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

United States Court of Appeals

for the

Second Circuit

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

Plaintiffs-Counter-Defendants-Appellants,

– v. –

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

Defendants-Counter-Claimants-Appellees.

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

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

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INTRODUCTION

In 2016, before the Exchange Offer was announced, the United States recognized the Venezuelan National Assembly as the legislative branch of Venezuela's Government, and urged the international community to respect the Assembly's "constitutional prerogatives" against the encroachments of the Maduro regime. JA-5106. The holders of the 2020 Notes (investment funds run by some of the world's most sophisticated asset managers) ignored that admonition. Instead, they opted into a Maduro-orchestrated transaction in disregard of a National Assembly resolution expressly invoking the Assembly's constitutional oversight powers, condemning the proposed transaction, and "reject[ing] categorically" its central feature—the proposed pledge of a controlling interest in the stock of CITGO Holding. JA-50-51 ¶¶ 6-7; JA-65 ¶ 50.

Appellants' lawsuit asked the district court to give effect to the National Assembly's official sovereign acts predating the 2020 Notes' issuance, including its September 2016 Resolution categorically rejecting the proposed transaction. JA-905; JA-907. Appellees counterclaimed for a declaration that the Transaction Documents are valid and enforceable, and that "PDVSA and PDVSA Petróleo had actual authority to enter into" them. JA-161-62. By granting Appellees' counterclaims and dismissing "all" of Appellants' claims, SPA-70, the district court denied legal effect to the Assembly's rejection, rendered its September 2016

Resolution a dead letter, and undermined the Executive Branch policy of discouraging the Maduro regime's usurpations of the Assembly's constitutional prerogatives. That was error. Once the court correctly found that the Assembly's 2016 Resolutions were official acts of a recognized sovereign, SPA-23-27, the act of state doctrine required it to grant those acts legal recognition. *See W.S. Kirkpatrick & Co. v. Env't Tectonics Corp., Int'l*, 493 U.S. 400, 405-06 (1990).

Appellees' chief response to the act of state doctrine is to double-down on the district court's misreading of the National Assembly's resolutions. But the text and historical context of those resolutions belie the court's misinterpretation of their supposed intent. Any doubt regarding those acts' meaning should have been resolved by the official construction of those acts offered by the Venezuelan Republic's submission to the district court.

Appellees' reliance on this Court's *Allied Bank* decision is similarly misplaced. That decision's extraterritorial takings exception has never been extended to a case like this, where the sovereign's acts occurred in Venezuela before the noteholders possessed any property interest. The National Assembly did not take property sited in New York, and filing this lawsuit did not retroactively change that reality. New York's standing as a commercial center does not depend on providing a haven for transactions with authoritarian regimes that violate democratically enacted constitutional safeguards.

Appellees' alternative grounds for affirmance are even less convincing. A court violates the act of state doctrine when it refuses to recognize a foreign sovereign's official act no less than it does by invalidating that act. And the United States' January 2016 recognition of the National Assembly as the legislative branch of Venezuela's Government conferred "sovereign" status on the Assembly for act-of-state purposes.

Separately, reversal is warranted because the district court incorrectly held that New York law governs the validity of the Transaction Documents. The court adopted an unjustifiably narrow construction of "validity" under the UCC; the leading UCC treatise (on which the district court heavily relied, but misconstrued) has since criticized the court's "questionable" decision as "neglecting" the statutory text. William D. Hawkland & James S. Rogers, 7A Hawkland UCC Series § 8-110:2 n.6 (June 2021). New York's choice-of-law rules regarding the actual authority of foreign state-owned entities and alleged illegality under foreign law also require the application of Venezuelan law to the threshold validity issue. At a minimum, this Court should vacate the decision below and remand for a determination of whether the lack of National Assembly authorization precluded the valid execution of the Transaction Documents—a question that only Venezuelan law can answer.

ARGUMENT

I. THE ACT OF STATE DOCTRINE COMPELS REVERSAL

Where a recognized foreign sovereign "has acted in a given way on the subject-matter of the litigation, the details of such action … cannot be questioned but must be accepted by our courts as a rule for their decision." *Ricaud v. Am. Metal Co., Ltd.*, 246 U.S. 304, 309 (1918). The district court disregarded this rule when it refused to give effect to the National Assembly's categorical rejection of the proposed transaction.

A. The District Court Erred By Denying Legal Effect to the National Assembly's Official Rejection of the Exchange

In May 2016, the National Assembly enacted a resolution warning potential counterparties "about the nullity of the contracts that are concluded in contravention of Article 150 of the Constitution." JA-904 ¶ 5; Republic's Br. 17-18, 28; Appellants' Br. 27-29. In September 2016, the National Assembly exercised its authority under Articles 150 and 187.9 of the Venezuelan Constitution when it convened in legislative session, reviewed the proposed Exchange Offer, and enacted a resolution categorically rejecting it. *See* JA-3518; JA-111; JA-905-07; Republic's Br. 14; Appellants' Br. 21-23. The district court was required to give legal effect to these "exercise[s] of sovereign power," *Galu v. Swissair: Swiss Air Transp. Co.*, 873 F.2d 650, 654 n.3 (2d Cir. 1989), undertaken within Venezuela, directed at

Venezuelan state-owned entities, before the 2020 Notes were issued. *Kirkpatrick*, 493 U.S. at 405-06.

Appellees echo the district court's erroneous conclusion that the Assembly's resolutions may be ignored because they did not expressly declare the Exchange Offer invalid. Appellees' Br. 12, 36-37. But Appellees never explain what legal principle required the Assembly to frame its rejection in any particular form. Nor could they. The Venezuelan Constitution does not require the Assembly to declare a proposed transaction invalid to disapprove it—it requires the proponents of a transaction to obtain express legislative authorization. Appellants' Br. 25-26.[1]

Appellees agree that "the National Assembly is empowered to interpret the Constitution in the exercise of its legislative powers through its resolutions." JA-3750; Appellants' Br. 36. This includes the exclusive authority to approve national public interest contracts. Appellants' Br. 6-7. When the Assembly exercised that power in September 2016, the Exchange Offer was a mere proposal that could have

[1] The Venezuelan Constitution is not alone in requiring prior legislative authorization as a condition of validity for specified acts. Professors' Br. at 13-17. Indeed, under the U.S. Constitution, where "two thirds of the Senators present [do not] concur" with a proposed treaty, that treaty is inoperative with or without a resolution rejecting it. Art. II. § 2.

been changed or withdrawn. Appellants' Br. 21-27; Republic's Br. 15-16, 18.[2] Nothing more needed to be said.

Appellees lean heavily (at 12) on the absence of *another* express declaration—the failure to declare that the Exchange Offer contemplated "contracts of national interest"—but that theoretical declaration was unnecessary. *See* JA-905; Republic's Br. 18. The September 2016 Resolution rejected the proposed transaction in the same breath that it invoked Article 187.9 of the Venezuelan Constitution, and the *only* power that Article confers is the power to authorize national public interest contracts. Republic's Br. 18; JA-2825-26. Appellees' supposition (at 35) that the resolution "solely" invoked Article 187.9 "to declare its" power to investigate the transaction is nonsensical because the Assembly's declaration that Article 187.9 empowered it "to obtain information" about the transaction necessarily determined that Article 187.9 applied to that transaction. As the Republic has explained, *see* Republic's Br. 32, the September 2016 Resolution reflects the Assembly's determination that the Exchange Offer proposed the execution of national public interest contracts, which the Assembly officially disapproved when it rejected the

[2] The fact that the September 2016 Resolution evaluated a *proposed* transaction completely answers Appellees' attempt (at 35) to compare that act against other Assembly resolutions expressly declaring *then-existing* transactions null and void.

transaction and instead began an investigation. JA-902-06; JA-111; JA-3514-16; Appellants' Br. 28-29.[3]

The act of state doctrine also forecloses Appellees' suggestion (at 13) that the National Assembly misinterpreted its own constitutional authority.[4] The Assembly's determination that the Exchange Offer was subject to its authorization under Article 187.9 serves as a rule of decision because it was an official sovereign act interpreting Venezuelan law within Venezuelan territory. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 415 n.17 (1964); *Fed. Treasury Enters. Sojuzplodoimport OAO v. Spirits Int'l B.V.*, 809 F.3d 737, 742-43 (2d Cir. 2016) ("*FTE*").

[3] Even were the National Assembly's refusal to authorize the Exchange considered solely a decision to refrain from acting, such exercise of sovereign power is just as "official" as Appellees' hypothetical declaration of nullity. Appellants' Br. at 26.

[4] Appellants agree with Appellees (at 13) that "this Court need not and should not" reach the merits of the Venezuelan legal questions unaddressed below. Appellees' interpretation of Venezuelan law (at 13-16) depends on their misinterpretation of the Venezuelan Supreme Tribunal's 2002 *Andrés Velásquez* decision. That interpretation is squarely at odds with subsequent decisions of the Supreme Tribunal itself (including the *EDELCA* decision), numerous subsequent National Assembly resolutions regarding national public interest contracts, the opinions of an overwhelming majority of Venezuelan legal scholars, and submissions by Appellees' own counsel in another PDVSA-related case, all of which recognize that contracts entered into by state-owned entities like PDVSA can qualify as national public interest contracts. *See* JA-2650-68, 2682-86; JA-4729-31; JA-2592-2601; JA-4843-4848; JA-2778-79.

B. The Republic's Interpretation of Its Own Official Acts Deserves Substantial Weight

In construing the 2016 Resolutions, the district court disregarded the "substantial weight" owed to the Venezuelan Republic's official interpretation of Venezuelan law. *Animal Sci. Prod. Co. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865, 1875 (2018). As the Republic explained, "the National Assembly asserted its authority over national public interest contracts, categorically rejected the pledge on which the proposed Exchange Offer depended, and made clear that the transaction as structured was unauthorized and therefore void *ab initio*." Republic's Br. 25; *see also* JA-904-05. This interpretation should have resolved any doubt as to the September 2016 Resolution's intended or actual meaning, because it was clear, thorough, authoritative, and consistent with the Republic's prior positions. *See Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70, 92 (2d Cir. 2002).

Appellees ignore most of the *Animal Science* factors, all of which support deference to the Republic's interpretation. *See* Appellants' Br. 31-38. Appellees instead assert (at 38-39) that *Animal Science* is irrelevant because U.S. law governs the act of state doctrine. That is a *non sequitur*. The issue on which the Republic is owed deference is the effect of the Assembly's 2016 resolutions under Venezuelan law. SPA-33-35; *see also* SPA-4 at n.1 (referring to its own "analysis of issues of Venezuelan law"). Courts applying the act of state doctrine routinely defer to

foreign sovereigns regarding the meaning and effect of foreign acts. *See, e.g.*, *Alfred Dunhill of London v. Repub. of Cuba*, 425 U.S. 682, 723 (1976) (statements of sovereign's counsel were "authoritative representations of the [sovereign's] position" and "serve[d] to confirm" that the acts were "an exercise of sovereign power"); *United States v. Pink*, 315 U.S. 203, 220 (1942) (a sovereign's declaration as to its legal decree was "conclusive" as to the decree's effect); *Banco de Espana v. Fed. Rsrv. Bank of N.Y.*, 114 F.2d 438, 445-46 (1940) (statements in the Spanish ambassador's affidavit were proof of certain acts).

Appellees repeat their baseless charge (at 39-41) that the Republic's position was invented for this litigation without addressing *any* of the consistent authorities the Republic cites dating back to 2003. *See* Republic's Br. 18-21. Indeed, Appellees' own counsel endorsed the Republic's interpretation in separate litigation—asserting that a PDVSA contract executed without National Assembly authorization was an invalid national public interest contract, that the Assembly's rejection of it via resolution was conclusive, and that "directly contravening" the Assembly's rejection would "no doubt undermine U.S. foreign policy by strengthening Maduro's hand in his power struggle with the National Assembly." JA-2778-79.

Appellees charge the Republic with inconsistency (at 40-41) based *entirely* on a single sentence, divorced from its context, from a report of the former Special

Attorney General. Appellees' assertion that the report's "conclusion is consistent with the Resolution's plain language," Appellees' Br. 40, is misleading because the sentence does *not* reflect the opinion's "conclusion" regarding the Resolution's meaning or effect. Appellees do not dispute that the report's actual conclusion is that the September 2016 Resolution rendered the 2020 Notes null and void *ab initio*, which is the Republic's precise position here. *See* Appellants' Br. 35-36. In any event, this single out-of-context sentence does not establish that the Republic has adopted inconsistent legal positions, and none of Appellees' cases (at 38-41) suggests otherwise. The district court erred by denying respectful consideration and substantial weight to the Republic's submission. *See* Appellants' Br. 37-38.

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

Appellees concede (at 28) that the extraterritorial takings exception of *Allied Bank International v. Banco Credito Agricola de Cartago*, 757 F.2d 516, 522 (2d. Cir. 1985), applies only when a foreign sovereign has confiscated property sited in the United States at the time of the taking. That exception is irrelevant here because the National Assembly's 2016 acts predated the 2020 Notes and any property interest those Notes could have created. *See U.S. Olympic Comm. v. Intelicense Corp., S.A.*, 737 F.2d 263, 267 (2d Cir. 1984) (governmental action does not take property where the owner "had no interest in the [property] at the time the [relevant] Act became law"); *Wyatt v. United States*, 271 F.3d 1090, 1096 (Fed. Cir. 2001) ("It is axiomatic

that only persons with a valid property interest at the time of the taking are entitled to compensation."). Consequently, *Allied Bank*'s rule regarding the repudiation of extraterritorial debt is irrelevant. *FTE*, 809 F.3d at 744 (extraterritorial takings exception does not apply where the act does not amount to a "confiscation");[5] *Tchacosh Co., Ltd. v. Rockwell Int'l. Corp.*, 766 F.2d 1333, 1337 (9th Cir. 1985) (act of state doctrine applied because "Iranian decrees did not confiscate [] property, but only divested [] of management authority").

Every case invoked by Appellees (and the district court), Appellees' Br. 28-33; SPA-28-33, 42-43, involved a purported *taking* of property in existence at the time of the relevant act. This case does not. The Assembly's 2016 Resolutions did not confiscate anything, and this lawsuit did not (and cannot) retroactively transform those laws into takings. A judicial determination giving effect to those Resolutions and declaring the 2020 Notes void *ab initio* does not "take" property because such a decision means that no valid property right was ever created. *See United States v. Sperry Corp.*, 493 U.S. 52, 59 (1989) (judicial attachment of property later found invalid did not result in a taking); *Pruco Life Ins. Co. v. Wells Fargo Bank, N.A.*, 780

[5] Appellees' attempt to distinguish *FTE* (at 32-33) fails because, as *FTE* makes clear, the extraterritorial takings exception predates *Allied Bank* and turns on the nature of the sovereign act (*i.e.*, whether the act constitutes a confiscation), not the physical location of the affected property interest. 809 F.3d at 744.

F.3d 1327, 1332 (11th Cir. 2015) ("A contract that is void *ab initio* is a contract that never existed.").

Contrary to Appellees' assertion, the act of state doctrine applies to sovereign acts even if the property is later moved to the United States. *See, e.g.*, *Sabbatino*, 376 U.S. at 428-37 (applying the doctrine to a Cuban decree causing an American commodity broker to forfeit proceeds later located in New York); *The Navemar*, 102 F.2d 444, 449 (2d Cir. 1939) (recognizing the validity of "title acquired under the laws of" Spain even where the property "afterwards reached our shores"). Aside from the decision below, every case that has applied the "extraterritorial takings" exception has considered the situs of the property relevant only *at the time of a taking*. *See* Appellants' Br. 39-41.

Appellees' attempt (at 31-32) to rebrand the 2016 Resolutions as a "prospective nullification" of the 2020 Notes only underscores the district court's error. Foreign governments routinely regulate transactions involving state-owned entities, often involving sovereign debt and natural resources, without "taking" property. *See, e.g., Beierwaltes v. L'Office Federale De La Culture De La Confederation Suisse*, --- F.3d ---, 2021 WL 2324544, at *7-8 (2d Cir. 2021) (exercising police powers to regulate economic affairs to protect the general welfare is not a taking); *West v. Multibanco Comermex, S.A.*, 807 F.2d 820, 831-32 (9th Cir. 1987) (monetary exchange controls are not a taking but an exercise of the

sovereign's "basic authority to regulate its economic affairs"); *Spectrum Stores, Inc. v. Citgo Petroleum Corp.*, 632 F.3d 938, 954 (5th Cir. 2011) ("[E]xploitation of natural resources is an inherently sovereign function."). Applying a preexisting control provision, like Article 187.9 of Venezuela's Constitution, to a proposed transaction does not "prospectively" take hopeful counterparties' property. *See Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980) ("[A] mere unilateral expectation … is not a property interest entitled to protection."); *U.S. Olympic Comm.*, 737 F.2d at 267; *Celestin v. Martelly*, No. 18-CV-7340, 2021 WL 919045, at *4 (E.D.N.Y. Mar. 10, 2021) (*Allied Bank*'s extraterritorial takings exception inapplicable where the act constituted a "prospective tax scheme" that did not "impair anyone's existing property right at the time they were imposed").

The district court's reasoning strips the National Assembly of its constitutional power to regulate transactions that Venezuelan state-owned entities purport to execute under New York law. That judgment amounts to "an order from a domestic court instructing a foreign sovereign to alter its chosen means of allocating and profiting from its own valuable natural resources." *Int'l Ass'n of Machinists Aerospace Workers v. OPEC*, 649 F.2d 1354, 1361 (9th Cir. 1981); *see also Sea Breeze Salt, Inc. v. Mitsubishi Corp.*, 899 F.3d 1064, 1071-72 (9th Cir. 2018) (dismissing claims where the relief sought "would require a United States court to invalidate Mexico's sovereign decisions about the exploitation of its natural

resources"). *Allied Bank* should not be stretched to invite such imperious treatment of foreign sovereign acts.

D. Recognizing the National Assembly's Sovereign Acts Would Further U.S. Law and Policy

The National Assembly's 2016 acts advanced its indisputably "legitimate concern in overseeing the debt situation of state-owned" entities. *Allied Bank*, 757 F.2d at 522. The Maduro regime openly circumvented the Assembly, JA-907, and unlike the majority of preexisting noteholders who declined the Offer, the exchanging noteholders bet that the regime would maintain power long enough to repay the 2020 Notes.[6] It would be inconsistent with U.S. law and policy to *deny* effect to the National Assembly's 2016 acts and to "tolerate those who seek to … loot Venezuelan resources to enrich themselves at the expense of the people." *Impact Fluid Sols. v. Bariven S.A.*, No. 4:19-cv-00652, Dkt. No. 55, at 17 (S.D. Tex. May 20, 2020) (citation omitted); *see also State of the Neth. v. Fed. Rsrv. Bank*, 201 F.2d 455 (2d Cir. 1953). As the U.S. Government explained below, "the impact of

[6] Appellees claim that they reasonably relied on legal representations in presuming the "legitimacy" of the Exchange (at 1, 43), but this invokes defenses (estoppel and unjust enrichment) that the district court did not adjudicate. SPA-65-67. Regardless, the record demonstrates that most noteholders declined to participate in the Exchange, that the risk of invalidity was well known, and that the U.S. Government in 2016 had publicly urged support for the "constitutional prerogatives of the National Assembly." JA-5106.

a loss of [CITGO] on … U.S. foreign policy goals in Venezuela, would be greatly damaging and perhaps beyond recuperation." JA-5239.

New York's status as a commercial center will be strengthened by recognizing that foreign countries have the power to regulate their state-owned entities' authority to contract. Appellants' Br. 43-45. Appellees raise (at 41-45) the specter of retroactive repudiations of valid debt obligations, but this case raises a different question—whether the U.S. legal system will honor the acts of a *legitimate* democratic legislature to prevent an *illegitimate* authoritarian regime from executing a transaction in violation of that nation's constitution. New York's status as an international commercial center will not suffer by refusing to provide a safe haven to such transactions.[7] The U.S. Government's declining to take a position below on *Allied Bank*'s applicability underscores this conclusion. *See* JA-5232.

[7] Following *Allied Bank*, courts have given effect to foreign government takings when consistent with U.S. law and policy. As Appellees concede (at 42), in *Hausler v. J.P. Morgan Chase Bank, N.A.*, 127 F. Supp. 3d 17 (S.D.N.Y. 2015), the court applied the permissive act of state doctrine to an act of a sovereign regulating its state-owned entity's assets in the United States. *See also Pravin Banker Assocs., Ltd. v. Banco Popular del Peru*, 165 B.R. 379 (Bankr. S.D.N.Y. 1994) (granting stay in deference to Peru's attempts to conform to IMF mandates); *Daly v. Llanes*, No. 98 CIV. 1196, 2001 WL 1631419 (S.D.N.Y. Dec. 19, 2001) (granting stay in deference to liquidation proceedings in Venezuela).

E. Appellees' Alternative Grounds for Affirmance Are Unavailing

1. The Act of State Doctrine Requires Granting Legal Effect to the National Assembly's Official Acts

The "rule of decision" compelled by the act of state doctrine precludes U.S. courts from "declar[ing] invalid" *or* "denying legal effect to" sovereign acts. *Kirkpatrick*, 493 U.S. at 405 (citation omitted). The dispositive question, which the district court failed to ask (and Appellees ignore), is whether any claim or defense "requires a determination" that a sovereign's act "was, or was not, effective." *Id.* at 406. Appellees sidestep this question by observing that most act-of-state cases involve claims "that a foreign official act violated international [or foreign] law," Appellees' Br. 47, but so does this case. Appellants' claim for relief depends on the Assembly's determination that the transaction violated Venezuela's Constitution, and the district court's contrary declaration (validating Appellees' counterclaims and defenses) denied legal effect to the Assembly's official rejection of that transaction pursuant to Venezuela's Constitution. *See* Appellants' Br. 21-27.

Appellees' argument (at 47-48) that the doctrine applies only where a court would explicitly "invalidate" a sovereign's action ignores the Supreme Court's admonition against "denying legal effect" to such acts. *Kirkpatrick*, 493 U.S. at 405; *see also Sabbatino*, 376 U.S. at 423. The Supreme Court has "used 'valid' and 'invalid' in the standard legal sense, meaning legally operative and inoperative," and, consequently, "the validity guaranteed by the act of state doctrine is legal

effectiveness." John Harrison, *The American Act of State Doctrine*, 47 Geo. J. Int'l L. 507, 519 (2016). This is sensible because the risk of offending a foreign sovereign—and thereby upsetting the separation of powers—is the same whether a reviewing court refuses to honor a sovereign's prohibitory act or declares it invalid. *See In re Yukos Oil Co. Sec. Litig.*, No. 04 Civ. 5243, 2006 WL 3026024, at *7 (S.D.N.Y. Oct. 25, 2006) (the doctrine applies irrespective of whether a party "seeks to invalidate or circumvent" that act). Accordingly, courts have applied the doctrine's rule of decision to preclude claims or defenses that would not have invalidated foreign acts but would have denied them legal effect.[8]

New York's "ordinary choice-of-law principles," Appellees' Br. 46, do not permit U.S. courts to refuse to recognize the National Assembly's acts. "[N]o matter what gloss be given" them, state policies must yield where they "amount[ ] to official disapproval or nonrecognition" of a recognized sovereign's acts. *Pink*, 315 U.S. at 223; *accord United States v. Belmont*, 301 U.S. 324, 327 (1937) (Russian

[8] *See, e.g., Underhill v. Hernandez*, 168 U.S. 250 (1897) (applying the doctrine where awarding tort damages would have refused judicial recognition of a military commander's decision to detain a U.S. national); *O.N.E. Shipping, Ltd. v. Flota Mercante Grancolombiana, S. A.*, 830 F.2d 449, 452 (2d Cir. 1987) (rejecting appellant's argument that his challenge "does not so much address Colombia's cargo reservation laws per se as it does appellees' manipulation of these laws"); *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291, 1298-99 (D. Del. 1970) (refusing to "undertake … an inquiry" into "[w]hether or not Venezuelan officials acted within their authority and by legitimate procedures" under Venezuelan regulations).

nationalization decree rendered the "policy of the State of New York" irrelevant even where "the situs of the bank deposit was within the State of New York"). As this Court has explained, the "discretion whether or not to respect a foreign act of state affecting property in the United States is closely tied to our foreign affairs, with consequent need for nationwide uniformity." *Repub. of Iraq v. First Nat'l City Bank*, 353 F.2d 47, 53 (2d Cir. 1965); *see also Sabbatino*, 376 U.S. at 424-25. "New York [can]not, by application of its choice of law rules, give a foreign act of state an effect, whether less or greater, differing from that dictated by federal law." *Repub. of Iraq*, 353 F.2d at 53. *Cf. JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V.*, 412 F.3d 418, 429 (2d Cir. 2005) (international comity precludes application of contractual New York choice-of-law provisions).

2. The National Assembly Has Been Part of Venezuela's Recognized Sovereign Government Since 2016

Where the Executive recognizes a government, U.S. courts deem that government's actions valid from its inception. *See Underhill*, 168 U.S. at 253. Thus, the district court correctly found that the U.S. Executive's recognition of the Guaidó Government validated the National Assembly's acts from the date it was elected in December 2015. SPA-26-27. This Court, however, need not resolve the contours of retroactive recognition because, in early 2016, the United States formally recognized the Assembly as Venezuela's legislative branch of government. Appellants' Br. 4-6 & n.2. The U.S. has repeatedly acknowledged the Assembly's

sovereign powers and supported its efforts to resist the Maduro regime's usurpations of its legislative functions. *E.g.*, JA-5112. Appellees are therefore incorrect that the Assembly "was not the Venezuelan 'sovereign' for act of state purposes in 2016." Appellees' Br. 48.

Appellees incorrectly assert (at 50-51) that only executive acts are eligible for act-of-state treatment. Because foreign legislatures exercise sovereign powers, the doctrine also recognizes legislative acts. *See Banco de Espana*, 114 F.2d at 443 (legislative decrees); *Kashef v. BNP Paribas S.A.*, 925 F.3d 53, 61 (2d Cir. 2019) ("statute[s]" and "resolution[s]" can be "evidence of sovereign authorization"); *Frazier v. Foreign Bondholders Protective Council, Inc.*, 283 A.D. 44, 49 (N.Y. App. Div. 1953) (applying act-of-state deference where "[t]he decisive act … was the enactment of the law by the Congress of Peru"). Thus, "[i]n determining whether an act is an act of state, the branch or agency of the government—executive, judicial, *or legislative*—that performed the act is not as important as is the nature of the action taken." Restatement (Second) of Foreign Relations Law § 41 cmt. d (1965) (emphasis added).

Appellees' contention (at 49-55) that "recognition of a new government" does not render "actions by the prior government invalid" is inapposite. The National Assembly's pertinent acts occurred *after* the U.S. Executive recognized the Assembly as a legitimate sovereign actor, and rallied the international community to

support it. *See* Appellants' Br. 21-30. The Assembly's acts warrant recognition because the United States still recognizes its legitimacy today. *See* JA-5228. By contrast, when this suit was filed the Executive had declared "*all* of [the] declarations and actions [of the Maduro regime] *illegitimate and invalid*." State Dep't, *Remarks at the Organization of American States*, Statement of Secretary of State Michael R. Pompeo (Jan. 24, 2019) (emphasis added). The Maduro regime's acts are not entitled to recognition here, both because the only "sovereign" recognized by the act of state doctrine is the one "extant and recognized by this country at the time of suit," *Sabbatino*, 376 U.S. at 428,[9] and because the regime (unlike the Assembly) acted beyond its sovereign "enforcement capacity" by purporting to execute "contracts made and to be performed in New York," Appellees' Br. 32 (citing *Bandes*, 852 F.2d at 667). This case is therefore unlike *Banco de Espana*, where the "former" government by the time of the opinion was the "present" and "friendly" government when the lawsuit was filed. 114 F.2d at 443-44.[10]

The reliance interests described in *Guaranty Trust Co. v. United States*, 304 U.S. 126 (1938), are inapposite here. *Guaranty Trust* rejected the claim that the

[9] *Accord Kirkpatrick*, 493 U.S. at 409; *Bigio v. Coca-Cola Co.*, 239 F.3d 440, 452-53 (2d Cir. 2000) (amended).

[10] In *Banco de Espana*, the U.S. Government itself contracted with the Spanish Government, and the Secretary of Treasury affirmed that the transaction had relied upon representations of title and authority made by the "duly accredited and accepted representative" of the Spanish government at the time of sale. 114 F.2d at 440-41.

recognition of a new government *by itself* invalidates a former government's acts. 304 U.S. at 140. Here, the U.S. Government never endorsed the Exchange—instead, it repeatedly urged respect for the National Assembly's constitutional prerogatives, both before and after the Assembly asserted those prerogatives by rejecting the Exchange. Appellants' Br. 4-6 & n.2. Unlike *Guaranty Trust*, this case does not involve a transaction that was "valid when entered into," 304 U.S. at 140; indeed, the Transaction's *ab initio* invalidity is the core of Appellants' case. SPA-25-26. Neither *Guaranty Trust* nor any other precedent immunizes the noteholders from the legal consequences of their transaction with the illegitimate Maduro regime. *See Kashef*, 925 F.3d at 61. The act of state doctrine "is meant to facilitate the foreign relations of the United States, not to furnish the equivalent of sovereign immunity to a deposed leader." *Repub. of Phil. v. Marcos*, 862 F.2d 1355, 1361 (9th Cir. 1988).

Appellees claim that retroactive recognition should be limited to "revolution or civil war," Appellees' Br. 48 & n.8, but "[n]o case has been found where the act of recognition by the United States has indicated that it would not be given retroactive effect." Restatement (Second) of Foreign Relations Law § 114, Reporter's cmt. This Court should not break new ground. *See Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 75-77 (2d Cir. 1977). In any event, the National Assembly's invocation of "constitutional processes" in finding the presidency vacant following a patently fraudulent election, Appellees' Br. 49, addressed a constitutional crisis

akin to revolution or civil war. If this Court addresses the retroactivity principle, it should follow the same rule that applies to any government recognized by the political branches. *See Underhill*, 168 U.S. at 252-53.

II. THE DISTRICT COURT ERRED IN HOLDING THAT VALIDITY IS GOVERNED BY NEW YORK LAW

The district court erred in holding that the Transaction Documents' validity is governed by New York law, which can have nothing to say on whether state-owned entities within Venezuela's National Public Administration required National Assembly authorization to enter into the Transaction Documents with foreign counterparties. The issue on appeal is not, as Appellees frame it (at 51), whether Appellants have "raised a genuine dispute of material fact as to any defense based on the Venezuelan Constitution." The choice of-law issue is a legal one on which the district court erred as a matter of law.

A. "Validity" in UCC Section 8-110 Is Not as Narrow as Appellees Portray

Boiled down, Appellees' entire affirmative argument on UCC section 8-110 is that "validity" as used in that section is a "narrow" term in a "narrow" UCC article that was never intended to encompass an issuance of securities in violation of a constitutional provision such as Article 150. Appellees' Br. 52-57.

While UCC Article 8 is not "a comprehensive codification of the law governing securities," it explicitly "deals with some aspects of the rights of securities

holders against issuers," including an issuer's ability to assert that a security is "not valid" due to its defective issuance in "violation of a constitutional provision." Prefatory Note to Article 8 at III.B (1994); U.C.C. § 8-202(b)(1). The Prefatory Note to Article 8 does *not* state, as Appellees claim (at 54), that the article deals "*only*" with "how interests in securities are evidenced and how they are transferred." The word "only" is Appellees' addition.

Likewise, the cited New York Bill Jacket for Article 8 does not state, as Appellees falsely imply (at 54), that the article was "intended" to govern only "how interests in securities are evidenced and how they are transferred in the current securities market." Rather, the Bill Jacket includes commentary on sections 8-110 and 8-202 and expressly recognizes that section 8-110 contains choice-of-law rules for determining "the substantive law that will govern [the] rights and obligations [of issuers and investors] … in connection with the *issuance*, ownership and transfer of securities," and this includes their "validity" as addressed in section 8-202. N.Y. Bill Jacket, 1997 A.B. 6619, Ch. 566, comm. report at 21-22 (emphasis added).

According to the Hawkland treatise, "validity" as used in section 8-110 refers generally to "whether issuance of the securities had been 'duly authorized,'" and is implicated by laws imposing "procedural or other requirements" on a security's issuance (as opposed to merely rendering unenforceable a certain promise to pay on an otherwise validly issued security). Hawkland § 8-110:2. Here, the 2020 Notes

had not been "duly authorized" because they were not authorized in advance by the National Assembly as procedurally required by the Venezuelan Constitution. JA-903 ¶ 2; JA-905 ¶ 9. Appellees make no serious attempt to defend the district court's misapplication of Hawkland's "Law X" hypothetical (Appellants' Br. 49-51), and the treatise's most recent update criticizes the district court's "questionable" decision as "neglecting" the fact that, unlike with other issues, "validity" *must* be governed by the law of the issuer's jurisdiction because the UCC *does not permit any other choice*. Hawkland § 8-110:2 n.6. This criticism presumes that violation of Article 150 is a "validity" issue.

Contrary to Appellees' suggestion (at 56), section 8-202 is "the principal Article 8 substantive rule to look to for guidance in applying the choice of law rule [for 'validity'] in subsection 8-110(a)," Hawkland § 8-110:2. And section 8-202 explicitly relates "validity" to the issuance of a security in "violation of a constitutional provision" (without limiting the type of provision). U.C.C. § 8-202(b)(1). This Court need not decide whether "*all* alleged constitutional violations … *necessarily* involve 'validity,'" Appellees' Br. 56 (first emphasis in original), as the violation of a constitutional provision requiring prior legislative authorization certainly does. Likewise, a ruling in Appellants' favor would not turn every issue of contract formation into a "validity" issue, SPA-50-51, as the issue here goes to the very core of "validity"—whether the issuance of the 2020 Notes was "duly

authorized" (Hawkland § 8-110:2) by the National Assembly in accordance with a "procedural or other requirement" (*id.*) for their issuance (prior authorization as required by Article 150). Initial drafts of the UCC defined "validity" as "within the issuer's power, authorized, free of fraud and duress, and in compliance with any applicable constitutional, statutory, charter and other regulatory provisions governing the authorization or issue of the security," and the definition was dropped not as a "change of substance," but as a "change of form only." Hawkland § 8-202:6 n.4.

Appellees next argue that Appellants' reliance on Official Comment 3 to section 8-202 is "misplaced" because the cases referenced therein involving securities issued in violation of constitutional debt limits were meant as "example[s] of the doctrine of estoppel by recitals, not as shedding light on the definition of validity." Appellees' Br. 57. But the comment's reference to these cases *does* shed light on the definition of "validity" because, as the comment explains, section 8-202 was intended to codify certain strands of the common law "estoppel by recitals" doctrine as reflected in such constitutional debt limit cases. *See* U.C.C. § 8-202, Official Comment 3. And while the constitutional provisions at issue in the referenced cases were "limited to issuance of debt," Appellees' Br. 57, they were *not* limited to issuance of debt in the form of *securities* (which were not even mentioned). *See, e.g.*, Colo. Const. art. XI § 6 (1876). Under the district court's

interpretation, which runs contrary to Official Comment 3, an issuance of securities in violation of such a constitutional provision would not go to their "validity" because the provision does not deal "specifically [] with the issuance of securities" but rather with a "broad category" of transactions. SPA-54.

Finally, Appellants did not argue that Article 150 should be deemed to relate to "validity" simply because it implicates important Venezuelan public policies. Appellees' Br. 57. Nor did Appellants "suggest" that "the perceived importance of a foreign law determines the definition of 'validity'" or that "any significant policies of [the issuer's] jurisdiction are, for that reason, matters of 'validity.'" *Id*. Article 150 goes to the 2020 Notes' "validity" because it rendered the issuance itself defective as a matter of Venezuelan constitutional law (as opposed, for example, to merely rendering unenforceable a promise to pay a certain interest rate on an otherwise validly issued security). The district court's excessively narrow reading of "validity" undermines the UCC rule's stated rationale—that "[t]he question … of invalidity may implicate significant policies of the Issuer's jurisdiction of incorporation." Appellants' Br. 53. Under the court's reading, even a law like Article 150, which implicates public policies of the highest order, would be deemed unrelated to a security's "validity" notwithstanding that it required prior authorization as a precondition of valid legal existence.

B. Foreign Law Determines the Actual Authority of a Foreign State-Owned Entity

The relevant question regarding actual authority is whether the PDVSA Parties themselves, *as entities*, had the actual authority under Venezuelan law to enter into the Transaction Documents (and thus to authorize their officers to execute them). The question is not, as the district court erroneously reasoned, whether PDVSA was authorized to act as the National Assembly's "agent." SPA-59-60.

Appellees are wrong that "[n]one of the cases … 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." Appellees' Br. 59. For example, in *Anglo-Iberia Underwriting Management Co. v. PT Jamsostek*, the court ruled that an Indonesian state-owned enterprise had no "actual authority" to enter into an alleged reinsurance agreement because "Indonesian law prohibited [the enterprise], and by extension [its] employees … from engaging in any reinsurance activity." 1998 WL 289711, at *3 (S.D.N.Y. June 4, 1998), *aff'd in relevant part*, 235 F. App'x 776 (2d Cir. 2007) (adopting the district court's reasoning on actual authority). Contrary to Appellees' mischaracterization (at 59), the gravamen of the court's analysis was that the former employee who signed the agreement in question could not have been authorized to bind the enterprise because *the enterprise itself* lacked "actual authority" to enter into such agreements. *Anglo-Iberia*, 1998 WL 228711, at *3.

Appellees' attempt (at 59-60) to distinguish *Export-Import Bank of China v. Central Bank of Liberia*, 2017 WL 1378271 (S.D.N.Y. Apr. 12, 2017), is equally unavailing. Although the court found that the Bank of Liberia's debts were valid, the court analyzed their validity *under Liberian law*. *Id.* at *4. Appellees make no serious attempt to distinguish *Storr v. Nat'l Def. Sec. Council of Indonesia-Jakarta*, 1997 WL 633405 (S.D.N.Y. Oct. 14, 1997), which found that an Indonesian entity had no "actual authority" to issue certain notes because, under Indonesian law, it "had no legal authority to issue debt instruments." *Id.* at *2. And while Appellees accuse Appellants (at 61) of trying to "reframe" the actual authority issue, Appellees themselves affirmatively alleged in their counterclaims that the PDVSA Parties, *as entities*, had "actual authority" to enter into the Transaction Documents. JA-160 ¶ 176; JA-161 ¶ 181; JA-162 ¶ 185.[11]

Appellees further argue (at 61-62) that Appellants' supposed "reframing" turns the actual authority issue into an "ultra vires" defense barred by New York Business Corporation Law section 203, which generally forbids corporations from asserting invalidity due to a lack of "capacity or power." But section 203 (which none of the relevant cases mention) is inapplicable precisely because, under the relevant choice-of-law rule, Venezuelan law governs. And it would not apply here

[11] Insofar as "agency" is fundamentally about authority, the National Assembly could be viewed as the PDVSA Parties' "principal" in that they had no authority to enter into the 2020 Notes transaction without the Assembly's prior authorization.

in any event because: (i) it applies only to acts that are "otherwise lawful," thereby distinguishing between acts that are merely outside the powers granted in a corporation's charter or articles of incorporation and acts that are also contrary to law, N.Y. Bus. Corp. Law § 203(a); (ii) the ability of a *securities issuer* to assert invalidity is specifically governed by the UCC, which looks to the law of the *issuer's jurisdiction*; and (iii) "[a] party contracting with the State is chargeable with knowledge of the statutes which regulate its contracting powers and is bound by them," *Parsa v. New York*, 64 N.Y.2d 143, 147 (1984), and Venezuelan Public Administration entities are part of the Venezuelan State in the relevant respect that their contracting powers are regulated by the same laws (including Article 150) that apply to organs of the government. JA-2640-42 ¶¶ 125-32; *see also Fed. Crop Ins. v. Merrill*, 332 U.S. 380 (1947) (government-owned corporation could not be bound by its agent's agreement to provide certain crop insurance because the corporation itself had no actual legal authority to insure such crops).[12]

Appellees' only other argument (at 60) is that Appellants' cases are "inapposite" because "they considered foreign law only after identifying the

[12] Appellees' attempt to distinguish *Merrill* fails because the decisions they cite (at 44 n.4) do not address the actual legal authority of a government-owned entity itself. *See Northrop Grumman v. Republic of Venezuela*, 575 F.3d 491, 500-1 (5th Cir. 2009) (applying this principle to a contract involving the Venezuelan Government) (citing Restatement (Third) of Agency § 2.03, cmt. g (2006)).

jurisdiction that had the 'most significant relationship' to the transaction." But, as the district court pointed out, "of the [cited] cases that ended up applying a foreign state's law, none … engaged in a traditional multifactor 'grouping of contacts' analysis." SPA-59 n.15. Indeed, the courts' rulings were seemingly driven by the recognition that "the state of dominant interest may depend upon the issue involved." Restatement (Second) of Conflict of Laws § 6, cmt. f (1971). Here, Venezuela unquestionably has the dominant interest in the constitutional limitations on the authority of its state-owned entities to enter into national public interest contracts.

C. The District Court's Undisputed Error in Applying the Choice-of-Law Rule for Illegality Is Not "Immaterial"

Appellees do not seriously dispute that the district court erred in looking to the "place of performance" (New York) to determine the law governing whether the Transaction Documents are unenforceable due to illegality. *See* SPA-61-62. They argue instead that the error is immaterial because the Transaction Documents were also "made" in New York, and illegal actions in Venezuela "related to" their making do not count. Appellees' Br. 65. Appellees are wrong.

As the Restatement explains, "[a] distinction must here be drawn between the effect of illegality upon the validity of the contract and the existence of illegality as such [and] whether there is any illegality will usually depend upon the local law of *each state* where an act *related to* the contract was, or is to be, done." Restatement (Second) of Conflict of Laws § 202, cmt. c (1971) (emphasis added). Here, it is

undisputed that numerous allegedly illegal acts related to the Transaction Documents were completed in Venezuela. If the district court were to find on remand that these acts were illegal under Venezuelan law, the question would become whether New York or Venezuelan law determines "the effect of illegality upon the validity of [the Transaction Documents]."

Even if it applied here, New York General Obligations Law section 5-1401 would not render foreign law of "no relevance" (Appellees' Br. 65) regarding illegality. *See Korea Life Ins. Co. v. Morgan Guar. Tr. Co. of N.Y.*, 269 F. Supp. 2d 424 (S.D.N.Y. 2003) (addressing alleged foreign illegality of contracts containing New York choice-of-law provisions); *Lehman Bros. Com. Corp. v. Minmetals Int'l Non-Ferrous Metals Trading Co.*, 179 F. Supp. 2d 118, 138-39 (S.D.N.Y. 2000) (section 5-1401 does not require courts to ignore alleged illegality under foreign law). Rather, it would require the application of New York law at the second step of the analysis—to determine the "effect of illegality" on the Transaction Documents' validity.

D. NYGOL Section 5-1401 Does Not Provide an Alternative for Affirmance on Actual Authority and Illegality

Appellees' alternative grounds for affirmance on actual authority and illegality, Appellees' Br. 62 & 65, rely on an over-reading of the New York Court of Appeals' decisions in *IRB-Brasil Resseguros, S.A. v. Inepar Invts, S.A.*, 20 N.Y.3d 310 (2012), and *Ministers & Missionaries Benefit Bd. v. Snow*, 26 N.Y.3d 466

(2015).[13] Contrary to Appellees' arguments, these cases do not stand for the incoherent proposition that section 5-1401 precludes any consideration of non-New York law in any circumstances, even where the issue is whether the contract containing the choice-of-law provision was validly formed in the first place. In *IRB*, the Appellate Division expressly recognized that the Brazilian defendant had submitted evidence and an expert opinion that its corporate officers lacked the authority to execute the guaranty at issue. *IRB-Brazil Resseguros, S.A. v. Inepar Invs., S.A.*, 83 A.D.3d 573, 573-74 (N.Y. 2011). The court then held that "under New York law, an agreement executed without proper authority may be enforceable under the doctrines of apparent authority and ratification," which only come into play if the agreement was executed without actual authority under applicable law. *Id.* at 575. In other words, the court accepted that the guaranty had been executed without actual authority under Brazilian law (as New York law cannot speak to that question) and then examined whether the guaranty was nevertheless enforceable under New York law on an apparent authority or ratification theory. *Id.* at 574-75.[14]

[13] Section 5-1401 could never provide an alternative basis for affirmance as to UCC section 8-110 because section 5-1401 expressly carves out the UCC's choice-of-law rules. N.Y. Gen. Oblig. § 5-1401(1).

[14] The Brazilian corporation in *IRB* had within itself the power to authorize its officers to execute the contract in question (and thus the power to ratify it). Here, the PDVSA Parties themselves had no such power because only the National Assembly could grant the required authorization. *See N.Y. Med. Transps. Ass'n, Inc. v. Perales*, 77 N.Y.2d 126, 131-32 (1990) ("A principal cannot ratify an agent's act

The only question that went to the Court of Appeals in *IRB* was whether a choice-of-law analysis must be undertaken when contracting parties choose New York law pursuant to section 5-1401 but do not expressly exclude New York's choice-of-law rules. *IRB*, 20 N.Y.3d at 312, 317. In affirming the decision below, the Court of Appeals held that "parties are not required to expressly exclude New York conflict-of-laws principles in their choice-of-law provision in order to avail themselves of New York substantive law" and that "in the event parties wish to employ New York's conflict-of-laws principles to determine the applicable substantive law, they can expressly so designate in their contract." *Id.* at 316. The holding of *Snow* was simply that a statutory choice-of-law rule is excluded just like any other choice-of-law rule when contracting parties choose New York law pursuant to section 5-1401 or otherwise (except that, as discussed above, section 5-1401 expressly yields to certain statutory choice-of-law rules, including the UCC's choice-of-law rules for securities). 26 N.Y.3d at 474, 476.

As the district court observed in *Jetsmarter*, this Court "has noted [that] there is a logical flaw inherent in following a contractual choice-of-law provision before determining whether the parties have actually formed the contract in which the choice-of-law clause appears." *Worthington v. JetSmarter, Inc.*, No. 18 Civ. 12113,

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that the principal itself could not have authorized."). For the same reason, only the National Assembly could have created any appearance of authority.

2019 WL 4933635, at *4 (S.D.N.Y. Oct. 7, 2019) (citing *Schnabel* v. *Trilegiant Corp.*, 697 F.3d 110, 119 (2d Cir. 2012)). Appellees dismiss this observation on the basis that *Jetsmarter* and *Schnabel* involved "clickwrap" agreements, Appellees' Br. 63, but the "logical flaw" is real and inescapable where the issue is one of contract formation. *See Berkley Assurance Co. v. MacDonald-Miller Facility Sols, Inc.*, No. 19-CV-7627, 2020 WL 1643866, at *2 (S.D.N.Y. Apr. 1, 2020) ("New York's choice-of-law rules distinguish between issues of contract formation and other threshold issues of contract validity," and thus "[i]f [a party] were to object, for example, on the ground that it never assented to the choice-of-law provision, then New York law would call for a choice-of-law analysis that ignores the effect of the provision").

Nevertheless, Appellees insist (at 63) that "there is no [logical] flaw" here because "there is no dispute that the PDVSA Parties assented to the Governing Documents," and "[t]he PDVSA Parties argue only that their assent was unlawful." While the PDVSA Parties *purported* to assent, the lack of required National Assembly authorization *precluded any valid manifestation of assent* under Venezuelan law and rendered the Transaction Documents void *ab initio*. JA-2594-

95; JA-4740; JA-911 ¶ 23-24. In the eyes of Venezuelan law, there *was no assent*. *Id.*[15]

CONCLUSION

The district court's judgment should be reversed or, at a minimum, vacated.

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Respectfully submitted,

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[15] *Motorola Credit Corp. v. Uzan*, 388 F.3d 39 (2d Cir. 2004), and *International Minerals & Resources, S.A. v. Pappas*, 96 F.3d 586 (2d Cir. 1996), are inapposite because, *inter alia*, there was no question that valid contracts had been formed. The issue in *Uzan* was whether non-parties could avail themselves of arbitration clauses in the contracts, 388 F.3d at 49-50, while the issue in *Pappas* was when contract formation occurred, 96 F.3d at 592.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

Pursuant to FED. R. APP. P. 32(g)(1), I certify the following:

1. This document complies with this Court's extension of the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure, granted on May 26, 2021, *see* Docket No. 205 (granting Appellants' motion for leave to file oversized reply brief of no more than 8,250 words), because excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Local Rule 32(g), this document contains 8,250 words.
2. This document complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type-style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this document has been prepared in a proportionately spaced typeface using Microsoft Word in 14-point Times New Roman font.

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