20-3858-cv(L),

20-4127-cv(CON)

In the 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-Plaintiffs-Appellees.

On Appeal from the United States District Court for the Southern District of New York

BRIEF OF DEFENDANTS-COUNTER-PLAINTIFFS-APPELLEES MUFG UNION BANK, N.A. AND GLAS AMERICAS LLC

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Glossary

2017 Notes	The 5.25% Senior Notes due 2017 and the 8.5% Senior Notes due 2017, both issued by PDVSA.
2020 Notes or Notes	The 8.5% Senior Secured Notes due 2020 issued by PDVSA pursuant to the Indenture.
Collateral	PDVH's pledge of a 50.1% interest in CITGO Holding under the Pledge Agreement.
Collateral Agent	GLAS Americas LLC, the collateral agent of the 2020 Notes.
Directing Holders	(i) Funds and accounts managed by affiliates of Ashmore Group plc; (ii) funds and accounts managed by affiliates of BlackRock, Inc.; and (iii) funds and accounts managed by Contrarian Capital Management, LLC.
Exchange Offer or Exchange	The tender offer announced by PDVSA on September 17, 2016, and closed on October 21, 2016, to exchange 2017 Notes for 2020 Notes.
Global Note	The Global Notes to which the Indenture refers, and that evidence the obligations of PDVSA, as issuer, and PDVSA Petróleo, as guarantor, to Cede & Co., which is the registered holder of the 2020 Notes.
Governing Documents	The Global Note, Indenture, and Pledge Agreement for the 2020 Notes.

Indenture	The Indenture dated October 27, 2016, between PDVSA as issuer, PDVSA Petróleo as guarantor, the Trustee, the Collateral Agent, the Law Debenture Trust Company of New York as registrar, transfer agent, and principal paying agent, and Banque Internationale à Luxembourg, Société Anonyme as Luxembourg paying agent.
Offering Circular	The Offering Circular for the 2020 Notes filed with the S.E.C.
PDVH	PDV Holding, Inc.
PDVSA	Petróleos de Venezuela, S.A.
PDVSA Parties	PDVSA, PDVSA Petróleo, and PDVH.
PDVSA Petróleo	PDVSA Petróleo S.A.
Pledge Agreement or Pledge	The Pledge and Security Agreement dated October 28, 2019, between PDVH as pledgor, PDVSA as issuer, PDVSA Petróleo as guarantor, the Collateral Agent, and the Trustee.
Trustee	MUFG Union Bank, N.A., the trustee of the 2020 Notes.
Republic	The Bolivarian Republic of Venezuela.

Preliminary Statement

The district court properly held that secured notes issued by PDVSA[1] in New York, sold to New York investors, payable in New York, subject to New York law, and enforceable in New York courts are enforceable under the terms of the notes, the governing agreements, and New York law. It correctly rejected the PDVSA Parties' contention that they should be excused from honoring the obligations they incurred on the ground that those obligations were allegedly illegal under Venezuelan law. Applying settled law in this Circuit and elsewhere, the court correctly held that neither the act of state doctrine nor New York choice-of-law principles obligated it to apply what the PDVSA Parties claim is Venezuelan law to excuse them from paying debts they voluntarily incurred. Its judgment should be affirmed.

The PDVSA Parties' contention that the Court should refuse to enforce the notes, if accepted, would displace established legal and financial foundations of the market for debt of sovereigns and state-owned enterprises. It would permit foreign states and state-owned corporations such as PDVSA to issue facially valid debt in the United States, represent that the debt is lawful and enforceable in U.S. courts, and then, years later, avoid paying that debt by declaring that the debt was unenforceable when issued under the sovereign's law. And it would preclude U.S. courts even from making an independent assessment of the sovereign's self-serving,

[1] Capitalized terms are defined in the preceding Glossary.

litigation-driven statements of what the sovereign's law supposedly requires. All of this is contrary to the law in this Circuit and elsewhere.

The relevant facts are undisputed. In 2016, PDVSA issued $3.4 billion of secured notes maturing in 2020 in exchange for earlier-maturing notes. The transaction was centered in New York and was marketed to U.S. and international investors. The PDVSA Parties agreed that New York law governed the notes and that they would be enforceable in the federal and state courts of New York. PDVSA and its subsidiaries gave unqualified representations and opinions that the notes were duly approved, that PDVSA had the authority to issue them, and that they were enforceable. PDVSA's Venezuelan and New York counsel provided opinions addressed to the Trustee and the Collateral Agent to the same effect, and provided an internal memorandum to PDVSA reaffirming the notes' enforceability under Venezuelan law. They disclosed no risk that they might later argue that the notes are subject to Venezuelan law or that they might be deemed unenforceable under that law.

The PDVSA Parties now ask the Court to disregard their own representations and to free them from any obligation to pay the notes. They urge the Court to rule that the notes are governed by the law of Venezuela—not New York, as they agreed—and that, because the notes were issued without specific approval by the Venezuelan legislature, they are unenforceable under the Venezuelan Constitution. And they contend that this Court must unquestioningly accept the after-the-fact, self-interested

interpretation of Venezuelan law by representatives of the Venezuelan government, PDVSA's sole shareholder, in determining that this result is what the Venezuelan Constitution requires.

The PDVSA Parties' arguments would gravely undermine the United States' interest in a stable market for debt issued by foreign sovereigns and their wholly owned subsidiaries. Under the standards the PDVSA Parties urge, investors would be unable to rely on representations by the issuer and choice-of-law provisions in transaction documents, opinions of the issuer's local counsel, or even their own independent assessment of foreign law. Governments and government-owned issuers in nations with underdeveloped or potentially unreliable legal systems would be free to manipulate their own law—indeed, that is just what the PDVSA Parties and the Republic seek to do here. And U.S. courts would be obligated to shield their eyes from such manipulation. Capital markets could not function under these conditions.

The PDVSA Parties' arguments should be rejected as a matter of established law.

First, their reliance on the act of state doctrine is misplaced. As the Court held more than 35 years ago in *Allied Bank International* v. *Banco Credito Agricola de Cartago*, 757 F.2d 516, 521-22 (2d Cir. 1985), that doctrine does not permit sovereigns to invoke their own laws to disavow debt obligations in the United States. The PDVSA Parties argue that Venezuelan law prohibited the PDVSA Parties from issuing the notes. But the act of

state doctrine does not require U.S. courts to apply foreign law to contracts made and to be performed in the United States. *See id.* at 520.

Second, New York choice-of-law rules do not require the application of Venezuelan law to the enforceability of the notes. The PDVSA Parties' contention that an alleged violation of Venezuelan law makes the notes "invalid" under section 8-110 of the U.C.C. goes far beyond the narrow meaning of that statutory term. The term refers only to obtaining appropriate corporate approvals for the issuance of securities, and there is no dispute that such approvals were obtained here.

Equally without merit are the PDVSA Parties' arguments that their debts should be excused because they supposedly lacked authority under Venezuelan law to incur them, and because the transaction was allegedly illegal under Venezuelan law. There is no question that the individuals who approved the notes issuance on the PDVSA Parties' behalf had the corporate authority to do so. And New York law imposes the risk that a corporation will enter into allegedly ultra vires contracts on the corporation itself, not its contractual counterparties. *See* N.Y. Bus. Corp. Law § 203(a). Likewise, alleged "illegality" under Venezuelan law has no bearing on the enforceability of contracts made and to be performed in New York.

The district court's ruling that the notes and the governing agreements are enforceable was correct and should be affirmed.

Issues Presented

1. Whether the act of state doctrine required the district court to rule that corporate notes issued in the United States in 2016, payable in the United States, secured by collateral in the United States, and governed according to their terms by New York law, are unenforceable under Venezuelan law.

2. Whether the district court erred in holding that the PDVSA Parties failed to raise a genuine dispute of material fact requiring the application of Venezuelan law to the enforceability of the 2020 Notes.

Statement of the Case

A. The Parties.

Appellants are the issuer, guarantor, and pledgor of collateral for secured notes maturing in 2020 (the 2020 Notes). SPA-9-10; JA-4904¶¶167-68. PDVSA, the issuer, is a petroleum company wholly owned by the Bolivarian Republic of Venezuela. SPA-1, 3-4; JA-2558¶¶7-8. It is a corporation, or *sociedad anonima* (S.A.), under Venezuelan law. SPA-3-5; JA-4850¶4. As a *sociedad anonima*, it is a legal person distinct from the Republic. JA-3643-45¶¶34-37; JA-4296¶12.

PDVSA Petróleo, the guarantor, is a wholly owned subsidiary of PDVSA. SPA-5, 10. Like PDVSA, it is a Venezuelan *sociedad anonima*. SPA-3-5; JA-4853¶14.

PDVH, the pledgor, also a wholly owned subsidiary of PDVSA, is a Delaware corporation with headquarters in Texas. SPA-5, 10. PDVH is the sole owner of CITGO Holding, Inc., the parent of CITGO Petroleum Corp. JA-4854¶¶20, 22. CITGO Holding and CITGO Petroleum are also incorporated in Delaware and have their headquarters in Texas. JA-4854-55¶¶21, 23. CITGO Petroleum has no assets or operations in Venezuela. JA-4855-56¶¶24-25, 30.

Appellees are the Trustee and the Collateral Agent for the 2020 Notes under the governing Indenture and Pledge Agreement. JA-4856¶33. The Trustee and the Collateral Agent are directed in this litigation by the nonparty Directing Holders, which beneficially own a majority of

outstanding 2020 Notes, and which are based in the United States and the United Kingdom. JA-4298-99¶¶34-38.

B. The Exchange Offer and the 2020 Notes.

1. The Exchange Offer.

Between 2007 and 2011, PDVSA issued $9.15 billion of unsecured notes due 2017. SPA-7; JA-4857¶¶39, 41. The 2017 Notes were denominated in U.S. dollars and were held by U.S. and other international investors. JA-4858-60¶¶46-53; CA-466¶156; JA-2708¶¶1-2.

On September 16, 2016, after years of financial struggles, PDVSA announced the Exchange Offer, in which it offered to exchange 2017 Notes for newly issued 2020 Notes. SPA-7-8; JA-2561¶30. The 2020 Notes were secured by a pledge by PDVH of a 50.1% equity interest in CITGO Holding. SPA-9; JA-4888-90¶¶115-17, 120; CA-459¶¶121-22. PDVSA warned investors that, should the transaction fail, it might default on the 2017 Notes. JA-4694. Analysts viewed the transaction as beneficial to PDVSA by giving it more time before payment. JA-4890-4895¶¶123-31; JA-2051; JA-2068-69; JA-2078-79; JA-2279-80.

The Exchange Offer closed in October 2016. JA-4903¶164. Participating investors tendered approximately 40% of the 2017 Notes, SPA-12, and PDVSA issued $3.4 billion face amount of new 2020 Notes. SPA-9-11; JA-2562¶36, JA-4903-04¶165.

The Indenture, Global Notes, and Pledge Agreement governing the 2020 Notes and Collateral were approved by the Boards of Directors of each of the PDVSA Parties, JA-4875-87¶¶74-80, 96, "in accordance with their respective certificates of incorporation and bylaws," JA-4875¶74. The transaction was also approved by the Republic as PDVSA's sole shareholder through its Minister of Petroleum. JA-4878¶¶79, 83.

The district court concluded that New York was the "center of gravity" for the Exchange Offer, because it was the location of "contracting and negotiation," "performance," and the "subject matter" of the Governing Documents. SPA-63-64. As the district court found, the 2020 Notes are enforceable in courts in New York; all principal and interest payments are required to be made in New York in U.S. dollars; the Notes are administered by New York-based registrars, transfer agents, paying agents, and depositary; and the Trustee and the Collateral Agent have offices in New York. SPA-5-6, 10-11, 63-64; JA-4751¶19; JA-4858-59¶¶46, 49-53; JA-4903-11¶¶161, 173, 186-88, 191.

The Exchange Offer was centered in New York in multiple other respects. Many exchanging holders of the 2017 Notes were located in the United States, JA-4901-02¶156, CA-465¶152, and [redacted]. JA-4896¶133; CA-465-66¶¶151-52, 154-56. The negotiations and closing occurred in New York. SPA-11; JA-4882-83¶99; JA-4900¶150; CA-20¶15(f); CA-463¶138. The Global Notes were

deposited with a custodian in New York and are registered in the name of a New York holder of record. SPA-11; JA-4910-11¶¶189, 194. And the Collateral Agent at all times held the Collateral in its vault in New York. SPA-10-11; JA-4906¶176.

The Governing Documents include broad, mandatory New York choice-of-law provisions. The Indenture provides:

> This Indenture and the notes shall be construed in accordance with, and this Indenture and the notes and all matters arising out of or relating in any way whatsoever to this Indenture and the notes (whether in contract, tort or otherwise) shall be governed by, the laws of the State of New York without regard to the conflicts of law provisions thereof (other than Section 5-1401 of the New York General Obligations Law).

JA-4907-08¶181 (emphasis added and capitalization altered). The Pledge Agreement and Global Note certificates contain substantially identical provisions. SPA-10; JA-4907-08¶¶180, 182.

The PDVSA Parties and their representatives assured the other parties to the Exchange Offer that the Notes and the Governing Documents were enforceable in accordance with their terms. The PDVSA Parties represented in the Governing Documents that the Notes and the Pledge were duly authorized, valid, and enforceable. JA-4912-15¶¶198-206. PDVSA's legal counsel provided unqualified opinion letters addressed to the Trustee and the Collateral Agent to the same effect under New York and Venezuelan law. JA-4977-81¶¶339-45. The letters opined that the Governing

Documents "do[] not[] violate Venezuelan Law" and that "[n]o approval, authorization or consent of . . . any governmental agency or governmental authority in Venezuela is required to be obtained." JA-4980-81¶¶344-45. [redacted]. CA-1657-60¶¶359-63. PDVSA's counsel also advised PDVSA privately that the transaction complied with Venezuelan law. JA-4983-88¶¶349-56. Nowhere in the Governing Documents or any other communication in the record did the PDVSA Parties identify any risk that the Notes could be deemed unenforceable or illegal.

2. The National Assembly Criticized the Exchange Offer but Did Not Declare That the 2020 Notes Would Be Illegal or Unenforceable.

At the time of the Exchange Offer and through January 2019, the United States recognized the administration of Nicolás Maduro as the legitimate government of Venezuela. JA-4868¶67; SPA-8; JA-4868-74¶¶67-71. In a legislative election held in 2015, the year before the Exchange Offer, opposition parties won a majority of seats in Venezuela's legislature, the National Assembly. SPA-8; JA-4874-75¶72. But the legislature did not contend that the Maduro administration was illegitimate. SPA-33-37.

On September 27, 2016, the opposition-led National Assembly adopted a resolution purporting to "summon" the Minister of Petroleum "to explain the terms of this bond swap transaction"; to "reject categorically" a

pledge of CITGO Holding stock; to call for an investigation of the transaction; and to urge PDVSA to develop a plan to refinance its debt. JA-111; SPA-11-12; JA-2566¶63.[2]

As discussed further below, the PDVSA Parties contend in this litigation that the 2020 Notes and the Pledge are invalid or unenforceable under Article 150 of the Venezuelan Constitution. That is so, they assert, because the Governing Documents are "contracts of national public interest" that, under that provision, must be expressly approved by the country's legislature, the National Assembly.

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[2] The operative provisions of the September 2016 Resolution read as follows:

> **First**. To summon citizen Eulogio del Pino, President of Petróleos de Venezuela SA, to appear before this National Assembly to explain the terms of this bond swap transaction, based on offering the majority of Citgo Holding Inc. shares as collateral.
> **Second**. To reject categorically that, within the swap transaction, 50.1% of the shares comprising the capital stock of Citgo Holding Inc. are offered as a guarantee with priority, or that a guarantee is constituted over any other property of the Nation.
> **Third**. To urge the Public Ministry to open an investigation to determine if the current transaction protects the National Property, in accordance with articles 187, section 9, 302 and 303 of the Constitution of the Bolivarian Republic of Venezuela.
> **Fourth**. To urge Petróleos de Venezuela S.A. to present the Country with a plan for the refinancing of its financial commitments and a recovery plan for the oil industry over the short- and medium-term.
>
> JA-111.

Neither the September 2016 Resolution nor any other statement by the National Assembly at the time of the Exchange Offer made any of these claims. The September 2016 Resolution did not assert that the 2020 Notes or the Pledge were invalid, illegal, or unenforceable, or that they were "contracts of national interest" requiring prior legislative approval. SPA-35. That is apparent not only from the face of the Resolution, but from an acknowledgement by the Special Attorney General of the current Venezuelan government shortly before this litigation was commenced that the Resolution "did not declare the unlawfulness of that Bond." JA-4818.47¶160. Senior opposition deputies likewise stated publicly at the time of the Exchange Offer that it did not require legislative approval. CA-1619-20¶¶286-87; JA-2726; CA-306-07; CA-981-82; CA-1446. As the district court noted, the September 2016 Resolution thus contrasts with other National Assembly resolutions, before and after the Exchange Offer, which declared that other, unrelated contracts not involving PDVSA were "illegal," a "nullity," and in violation of Article 150. JA-4960-62¶¶300-05.

In October 2019—three years after the Exchange Offer closed, and two weeks before this lawsuit was filed—the National Assembly adopted a new resolution. SPA-13; JA-4772¶69. That resolution purported to "reiterate" that "the 2020 Bond indenture violated Article 150 of the Constitution." SPA-13; JA-1823-26; JA-4772-74¶¶69-71. As the district court noted, however, the September 2016 Resolution said no such thing.

3. Venezuelan Law at the Time of the Exchange Offer Did Not Require PDVSA to Obtain National Assembly Approval, and the PDVSA Parties' Unbroken Practice Is Consistent with That Understanding.

The district court did not reach the merits of the PDVSA Parties' argument that the 2020 Notes and the Pledge required National Assembly Approval under Article 150 of the Venezuelan Constitution, and this Court need not and should not do so. But the record shows that Venezuelan law at the time of the Exchange Offer imposed no such requirement. It shows instead that Article 150, as interpreted at the time of the Exchange Offer, did not require PDVSA to seek or obtain prior legislative approval for the Exchange Offer. That is because only transactions to which the Republic itself is a party—and not those involving separate legal entities such as PDVSA—are "contracts of national public interest" governed by that provision.

Venezuela's highest constitutional court has so held. More than a decade before the Exchange Offer, the Constitutional Chamber of Venezuela's Supreme Tribunal of Justice, in a case called *Andrés Velásquez*, held that the term "Contracts of National Interest" in Article 150 applies only to contracts to which the Republic itself (and not state-owned corporations such as PDVSA) is a party. *See* JA-3636-37¶15; JA-3664-71¶¶87-88, 94, 99-101, 104. Decisions of the Constitutional Chamber interpreting the Venezuelan Constitution "are the highest and most final

statements of Venezuelan law." *DRFP L.L.C.* v. *República Bolivariana de Venezuela*, 706 F. App'x 269, 277 (6th Cir. 2017); JA-2830 art. 335.

The PDVSA Parties' own Venezuelan legal expert in this case—whom they characterized as "the world's foremost scholar of Venezuelan public law," Dist. Ct. ECF 117, at 3, 33, 38—repeatedly expressed agreement. In multiple publications issued over more than a decade before and after the Exchange Offer, the expert opined that the Constitutional Chamber "established a binding interpretation and reduced the category of 'contracts of public interest' (art. 150 C.) to those signed or agreed to by the Republic, . . . excluding from such classification public contracts signed by . . . national public companies, such as PDVSA." JA-3726¶29; Dist. Ct. ECF 128-14. *See also* JA-3728¶33 (statement by PDVSA Parties' expert in 2017 article that under the Constitutional Chamber's decisions, "public contracts signed by . . . state companies, like [PDVSA] and its subsidiary companies, may be freely entered into . . . without it being necessary to obtain authorization from the National Assembly"). When challenged on the contrary opinion he offered in support of the PDVSA Parties in this case, he claimed that these statements were just "inadvertent." Dist. Ct. ECF 165, at 25-26. As the district court pointed out, the "idea that somehow it's some scrivener's error that just keeps showing up in his scholarship . . . causes me concern that I would give any credence to anything that he's saying if he can't proofread his own articles." JA-5347.

PDVSA's Venezuelan counsel reached the same conclusion. In a legal memorandum to PDVSA before the Exchange Offer closed, its counsel, the Caracas office of Hogan Lovells, opined that "[c]onclusively, the Exchange Offer, including the Pledge, is not subject to the approval of the National Assembly as provided by article 150 of the Venezuelan Constitution." JA-4975¶335; JA-4984-87¶¶349-55. Hogan Lovells further advised PDVSA that, under Venezuela's public finance statute, it was "fully enabled to enter operations of public credit without the approval of the National Legislative or Executive branches of government." JA-4984¶351.

The decades-long conduct of PDVSA and its subsidiaries is consistent with this view. Since PDVSA's founding in 1976, it and its subsidiaries have issued billions of dollars in debt in dozens of transactions in the United States and elsewhere, and they have done so without ever seeking National Assembly approval. Indeed, as here, they have issued debt secured by equity in CITGO Holding and CITGO Petroleum, and by CITGO Petroleum's principal assets—the same assets effectively at issue in this litigation. JA-4998¶381; JA-5029-31¶¶443, 449; JA-5035¶458; JA-5038-42¶¶468-69, 471-72, 475; JA-5048¶497. PDVSA has likewise entered into major purchase and sale transactions without obtaining approval from the National Assembly. CA-793-94; JA-5049-51¶¶500, 504. Until this case, none of those transactions has ever been challenged in any court on the ground that the lack of National Assembly approval made them illegal or unenforceable. CA-1666¶380; JA-4998¶380.

PDVSA and its subsidiaries have continued that practice since the Exchange Offer, and even while this litigation was pending. In August 2019, CITGO Holding issued $1.37 billion in notes, secured by its entire ownership interest in CITGO Petroleum. JA-5042¶475. Again, in June 2020, CITGO Petroleum announced the issuance of $1.125 billion in notes secured by all of its principal assets. JA-5048-49¶¶497-98. No National Assembly approval was sought for either transaction, and neither the PDVSA Parties nor the National Assembly has suggested that they are unlawful or unenforceable.[3] JA-5043¶477; JA-5049¶499.

[3] The Republic's amicus brief argues that the Notes issuance violated Venezuelan law, but ignores the facts described in text that are wholly inconsistent with that position. ECF 146, at 15-18. The Republic asserts that Venezuela's Supreme Tribunal has "recognized that contracts of state-owned enterprises can be national public interest contracts." *Id.* at 5. But the principal case they cite, *EDELCA*, involved a contract entered in execution of an international agreement between the Republic and Brazil, which created a direct liability for the Republic. JA-3738-40§§63-67. By contrast, the Notes issuance here created no liability for the Republic. The other case cited by the Republic, *DIANCA*, is not a decision by the Constitutional Chamber and did not involve a challenge to the enforceability of a contract under Article 150. JA-3671-72§104 n.144. Contrary to the Republic's position here, the PDVSA Parties' expert repeatedly stated that contracts involving only PDVSA did not require National Assembly approval even *after* these decisions were issued. JA-3724-28§§25-31, 33.

4. The Parties Reasonably Believed That the Transaction Complied with Venezuelan Law.

The evidence shows that the PDVSA Parties, PDVSA's professional advisors, and the investing community believed that National Assembly approval was not required. This conclusion is supported by, among other evidence, the undisputed testimony by representatives of the Directing Holders, CA-1643-44¶¶334-37; JA-4976¶¶334-37; contemporaneous documents, CA-1656-65¶¶357-75; JA-4992-97¶¶366-68, 370-75; [redacted], CA-1565-66¶140; the contemporaneous opinions of Hogan Lovells, *see* above, pp. 9-10, 15; and the legal and academic materials on Venezuelan law and PDVSA's long borrowing history just discussed. Nor is there evidence that the parties to the Exchange Offer believed that it violated Venezuelan law, as shown by the foregoing evidence and by the uncontested statements by the Trustee and the Collateral Agent, JA-4974-75¶¶332-33; JA-3863¶¶11-12; JA-3580¶8. Had the PDVSA Parties and their professional advisors believed that the Notes or the Pledge were legally defective, their failure to disclose that defect to investors would have constituted flagrant securities fraud.

Market analysts agreed as well. One leading Venezuelan analyst advised investors (including two of the Directing Holders) that the September 2016 Resolution "does not state that the operation is illegal nor does it criticize it on legal grounds," and concluded that "there is little doubt as to the legality of a PDVSA bond issuance or debt refinancing without

National Assembly approval under current legislation." JA-4955¶295; Dist. Ct. ECF 126-44¶81. The vast majority of other commentary about the Exchange Offer mentioned no risk of illegality or invalidity. Dist. Ct. ECF 126-44¶¶29-40, 73-81. A few analysts mentioned that, in the event of a change of government, the new government might repudiate the 2020 Notes. But they offered no legal analysis for any claim that the bond issuance was unlawful. *Id.* ¶¶73-81.

The PDVSA Parties' contention that, by participating in the transaction, investors "bet against the Assembly's political success vis-à-vis the Maduro regime," PB44, is contrary to the undisputed evidence. The investing community broadly supported a democratic transition in Venezuela, in the belief that a new government with wide popular support would increase political stability and help to restore Venezuela's economic fortunes. *See, e.g.*, CA-1010-13; CA-1025; Dist. Ct. ECF 120-1¶37.

C. Political Developments in Venezuela Since the Exchange Offer.

Events years after the Exchange Offer led the National Assembly in January 2019 to designate Juan Guaidó as the Interim President of Venezuela, and led the United States to recognize the Guaidó administration as the legitimate government of the Republic. These events included a Presidential election in May 2018 that was widely viewed as fraudulent and the expiration in January 2019 of Maduro's presidential term. JA-49-50, 55¶¶3, 23; JA-2578¶116.

The PDVSA Parties allege that the Guaidó administration assumed office in January 2019 in accordance with the Venezuelan Constitution. The PDVSA Parties' Complaint alleges that, following the 2018 election, "Venezuela's democratically elected National Assembly declared the presidency vacant and, in accordance with the Venezuelan Constitution, . . . Juan Guaidó, became the country's interim president." JA-49-50¶3. Likewise, in recognizing the Guaidó administration on January 23, 2019, the United States cited the illegitimacy of the 2018 election and the National Assembly's declaration that the Presidency had become vacant. SPA-12-13; JA-4656; JA-4818. The United States has never declared that the Maduro administration was illegitimate in 2016.

In 2019, the Guaidó administration appointed ad hoc Boards of PDVSA and its subsidiaries. JA-59-60¶¶35, 38. The Maduro regime retains de facto control of the Venezuelan state and PDVSA's operations in Venezuela. JA-5053¶510; JA-5057¶¶517-18; JA-5069¶553. But U.S. courts have recognized the Guaidó-appointed ad hoc Boards as the legitimate bodies governing PDVSA's assets and operations in the United States, including CITGO Holding and CITGO Petroleum. JA-60¶¶36-38. Accordingly, those ad hoc Boards, under the supervision of the Guaidó administration, manage the PDVSA Parties in this litigation. JA-4297¶¶18-19; JA-4854¶18.

The United States has imposed broad sanctions on the Republic and its state-owned businesses, including PDVSA. Those sanctions, implemented by the U.S. Office of Foreign Assets Control ("OFAC"), include

restrictions relating to the enforcement of the 2020 Notes by the Trustee, the Collateral Agent, and beneficial owners of the Notes. JA-4922-23¶226. In July 2018, however, OFAC issued General License 5, which authorized foreclosure on the Collateral securing the 2020 Notes under the terms of the Governing Documents. *Id.* On October 24, 2019, OFAC suspended the right to foreclose on the Collateral through January 22, 2020. JA-4923-24¶¶227-29. Following additional OFAC directives, the right to foreclose is currently suspended until July 21, 2021. *See* OFAC, General License No. 5F (Dec. 23, 2020), https://tinyurl.com/bc6ft6jr.

D. PDVSA, with the Approval of the National Assembly, Made Repeated Payments of Principal and Interest on the Notes Before Defaulting.

Between October 2016 and April 2019, PDVSA made all scheduled payments of principal and interest on the 2020 Notes. SPA-12; JA-4329-30¶¶211-17. The National Assembly did not criticize these payments or attempt to block them. JA-4329-30¶¶211-17. The April 2019 interest payment was authorized by the Guaidó-appointed ad hoc Board and by the National Assembly. JA-4918-20¶¶216-19. The PDVSA Parties assert that they made the April 2019 payment "under protest." JA-4918¶216. But the directors did not declare the Notes invalid or unenforceable. CA-477¶¶220-24; JA-2266.

On October 27, 2019, PDVSA failed to make a payment due under the 2020 Notes of approximately $913 million. SPA-14; JA-4939¶¶259-61. All unpaid principal and interest is now due and owing. JA-4942¶271.

E. Proceedings in the District Court.

The PDVSA Parties commenced this action in October 2019. JA-48. The Complaint seeks a declaratory judgment that the 2020 Notes, Indenture, and Pledge Agreement are unenforceable under Article 150 of the Venezuelan Constitution. JA-75¶83; JA-77¶94; JA-4940¶264. The Trustee and the Collateral Agent asserted counterclaims for a declaratory judgment that the Notes and the Governing Documents are legal and enforceable; a declaratory judgment that Events of Default (as defined in the Indenture, JA-736) have occurred and that the Collateral Agent is entitled to sell the Collateral, subject to OFAC approval; and unpaid principal, interest, and fees and expenses. SPA-15; JA-124; JA-143-44. They also asserted counterclaims for unjust enrichment and quantum meruit. JA-168-73. Following fact and expert discovery, the Trustee and the Collateral Agent moved for summary judgment on their claims for breach of contract, and the PDVSA Parties moved for summary judgment on all of their claims. SPA-15.

The United States and the Republic submitted their views to the district court. In a Statement of Interest submitted at the court's request, the United States stated that "the law and policy of the United States generally favors certainty in lawful contractual relations and an orderly process for restructuring sovereign debts for which creditors can

legitimately expect payment," JA-5227, but it concluded that it would be premature to opine on the application of the act of state doctrine, JA-5222-35; JA-5249-67. The United States took no position on the PDVSA Parties' contention that the Notes and the Pledge were invalid under Venezuelan law. JA-5227. The Republic's submission argued that the Pledge was a contract of national public interest under the Venezuelan Constitution, and that the 2020 Notes were thus void *ab initio* because the National Assembly had not approved them. JA-902-08. The Republic also argued that the October 2019 Resolution "reiterated the September 2016 Resolution" and that it declared the Governing Documents void "based on the September 2016 Resolution." JA-907; JA-911.

The district court granted summary judgment to the Trustee and the Collateral Agent. SPA-67-68.

The district court rejected the PDVSA Parties' argument that it should hold the Notes unenforceable under the act of state doctrine. Following *Allied Bank* and its progeny, the district court held that the act of state doctrine did not apply to efforts by a foreign sovereign to expropriate assets outside its own territory, and that the situs of the Notes was the United States. SPA-27-43. The court rejected the PDVSA Parties' effort to distinguish *Allied Bank* on the ground that the September 2016 Resolution "prospectively" rendered the Notes invalid. The court concluded that the Resolution did not purport to invalidate the Exchange, SPA-33-41, and that, in any event, *Allied Bank* does not permit the expropriation of debts in the

United States, whether retrospectively or "prospectively." SPA-42-43. The court also declined the PDVSA Parties' invitation to hold, under the so-called "permissive" act of state doctrine, that the Notes were unenforceable because so holding would allegedly be consistent with U.S. law and policy. The court held that refusing to enforce the Notes would be contrary to the interests of the United States in enforcing debt obligations located here. SPA-44-47.

The court concluded that New York law, not the law of Venezuela, governs this action. SPA-47-65. The court reasoned that, under New York's "grouping of contacts" approach to choice of law in contract disputes, New York had the "most substantial relationship to the transaction and the parties," and no other choice-of-law rule required the application of Venezuelan law. SPA-62.

The court rejected the PDVSA Parties' arguments that, under New York law, the 2020 Notes should be denied enforcement on grounds of alleged invalidity, lack of actual authority, and illegality. SPA-47-65. *First*, the court rejected the PDVSA Parties' argument that the transaction was "invalid" under N.Y. U.C.C. § 8-110. It concluded that section 8-110 applies only to matters of internal corporate authorization, which was not at issue here. SPA-49-55. *Second*, the court rejected their claim that the PDVSA Parties lacked "actual authority" to issue the Notes. It reasoned that the PDVSA Parties' Boards of Directors had actual authority to bind the corporations, and that the absence of National Assembly approval did not

create a dispute about actual authority. SPA-55-60. *Third*, the court rejected the PDVSA Parties' argument that the Notes are unenforceable on grounds of illegality. It reasoned that the Governing Documents were legal under the law of New York, where they were made and to be performed. SPA-60-65. The district court did not reach the merits of the PDVSA Parties' contention that the transaction violated the Venezuelan Constitution. SPA-65. Nor did the district court reach other arguments raised by the Trustee and the Collateral Agent, including arguments that Article 150 as construed by the PDVSA Parties violates New York public policy; that PDVSA Petróleo's guarantee is unconditional; and that the PDVSA Parties had apparent authority to issue the Notes and the Pledge and were bound by equitable estoppel. *See* JA-138-41¶¶96-106; JA-168-173¶¶221-240, 248-53; Dist. Ct. ECF 99, at 36-44; Dist. Ct. ECF 160, at 27-45; Dist. Ct. ECF 182, at 12-20.

On December 1, 2020, the district court entered partial final judgment under Rule 54(b) dismissing the PDVSA Parties' claims with prejudice and granted the Trustee and the Collateral Agent $1.9 billion in unpaid principal and interest and declaratory relief. Dist. Ct. ECF 229, at 1-2. The district court also determined that PDVSA and PDVSA Petróleo are liable for the Trustee and the Collateral Agent's fees, disbursements, and expenses, including reasonable attorneys' fees, in an amount to be determined after the conclusion of this appeal. SPA-68; Dist. Ct. ECF 231, at 6.

Summary of Argument

I. The district court correctly held that the act of state doctrine is inapplicable, and that, accordingly, it was not obligated to defer to any alleged act by the Republic purporting to invalidate the 2020 Notes or the Pledge.

A. This Court's decision in *Allied Bank International* v. *Banco Credito Agricola de Cartago*, 757 F.2d 516 (2d Cir. 1985), establishes that the act of state doctrine is inapplicable to an attempt by a foreign sovereign to invalidate a debt, such as the 2020 Notes, with its situs in the United States.

B. The PDVSA Parties' effort to distinguish *Allied Bank* on the ground that it does not apply to a foreign state's "prospective" nullification of foreign corporate debt sited in the United States is contrary to the plain language of the September 2016 Resolution, which did not purport to nullify the Notes or the Pledge. It also finds no support in the governing law. The district court properly did not defer to the views about the Resolution in the Republic's submission, which contradicted the plain language of the Resolution and the prior determination by the Republic's Special Attorney General.

C. The district court correctly declined to apply the so-called "permissive" act of state doctrine, because no such doctrine has been recognized by U.S. courts, and because applying that purported doctrine to

invalidate the Notes would undermine the United States' interests in enforcing debts according to their terms.

D. This Court can affirm on at least two alternative grounds. *First*, the act of state doctrine does not preclude a district court from declining to apply foreign law under ordinary principles of choice of law. *Second*, the act of state doctrine does not apply because the United States' recognition of the Guaidó government in 2019 did not retroactively render the National Assembly the "sovereign" at the time of the Exchange Offer.

II. The PDVSA Parties have not shown that an alleged violation of the Venezuelan Constitution would render the Notes or the Pledge unenforceable under New York choice-of-law principles.

A. The district court correctly held that a corporation's failure to obtain government approval to issue debt is not a defect of "validity" under N.Y. U.C.C. § 8-110 for which the issuer's local law would govern. Rather, "validity" requires only that the issuance be "duly authorized." The PDVSA Parties approved the Exchange transaction "in accordance with their respective certificates of incorporation and by-laws." JA-4875¶74.

B. The district court correctly held that the PDVSA Parties' "actual authority is not at issue in this action." SPA-59. The PDVSA Parties' Boards of Directors possessed authority to bind the corporations, and there is no claim that PDVSA acted as an agent of the National Assembly in issuing the Notes.

C. The district court correctly rejected the defense of illegality. The court ruled, consistent with New York precedent, that New York would not look to the law of Venezuela to determine the legality of contracts, such as the Governing Documents, that are made and to be performed in New York.

The choice-of-law provisions in the Governing Documents provide additional support for rejecting the PDVSA Parties' actual authority and illegality claims. Those provisions and N.Y. Gen. Oblig. Law § 5-1401 required the district court to apply only New York law and the law of no other jurisdiction, as the New York Court of Appeals has squarely held.

Argument

I. The District Court Correctly Held That the Act of State Doctrine Does Not Apply.

The district court correctly held that, under *Allied Bank* and its progeny, the act of state doctrine does not apply because the 2020 Notes are property located in the United States that Venezuela may not expropriate. The district court correctly rejected the PDVSA Parties' attempt to distinguish *Allied Bank* on the grounds that it purportedly does not apply to a foreign state's "prospective" nullification of foreign corporate debt with its situs in the United States, PB41-42, and that the September 2016 Resolution was such a "prospective" nullification. PB22-38. This Court can also affirm the district court's holding on the grounds that (i) the National Assembly was not a sovereign for act of state purposes; and (ii) enforcement of the 2020

Notes does not constitute an "invalidation" of the National Assembly's resolutions.

A. *Allied Bank* Precludes Application of the Act of State Doctrine.

Under the act of state doctrine, U.S. courts generally "will not examine the validity of a taking of property within its own territory by a foreign sovereign government." *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 428 (1964). But "[i]t has always been clear that the 'act of state doctrine does not . . . bar inquiry by the court into extraterritorial takings.'" *Allied Bank*, 757 F.2d at 520 (quoting *Banco Nacional de Cuba* v. *Chem. Bank of N.Y. Trust Co.*, 658 F.2d 903, 908 (2d Cir. 1981)). The applicability of the doctrine thus "depends on the situs of the property at the time of the purported taking." *Id.* at 521.

Under *Allied Bank*, when debt obligations are payable in the United States, or the debtor has consented to jurisdiction in U.S. courts, the act of state doctrine does not apply because the United States is the situs of the debt. *Id.* In *Allied Bank*, Costa Rican government decrees purported to prohibit state-owned banks from paying debts to foreign creditors in foreign currency. *Id.* at 518-19. As a result, the banks defaulted on U.S.-dollar-denominated notes, payable in New York, and subject to the jurisdiction of courts in New York. *Id.* The banks argued that the act of state doctrine barred claims on the notes by U.S.-based noteholders, on the ground that

enforcing the notes would impermissibly invalidate the Costa Rican government decrees. *Id.*

The Court held that the act of state doctrine did not require it to give effect to the Costa Rican decrees. It reasoned that, because the doctrine applies only to the taking of property "within the foreign sovereign's territory," *id.* at 521, the Costa Rican decrees should be honored "only if, when [they] were promulgated, the situs of the debts was in Costa Rica." *Id.* The Court concluded that the situs of the notes at issue was the United States, not Costa Rica, because the banks had consented to the jurisdiction of courts in New York and had agreed to pay the debt in U.S. dollars in New York. *Id.* The Court also reasoned that, because the notes were payable and enforceable in the United States, no taking could "come to complete fruition within [the Costa Rica government's] dominion." *Id.* (quoting *Tabacalera Severiano Jorge, S. A.* v. *Standard Cigar Co.*, 392 F.2d 706, 715-16 (5th Cir. 1968)). In the Court's view, enforcing the decrees would be "contrary to the interests of the United States, a major source of private international credit," and to "principles of contract law" favoring enforcement of contracts in accordance with their terms. *Id.* at 521-22.

This Court has consistently reached the same conclusion in the 36 years since *Allied Bank* was decided. In *Drexel Burnham Lambert Group Inc.* v. *Galadari*, 777 F.2d 877 (2d Cir. 1985), the Court held that the act of state doctrine did not require giving effect to an order from the government of the United Arab Emirates purporting to freeze payment on a

note issued by a UAE citizen and to claim the collateral supporting the note. Because the notes were "payable in United States dollars at [the creditor's] London office," the Court held that the act of state doctrine did not apply, as the situs of the debt was not the UAE. *Id.* at 881. Likewise, in *Bandes* v. *Harlow & Jones, Inc.*, 852 F.2d 661 (2d Cir. 1988), the Court held that the act of state doctrine did not require the Court to honor a claim by the government of Nicaragua to funds owed by a company in Connecticut, based upon the nationalization of the creditor's business. The Court held that the doctrine did not apply because the situs of the funds was in the United States, and the claim to the funds was therefore "beyond [Nicaragua's] enforcement capacity." *Id.* at 666-67.

Because the 2020 Notes manifestly have their situs in New York, *Allied Bank* and its progeny are dispositive here. As the district court reasoned:

> Much like in *Allied Bank*, the principal and interest payments on the 2020 Notes are obligated to be paid in U.S. dollars in New York City. Even more significantly, the collateral is sitting in a vault in New York City, well outside Venezuela's reach. It is therefore difficult to argue that Venezuela's attempted taking is an "accomplished fact" or has come to "complete fruition." To the contrary, Plaintiffs have brought this action *because of* Venezuela's inability to complete this expropriation within its borders.

SPA-30 (quoting *Allied Bank*, 757 F.2d at 521; *Tabacalera*, 392 F.2d at 715).

B. The PDVSA Parties' Efforts to Avoid *Allied Bank* Are Unavailing.

The district court correctly rejected the PDVSA Parties' efforts to distinguish *Allied Bank* on the ground that this case allegedly involves a "prospective" nullification of the Notes and the Pledge. As the district court held, *Allied Bank* applies to "prospective" as well as "retrospective" efforts by foreign sovereigns to expropriate debts located in the United States, and, in any event, there was no "prospective" nullification here.

1. The Act of State Doctrine Does Not Require U.S. Courts to Defer to Alleged "Prospective" Nullifications of a Debt Sited in the United States.

The PDVSA Parties attempt to avoid *Allied Bank* on the ground that this case purportedly involves a "prospective" nullification of the 2020 Notes. But nothing in *Allied Bank*, or any other case applying the act of state doctrine, turns on whether a purported expropriation of property in the United States is "prospective" or "retrospective." As discussed above, pp. 28-30, the doctrine applies to a foreign sovereign's exercise of jurisdiction over persons or things within its territory. Thus, the act precludes U.S. courts from questioning actions by a foreign sovereign to expropriate tangible property within that sovereign's jurisdiction, even if the property is later moved here. *See, e.g.*, *Sabbatino*, 376 U.S. at 403-04 (Cuban confiscation of a boatload of sugar docked in Cuba); *Oetjen* v. *Cent. Leather Co.*, 246 U.S. 297, 300-01 (1918) (Mexican seizure of leather hides in Mexico). None of the act of state cases the PDVSA Parties cite suggest that a foreign

sovereign may "prospectively" expropriate property, such as the 2020 Notes, located in the United States.

The PDVSA Parties' position, in effect, is that Venezuelan law prohibited PDVSA from issuing the 2020 Notes in New York, and that the act of state doctrine requires the U.S. courts to apply Venezuelan law to this dispute. But nothing in the doctrine requires U.S. courts to defer to efforts by foreign sovereigns to extend their law to transactions by their nationals in the United States. As this Court has emphasized, "the foreign sovereign is acting beyond *its* enforcement capacity when it involves itself within our nation's jurisdiction." *Bandes*, 852 F.2d at 667 (emphasis in original). The PDVSA Parties' assertion that Venezuelan law governs the Exchange transaction raises, at most, ordinary choice-of-law issues. As discussed in Point II below, the PDVSA Parties' position is inconsistent with established New York choice-of-law principles. The act of state doctrine does not override those principles or permit Venezuela, as a matter of federal law, to extend its jurisdiction to contracts made and to be performed in New York. *See Sabbatino* 376 U.S. at 495 (doctrine applies to "the validity of *an otherwise applicable* rule of law") (emphasis added); *Allied Bank*, 757 F.2d at 520 (same).

This Court's decision in *Federal Treasury Enterprise Sojuzplodoimport* v. *Spirits International B.V.*, 809 F.3d 737 (2d Cir. 2016) ("*FTE*"), on which the PDVSA Parties rely, PB41-42, has no bearing here. That case presented the narrow question whether the transfer by the

Russian government of purported trademark rights between two Russian government branches or entities should be ruled invalid on the ground that the transfer violated Russian law. *FTE*, 809 F.3d at 740-41. The Court held that invalidating the transfer was precluded by the comity and act of state doctrines. *Id.* at 743-45. The decision makes no mention of the *Allied Bank* "situs" test, and the case did not involve either prospective or retrospective invalidation or expropriation of debt or other property in the United States. On the contrary, the Court emphasized that concerns about extraterritorial takings "are not present here because neither the Decree [directing the transfer] nor the resulting Assignment impairs anyone's property rights or affects the jurisdiction of the United States courts to decide the competing claims to ownership of the Marks." *Id.* at 744; *see also id.* (noting that the validity of the assignment "determines only FTE's statutory standing to assert such claims as the Russian Federation may have"). *FTE* does not hold that a government may "prospectively" invalidate debt created or payable in the United States, or that U.S. courts are obligated to apply foreign law to the rights of third parties under contracts made and to be performed in the United States.

The other cases cited by the PDVSA Parties, PB39-42, also involved actions by foreign sovereigns entirely within their own jurisdictions. *See Sea Breeze Salt, Inc.* v. *Mitsubishi Corp.*, 899 F.3d 1064, 1071 (9th Cir. 2018) (contract requiring delivery of salt in Mexico); *Tchacosh Co.* v. *Rockwell Int'l Corp.*, 766 F.2d 1333, 1338 (9th Cir. 1985) (contract to be

performed in Iran); *French* v. *Banco Nacional de Cuba*, 23 N.Y.2d 46, 59 (1968) (contract made and performed in Cuba and governed by Cuban law); *United States ex rel. Von Heymann* v. *Watkins*, 159 F.2d 650, 652 (2d Cir. 1947) (detention of individual in Costa Rica). None of those cases holds that a U.S. court must apply foreign law to property with its situs in the United States.

2. The Venezuelan National Assembly Did Not "Prospectively" Invalidate the 2020 Notes.

The district court correctly determined that neither the September 2016 Resolution nor any other official act of the Republic that pre-dated the issuance of the 2020 Notes purported to invalidate the 2020 Notes or the Pledge, and correctly refused to defer to the interpretation of the Resolution proffered by the Republic.

(a) The September 2016 Resolution Did Not Declare the 2020 Notes Invalid.

The district court correctly concluded that the National Assembly's September 2016 Resolution did not purport to invalidate the 2020 Notes. As noted, the Resolution does not declare that the 2020 Notes or the Pledge were invalid, illegal, void *ab initio*, or unenforceable, or that any part of the Exchange Offer was a "contract of national public interest" requiring National Assembly approval. *See* above, pp. 10-12. A purported statement by one National Assembly Deputy characterizing the 2020 Notes and the Pledge as legally invalid, PB29 & n.8, cannot override the plain language of

the Resolution, SPA-38, particularly where other National Assembly deputies expressed the opposite view, *see* above, p. 12.

The single reference in the Resolution to Article 187.9, which provides that authorizing certain contracts of public interest is a function of the National Assembly, does not require a different result. PB24-26. The Resolution invokes Article 187.9 not to declare the Notes or the Pledge invalid, but solely to declare its "power to obtain information" and to "urge the Public Ministry to open an investigation." JA-2566-67¶¶64-65; SPA-36.

The purported "context" of the National Assembly's September 2016 Resolution does not, as the PDVSA Parties suggest, change its plain meaning. PB27-31. The May 2016 Resolution, upon which the PDVSA Parties rely, PB29, makes no mention of the Exchange Offer or PDVSA, and does not suggest that contracts involving state-owned entities such as PDVSA are "contracts of national public interest" requiring National Assembly approval. JA-3514-16. On the contrary, the resolution applies the term "contracts of national public interest" only to contracts entered into by the "National Executive"—i.e., the Republic itself. SPA-33-35; *see also* JA-2592¶22 (PDVSA not part of National Executive).

The PDVSA Parties cite other resolutions of the National Assembly approving contracts involving PDVSA. PB29; *see* JA-903¶4 n.3. But those resolutions only highlight that the September 2016 Resolution does not declare the 2020 Notes or the Pledge unenforceable under Article 150 or otherwise. Those other resolutions do not show that the National

Assembly had authority to disapprove debt issuances or pledges of collateral by PDVSA. They involved joint venture agreements affecting Venezuela's hydrocarbon reservoirs, which are subject to National Assembly approval under a Venezuelan statute, the Organic Hydrocarbons Law. JA-4705-06¶14. That law does not apply here. In contrast, the Venezuelan public finance law expressly *excludes* debt issuances by PDVSA from any otherwise applicable requirement for legislative approval. JA-3686-87§157.

The PDVSA Parties argue that the National Assembly's *failure* to approve the Exchange Offer in 2016 qualifies as an act of state to which U.S. courts must defer. PB26-28. The district court correctly rejected this argument on the ground that mere inaction lacks the "formality" required to constitute an act of state. SPA-33 n.6 (citing *Kashef* v. *BNP Paribas S.A.*, 925 F.3d 53, 60 (2d Cir. 2019)). As this Court held in *Kashef*, "[t]o qualify as 'official,' an act must be imbued with some level of formality, such as authorization by the foreign sovereign through an official 'statute, decree, order, or resolution.'" 925 F.3d at 60 (quoting *Alfred Dunhill of London, Inc.* v. *Rep. of Cuba*, 425 U.S. 682, 695 (1976)). Mere inaction that is alleged to have legal consequences under the sovereign's laws does not satisfy that standard. None of the cases the PDVSA Parties cite, PB26 & n.7, hold that the act of state doctrine can rest on such mere inaction. *See Underhill* v. *Hernandez*, 168 U.S. 250, 251 (1897) (acts of detaining petitioner by refusing to grant him a passport, confining him in his house, and alleged "assaults and affronts"); *Rep. of Philippines* v. *Marcos*, 806 F.2d 344, 359 (2d Cir. 1986)

(holding that act of state doctrine did not apply to protect private acts of personal corruption by head of state); *United States* v. *Merit*, 962 F.2d 917, 921 (9th Cir. 1992) (act of extradition); *West* v. *Multibanco Comermex S.A.*, 807 F.2d 820, 828 (9th Cir. 1987) (act of implementing currency control program).

The PDVSA Parties argue that the district court's analysis presented a "false choice" because, they assert, the Venezuelan Constitution prohibits the PDVSA Parties from entering into contracts of national interest without the affirmative approval of the National Assembly. PB26-27; *see also* ECF 146, at 17 (same). But the act of state doctrine requires only that U.S. courts respect "the *official act[s]* of a foreign sovereign performed within its own territory." *W.S. Kirkpatrick & Co., Inc.* v. *Env't Tectonics Corp., Int'l*, 493 U.S. 400, 405 (1990) (emphasis added). As this Court emphasized in *Kashef*, the act of state doctrine "should not . . . be casually expanded 'into new and uncharted fields.'" *Kashef*, 925 F.3d at 58 (quoting *Kirkpatrick*, 493 U.S. at 409). The Court should reject the effort by the PDVSA Parties and the Republic to transmute the doctrine into a directive binding U.S. courts to apply foreign laws in actions arising from contracts made and to be performed in the United States.

Finally, the National Assembly's October 2019 Resolution—adopted three years after the 2020 Notes were issued and just two weeks before the PDVSA Parties commenced this action—is of no aid to the PDVSA Parties. PB10, 30-31. That resolution purports to "reiterate" the

National Assembly's alleged determination in the September 2016 Resolution that the 2020 Notes and the Pledge were issued in violation of Article 150. PB30; JA-118-21. But, as discussed above, pp. 10-12, the September 2016 Resolution said no such thing. To the extent that the October 2019 Resolution purports to constitute a new and independent act invalidating the 2020 Notes and the Pledge, it represents an effort by the Republic to expropriate assets located in the United States and should be disregarded under *Allied Bank*.

(b) The District Court Properly Did Not Defer to the Assertions About the September 2016 Resolution in the Republic's Submission.

The PDVSA Parties argue that the district court failed to give sufficient weight to the "interpretation" of the September 2016 Resolution set forth in a letter to the district court from the Guaidó administration's Ambassador to the United States. PB31; JA-902-12. They contend that *Animal Science Products Co.* v. *Hebei Welcome Pharmaceutical Co.*, 138 S. Ct. 1865 (2018), required the district court to defer to that interpretation. Under *Animal Science*, a government's stated view of "its own law" is "ordinarily entitled to substantial but not conclusive weight." *Id.* at 1875; *see* PB31-38.

First, the issue at hand—whether the Republic seeks to effect an extraterritorial taking of property under *Allied Bank*—is an issue of federal law, not the law of Venezuela. The act of state doctrine is "exclusively . . . an

aspect of federal law." *Sabbatino*, 376 U.S. at 423. "[D]eciding the situs of a debt" is likewise "a matter of federal law." *Tabacalera*, 392 F.2d at 715. Whether securities issued in the United States under contracts with U.S. counterparties and payable in the United States are enforceable is a question in the first instance of U.S. law. Any other rule would invite foreign sovereigns to effectuate extraterritorial takings simply purporting to reinterpret their laws retroactively, and then arguing (as the PDVSA Parties do here) that U.S. courts must defer to that reinterpretation as the sovereign's expressed view of its own law. Thus, the opinion of the Republic about Venezuelan law is irrelevant to the application of the act of state doctrine.

Second, even if Venezuelan law were applicable, the district court was "neither bound to adopt [Venezuela's] characterization nor required to ignore other relevant materials." *Animal Sci.*, 138 S. Ct. at 1873. The district court was required only to give "respectful consideration" and "appropriate weight" to Venezuela's views. *Id.* at 1873-74.

Here, the district court properly declined to defer to the Republic's views about the import of the September 2016 Resolution. As noted, the Resolution by its terms did not declare the Notes or the Pledge invalid or unenforceable. SPA-41; JA-4818.47. The district court also concluded that the Republic's stated views should be given limited weight because they were offered "specifically for the purposes of this litigation, and seemingly in coordination with" the PDVSA Parties. SPA-41. As the court

noted, when a foreign government offers an interpretation of its laws in a litigation context, "there may be cause for caution" in evaluating its stated views. *Id.* (quoting *Animal Sci.*, 138 S. Ct. at 1873).

In declining to adopt the Republic's stated position, the district court was in good company. Other courts, in similar circumstances, have rejected self-serving interpretations offered by foreign sovereigns about their own law. *E.g.*, *Exp.-Im. Bank of China* v. *Cent. Bank of Liberia*, 2017 WL 1378271, at *4 (S.D.N.Y. Apr. 12, 2017) (rejecting Liberian Deputy Minister of Justice's interpretation of Liberian law, in light of contrary views in a legal opinion issued by Liberian Ministry of Justice at the time of the transaction at issue), *vacated on other grounds,* 2018 WL 1871436 (Feb. 6, 2018); *Themis Capital, LLC* v. *Dem. Rep. Congo*, 881 F. Supp. 2d 508, 521 n.5 (S.D.N.Y. 2012) (rejecting interpretation provided by Democratic Republic of Congo whether actual authority existed to bind the country under DRC law); *McKesson HBOC, Inc.* v. *Islamic Rep. Iran*, 271 F.3d 1101, 1108-09 (D.C. Cir. 2001) (rejecting interpretation of Iranian corporate law submitted by the Republic of Iran), *vacated in part on other grounds,* 320 F.3d 280 (2003); *United States* v. *McNab*, 331 F.3d 1228, 1240 (11th Cir. 2003) (rejecting statements of Honduran officials regarding Honduran law).

The district court's reading of the September 2016 Resolution was shared by the Guaidó administration's then-Special Attorney General who, as noted, acknowledged that the Resolution "did not declare the unlawfulness of that Bond." JA-4818.47¶160. The PDVSA Parties contend

that the district court took the Special Attorney General's statement "out of context." PB35-37. But they do not and cannot dispute the Special Attorney General's conclusion is consistent with the Resolution's plain language. The PDVSA Parties' assertions that the National Assembly is not "bound by the Special Attorney General's interpretations of Venezuelan legal acts," and that only the Venezuelan Ambassador has "authority to convey Venezuela's binding legal position to American courts," PB36-37, are a red herring. The district court properly considered that the Republic's position was inconsistent with prior statements by the Republic's own officials. *Animal Sci.*, 138 S. Ct. at 1873-74 (holding that district court properly considered prior inconsistent statements by other officials of the same government).

C. The District Court Correctly Held That the So-Called "Permissive" Act of State Doctrine Does Not Apply.

The district court also properly declined to invalidate the Notes and the Pledge under the so-called "permissive" act of state doctrine, which assertedly allows a court to "recognize an extraterritorial taking by a foreign sovereign if such recognition would be consistent with the law and policy of the United States." SPA-44.

While dictum in *Allied Bank* suggests that the "permissive" act of state doctrine may permit a court to override ordinary choice-of-law principles and apply foreign law to debt located in the United States based upon its view of U.S. "law and policy," 757 F.2d at 522, the federal courts have never adopted that doctrine. As the highly influential amicus brief of

the United States in *Allied Bank* explained, consideration of law and policy reflects "a limiting doctrine, specifying when [foreign] law should not be applied notwithstanding other choice-of-law considerations." JA-4637. The doctrine reflects the recognized choice-of-law principle that a forum court may refuse to apply an otherwise applicable law that contravenes significant interests of the forum. JA-4633-35. The doctrine thus does not permit the Court to apply foreign law notwithstanding ordinary choice-of-law rules; instead, it precludes applying foreign law when doing so would be inconsistent with the law and policy of the United States.

As the district court noted, there are, at most, "vanishingly few examples of courts utilizing this extension to the doctrine." SPA-44 n.11. The only "possible" example the district court cited, *Hausler* v. *J.P. Morgan Chase Bank, N.A.*, 127 F. Supp. 3d 17 (S.D.N.Y. 2015), did not apply the doctrine. Instead, the court in that case treated U.S. law and policy as a limit on the appropriateness of recognizing the extraterritorial effect of a foreign government's taking of a corporation or other legal entity, completed abroad, with respect to assets owned by the entity in the United States. *Id.* at 57. The court concluded that recognizing the extraterritorial effect of a taking of a Cuban foundation by the Cuban government with respect to the foundation's assets in the United States would be consistent with U.S. law and policy because, on the unusual facts before it, such recognition would allow the U.S. plaintiffs to execute on a judgment against the Cuban

government, and no bona fide owner had appeared to dispute the appropriation. *Id.* There are no such facts at issue here.

In any event, declaring the Notes unenforceable would not be consistent with the law and policy of the United States. As the district court correctly concluded, so doing would undermine the United States' interest in "stabilizing financial markets, protecting the expectations of creditors, and maintaining New York's status as a preeminent global commercial center." SPA-47. The court also rightly expressed concern that refusing to enforce the Notes "would invite less honest foreign governments to invalidate and repudiate legitimate debts and leave innocent creditors in the lurch." *Id.*

Contrary to the PDVSA Parties' contention, the policy interests underlying *Allied Bank* do not support refusing to enforce the Notes. As in *Allied Bank*, the PDVSA Parties, with the support of the Republic, seek to disclaim debts PDVSA incurred in New York, subject to New York law and the jurisdiction of courts in New York. To refuse enforcement of facially valid debt securities would strip investors of their legal rights, undermine their legitimate expectations, and create commercial uncertainty in future lending. Those are precisely the consequences that *Allied Bank* seeks to avoid.

The PDVSA Parties' assertion that noteholders were "on notice of the interbranch conflict sparked by the Exchange Offer," PB44, does not change the inequity of the result they urge. As discussed above, pp. 17-18, investors in the notes had every reason to believe that the Notes were lawful

and enforceable. Nor did investors "flout[ ] the U.S. Government's clear policy supporting the Assembly's constitutional role." *Id.* On the contrary, at the time of the Exchange Offer, the U.S. government recognized the legitimacy of the Maduro government and expressed no doubt about the Exchange Offer. *See* above, pp. 10, 19. Even when asked to do so by the district court in this case, the United States declined to support the position taken by the PDVSA Parties. JA-5227; JA-5263-64.[4]

The PDVSA Parties also argue that the district court's application of *Allied Bank* would "transform New York into a haven for those who seek to profit from the anti-democratic actions of authoritarian regimes." PB44. Not so. The district court's ruling is based on settled

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[4] The PDVSA Parties' citation to *Federal Crop Insurance* v. *Merrill*, 332 U.S. 380 (1947), for the proposition that "U.S. law does not shield private counterparties from the risk of invalidity when contracting with a government-owned entity" is misplaced. PB45. As this Court has held, foreign government entities—in contrast to U.S. government agencies such as the one at issue in *Merrill*—can be bound to commercial contracts entered into by agents with apparent (even if not actual) authority. *See First Fid. Bank, N.A.* v. *Gov't Antigua & Barbuda–Perm. Mission*, 877 F.2d 189, 193 (2d Cir. 1989); *Jota* v. *Texaco, Inc.*, 157 F.3d 153, 163 (2d Cir. 1998) (the parties "were entitled to rely on [Ecuador's ambassador's] representations unless they were actually aware that [the ambassador] lacked such authority"); *see also Themis Capital, LLC* v. *Dem. Rep. Congo*, 35 F. Supp. 3d 457, 479 (S.D.N.Y. 2014) ("the Court finds that apparent authority can bind foreign governments whose acts are private, including entering into commercial transactions on apparent behalf of a sovereign state"), *aff'd in part, rev'd in part, and remanded*, 626 F. App'x 346 (2d Cir. 2015).

principles of law, and the PDVSA Parties cite no precedent for invalidating otherwise lawful debt on this basis. To the extent the policy interests of the United States support prohibiting trade with undemocratic governments or their state-owned corporations, the relevant interests are best weighed by the political branches rather than the courts. *Sabbatino*, 376 U.S. at 412 (executive branch action to freeze Cuban assets "exemplifies the capacity of the political branches to assure . . . that the national interest is protected").[5]

D. The Court Can Affirm on Alternative Grounds.

The Court can also affirm on at least two alternative grounds not reached by the district court. *See, e.g.*, *Holtz* v. *Rockefeller & Co., Inc.*, 258 F.3d 62, 69 (2d Cir. 2001). *First,* the act of state doctrine does not apply because enforcing the rights of the Trustee and the Collateral Agent would not "invalidate" any act by the Republic. *Second*, the September 2016 Resolution was not an act by a sovereign.

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[5] The assertion by the law professor amici that affirmance here will "embolden dictators" to privatize state assets "for their personal gain," ECF 147-2, at 22-24, is similarly misplaced. The PDVSA Parties have offered no evidence that the Exchange Offer was intended to enrich Maduro or members of his regime. The law professors' reference to "odious debt" is also inapposite. There is no basis in U.S. law for refusing to enforce a debt on that ground, as articles the law professors cite themselves acknowledge. *Id.* at 23-24 nn.37-39. In any event, the PDVSA Parties have offered no evidence that the Exchange Offer was "odious" or was anything other than an ordinary refinancing of commercial debt to avoid the threat of an impending default.

1. The Act of State Doctrine Does Not Apply Because the Trustee and the Collateral Agent Do Not Seek to "Invalidate" Any Act of the National Assembly.

The act of state doctrine does not apply—and the district court's ruling can accordingly be affirmed—for the additional reason that the district court did not purport to "invalidate" any act by the Venezuelan government, including the National Assembly resolutions. The doctrine, where applicable, precludes U.S. courts from invalidating certain acts of a foreign sovereign under the foreign sovereign's law or international law. It does not prohibit U.S. courts from determining, based on ordinary choice-of-law principles, that a foreign sovereign's law does not apply to the dispute before it. Because that is all the district court did, the act of state doctrine does not apply.

Under the act of state doctrine, a U.S. court should not "declar[e] invalid" or "examine the validity" of the official act of a foreign sovereign. *Sabbatino*, 376 U.S. at 428, 432. To "invalidate" an official act means to declare that it "violates customary international law," *id.*, or the foreign state's own law, *FTE*, 809 F.3d at 742-43. *See also, e.g.*, *Royal Wulff Ventures LLC* v. *Primero Mining Corp.*, 938 F.3d 1085, 1095 n.2 (9th Cir. 2019) ("[T]he act of state doctrine applies where a court must decide the legality of a foreign sovereign's actions under that sovereign's laws.").

Here, enforcing the rights of the Trustee and the Collateral Agent under the Governing Documents does not require finding that the National Assembly violated international or Venezuelan law. The district

court held, applying ordinary choice-of-law principles, that Venezuelan law did not apply to the enforceability of the Governing Documents. That decision does not violate the act of state doctrine, which is concerned only with "the validity of an otherwise applicable rule of law." *Sabbatino*, 376 U.S. at 438; *Allied Bank*, 757 F.2d at 520 (same). Contrary to the PDVSA Parties' assertion, a U.S. court does not "invalidate" a foreign official act whenever it "den[ies] legal effect" to the act. PB21-22. All of the cases cited by the PDVSA Parties involved a claim or defense that a foreign official act violated international law[6] or the foreign sovereign's law.[7] The district court's ruling

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[6] *Sabbatino*, 376 U.S. at 433 (refusing to rule on defendants' claim that Cuba's expropriation of sugar violated international law); *Oetjen*, 246 U.S. at 302-04 (rejecting plaintiff's argument that the levy of the contribution by the Mexican commanding general violated international law); *First Nat'l City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759, 775 (1972) (same); *Ricaud* v. *Am. Metal Co.*, 246 U.S. 304, 310 (1918) (same); *Underhill*, 168 U.S. at 251 (same); *Kashef*, 925 F.3d at 60-62 (same); *West*, 807 F.2d at 828-29 (same); *French*, 23 N.Y.2d at 54 (same).

[7] *Riggs Nat'l Corp. & Subsids.* v. *Comm'r of Internal Revenue Serv.*, 163 F.3d 1363, 1367-69 (D.C. Cir. 1999) (rejecting Commissioner's challenge to the legal validity of the Brazilian Minister of Finance's tax classification under Brazilian law); *FTE*, 809 F.3d at 743 (rejecting defendants' argument that an assignment of rights by the Russian Federation violated Russian law); *Konowaloff* v. *Metro. Museum of Art*, 702 F.3d 140, 146-47 (2d Cir. 2012) (rejecting plaintiff's claim that the acquisition of a painting by the Russian government violated Russian law); *Kashef*, 925 F.3d at 60 (Sudanese law); *Kirkpatrick*, 493 U.S. at 402 (Nigerian law); *United States* v. *Belmont*, 301 U.S. 324, 326-27 (1937) (Soviet law); *Sea Breeze Salt*, 899 F.3d at 1070-71 (Mexican law); *Merit*, 962 F.2d at 921 (South African law); *Galu* v. *Swissair*, 873 F.2d 650, 653-54 (2d Cir. 1989) (Swiss

that New York law governs the Governing Documents does not implicate or violate the act of state doctrine.

2. The September 2016 Resolution Was Not the Act of a "Sovereign."

The district court concluded that the United States' recognition of the Guaidó administration rendered the National Assembly retroactively the sovereign as of 2016, and consequently that the September 2016 Resolution was an official act. The district court's judgment can be affirmed on the ground that the National Assembly was not the Venezuelan "sovereign" for act of state purposes in 2016.

Courts have treated U.S. recognition of a government as retroactive to the formation of that government in circumstances involving revolution or civil war, when the later-recognized government had claimed power at the time of the taking.[8] The Restatement of Foreign Relations Law

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law); *O.N.E. Shipping Ltd.* v. *Flota Mercante Grancolombiana, S.A.*, 830 F.2d 449, 450-53 (2d Cir. 1987) (Colombian law); *West*, 807 F.2d at 828-29 (Mexican law); *Marcos*, 806 F.2d at 348, 357-60 (Philippine law); *Allied Bank*, 757 F.2d at 521-22 (Costa Rican law); *Tchacosh Co.*, 766 F.2d at 1335 (Iranian law); *Von Heymann*, 159 F.2d at 652 (Costa Rican law).

[8] *See, e.g.*, *Oetjen*, 246 U.S. at 300-03 (retroactively applying act of state doctrine to levy by the Mexican revolutionary forces upon property of Mexican residents in a recently captured town at a time when those forces possessed "two-thirds of the area of the entire country"); *Underhill*, 168 U.S. at 250, 254 (refusing to question lawfulness of "the acts of a military commander representing the authority of the revolutionary party as a government" within a city the commander had just captured, two months

likewise provides that retroactive recognition applies to actions of a later-recognized regime "after it had proclaimed itself a government." Restatement (Second) of Foreign Relations Law § 114 cmt. b (1965). Here, no revolution or civil war led to the accession of the Guaidó administration, and the National Assembly did not claim to be the sovereign in 2016. The PDVSA Parties cite no cases, and we are aware of none, holding that recognition of a new government that attains authority in a constitutional transition renders actions by the prior government invalid. Extending retroactivity to that extent would have the absurd result of calling into question the validity of actions by any government whenever a new government is elected or otherwise comes to power through constitutional processes.

The PDVSA Parties' position would undermine important reliance interests of those who deal with recognized governments or state-owned enterprises under the aegis of those governments. As this Court recognized in enforcing, after the Spanish Civil War, a transaction between U.S. entities and the Republican government entered into at a time when the United States recognized that government, "[p]ersons who dealt with the

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before U.S. recognition of the new government); *United States* v. *Pink*, 315 U.S. 203, 223 (1942) (refusing to question the lawfulness of nationalizations ordered by Soviet regime in 1918 and 1919, which occurred after that regime seized power in the successful Russian Revolution of 1917); *Belmont*, 301 U.S. at 326, 328 (same); *Konowaloff*, 702 F.3d at 146 (same).

former . . . government [were] entitled to rely upon the finality and legality of that government's acts." *Banco de Espana* v. *Fed. Reserve Bank*, 114 F.2d 438, 440, 444 (2d Cir. 1940). Likewise, in holding that the Soviet Union was bound by actions in the United States of the previously recognized Provisional Government, the Supreme Court emphasized:

> The very purpose of the recognition by our government is that our nationals may be conclusively advised with what government they may safely carry on business transactions and who its representatives are. If those transactions, valid when entered into, were to be disregarded after the later recognition of a successor government, recognition would be but an idle ceremony, yielding none of the advantages of established diplomatic relations in enabling business transactions to proceed, and affording no protection to our own nationals in carrying them on.

Guaranty Tr. Co. v. *United States*, 304 U.S. 126, 140-41 (1938). Here, too, investors should not be penalized for engaging in transactions with the PDVSA Parties expressly approved by the government of Venezuela then recognized by the United States.

Finally, there can be no credible argument that the Court should deem the National Assembly the "sovereign" only for purposes of the exercise of its alleged powers to approve contracts of national public interest. We are aware of no cases in which a claim for such dual sovereignty was even made, much less accepted. *See* Joanne Foakes, *The Position of Heads of State and Senior Officials in International Law* 110 (2014) ("The Government [under international law] is the organ which exercises the

executive authority of the State and it is usually the Government through which the State acts on a day-to-day basis and which determines how it acts."). The principles of the act of state doctrine would be gravely undermined were this Court to undertake to adjudicate a dispute between branches of the Venezuelan government under the Venezuelan Constitution. And the ability of U.S. nationals to rely on actions by recognized foreign governments in the United States would be called into serious question if the sovereignty of those governments with regard to particular issues could later be challenged in U.S. courts under their own laws.

II. The District Court Correctly Held That the PDVSA Parties Have Failed to Raise a Genuine Dispute of Material Fact as to Any Defense Based on the Venezuelan Constitution.

As an alternative to their reliance on the act of state doctrine, the PDVSA Parties argue that Venezuelan law should apply under New York choice-of-law rules. The district court correctly ruled that New York substantive law—not the law of Venezuela—applies to this dispute under New York's choice-of-law rules. SPA-47-48.

Consequently, the district court held, the PDVSA Parties' challenges to the enforceability of the 2020 Notes under Venezuelan law fail. SPA-65. The district court determined that it need not address the enforceability of the provisions in the parties' contracts selecting New York substantive law to govern any relevant disputes. SPA-48 n.12. (If the Court concludes that Venezuelan law is relevant to this case, it should remand to the district court to assess that law in the first instance.)

The PDVSA Parties argue that: (1) the "validity" of the 2020 Notes is governed by Venezuelan law under N.Y. U.C.C. § 8-110, PB46-53; (2) under New York choice-of-law rules, the actual authority of PDVSA and PDVSA Petróleo to enter into contracts must be determined by Venezuelan law, PB53-56, 59-60; and (3) under New York choice-of-law rules, the court should have relied on Venezuelan law to hold that the contracts are illegal and hence unenforceable, PB57-58. The district court's rulings rejecting these arguments should be affirmed. The district court's rulings regarding actual authority and illegality can also be affirmed on the ground that the parties' broad agreement to apply New York law to their disputes should be enforced.

A. An Alleged Violation of Article 150 Does Not Relate to the 2020 Notes' "Validity" Under N.Y. U.C.C. Section 8-110.

The district court correctly rejected the PDVSA Parties' argument that their challenge to the enforceability of the 2020 Notes raises an issue of "validity" that must be determined under Venezuelan law pursuant to section 8-110(a) of the New York Uniform Commercial Code.[9]

The term "validity" as used in U.C.C. section 8-110(a) refers narrowly to "whether issuance of the securities had been 'duly authorized.'" SPA-52 (citing 7 William D. Hawkland, et al., Uniform Commercial Code Series § 8-110:2 (2020) ("Hawkland")). As the district court noted, "the term

[9] Section 8-110(a) provides in relevant part that "[t]he local law of the issuer's jurisdiction . . . governs . . . the validity of a security." N.Y. U.C.C. § 8-110(a).

'validity' as used in section 8-110, has a far narrower meaning than the common understanding of the word." SPA-49. The New York legislature echoed that understanding in updating U.C.C. Article 8. It explained that "validity" refers narrowly to whether a security was "issued pursuant to appropriate corporate or other similar action." N.Y. Bill Jacket, 1997 A.B. 6619, Ch. 566; *see also* SPA-51. "[O]ther similar action" in this context refers to similar authorization procedures by issuers that are not corporations, such as issuers of municipal bonds. *See also, e.g.*, Scott FitzGibbon & Donald W. Glazer, *Legal Opinions in Corporate Transactions: The Opinion on Agreements and Instruments*, 12 J. Corp. L. 657, 660-61 (1987) ("[D]uly authorized" means "that the proper corporate body has approved the agreement or instrument in the manner required by corporate law, the charter, and the by-laws.").

The Hawkland treatise, a leading authority on the U.C.C., agrees that the term refers only to "procedural or other requirements for issuance of securities," and does not encompass laws of "general applicability" that "render[ ] unenforceable a certain category of promises to pay money." Hawkland § 8-110:2. As the treatise notes, "[a]lthough it would be possible to describe the question of the enforceability of the promise to pay as an issue about the 'validity' of the issuer's obligation, this is not the type of issue to which subsection 8-110(a) refers in using the word 'validity.'" *Id.* It reasons that a broader interpretation of "validity" to encompass whether a security is "enforceable" or "legal, valid, and binding," SPA-52 (citing Hawkland § 8-

202:6), would have the undesirable "effect of carving out an enormous and ill-defined exception to the general principles of choice of law recognized by both the UCC and general law," Hawkland, § 8-110:2.

As the district court noted, if the term "validity" were construed broadly to encompass a broad range of defenses to enforceability under general contract law, "Article 8 would swallow whole any choice of law analysis involving the formation of a contract for securities. This was plainly not the intent of the drafters of the revised U.C.C. [Article 8]." SPA-50-51. The court noted that the narrow scope of section 8-110 is "further reinforced by the absence of any case law supporting [the PDVSA Parties'] broad interpretation of 'validity,'" which would, if accepted, give rise to frequent disputes under the issuer's local law about the enforceability of securities issued in the United States by non-U.S. entities. SPA-55 n.14. The almost complete absence of reported decisions construing Section 8-110 evidences the narrow scope of that provision.

This limited scope of section 8-110 is consistent with the narrow focus of Article 8 itself. As the New York Bill Jacket explains, Article 8 was intended to "govern how interests in securities are evidenced and how they are transferred in the current securities market." N.Y. Bill Jacket, 1997 A.B. 6619, Ch. 566. The official Prefatory Note to Article 8 explains that Article 8 deals only with "how interests in securities are evidenced and how they are transferred." Prefatory Note to Revised Article 8 at III.B (1994). Article 8 is "in no sense a comprehensive codification of the law governing securities

or transactions in securities." *Id.* Rather, "most of [the] relationship [between securities holders and issuers] is governed not by Article 8, but by corporation, securities, and contract law." *Id.*

Under the correct reading of section 8-110, there is no dispute about the "validity" of the 2020 Notes. The 2020 Notes were approved in accordance with the PDVSA Parties' charters and by-laws and governing corporate law. *See* JA-4875¶74; JA4880-82¶¶88-96; *see also* SPA-9 (finding the Exchange Offer had been approved by the PDVSA board of directors and by PDVSA's sole shareholder). These approvals establish that the 2020 Notes are "duly authorized" and "valid" within the meaning of section 8-110. By contrast, Article 150 of the Venezuelan Constitution is not part of Venezuelan corporate law or a provision specific to the issuance of securities. Instead, it is a principle of contract law that, according to the PDVSA Parties, renders the Notes and Pledge illegal. Article 150 therefore does not bear on the "validity" of the Notes within the narrow meaning of section 8-110.

The PDVSA Parties concede on appeal that "validity" is properly limited to "corporate or other authority to issue securities." PB50 (quoting N.Y. Bill Jacket, 1997 A.B. 6619, Ch. 566). They argue, however, that National Assembly authorization under Article 150 should be viewed as such a matter of "validity." PB49-50. But nothing in the Bill Jacket or any other authority the PDVSA Parties cite suggests that validity, in the case of a corporate issuer, includes approvals by governmental entities that are

external to a corporate issuer, such as the National Assembly, or compliance with general legal restrictions on certain contracts such as that purportedly imposed by Article 150.

The PDVSA Parties' reliance on a reference in U.C.C. section 8-202(b)(1) to "a violation of a constitutional provision" is misplaced.[10] Section 8-202(b)(1) does not purport to interpret the term "validity" or expand the scope of that term to include all alleged constitutional violations. Instead, that section merely addresses the consequences of a defect "going to [the security's] validity," including circumstances in which the asserted "defect involves a violation of a constitutional provision." The language of the section is squarely at odds with the PDVSA Parties' suggestion that *all* alleged constitutional violations, even those not specific to the issuance of securities, necessarily involve "validity." As an example of a constitutional provision that could bear on validity, the district court noted state constitutional provisions prohibiting the issuance of watered stock, which "specifically address the requirements for the issuance of securities." SPA-52; *see also* Idaho Const. art. XI, § 9 (same). By contrast, as noted, Article 150 of the

[10] Section 8-202(b)(1) reads: "The following rules apply if an issuer asserts that a security is not valid: (1) 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 that case, the security is valid in the hands of a purchaser for value and without notice of the defect, other than one who takes by original issue."

Venezuelan Constitution applies broadly to "contracts of national public interest," not merely debt issuances or securities, and thus does not address "validity" as narrowly used in Article 8.

The PDVSA Parties' reliance on Comment 3 to section 8-202, and cases cited in the comment involving constitutional debt limits, PB51-52, is similarly misplaced. The Comment cites these cases as an example of the doctrine of estoppel by recitals, not as shedding light on the definition of validity, and the constitutional provisions at issue also were narrowly limited to issuance of debt.

Finally, the PDVSA Parties argue that Article 150 should be deemed to relate to validity because it implicates important Venezuelan public policies. PB52-53. That is a red herring. Nothing in the statute or any authority the PDVSA Parties cite suggests that the perceived importance of a foreign law determines the definition of "validity." Many general laws governing contracts—for example, laws against fraud—are important and can void securities contracts, but they are not matters of "validity" under section 8-110. Comment 2 to section 8-110, which the PDVSA Parties cite, notes only that questions of validity "may implicate significant policies of the issuer's jurisdiction of incorporation," PB47; it does not say, as the PDVSA Parties suggest, that any significant policies of that jurisdiction are, for that reason, matters of "validity."

B. There Is No Colorable Claim That the PDVSA Parties Lacked Actual Authority to Issue the Notes or the Pledge.

The PDVSA Parties also rely on cases holding that, in appropriate circumstances, New York choice-of-law rules require the application of a foreign state's law "'to determine the actual authority of an agent of the state's government.'" SPA-56 (quoting *Themis*, 881 F. Supp. 2d at 521). They contend that these cases apply here because the absence of National Assembly approval deprived the PDVSA Parties of actual authority to issue the 2020 Notes and the Pledge. PB56. The district court correctly rejected that argument. SPA-55-60.

The Boards of Directors of the PDVSA Parties had actual authority to approve the Governing Documents on their behalf. *See* above, pp. 8-10; SPA-4-5; JA-4875¶74; JA-4878¶82; JA-4983-87¶¶349-55; JA-5355; *UBS AG, Stamford Branch* v. *HealthSouth Corp.*, 645 F. Supp. 2d 135, 144-45 (S.D.N.Y. 2008) (finding that there can be "no question" that board of directors approval "conferred express actual authority").

The district court correctly concluded that Article 150 does not call the PDVSA Parties' actual authority into question. It reasoned that actual authority "deals with the relationship between a principal and its agent," and "the National Assembly is not the principal" of the PDVSA Parties. SPA-59-60; *see also, e.g., In re Motors Liquidation Co.*, 777 F.3d 100, 105 (2d Cir. 2015) ("Actual authority . . . is created by a principal's manifestation to an agent that, as reasonably understood by the agent,

expresses the principal's assent that the agent take action on the principal's behalf" (quoting Restatement (Third) of Agency § 3.01 (2006))). The PDVSA Parties were not acting as agents for the Republic in entering into the 2020 Notes transaction. The Republic is not a party to that transaction, and the Trustee and the Collateral Agent do not seek to bind it to the Governing Documents. *See* SPA-60.

None of the cases the PDVSA Parties cite held that a corporation owned by a foreign state could escape a contractual obligation, duly authorized as a matter of corporate law, on the ground that it was alleged to lack authority under the foreign state's law. *See* PB55-57. In *Export-Import Bank of the Republic of China* v. *Central Bank of Liberia*, the court rejected the argument—akin to the argument the PDVSA Parties advance here—that debts owed by the Central Bank of Liberia should be deemed unenforceable because the Liberian Constitution allegedly precluded the Bank from borrowing without legislative approval. 2017 WL 1378271, at *4.

In *Anglo-Iberia Underwriting Management Co.* v. *PT Jamsostek*, 1998 WL 289711, at *2 (S.D.N.Y. June 4, 1998), *aff'd in part*, 235 F. App'x 776 (2d Cir. 2007), the court held that a state-owned entity was not bound by a reinsurance contract that was not signed by an officer or employee. The court there cited an Indonesian law prohibiting such entities from engaging in reinsurance transactions only as further support for its conclusion that the individual who signed the contract, a former employee, had no authority to bind the entity to the agreement. *Id.* at *4.

The remaining cases the PDVSA Parties cite similarly involved the actual authority of foreign government officials to enter into transactions on the governments' behalf. *See Themis Capital*, 881 F. Supp. 2d at 520-21 (whether government officials had actual authority to issue debt in name of Democratic Republic of Congo); *Rep. of Benin* v. *Mezei*, 2010 WL 3564270, at *5 (S.D.N.Y. Sept. 9, 2010) (whether government official had actual authority to sell land belonging to Republic of Benin); *Storr* v. *Nat'l Def. Sec. Council of Rep. of Indonesia-Jakarta*, 1997 WL 633405, at *2 (S.D.N.Y. Oct. 14, 1997), *aff'd*, 164 F.3d 619 (2d Cir. 1998) (whether government agency had actual authority to issue notes payable by Bank Indonesia and Republic of Indonesia).

The cases on which the PDVSA Parties rely are also inapposite because they considered foreign law only after identifying the jurisdiction that had the "most significant relationship" to the transaction. *See, e.g.*, *Themis Capital*, 881 F. Supp. 2d at 521; *Exp.-Imp. Bank*, 2017 WL 1378271, at *3. The district court conducted that analysis here and determined that New York law had the most significant relationship to this transaction. SPA-62-65; *see* above, pp. 8-9. The PDVSA Parties do not dispute that determination; they argue instead that Venezuela has strong interests as PDVSA's place of incorporation. PB59-60. But New York has stronger interests in the enforceability of financial transactions made and to be performed here according to their terms. "[W]ith regard to the law governing financial transactions arranged in New York, New York has

emphasized the state's role as an international financial center." *Fieger* v. *Pitney Bowes Credit Corp.*, 251 F.3d 386, 394 (2d Cir. 2001); *see also J. Zeevi & Sons* v. *Grindlays Bank (Uganda)*, 333 N.E.2d 168, 172-73 (N.Y. 1975) (noting New York's "overriding and paramount interest" in maintaining its status as "a financial capital of the world").

The PDVSA Parties try to reframe the question as whether a "state-owned enterprise, *as an entity*, had the actual authority to enter into a certain contract." PB56. But that is not an argument about actual authority. It is an argument that the Exchange transaction was ultra vires. New York, however, has eliminated that defense by statute and common law. *See* N.Y. Bus. Corp. Law § 203(a) ("No act of a corporation . . . , otherwise lawful, shall be invalid by reason of the fact that the corporation was without capacity or power to do such act."); *see also* McKinney's Bus. Corp. Law § 203, Legis. Studies and Rep. Cmt. (2019) (Section 203 "largely codifies New York case law"). The ultra vires defense is unavailable to foreign as well as domestic corporations. *E.g.*, *Chiat/Day Direct Mktg., Inc.* v. *Nat'l Car Rental Sys., Inc.*, 1994 WL 524982, at *3-4 (S.D.N.Y. Sept. 27, 1994) (ultra vires defense not available to Delaware corporation); *Comm. Trading Co.* v. *120 Jane Corp.*, 275 N.Y.S.2d 621, 623 (1st Dep't 1966) (applying section 203 to Delaware corporation).

New York is not alone in precluding foreign corporations from asserting a defense of ultra vires even when that defense would be recognized by their home jurisdictions. As the Restatement explains:

> If ultra vires is not a defense in the particular circumstances under the law selected by application of the choice of law rules stated in this Section, the contract will not be held unenforceable on the ground of ultra vires. This is so even though the contract would be unenforceable on the ground of ultra vires under the local law of the state of incorporation . . . . Even if a particular limitation contained in the charter or articles of incorporation is intended by the state of incorporation to bind the corporation everywhere, it may nevertheless be held ineffective by the law selected by application of the choice-of-law rules stated in this Section.

Restatement (Second) of Conflict of Laws § 301 cmt. c (1971).

The New York choice-of-law clauses in the Governing Documents, JA1574-76, provide a separate and independent reason to reject the PDVSA Parties' argument. New York legislation requires that a choice of New York law be enforced regardless of contacts with New York provided only that the transaction involves at least $250,000. N.Y. Gen. Oblig. Law § 5-1401(1). To engage in any "conflict-of-law analysis" in such cases would "frustrate the Legislature's purpose." *IRB-Brasil Resseguros, S.A.* v. *Inepar Investments, S.A.*, 20 N.Y.3d 310, 316 (N.Y. 2012). When parties choose New York law, section 5-1401 requires the courts to apply the law of New York "and no other state." *Ministers & Missionaries Benefit Bd.* v. *Snow*, 45 N.E.3d 917, 922-24 (N.Y. 2015).

Section 5-1401 forecloses the PDVSA Parties' claims based upon Venezuelan law. *See IRB-Brasil*, 20 N.Y.3d at 313, 315. In *IRB-Brasil*, a Brazilian corporation guaranteed notes issued by a Uruguayan company.

The notes and guaranty included broad New York choice-of-law provisions. *Id.* at 313. The guarantor argued that the guaranty was "void under Brazilian law because it was never authorized by [the guarantor's] board of directors," as Brazilian corporate law allegedly required. *Id.* The Court of Appeals rejected that argument—identical in all relevant respects to the PDVSA Parties' central contention here—and held that section 5-1401 forbade any consideration of Brazilian law. *Id.* at 315-16; *accord Ministers*, 45 N.E.3d at 923-24. Here, too, the parties' choice of New York law precludes consideration of the law of Venezuela.

The district court noted (without accepting) the PDVSA Parties' argument that there is a "logical flaw" in applying a choice-of-law clause to a dispute over contract formation. SPA-48 n.12 (citing *Schnabel* and *Jetsmarter*). There is no flaw. *Schnabel* and *Jetsmarter* addressed whether a party had actually assented to an arbitration clause in a "clickwrap" agreement. Here, there is no dispute that the PDVSA Parties assented to the Governing Documents. The PDVSA Parties argue only that their assent was unlawful. A court cannot decide that issue without choosing some law to apply, and there is no logical flaw in choosing the law that the parties chose. *See, e.g.*, *Motorola Credit Corp.* v. *Uzan*, 388 F.3d 39, 50 (2d Cir. 2004) ("[A] choice-of-law clause in a contract will apply to disputes about the existence or validity of that contract."); *Int'l Mins. & Res., S.A.* v. *Pappas*, 96 F.3d 586, 592 (2d Cir. 1996) (applying choice-of-law clause to contract formation

because "New York law is unambiguous in the area of express choice of law provisions in a contract").

C. Venezuelan Law Does Not Determine the Legality of Contracts Made and to Be Performed in New York.

The district court correctly declined to apply Venezuelan law under cases holding that, where a violation of foreign law is alleged, "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., Ltd.* v. *Morgan Guar. Tr. Co.*, 269 F. Supp. 2d 424, 438 (S.D.N.Y. 2003). Under those cases, "the existence of illegality in a contract is usually determined by the law of the place of performance." *Lehman Bros. Com. Corp.* v. *Minmetals Int'l Non-Ferrous Metals Trading Co.*, 179 F. Supp. 2d 118, 139 (S.D.N.Y. 2000); Restatement (Second) of Conflict of Laws, § 202, cmt. c ("The local law of the state where a promise was made will usually be applied to determine the legality of its making," while "the legality or illegality of performance . . . is usually determined by the local law of the state where this performance either has taken, or is to take, place."). As the district court reasoned, these cases require the application of New York law because New York, not Venezuela, is the place in which the Governing Documents were made and to be performed. SPA-60-62; *see* above, pp. 8-9.

The PDVSA Parties argue that the district court erred by looking to the "place of performance" (which, they do not dispute, is New York), instead of the place of the "making" of the contracts. PB57. The difference is immaterial, because on the uncontroverted facts, the contract was made in New York. *See* SPA-10-11; *see also* JA-4900¶150; CA462-68¶¶132-63. The PDVSA Parties cite no evidence that any of the Governing Documents were "made" in Venezuela, and instead point only to allegedly "'illegal acts' *related to* the making of the 2020 Notes." PB57 (emphasis added). These acts, however, are not the making of the contracts, but only the actions by the Boards of PDVSA and PDVSA Petróleo approving the transactions, and purported acts or inaction by Venezuelan government actors who are not parties to the Governing Documents. The PDVSA Parties cite no case that has sustained a defense of foreign illegality, with respect to a contract made and performed in New York, on the basis of such loosely "related" acts in a foreign country.

These cases do not change this outcome for the additional reason that, when the parties have made a choice of New York law enforceable under section 5-1401, alleged illegality under foreign law has no relevance. *See, e.g.*, *IRB-Brasil*, 20 N.Y.3d at 315 (declining to consider alleged illegality under Brazilian law where parties agreed to application of New York law); *BDC Mgmt. Servs., LLP* v. *Singer*, 2016 WL 75603, at *7 (Sup. Ct. N.Y. Cnty. Jan. 7, 2016) (declining to give effect to New Jersey law regulating dental offices in New Jersey); *Hamilton Capital VII, LLC, I* v. *Khorrami,*

LLP, 2015 WL 4920281, at *6 (Sup. Ct. N.Y. Cnty. Aug. 17, 2015) (declining to give effect to California Constitution provisions concerning usury, even with respect to California borrower).

Conclusion

The district court's judgment should be affirmed.

Dated: New York, New York
May 14, 2021

Respectfully submitted,

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(as to issues of U.S. law only)

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Certificate of Compliance

I, Jonathan Hurwitz, attorney for the Defendants-Counter-Plaintiffs-Appellees, hereby certify that this brief conforms to the type-volume requirements of Fed. R. App. P. 32(a)(7) and Local Rule 32.1(a)(4), as modified by the Order of this Court dated May 7, 2021, allowing the Appellees to file an oversized brief not to exceed 16,500 words, ECF 186, because this brief contains 16,293 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Century Expanded BT 14-point font.

Dated: New York, New York
May 14, 2021

s/
Jonathan Hurwitz