1988,[9] Colombia in 1991,[10] and Ecuador in 1998[11] are all examples of countries that amended or instituted new constitutions as a reaction to prior executive branch overreach. Among the measures designed to reign in *caudillismo* were independent control bodies, efforts to strengthen the judiciary's independence, and the inclusion of additional powers granted to congresses and legislative assemblies to check executive action.

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[8] Robert S. Barker, *Latin American Constitutionalism: An Overview*, 20 Willamette J. Int'l Law & Disp. Resol. 1, 5 (2012) ("[T]hroughout the nineteenth century and most of the twentieth, the Latin American political reality was one of caudillismo, golpes de estado, and dictatorships, both military and civilian.").

[9] *Brazil's Democratic Constitution of 1988 was Built by Society*, Presidency of the Republic of Brazil (Nov. 12, 2018), http://www.brazil.gov.br/about-brazil/news/2018/11/brazils-democratic-constitution-of-1988-was-built-by-society.

[10] Stan Yarbro, *Colombia's New Constitution Tackles Old Corruption*, L.A. Times (July 8, 1991), https://www.latimes.com/archives/la-xpm-1991-07-08-mn-1411-story.html.

[11] Rodrigo Uprimny, *The Recent Transformation of Constitutional Law in Latin America: Trends and Challenges*, 89 Tex. L. Rev. 1588 (2011).

In keeping with regional trends, Venezuela also embarked on a series of constitutional reforms in the late 1990s. At the end of 1998, Hugo Chávez was elected to be Venezuela's president and quickly fulfilled a campaign promise to set up a Constituent National Assembly to replace the Venezuelan Constitution. Importantly for purposes of this case, the 1999 Constitution included Articles 150 and 187(9). These provisions reaffirmed historical antecedents in the Venezuelan Constitution that were designed as a check on authoritarian abuse.[12] In particular, these provisions created a decision-making system that required sign-off from the National Assembly before Venezuela's most valuable asset could be encumbered or dissipated. This legislative check prevented the executive branch from exerting unilateral control over Venezuelan petroleum—an important concern of the people. It also limited the ability of private, multinational corporations to exert such control as well—an important concern of the new Chávez administration.

[12] *See* Diego A. Zambrano, *The Constitutional Path to Dictatorship in Venezuela*, LawFare (Mar. 18, 2019) ("Venezuela's 1961 constitution was designed to be anti-authoritarian"); Venezuela Const. Art. 126 (1961) ("Sin la aprobación del Congreso, no podrá celebrarse ningún contrato de interés nacional, salvo los que fueren necesarios para el normal desarrollo de la administración pública o los que permita la ley…. Tampoco podrá celebrarse ningún contrato de interés público nacional, estadal o municipal con Estados o entidades oficiales extranjeros, ni con sociedades no domiciliadas en Venezuela, ni traspasarse a ellos sin la aprobación del Congreso. La ley puede exigir determinadas condiciones de nacionalidad, domicilio o de otro orden, o requerir especiales garantías, en los contratos de interés público.").

It is perhaps ironic that Articles 150 and 187(9) were instituted through a constitutional convention effectively called into existence by Chávez. These provisions are anti-dictatorial in their operation and, of course, Venezuela wound up drifting towards autocracy during Chávez's presidency. At the time, however, there was at least a notional alignment between the will of the people and the desires of the Chávez regime when it came to these reforms. Specifically, Articles 150 and 187(9) advanced an important objective of the nascent Chávez regime—renationalizing the oil industry.

Chávez's government was acutely concerned with prior governmental policies towards Venezuelan oil, believing that PDVSA and its affiliates had overly privatized and overly exposed this asset to foreign influence. That perspective is well documented in a 2005 speech by Rafael Darío Ramírez Carreño, Venezuela's Minister of Energy and Petroleum and the president of PDVSA from 2002 to 2014.[13] In this speech, Ramírez expressed a number of dominant attitudes in the Chávez administration, referring to previous governmental oil policies as "a veritable assault

[13] Ramírez was also Venezuela's Minister of Foreign Affairs from September 2014 to December 2014, and Venezuela's Permanent Representative to the United Nations from December 2014 to November 2017.

on Venezuelan oil" by "international institutions in oil consuming countries together with big multinationals."[14]

According to Ramírez, prior government officials and PDVSA executives were prepared to "hand over [Venezuela's] energy resources to foreign capital and to progressively withdraw from many of [PDVSA's] own spheres of activity through their privatization."[15] "PDVSA and its affiliates" had "willfully ignor[ed] the fact that their shareholder was the State itself" and that its goal was maximizing value for the "Venezuelan people," not maximizing value for shareholders abroad.[16] As a consequence of PDVSA's attitude, multinationals had been "expropriating from the Venezuelan people the sovereign management and use of their main resource: oil."[17] This derogation of control was "totally unacceptable in a national company owned by the Venezuelan state" and had caused "profound economic and social crises that have systematically impoverished millions of Venezuelans."[18]

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[14] Rafael Darío Ramírez Carreño, *Report to the National Assembly of Venezuela: A National, Popular, and Revolutionary Oil Policy for Venezuela* § 1 (May 25, 2005), https://venezuelanalysis.com/analysis/1182 ("Venezuela Report").

[15] *Id.*

[16] *Id.* § 1.1.

[17] *Id.*

[18] *Id.* §§ 1.1, 4.2, 6.

In perceived contrast to its predecessors, the Chávez government aggressively pursued a policy of exerting "full sovereignty" over Venezuela's oil.[19] The goal of this strategy was for Venezuela to regain control of its petroleum industry from private multinational corporations, so it would be "at the service of the people" and so the Venezuelan people would "be the beneficiary of the petroleum rent."[20] One way the Chávez government sought to fulfill these high, aspirational goals was to reform PDVSA, so that it would be "perfectly aligned with the overall orientation of the Venezuelan state" and form "an integral part of the country . . . committed to building a better future for the whole Nation."[21] Another way the Chávez government implemented this strategy was through Articles 150 and 187(9), which reasserted popular sovereignty over Venezuelan assets, over and against private and international actors.

In short, the historical context of Articles 150 and 187(9) points to two separate but related objectives—renationalizing the oil industry (a Chávez priority) and reigning in potential executive dissipation of Venezuela's assets (a priority of the Venezuelan people, in keeping with regional developments). As described

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[19] Rafael Darío Ramírez Carreño, Speech at Third OPEC International Seminar, *OPEC in a New Energy Era: Challenges and Opportunities: Full Sovereignty Over Oil* (Sept. 2006), https://www.opec.org/opec_web/static_files_project/media/downloads/press_room/Rafael_Ramirez.pdf.

[20] Venezuela Report §§ 7-8.

[21] *Id.* § 7.

below, that latter feature of the constitutional provisions—the legislative check on executive branch abuses—became of critical importance when the subsequent Maduro regime attempted to encumber Venezuela's key asset, despite the clear wishes of the substantially more democratic National Assembly.

II. Articles 150 and 187(9) of the Venezuelan Constitution Require The Venezuelan Government To Obtain Prior Approval From the National Assembly Before Entering Into Contracts In the "National Public Interest."

To protect against executive abuses, Articles 150 and 187(9) operate as a kind of constitutional "condition precedent" to "contracts in the national public interest" by depriving the executive branch (including state-owned enterprises such as PDVSA) of authority to enter into such contracts without first obtaining the National Assembly's approval.

Article 150 provides in pertinent part:

> Entering into contracts in the national public interest shall require the approval of the National Assembly in those cases in which such requirement is determined by law.
>
> No contract in the municipal, state or national public interests determined shall be entered into with foreign States or official entities, or with companies not domiciled in Venezuela, or transferred to any of the same, without the approval of the National Assembly.

Article 187(9) provides:

> It shall be the function of the National Assembly . . . (9) To authorize the National Executive to enter into contracts in the national interest, in the cases established by law. To authorize contracts in the municipal, state and national public interest, with foreign States, or

official entities or with companies not domiciled in Venezuela.

Together, these provisions create two legal tools for assuring the people of Venezuela an opportunity to benefit from being "in one of the countries with the largest oil endowments in the planet,"[22] and for safeguarding them against an overreaching executive branch that might sell the nation's most valuable asset to foreign companies not beholden to the people's best interests.

First, as a matter of constitutional law, Article 150 ***automatically*** deprives the executive branch of authority to enter into national public interest contracts unless and until the people, through their representatives in the National Assembly, affirmatively consent through official acts that approve those contracts. Importantly, Articles 150 and 187(9) do not require the National Assembly to take any affirmative act to repudiate a contemplated national public interest contract. Instead, Articles 150 and 187(9) constitutionally deprive the executive branch of lawful authority even to enter into national public interest contracts unless and until the National Assembly affirmatively acts to approve them. Constitutional or legislative authority to contract is so fundamental that government contracts without it are void.[23]

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[22] *Id.* § 8.

[23] *E.g.*, *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 383-84 (1947) ("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. The scope of this authority may be explicitly defined by Congress or be limited by delegated legislation, properly exercised through the rule-making power."); *The Floyd*

Second, Articles 150 and 187(9) provide public notice to any foreign company that the National Assembly's approval is required before entering into contracts involving the national public interest. The text of these provisions is clear, straightforward, and cognizable to any person that chooses to read them. Investors do not need to delve into complex and often ambiguous questions of constitutional history and legislative intent to understand the meaning of these provisions. They just need to read the short, clear sentences in the Constitution to understand that a nationally significant contract with foreign investors is void *ab initio* if it was not first approved by the National Assembly.

III. Articles 150 and 187(9) Are Comparable In Purpose and Effect To Provisions in The Constitutions of Numerous Other Countries.

Venezuela is not alone in having encoded into its constitution a requirement of express legislative authorization before the executive branch may enter into foreign contracts implicating the national public interest. Other nations whose valuable assets have been squandered by dictators have established comparable constitutional provisions. As with Articles 150 and 187(9) of the Venezuelan Constitution, the purpose of these provisions is to prohibit the undertaking of

Agreements, 74 U.S. (7 Wall.) 666, 671, 681 (1869) (contract between the Secretary of War and supply company was null and void because "the Secretary was acting wholly beyond the scope of his authority").

significant financial obligations by a too-powerful executive branch, absent express authorization from a democratically elected body.

Provisions like Article 150 and 187(9) are common in constitutions throughout Latin America, particularly those drafted shortly after periods of authoritarian rule. In 1986, for example, Brazil elected a Constitutional Congress to rewrite its constitution after emerging from 21 years of military rule.[24] The Constitution that was ratified two years later provided that "[t]he Federal Senate has exclusive power … to authorize foreign financial transactions of interest to the Union." Brazil Const. Art. 52(V). This can plainly be understood as an effort to provide a democratic check on further debt issuances by the Brazilian presidency, especially in light of Brazil's staggering $110 billion debt load at that time.[25]

Similarly, Bolivia's Constitution grants the legislative branch authority to "approve the contracting of loans that commit general income of the State," to "approve the contracts of public importance with regard to natural resources," and to "approve the disposal of assets of public dominion of the State." Bolivia Const. Art. 158(10), (12), (13). In Guatemala, Congress has exclusive power to approve,

[24] *See* Alan Riding, *Brazil, in Transition, Votes for Congress*, N.Y. Times (Nov. 16, 1986).

[25] Eliana Cardoso & Albert Fishlow, *The Macroeconomics of the Brazilian External Debt*, *in Developing Country Debt and the World Economy* (Jeffrey D. Sachs ed. 1989) (noting that Brazil's debt accounted for fully 10 percent of the total debt of developing countries in the late 1980s).

"before their ratification," any agreements that "obligate the State financially, in proportion that it exceeds one percent of the Budget of the Ordinary Revenues or when the amount of the obligation is indeterminate." Guatemala Const. Art. 171(l). And in El Salvador, the Legislative Assembly has the power "to authorize the Executive Organ to contract voluntary loans (empréstitos), inside or outside the Republic, when a grave and urgent necessity demands it," such ratification to be made by a two-thirds vote.[26] El Savador Const. Art. 148.

In the African continent—which has struggled with a history of dictators abusing their power and draining their countries' resources—constitutional provisions like Article 150 and 187(9) are equally common. Consider, for example, the Central African Republic, which suffered a military coup in 2003 and yet another in 2013. The CAR's constitution (which was passed by referendum in 2015 and ratified a year later[27]) provides that "[t]he Government has the obligation to

[26] The Constitution further states that "[t]he legislative decree in which the issuance or contracting of a loan is authorized, shall clearly express the end to which the funds of this shall be designated, and in general, all the essential conditions of operation." El Savador Const. Art. 148. *See, e.g.*, *Asamblea Ratifica Dos Empréstitos*, El Pais (Aug. 15, 2010) (describing legislature's decision to ratify $50 million loan but reject second $100 million loan).

[27] *See* Kameldy Neldjingaye, *The Central African Republic: Introductory Note*, *in Oxford Constitutions of the World* ("The origins and historical development of the 2016 Constitution of the Central African Republic (CAR) can be traced back to the country's political history and the recent devastating conflict it has faced, including the political transition of 2013.").

previously obtain the authorization of the National Assembly before the signature of any contract relative to natural resources as well as financial conventions." Central African Republic Const. Ch. 2 Art. 60.

Looking elsewhere in Africa, consider the example of Egypt after the ouster of former President Hosni Mubarak in 2011 and the subsequent ouster of President Mohammed Morsi. In an effort to learn from its history and constrain the powers of future strongmen autocrats, the Egyptian Constitution (passed by referendum in 2014) provides that "[t]he executive authority may not contract a loan, obtain funding, or commit itself to a project that is not listed in the approved state budget entailing expenditure from the state treasury for a subsequent period, except with the approval of the House of Representatives." Egypt Const. Section 1 Art. 127.

Venturing further back into history, countries emerging from authoritarian regimes in the wake of World War II enacted constitutional provisions similar to Articles 150 and 187(9)—restricting the ability of the executive to encumber fledgling democracies with significant financial obligations. For example, the Japanese Constitution (authored in part by the Allied Powers under General Douglas MacArthur's command[28]) provided that "[n]o money shall be expended, nor shall the State obligate itself, except as authorized by the Diet." Japan Const. Ch. VII Art.

[28] *See* Zachary Elkins, Tom Ginsburg, & James Melton, *Baghdad, Tokyo, Kabul….Constitution Making in Occupied States*, 49 Wm. & Mary L. Rev. 1139, 1140 (2008).

85. Similarly, the Austrian Constitution (reinstated the day after Hitler's death) provides that "[a]greements which are to be binding also on the authorities of the Federal legislature can be concluded by the Federal Government only with the approval of the National Council…." Austria Const. Ch. 1 Art. 15A.

Finally, constitutional provisions like Article 150 exist even in countries that have enjoyed relatively more stability than those mentioned above, highlighting their utility as a prophylactic against potential overreach by even non-authoritarian executives. *See, e.g.*, Rep. of Korea Const. Ch. II Art. 58 ("When the Executive plans to issue national bonds or to conclude contracts which may incur financial obligations on the State outside the budget, it shall have the prior concurrence of the National Assembly."); Luxembourg Ch. VIII Art. 99 ("No loan charged to the State may be contracted without the assent of the Chamber. No real property of the State may be alienated if the alienation is not authorized by a special law …. any significant financial commitment of the State must be authorized by a special law."); Spain Const. Sec. 135(3) ("The State and the Self-governing Communities must be authorized by Act in order to issue Public Debt bonds or to contract loans").[29]

[29] *See* Eduardo Melero Alonso, *La flexibilización de la reserva de ley*, Revista Jurídica Universidad Autónoma De Madrid 114 (2016) (contrasting this highly formal reservation of law, in which the legislature determines the material content of the action, to less intense reservations elsewhere in the Constitution, through which the executive branch may exercise some regulatory control).

None of the aforementioned constitutions require a legislature to affirmatively nullify a governmental obligation undertaken without prior authorization (through, for instance, the passage of a law, issuance of a proclamation, or some other affirmative declaration repudiating the contract). Rather, the legislation requires an affirmative legislative act approving the contract. Contracts entered into by executive branches without the requisite legislative approval are void *ab initio* by virtue of these constitutional provisions.

IV. The District Court's Analysis Erroneously Avoided Consideration of Article 150 And, In Doing So, Frustrated Its Text and Purpose.

As demonstrated above, it is fairly common for constitutions around the world (in both developing and developed countries) to require ex ante legislative authorization in order for an executive branch to enter nationally significant contracts with foreign actors. Articles 150 and 187(9) of the Venezuelan Constitution follow this model and their text is clear.

As such, *amici* agree with PDVSA's contention that the fundamental question facing the district court was whether, in fact, the Exchange Offer and its Governing Documents were national public interest contracts requiring National Assembly approval. If so— which seems quite likely, given the economic significance of these contracts, and as both PDVSA and the Republic of Venezuela have represented— then that would have been dispositive. The National Assembly failed to approve

those contracts ex ante, meaning the executive branch of the Venezuelan government simply lacked the constitutional authority to enter into these contracts.[30]

Despite being the key issue, the district court "determined that resolution of the national public interest contract issue [was] not necessary." SPA-6 n.3. As a result, instead of resolving the parties' dispute on the basis of the Venezuelan Constitution, the Court relied on New York contract law and an incorrect application of the act of state doctrine. For the reasons detailed below, *amici* strongly believe the Court's decision was erroneous. As importantly, *amici* are troubled by the implications of the Court's approach, which improperly jettisons due consideration of the operative provisions of the Venezuelan Constitution.

A. The Court Misapplied New York State Contract Law.

The parties have extensively briefed issues concerning the Court's reliance on New York contract law to resolve the dispute. *Amici* wish to emphasize only one additional point. Reliance on New York law, even if it were the right approach, does not obviate the need to engage in an analysis of the Venezuelan Constitution. The

[30] Whatever else might be said about the 2016 Resolutions, neither can be construed as affirmatively approving the Exchange Offer or any of its component parts, and nothing in the district court's analysis suggests the contrary. In fact, the district court acknowledged that the National Assembly's September 2016 Resolution "reject[ed] categorically" offering 50.1% of CITGO Holding, Inc. stock "as a guarantee with priority." SPA-35. Without the National Assembly's approval, the executive branch had no lawful authority to enter into a national public interest contract with a company that is not domiciled in Venezuela.

reason is straightforward. It is a basic principle of New York law that contracts executed by governmental entities in contravention of statutory restrictions are not legally enforceable.[31] As a consequence, if the Exchange Offer is a national public interest contract within the meaning of Article 150, then—given the National Assembly's failure to affirmatively approve it—the Exchange Offer is invalid under New York law.

In other words, the Court did not have a basis to sidestep an analysis of Articles 150 and 187(9); even under New York law, it would have been essential to consider the impact of those provisions on the validity of the Exchange Offer.

B. The Court Misapplied The Act of State Doctrine.

In addition to misapplying New York law, the Court misinterpreted the act of state doctrine in an effort to avoid applying the Venezuelan Constitution.

Succinctly stated, the act of state doctrine "precludes any review whatever of the acts of the government of one sovereign State done within its own territory by the courts of another sovereign State."[32] United States courts do not "sit in judgment on the acts of the government of another done within its own territory."[33] A proper

[31] *See*, *e.g.*, *Granada Buildings, Inc. v. City of Kingston*, 58 N.Y.2d 705, 708, 458 N.Y.S.2d 906 (1982) ("Municipal contracts which violate express statutory provisions are invalid." (citing *Seif v. City of Long Beach*, 286 N.Y. 382 (1941))).

[32] *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 763 (1972).

[33] *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897).

application of the doctrine, therefore, requires identifying the relevant act of the foreign State and also the legal significance of that act.

The district court rightly concluded that the May 2016 and September 2016 Resolutions were the relevant state acts. But the district court wrongly and repeatedly suggested that the act of state doctrine would only apply if the National Assembly took some affirmative act to repudiate the Exchange Offer. For example, the district court initially considered whether the National Assembly's May 2016 and September 2016 Resolutions effected a "taking." SPA-27-33. It then considered whether the 2016 Resolutions were intended to or had the effect of "invalidating the 2020 Notes and Governing Documents *ex ante*." SPA-37. Finally, the Court concluded that even if it were to assume the 2016 Resolutions invalidated the Exchange Offer, it "would still be compelled to find that the taking took place outside of Venezuela." SPA-42.

The district court's act of state analysis is premised on the notion that the Exchange Offer would be a valid exercise of the executive branch's authority unless the National Assembly intentionally intervened to stop it. But, again, that is just not how Venezuela's constitutional scheme works. Article 150, like constitutional provisions in many other countries, withholds from the executive branch's lawful authority to enter into national public interest contracts with companies not domiciled in Venezuela unless and until the National Assembly undertakes some act

to affirmatively ***approve*** the contract. Under the Venezuelan Constitution, the National Assembly does not need to take any affirmative act to repudiate or invalidate a proposed national public interest contract. Such contracts are void—they have no legal existence or effect—until the National Assembly says otherwise.

It is further notable that the district court's act of state analysis is at odds with the United States government's approach to political relations with Venezuela. Since January 2019, the democratically-elected, opposition-controlled National Assembly has been the *only* recognized governmental entity of Venezuela.[34] The executive branch controlled by Maduro is not. Neither is the Venezuelan Supreme Court—which the United States, and other countries, took the extraordinary step of placing under sanctions in 2017, after the Court purported to annul the National Assembly.[35] Because the National Assembly is the only branch of the Venezuelan government with recognized power to act in dealings with the United States, its actions and inactions should have been the only relevant "acts of state" in the district court's analysis.

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[34] *See* Scott R. Anderson, *What Does It Mean for the United States to Recognize Juan Guaido as Venezuela's President*?, Lawfare (Feb. 1, 2019), https://www.lawfareblog.com/what-does-it-mean-united-states-recognize-juan-guaid%C3%B3-venezuelas-president.

[35] *See* Aria Bendix, *U.S. Sanctions Venezuela's Supreme Court*, The Atlantic (May 19, 2017). In addition, a number of other countries have also sanctioned members of the Venezuelan Supreme Court, including the European Union, Canada, and Panama.

As the PDVSA Plaintiffs explain in their Opening Brief, the act of state doctrine precludes a United States court from "any review whatever" not only of a foreign state's decisions to take affirmative action, but also its decisions to take *no* action.[36] It was therefore an essential question whether the Exchange Offer, the 2020 Notes, or any of the other Governing Documents qualified as national public interest contracts with a company not domiciled in Venezuela. If so, then the lack of National Assembly approval would have constitutionally deprived the executive branch of legal capacity to enter into the contracts. And the district court would have been precluded from "any review whatever" of the National Assembly's act of state.

C. If Affirmed, the District Court's Rationale Would Make Article 150 a Nullity and Threaten Similar Anti-Authoritarian Constitutional Provisions Around the World.

Amici are troubled by the implications of the Court's decision to elevate New York contract law, and an overly narrow interpretation of the act of state doctrine, over the express terms of a foreign constitution. For decades, government leaders and legal scholars have struggled to find solutions to the sometimes extraordinary burdens imposed on developing countries by authoritarian leaders who dissipate or transfer their countries' most valuable resources for their own personal benefits—

[36] PDSVA Opening Brief at 27-29.

especially when enforcing the debts can lead to morally reprehensible results.[37] Without constitutionally embedded and enforceable limitations on executive leaders, already struggling nations can find themselves shackled with substantial debt obligations, incurred for the personal gain of autocrats at the expense of the country's population. Countries seeking to relieve themselves of so-called "odious debts" often face difficult legal obstacles without clear standards.[38]

Constitutional provisions like Article 150 are, therefore, essential. They can make it more difficult for overreaching executive branches to enter into undesirable transactions. And, importantly, by simultaneously withholding legal authority for such transactions and providing potential counterparties with clear notice that legislative intent is required, provisions like Article 150 can give countries established common law theories (lack of authority and prior notice to the counterparty) for setting improvident debts aside.

The district court's approach threatens to upend all of these salutary benefits. If it is validated, then anti-authoritarian provisions expressly limiting an executive branch's legal authority to contract—an important and hard-won feature of constitutions across the globe—could effectively be sidestepped by foreign investors

[37] Lee C. Buchheit, G. Mitu Gulan, & Robert B. Thompson, *The Dilemma of Odious Debts*, 56 Duke L. J. 2101, 1203 (2007).

[38] Andrew Yanni & David Tinkler, *Is There a Recognized Legal Doctrine of Odious Debt?*, 32 N.C. J. Int'l L. & Com. Reg. 749, 754-56 (2007).

and dictators alike. An investor could enter into a contract in New York and enforce its terms by pointing to a foreign legislature's failure to take *post hoc* action—completely ignoring the facts that the contract is void under the country's constitution, and that no *post hoc* legislative action was ever required to negate its legal effect. There is no reason to create such a damaging and anti-democratic loophole to other countries' constitutions. U.S. courts *can* and *should* consider the consequences of their decisions for democracies abroad and "should not serve the interests of foreign dictators."[39] If taken seriously by our courts, the district court's ruling would embolden dictators to profit off their country's assets by entering into contracts that are void under their domestic law and in complete derogation of their constitutional obligations. For these reasons, *amici* respectfully urge this Court to reverse the district court's ruling.

CONCLUSION

The judgment of the district court with respect to the act of state doctrine is inconsistent with the clear text and intent of Article 150 of the Venezuelan Constitution. It should be overruled.

[39] Diego A. Zambrano, *Foreign Dictators in U.S. Courts*, U. Chi. L. Rev. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3665424.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(a)(4)(G) and Fed. R. App. P. 32(a)(7)(C), I certify that this brief complies with the type-volume limitation because this brief contains 5,600 words.

Pursuant to Fed. R. App. P. 32(a)(5) and (6), this brief complies with the typeface and type style requirements because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14-point font.

/s/ Douglass Mitchell

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of March, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Douglass Mitchell