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., GLAS AMERICAS LLC,

Defendants-Counter-Claimants-Appellees.

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

BRIEF OF PLAINTIFFS-COUNTER-DEFENDANTS-APPELLANTS PETRÓLEOS DE VENEZUELA, S.A., PDVSA PETRÓLEO, S.A. AND PDV HOLDING, INC.

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

PDVSA Petróleo, S.A ("Petróleo") and PDV Holding, Inc. ("PDVH") are wholly owned by Petróleos de Venezuela, S.A. ("PDVSA"), which is wholly owned by the Bolivarian Republic of Venezuela (the "Republic" or "Republic of Venezuela").

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JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. §§ 1332(a)(3) and 1367. Final judgment under Federal Rule of Civil Procedure 54(b) was entered on December 1, 2020. SPA-70-72. Appellants filed a protective notice of appeal from the district court's summary judgment order on November 12, 2020, JA-5240-42, and a timely notice of appeal from the final judgment on December 11, 2020. JA-5247-48. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the district court contravened the act of state and international comity doctrines by denying legal effect to the Venezuelan National Assembly's exercise of its exclusive constitutional power to authorize national public interest contracts, including its categorical rejection of the Exchange Offer's proposal to pledge a majority of CITGO Holding's stock as collateral.

2. Whether the district court erred in holding that New York law rather than Venezuelan law governs this action when New York's choice-of-law rules dictate that:

   (i) the "validity" of an investment security such as the 2020 Notes is governed by the local law of the "issuer's jurisdiction" (here, Venezuela);

(ii) the actual authority of a foreign state-owned entity to enter into a contract is governed (and, by definition, can only be governed) by the law of the foreign state (here, Venezuela); and

(iii) the illegality of a contract allegedly executed in violation of foreign law is governed by the law of the jurisdiction where the alleged illegal acts occurred (here, Venezuela).

STATEMENT OF THE CASE

In October 2016, the authoritarian regime of Nicolás Maduro violated the Venezuelan Constitution and usurped the constitutional powers of the democratically elected National Assembly by directing PDVSA, Venezuela's state-owned oil company, and two of its subsidiaries (Petróleo and PDVH) to execute a transaction involving contracts of national public interest without legislative authorization. Under Articles 150 and 187.9 of the Venezuelan Constitution, legislative authorization is required for all "national public interest" contracts entered into with foreign, non-domiciled counterparties. The transaction at issue involved the issuance of new PDVSA notes due in 2020 (the "2020 Notes") in exchange for notes (due in 2017) on the verge of default. To entice the noteholders—mostly foreign hedge funds—to accept this exchange (the "Exchange Offer"), the regime offered to secure the 2020 Notes with the pledge of a controlling interest in CITGO Holding, Inc. ("CITGO"), which owns 100% of the U.S. based-

refiner CITGO Petroleum Corporation—the foreign "crown jewel" of Venezuela's national oil industry. Far from authorizing the transaction, the National Assembly explicitly invoked its constitutional authority over national public interest contracts and, before the 2020 Notes were issued, enacted an official resolution "categorically rejecting" any transaction purporting to pledge a controlling interest in CITGO. The Maduro regime, which was engaged in an ongoing campaign to usurp the Assembly's constitutional prerogatives, executed the transaction in total disregard of the Assembly's acts.

A. The 2020 Notes Transaction

Over two decades, the Chávez and Maduro regimes "destroyed democratic institutions … and ruined the prosperity Venezuela once enjoyed," JA-5237, making Venezuela "one of the most miserable, mismanaged, hopeless countries on the planet." JA-3563.4. By 2016, with Venezuela's oil-dependent economy collapsing, PDVSA was heading toward default on billions of dollars of unsecured notes coming due in 2017 (the "2017 Notes"). *See* SPA-7-8. A default by Venezuela's national oil company amid rising democratic opposition would have damaged the Maduro regime.

To stave off a potential political crisis, the regime announced the Exchange Offer on September 16, 2016. Less than half of the 2017 Notes were tendered for exchange. SPA-9; JA-3318-19; JA-906-07 ¶ 15. The 2020 Notes were issued

pursuant to an Indenture entered into by PDVSA (as issuer) and Petróleo (as guarantor) with various foreign entities, including Appellees as trustee and collateral agent. SPA-10; JA-3367.

The defining feature of the Exchange Offer was the purported pledge of a controlling interest in CITGO as collateral for the 2020 Notes. Never before had PDVSA notes been secured by such a pledge of a critical national asset. SPA-9; JA-3479-82; JA-904 ¶ 7. Pursuant to a Pledge and Security Agreement (the "Pledge Agreement") to which PDVSA and Petróleo were also parties, PDVH (at PDVSA's instruction) purported to pledge as collateral 50.1% of CITGO. SPA-9-10; JA-3481-82; JA-4312 ¶ 115. The 2020 Notes, the Indenture, and the Pledge Agreement comprise an interrelated set of contracts (as defined in the Indenture, the "Transaction Documents") executed as part of a single, integrated transaction. JA-3384.

B. The United States' Recognition of and Support for the National Assembly

In December 2015, political parties opposing Maduro won an overwhelming majority of seats in the Venezuelan National Assembly—the country's unicameral legislature. Since then, the United States has continuously recognized "the democratically-elected National Assembly [as Venezuela's] only legitimate legislative body." JA-4815; *see also* JA-4818.

Immediately following the elections, the United States "call[ed] on all parties to respect the independence, authority, and constitutional prerogatives of the National Assembly." JA-5106. In February 2016, the United States urged the Maduro regime to respect "the will of the people, the rule of law, the separation of powers within the government, and the democratic process." JA-5108. Just prior to the Exchange Offer, the United States expressed concern "that the National Assembly has not been allowed to carry out its rightful role," JA-5112, and again urged the Maduro regime to "respect the constitutional role of the National Assembly" and to "honor its own constitutional mechanisms … including the essential elements of the separation of powers and independence of the branches of government." JA-5112.

On January 23, 2019, following a rigged presidential election, the United States branded the Maduro regime "illegitimate," reiterated that the National Assembly is Venezuela's "only legitimate branch of government," and officially recognized the Assembly's President, Juan Guaidó, as the Interim President of Venezuela. JA-4818. The Executive Branch has reaffirmed U.S. support for the National Assembly in executive orders, licenses, guidance, acceptance of diplomats, and public statements.[1] Through three consecutive administrations, U.S. foreign

[1] For example, the United States imposed strict sanctions in light of Maduro's "usurpation of power" and the "illegitimate Maduro regime[']s]" efforts to "prevent the Interim President and the National Assembly from exercising legitimate

policy has urged international respect and support for the National Assembly's constitutional role.[2] As it explained below, the U.S. Government has "strong foreign policy and national security interests … in supporting the interim government's efforts both to restore democracy to Venezuela with the departure of Maduro, and to reconstruct the Venezuelan economy following Maduro's departure." JA-5228. The United States also explained that "the impact of a loss of these Venezuelan assets [CITGO] on Guaidó, the interim government, and U.S. foreign policy goals in Venezuela, would be greatly damaging and perhaps beyond recuperation." JA-5239.

C. The National Assembly's Rejection of the Exchange Offer

Like the U.S. Constitution, the Venezuelan Constitution establishes a separation of powers between its branches of government. Article 150 of the Venezuelan Constitution provides that "[n]o … national public interest contract shall

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authority in Venezuela." JA-4828-29 (Executive Order 13857); JA-4831-33 (Executive Order 13884); *see also* JA-4835 ("Statement from National Security Advisor Ambassador John Bolton"); JA-4835.2 ("United States Stands with Interim President Juan Guaidó and Venezuela's President").

[2] U.S. Dep't of State, Statement of Secretary Michael R. Pompeo, Jan. 5, 2021, https://cl.usembassy.gov/united-states-continues-to-recognize-interim-president-guaido-and-the-national-assembly-in-venezuela/ (noting the United States' continued recognition of the "legitimate" National Assembly elected in 2015 as the "only democratic representatives of the Venezuelan people," and urging respect for the National Assembly's "constitutional role"); U.S. Dep't of State, Transcript of Press Briefing, Feb. 3, 2021, https://www.state.gov/briefings/department-press-briefing-february-3-2021 ("[T]he United States continues to recognize the 2015 National Assembly as the last remaining democratic institution in Venezuela"). This Court may take judicial notice of these statements. *Am. Civil Liberties Union v. Nat'l Sec. Agency*, 925 F.3d 576, 599 n.126 (2d Cir. 2019).

be executed with … companies not domiciled in Venezuela … without the approval of the National Assembly." JA-2825, *quoted in* SPA-6. Correspondingly, Article 187.9 of the Venezuelan Constitution provides that "[i]t is the role of the National Assembly to … [a]uthorize contracts of … national public interest … with companies not domiciled in Venezuela." JA-2825-26, *quoted in* SPA-6.

Soon after the seating of the National Assembly in 2016, the Maduro regime embarked on a systematic campaign to usurp the Assembly's constitutional prerogatives, including its approval power over national public interest contracts. In early May 2016, Maduro issued an "emergency" decree purporting to empower the "National Executive" to execute certain national public interest contracts without legislative authorization. JA-2612-13 ¶ 68. On May 26, 2016, the National Assembly responded by passing a resolution (the "May 2016 Resolution") reiterating its exclusive power under Article 187.9 to authorize national public interest contracts. JA-3514-16. While specifically rejecting Maduro's illegal decree, the Assembly emphasized the broad scope of its powers under Articles 150 and 187.9, declaring 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*." JA-3516 (emphasis added). The Assembly further requested that foreign embassies in Venezuela "inform the[ir] Governments … and

the corresponding companies about the nullity of contracts that are concluded in contravention of Article 150 of the Constitution." JA-3516.

Without seeking legislative authorization, the Maduro regime convened meetings in Caracas on September 7–8, 2016, during which the regime's oil minister instructed PDVSA to carry out the transaction, and the PDVSA Shareholders Assembly instructed Petróleo and PDVH to execute the necessary documents. JA-4306-07 ¶¶ 78-80, 82. After the Maduro regime announced the Exchange Offer on September 16, 2016, SPA-9, the National Assembly convened in parliamentary session to review the proposed transaction. *See* JA-3518. Echoing the May 2016 Resolution, the president of the National Assembly's Comptroller's Commission declared during the session that the Assembly "will not acknowledge any national interest contract that does not come before this National Assembly … [and creditors] will not be able to ask us to honor the commitments of the irresponsible individuals who destroyed PDVSA." JA-3557.[3]

Following its deliberations, the National Assembly passed a formal resolution on September 27, 2016 (the "September 2016 Resolution") invoking its "control functions over the National Government and the Public Administration" and

[3] The Comptroller's Commission is responsible for "monitoring the investment and use of public funds" by Venezuela's "financial and public entities." National Assembly Legislative Power, http://www.asambleanacional.gob.ve/asamblea/bases_legales (reglamento de interior y de debates).

"***reject[ing] categorically***" the pledge of a controlling interest in CITGO "within the swap transaction." JA-111 (emphasis added).[4] Citing Article 187.9 (among other provisions), the resolution also demanded an investigation into whether the Exchange Offer "protects the National Property" and summoned PDVSA's president, who was also the Maduro regime's oil minister, to explain the Exchange Offer. JA-111; JA-907 ¶ 16.[5]

The National Assembly's condemnation of the Exchange Offer was the subject of significant public commentary. Various market analyses specifically discussed the risk that the transaction would be deemed invalid without the Assembly's approval. *See, e.g.*, JA-4403.4 ("[T]he collateral should not be taken at face value as … investors would be right to be concerned this swap is being carried out without the consent of the opposition-controlled National Assembly"); JA-3570.3 (the pledged CITGO shares "should not be worth much" as collateral because the Assembly had not "blessed" the transaction); *see also* JA-3560.

[4] In connection with the September 2016 Resolution, the Assembly commissioned the opinion of a prominent legal expert, Juan Cristóbal Carmona Borjas, regarding the Exchange Offer's legality. Professor Carmona's opinion confirmed that the Exchange Offer called for the execution of national public interest contracts that required the Assembly's authorization under Article 150. JA-2615-17 ¶¶ 76-81.

[5] The Maduro-controlled Supreme Tribunal of Justice purported to enjoin any investigation into the Exchange Offer. JA-2614-15 ¶ 74. The U.S. Government subsequently sanctioned members of the Tribunal. JA-4818.52.

Notwithstanding the National Assembly's public denunciation of the Exchange Offer and widespread doubts regarding its legality, the Maduro regime directed PDVSA and its subsidiaries to complete the transaction. The Indenture and the Pledge Agreement were executed on October 27, 2016, and the 2020 Notes were issued on October 28, 2016. SPA-12.

On October 15, 2019, following U.S. recognition of the Guaidó Government, the National Assembly enacted another resolution (the "October 2019 Resolution"), which "reiterate[ed] the invalidity of PDVSA's 2020 Bonds." JA-118-21. The Assembly emphasized that its September 2016 Resolution "questioned the irresponsible over-indebtedness of PDVSA, initiated an investigation into the bond swap offer, rejected the collateral of 50.1% of the shares in Citgo Holding, Inc., and ordered the initiation of investigations for alleged crimes to the public patrimony derived from this transaction." JA-118. The Assembly further "ratified" (*i.e.*, confirmed its prior finding) that "the 2020 Bond indenture violated Article 150 of the Constitution … since it concerned a national interest public contract, executed with foreign companies, which was not authorized by the National Assembly." JA-120.

D. The District Court Proceedings

The Exchange Offer compounded PDVSA's financial problems. A year after the Exchange Offer, PDVSA defaulted on all of its debt except the 2020 Notes. JA-

2563 ¶ 46. On October 27, 2019, PDVSA defaulted on the 2020 Notes as well. SPA-14. Prior to that default, President Guaidó had appointed new directors to an ad hoc board of PDVSA, which freed PDVSA and its subsidiaries from Maduro's control (at least so far as U.S. law is concerned). *See Jimenez v. Palacios*, No. 19-CV-0490-KSJM, 2019 WL 3526479, at *6 (Del. Ch. Aug. 2, 2019).

On October 29, 2019, after failed efforts at a consensual resolution, Appellants filed suit seeking a declaration that the 2020 Notes and the related transaction documents are invalid, illegal, void *ab initio*, and thus unenforceable. JA-74-75 ¶¶ 73-83. On December 18, 2019, Appellees filed counterclaims seeking a contrary declaration and other relief. JA-141-175 ¶¶ 107-254. The parties cross-moved for summary judgment, and, on October 16, 2020, the district court granted Appellees' motion in part and dismissed all of Appellants' claims with prejudice. SPA-67-68. The district court's opinion is reported at *Petroleos de Venezula S.A. v. MUFG Union Bank*, N.A., No. 19 Civ. 10023 (KPF), 2020 WL 6135761 (S.D.N.Y. Oct. 16, 2020).

E. The District Court's Summary Judgment Decision

1. Act of State Doctrine

The district court found the act of state doctrine inapplicable based on the "extraterritorial takings" exception articulated by this Court in *Allied Bank International v. Banco Credito Agricola de Cartago*, 757 F.2d 516 (2d Cir. 1985).

The district court acknowledged that the National Assembly's formal resolutions constituted "official acts" of a sovereign actor, SPA-23, but it refused to give them legal effect because the September 2016 Resolution did not expressly declare the Exchange Offer to be unlawful. SPA-40-41. And because the court concluded that the Assembly's actions did not prevent the valid completion of the Exchange Offer, it determined the "situs" of the debt under the 2020 Notes to be New York, and therefore that no "taking" could have "come to complete fruition" in Venezuela. SPA-30-31.

In reaching this conclusion, the district court rejected the Republic of Venezuela's official interpretation of Venezuelan law, in which the Republic explained that the September 2016 Resolution had rendered the Transaction Documents "invalid, illegal, and null and void *ab initio*." SPA-39-40. The court disregarded the Republic's explanation of the historical and legal context of the September 2016 Resolution, substituting its own construction of that resolution's meaning.

2. Choice of Law

The district court held that New York law rather than Venezuelan law "governs this action." SPA-47-49. The district court first addressed section 8-110 of the Uniform Commercial Code (as adopted in New York, the "UCC"), which provides that "the validity of a security" is governed by "the local law of the issuer's

jurisdiction" (here, Venezuela). SPA-49. The court conceded that under a "plain reading" of UCC § 8-110, "Venezuelan law would govern the validity of the 2020 Notes and the Governing Documents," SPA-49, but concluded that section 8-110 "has a far narrower understanding of 'validity'" that excludes "illegality, or incapacity, or lack of authority." SPA-54-55.

The district court then addressed a line of cases it described as "[finding] that New York law points to the application of a foreign state's law when the actual authority of that foreign state's agent is in question." SPA-56 (citations omitted). The district court opined that these cases are "irrelevant" for several reasons, including that, according to the court, "actual authority deals with the relationship between a principal and its agent" and thus "is not at issue in this action." SPA-59-60.

The district court also addressed the choice-of-law rule that, "[i]n cases alleging a violation of foreign law, the existence of illegality is to be determined by the local law of the jurisdiction where the illegal act is done." SPA-60-61. Rather than look to the jurisdiction where the "illegal acts" relating to the 2020 Notes transaction were done (Venezuela), the court looked to "the place of performance" (New York). SPA-61-62.

Ultimately, the district court conducted a multifactor "grouping of contacts" analysis, finding that New York has the most significant relationship to the transaction as a whole. SPA-62-65.

On December 1, 2020, the district court entered a final judgment declaring the Transaction Documents valid and enforceable, and authorizing Appellees to enforce the judgment via foreclosure on CITGO's stock pursuant to the Pledge Agreement. SPA-70-72. The district court stayed its judgment pending appeal. JA-5248.1-48.7.

SUMMARY OF ARGUMENT

I.A. The decision below contravened the central tenet of the act of state doctrine by "denying legal effect" to the National Assembly's exercise of its constitutional power to authorize the Exchange Offer by condemning the transaction, including through its categorical rejection of the Offer's defining feature. The National Assembly acted to prevent the execution of the transaction when, following an official legislative hearing to review the Exchange Offer, it declined to approve the transaction as required by Article 150 of the Venezuelan Constitution, and instead categorically rejected the Exchange Offer based on its inclusion of the pledge, expressly invoked its constitutional oversight power over national public interest contracts, and announced an investigation into the transaction. The district court's ruling that the Transaction Documents, including the Pledge Agreement, are valid and enforceable inescapably denies legal effect to

the Assembly's exercise of its sovereign authority embodied in the September 2016 Resolution.

The district court's opinion rested almost entirely on its erroneous assumption that the National Assembly was required to enact a law preemptively and explicitly declaring the Exchange Offer unlawful in order to prevent the transaction from coming into valid legal existence. There is no authority for that proposition under Venezuelan or U.S. law. Venezuelan law requires the opposite—as a national public interest contract, the Exchange Offer could not be legally executed absent legislative authorization. The district court's insistence that the Assembly was required to go further than it did purports to instruct the Assembly on the exercise of its constitutional oversight of state-owned entities. The act of state doctrine forbids second-guessing a foreign sovereign's acts in this manner.

I.B. The district court misinterpreted the National Assembly's actions in September 2016 because it failed to understand the historical context in which those acts took place. The court's misreading of the Assembly's "intent" derived from a selective and counterfactual analysis of resolutions enacted in both May 2016 and October 2019. Properly construed, each of those resolutions reinforces the conclusion that the Assembly's acts in September 2016 rendered the transaction void ab initio.

I.C. The district court's interpretation of the National Assembly's acts expressly rejected the official construction of those acts offered in a formal submission by the Republic of Venezuela. Notwithstanding the Supreme Court's admonition in *Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Company*, 138 S. Ct. 1865 (2018), that federal courts should grant such submissions "substantial" weight, the district court labored to discredit the Republic's legal position. The court repeatedly substituted its own reading of Venezuelan legislative acts for the Republic's interpretations, ignored the historical examples and legal authorities adduced by the Republic, and applied principles of U.S. law that offer no assistance in interpreting the meaning of the National Assembly's acts.

I.D. The decision below also misconstrued this Court's decision in *Allied Bank*. The district court opined that giving legal effect to the National Assembly's acts would effect an extraterritorial taking of property, yet admitted uncertainty as to whether "any taking can be said to have occurred." SPA-43. The court ignored that a government cannot "take" property where the claimant "had no [property] interest … at the time the [relevant] Act became law." *U.S. Olympic Comm. v. Intelicense Corp., S.A.*, 737 F.2d 263, 267 (2d Cir. 1984). Here, the relevant sovereign acts occurred in Venezuela, under Venezuelan law, *before* any purported debt obligation existed. When the National Assembly acted in 2016, Appellees did not own the property that was theoretically "confiscated," and the Assembly's acts

were aimed at a Venezuelan state-owned entity's authority to issue new debt via national public interest contracts. *Allied Bank* says nothing about the propriety of a foreign sovereign's efforts to prevent new debt instruments from coming into legal existence *ab initio*, and this Court should not extend the doctrine to such contexts.

I.E. The district court's misreading of the National Assembly's 2016 acts also rendered incoherent its analysis of the "permissive" application of the act of state doctrine. Unlike in *Allied Bank*, here there are overwhelmingly strong legal and policy interests supporting respect for the National Assembly's 2016 invocation of its constitutional oversight powers to prevent the Maduro regime from looting Venezuelan resources, and little (if any) legitimate countervailing interests.

II.A. Regarding choice of law, the district court erred in holding that the validity of the 2020 Notes was not an issue of "validity" within the meaning of UCC § 8-110. Under section 8-110, which contains the UCC's choice-of-law rules for investment securities, "the local law of the issuer's jurisdiction" (here, Venezuela) governs "the validity of a security." U.C.C. § 8-110(a)(1). As the district court acknowledged, the meaning of the term "validity" in section 8-110 must be interpreted by reference to section 8-202(b), which expressly provides that defects going to "validity" include the issuance of a security in "violation of a constitutional provision."

The district court rejected the "plain meaning" of the term validity, instead finding section 8-110 inapplicable because Article 150 of the Venezuelan Constitution does not "specifically address requirements for the issuance of securities," but rather requirements for a "broader category of contracts" that can include securities. The court's misinterpretation, which was based chiefly on an inapposite hypothetical from a UCC treatise, is contrary not only to the plain meaning of the relevant statutory provisions but to their underlying purposes and policies.

II.B. The district court also misconstrued the New York choice-of-law rule applicable to the issue of actual authority, erroneously limiting the rule to the "principal-agent" context and then reasoning that "authority is an inappropriate framework for this action" because "the National Assembly is not the principal of any of the [Appellants]." SPA-60. Some of the very cases examined by the court involved, as here, the question of whether a foreign government institution or state-owned enterprise, *as an entity*, had actual authority to enter into a particular contract. The question is not whether PDVSA and Petróleo are the National Assembly's "agents" but whether they had the actual authority as state-owned entities within Venezuela's National Public Administration to enter into the 2020 Notes transaction.

II.C. The district court also misapplied the New York choice-of-law rule for alleged contractual illegality, looking to the "place of performance" rather than the

place of the "illegal acts" in the formation of the 2020 Notes transaction, which occurred in Venezuela. New York's choice-of-law rules do not require turning a blind eye to the illegality of a transaction orchestrated by an authoritarian regime in direct violation of constitutional provisions intended precisely to protect against such abuses of executive power.

II.D. Finally, the district court erroneously defaulted to a multifactor "grouping of contacts" analysis applied to the 2020 Notes transaction as a whole. By definition, New York law does not speak to the actual authority of Venezuelan state-owned entities to enter into contracts of national public interest without prior National Assembly authorization.[6]

STANDARD OF REVIEW

This Court reviews *de novo* questions of law addressed on cross-motions for summary judgment. *Estate of Landers v. Leavitt*, 545 F.3d 98, 105 (2d Cir. 2008), *as revised* (Jan. 15, 2009).

[6] Because the district court granted Appellees' motion for summary judgment, it also excluded as irrelevant the expert testimony of David C. Hinman because (in the court's view) the opinion was directed at defenses that the court's opinion rendered moot. SPA-66-67. In reversing or vacating the district court's judgment, this Court should also vacate the exclusion of this testimony.

ARGUMENT

I. THE DISTRICT COURT CONTRAVENED THE ACT OF STATE DOCTRINE BY RULING THAT THE TRANSACTION DOCUMENTS ARE VALID AND ENFORCEABLE

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.'" *Fed. Treasury Enter. Sojuzplodoimport v. Spirits Int'l B.V.*, 809 F.3d 737, 743 (2d Cir. 2016) ("*FTE*") (quoting *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 763 (1972)). The doctrine's "constitutional underpinnings … arise[] out of the basic relationships between branches of government in a system of separation of powers," and it "expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964).

Far from "some vague doctrine of abstention," the doctrine is "'a *principle of decision* binding on federal … courts.'" *W.S. Kirkpatrick & Co. v. Env't. Tectonics Corp., Int'l*, 493 U.S. 400, 406 (1990) (quoting *Sabbatino*, 376 U.S. at 423). So long as the acts of a foreign government are official sovereign acts, they "'cannot be questioned but must be accepted by our courts as a rule for their decision'" and "'deemed valid'" when taken. *Konowaloff v. Metro. Museum of Art*, 702 F.3d 140,

146 (2d Cir. 2012) (quoting *Ricaud v. American Metal Co.*, 246 U.S. 304, 309 (1918), and *Kirkpatrick*, 493 U.S. at 409); *see also FTE*, 809 F.3d at 743; *O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A.*, 830 F.2d 449, 452 (2d Cir. 1987) ("[T]he act of state doctrine is a principle of law designed primarily to avoid judicial inquiry into the acts and conduct of the officials of the foreign state, its affairs and its policies and the underlying reasons and motivations for the actions of the foreign government."). Where a U.S. court is presented with the official acts of a recognized foreign government, the doctrine prevents the entry of any relief (as to any claim or defense) that would "deny[] legal effect" to the sovereign's acts. *Kirkpatrick*, 493 U.S. at 405.

A. The District Court Improperly Denied Legal Effect to the National Assembly's Sovereign Acts by Declaring Valid the Precise Transaction the National Assembly Categorically Rejected

As the district court correctly recognized, there is "no doubt that resolutions passed by the National Assembly are sufficiently formal to qualify as official acts of a foreign sovereign." SPA-23 (citing *Kashef v. BNP Paribas S.A.*, 925 F.3d 53, 60 (2d Cir. 2019)). Given that finding, the court was obliged to ask whether the relief sought by the parties, including any counterclaims or defenses Appellees raised, "would … require[] denying legal effect" to those resolutions. *Kirkpatrick*, 493 U.S. at 405; *see also Sabbatino*, 376 U.S. at 423; *Banco de Espana v. Fed. Res. Bank of N.Y.*, 114 F.2d 438 (1940). The court ignored that question altogether.

It is indisputable that the National Assembly convened an official session in September 2016 to review the Exchange Offer in the exercise of its constitutional oversight powers, and that the Assembly refused to grant PDVSA authority to execute the Exchange Offer. *Supra* at 8-9. The district court refused to give effect to the September 2016 Resolution that encapsulated this review because it did not explicitly state that the Assembly had intended "to affirmatively invalidate the Exchange Offer." SPA-35-36. The court's cramped interpretation of the Assembly's intent contradicts its acknowledgment that the Assembly preemptively "condemned" the Exchange Offer, SPA-2, as well as its observation that "invalidation" of "the 2020 Notes and the Governing Documents … was the National Assembly's prime motivation," SPA-32. Nor did the court explain why the act of state doctrine should turn on the Assembly's purported intent, rather than on the *meaning* of the enacted resolutions under Venezuelan law. Regardless, the court's "plain meaning" characterization of the National Assembly's intent erred in numerous ways. SPA-37.

The district court's efforts to separate the September 2016 Resolution's discussion of the pledge from the Exchange Offer of which the pledge was an integral part ignores that Appellees' counterclaims (which the court granted) depend upon a U.S. judicial determination that the Pledge Agreement itself is valid and enforceable. Even if, counterfactually, the September 2016 Resolution had

amounted to nothing more than a bare rejection of the pledge, the act of state doctrine required the district court to give effect to that rejection, and thus prohibited the court from questioning whether that categorical rejection was legally effective in Venezuela. *See Ricaud*, 246 U.S. at 309 ("[W]hen 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."). Yet by declaring the Pledge Agreement valid and enforceable, SPA-67-68, the court did just that.

More importantly, the district court defied logic in concluding that the National Assembly's categorical rejection of the pledge was an insufficient basis for inferring the Assembly's intent to "preempt the existence of the 2020 Notes and Governing Documents" as a whole. SPA-35. The offer made to the noteholders was to exchange their *unsecured* 2017 Notes verging on default for "*secured* notes" due in 2020. Given PDVSA's financial distress due to the collapse of its oil production, JA-177, 194, 201, the pledge was the Maduro regime's sole hope of attracting a sufficient number of noteholders to the Exchange Offer. The pledge was thus the most critical component of the Exchange Offer, and the Assembly's categorical rejection of the pledge had the effect of legally disapproving the Exchange Offer as it was then structured. *See* JA-906 ¶ 11.

As the district court acknowledged, the Assembly "condemned" the offer on the table, SPA-2, and it would be nonsensical to suggest that the Assembly's focus on the pledge somehow worked to authorize the Exchange Offer *sub silentio*. Nor is it of any moment that the September 2016 Resolution omitted an express "recognition of the Exchange Offer as a contract of national public interest." SPA-35. Under Venezuelan law, the National Assembly was not required to recite such an express finding in order to effectuate its disapproval. Indeed, an American court's imposition of such a procedural requirement on a foreign sovereign legislature "is precisely what the act of state doctrine bars." *Konowaloff*, 702 F.3d at 147; *see also Riggs Nat'l Corp. v. Comm'r,* 163 F.3d 1363, 1368 (D.C. Cir. 1999) (reversing a decision that "implicitly declared" "invalid" a Brazilian Ministry of Finance's order to Brazil's Central Bank because the "act of state doctrine requires courts to abstain from even engaging in such an inquiry").

The district court's reading of the September 2016 Resolution also departs from the plain meaning of Article 187.9 of the Venezuelan Constitution. The court acknowledged that the resolution expressly invoked that constitutional provision when it criticized (and did not authorize) the Exchange Offer. SPA-36. But the court then posited that the Assembly's sole intent in invoking Article 187.9 was to call for an "investigation to determine if the current transaction protects the National Property," finding that insufficient to "demonstrate[] an intent to affirmatively

invalidate the Exchange Offer." SPA-36. The court's unsupported theory regarding the National Assembly's intent ignores that Article 187.9 grants the Assembly only one power—to authorize (or not) national public interest contracts. JA-2825-26; *supra* at 7-8. By expressly invoking Article 187.9 in the same legislative act that included a categorical rejection of the Exchange Offer as then constructed, the National Assembly plainly exercised its constitutional approval power. As the Republic of Venezuela has explained, the Assembly's invocation of Article 187.9 "challenged the Exchange Offer," and "the categorical rejection of the Pledge" indicated that it had "refused" the constitutionally required approval for the transaction. JA-905-06 ¶¶ 9-11.

Contrary to the district court's unsupported speculation, the Assembly's demand for further investigation did not reflect uncertainty as to whether the transaction was subject to legislative approval. The Assembly demanded an investigation into whether the proposed transaction "protects the National Property," JA-111, an inquiry which neither asks nor doubts whether the Exchange Offer was subject to legislative approval *ex ante*. The National Assembly's decision to investigate what appeared to be a financially ruinous transaction was entirely consistent with the express invocation of its approval power under Article 187.9. In sum, the National Assembly rejected the Exchange Offer as presented *and simultaneously* demanded that the Maduro regime answer for its conduct. *See* JA-

2825-26. The district court cited no evidence supporting its speculation that the Assembly intended otherwise.

The district court also erred by assuming that the National Assembly's failure to use "clear language expressing [an] intent" to preemptively invalidate the transaction, SPA-40, effectively transformed those actions into a "simple failure to act," SPA-33 n.6. That is a false choice. The Venezuelan Constitution allows the National Assembly to exercise its oversight powers without the artificial need to issue a prospective declaration of nullity, and the Assembly did so here by reviewing the transaction and refusing to authorize it. *Supra* at 8-9.

The act of state doctrine treats a sovereign's decision to withhold authorization no differently than a sovereign's decision to grant authorization. *See Underhill v. Hernandez*, 168 U.S. 250, 251 (1897) (rejecting a private citizen's suit for damages against a military commander who refused to grant requests for a passport to leave Ciudad Bolivar); *Republic of Philippines v. Marcos*, 806 F.2d 344, 358 (2d Cir. 1986) (act of state deference may be applied to the exercise of "a sovereign power either to act or to refrain from acting").[7] The particular *form* of a sovereign's act is not dispositive—what matters is whether the act "was an exercise

[7] *See also United States v. Merit*, 962 F.2d 917, 921 (9th Cir. 1992) (the act of state doctrine precluded examination of South Africa's alleged "failing to issue a warrant" of extradition); *West v. Multibanco Comermex S.A.*, 807 F.2d 820, 828 (9th Cir. 1987) (act of state doctrine barred review of "acts or omissions" of Mexican officials).

of the sovereign power" of a recognized government. *Galu v. Swissair: Swiss Air Transport Co.*, 873 F.2d 650, 653 (2d Cir. 1989); *see also French v. Banco Nacional de Cuba*, 23 N.Y.2d 46, 53 n.5 (N.Y. 1968) ("It is immaterial what form an act of state takes … as long as such act is committed by the foreign government within its own territory."). A legislature's refusal to approve a transaction, following review under a constitutional provision requiring such approval, is plainly an exercise of sovereign power that should operate as a rule of decision in U.S. courts.

Here, the National Assembly exercised its official sovereign powers in considering the Exchange Offer, rejecting its key component, and calling for an investigation under the Assembly's exclusive constitutional authority. The district court denied legal effect to these actions when it affirmatively declared the validity and enforceability of the Transaction Documents.

B. The District Court Ignored the Context of the National Assembly's September 2016 Resolution

The district court's imposition of an "affirmative" invalidation requirement also turns a blind eye to both the pre- and post-enactment context of the September 2016 Resolution. Pre-enactment, the National Assembly's May 2016 Resolution expressly declared that the absence of prior legislative authorization would render any national public interest contract null and void. *Supra* at 7-8. That express reaffirmation of its constitutional approval power weighs heavily against the district

court's supposition that the Assembly's subsequent invocation of that power in September 2016 was merely hortatory.

The district court opined that the "plain language of the May 2016 Resolution very clearly cabins the Resolution's applicability to contracts" executed by the National Executive. SPA-34-35. That is a myopic view at best. To be sure, the May 2016 Resolution was enacted in response to a Maduro decree relating to certain National Executive contracts, *supra* at 7-8, but the text of the resolution was broader. Several provisions of the May 2016 Resolution discuss national public interest contracts without any reference to the National Executive. JA-3514-16. More importantly, the resolution urged foreign embassies in Venezuela to "inform the[ir] Governments … *and the corresponding companies* about the nullity of the contracts that are concluded in contravention of Article 150 of the Constitution and about the liabilities arising therefrom." JA-3516 (emphasis added). The text of Article 150 does not reference the "National Executive"—it applies to national public interest contracts entered into with "foreign States or official entities, or with companies not domiciled in Venezuela." JA-3516. Thus, the National Assembly's instruction demonstrates its understanding that its constitutional authority extends to all national public interest contracts with foreign companies—and the Assembly exercised that very power four months later to reject the Exchange Offer.

The constitutional interpretation reflected in the May 2016 Resolution did not break new ground. As the Republic of Venezuela explained below, the May 2016 Resolution reaffirmed that "any national interest contract entered with foreign companies must be previously authorized by the National Assembly." JA-904 ¶ 5. Years prior to the Exchange Offer, the National Assembly enacted resolutions authorizing—expressly as national public interest contracts under Article 150—agreements executed by PDVSA entities rather than by the National Executive. JA-903 ¶ 4.

Viewed against the May 2016 Resolution, the only plausible reading of the National Assembly's September 2016 Resolution is as an exercise of the Assembly's constitutional approval power. That reading is supported by the statement made during the Assembly's official review of the Exchange Offer by the head of the Comptroller's Commission that the transaction would be null and void without legislative authorization. *Supra* at 8.[8]

The district court also misinterpreted the National Assembly's October 2019 Resolution as narrowing the September 2016 Resolution. The court acknowledged

[8] The district court refused to give this contemporaneous statement any weight, invoking U.S. precedents cautioning against reliance on legislative history. SPA-38. Even if this presumption applied to the interpretation of Venezuelan law, the floor statement is far more persuasive evidence of how the National Assembly interpreted the May 2016 Resolution in the context of the Exchange Offer than the district court's selective reading of (certain provisions of) the May Resolution.

that the October 2019 Resolution reaffirmed "that the Exchange Offer and the 2020 Notes were contracts of national public interest and had violated Article 150." SPA-36-37. But instead of treating that statement as *confirmation* that the transaction was subject to the National Assembly's authorization, the court portrayed it as an "admi[ssion] that it was *not until after* 'investigations conducted in coordination with the Office of the Special Prosecutor, [that] it was concluded that the 2020 Bond indenture [was] a national public contract that should have been authorized by the National Assembly.'" SPA-37 (emphasis added). The October 2019 Resolution admits no such thing—the text implies *nothing* about what the Assembly had "concluded" regarding the constitutional status of the transaction prior to calling for the investigation. In fact, the Assembly had already reached that conclusion in September 2016. *See supra* at 8-10.

The district court's interpretation of the October 2019 Resolution also cannot be squared with the resolution's express statement that its purpose was to "*reiterate* the invalidity of PDVSA's 2020 Bonds." JA-118 (emphasis added). The plain meaning of "reiterate" is that the National Assembly had previously reached such a conclusion. *See supra* at 10. The district court made no effort to reconcile this language with its interpretation of the resolution.

C. The District Court Violated the Doctrine of International Comity by Disregarding Venezuela's Official Interpretation of Its Law

The district court separately erred in failing to grant "substantial" weight to Venezuela's official interpretation of its own legislature's resolutions. *Animal Sci. Prods.*, 138 S. Ct. at 1875. The Republic of Venezuela filed a formal submission below, explaining in detail why the National Assembly's resolutions had the legal effect of invalidating the Transaction Documents under Venezuelan law. *See* JA-905-07 ¶¶ 9, 15, 16. The district court's rejection of that interpretation amounts to a declaration that the Republic either failed to understand Venezuelan law or willfully misinterpreted it, either of which is intolerable.

The Supreme Court has held that a "government's expressed view of its own law is ordinarily entitled to substantial but not conclusive weight." *Animal Sci. Prods.*, 138 S. Ct. at 1875. Under *Animal Science*, a "federal court should accord respectful consideration" to a foreign government's "official statement on the meaning and interpretation of its domestic law." *Id.* at 1869. Relevant considerations include the "statement's clarity, thoroughness, and support; its context and purpose; the transparency of the foreign legal system; the role and authority of the entity or official offering the statement; and the statement's consistency with the foreign government's past positions." *Id.* at 1868.

Deference is particularly appropriate where a foreign government has acted to clarify foreign legal provisions. *See United States v. Pink*, 315 U.S. 203, 219-21

(1942) (deferring to the Russian Commissariat of Justice's interpretation of the extraterritorial effect of an expropriation decree); *Banco de Espana*, 114 F.2d at 445 (deferring to an ambassador's affidavit regarding the Spanish government's authority to acquire property). American courts should not reject a foreign sovereign's construction of foreign legal provisions based upon U.S. interpretive principles, because concepts like "plain and ordinary meaning" can produce results that are "divorced from [a] term's meaning in the law of the [foreign] country." *Bader v. Kramer*, 484 F.3d 666, 670 (4th Cir. 2007); *see also Whallon v. Lynn*, 230 F.3d 450, 456 (1st Cir. 2000) ("Care must be taken to avoid imposing American legal concepts onto another legal culture."). And "[w]here a choice between two interpretations of ambiguous foreign law rests finely balanced, the support of a foreign sovereign for one interpretation furnishes legitimate assistance in the resolution of interpretive dilemmas." *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70, 92 (2d Cir. 2002).

The district court paid lip service to these principles, SPA-23, 33-43, but ignored them in application. The court's disrespectful treatment of the Republic's submission cannot be squared with *Animal Science*.

1. *The Republic's Submission Was Adequately Supported*

The Republic offered a detailed interpretation of the September 2016 Resolution, supported by numerous citations to Venezuelan legal authorities. JA-

905-06 ¶¶ 9-12. The district court nonetheless asserted that the "Republic's submission does not provide significant support for the proposition that the September 2016 Resolution either characterized the Exchange Offer as a contract of national public interest or declared the Exchange Offer as null and void." SPA-40. That assertion is wrong on both counts.

The Republic directly explained that the September 2016 Resolution "challenged the Exchange Offer, pursuant to article 187 numeral 9 of the Venezuelan Constitution that contemplates the parliamentary control over 'public national interest contracts.'" JA-905 ¶ 9. To contextualize the Assembly's invocation of that authority, the Republic cited other resolutions involving national public interest contracts, JA-905 ¶ 10, and explained why the Transaction Documents constitute national public interest contracts under Venezuelan law, JA-906 ¶¶ 11-12.

The district court did not address these examples. Instead, the court opined that the September 2016 Resolution failed clearly to declare "the Exchange Offer as null and void." SPA-40. The court's "clear statement" rule has no legal support, and entirely misunderstands the Republic's submission. The Republic explained that under Article 150 of the Venezuelan Constitution, legislative approval is a necessary prerequisite to validity, and therefore the Assembly's decision *not* to approve the Exchange Offer—but instead acted to "categorically reject" one of its

integral components—rendered the Transaction Documents void *ab initio*. JA-903 ¶ 4; JA-907 ¶ 18.

The district court also misinterpreted the meaning of "other National Assembly resolutions [that] have expressly declared certain transactions to be null and void." SPA-40 (citing JA-905 ¶ 10). Given that the Maduro regime (or the existing noteholders) could have abandoned the Exchange Offer or modified its terms based on the September 2016 Resolution, it was premature (and certainly unnecessary) to issue an anticipatory declaration that the *proposed* transaction was "null and void." In any event, all of the purportedly similar resolutions cited by the court were enacted *after* the execution of the transaction in question, *see* JA-905 ¶ 10, making them materially indistinguishable from the October 2019 Resolution that "reiterated" that national public interest contracts executed without prior Assembly authorization (including the Transaction Documents) were "null and void." JA-118.

2. *The District Court's Charge of Inconsistency Is Meritless*

The district court also found that the consistency of the Republic's interpretation of Venezuelan law was "fatally undermined" by a 2019 opinion by José Ignacio Hernández, then Venezuela's Special Attorney General. SPA-40-41. Specifically, the district court seized upon Mr. Hernández's observation that the September 2016 Resolution "did not declare the unlawfulness of that Bond, but it

did announce the start of an investigation based on the questioning of the operation." SPA-41 n.9. The court's reliance on this solitary sentence is unavailing, and if credited would warrant disregarding foreign sovereign submissions in almost any context.

First, the district court took the sentence out of context. The section containing the sentence (¶ 160) addresses legal arguments relating to the diligence and good faith of the noteholders, including whether the noteholders were on notice of the validity concerns regarding the Exchange Offer. JA-4818.47 ¶¶ 160-62; CA-1846 ¶ 159. The paragraph from which the district court quoted answers that question in the affirmative based upon the September 2016 Resolution. JA-4818.47 ¶ 160. It was in this context that Mr. Hernández acknowledged that the September 2016 Resolution "did not declare the unlawfulness of that Bond, but it did announce the start of an investigation." JA-4818.47 ¶ 160.

Second, the sentence is unfaithful to Mr. Hernández's opinion regarding the legal effect of the September 2016 Resolution, the substance of which aligns with the Republic's submission. Mr. Hernández's opinion acknowledges that the September 2016 Resolution does not contain an express declaration of invalidity, but concludes that the absence of such a declaration is irrelevant under Venezuelan

law.[9] As both Mr. Hernández and the Republic explained, under Article 150, the Transaction Documents were presumptively invalid unless and until approved by the National Assembly, and the September 2016 Resolution is entirely consistent with that opinion. *See* JA-905-07 ¶¶ 9-16; JA-4818.37 ¶ 106; JA-4818.43-18.44 ¶ 132; CA-1846 ¶¶ 158-59.

Third, the district court failed to consider whether the National Assembly is bound by the Special Attorney General's interpretations of Venezuelan legislative acts. Under *Animal Science*, the *authority* of the foreign official purporting to interpret foreign law is critical. 138 S. Ct. at 1875. Here, it is undisputed that the National Assembly is the "only legitimate governing body of Venezuela" and "the first-instance interpreter of the [Venezuelan] Constitution." JA-2604 ¶ 53; JA-2614 ¶ 73; *see also* JA-3750 § 99 ("[T]he National Assembly is empowered to interpret the Constitution in the exercise of its legislative powers through its resolutions."). The credentialed Venezuelan Ambassador (who signed the Republic's submission) is the official with authority to convey Venezuela's binding legal positions to

[9] *See* JA-4818.37 ¶106 ("The indenture is a national public interest agreement that must be previously authorized by the National Assembly owing to the obligation to constitute a pledge on 50.1% of the stock of Citgo Holding, Inc."); JA-4818.43-18.44 ¶ 132 (conceding that the September 2016 Resolution did not contain an express declaration of the Exchange Offer's status but concluding that Venezuelan law did not require the Assembly to make such a declaration because "the constitutional concept of a public interest contract does not depend on its prior classification by the National Assembly, but on compliance with the requirements established in jurisprudence").

American courts. *See Jota v. Texaco, Inc.*, 157 F.3d 153, 162-63 (2d Cir. 1998); *Banco de Espana*, 114 F.2d 445. It was plainly inappropriate for the district court to discount the formal submission of the Republic's credentialed representative based upon a single out-of-context sentence by another government official.

3. *The District Court Misinterpreted the Context of the Venezuelan Government's Submission*

Finally, the district court erred by discounting the Republic's interpretation of Venezuelan law because it was "offered specifically for the purposes of this litigation." SPA-41. That accusation is meritless. The Republic's submission cites National Assembly actions and court decisions predating this litigation by years. *See* JA-904-07 ¶¶ 5, 9-10, 15-17. Even were that not the case, the Assembly's October 2019 Resolution (also pre-dating this lawsuit) adopted the same legal position Venezuela espoused in its submission. *See* SPA-40; JA-907 ¶ 17. In any event, the Republic did not concoct its legal interpretation for this litigation; Appellees' own counsel embraced the identical interpretation of Article 150, relying on a legal opinion by Mr. Hernández, in separate litigation involving a PDVSA contract pre-dating this suit. *See* JA-2778-79 (arguing that "contracts with state owned entities (like PDVSA) … [may] qualify as 'national interest contracts'" and that such contracts are "void" unless authorized in advance by the National Assembly).

Contrary to the district court's suggestion, it is entirely appropriate for foreign sovereigns to submit amicus briefs in cases involving their interests, and those

interests do not detract from the merits of the sovereign's legal views. *See Animal Sci.*, 138 S. Ct. at 1873; *Karaha Bodas*, 313 F.3d at 92 ("That Indonesia is a party to the case does not blunt this comity concern."). This case is a stark example—it involves control over critical economic assets and the legitimacy of actions within Venezuela's legal system. Moreover, President Guaidó's government—which seeks to vindicate the National Assembly's rightful constitutional role—has a direct interest in ensuring proper respect for the Assembly's exercise of its constitutional prerogatives. *See* JA-902 ¶ 1. Those interests do not undermine the merits or sincerity of the Republic's legal views. The district court's contrary conclusion, if accepted in principle, would neuter *Animal Science*'s "substantial" deference standard.

The district court's ruling would invite courts to overrule foreign governments' interpretations of foreign law in virtually every case. Questioning the sincerity or competence of a foreign sovereign's legal interpretation of its own law risks needlessly sparking diplomatic tensions with friendly foreign governments around the world. *See Kirkpatrick*, 493 U.S. at 404 (acknowledging the "unique embarrassment that may result from the judicial determination that a foreign sovereign's acts are invalid"). The district court's refusal to defer to the Republic's submission should be reversed.

D. *Allied Bank's* Extraterritorial Takings Exception Is Inapplicable

The district court erroneously relied on this Court's decision in *Allied Bank* in concluding that the "takings" exception to the act of state doctrine controls this case. SPA-30-31. *Allied Bank* involved a *retroactive* repudiation of debt that was indisputably valid when issued. By contrast, this case involves a foreign sovereign's *prospective* refusal to authorize the issuance of new debt. Indeed, this case concerns *Venezuelan* decrees, issued under *Venezuelan* law in *Venezuela*, directed at *Venezuelan* state-owned entities *prior* to the existence of the purported debt obligation.[10] *Allied Bank* is entirely inapposite.

"Notions of territoriality run deep through the [act of state] doctrine" such that the doctrine applies only to acts undertaken within a sovereign's territory. *Tchacosh Co. v. Rockwell Int'l Corp.*, 766 F.2d 1333, 1336–37 (9th Cir. 1985). This territoriality requirement is a recognition that "any state may resent the refusal of the courts of another sovereign to accord validity to acts within its territorial border." *Sabbatino*, 376 U.S. at 432.

Allied Bank applied the territoriality requirement to a purported taking of property and held that, under the "situs rule," the doctrine applies only when the taken property's "situs" is in the sovereign's territory. 757 F.2d at 521. The situs

[10] Even as to the Pledge Agreement, it is undisputed that PDVSA and Petróleo are both parties and that PDVH (a wholly-owned PDVSA subsidiary) was instructed to execute it by the PDVSA Shareholders Assembly in Venezuela. JA-3479, 3482-83.

rule, however, is limited by the principle that the situs must be evaluated at the time of the purported taking. *Id.*; *see also* SPA-29. Thus, the situs of a given interest in property is irrelevant unless that property has been "taken."

Here, no taking could have occurred because there was no extant interest in property. *See United States v. Sperry Corp.*, 493 U.S. 52, 59 (1989); *Grayton v. United States*, 92 Fed. Cl. 327, 337 (2010). The "situs" of a debt obligation is a legal fiction, J. Stern, *Property, Exclusivity, and Jurisdiction*, 100 VA. L. REV. 111, 113 (2014), and that fiction is a fantasy before a debt obligation exists.

Here, unlike in *Allied Bank*, the sovereign acts in question predated the issuance of the debt, at which time Appellees had no property interest to take. *See U.S. Olympic Comm.*, 737 F.2d at 267 (governmental action does not effect a taking where the property owner "had no interest in the [property] at the time the [relevant] Act became law"). *Allied Bank*'s exception to the act of state doctrine does not extend to a sovereign's efforts to prevent its own instrumentalities from creating debt obligations *ex ante*. *See French*, 23 N.Y.2d at 55 (noting that "[a] legislator who reduces rates of interest or renders agreements invalid or incapable of being performed … does not take property" under the act of state doctrine) (quoting Mann, *Money in Public International Law*, 96 RECUEIL DES COURS (1959)).

The district court could not identify a single case applying the *Allied Bank* exception to a sovereign's effort to prevent the issuance of debt *ab initio*. That is

unsurprising. *Allied Bank* involved actions by the Costa Rican Government to repudiate preexisting debt obligations that existed in New York at the time the relevant decree purported to suspend them. *See* 757 F.2d at 521. This Court made clear that the act of state doctrine would have applied if, "when the decrees were promulgated, the situs of the debts was in Costa Rica." *Id.*[11]

In subsequent cases, this Court has limited the "situs test" to "takings" of *existing* property or debt. *See FTE,* 809 F.3d at 742-45. As this Court has explained, the situs test does not control where the relevant act of state is an intra-government regulation of rights or authorities rather than a "taking." *Id.* In *FTE,* this Court applied the act of state doctrine to "intragovernmental" acts, similar to those at issue here, and held that the situs test does not control where the relevant act of state is an intra-government regulation of rights or authorities. *Id.* Applying similar principles, this Court and others have held that domestic exercises of sovereign authority, like the National Assembly's invocation of Articles 150 and 187.9 here, warrant respect

[11] The other cases the district court invoked (*see* SPA-29-30, 42-43) also involved "takings" of property that indisputably existed outside of the sovereign's territory at the time of the taking. *See Maltina Corp. v. Cawy Bottling Co.*, 462 F.2d 1021, 1026 (5th Cir. 1972) (validly issued trademark); *Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co.*, 392 F.2d 706, 714 (5th Cir. 1968) (preexisting debt); *Bandes v. Harlow & Jones, Inc.*, 852 F.2d 661, 666 (2d Cir. 1988) (existing fund of $460,000); *Drexel Burnham Lambert Grp. Inc. v. Galadari*, 610 F. Supp. 114, 118 (S.D.N.Y. 1985) (validly issued securitized debt instrument), *aff'd in relevant part,* 777 F.2d 877 (2d Cir. 1985); *Menendez* v. *Saks & Co.*, 485 F.2d 1355, 1364 (2d Cir. 1973), *rev'd on other grounds sub nom, Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976) (debt obligations).

under the act of state doctrine. *See United States ex rel. Von Heymann v. Watkins*, 159 F.2d 650, 652 (2d Cir. 1947) (applying the act of state doctrine "since it must be assumed for present purposes that the acts of the Costa Rican government in causing his arrest, detention, and delivery to agents of this country within Costa Rica were lawful"); *Sea Breeze Salt, Inc. v. Mitsubishi Corp.*, 899 F.3d 1064, 1071 (9th Cir. 2018) ("There is nothing to suggest that this state-owned Mexican corporation made its decisions about the distribution of Mexico's salt anywhere other than within Mexico.").

The district court relied on the irrelevant fact that, because the Maduro regime circumvented the National Assembly's condemnation of the Exchange Offer, the situs of the debt obligation purportedly created by the 2020 Notes is now in New York. SPA-42-43. But the act of state doctrine asks where the property was located at the time of the foreign sovereign's acts, *not* where the property is located *at the time of suit*. *See Allied Bank*, 757 F.2d at 521. The district court's rejection of that principle conflicts with a long and unbroken line of Supreme Court precedents. *See Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 303–04 (1918) (applying the doctrine where the sovereign acted to transfer title of certain property later "brought within the custody of a [U.S.] court"); *see also Sabbatino*, 376 U.S. at 428-37 (applying the doctrine to a Cuban act that caused an American commodity broker to forfeit proceeds located in New York); *United States v. Belmont*, 301 U.S. 324, 332 (1937)

(applying the doctrine to an act that forced a New York banker to return a sum of money deposited in New York by a nationalized Russian corporation).

E. United States Law and Policy Interests Favor Giving Effect to the National Assembly's Sovereign Acts

The district court's erroneous interpretation of the National Assembly's 2016 acts separately warrants reversal of the court's rejection of the "permissive application" of the act of state doctrine. SPA-44-47. Because the National Assembly did not act in 2016 to repudiate existing debt, but instead acted to regulate Venezuelan state-owned entities, giving effect to those 2016 acts is fully consistent with the law and policy of the United States. *Allied Bank*, 757 F.2d at 522.

The policy interests animating this Court's decision in *Allied Bank* are inverted here. In *Allied Bank*, the United States expressly argued that the Costa Rican directives were "inconsistent with United States policy" because they purported retroactively to repudiate valid debt obligations. 757 F.2d at 519. The United States has not advanced that claim here, and with good reason. For more than half a decade through three administrations, a central pillar of U.S. foreign policy towards Venezuela has been American support for the National Assembly's assertion of its constitutional prerogatives against the usurpations of the Maduro regime. *Supra* at 5-6. Denying legal effect to the Assembly's sovereign efforts to stop the Maduro regime from executing the Exchange Offer would undermine the credibility of that policy. Furthermore, the United States has clearly stated that

should the noteholders obtain the relief they seek (seizure of the stock of CITGO), U.S. foreign policy towards Venezuela will be irreparably harmed. *See* JA-5239; *supra* at 5-6.

On the other side of the balance, the noteholders were on notice of the interbranch conflict sparked by the Exchange Offer. *See* JA-3572-73; CA-1481. The noteholders here were not left "in the lurch" by the National Assembly's 2016 Resolutions, which reflect the requirements of the Venezuelan Constitution. SPA-47. The noteholders were on notice of the National Assembly's assertion of its constitutional prerogatives, but bet against the Assembly's political success vis-à-vis the Maduro regime. In making that bet, the noteholders flouted the U.S. Government's clear policy supporting the Assembly's constitutional role. *See* JA-5228. U.S. law does not shield private counterparties from the risk of invalidity when contracting with a government-owned entity. *See Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 381, 383-85 (1947) (as a "wholly Government-owned enterprise," the U.S. Federal Crop Insurance Corporation could not be bound to an insurance policy it lacked legal authority to issue even though the plaintiffs "reasonably believed that their entire crop was covered").

Finally, the district court's extension of *Allied Bank* would upend the doctrine's purpose and transform New York into a haven for those who seek to profit from the anti-democratic actions of authoritarian regimes. Applying an inflexible

"situs" rule to sovereign acts predating the existence of the property would invite deliberate efforts by would-be dictators to circumvent the acts of foreign legislatures by absconding with assets to the United States. Foreign sovereigns are entitled to structure their constitutions to prevent lawless looting of national resources, and the act of state doctrine should respect those policy choices when made by recognized governments. *See Netherlands v. Fed. Rsrv. Bank of N.Y.*, 201 F.2d 455, 463 (2d Cir. 1953) ("Nor should we deny enforcement simply because the decree was not so successful in accomplishing its purpose of preventing enemy looting as its authors may have wished; such enactments would become all the less effective in the future if we were to refuse recognition here."). The district court's unprecedented expansion of *Allied Bank* should be reversed.

II. THE VALIDITY OF THE TRANSACTION DOCUMENTS IS GOVERNED BY VENEZUELAN LAW

After erroneously refusing to respect the National Assembly's acts of state, the district court turned to choice of law. Recognizing the "logical flaw inherent in following a contractual choice-of-law provision before determining whether the parties have actually formed the contract in which the choice-of-law clause appears," the district court correctly proceeded "as if the [Transaction Documents' New York] choice of law provisions were not effective." SPA-48 n.12. The court then held that, under New York's choice-of-law rules, "New York law governs this action." That is wrong.

A. The Parties' Dispute Regarding the Validity of the 2020 Notes Is a Dispute Regarding Their "Validity" Within the Meaning of UCC § 8-110

There is no dispute that the 2020 Notes are "securities" within the meaning of Article 8 of the UCC. Section 8-110, which contains the UCC's choice-of-law rules for securities, provides in subsection "(a)" that "[t]he local law of the *issuer's jurisdiction*, as specified in subsection (d), governs: (1) the *validity* of a security." U.C.C. § 8-110(a) (emphasis added).[12] Subsection "(d)" specifies that the "issuer's jurisdiction" is "the jurisdiction under which the issuer of the security is organized or, if permitted by the law of that jurisdiction, the law of another jurisdiction specified by the issuer." U.C.C. § 8-110(d). And while subsection (d) allows an issuer to "specify the law of another jurisdiction as the law governing the matters specified in subsection (a)(2) through (5)," it does not allow this option for "validity," which is addressed in subsection (a)(1). U.C.C. § 8-110(a)(1) & (d). Thus, "[t]he issuer *cannot specify* that the law of another jurisdiction should determine the validity of a security." 8 Anderson U.C.C. § 8-110:6 [Rev] (3d ed.) (emphasis added). "This lack of choice is consistent with Prior Article 8 and the

[12] Section 5-1401 of the New York General Obligations Law, which allows contracting parties to agree that New York law will govern their rights and duties even if their contract bears no reasonable relation to the state, is expressly inapplicable if their choice is overridden by the UCC's choice-of-law rules. N.Y. Gen. Oblig. § 5-1401(1). As specified in UCC § 1-301(c), this includes the choice-of-law rules contained in section 8-110. *See* U.C.C. § 1-301(c)(6).

prevailing view that the law under which an issuer is organized [here, Venezuela] must govern whether a security issued by that entity is valid." N.Y. Bill Jacket, 1997 A.B. 6619, Ch. 566, comm. report at 22.[13]

The Official Comments to UCC § 8-110 explain that issuers are permitted to specify the law of another jurisdiction "except as to the validity issue" because "[t]he question whether an issuer can assert the defense of invalidity may implicate significant policies of the Issuer's jurisdiction of incorporation." U.C.C. § 8-110, Official Comment 2. The Official Comments then refer to "Section 8-202 and Comments thereto." *Id.* Thus, section 8-202, which deals with validity, is the principal Article 8 substantive rule to look to for guidance in applying the choice of law rule [for 'validity'] in subsection 8-110(a)." William D. Hawkland & James S. Rogers, 7A Hawkland UCC Series § 8-110:2 (2019) ("Hawkland").

Section 8-202(b) sets forth the "rules [that] apply if an issuer asserts that a security is not valid." These rules provide that "[a] security other than one issued by a government or governmental subdivision, agency, or instrumentality, even though issued with a defect going to its validity, is valid in the hands of a purchaser for value and without notice of the particular defect unless the defect involves a *violation of a constitutional provision*," in which case "the security is valid in the

[13] In any event, Venezuelan law does not permit PDVSA to specify "the law of another jurisdiction" to govern the validity of its contracts. JA-2643 ¶ 133.

hands of a purchaser for value and without notice of the defect, other than one who takes by original issue." UCC § 8-202(b)(1) (emphasis added). The same rules apply to "an issuer that is a government or governmental subdivision, agency, or instrumentality," except that an otherwise invalid security issued by a government or governmental entity will not be subject to validation unless certain conditions are met. *Id*. at § (b)(2). Accordingly, the issuance of a security "in violation of a constitutional provision" is unquestionably a defect going to its "validity" within the meaning of UCC § 8-110.

The district court acknowledged that, "based on a plain reading of [section 8-110(a)(1)], [] Venezuelan law would govern the validity of the 2020 Notes and the Governing Documents." SPA-49. However, the court disregarded that plain reading on the basis that the meaning of "validity" under UCC Article 8 is narrower than under contract law, SPA-50-51, and that Article 150 of the Venezuelan Constitution "has nothing specifically to do with the issuance of securities," SPA-54.

The district court quoted statements from Article 8's prefatory note and New York legislative history regarding the Article's scope, but the quotes are not relevant here. SPA-49-51. While it is true that "Article 8 is in no sense a comprehensive codification of the law governing securities," Prefatory Note to Article 8 at III.B (1994), Article 8 most certainly "deals with some aspects of the rights of securities holders against issuers." *Id*. One of those aspects, as discussed below, is an issuer's

ability to assert that a security is "not valid" due to a defect in its issuance in "violation of a constitutional provision." UCC § 8-202(b). Article 8 also deals explicitly with "the substantive law that will govern [the] rights and obligations [of issuers and investors] … in connection with the issuance, ownership and transfer of securities," including the "validity" of their issuance. N.Y. Bill Jacket, 1997 A.B. 6619, Ch. 566, comm. report at 21-22.

Despite acknowledging section 8-202's explicit reference to the "violation of a constitutional provision" as a "validity" issue, the district court opined that this is only the case if the constitutional provision in question deals specifically with the "issuance of securities." SPA-52. The court artificially limited the applicability of section 8-110 in this way because it erroneously viewed Article 150 of the Venezuelan Constitution as somehow analogous to a hypothetical "Law X" discussed in the Hawkland UCC treatise. SPA-54. There, the treatise authors opined that the hypothetical "Law X"—"a provision of general applicability that could apply to [the enforceability of] any promise to pay money [on a contract]"—would not go to the "validity" of a security because it "does not deal with the procedural or other requirements for issuance of securities" but merely "renders unenforceable a certain category of promises to pay money." Hawkland § 8-110:2. The court analogized Article 150 to "Law X" on the basis that Article 150 applies to a "broad category of contracts," not just securities. SPA-53-54. But unlike "Law X," Article

150 mandated prior National Assembly authorization as a "procedural requirement" of the highest order—a *constitutional prerequisite* for valid contract formation and thus, in the case of a securities transaction, *valid issuance* of the security. Accordingly, Article 150 does not merely "render unenforceable" PDVSA's "promise to pay" on an otherwise validly issued security. Rather, the issuance of the 2020 Notes without National Assembly authorization rendered *the issuance itself* defective and the notes and related contracts void *ab initio* under Venezuelan law. JA-2594-95 ¶¶ 28-30; JA-4740 ¶ 38.

Indeed, as the same UCC treatise concludes, "'valid' … refers to the issue that lawyers today would probably describe as whether issuance of the securities had been 'duly authorized.'" Hawkland § 8-110:2. Likewise, the report of the Committee on Uniform State Laws and the New York Bar Association Banking Law Committee on the 1997 amendments to the UCC observed that "the validity of a security" refers to "validity in the sense of corporate or other authority to issue securities." N.Y. Bill Jacket, 1997 A.B. 6619, Ch. 566, comm. report at 22. This focus on the issuance process echoes the Official Comments to section 8-202, which identify "the validity of the security" with "compli[ance] with the law governing its issue." U.C.C. § 8-202, Official Comment 3.

Here, the issuance of the 2020 Notes plainly was not "duly authorized" if National Assembly authorization was required by governing provisions of the

Venezuelan Constitution. Absent such authorization, PDVSA and Petróleo lacked any authority as state-owned Public Administration entities to execute the Transaction Documents, and the entire transaction was void *ab initio*. JA-2594-95 ¶¶ 28-30. Under Venezuela's Organic Law of the Public Administration, which applies to organs of the government and state-owned entities alike, the powers granted to a Public Administration organ or entity are subject to any "conditions, limits, and procedures" established by law, and any act carried out by an "incompetent" organ or entity or "usurped" by one acting without authority (*i.e.*, without "competence") is "null and void and its effects shall be non-existent." JA-2640-42 ¶¶ 125-32. The Hawkland treatise hypothetical, on which the district court so heavily relied, is therefore inapposite.

The district court's interpretation of "validity" is also untenable because, in the body of common law on which section 8-202 was based, a common "validity" issue was the issuance of government securities in violation of a constitutional or statutory debt limit. The Official Comments to section 8-202 mention two such cases—*Board of Commissioners of Gunnison County, Colorado v. E. H. Rollins & Sons*, 173 U.S. 255 (1899), and *Board of Commissioners of Chaffee County v. Potter*, 142 U.S. 355 (1892). *See* U.C.C. § 8-202, Official Comment 3. Both cases involved the Colorado Constitution, and the relevant debt limit provision did not (and still does not) deal specifically with the issuance of securities but rather prohibits the

state from contracting "any debt" in "any form" except in certain circumstances and within certain limits. Colo. Const. art. XI, § 6; Colo. Const. art. XI, § 6 (1876).

Finally, as discussed above, the Official Comments to UCC § 8-110 explain that "validity" is governed by the law of the issuer's jurisdiction because "[t]he question whether an issuer can assert the defense of invalidity [as addressed in section 8-202] may implicate significant policies of the issuer's jurisdiction of incorporation." U.C.C. § 8-110, Official Comment 2. In addition, one of the policies reflected in section 8-202, which refers specifically to securities issued in violation of "a constitutional provision" and does not narrow the type of "constitutional provision" in any way, is to afford governments and "governmental instrumentalities" a greater ability than private issuers to assert that their securities are invalid. *See* UCC § 8-202, Official Comment 3 (explaining that "governmental issuers are distinguished in subsection (b) from other issuers as a matter of public policy"). Under the district court's unduly narrow interpretation of "validity," however, UCC § 8-110 would not apply to the question of whether a security was issued by a governmental instrumentality in violation of a constitutional provision implicating even the most significant policies of the issuer's jurisdiction (here, the separation of governmental powers and legislative oversight of national public interest contracts) unless the provision has "specifically to do with the issuance of securities." Simply put, the court's interpretation is not only contrary to the plain

language of sections 8-110 and 8-202, but it undermines the policy concerns they were meant to address.

B. Under New York's Choice-of-Law Rules, a Foreign State-Owned Entity's Actual Authority to Contract Must Be Determined Under the Foreign State's Law

The district court described *Themis Capital, LLC v. Democratic Republic of Congo*, 881 F. Supp. 2d 508 (S.D.N.Y. 2012), and "similar cases" as standing for the proposition that "New York law points to the application of a foreign state's law when the actual authority of that foreign state's agent is in question." SPA-56 (citing cases). The court then deemed this line of cases "irrelevant," opining that "what links these cases together is what distinguishes them from the instant action." SPA-59. None of the court's purported distinctions bears scrutiny.

The first purported distinction—that the cases in question involved the Foreign Sovereign Immunities Act (the "FSIA") SPA-57, 59—is a distinction without a difference. The FSIA had nothing to do with the choice-of-law analyses regarding actual authority, and, as the district court acknowledged, not all of the cases even involved the FSIA. *See Republic of Benin v. Mezei*, No. 06 Civ. 870 (JGK), 2010 WL 3564270 (S.D.N.Y. Sept. 9, 2010).

The second purported distinction—that "the parties have not argued that PDVSA is a foreign sovereign or an instrumentality of a foreign sovereign," SPA-59—is no distinction at all. Appellants repeatedly emphasized below that, as

reflected in Articles 302 and 303 of the Venezuelan Constitution, PDVSA is the entity "created to manage the [Venezuelan] petroleum industry," which is reserved to the State, and is the only entity that must be wholly owned by Venezuela "[f]or reasons of economic and political sovereignty and national strategy." *See, e.g.*, JA-2556; JA-4841-42; JA-5392-93. Appellants' Venezuelan law expert similarly explained that "PDVSA is thus an instrument of the Venezuelan State created to manage the nationalized oil industry," as further reflected in its by-laws, which provide that "[t]he fulfillment of the corporate purpose must be carried out by the company *under the guidelines and policies that the National Executive through the Ministry of Energy and Mines establishes or set[s] down.*" JA-2690-2691 ¶¶ 87-89 (emphasis in original). In any event, PDVSA *is* "an instrumentality of Venezuela," *Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, 932 F.3d 126, 140 (3d Cir. 2019), and the district court offered no interpretation of PDVSA's status under Venezuelan law that would suggest otherwise.

As to the third and purportedly "most important" distinction, the district court opined that "authority is an inappropriate framework for this action" because "[a]ctual authority deals with the relationship between a principal and its agent," and "the National Assembly is not the principal of any of the Plaintiffs in this action." SPA-59-60. The relevant line of cases, however, is not limited to actual authority in this "principal-agent" sense. Some of the cases involved, as here, the question of

whether a foreign government institution or state-owned enterprise, *as an entity*, had the actual authority to enter into a certain contract. For example, the National Defence Security Council of Indonesia was found to have had no "actual authority" to issue the notes in question because, under Indonesian law, "the NDSC had no legal authority to issue debt instruments," which can only be issued by the Ministry of Finance and Bank Indonesia. *Storr v. Nat'l Def. Sec. Council of Indonesia-Jakarta*, No. 95 Civ. 9663 (AGS), 1997 WL 633405, at *2 (S.D.N.Y. Oct. 14, 1997). Similarly, an Indonesian state-owned enterprise was found to have had no "actual authority" to enter into an alleged reinsurance agreement because "Indonesian law prohibited [the enterprise], and by extension [its] employees … from engaging in any reinsurance activity." *Anglo-Iberia Underwriting Mgmt. Co. v. PT Jamsostek*, No. 97 Civ. 5116 (HB), 1998 WL 289711, at *3 (S.D.N.Y. June 4, 1998). In another case, certain loan agreements entered into by the National Bank of Liberia were alleged to be invalid for having not been authorized by the Liberian legislature as allegedly required by the Liberian Constitution. *Exp.-Im. Bank of China v. Cent. Bank of Liberia*, No. 15 Civ. 9565 (ALC), 2017 WL 1378271, at *3 (S.D.N.Y. Apr. 12, 2017). The court held that Liberian law governed the "actual authority" of the bank, "as an institution," to enter into the loan agreements. *Id*.

By focusing on whether PDVSA and Petróleo are the National Assembly's "agents," the district court erroneously narrowed the applicable choice-of-law rule

and missed the forest for the trees. The critical point is that, under Venezuelan law, a state-owned entity within Venezuela's National Public Administration has no actual authority to enter into a national public interest contract without prior National Assembly authorization, thereby precluding any valid manifestation of consent to the contract. JA-2594-95 ¶¶ 28-30; JA-2640-42 ¶¶ 125-32. Simply put, if PDVSA and Petróleo required prior National Assembly authorization to enter into the 2020 Notes transaction, they had no *actual authority* to do so, and thus, under Venezuelan law, lacked any institutional capacity (*i.e.*, corporate "power" or "competence") to validly execute the Transaction Documents. JA-2594-95 ¶¶ 28-30; JA-2640-42 ¶¶ 125-132.[14] Consistent with this reality, the legal opinion letters for the transaction treated PDVSA and Petróleo's actual authority to execute the Transaction Documents, the need for any government approvals, and the transaction's fundamental legality as matters of *Venezuelan* law, not New York law. JA-3923-26. The letter of New York counsel, which covered other matters, simply "assumed" such authority, approvals, and legality. JA-3908.

[14] Entities owned by the U.S. Government are likewise subject to the limitations imposed by U.S. law on their authority to enter into contracts. *See Merrill*, 332 U.S. at 384-85. The United States would expect foreign courts to respect such limits as a matter of comity, and the result should be no different here.

C. The District Court Misapplied New York's Choice-of-Law Rule Regarding Transactions Allegedly Executed in Violation of Foreign Law

The district court also misapplied the rule that "[i]n cases alleging a violation of foreign law, the existence of illegality is to be determined by the local law of the jurisdiction where the illegal act is done, while the effect of illegality upon the contractual relationship is to be determined by the law of the jurisdiction which is selected under conflicts analysis." *Korea Life Ins. Co.*, v. *Morgan Guar. Tr. Co. of N.Y.*, 269 F. Supp. 2d 424, 438 (S.D.N.Y. 2003). The court concluded that, since "it is New York, and not Venezuela, that is the *place of performance*, this rule is of no use to Plaintiffs." SPA-61 (emphasis added). Regarding the *existence* of illegality, however, the rule looks to the place of the alleged *illegal act*—not the place of performance—and distinguishes between illegality in the "performance" of a contract and illegality in its "making." *See* Restatement (Second) of Conflict of Laws § 202 (1971), cmt. c (discussing the "[e]xistence and effect of illegality").

Here, the "illegal acts" related to the "making" of the 2020 Notes transaction took place in Venezuela—most significantly, the Maduro regime's failure to obtain the National Assembly authorization in accordance with Article 150 of the Venezuelan Constitution, the Maduro-controlled Supreme Tribunal's illegal quashing of the National Assembly's investigation of the Exchange Offer, the Maduro regime's ultimate direction to execute the transaction in disregard of the

National Assembly's "categorical rejection" of the pledge, and the corporate governance actions taken by PDVSA and Petróleo in furtherance of that illegal directive. *Supra* at 7-8, 10.

Under New York law (assuming New York law applies at all), the "effect" of illegality is that the contract is unenforceable unless certain conditions are met, including that the contract is not *malum in se*. *See Schlessinger v. Valspar Corp.*, 686 F.3d 81, 85 (2d Cir. 2012) (recognizing conditions for enforcement of illegal contracts); *see also Korea Life*, 269 F. Supp. 2d at 441. Here, the 2020 Notes transaction is *malum in se* at the core, as its very execution marked the further destruction of Venezuela's constitutional system of government, which had been under systematic assault by the Maduro regime from the moment the opposition parties won control of the National Assembly. *See* JA-2619-23 ¶¶ 86-87. Such usurpation by an authoritarian regime rendered the transaction's execution an act of great "moral turpitude." *See Korea Life*, 269 F. Supp. 2d at 441 (recognizing "moral turpitude" as the distinguishing feature of a *malum in se* contract).[15]

[15] As Appellants argued below, even if New York law applies to the enforceability of the Transaction Documents, they fail to meet any of the three conditions that must be met for the enforcement of an illegal contract. JA-4839-40.

D. The District Court's Multifactor "Grouping of Contacts" Analysis Was Inappropriate for Determining the Law Applicable to the Issue of Actual Authority

Even assuming that New York has the "most substantial relationship to the transaction as a whole" under a multifactor "grouping of contacts" or "center of gravity" analysis, this is not an appropriate analysis for determining the law applicable to the actual authority of Venezuelan Public Administration entities to enter into the 2020 Notes transaction without legislative authorization. As the district court noted, "of the [cited] cases that ended up applying a foreign state's law, none of them engaged in a traditional multifactor 'grouping of contacts' analysis." SPA-59 n.15. For example, the *Themis Capital* court referred to a "grouping of contacts" analysis but, as the district court observed, "[found] that the DRC had the most significant relationship merely because 'plaintiffs' claims, if successful, [would] expose the DRC and its instrumentalities to up to $80 million in liabilities.'" SPA-56 (quoting *Themis Capital*, 881 F. Supp. 2d at 521).

The *Themis Capital* court's analysis makes perfect sense given that, "[i]n general, it is fitting that the state whose interests are most deeply affected should have its local law applied," and "[w]hich is the state of dominant interest may depend upon the issue involved." Restatement (Second) of Conflict of Laws § 6, cmt. f (1971). As to the issue of actual authority, Venezuela has an inherently more significant interest than any other jurisdiction in its separation of governmental

powers and the constitutional limitations placed on the authority of the state-owned entities within its National Public Administration. Indeed, it has long been recognized that "[i]n civil law countries [such as Venezuela], government agencies must be explicitly empowered with regard to the content, scope, and sometimes procedure of agreements," and "particularly in Latin America" there are "constraints and rules for government contracting in the constitution [and elsewhere]" such that "[c]ontracts concluded by government agencies without sufficient authority … are ultra vires and therefore void." Thomas W. Wälde and George Ndi, *Stabilizing International Investment Commitments: International Law Versus Contract Interpretation*, 31 Tex. Int'l L.J. 215 (Spring 1996). The better approach is simply to recognize, as the court did in *Republic of Benin*, that "[e]ven if New York law applies, New York must look to the law of [the foreign state] to determine … actual authority," not least because "New York law does not speak to [that question]." 2010 WL 3564270, at *6.

Under the district court's choice-of-law analysis, a foreign state's constitution can be effectively nullified by an authoritarian regime as long as its illegal transaction has sufficient New York contacts, in which case the foreign state's law becomes "irrelevant" and a New York court must enforce the transaction contracts no matter how patent their illegality. New York's choice-of-law rules do not permit, let alone require, such a disturbing outcome.

CONCLUSION

This Court should reverse or, at a minimum, vacate the district court's judgment.

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Respectfully submitted,

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