To be Argued by:
IGOR V. TIMOFEYEV
(Time Requested: 30 Minutes)

CTQ-2022-03

Court of Appeals
of the
State of New York

PETRÓLEOS DE VENEZUELA S.A., PDV HOLDING, INC., PDVSA PETRÓLEO S.A.,
Plaintiffs-Counter-Defendants-Appellants,
– against –
MUFG UNION BANK, N.A., GLAS AMERICAS LLC,
Defendants-Counter-Claimants-Respondents.

QUESTIONS CERTIFIED BY THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT IN DOCKET NOS. 20-3858-CV(L) AND 20-4127-CV(CON)

REPLY BRIEF FOR PLAINTIFFS-COUNTER-DEFENDANTS-APPELLANTS

MICHAEL J. GOTTLIEB
WILLKIE FARR & GALLAGHER LLP
1875 K Street, NW
Washington, DC 20006
Tel.: (202) 303-1000
Fax: (202) 303-2000
mgottlieb@willkie.com

– and –

JEFFREY B. KORN
WILLKIE FARR & GALLAGHER LLP
787 Seventh Avenue
New York, New York 10019
Tel.: (212) 728-8000
Fax: (212) 728-8111
jkorn@willkie.com

Counsel for Plaintiff-Counter-Defendant-Appellant PDV Holding, Inc.

KURT W. HANSSON
JAMES L. FERGUSON
PAUL HASTINGS LLP
200 Park Avenue
New York, New York 10166
Tel.: (212) 318-6000
Fax: (212) 319-4090
kurthansson@paulhastings.com
jamesferguson@paulhastings.com

– and –

IGOR V. TIMOFEYEV
PAUL HASTINGS LLP
2050 M Street, NW
Washington, DC 20036
Tel.: (202) 551-1700
Fax: (202) 551-1705
igortimofeyev@paulhastings.com

Counsel for Plaintiffs-Counter-Defendants-Appellants PDVSA Petróleo, S.A. and Petróleos de Venezuela, S.A.

(For Continuation of Appearances See Inside Cover)

Date Completed: July 25, 2023

NICHOLAS REDDICK
WILLKIE FARR & GALLAGHER LLP
One Front Street, 34th Floor
San Francisco, California 94111
Tel.: (415) 858-7400
Fax: (415) 858-7599
nreddick@willkie.com

– and –

KRISTIN E. BENDER
WILLKIE FARR & GALLAGHER LLP
Citypoint, 1 Ropemaker Street
London EC2Y 9AW, United Kingdom
Tel.: +44 (203) 580-4833
Fax: +44 (203) 580-4800
kbender@willkie.com

Counsel for Plaintiff-Counter-Defendant-Appellant PDV Holding, Inc.

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INTRODUCTION

New York Uniform Commercial Code ("UCC") § 8-110 provides that "the local law of the issuer's jurisdiction … governs … the validity of a security." UCC § 8-110(a)(1). The Noteholders do not seriously dispute, under both the Governing Documents and New York statutory law, this choice-of-law provision is mandatory and not subject to contractual override. And, as the PDVSA Parties have shown, "validity" in UCC § 8-110 encompasses the question of whether a governmental issuer complied with constitutional prerequisites to its authority. This construction accords with the term's ordinary meaning, the statutory context, the UCC official commentary, and section 8-110's purpose.

Thus, the question whether the Governing Documents are invalid because they lacked the requisite Venezuelan National Assembly authorization falls squarely within the meaning of "validity" in UCC § 8-110. The Noteholders' contrary construction—based solely on what they claim as the prevailing understanding among transactional securities lawyers—adopts an atextual reading of the statute, ignores the statutory context and the official commentary, and has been repudiated by the leading UCC treatise. At bottom, the Noteholders advance an illogical notion that "validity" in section 8-110 *excludes* a public issuer's compliance with the constitutional limits on its issuance authority—a theory that finds no support in the UCC, and is refuted by the very industry commentary they invoke.

Even aside from the UCC, Venezuelan law would govern the 2020 Notes' validity. No provision of New York statutory or common law purports to define a foreign state-owned entity's contracting authority. Rather, the law under which an entity is organized—here, Venezuelan law—determines that question. Venezuela has the paramount interest—enshrined in its constitution—in protecting its public fisc from executive abuse by ensuring that state-owned entities seek legislative authorization before entering into national public interest contracts. This interest is materially greater than New York's interest in this foreign debt-restructuring transaction.

As a last resort, the Noteholders conjure a parade of horribles that would purportedly result if this Court applies the plain command of UCC § 8-110 or settled conflict-of-laws principles. These dangers are illusory. Transnational financial actors will not suddenly flee New York if this Court reaffirms that foreign issuers are bound by constitutional restrictions on their contracting authority. Nor would foreign state-owned entities start repudiating their debt obligations. Numerous legal doctrines, such as non-retroactivity, estoppel, and unjust enrichment, stand in the way. This appeal is *not* about whether the Governing Documents are enforceable—it is *only* about what law will decide that issue. This Court should provide guidance on that question, and let federal courts apply it on remand.

ARGUMENT

I. UCC SECTION 8-110'S CHOICE-OF-LAW RULE GOVERNS THIS DISPUTE BOTH UNDER THE GOVERNING DOCUMENTS AND AS A MANDATORY PROVISION OF NEW YORK LAW

A. The Noteholders Concede that the Governing Documents' Choice-of-Law Provision Incorporates § 8-110

Throughout this litigation, including before this Court, the Noteholders have conceded that the Governing Documents incorporate UCC § 8-110(a) as a choice-of-law rule. A-2081-83; A-2392-97; PDVSA Br. 36-38; Resp. Br. 12. Nor do the Noteholders dispute that they forfeited any contrary argument by failing to raise it in federal court. PDVSA Br. 38.

The Governing Documents expressly state that they "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)." A-1912-13 ¶¶ 180-82 (capitalization omitted) (emphasis added). NYGOL § 5-1401, in turn, provides that New York law "shall *not apply … to the extent provided to the contrary in subsection (c) of section 1-301 of the uniform commercial code*." NYGOL § 5-1401(1) (emphasis added). By referencing NYGOL § 5-1401, the Governing Documents thus incorporate the UCC choice-of-law rules, including those of UCC § 8-110. *See* PDVSA Br. 36-37; *infra* at 4-7.

This Court therefore need not reach the broader question whether UCC § 8-110 would override a contrary contractual choice-of-law provision, or how this

Court's decisions in *IRB-Brasil Resseguros, S.A. v. Inepar Invs., S.A.*, 20 N.Y.3d 310 (2012), and *Ministers & Missionaries Benefit Board v. Snow*, 26 N.Y.3d 466 (2015), might apply to differently phrased choice-of-law provisions, Resp. Br. 28-31, or to a contract lacking any choice-of-law provisions, Resp. Br. 32-33. Here, the actual choice-of-law provisions at issue incorporate UCC § 8-110 as a governing rule for any question going to the Governing Documents' "validity."

B. UCC § 8-110 Is a Mandatory Choice-of-Law Rule that Overrides Any Contrary Contractual Provision

Regardless, UCC § 8-110(a) is a mandatory choice of law provision that applies notwithstanding any contrary private agreement. PDVSA Br. 31-36. While New York law authorizes contracting parties to choose the law applicable to their transaction, *see* UCC § 1-301(a), it expressly provides that, for matters falling within specific articles of the UCC—including UCC § 8-110, *see* UCC § 1-301(c)(6)—the law specified in that article governs—namely, the law of the issuer's jurisdiction. UCC § 1-301(c) (emphasis added). Thus, UCC § 8-110 is among the "*mandatory rules* [that] are applicable despite purported agreement by the parties to the contrary"—in short, a mandatory rule that, under New York law, contracting parties cannot avoid. 1 William D. Hawkland, et al., Uniform Commercial Code Series § 1-301:4 (2023) ("Hawkland") (citations omitted) (emphasis added); *see also* PDVSA Br. 33-34.

The Noteholders offer no response to this argument, nor do they engage *at all* with the text of UCC § 1-301. Instead, they argue that New York law must govern the validity of the 2020 Notes by virtue of New York General Obligation Law ("NYGOL") § 5-1401. Resp. Br. 28-31. But NYGOL § 5-1401 expressly references UCC § 1-301, thereby incorporating the UCC choice-of-law rules, including those of section 8-110. NYGOL § 5-1401(1); PDVSA Br. 36-37; *supra* at 3-4.[1] The Noteholders acknowledge that NYGOL § 5-1401 "specifies certain exceptions, including an exception to the extent provided to the contrary in [UCC] section 1-105(2)." Resp. Br. 29.[2] But they never explain how, despite this express reservation, section 5-1401 "compel[s] the application of New York's substantive law" to the question of the 2020 Notes' validity. Resp. Br. 31. On the contrary, NYGOL § 5-1401 expressly *reaffirms* UCC § 1-301's restriction on the contracting parties' ability to choose the law governing certain issues—including the security's

[1] The Noteholders do not contest that UCC § 1-301 renders section 8-110's choice-of-law requirement mandatory, restricting the contracting parties' ability to override it by choosing a different law. Nor do they contest (although this Court need not decide this issue) that, like New York law, Venezuelan law does not permit the selection of another country's law to govern the issuance of securities by Venezuelan state entities. *See* A-835 ¶ 133; *see also* A-96; PDVSA Br. 32.

[2] UCC § 1-105 is the statutory predecessor of UCC § 1-301, and the two sections are "substantively identical." UCC § 1-301, Official Comment. The Legislature replaced the former UCC § 1-105 with the current UCC § 1-301 in 2014, *see* N.Y. L. 2014, ch. 505, § 1, and then updated NYGOL § 5-1401 accordingly in 2018, *see* N.Y. L. 2018, ch. 237, § 7.

validity. That question is "govern[ed]" by "[t]he local law of the issuer's jurisdiction" (here, Venezuela). UCC § 8-110(a)(1).

The Noteholders' suggestion that *IRB* and *Ministers* override section 1-310 (*see* Resp. Br. 30-31) misconstrues those cases. *IRB* did not hold that NYGOL § 5-1401 "forbade any consideration of [foreign] law." Resp. Br. 30 (citing 20 N.Y.3d at 315). *IRB* held only that, under NYGOL § 5-1401, "New York substantive law applies when parties include an ordinary New York choice-of-law provision," and contracting parties "are not required to expressly exclude New York's conflict-of-law principles in their choice-of-law provision in order to avail themselves of New York substantive law." 20 N.Y.3d at 315-16. *IRB* in no way suggested that section 5-1401 dispensed with UCC § 1-301's statutory restrictions on the contracting parties' ability to select governing law with respect to certain issues—restrictions that section 5-1401 expressly reaffirmed. *See* PDVSA Br. 34-35.

This Court's decision in *Ministers* is similarly inapposite. There, the Court held that, when the parties selected New York law to govern their retirement benefit plans, they did not intend to adopt a choice-of-law provision of New York's trusts and estate statute since that provision was not part of the "substantive law" the parties presumably chose when selecting New York law. *Ministers*, 26 N.Y.3d at 474-75. But unlike the statutory choice-of-law provision in *Ministers*—which the

parties were free to adopt, as long as they did so explicitly—UCC § 8-110(a)(1) is a *mandatory* rule that *expressly overrides* any contrary choice by the parties to a contract. *See* UCC § 1-301(c); PDVSA Br. 35-36. *Ministers* does not speak to a mandatory choice-of-law rule like section 8-110(a)(1), which, pursuant to section 1-301(c), renders any "contrary agreement" of the parties ineffective. UCC § 1-301(c); *see also* PDVSA Br. 35-36.

Ultimately, the Noteholders' argument boils down to the radical theory that the New York Legislature lacks the power to enact a mandatory choice-of-law rule capable of overriding private agreements. But neither *Ministers* nor *IRB* altered the long-standing rule that "it is always within the power of the Legislature, subject to constitutional limitations, to change [a] common law rule or to create exceptions to it." *People v. Dethloff*, 283 N.Y. 309, 314 (1940); *see also* N.Y. Const. art. I, § 14. Here, the Legislature deliberately restricted the contracting parties' ability to depart from section 8-110's requirements.

The Noteholders' reliance on the common-law "grouping of contacts" test, *see* Resp. Br. 32-33, similarly misses the mark. That doctrine cannot be read to override UCC § 1-301's mandatory statutory choice-of-law directive, which incorporates UCC § 8-110. Nor does it supplant the Governing Documents' contractual choice-of-law provision or somehow limit or supplant NYGOL § 5-1401 and UCC § 1-301.

II. UCC SECTION 8-110'S TEXT, STATUTORY CONTEXT, AND COMMENTARY DEMONSTRATE THAT PDVSA'S AUTHORITY TO ISSUE THE 2020 NOTES IS A QUESTION OF "VALIDITY" GOVERNED BY VENEZUELAN LAW

The question whether the Governing Documents are invalid and unenforceable because they lacked the requisite Venezuelan National Assembly authorization falls squarely within the meaning of "validity" in section 8-110. PDVSA Br. 17-31. This conclusion accords with the term's ordinary meaning, read in light of the statutory context and the UCC official commentary. This construction of "validity" also furthers section 8-110's legislative purpose and is embraced by the leading UCC treatise. Collectively, these interpretive authorities conclusively demonstrate that "validity" in section 8-110 extends to disputes about whether a security was issued consistent with the issuer's legal authority, including—as here—whether a governmental issuer complied with constitutional prerequisites to the issuer's authority to issue the security. PDVSA Br. 18-25, 29-31.

The Noteholders concede that section 8-110 contains no specialized definition of "validity," and so "dictionary definitions serve as useful guideposts in determining the word's ordinary and commonly understood meaning." *People v. Aleynikov*, 31 N.Y.3d 383, 397 (2018) (internal quotation marks and citation omitted). And the Noteholders do not contest that dictionaries of both legal and ordinary usage define "validity" broadly "to mean '[l]egal sufficiency, in contradistinction to mere regularity,' or '[l]egal strength, force, or authority,'" nor

that these definitions would cover the present dispute. Resp. Br. 37 (quoting Black's Law Dictionary 1719 (4th ed. 1951); Webster's New International Dictionary of English Language 2814 (2d ed. 1935)); *see also* PDVSA Br. 19-20.[3]

The Noteholders' main counter is that the term "validity" in section 8-110 has a technical meaning in "longstanding usage by transactional lawyers in the context of securities issuances," and must be interpreted in light of that purported specialized meaning. Resp. Br. 35. The Noteholders claim their interpretation "dates back to James Fuld's often-cited 1973 article on opinion letters," which "'suggest[ed] that "valid" *may be* a desirable word'" to denote that "'an agreement has been properly executed and is in existence, without any conclusion as to binding, enforceable or lawful aspects.'" Resp. Br. 36 (quoting James J. Fuld, *Legal Opinions in Business Transactions—An Attempt to Bring Some Order Out of Some Chaos*, 28 Bus. Law. 915, 928 (1973)) (emphasis added). But the premise of Fuld's article is that a specialized term reflecting his (and the Noteholders') preferred meaning *did not yet exist* in statutory law (or even industry understanding)—a notion directly at odds with the Noteholders' claim that "validity" in the UCC carries a long-settled specialized meaning.

[3] The Noteholders' argument that other dictionaries define "validity" more narrowly (Resp. Br. 37) only highlights the importance of the statutory context. A word that "has many dictionary definitions … must draw its meaning from its context." *Ardestani v. INS*, 502 U.S. 129, 135 (1991). Here, that context demonstrates that the term "validity" encompasses this dispute. PDVSA Br. 20-23; *infra* at 13-15.

Moreover, when Fuld wrote his article in 1973, the substantive UCC provision at issue in this case had already been in effect for *over ten years*. *See* UCC § 8-106 (1962) ("The validity of a security [is] governed by the law (including the conflict of laws rules) of the jurisdiction of organization of the issuer."). Thus, Fuld's article (however influential among securities lawyers in 1973) obviously did not inform the Legislature that enacted the applicable UCC provision a decade earlier, in 1962.[4]

In any event, the fact that transactional securities lawyers have a particular view of "validity" in the context of opinion letters does not transform it into "a legal term of art that has meaning under the New York common law," *Chauca v. Abraham*, 30 N.Y.3d 325, 331 (2017), let alone one incorporated into UCC § 8-110 on drafting and enactment. Rather, the UCC is interpreted according to the "language of the statute, as well as the clear commentary on the relevant sections." *Worthy Lending LLC v. New Style Contractors, Inc.*, 39 N.Y.3d 99, 103 (2022).

Moreover, the fact the term "validity" *includes* a private issuer's compliance with its corporate charter—which is all the authorities the Noteholders invoke reflect, *see* Resp. Br. 35-37—does not mean that validity *excludes* a public issuer's compliance with the constitutional limits on its power. In fact, these commentators expressly state that the term "validity" in the context of opinion letters encompasses

[4] The Legislature's 1997 revision to Article 8 renumbered UCC § 8-106 as § 8-110 but left its text substantially unchanged.

compliance with statutory (or similar) requirements on a corporation's power or authority to issue a security. Thus, FitzGibbon and Glazer note that while "a lawyer should not be expected to pass upon all laws" when issuing an opinion that stock has been "validly issued," "[a] lawyer is expected to confirm that the Department of Public Utilities has approved a stock issuance by a public utility as required by the statute under which the corporation was organized." Scott FitzGibbon & Donald W. Glazer, *Legal Opinions in Corporate Transactions: The Opinion that Stock Is Duly Authorized, Validly Issued, Fully Paid and Nonassessable*, 43 Wash. & Lee L. Rev. 863, 877 (1986). As a 1979 report on legal opinions in New York commercial transactions observes, "violation of a statute which makes the issuance of securities void or voidable because of a lack of approval of a regulatory authority, whether state or federal, or which gives a right to void an issuance to a third party or regulatory authority, will preclude the giving of a valid issuance opinion." *Legal Opinions to Third Parties: An Easier Path*, 34 Bus. Law. 1891, 1911 (1979). And the report specifically notes that "[a]n example would be an issuance of stock as to which Interstate Commerce Commission (or similar regulatory) approval is required. In any such situation the Committee prefers that a specific opinion on that point be requested." *Id.* at 1911 n.29.[5]

[5] The other commentaries similarly require that a legal opinion on whether a security has been "validly issued" confirm that the applicable statutes authorize the company

These regulatory approval requirements are indistinguishable from Article 150 of the Venezuelan Constitution, which provides that any "national public interest" contract between a state-owned company and a foreign counterparty must be authorized by the National Assembly. Under Venezuela's Organic Law of the Public Administration, the powers granted to state-owned entities are subject to any "conditions, limits and procedures" established by law, and any act carried out by an entity acting without authority is "null and void and its effects shall be non-existent." A-2660-62 ¶¶ 125-32. This principle reveals the emptiness of the Noteholders' manufactured and atextual distinction between "approvals by governmental entities that are external to [a] corporate issuer" and "general legal restrictions on certain contracts." *See* Resp. Br. 49-50. Whether authorization must be granted by a corporate body or a branch of government makes no difference to the "validity" rule's stated rationale—namely that the ability of an issuer (especially a governmental instrumentality) to assert invalidity implicates significant public policy concerns. UCC § 8-110, Official Comment 2; *see also* PDVSA Br. 31.

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to issue the security. *See* Fuld, *Legal Opinions in Business Transactions*, 28 Bus. Law. at 933 ("[W]ith regard to whether the shares were 'validly issued and are fully paid' … [t]he first step to check is whether the directors duly authorized the issuance of the shares *in accordance with the statute*, charter, by-laws and any applicable agreement in effect at the time of such issuance.") (emphasis added); Frank E. Babb, et al., *Legal Opinions to Third Parties in Corporate Transactions*, 32 Bus. Law. 553, 567 (1977) ("If … there are statutory … restrictions on the issuance of shares, … an examination of [those] other requirements should be made.").

In any event, the authoritative statutory context here makes clear that constitutional restrictions on a public entity's authority to issue securities are within the scope of "validity" under section 8-110(a)(1). As the UCC's Official Comments explain, the term "validity" in section 8-110 should be understood with reference to the substantive validity provisions of Article 8 and, specifically, section 8-202. *See* UCC § 8-110, Official Comment 2; *see also* 7 Hawkland § 8-110:2; A-28-30; PDVSA Br. 20-23. And section 8-202(b)(1) expressly refers to "the defect involv[ing] a violation of a constitutional provision" as "a defect going to [a security's] validity," UCC § 8-202(b)(1), with additional validation safeguards imposed on government issuers, UCC § 8-202(b)(2). Contrary to the Noteholders' insistence (Resp. Br. 45), *nothing* in section 8-202 purports to limit the applicable constitutional provisions only to those that specifically address the issuance of securities. Any such a limitation would be illogical: "[A]s constitutions generally deal with principles and policies rather than particular policy decisions, one would fully expect constitutional provisions about validity to be expressed with a broad rather than narrow scope." Carl Bjerre, *Annual Survey of Commercial Law: Investment Securities*, 76 Bus. Law. 1371, 1380-81 n.46 (Fall 2021). There is no practical difference, for instance, between a state constitutional provision that "no public utility may issue securities without the State Treasurer's approval" and a

provision that "no public utility may incur debt without the State Treasurer's approval."

The paradigmatic cases cited in the Official Comments to section 8-202 confirm that it applies to constitutional provisions that are *not* "specific to the issuance of securities" but nonetheless *can encompass* an issuance of securities. The Official Comments cite two bond invalidity cases involving Colorado's constitutional provision that limits municipalities' power to "contract any debt by loan in any form" and does not mention securities at all. *See* UCC § 8-202, Official Comment 3 (citing *Bd. of Comm'rs of Gunnison Cnty., Colo. v. E. H. Rollins & Sons*, 173 U.S. 255, 259 (1899); *Bd. of Comm'rs of Chaffee Cnty. v. Potter*, 142 U.S. 355, 362 (1892)); *see also* PDVSA Br. 22-23. The Noteholders characterize these cases as simply "providing background" to the "'estoppel by recitals' doctrine," Resp. Br. 45-46, but that is a distinction without a difference. The Official Comments cite those cases as representing "[a] long and well established line of federal cases" standing for the common law estoppel doctrine against governmental issuers that section 8-202's "validity" rules were intended to incorporate. *See* UCC § 8-202, Official Comment 3. The Official Comments further confirm those cases' relevance to the "validity" question when they observe that "the problem of policing governmental issuers" (which the estoppel doctrine was designed to address) "has

been alleviated by the present practice of requiring legal opinions as to the validity of the issue." *Id.*

The fact this issue has not arisen previously is not surprising. As the Official Comments anticipated, "validity" challenges to governmental issuers "seldom aris[e]" because of the practice of issuing opinion letters. *Id.* Here, the relevant opinion letter expressly analyzed *Venezuelan law* in assessing the validity of the Exchange Offer. And, contrary to the Noteholders' portrayal of how all transactional securities lawyers analyze "validity" in opinion letters, this one extensively considered not just PDVSA's internal corporate procedures, but also "the laws, statutes, regulations and decrees of Venezuela" before representing that the Exchange did not "violate any Venezuelan law, rule, regulation, order, judgment or decree applicable to the Company," and that no "approval, authorization or consent of or registration or filing with, any governmental agency or governmental authority in Venezuela is required to be obtained or made by the Company or the Guarantor under Venezuelan Law." A-687-88. This analysis of "validity"—though wrong on the merits of Venezuelan law, *see* PDVSA Br. 29—reveals the insincerity of the Noteholders' artificially "narrow" construction of "validity."

The Noteholders halfheartedly defend the district court's reliance on the Hawkland treatise as supporting their unwarrantedly narrow view of "validity" in section 8-110. *See* Resp. Br. 41-43. But they effectively concede (via silence) that

the district court misread the Hawkland treatise's "Law X" hypothetical. PDVSA Br. 28-31. And while the Noteholders profess that "[t]he Hawkland treatise' discussion [of section 8-110] is entitled to great weight," Resp. Br. 42, they studiously ignore that the updated Hawkland treatise expressly criticizes the district court's "holding that the [N]otes' validity as affected by authorization by the Venezuelan National Assembly is governed by New York rather than Venezuela law" as "questionabl[e]" and "neglecting the non-variability of subsection (a)(1)." 7 Hawkland § 8-110:2 n.6 (Mar. 2023 Update).

As explained by the Hawkland treatise's editor-in-chief, Professor Carl Bjerre, "Article 150, whatever its applicability to the merits of the *PDVSA* dispute, would seem clearly to be a provision about the obligor and validity, and thereby to fall within the ambit of U.C.C. section 8-110(a)(1), unlike the Law X of the Hawkland discussion." Bjerre, *Investment Securities*, 76 Bus. Law. at 1379. When "correct[ly] underst[ood]," "[t]his Hawkland discussion supports the application of Venezuelan law to the Notes." *Id.* at 1379 & n.36. The Noteholders chastise Professor Bjerre for purportedly not explaining how the "requirement that PDVSA obtain approval from the National Assembly can be said to pertain to PDVSA's 'internal processes,'" Resp. Br. 43, while ignoring the fact that PDVSA is a *public issuer*, and so is subject to requisite government approvals. As Professor Bjerre explained, "Article 150 does indeed deal with a procedural requirement (approval

by the National Assembly) for the issuance of securities by Venezuelan issuers, so long as the issuance is a national public interest contract. … [T]he fact that Article 150 does not refer specifically to securities does not diminish its applicability to the Notes in any way." Bjerre, *Investment Securities*, 76 Bus. Law. at 1380.

Finally, the Noteholders contend that "no court … has construed the term 'validity' as broadly as [the PDVSA Parties] now urge" because (they claim) otherwise "countless delinquent foreign issuers would have been incentivized to attempt to escape their obligations by asserting that the issuance violated the law of the issuer's jurisdiction." Resp. Br. 44. But neither has any court interpreted the term "validity" as narrowly as the Noteholders would prefer. Public issuers rarely attempt to evade constitutional limits on their power, and most investors (as here, A-665-66 ¶ 15) would decline to participate in transactions executed by authoritarian regimes in the face of constitutional objections raised by that regime's democratically-elected legislative counterpart. Nor are foreign governments likely to decide whether to honor debt obligations based on this Court's interpretation of UCC choice-of-law principles—not just because those governments have their own substantive rules informing the issue of "validity," but also because of other limitations on asserting a defense of invalidity separate from choice of law, including legal principles such as non-retroactivity, estoppel, and unjust enrichment (as

evidenced by the Noteholders' own claims in this case). *See* A-113-14 ¶¶ 100, 102; A-142-43 ¶¶ 221-26.

III. THE PDVSA PARTIES' CONSTRUCTION OF "VALIDITY" FURTHERS THE LEGISLATIVE PURPOSE UNDERLYING SECTION 8-110

The New York Legislature deliberately restricted the contracting parties' ability to depart from section 8-110(a)(1)'s mandatory requirement in order to be "consistent with … the prevailing view that *the law under which an issuer is organized must govern whether a security issued by that entity is valid*." N.Y. Bill Jacket, L. 1997, ch. 566 at 72 (comm. report at 22) (emphasis added). Ignoring this stated purpose of section 8-110(a)(1), the Noteholders argue that the construction of "validity" as encompassing constitutional restrictions on the issuer's authority to issue securities would "impede" contracting parties' ability to choose the law to govern their transaction. Resp. Br. 46. But that limitation is a feature, not a bug. The Legislature consciously imposed section 8-110 as a mandatory rule that contracting parties are *not* free to vary. *Infra* at 20-21.

The Noteholders implausibly insist that a textually faithful interpretation of section 8-110 would undermine New York's status as a leading commercial center. Resp. Br. 47. But nearly all other U.S. states have enacted substantively identical versions of UCC § 8-110(a)(1), and are subject to the same limitation. Moreover, parties to sophisticated international financial transactions select New York law not

just because New York is a financial center (with resulting jurisdiction over many transnational financial transactions), but also because it has a judiciary committed to the rule of law and highly experienced with commercial matters. It is simply not credible to suggest that interpreting New York's choice-of-law rules to apply foreign law to the question whether public issuers have adhered to the requirements of their own constitutions would prompt those issuers (or investors) to flee New York for foreign jurisdictions.

By contrast, the Noteholders' narrow interpretation of section 8-110 would transform New York's choice-of-law clauses into vehicles by which authoritarian regimes could sidestep core separation-of-powers choices of their constitutions. *See* PDVSA Br. 25. The Noteholders' response that this has not yet "come to pass," Resp. Br. 47, downplays that this risk *will* materialize if New York courts bless the Maduro regime's circumvention of Venezuelan National Assembly. Other authoritarian leaders will follow suit. The Legislature did not intend the UCC's choice-of-law rules to operate in this manner, and nothing in this Court's precedents compels such a result.

IV. NEW YORK CONFLICT-OF-LAWS PRINCIPLES REQUIRE APPLICATION OF VENEZUELAN LAW

Venezuelan law would govern the validity of the 2020 Notes even without UCC § 8-110(a)(1). In New York, the law under which an entity is organized determines whether the entity has the power and capacity to contract. The "grouping

of contacts" analysis and the "fundamental public policy" principle similarly require application of Venezuelan law. Further, the common law principles on illegality result in application of Venezuelan law in determining the Governing Documents' legality.

A. The Law of a Corporation's Jurisdiction of Organization Governs Its Capacity, Power, and Authority to Enter into a Contract

The principle that a company's authority to enter into a contract is governed by the law under which it is organized is a limitation on the parties' ability to choose the law of their contract; there are "issues the parties could not have determined by explicit agreement," namely those involving "capacity" and "substantial validity." Restatement (Second) of Conflict of Laws ("Restatement") § 187 cmt. d (1971). The Court endorsed this principle in *Indosuez International Finance B.V. v. National Reserve Bank*, 98 N.Y.2d 238 (2002). *See* PDVSA Br. 39-40. Accordingly, a court must find that there was a valid contract (executed by parties with the requisite authority) before giving effect to the contractual choice-of-law clause.

The Noteholders' observation that *Indosuez* applied New York law when determining the transaction's enforceability, Resp. Br. 55-56, is beside the point. *Indosuez* applied New York law pursuant to a choice-of-law analysis—*not* the contracts' choice-of-law provisions—because "parties would not be bound by [a]

choice of law ... provision[] if the agreements were otherwise invalid." 98 N.Y.2d at 244.[6]

As this Court held, parties may not contract around laws limiting the powers of state-owned entities to enter into agreements. *Parsa v. New York*, 64 N.Y.2d 143, 147 (1984); *see also* PDVSA Br. 43. As a Public Administration entity subject to Venezuelan laws regulating public contracts, the Noteholders were "chargeable with knowledge of the statutes which regulate its contracting powers and is bound by them." *Parsa*, 64 N.Y.2d at 147; *see also Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 381-82, 384-85 (1947); *Northrop Grumman Ship Sys., Inc. v. Ministry of Def. of the Republic of Venezuela*, 575 F.3d 491, 500-02 (5th Cir. 2009). The Noteholders attempt to dismiss this precedent as involving domestic corporations, Resp. Br. 58-59, but offer no basis for discriminating against foreign sovereigns.

[6] The Noteholders argue that the PDVSA Parties "undisputedly assented to the Governing Documents, including their choice-of-law clauses." Resp. Br. 57. That begs the question. Under Venezuelan law, PDVSA had no power or capacity to validly assent to the Governing Documents without prior National Assembly authorization. PDVSA Br. 28-29, 48, 56-57; *supra* at 12. That fact also renders inapposite the Noteholders' reliance on the observation in *Commodities & Minerals Enter. Ltd. v. CVG Ferrominera Orinoco, C.A.*, 49 F.4th 802, 816-17 (2d Cir. 2022), that an arbitration agreement's choice-of-law clause is separable from the contract's overall validity. This arbitration-specific rule, grounded in the requirement that an arbitration agreement's validity is governed by "the law to which the parties have subjected it," New York Convention Art. V(1)(a), *quoted in id.* at 816, does not authorize evasion of restrictions on a party's authority to contract. *See* A-32 n.12; PDVSA Br. 39-40.

The Fifth Circuit rejected just such an invitation, *Northrop*, 575 F.3d at 500-01, and this Court should do the same.

The Noteholders argue (Resp. Br. 54) that PDVSA's argument is barred by section 203(a) of the New York Business Corporation Law, which provides that "[n]o act of a corporation and no transfer of real or personal property to or by a corporation, *otherwise lawful*, shall be invalid by reason of the fact that the corporation was without capacity or power to do such act or to make or receive such transfer." N.Y. Bus. Corp. Law § 203(a) (emphasis added). Absent National Assembly authorization, PDVSA's execution of the Governing Documents was not "otherwise lawful." Section 203 carefully distinguishes its general rejection of the ultra vires defense from the question of illegality: "This section … insert[s] … an express exception of the defense of illegality, as distinguished from ultra vires." *Id.*, Revision Notes. Section 203 "distinguishes between purported corporate action in excess of corporate purposes (see §201) or powers (see § 202) and illegality of any action, and does not apply to the latter." N.Y. Bill Jacket, L. 1961, ch. 855 at 251. Thus, this is not a question of whether there is an ultra vires defense to a corporation's action (which may be premised on general legal prohibition of certain types of contracts). Rather, it is a question of whether a corporation had authority to enter into a contract in the first place, which is governed by Venezuelan law.

B. The Precedents on a Corporation's Actual Authority Are Not Limited to Principal-Agent Relations

The Noteholders seek to evade extensive authority that foreign law determines limitations on a state-owned entity's ability to contract, PDVSA Br. 41-43, on the grounds that this case "do[es] not implicate 'actual authority' in the ordinary sense of 'a relationship between a principal and its agent,'" Resp. Br. 51 (quoting A-2343-44). But these precedents are not limited to the principal-agent context.

In *Storr v. National Defense Security Council of Republic of Indonesia-Jakarta*, the state-owned entity lacked "actual authority" to issue certain notes, not for a lack of a principal's authorization, but because, under Indonesian law, the entity itself "had no legal authority to issue debt instruments." No. 95 Civ. 09663 (AGS), 1997 WL 633405, at *2 (S.D.N.Y. Oct. 14, 1997). Likewise, in *Anglo-Iberia Underwriting Mgmt. Co. v. PT Jamsostek*, the state-owned entity lacked "actual authority" to enter into a reinsurance agreement because "Indonesian law prohibited [the entity itself], and by extension [its] employees … from engaging in any reinsurance activity." No. 97 Civ. 5116 (HB), 1998 WL 289711, at *3-4 (S.D.N.Y. June 4, 1998). And in *Export-Import Bank of China v. Central Bank of Liberia*, the issue was not authority from a principal but whether the Liberian Constitution required the Bank of Liberia to obtain prior legislative authorization to make certain loans—an issue the court analyzed under Liberian law notwithstanding the notes'

New York choice-of-law provisions. 2017 WL 1378271, at *3 (S.D.N.Y. Apr. 12, 2017).

Here, only the National Assembly had power to grant the legal authority required by the Venezuelan Constitution, and the National Assembly did not provide it. The fact that the federal courts in these cases determined foreign law applied given their "significant relationship" to the transaction, Resp. Br. 52-53, makes these cases more instructive here, not less.

C. New York's "Grouping of Contacts" Analysis Requires the Application of Venezuelan Law

The "grouping of contacts" principles require application of Venezuelan law because Venezuela—not New York—has the most significant relationship to whether PDVSA had authority to enter into the Governing Documents. PDVSA Br. 45-48.

The Noteholders rely on *Indosuez* and *Ehrlich-Bober & Co. v. University of Houston*, 49 N.Y.2d 574 (1980), to argue that New York has the paramount interest. Resp. Br. 61. But the interests of Russia in *Indosuez* and Texas in *Ehrlich* pale in comparison to that of Venezuela here. In *Indosuez*, the contracts were forward currency exchanges where "the essence of the contract [was] an exchange pegged to the value of the United States dollar." 98 N.Y.2d at 245. In *Ehrlich*, Texas's interest was deemed mere "administrative convenience." 49 N.Y.2d at 580-81.

This case, by contrast, implicates the "very heart of the governmental function" in Venezuela—the power of the Legislature to limit the misuse of national resources by the Executive, thereby "safeguard[ing] the public fisc." *Id*. The Venezuela Constitution mandates state ownership of PDVSA for reasons of "economic and political sovereignty and national strategy" and, accordingly, subjects PDVSA's capacity to enter into national public interest contracts to legislative approval. A-988-89. As a result of the Maduro regime's violation of this requirement, Venezuela faces the potential loss of ownership of CITGO Holding—the foreign "crown jewel" of its national industry.

The Noteholders' argument that Venezuela's interest is "limited" because PDVSA had previously issued debt without National Assembly approval, Resp. Br. 17-18, 61-62, has no merit. For starters, debt issuances by PDVSA subsidiaries, such as CITGO Petroleum and CITGO Holding (*see* Resp. Br. 18) are not subject to National Assembly authorization because such non-Venezuelan entities are not considered part of Venezuela's national public administration. A-665 ¶ 12; A-1686 ¶ 28. Furthermore, since 1999 the Chavez and Maduro regimes systematically ignored the National Assembly's constitutional authority by executing national public interest contracts without submitting them for required authorization. *See* A-797-802 ¶¶ 54-64; A-888-89 ¶¶ 99-102. A lack of National Assembly authorization for a specific transaction, therefore, does not prove that such approval

was not required. Following the opposition parties' electoral victory in 2015, the National Assembly has passed numerous resolutions rejecting national public interest contracts concluded without legislative authorization, including other PDVSA contracts. *See* A-802-03 ¶¶ 63, 65.

D. New York's Public Policy Principles Require the Application of Venezuelan Law

Under New York law, "a foreign State's sufficiently compelling public policy could preclude an application of New York law." *Zurich Ins. Co. v. Shearson Lehman Hutton, Inc.*, 84 N.Y.2d 309, 319 (1994); *see also* Restatement § 187(2)(b); PDVSA Br. 50-55. Venezuela has a compelling and fundamental public policy, reflected in its constitutional provisions, of prohibiting state-owned entities from entering into contracts of national public significance without legislative authorization. This policy, designed to stave off authoritarian mismanagement of public resources, is paramount to Venezuela's existence as a democracy and is materially greater than that of New York. *Supra* at 25.

The Noteholders' argument that this "fundamental public policy" principle is foreclosed by *IRB* and *Ministers*, Resp. Br. 62, is unavailing. This Court has not yet addressed, let alone determined, the applicability and contours of the "fundamental public policy" exception to the enforcement of choice-of-law provisions after the enactment of NYGOL § 5-1401. This Court and others, however, have generally continued to recognize the validity of the exception. *See 2138747 Ontario, Inc. v.*

Samsung C&T Corp., 31 N.Y.3d 372, 377 (2018); *Askari v. McDermott, Will & Emery, LLP*, 113 N.Y.S.3d 412, 428 (2d Dep't 2019).

Certain courts have held that NYGOL § 5-1401 forecloses consideration of a foreign jurisdiction's public policy given the provision's lack of an explicit exception for the violation of a foreign state's fundamental public policy. *See, e.g.*, *Supply Building Co. v. Estee Lauder Int'l*, No. 95 Civ. 8136, 2000 WL 223838, at *2-3 (S.D.N.Y. Feb. 25, 2000). This analysis ignores the context of section 5-1401's enactment.

Prior to the enactment of NYGOL § 5-1401, courts generally enforced contractual choice-of-law provisions unless (i) the transaction did not bear a reasonable relationship to the chosen state, or (ii) application of the chosen state's law would violate a fundamental public policy of a state with a materially greater interest in the relevant issue. *See, e.g.*, *Joy v. Heidrick Struggles, Inc.*, 93 Misc. 2d 818, 821 (N.Y. Civ. Ct. 1977) (citing Restatement § 187(2)). Section 5-1401's stated purpose was to eliminate the "reasonable relationship" requirement, not the "fundamental public policy" exception. *See* N.Y. Bill Jacket, L. 1984, ch.421 at 7-8, 17-18. Indeed, NYGOL § 5-1401 "*leaves it to the courts to determine whether under unusual circumstances a fundamental public policy of a state other than New York may override an otherwise valid stipulation of New York law*." Committee Report, Proposal for Mandatory Enforcement of Governing Law Clauses and Related

Clauses in Significant Commercial Agreements, 38 Rec. Ass'n B. City N.Y. 537, 544 (1983) (emphasis added).

No "valid stipulation of New York law" governs the threshold issue of the 2020 Notes' validity. But if there were ever an "unusual circumstance" where "a fundamental public policy of a state other than New York" should "override" such a stipulation, this is that case.

E. The Restatement Principles on Contractual Illegality Require the Application of Venezuelan Law

Section 202 of the Restatement provides that "[t]he effect of illegality upon a contract is determined by the law selected by application of the rules of [sections] 187-188 [i.e., the Restatement's general choice-of-law rules]." Restatement § 202(1). In determining the "effect of illegality," the court first asks "whether there is any illegality" by looking to the local law of each jurisdiction where an allegedly illegal act "related to" to the "making" or "performance" of the contract occurred. *Id.* § 202 cmt. c. The court then applies the law chosen under general choice-of-law principles to determine "the effect of th[e] illegality" upon the contracting parties' rights. *Id.* Although this Court has not articulated a choice-of-law rule for contractual illegality, New York courts conduct analysis with reference to the Restatement's sections 187 and 188, which section 202 expressly mentions. *See, e.g.*, *Freedman v. Chemical Constr. Corp.*, 43 N.Y.2d 260, 265 n* (1977); *Joy*, 93 Misc. 2d at 821-22; *see also* PDVSA Br. 55-58.

The Noteholders take no issue with the Restatement's principles. They argue instead that *IRB* and *Ministers* "forbid any choice-of-law analysis" and therefore any consideration of illegality under non-New York law. Resp. Br. 66-67. Under the Noteholders' argument, illegality under Venezuelan law would be irrelevant even if Venezuela were indisputably the exclusive place of "performance" *and* the exclusive place of "making." This cannot be right, and was certainly not the holding in *IRB* or *Ministers*, which did not address the interplay between contractual choice of law and illegality in the making or performance of a contract.

The Noteholders argue that Venezuelan law is inapplicable regardless because "the location of both the making and the performance of the Governing Documents is New York." Resp. Br. 67 (citing A-2347-48). But while certain acts in New York, including the delivery of signatures, related to the making of the Governing Documents, *all* of the specific (and illegal) acts relating to PDVSA's capacity to contract occurred in Venezuela, including the Maduro regime's formal direction to PDVSA to execute the transaction over the National Assembly's objection. PDVSA Br. 56-57.

Finally, the Noteholders argue that the Governing Documents would nonetheless be enforceable in New York because a "failure to obtain legislative approval" is not *malum in se* ("evil in itself"), the Governing Documents are not executory, and PDVSA is *in pari delicto*, having "expressly represented that the

Governing Documents were lawful and enforceable." Resp. Br. 68. But this case is *not* about whether the Governing Documents are enforceable—it is *only* about what body of law will decide that question. Further, the lack of legislative authorization here reflects the Maduro regime's deliberate disregard of the National Assembly's constitutional prerogative to protect the Venezuelan people from abuses of executive power. *See* PDVSA Br. 1-2, 48. That regime controlled PDVSA's representations at the time of the transaction, as the Noteholders understood. A-1472-73 ¶¶ 78-80, 82. By the same token, PDVSA cannot be considered *in pari delicto* when it was being illegally controlled by an authoritarian regime. *See* PDVSA Br. 5-9. The Governing Documents are illegal because they lacked the requisite non-waivable prior authorization designed by the Venezuelan Constitution to protect the public fisc. *See In re N.Y. State Med. Transporters Ass'n, Inc. v. Perales*, 77 N.Y.2d 126, 131-32 (1990).

CONCLUSION

This Court should answer the first and second certified questions in the affirmative, and the third question in the negative.

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Respectfully submitted,

Michael J. Gottlieb
Willkie Farr & Gallagher LLP
1875 K Street, NW
Washington, DC 20006
Tel.: (202) 303-1000
Fax: (202) 303-2000
mgottlieb@willkie.com

Jeffrey B. Korn
Willkie Farr & Gallagher LLP
787 Seventh Avenue
New York, New York 10019
Tel.: (212) 728-8000
Fax: (212) 728-8111
jkorn@willkie.com

Nicholas Reddick
Willkie Farr & Gallagher LLP
One Front Street, 34th Floor
San Francisco, California 94111
Tel.: (415) 858-7400
Fax: (415) 858-7599
nreddick@willkie.com

– and –

Kristin E. Bender
Willkie Farr & Gallagher LLP
Citypoint, 1 Ropemaker Street
London EC2Y 9AW, United Kingdom
Tel.: +44 (203) 580-4833
Fax: +44 (203) 580-4800
kbender@willkie.com

Counsel for Plaintiff-Counter-Defendant-Appellant PDV Holding, Inc.

Kurt W. Hansson
James L. Ferguson
Paul Hastings LLP
200 Park Avenue
New York, New York 10166
Tel.: (212) 318-6000
Fax: (212) 319-4090
kurthansson@paulhastings.com
jamesferguson@paulhastings.com

– and –

Igor V. Timofeyev
Paul Hastings LLP
2050 M Street, NW
Washington, DC 20036
Tel.: (202) 551-1700
Fax: (202) 551-1705
igortimofeyev@paulhastings.com

Counsel for Plaintiffs-Counter-Defendants-Appellants PDVSA Petróleo, S.A. and Petróleos de Venezuela, S.A.

CERTIFICATION

I certify pursuant to 500.13(c)(1) that the total word count for all printed text in the body of the brief, exclusive of the statement of the status of related litigation; the corporate disclosure statement; the table of contents, the table of cases and authorities and the statement of questions presented required by subsection (a) of this section; and any addendum containing material required by subsection 500.1(h) is 6,999.

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Dated: July 25, 2023
New York, New York

Kurt W. Hansson

Kurt W. Hansson