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)

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: March 27, 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.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 500.1(f) of this Court's Rules of Practice, Appellants' parents, subsidiaries, and affiliates (other than Appellants in relation to one another) are as follows:

Corporación Venezolana Del Petróleo, S.A.

PDVSA Gas, S.A.

PDV Marina, S.A.

PDVSA Servicios, S.A.

Bariven, S.A.

Intevep, S.A.

PDVSA Ingeniería Y Construcción, S.A.

Commercit

Commerchamp

PDVSA TV, S.A.

PDVSA Industrial, S.A.

PDVSA Naval, S.A.

PDVSA Agrícola, S.A.

PDVSA Dessarollos Urbanos, S.A.

PDVSA Gas Comunal, S.A.

PDVSA América, S.A.

PDVSA V.I. Inc. (Islas Vírgenes)

Propernyn B.V. (Holland)

Refinería Isla, S.A. (Curazao)

Petroleum Marketing International Petromar A.V.V.

PDVSA Marketing International PMI Aruba, A.V.V.

PDV Insurance Co. (Bermudas)

CITGO Holding, Inc.

CITGO Petroleum Corp.

STATEMENT OF RELATED LITIGATION

As of the date of completion of this Brief, there are no related cases pending before any court, other than the appeal pending in the United States Court of Appeals for the Second Circuit, *Petróleos de Venezuela S.A. v. MUFG Union Bank, N.A.*, Nos. 20-3858, 20-4127, where the Second Circuit certified the questions of New York law to this Court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION AND SUMMARY OF ARGUMENT

In 2016, the authoritarian regime of Nicolás Maduro violated the Venezuelan Constitution and usurped the constitutional powers of the democratically elected National Assembly by directing Petróleo de Venezuela, S.A. ("PDVSA")—Venezuela's national oil company—and two of its subsidiaries (PDVSA Petróleo, S.A. ("Petróleo") and PDV Holding, Inc. ("PDVH")) (collectively, "the PDVSA Parties") to issue new debt notes due in 2020 (the "2020 Notes") in exchange for existing notes due in 2017 that were on the verge of default. To entice the noteholders—mostly foreign hedge funds, including the Respondents here ("the Noteholders")—to accept this exchange, the regime offered to secure the 2020 Notes with the pledge of a controlling interest in the holding company of U.S.-based refiner CITGO Petroleum Corporation—the foreign "crown jewel" of Venezuela's national oil industry.

Under the Venezuelan Constitution, authorization by the National Assembly—the country's unicameral legislature—is required for any "national public interest" contract, such as this one, between a government agency and a foreign counterparty. The National Assembly refused to authorize this transaction. Instead, the Assembly, in a legislative session expressly invoked its constitutional oversight authority over national public interest contracts and enacted an official resolution *categorically rejecting* any transaction purporting to pledge a controlling

interest in CITGO's holding company. The Maduro regime ignored the Assembly's constitutional prerogatives and executed the transaction in disregard of the Assembly's formal refusal to authorize the exchange.

Each of the documents governing the transaction contains a choice-of-law provision providing that it "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)." The question in this case is whether New York's choice-of-law rules authorize a foreign state-owned entity to nullify the express commands of its own constitution by signing an agreement with a New York choice-of-law provision. New York law does no such thing. The Uniform Commercial Code, adopted by New York (and by all other states), and longstanding New York choice-of-law principles, honor the limitations imposed by foreign constitutions on the issuance of securities by foreign agencies and instrumentalities. This Court should reaffirm these principles and reject the invitation to transform New York State—a leading center of international commerce—into a safe haven for unscrupulous authoritarian regimes to execute illegal transactions that violate their own constitutions.

The first certified question turns on a provision of New York law stating that "the local law of the issuer's jurisdiction … governs … the validity of a security."

UCC § 8-110(a)(1). The essence of the parties' dispute is whether "validity" encompasses a claim that the issuer lacked authority to issue the security, based on express terms of the constitution of the issuer's nation dealing with the separation of powers, or whether some extra-textual limitation cabins "validity" to challenges based solely on laws that relate exclusively to the issuance of securities. The PDVSA Parties have challenged the "validity" of the PDVSA 2020 Notes because they were issued in direct contravention of the Venezuelan Constitution. That legal defect resides squarely within the scope of UCC § 8-110(a)(1), and is supported by the term's ordinary meaning, statutory context, official UCC commentary, leading treatises, legislative history, and purpose. Section 8-110's requirement is also a mandatory UCC rule that parties cannot contract around by selecting the law of a different jurisdiction, and, in any event, the pertinent choice-of-law provisions at issue incorporate the UCC's mandatory rule.

As to the second certified question, Venezuelan law governs the 2020 Notes' validity under common law choice-of-law principles. Party autonomy to choose the law governing a contract is not unlimited, and it is axiomatic in commercial transactions that an entity's capacity, power, and authority to enter into a particular contract must be determined under the law of its jurisdiction of organization. Applying similar reasoning, this Court has long recognized that parties dealing with

foreign state-owned entities are bound by the legal limitations on those entities' power to contract.

This result not only comports with common sense and the traditional limits on party autonomy, but it adheres to New York's choice-of-law rules and public policies. As noted, the issue before the Court is PDVSA's power and capacity to enter into the 2020 Notes transaction without prior legislative authorization. Venezuela has a far greater interest than New York in the resolution of this issue, and New York's status as an international commercial center would be harmed, not helped, by according legal respect to the Maduro regime's flouting of the Venezuelan Constitution.

As to the third certified question, no New York statute or common law theory renders the Governing Documents enforceable given their invalidity under Venezuelan law.

JURISDICTIONAL STATEMENT

This Court has jurisdiction over the certified questions pursuant to 22 N.Y.C.R.R. § 500.27(a).

QUESTIONS PRESENTED

1. Given PDVSA's argument that the Governing Documents are invalid and unenforceable for lack of approval by the National Assembly, does New York Uniform Commercial Code section 8-110(a)(1) require that the validity of the

Governing Documents be determined under the Law of Venezuela, "the local law of the issuer's jurisdiction"?

Answer: Yes.

2. Does any principle of New York common law require that a New York court apply Venezuelan substantive law rather than New York substantive law in determining the validity of the Governing Documents?

Answer: Yes.

3. Are the Governing Documents valid under New York law, notwithstanding the PDV Entities' arguments regarding Venezuelan law?

Answer: No.

STATEMENT OF THE CASE

In October 2016, the authoritarian regime of Nicolás Maduro usurped the constitutional powers of Venezuela's democratically elected National Assembly by directing PDVSA, Venezuela's state-owned oil company, and two of its subsidiaries, (Petróleo and PDVH) to execute contracts of national public interest without legislative authorization. A-2296; A-13-14. Under Articles 150 and 187.9 of the Venezuelan Constitution, legislative authorization is required for all "national public interest" contracts entered into with foreign, non-domiciled counterparties. A-988-89.

The transaction involved the issuance of new PDVSA notes due in 2020 in exchange for notes due in 2017 that were on the verge of default. A-2293; A-996-97. To entice the noteholders—mostly foreign hedge funds—to accept this exchange (the "Exchange Offer"), the regime offered to secure the 2020 Notes with the pledge of a controlling interest in CITGO Holding, Inc. ("CITGO"), which owns 100% of the U.S.-based refiner CITGO Petroleum Corporation—the foreign "crown jewel" of Venezuela's national oil industry. A-25; A-2293-94; A-1159-60.

The National Assembly rejected the transaction prior to its execution. Following a public hearing, the Assembly expressly invoked its constitutional approval authority over national public interest contracts, and enacted an official resolution "reject[ing] categorically" any transaction purporting to pledge a controlling interest in CITGO. A-87; A-666 ¶ 16. The Maduro regime nevertheless executed the transaction in disregard of the Assembly's disapproval and the Venezuelan Constitution. A-2296. Ultimately, given the widespread uncertainty surrounding the validity of the 2020 Notes, fewer than half of the 2017 Notes were tendered in the exchange. A-10; A-2296; A-996-97; A-665-66 ¶ 15

A. The Venezuelan Constitution and the Maduro Regime's Proposed Exchange Offer

Article 150 of the Venezuelan Constitution provides that "[n]o municipal, state or national public interest contract shall be executed with foreign States or official entities, or with companies not domiciled in Venezuela, or shall be

transferred to them without the approval of the National Assembly." A-988. Article 187.9 of the Venezuelan Constitution provides that "[i]t is the role of the National Assembly to … [a]uthorize contracts of municipal, state and national public interest, with States or official foreign entities or with companies not domiciled in Venezuela." A-988-89.

In the Venezuelan legal system, the National Assembly is the "first-instance interpreter of the Constitution whenever it enacts laws, adopts resolutions, or performs other parliamentary acts in accordance with its constitutional authority." A-2624 ¶ 53; Brief for the Bolivarian Republic of Venezuela as *Amicus Curiae* Supporting Appellants, *Petróleos de Venezuela S.A. v. MUFG Union Bank, N.A.*, No.20-3858, Dkt. No. 146, at 3-4 (2d Cir. Mar. 22, 2021) ("Venezuela Amicus Brief"). As the Republic of Venezuela explained below, the Governing Documents are "national public interest" contracts within the meaning of Articles 150 and 187.9. *See* A-661-65 ¶¶ 2-12; A-2615-21 ¶¶ 31-45; Venezuela Amicus Brief at 15-16. Indeed, until the pledge and issuance of the Notes at issue in this appeal, PDVSA had never pledged strategic assets without the prior authorization of the National Assembly. A-663 ¶ 7; Venezuela Amicus Brief at 6.

In December 2015, political parties opposing the Maduro regime won an overwhelming majority of seats in the Venezuelan National Assembly—the country's unicameral legislature. The National Assembly then "began to assert its

prerogatives under the Venezuelan Constitution, including with respect to PDVSA." A-11.

Soon after the National Assembly was seated in 2016, the Maduro regime embarked on a concerted effort to usurp the National Assembly's constitutional prerogatives. In early May 2016, Maduro issued an "emergency" decree claiming the power to execute certain national public interest contracts without legislative authorization. A-12; A-2632-33 ¶ 68. On May 26, 2016, the National Assembly responded by passing a resolution (the "May 2016 Resolution") reiterating its exclusive constitutional power to authorize national public interest contracts. A-12-13; A-1192-94. The Assembly emphasized the broad scope of its powers under Articles 150 and 187.9, and "'remind[ed] that … contracts of national … public interest … without the approval of the National Assembly … *shall be null and void in their entirety*.'" A-13 (quoting A-1194) (emphasis added). The Assembly further instructed that the resolution be circulated to foreign embassies in Venezuela to "inform the[ir] Governments … and the corresponding companies about the nullity of contracts that are concluded in contravention of Article 150." A-1194; *see also* A-13.

By 2016, with Venezuela's oil-dependent economy collapsing, PDVSA was facing default on billions of dollars of unsecured notes due in 2017 (the "2017 Notes"). *See* A-2291-92.

To stave off the default, the regime announced the Exchange Offer on September 16, 2016. The Exchange Offer purported to exchange new secured 2020 Notes for unsecured 2017 Notes, but its defining feature was embodied in a Pledge and Security Agreement (the "Pledge Agreement"), under which PDVH (at PDVSA's instruction) purported to pledge as collateral a controlling interest of 50.1% of CITGO's stock. A-2293-94; A-1159-60; A-1478 ¶ 115. Never before had PDVSA notes been secured by a pledge of a critical national asset. A-663 ¶ 7.

Without seeking legislative authorization, the Maduro regime convened meetings in Caracas on September 7-8, 2016, during which the regime's oil minister instructed PDVSA to carry out the Exchange Offer, and PDVSA instructed Petróleo and PDVH to execute the documents necessary for the transaction. A-1472-73 ¶¶ 78-80, 82.

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

Immediately after the Maduro regime announced the Exchange Offer on September 16, 2016, the National Assembly convened in parliamentary session and responded with a formal resolution on September 27, 2016 (the "September 2016 Resolution"). A-13. The September 2016 Resolution "invoked the National Assembly's powers under Article 187," and "*reject[ed] categorically*" the pledge of a controlling interest in CITGO "within the swap transaction." A-13 (emphasis added); *see also* A-87; A-666 ¶ 16.

The National Assembly's condemnation was the subject of significant public commentary. Various analysts noted the risk that the transaction would be deemed invalid without the Assembly's approval. *See, e.g.*, A-3386 ("[T]he collateral should not be taken at face value as … investors would be right to be concerned this swap is being carried out without the consent of the opposition-controlled National Assembly."); A-1248 (the pledged CITGO shares "should not be worth much" as collateral because the Assembly had not "blessed" the transaction); *see also* A-1238. Around the same time, the United States similarly expressed concern "that the National Assembly has not been allowed to carry out its rightful role," A-2109, and urged the Maduro regime to respect the constitutional role of the National Assembly. A-2108-09; *see also* A-2103.

The Maduro regime nevertheless directed PDVSA and its subsidiaries to complete the transaction. The Indenture and the Pledge Agreement were executed on October 27, 2016, and the 2020 Notes were issued on October 28, 2016. A-10; A-2296.

The 2020 Notes were issued pursuant to an Indenture entered into by PDVSA (as issuer) and Petróleo (as guarantor) with various foreign entities, including the Noteholders as trustee and collateral agent. A-2294.

The 2020 Notes, the Indenture, and the Pledge Agreement comprise an interrelated set of contracts (as defined in the Indenture, the "Transaction

Documents," and as described by the district court and Second Circuit, the "Governing Documents") executed as part of a single, integrated transaction. A-1062. Each of the Governing Documents contains a substantially similar choice-of-law provision providing that the document "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).

C. The United States' Recognition of the National Assembly-led Government and the *Ad Hoc* PDVSA Board

On January 15, 2019, following a rigged presidential election, the National Assembly declared the presidency vacant and, in accordance with the Venezuelan Constitution, named the Assembly's President, Juan Guaidó, as the country's Interim President. A-14 (citing A-1753). Viewing the National Assembly as Venezuela's "only legitimate branch of government," the United States officially recognized the Guaidó government. A-14 (citing A-1753).

In February 2019, the National Assembly enacted a statute to govern Venezuela's transition to democracy, leading to the appointment of a new *ad hoc* Board of Directors of PDVSA and freeing PDVSA and its subsidiaries from

Maduro's control. *See* A-14. The United States government recognized the *ad hoc* board as PDVSA's governing body. A-15.[1]

On October 15, 2019, the National Assembly enacted another resolution (the "October 2019 Resolution"), "reiterat[ing] the invalidity of PDVSA's 2020 Bonds." A-94-97; *see also* A-15. The Assembly confirmed its prior finding that "the 2020 Bond indenture violated Article 150 of the Constitution … since it concerned a national public contract, executed with foreign companies, which was not authorized by the National Assembly." A-96. The Assembly reiterated that its September 2016 Resolution "rejected the collateral of 50.1% of the shares in Citgo Holding, Inc., and ordered the initiation of investigations for alleged crimes to the public patrimony derived from this transaction." A-94.

A year after the Exchange Offer, PDVSA defaulted on all of its debt except the 2020 Notes. A-756 ¶ 46. On October 27, 2019, PDVSA defaulted on the 2020 Notes as well. A-2298.

[1] On January 3, 2023, the National Assembly amended the Transition Statute, terminating the interim Guaidó Government and vesting its powers with respect to the PDVSA governance in a Delegate Commission of the National Assembly and the newly established Council for the Management and Protection of Assets. The State Department announced that "[t]he United States continues to recognize the democratically elected 2015 National Assembly as the last remaining democratic institution in Venezuela" and "welcome[s] the agreement reached to extend its authority." U.S. Dep't of State, *Venezuela's Interim Government and the 2015 National Assembly* (Jan. 3, 2023).

D. The District Court Proceedings

On October 29, 2019, the PDVSA Parties filed suit seeking a declaration that the 2020 Notes and the related Governing Documents are invalid, illegal, void *ab initio*, and thus unenforceable. A-75-76 ¶¶ 73-83. The Noteholders counterclaimed, seeking a contrary declaration and other relief. A-115-49 ¶¶ 107-254. The parties cross-moved for summary judgment, and, on October 16, 2020, the district court granted the Noteholders' motion in part and dismissed the PDVSA Parties' claims. A-2351-52.

As relevant here, the district court ruled that New York law rather than Venezuelan law "governs this action." A-2331-33. The court first addressed section 8-110 of the Uniform Commercial Code (as adopted in New York, the "UCC"), which provides that "the validity of [a] security" is governed by "the local law of the issuer's jurisdiction" (here, Venezuela). A-2333. The court conceded that under a "plain reading" of UCC § 8-110, "Venezuelan law would govern the validity of the 2020 Notes and the Governing Documents," A-2333, but concluded that section 8-110 "has a far narrower understanding of 'validity'" that excludes "illegality, or incapacity, or lack of authority." A-2338-39.

Turning to the choice-of-law issues, the district court refused to apply the principle that a foreign state's law should apply "when the actual authority of that foreign state's agent is in question." A-2340 (citations omitted). The court also

rejected the rule that, "[i]n cases alleging a violation of foreign law, the existence of illegality is to be determined by the local law of the jurisdiction where the illegal act is done" (here, Venezuela), A-2344-45, looking instead to "the place of performance" (New York), A-2345-46. Finally, the district court ruled that New York has the most significant relationship to the transaction under a multifactor "grouping of contacts" analysis. A-2346-49.

The district court then entered a final judgment declaring the Governing Documents valid and enforceable. A-2356-58. The court stayed its judgment pending appeal. A-2361-67.

E. The Second Circuit's Certification Opinion

The PDVSA Parties appealed to the Second Circuit. On October 13, 2022, the Second Circuit certified questions of New York law to this Court. A-44-45. The Second Circuit explained that the question of whether the Governing Documents "were all void from the jump because [under Venezuelan law] PDVSA possessed no ability, authority, or capacity to execute the Exchange Offer absent National Assembly approval" turns on whether New York's choice-of-law rules require the application of "the asserted requirements of Venezuelan law to challenge the validity of the bonds." A-25. The Second Circuit pointed to two potential New York law rules requiring application of Venezuelan law: *first*, "the statutory choice-of-law directive for investment securities in New York Uniform Commercial Code section

8-110(a)(1), which says that 'the local law of the issuer's jurisdiction … governs … the validity of a security,'" and, *second*, "common law choice-of-law principles …, including the principle that a foreign entity's authority is determined under foreign law, and that under New York law a security issued by a foreign entity can be unenforceable on the ground that it was issued in violation of the law of the issuer's jurisdiction." A-26.

As to the first question, the court observed that because UCC sections 8-110(a)(1) and (d) apply the "issuer's jurisdiction" (here, Venezuela) to determine the "validity of a security," the statute "appears to call for the application of Venezuelan law to determine the 'validity' of the 2020 Notes." A-28. The court noted that the Official Comment to section 8-110 "explicitly mentions constitutional violations as a type of defect that could bear on a security's invalidity." A-29. Thus, "the plain language of Article 8 and associated commentary support applying Venezuelan law to determine the validity of the 2020 Notes in light of Articles 150 and 187(9) of the Venezuelan Constitution." A-29-30. Nevertheless, the Second Circuit could not "confidently predict" how this Court might apply section 8-110 given the Court's two recent decisions—*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)—"giving broad effect to choice-of-law clauses in New York"

and the absence of New York case law interpreting section 8-110. A-30-31; A-33-34.

As to the second question, the Second Circuit acknowledged "[t]he general rule under New York law … that 'courts will generally enforce choice-of-law clauses and that contracts should be interpreted so as to effectuate the parties' intent.'" A-35 (quoting *Ministers*, 26 N.Y.3d at 470). The Second Circuit also noted, however, that under "a public policy exception," courts will not enforce the contracting parties' choice of law where doing so would violate a fundamental public policy of a state with a materially greater interest in the relevant issue. A-35-37. Here, "there is a colorable argument that … Venezuela has the 'materially greater interest' over the 'particular issue' of PDVSA's authority or capacity to execute the Exchange Offer without National Assembly approval, and that enforcing the Governing Documents would violate a 'fundamental policy' of Venezuela." A-38 (quoting Restatement (Second) of Conflict of Laws § 187(2) (1971)). The Second Circuit noted, however, that this Court "has not decided whether, in light of *Ministers* and *IRB-Brasil*, New York recognizes this [public policy] exception." A-37-38.

The Second Circuit also observed that "other common law doctrines may be relevant." A-38. Specifically, the court pointed to the "most-significant-relationship analysis" applied in *Indosuez International Finance B.V. v. National Reserve Bank*,

98 N.Y.2d 238 (2002), and it sought this Court's guidance on whether *Indosuez* remains good law after *IRB-Brasil*. A-38-39. The Second Circuit additionally referenced decisions by federal courts applying New York law and concluded that "questions regarding the actual authority of an agent of the [foreign] state's government should be resolved with reference to the law of the foreign jurisdiction … even in the presence of a contractual choice-of-law election." A-39-40 (citing cases).

On November 22, 2022, this Court accepted the certified questions. A-48.

ARGUMENT

I. UCC SECTION 8-110 MANDATES THAT THE VALIDITY OF THE 2020 NOTES BE DETERMINED UNDER VENEZUELAN LAW

UCC § 8-110 dictates that questions involving the "validity" of the 2020 Notes be decided by application of the law of the issuer's jurisdiction—here, Venezuelan law. The PDVSA Parties' challenge to the validity of the Governing Documents—that PDVSA lacked authority to issue the 2020 Notes—raises a core "validity" issue within the meaning of section 8-110 because it turns on whether a governmental issuer complied with a constitutional provision that imposed conditions on the issuer's authority to issue the security. Unlike the other choice-of-law provisions previously considered by this Court, UCC § 8-110 is a *mandatory* rule that expressly requires the application of the law of the issuer's jurisdiction to determine the validity of its securities. Moreover, even if the parties did have the

power to choose the law governing validity, the contractual documents at issue expressly contemplate the application of UCC § 8-110, and thus cannot be construed to override the application of Venezuelan law. This Court should answer the first certified question in the affirmative.

A. UCC Section 8-110(a)(1) Mandates Application of Venezuelan Law to this Dispute About the "Validity" of the Governing Documents

UCC § 8-110 provides that "the local law of the issuer's jurisdiction … governs … the validity of a security." It is undisputed that the 2020 Notes are a "security" within the meaning of section 8-110 and that the 2020 Notes' issuer's jurisdiction is Venezuela. A-2333. The ordinary meaning of the term "validity" in section 8-110, the statutory context, official commentary, leading treatise, and available legislative history, collectively 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 a constitutional provision that applied to the issuer's authority to issue the security. The district court's contrary holding relied heavily on a misreading of a hypothetical in the leading UCC treatise, but the treatise's editor has since explained that the district court's interpretation of section 8-110 was erroneous, and the updated treatise reflects that view.

1. All of the Accepted Sources of Statutory Interpretation Demonstrate that "Validity" Encompasses Disputes over Whether a Security Was Issued Consistent with the Issuer's Legal Authority, Like the Dispute in this Case

When interpreting the UCC, this Court follows 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, 103-04 (2022). Absent an express statutory definition of a term, "the Court must give the word its ordinary meaning." *People v. Versaggi*, 83 N.Y.2d 123, 129-30 (1994) (citation omitted). "[D]ictionary 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). In addition, "[w]hen the statutory provision to be interpreted is but one component in a larger statutory scheme, it must be analyzed in context and in a manner that harmonizes the related provisions and renders them compatible." *Town of Irondequoit v. Cnty. of Monroe*, 36 N.Y.3d 177, 182 (2020) (internal quotation marks and citations omitted).

Here, because section 8-110 does not define the term "validity," the Court may look to the word's "ordinary meaning." *Versaggi*, 83 N.Y.2d at 129-30.[2] The

[2] Article 8 defines numerous otherwise ordinary terms to carry a specialized or technical meaning. *See, e.g.*, UCC § 8-102 (giving specialized definitions to terms like "control," "delivery," "financial asset," "broker," and even "communicate"). UCC Article 1 defines even more common terms, like "bank," "consumer," "money," "right," and "signed," for purposes of the UCC as a whole, and even establishes separate, distinct definitions of "agreement" and "contract." *See* UCC

editions of Black's Law Dictionary published contemporaneously with the adoption of UCC Article 8 and with its 1994 revision, respectively, define "validity" to mean "[l]egal sufficiency, in contradistinction to mere regularity." Black's Law Dictionary 1719 (4th ed. 1951); *see also* Black's Law Dictionary 1550 (6th ed. 1990) (same).[3] Dictionaries of ordinary usage likewise define "validity" to mean "[l]egal strength, force, or authority; that quality of a thing which renders it supportable in law or equity; legal sufficiency." Webster's New International Dictionary of the English Language 2814 (2d ed. 1935). This ordinary meaning of "validity" unquestionably covers this dispute, and the Noteholders have never contended otherwise.

The statutory context of section 8-110 further demonstrates that the term "validity" encompasses this dispute. The UCC's Official Comments explain that the term "validity" in section 8-110, which deals with the issuer's rights and duties,

---

§ 1-201. Notwithstanding these specialized definitions for numerous other terms, the UCC's drafters declined to give "validity" any specialized or technical definition.

[3] Black's Law Dictionary also defines "valid" as "[h]aving legal strength or force, executed with the proper formalities, incapable of being rightfully overthrown or set aside," as well as "[o]f binding force; legally sufficient or efficacious; authorized by law." Black's Law Dictionary 1719 (4th ed. 1951); *see also* Black's Law Dictionary 1550 (6th ed. 1990) (same). Other legal dictionaries are in accord. *See* Merriam-Webster's Dictionary of Law 521 (1996) (defining "valid" to mean "having legal efficacy or force," "executed with proper authority and form"); Max Radin, Radin Law Dictionary 360 (1970) (defining "validity" to mean "[l]egal effectiveness or sufficiency," and "valid" to mean "[h]aving legal effect; binding according to law; vested with legal authority").

should be understood with reference to the substantive validity provisions of Article 8. Specifically, Official Comment 2 to section 8-110 explains that section 8-110(a)(1) "provides that the law of the issuer's jurisdiction governs the validity of the security," which "ensures that a single body of law will govern the questions addressed in Part 2 of Article 8, concerning the circumstances in which an issuer can and cannot assert invalidity as a defense against purchasers." UCC § 8-110, Official Comment 2.[4]

Section 8-202—"the principal Article 8 substantive rule to look to for guidance in applying the choice of law rule in subsection 8-110(a)," 7 Hawkland § 8-110:2—removes any doubt as to whether section 8-110 applies to "validity" challenges like the one at issue. That subsection, which sets forth rules to apply "if an issuer asserts that a security is not valid," UCC § 8-202(b), provides that "[a] security … issued with a defect going to its validity, is valid in the hands of a purchaser for value and without notice of the particular defect *unless the defect involves a violation of a constitutional provision*," in which case "the security is valid in the hands of a purchaser for value and without notice of the defect, other than one who takes by original issue." UCC § 8-202(b)(1) (emphasis added). The same rules apply to "an issuer that is a government or governmental subdivision,

[4] The main treatise on the UCC confirms that "the scope of [section 8-110] is easily understood in light of the substantive provisions of Article 8." 7 William D. Hawkland, et al., Uniform Commercial Code Series § 8-110:2 (2023) ("Hawkland").

agency or instrumentality," except that an otherwise invalid security issued by a government or governmental entity will not be subject to validation unless certain conditions are met. UCC § 8-202(b)(2).[5]

Given the absence of an express definition of validity in section 8-110, section 8-202(b) carries considerable interpretive weight. As the Second Circuit correctly observed, because defenses of invalidity under section 8-202 are connected to section 8-110, and "because section 8-202 explicitly mentions constitutional violations as a type of defect that could bear on a security's invalidity, the plain language of Article 8 and associated commentary support applying Venezuelan law to determine the validity of the 2020 Notes in light of Articles 150 and 187(9) of the Venezuelan Constitution." A-29-30.[6]

The Official Comments confirm that the UCC drafters had in mind constitutional provisions that are *not* "specific to the issuance of securities" but nonetheless *can encompass* an issuance of securities, like Article 150 of the

[5] As the Official Comment to section 8-202 explains, "governmental issuers are distinguished … as a matter of public policy, and additional safeguards are imposed before governmental issues are validated." UCC § 8-202, Official Comment 3.

[6] As the Second Circuit observed, this case is "quite analogous" to a scenario where "a governmental issuer sold municipal bonds to the public, only to later discover some 'constitutional or statutory provision concerning authorization for issuance of municipal bonds had not been satisfied.'" A-30 n.10 (citing 7 Hawkland § 8-110:2). "Here, … a government-owned issuer [is] arguing a key constitutional provision concerning authorization for public interest contracts has not been satisfied." A-30 n.10.

Venezuelan Constitution does. Thus, the Official Comments to UCC section 8-202 cite two bond invalidity cases involving Colorado's constitutional debt limit for municipalities, which limits their power to "contract any debt by loan in any form" and does not mention securities at all. *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). The Official Comments cite these cases as representing one strand of the common law estoppel doctrine that the "validity" rules in section 8-202 were intended to incorporate. *See* Colo. Const., art. 11, § 6 (1875) ("No county shall contract any debt by loan in any form, except [for certain purposes and within certain limits].").

The legislative history of section 8-110 fully supports the statutory text and context. As the New York legislature emphasized when it adopted the Uniform Law Commission's revisions to Article 8 in 1998, the mandatory nature of section 8-110(a)(1)'s choice-of-law regime "is 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, in the sense of having been issued pursuant to appropriate corporate or other similar action." N.Y. Bill Jacket, 1997 A.B. 6619, Ch. 566, comm. report at 22. The Bill Jacket does not suggest, let alone state, that disputes over whether a security was "issued pursuant to appropriate corporate *or other similar action*" would exclude disputes about whether a government-issued security

was "issued pursuant to" a governing constitutional provision. Nor could it have, since that situation—where a government agency issued securities inconsistent with its local constitution or laws—is plainly within the Bill Jacket's description of its authors' understanding of UCC § 8-110.

2. The UCC's Statutory Purposes and Fundamental Public Policy Objectives Confirm that the Meaning of "Validity" Encompasses Disputes Like this One

The New York legislature has directed that "the UCC 'be liberally construed and applied to promote its underlying purposes and policies.'" *In re Peaslee*, 13 N.Y.3d 75, 81 (2009) (quoting UCC § 1-103(a)). Section 8-110(a)(1) ensures that the law of the issuer's jurisdiction governs validity of a security because that jurisdiction has the greatest interest in preventing an abuse or usurpation of power. That purpose would unquestionably be served here. Indeed, this case is a perfect illustration why the legislature has mandated that the law of an issuer's jurisdiction govern the validity of a security.

This case arises from an attempt by an illegitimate authoritarian regime to usurp the authority conferred by the Constitution of Venezuela upon the democratically elected National Assembly. The Maduro regime's execution of the Exchange Offer followed the National Assembly's invocation of its constitutional power to review and disapprove the Exchange Offer, including warnings to foreign creditors, in an official resolution and in legislative debates, that any resulting

transaction would not be enforceable. A-87; A-1194; A-1235; A-1732 ¶ 83. The Noteholders' convoluted interpretation of the term "validity" would effectively ratify the Maduro regime's illegitimate usurpation of legislative authority. It is therefore entirely unsurprising that the law firms that opined on the "validity" of the Exchange at the time did so as a matter of Venezuelan law. A-1445-48.

The Noteholders' narrow interpretation of section 8-110 would transform New York choice-of-law clauses into vehicles for sidestepping—and even overriding—the core separation-of-powers choices made by foreign constitutions. Under this version of "validity," any foreign government actor can willfully ignore constitutional limits (whether on issuing debt, securities, or executing other agreements) simply by inserting a New York choice-of-law provision in a contract with a foreign investor. Nor would those consequences be necessarily limited to foreign jurisdictions. Rogue agents, agencies, or instrumentalities of U.S. states could similarly upend restrictions on their own authority under their state constitutions. And New York agencies could attempt the reverse by selecting the law of some other state to govern issuance of securities to avoid New York law's limitations on their authority. The policy objectives of UCC section 8-110(a)(1) are squarely contrary to these outcomes, because they are designed to respect, not override, the policy choices made by sovereigns. *See* UCC § 8-110, Official Comment 2.

3. The Noteholders' Narrow Construction of "Validity" in Section 8-110(a)(1) Runs Counter to the Statutory Text, Structure, and Purpose

The Noteholders have argued that "validity" in section 8-110(a)(1) has an unusual technical meaning—one that "goes only to whether the security was issued in accordance with the issuer's corporate charter, by-laws, and the corporate law of the issuer's jurisdiction." A-30. This interpretation is untenable for many reasons. As an initial matter, if the term "validity" in section 8-110 were so limited, one would expect to find *some* evidence supporting that highly unusual interpretation (such as a specialized definition of the term) in the statutory text or official comments. But there is none. *See supra* at 19-22 & n.3. Thus, the Second Circuit was generous in observing that the Noteholders' interpretation of "validity" is "weak[] as a textual matter." A-30.

The Noteholders attempt to explain away "section 8-202(b)(1)'s reference to 'violation[s] of … constitutional provision[s]'" by claiming that it "is cabined to those constitutional provisions directly dealing with the issuance of securities." A-30 (footnote omitted). But *nothing* in the text of section 8-202(b)(1) supports that theory. Section 8-202(b)(1) does not limit, *in any way*, the concept of a "defect [that] involves the violation of a constitutional provision," notwithstanding that it would have been simple for the UCC drafters to insert the words "directly dealing with the issuance of securities" to modify the kinds of constitutional provisions at issue. And

the constitutional provisions at issue in the cases cited by the Official Comment likewise contain no such limitation. *Supra* at 22-23. This Court should reject the Noteholders' "decontextualized interpretation of the statutory language." *People v. Roberts*, 31 N.Y.3d 406, 411 (2018).

The district court's efforts to conjure atextual limitations on section 8-110 fare no better. The district court was apparently concerned that a definition of "validity" that extends beyond constitutional provisions that "specifically address the requirements for the issuance of securities" would "swallow whole any choice of law analysis involving the formation of a contract for securities." A-2335-36. But there is simply no evidence that the UCC's drafters intended for the UCC's choice-of-law provisions to decide the sensitive policy question of which foreign constitutional provisions are (or are not) sufficiently weighty to bind a foreign governmental issuer. Indeed, the fundamental purpose of section 8-110 is to recognize and respect that the law of the issuer's jurisdiction has the greatest interest in regulating the authority of the issuer. A narrow and non-textual interpretation of "validity" would frustrate that purpose. In any event, the "clearest indicator" of a legislator's intent is the "statutory text," *People v. Pabon*, 28 N.Y.3d 147, 152 (2016), which demonstrates that "validity" in section 8-110(a)(1) is broader than the district court's excessively narrow construction.

The district court based its construction of "validity" mainly on a misapplication of a hypothetical "Law X" discussed in the Hawkland UCC treatise. A-2338-39. In that hypothetical, "Law X"—"a provision of general applicability that could apply to [the enforceability of] any promise to pay money [on a contract]"—would not go to the "validity" of a security because it "does not deal with the procedural or other requirements for issuance of securities" but merely "renders unenforceable a certain category of promises to pay money." 7 Hawkland § 8-110:2. The district court analogized Article 150 to "Law X" on the basis that Article 150 applies to a "broad category of contracts," not just securities. A-2337-39.

But even assuming the Hawkland treatise's hFypothetical is correct, it does not support the district court's decision for two reasons. *First*, the Law X hypothetical deals with a general matter of contract law, not the authority of the issuer. Thus, the hypothetical does not, as this case clearly does, implicate the profound interest of the issuer's jurisdiction in the powers and authority of the issuer. *Second*, the district court mistakenly equated the Venezuelan constitutional provisions in this case to Law X, which did not address procedural or other requirements for the issuance of securities. But unlike "Law X," Article 150 of Venezuelan Constitution mandated prior National Assembly authorization as a "procedural requirement" of the highest order—a constitutional prerequisite for

valid contract formation and thus, in the case of a securities transaction, valid issuance of the security. Accordingly, Article 150 does not merely "render unenforceable" PDVSA's "promise to pay" the holder of an otherwise validly issued security. Rather, the issuance of the 2020 Notes without National Assembly authorization rendered the *issuance itself* defective and the 2020 Notes void *ab initio* under Venezuelan law. A-2614-15 ¶¶ 28-30; A-1690 ¶ 38.

Indeed, the Hawkland treatise's editor-in-chief, Professor Carl Bjerre, agrees that the district court "misconstrued" the "Law X" hypothetical, and adopted an artificially "narrow" view of Article 8 premised on "overly selective quotations," while ignoring that Article 150 of the Venezuelan Constitution is exactly the type of validity requirement that section 8-110 contemplates. Carl Bjerre, *Annual Survey of Commercial Law: Investment Securities*, 76 Bus. Law. 1371, 1379-81 (Fall 2021). As Professor Bjerre explained, "Venezuelan law should have been found to control the validity of the Notes" because "validity" in section 8-110 encompasses constitutional limitations on an issuer's corporate power such as the limitation imposed by Article 150 on entities within Venezuela's National Public Administration, which are the only entities capable of entering into national public interest contracts subject to Article 150's prior authorization requirement. *Id.* at 1374, 1379-81.

As the Second Circuit recognized, the Hawkland treatise is more reasonably read to support the PDVSA Parties' view because it "suggests section 8-202 contemplates a scenario quite analogous to [this] case: where a governmental issuer sold municipal bonds to the public, only to later discover some 'constitutional or statutory provision concerning authorization for issuance of municipal bonds had not been satisfied.' Here, we have a government-owned issuer arguing a key constitutional provision concerning authorization for public interest contracts has not been satisfied." A-30 n.10 (quoting 7 Hawkland, § 8-110:2). And to the extent any doubt remained, a recent update to the Hawkland treatise expressly criticizes the district court's construction of section 8-110(a)(1). *See* 7 Hawkland § 8-110:2 n.6 (characterizing the district court's decision as "*questionably* holding that the notes' validity as affected by authorization by the Venezuelan National Assembly is governed by New York rather than Venezuela law" and "*neglecting* the non-variability of subsection (a)(1) under subsection (d).") (emphasis added).

Curiously, the district court also relied on the Hawkland treatise's statement that the term "valid" refers to the concept of "whether issuance of the securities had been 'duly authorized,'" yet failed to explain why a dispute regarding whether the 2020 Notes issued by PDVSA were duly authorized does not fall squarely within that description. *See* A-2336 (quoting 7 Hawkland § 8-110:2). The core dispute in this case is whether the 2020 Notes were "duly authorized" in the absence of the

authorization from the sole authority (the National Assembly) capable of doing so under the Venezuelan Constitution.

Under Venezuela's Organic Law of the Public Administration, the powers granted to state-owned entities within the Public Administration 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. Whether authorization must be granted by a corporate body or, as here, a branch of government, makes no difference to the "validity" rule's stated rationale—namely that the ability of an issuer (especially a government or governmental instrumentality) to assert invalidity implicates significant public policy concerns. UCC § 8-110, Official Comment 2. Indeed, the constitutionally required authorization of a governmental body is far more likely to embody significant public policies of the issuer's jurisdiction than the technical provisions of an issuer's corporate charter or by-laws, which is likely why the validation rules in UCC § 8-202 distinguish between constitutional violations and other violations of law.

B. UCC Section 8-110 Controls this Dispute

1. UCC Section 8-110 Is a Mandatory Choice-of-Law Rule that Is Not Subject to Contractual Override

UCC § 8-110 applies to this dispute because it is a mandatory rule that is not subject to contractual override. New York law expressly provides that, where

section 8-110 "specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law so specified"—namely, the law of the issuer's jurisdiction (here, Venezuela). UCC § 1-301(c)(6).

Section 8-110(a), which contains the UCC's choice-of-law rules for securities, provides that "[t]he local law of the *issuer's jurisdiction*, as specified in subsection (d), governs … the *validity* of a security." UCC § 8-110(a)(1) (emphasis added); *see also* A-27. Subsection (d) specifies that the "issuer's jurisdiction" is "the jurisdiction under which the issuer of the security is organized or, if permitted by the law of that jurisdiction, the law of another jurisdiction specified by the issuer." UCC § 8-110(d); *see also* A-27-28. Critically, while subsection (d) allows an *in-state* issuer to "specify the law of another jurisdiction as the law governing the matters specified in subsection (a)(2) through (5)," it does not allow this choice for "validity" in subsection (a)(1). UCC § 8-110(a)(1) & (d). Thus, an in-state "issuer *cannot specify* that the law of another jurisdiction should determine the validity of a security." 8 Anderson U.C.C. § 8-110:6 [Rev] (3d ed.) (2022) (emphasis added).

The same is true for out-of-state issuers (such as PDVSA), who may select another jurisdiction's law only "if permitted by the law of that jurisdiction." UCC § 8-110(d). Like New York law, Venezuelan law does not permit the selection of some other country's law to govern the issuance of securities by state entities, *see* A-835 ¶ 133; *see also* A-96, nor have the Noteholders argued otherwise. As the

Official Comments to the UCC make clear, the reason section 8-110 does not allow that choice is because "[t]he question whether an issuer can assert the defense of invalidity may implicate significant policies of the issuer's jurisdiction of incorporation." UCC § 8-110, Official Comment 2. And, as the New York legislature noted when it adopted the Uniform Law Commission's revisions to Article 8 in 1998, "[t]his lack of choice is 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*, in the sense of having been issued pursuant to appropriate corporate or other similar action." N.Y. Bill Jacket, 1997 A.B. 6619, Ch. 566, comm. report at 22 (emphasis added).

Contracting parties may not change the choice-of-law rule in UCC § 8-110. While section 1-301 of the UCC authorizes contracting parties to choose the law applicable to their transaction, *see* UCC § 1-301(a), that authorization is expressly subject to restrictions with respect to specific UCC provisions listed in subsection 1-301(c), which "mandat[es] the application of certain choice of law rules in limited cases." 1 Hawkland § 1-301:2 (citations omitted). Specifically, section 1-301 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 and *a contrary agreement is effective only to the extent permitted by the law so specified*." 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." 1 Hawkland § 1-301:4 (citations omitted) (emphasis added). In short, § 8-110 is a mandatory rule that contracting parties cannot avoid. As a result, the law of the issuer's jurisdiction governs the validity of a security unless that jurisdiction permits the issuer to select some other jurisdiction's law and the issuer does so.

This case highlights the wisdom of section 8-110(a)(1)'s mandatory character. The question of "validity" in this case revolves around the legality of an attempt by the Maduro regime—which the U.S. government has branded illegitimate, A-14 (citing A-1753)—to circumvent the Venezuelan National Assembly's constitutional authority, and it raises fundamental separation-of-powers issues under Venezuelan law. The fact that the authoritarian branch of government in Venezuela sought to circumvent legal restrictions on its authority by signing an agreement containing a New York choice-of-law clause only highlights the importance of deferring to the "significant policies of the issuer's jurisdiction of incorporation." UCC § 8-110, Official Comment 2.

This Court's decisions in *IRB-Brasil Resseguros, S.A. v. Inepar Investments, S.A.*, 20 N.Y.3d 310 (2012), and *Ministers & Missionaries Benefit Board v. Snow*, 26 N.Y.3d 466 (2015), do not alter the mandatory nature of section 8-110. Neither case confronted a statutory provision like section 8-110(a)(1), which expressly limits

the contracting parties' freedom to select applicable law. *See* UCC § 1-301(c)(6). The only question in *IRB* was whether a choice-of-law provision in a guarantee issued by a Brazilian company, selecting New York law but not expressly excluding New York's conflict-of-laws principles, required that those principles apply, potentially resulting in the application of Brazilian substantive law. 20 N.Y.3d at 313-15. This Court held, relying on New York General Obligations Law ("NYGOL") § 5-1401, that "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" and that parties wishing to include New York's choice-of-law principles must do so explicitly. *IRB*, 20 N.Y.3d at 316. *IRB* did not involve *any* statutory choice-of-law provision, much less a mandatory one.

In *Ministers*, this Court considered a choice-of-law provision of New York's trusts and estate statute, Estates, Powers and Trusts Law § 3-5.1(b)(2), which required application of "the law of the state where the decedent was domiciled at the time of death" (there, Colorado) to a determination of whether the decedent had revoked a retirement plan beneficiary designation. 26 N.Y.3d at 469. Relying on *IRB*, the Court held that this provision was not part of the "substantive law" the parties presumably intended to choose when they selected New York law to govern the retirement benefit plans at issue. *Id.* at 474-75. Unlike UCC § 8-110(a)(1), the statutory choice-of-law rule at issue in *Ministers* was not a *mandatory* rule that

expressly overrides any contrary choice by the parties to a contract. This Court's holding in *Ministers* has no application 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). Thus, neither decision speaks to whether parties may contract around a mandatory statutory provision that restricts the parties' authority to enter into that contract in the first place.

2. In Any Event, the Governing Documents Incorporate Section 8-110's Choice-of-Law Rule

In this case there is an additional reason section 8-110's choice-of-law rule applies—the Governing Documents expressly incorporate it. Nor have the Noteholders ever claimed that the Governing Documents contract around section 8-110 (assuming *arguendo* they could).

Each of the Governing Documents contains a substantially similar choice-of-law provision providing that the document "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). These provisions thus expressly incorporate NYGOL § 5-1401 as part of the chosen New York law.

Under NYGOL § 5-1401, parties to a transaction valued at $250,000 or more (such as this one) may select New York law regardless of the transaction's "reasonable relation to this state," but 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). And UCC § 1-301 in turn provides that if "one of" a list of UCC provisions—including section 8-110—"specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law so specified." UCC § 1-301(c); *see also supra* at 33-34. Thus, because the Governing Documents expressly incorporate NYGOL § 5-1401, which in turn references UCC § 1-301, they also incorporate the UCC choice-of-law rules, including those of section 8-110.[7]

At summary judgment, the PDVSA Parties argued that the Governing Documents "expressly incorporate" NYGOL section 5-1401, and that "[t]hus, unlike in *Missionaries & Ministers* … , there can be no doubt as to the Transaction Documents' adoption of NYGOL 5-1401's choice of law rules," and with it, section 8-110. A-3643 & n.10. The Noteholders never disputed that point; instead, they argued only that the terms "validity" and "security" in section 8-110 should be interpreted to exclude the "validity" challenge raised in this case. A-2081-83. In fact, while the district court "proceed[ed] as if the choice of law provisions were not effective," it also observed that even under those provisions, it "would still need to

[7] The Second Circuit correctly observed that "where the authority for a New York choice-of-law election relies on section 5-1401(1), that choice-of-law election cannot override section 8-110." A-31 n.11.

assess the applicability of Section 8-110." A-2332-33 n.12 (citing NYGOL § 5-1401).

Before the Second Circuit, the Noteholders again did not dispute that the Governing Documents incorporate NYGOL § 5-1401, and thereby UCC §§ 1-301 and 8-110. *See* A-2392-97. Thus, it is uncontested that the contracts at issue incorporate UCC § 8-110, and any contrary argument has been forfeited. *Allianz Ins. Co. v. Lerner*, 416 F.3d 109, 114 (2d Cir. 2005). This Court does not entertain forfeited arguments on certification. *Tunick v. Safir*, 94 N.Y.2d 709, 711 (2000).

II. NEW YORK COMMON LAW REQUIRES APPLICATION OF VENEZUELAN LAW WHEN EVALUATING PDVSA'S CAPACITY, POWER, AND AUTHORITY TO ENTER INTO THE 2020 NOTES TRANSACTION

Venezuelan law would govern the validity of the 2020 Notes even if UCC § 8-110(a)(1) did not so require. The traditional rule, which prevails in New York, holds that the question of whether an entity has the power and capacity to enter into a contract must be answered under the law under which the entity is organized. Moreover, a party dealing with a state-owned entity is bound by any legal limitations on the entity's power to contract. *Parsa v. State of New York*, 64 N.Y.2d 143, 147 (1984). PDVSA's power and capacity to enter into the 2020 Notes transaction is thus necessarily a question of Venezuelan law, regardless of the choice-of-law provisions in the Governing Documents.

A. A Corporation's Capacity, Power, and Authority to Enter into a Contract Is Governed by the Law of its Jurisdiction of Organization

As a general principle, contracting parties are free to choose the law of their contract. *See, e.g.*, *Boss v. Am. Express Fin. Advisors, Inc.*, 15 A.D.3d 306, 307 (1st Dep't 2005), *aff'd*, 6 N.Y.3d 242 (2006). But this freedom is not absolute. Rather, party autonomy is subject to certain generally recognized limits when it comes to fundamental validity issues affecting contract formation.

In particular, "capacity" and "substantial validity" are "issues the parties could not have determined by explicit agreement." Restatement (Second) of Conflict of Laws § 187 (Comment on Subsection 2). "[I]f the parties do not agree that they made a binding contract, it is hard to see how the law which governs or would have governed that both-alleged-and-denied contract can have any legitimate role in resolving the dispute about formation." Adrian Briggs, Agreements on Jurisdiction and Choice of Law, § 3.64, at 94-95 (2008). Thus, "the ability of individuals to confer upon themselves a contractual capacity which they would otherwise lack ought not to be a matter of party choice." *Id.* § 10.27, at 395-96 (footnotes omitted).

Consistent with this logic, this Court in *Indosuez International Finance B.V. v. National Reserve Bank*, 98 N.Y.2d 238 (2002), accepted the First Department's reasoning that "parties would not be bound by [a] choice of law ... provision[] if the agreements were otherwise invalid." 98 N.Y.2d at 244; *see also Indosuez Int'l Fin.*

B.V. v. Nat'l Rsrv. Bank, 279 A.D.2d 408, 408 (1st Dep't 2001) (same); *Freedman v. Chem. Constr. Corp.*, 43 N.Y.2d 260, 265 n.* (1977) (where "the issue arguably cannot be controlled by voluntary agreement, *there is some question whether … their choice of law will be honored*") (emphasis added). The Second Circuit since has echoed this logic: "Applying the choice-of-law clause to resolve the contract formation issue would presume the applicability of a provision before its adoption by the parties has been established." *Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 119 (2d Cir. 2012), *cited in* A-32 n.12; *see also Worthington v. JetSmarter, Inc.*, No. 18 Civ. 12113 (KPF), 2019 WL 4933635, at *4 (S.D.N.Y. Oct. 7, 2019) ("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."); 17 C.J.S. Contracts § 27 ("[O]nly if the court finds a valid contract may it turn to a choice-of-law provision in the agreement.").

Instead of the law chosen in the contract, it has long been understood—and taken for granted in commercial transactions—that a corporation's capacity, power, and authority to enter into a contract is governed by the law of the corporation's jurisdiction. The New York Legislature recognized this principle when it adopted the revisions to UCC Article 8 in 1998, explaining 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, 1997 A.B. 6619, Ch. 566, comm. report at 22. The

Legislature was correct to characterize this view as "prevailing." *See* Am. Bar Ass'n, Section of Business Law, Third-Party Legal Opinion Report, Including the Legal Opinion Accord (the "ABA Accord"), 47 Bus. Law. 167 [p. 18 of 41] (Nov. 1991) ("[T]he authorization of the Transaction and the Transaction Documents will be governed by the law of the Client's jurisdiction of organization—whether or not it is the law governing the Transaction Document."); Georges R. Delaume, Legal Aspects of International Lending and Economic Development Financing 130 (1967) ("It is generally recognized that the capacity or authority of a corporate [or] governmental ... entity to contract loans and issue bonds is governed by its personal law, i.e., by the law of the borrower itself, if it is a government [or] by the law of the state of incorporation … if it is a corporate entity … ."); *Canada S. Ry. Co. v. Gebhard*, 109 U.S. 527, 537 (1883) ("Whatever disabilities are placed upon the corporation at home it retains abroad, and whatever legislative control it is subjected to at home must be recognized and submitted to by those who deal with it elsewhere.").

New York federal courts sitting in diversity have consistently held that foreign state-owned entities' actual authority to enter into transactions is governed by the law of the foreign state. For example, in *Anglo-Iberia Underwriting Mgmt. Co. v. PT Jamsostek*, No. 97 Civ. 5116 (HB), 1998 WL 289711 (S.D.N.Y. June 4, 1998), the court held that an Indonesian state-owned entity had no "actual authority" to

enter into an alleged reinsurance agreement because "Indonesian law prohibited [the entity], and by extension [its] employees … from engaging in any reinsurance activity." 1998 WL 289711, at *3-4, *aff'd in relevant part*, *Anglo-Iberia Underwriting Mgmt. Co. v. Lodderhose*, 235 F. App'x 776, 780 (2d Cir. 2007). Similarly, the court in *Storr v. National Defense Security Council of Republic of Indonesia-Jakarta*, No. 95 Civ. 09663 (AGS), 1997 WL 633405 (S.D.N.Y. Oct. 14, 1997), held 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." 1997 WL 633405, at *2, *aff'd*, *Storr v. Nat'l Def. Sec. Council of Republic of Indonesia-Jakarta*, 164 F.3d 619 (2d Cir. 1998); *see also Exp.-Imp. Bank of Republic of China v. Cent. Bank of Liberia*, No. 15 Civ. 9565 (ALC), 2017 WL 1378271, at *3 (S.D.N.Y. Apr. 12, 2017) (analyzing the Bank of Liberia's actual authority to make certain loans without prior parliamentary authorization as an issue of Liberian law), *vacated due to settlement*, 2018 WL 1871436 (S.D.N.Y. Feb. 6, 2018).

In accordance with this general understanding, the opinion letters issued in connection with the 2020 Notes transaction treated PDVSA and Petróleo's capacity, power, and authority to enter into the transaction as matters of *Venezuelan* law. A-1445-48. Nowhere did the opinion letters relating to the transaction state, or even suggest, that the inclusion of New York choice-of-law provisions in the Governing Documents would somehow render Venezuelan law irrelevant to these issues.

A-1429-36; A-1443-48. Like the state-owned entities in *Anglo-Iberia* and *Storr*, PDVSA had no actual authority, in the sense of legal authority as a state-owned entity within Venezuela's Public Administration, to enter into the 2020 Notes transaction without prior National Assembly authorization.

B. A Party Dealing with a State-Owned Entity Is Bound by Any Legal Limitations on that Entity's Power to Contract

Party autonomy is also subject to laws limiting the powers of state-owned entities. In *Parsa v. State of New York*, 64 N.Y.2d 143 (1984), this Court held that a physician could not assert a monetary claim based on a proposed agreement with a state-owned hospital because the agreement was never approved by the New York State Comptroller as required by New York's finance law. In so holding, this Court recognized that "[a] party contracting with the State is chargeable with knowledge of the statutes which regulate its contracting powers and is bound by them." *Id*. at 147.

This Court's jurisprudence is consonant with U.S. Supreme Court precedent. In *Federal Crop Insurance Corporation v. Merrill*, 332 U.S. 380 (1947), the Supreme Court held that the Federal Crop Insurance Corporation, a "wholly government-owned enterprise," could not be bound to an insurance policy entered into by its agent, and governed by Idaho state law, because the corporation itself lacked actual authority under federal law to insure the particular type of wheat crop at issue. *Id.* at 381-82, 384-85. The Supreme Court observed that the federal

regulations limiting the corporation's authority to insure certain crops were binding on all who dealt with the corporation regardless of their actual knowledge or the hardship resulting from even the innocent ignorance of the agent and the defendant farm owner. *Id*. at 385. As the Supreme Court put it, "[t]he Government may carry on its operations through conventional executive agencies or through corporate forms especially created for defined ends[,] [and] [w]hatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority." *Id.* at 384.

The Fifth Circuit's decision in *Northrop Grumman Ship Systems, Inc. v. Ministry of Defense of the Republic of Venezuela*, 575 F.3d 491 (5th Cir. 2009), is also instructive. There, the Republic of Venezuela challenged the enforceability of a settlement on the grounds that, under Venezuelan law, its local Mississippi attorney had no actual authority to bind the Republic to the settlement. *Id*. at 495. Applying the Restatement (Second) of Conflict of Laws' "most significant relationship" analysis for agency questions, the Fifth Circuit upheld the district court's ruling that Mississippi agency law applied to determine whether the Republic's local Mississippi counsel had settlement authority. The Fifth Circuit went on to hold, however, that even under Mississippi law, where a foreign government entity's power to contract must be exercised in a prescribed manner, the prescribed manner

of contracting must be followed in order for a valid contract to have been formed. *Id*. at 500. Interpreting the relevant provisions of Venezuelan law, the Fifth Circuit held that the district court had "clearly erred" in determining that the Republic's Mississippi attorney had actual authority to bind the Republic to the settlement. *Id*. at 502.

As a state-owned entity within Venezuela's National Public Administration, PDVSA is part of the Venezuelan State and is subject to Venezuelan public law, including the same laws governing the power to contract that apply to organs of the government itself. A-2616-18 ¶¶ 32-38. The Noteholders cannot "advance[] any legitimate reason for [New York] courts to discriminate against foreign sovereigns in particular." *Northrop Grumman Ship Sys., Inc.*, 575 F.3d at 501.

C. New York's "Grouping of Contacts" Principles Require the Application of Venezuelan Law

New York's "grouping of contacts" analysis additionally requires the application of Venezuelan law. In *Zurich Ins. Co. v. Shearson Lehman Hutton, Inc.*, 84 N.Y.2d 309 (1994), this Court noted that it had "inaugurated the use of 'center of gravity' or 'grouping of contacts' as the appropriate analytical approach to choice of law questions in contract cases," and that "[t]he purpose of grouping contacts is to establish which State has 'the most significant relationship to the transaction and the parties.'" 84 N.Y. 2d at 317 (quoting Restatement (Second) of Conflict of Laws § 188 [1]). Section 188 of the Restatement makes clear that the relevant

jurisdictional contacts "are to be evaluated according to their *relative importance with respect to the particular issue.*" Restatement (Second) of Conflict of Laws § 188(2) (emphasis added); *see also id.* § 188 cmt. e (courts should consider "the relative interests of those states in the decision of the particular issue"). To the same effect, this evaluation is to be carried out "under the principles stated in [Section 6]" of the Restatement, 84 N.Y. 2d at 318, which provides, in relevant part, that "the state of dominant interest may depend upon the issue involved." Restatement (Second) of Conflict of Laws § 6, cmt. f.

As this Court said in *Indosuez*, "New York choice of law principles require a court to apply the law of the state with the most significant relationship with the particular issue in conflict." 98 N.Y.2d at 245 (citing *J. Zeevi & Sons, Ltd. v. Grindlays Bank (Uganda) Ltd.*, 37 N.Y.2d 220, 226-27 (1975); Restatement (Second) of Conflict of Laws §§ 188(1), 292(1)). *Indosuez* embraces this Court's longstanding approach of evaluating a jurisdiction's most significant contacts where threshold questions exist as to contractual validity. *See Haag v. Barnes*, 9 N.Y.2d 554, 559-60 (1961) (conducting contacts analysis despite choice-of-law provision where applicable law would determine whether agreement was valid and enforceable); *see also Cargill, Inc. v. Charles Kowsky Res., Inc.*, 949 F.2d 51, 55 (2d Cir. 1991) ("New York law allows a court to disregard the parties' choice when the

most significant contacts with the matter in dispute are in another state.") (internal quotation marks and citation omitted).

Under the grouping of contacts analysis, there are cases in which "the policies underlying conflicting laws in a contract dispute are readily identifiable and reflect strong governmental interests, and therefore should be considered." *Zurich*, 84 N.Y.2d at 319 (internal quotations marks and citations omitted). Thus, this Court need not, and should not, limit itself to considering only the place of performance, but instead must employ a more contextual analysis. *See Auten v. Auten*, 308 N.Y. 155, 161 (1954) ("[T]he place having the most interest in the problem [has] paramount control over the legal issues arising out of a particular factual context, thus allowing the forum to apply the policy of the jurisdiction most intimately concerned with the outcome of [the] particular litigation") (internal quotation marks and citation omitted); *In re Allstate Ins. Co. (Stolarz)*, 81 N.Y.2d 219, 226 (1993) (what is "[c]ritical to a sound analysis … is selecting the contacts that *obtain significance in the particular contract dispute*") (emphasis added).[8]

[8] Federal courts applying New York choice-of-law rules have determined that the foreign forum's economic exposure is a particularly salient consideration. *See, e.g.*, *Themis Cap., LLC v. Democratic Republic of Congo*, 881 F. Supp. 2d 508, 521 (S.D.N.Y. 2012); *Exp.-Imp. Bank of Republic of China v. Cent. Bank of Liberia*, No. 15 Civ. 09565 (ALC), 2017 WL 1378271, at *3 (S.D.N.Y. Apr. 12, 2017), *vacated on other grounds*, No. 15 Civ. 09565 (ALC), 2018 WL 1871436 (Feb. 6, 2018).

Here, it is Venezuela—not New York—that has the most significant relationship with the particular issue of PDVSA's authority to enter into the Governing Documents. PDVSA was incorporated specifically to manage Venezuela's most vital national industry, and its state ownership is specifically mandated by the Venezuelan Constitution for reasons of "economic and political sovereignty and national strategy." A-989. Moreover, for the protection of Venezuela's national interests, PDVSA's power and capacity to enter into national public interest contracts is subject to constitutionally required National Assembly authorization. A-988. As a consequence of PDVSA's Maduro-directed, illegal execution of the 2020 Notes transaction, Venezuela faces the potential loss of ownership of the CITGO entities—the foreign "crown jewel" of Venezuela's national oil industry. And in the broader context of the Maduro regime's systematic campaign to strip the National Assembly of its constitutional powers, the issuance of the 2020 Notes in disregard of the National Assembly was a key part of the regime's dismantling of Venezuela's constitutional system of government. *See* A-2639-43 ¶¶ 86-87. The transaction's contacts with New York pale by comparison with respect to the "particular issue in conflict."

D. PDVSA Cannot Create the Appearance of Its Own Authority or Ratify a Contract It Never Had Authority to Execute

The authority at issue in this case is the authority of PDVSA to enter into national public interest contracts with foreign counterparties, and under the

Venezuelan Constitution that authority can be granted *only by the National Assembly*. Accordingly, *only the National Assembly* could have created the appearance of that authority. *See supra* at 6-8, 12, 28-29. In fact, it did just the opposite, condemning the 2020 Notes transaction and "reject[ing] categorically" the proposed pledge of CITGO shares. A-87.

As this Court observed in *Perales*, "[i]llegal contracts are not generally enforceable … a rule that applies as well to ratification." *In re N.Y. State Med. Transporters Ass'n, Inc. v. Perales*, 77 N.Y.2d 126, 131-32 (1990); *see also Strauss Linotyping Co. v. Schwalbe*, 159 A.D. 347 (1st Dep't 1913) (an illegal agreement "void in its inception" cannot be ratified). Thus, even assuming New York law applies, no purported ratification under New York law can rescue this illegal transaction. Moreover, because only the National Assembly could have ratified the transaction, PDVSA had no power to authorize its officers to execute the Governing Documents. As this Court observed in *Perales*, "[a] principal cannot ratify an agent's act that the principal itself could not have authorized." *Perales*, 77 N.Y.2d at 131-32. This case is therefore unlike *IRB*, which involved the authority of the Brazilian corporation's officers to sign the guaranty at issue—a power that (unlike PDVSA's authority here) the Brazilian corporation itself had authority to grant. 20 N.Y.3d at 313.

E. New York's "Public Policy" Choice-of-Law Principles Require the Application of Venezuelan Law

The importance of Venezuelan public policy embodied in the relevant articles of the Venezuelan Constitution dictates the application of Venezuelan law here. In *Zurich*, this Court held that "in a proper case, a foreign State's sufficiently compelling public policy could preclude an application of New York law otherwise indicated by the grouping of contacts analysis, particularly where New York's policy is weak or uncertain." 84 N.Y.2d at 319. Even if this Court were to conclude that the "grouping of contacts" analysis counsels in favor of applying New York law, *supra* at 45-48, Venezuela's compelling public policy *still* would require application of Venezuelan law.

As reflected in section 187(2)(b) of the Restatement (Second) of Conflict of Laws, choice-of-law provisions generally do not apply when 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 and which would be applicable law absent the choice-of-law provision. *See* A-36 (citing *Welsbach Elec. Corp. v. MasTec N. Am., Inc.*, 7 N.Y.3d 624, 629 (2006)); *see also Medicrea USA Inc. v. K2M Spine, Inc.*, No. 17 Civ. 08677 (AT), 2018 WL 3407702 at *8-10 & n.5 (S.D.N.Y. Feb. 7, 2018) ("New York's choice-of-law rules mirror the Restatement on this issue."); *S. Int'l Sales Co. v. Potter & Brumfield Div. of AMF Inc.*, 410 F. Supp. 1339, 1341-42 (S.D.N.Y. 1976).

This case implicates the integrity of Venezuela's constitutional system of government, including its ability to safeguard its national public interests from abuses of executive power. Venezuela has a fundamental policy, enshrined in its Constitution, that contracts implicating the national public interest must be authorized by the National Assembly. *See* A-988-89. This policy is integral to Venezuela's existence as a democracy, and it is borne of a rejection of Venezuela's history of dictatorial regimes that have mismanaged public resources to the detriment of the country. *See* A-1245; A-2126; Brief of Four Law Professors as *Amici Curiae* in Support of Appellants, *Petróleos de Venezuela S.A. v. MUFG Union Bank, N.A.*, No.20-3858, Dkt. No. 147-2, at 6 (2d Cir. Mar. 22, 2021) ("Professors' Amicus Brief") ("These provisions reaffirmed historical antecedents in the Venezuelan Constitution that were designed as a check on authoritarian abuse.").

On the other side of the ledger, New York's interest in maintaining its status as a premier center of international commerce is consistent with applying longstanding choice-of-law principles that respect the allocation of sovereign powers in foreign constitutions. By contrast, overriding those principles risks opening "a damaging loophole to anti-authoritarian constitutional provisions around the world." Professors' Amicus Brief at 3; *see also Bank of Credit & Com. Int'l (Overseas) Ltd. v. State Bank of Pakistan*, 46 F. Supp. 2d 231, 238 (S.D.N.Y. 1999), *vacated and remanded on other grounds*, 273 F.3d 241 (2d Cir. 2001) (applying

Pakistani law where "an impact upon New York's interest in maintaining its international financial status … could in no way be as great as the impact that the outcome of this action will have in relation to Pakistan"). Should the Noteholders' interpretation prevail, foreign jurisdictions could respond by enacting laws that prohibit their agencies and instrumentalities from executing contracts and issuing securities under New York law.

Venezuela has a materially greater interest than New York in the correct interpretation of its Constitution, including in national public contracts purported to be issued pursuant to it, and in "PDVSA's authority or capacity to execute the Exchange Offer without National Assembly approval." A-38; *see also* Restatement (Second) of Conflict of Laws § 6, cmt. f ("Which is the state of dominant interest may depend upon the issue involved."). If this case does not come within this Court's "compelling public policy" exception, it is hard to imagine a case that would.

This Court has made clear that public policy is an indispensable part of contract law. *See, e.g.*, *2138747 Ontario, Inc. v. Samsung C&T Corp.*, 31 N.Y.3d 372, 377 (2018); *see also Askari v. McDermott, Will & Emery, LLP*, 179 A.D.3d 127, 147-48 (2d Dep't 2019) ("courts will not enforce agreements 'where the chosen law violates some fundamental principle of justice'") (quoting *Welsbach*, 7 N.Y.3d at 632); *Medtronic, Inc. v. Walland*, No. 21 Civ. 02908 (ER), 2021 WL 4131657, at

*5 (S.D.N.Y. Sept. 10, 2021) ("[E]ven after *Ministers*, New York appellate courts continue to apply such exceptions.").

Moreover, courts have applied New York's public policy exception even in the face of a choice-of-law provision. For example, in *Business Incentives Co., Inc. v. Sony Corporation of America*, 397 F. Supp. 63 (S.D.N.Y. 1975), the court applied section 187(2) as New York conflicts law and declined to enforce a New York choice-of-law provision under the "reasonable relationship" requirement and the "fundamental public policy" exception. 397 F. Supp. at 67. *Business Incentives* is but one example. *See, e.g.*, *In re Penn-Dixie Indus., Inc.*, 22 B.R. 794, 797 (Bankr. S.D.N.Y. 1982) ("The courts of New York have given effect to a contractual choice of law clause calling for governance by the laws of a particular state unless application of that law would be an affront to the law or public policy of some state with more significant contact with the matter in dispute.") (citing New York and federal cases).

Courts should not be foreclosed from considering a foreign state's compelling public policy. In this regard, the working draft of the forthcoming Restatement (Third) of Conflict of Laws incorporates the "fundamental public policy" exception in broad fashion, providing in section 8:02(3)(a) that "[t]he law of the chosen state shall not apply if … it is contrary to a fundamental public policy of the state that would provide the governing law in the absence of the parties' choice." Restatement

of the Law (Third), Conflict of Laws, Council Draft No. 5 (Sept. 20, 2021) ("Restatement (Third) Draft") § 8:02, at 16, *available at* ADD-21. The official comments to that section emphasize that "party autonomy and fulfillment of the parties' expectations are not the only values at issue in contract law. State interest and state regulation also have significant roles to play. In the context of contractual choice-of-law clauses, courts should not apply the chosen law without regard for the interests of the state that would provide the governing law for a particular issue in the absence of an effective choice by the parties." *Id.* § 8:02, cmt. g, at 27-28, *available at* ADD-32-33. Thus, "*[o]ne purpose of the fundamental-policy exception is to guard against parties impermissibly trying to elude the regulations that would ordinarily govern their affairs*." *Id*. at 28, *available at* ADD-32-33 (emphasis added).

The Noteholders would enforce the Governing Documents' choice-of-law provisions *even though* PDVSA had no capacity, power, or authority under Venezuelan law to enter into the transaction and did so in flagrant violation of the Venezuelan Constitution. By that logic, a state-owned entity acting under the control of an authoritarian regime could effectively nullify constitutional limitations on its own corporate power by simply choosing New York law to govern its illegally executed transactions. New York law does not sanction such a perverse result. While choice-of-law rules should "respect the impulse of parties to create private

obligations among themselves," the rules "must also respect assertions of sovereign power to govern matters that offend a jurisdiction's deeply held public-policy prohibitions"—here, the execution of national public interest contracts without prior National Assembly authorization. Restatement (Third) Draft § 8:02, at 5, *available at* ADD-16.

F. Choice-of-Law Principles for Contractual Illegality Similarly Require the Application of Venezuelan Law

Section 202 of the Restatement ("Illegality") 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 (Second) of Conflict of Laws § 202(1). As the comments to that section explain, determining the "effect" of illegality on a contract is the second step in a two-step analysis. The first step is to determine "whether there is any illegality," which "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. The rule applies "whether the illegality involves the making of the contract, such as the making of a contract in violation of a Sunday law, or the performance of the contract." *Id.* at cmt. b ("Scope of section").

Although this Court has not yet addressed the matter, federal courts have applied the "illegality" principles set forth in section 202 of the Restatement (Second) of Conflict of Laws to contracts that otherwise would be governed by New

York law. *See Korea Life Ins. Co. v. Morgan Guar. Trust Co. of N.Y.*, 269 F. Supp. 2d 424, 438 (S.D.N.Y. 2003) (applying section 202 principles and analyzing illegality under Korean law for contracts containing New York choice-of-law provisions); *cf. 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) ("The fact that New York law governs the parties' contract does not necessarily mean that the contract is enforceable; New York law does not ignore [foreign] illegality … ."). It is accordingly "well-settled" in New York that "'[i]n cases alleging a violation of foreign law, the existence of illegality is to be determined by the local law of the jurisdiction where the illegal act is done, while the effect of illegality upon the contractual relationship is to be determined by the law of the jurisdiction which is selected under conflicts analysis.'" *JPMorgan Chase Bank, N.A. v. Controladora Comercial Mexicana S.A.B. de C.V.*, No. 603215/08, 2010 WL 4868142, at *13 (N.Y. Sup. Ct. Mar. 16, 2010) (quoting *Korea Life*, 269 F. Supp. 2d at 438).

Here, it is plain that the numerous illegal acts that rendered the 2020 Notes invalid—the Maduro regime's circumvention of the National Assembly's constitutional oversight powers, its direction to PDVSA to execute the transaction in disregard of the National Assembly's "categorical rejection" of the pledge, and the actions taken by PDVSA and Petróleo in furtherance of that illegal directive—

all occurred in Venezuela. *See, e.g.*, A-87; A-663-67; A-2632-35; *see also supra* at 8-11. This Court should adopt the Restatement's sensible approach here.

The district court in this case accepted these principles of illegality, but misapplied them based on its misguided view that illegality is relevant only if it occurs in the "place of performance" of the Governing Documents (New York). A-2344-46. But the choice-of-law rule, as recited by the district court itself (A-2344-45), expressly requires a determination of illegality under the law of the place where the alleged "illegal act is done" (which could be the place of performance *or* the place of acts related to the "making" of the contract). *Korea Life*, 26 F. Supp. 2d at 438; Restatement (Second) of Conflict of Laws § 202 cmt. c. Were the district court to find on remand that the acts of the Maduro regime related to the making of the Governing Documents were illegal where they were "done," that is, under Venezuelan law, the question would become whether New York or Venezuelan law determines the effect of illegality upon the validity of the Governing Documents.

Further, for the reasons stated, under the second step of illegality determinations, a conflicts analysis would require that Venezuelan law determine the effect of illegality upon the validity of the Governing Documents. *See supra* at 39-43. But if New York law applied, the Governing Documents would be deemed illegal.

Under New York law, the "effect" of illegality on a contract is that the contract is generally unenforceable, unless, for certain types of illegality, certain conditions are met. *See Schlessinger v. Valspar Corp.*, 686 F.3d 81, 85 (2d Cir. 2012). The Governing Documents are illegal—and thus unenforceable—in the same sense as the contracts addressed by this Court in *Perales*, 77 N.Y.2d 126. There, this Court characterized as "illegal"—and thus unenforceable—contracts for the non-emergency transport of Medicaid patients that required prior authorization of the New York Department of Social Services. *Id.* at 131-32. What made the transport contracts "illegal" was the lack of legally required prior authorization, which was meant to protect the public fisc from collusion between transportation service providers and agents of the Department of Social Services. As this Court emphasized, the Department of Social Services had no right to waive the statute and regulations requiring prior approval. *Id.* at 132. Likewise, the 2020 Notes are illegal and unenforceable because they lacked prior authorization as required by articles of the Venezuelan Constitution, and PDVSA had no right to waive those requirements because they exist for the purpose of protecting the Venezuelan public and Venezuelan democracy.

This Court should expressly adopt the Restatement principles on illegality and clarify that Venezuelan law must be applied in determining whether the Governing Documents are invalid and unenforceable due to illegality related to their making.

III. NEW YORK LAW DOES NOT RESUSCITATE THE GOVERNING DOCUMENTS AS "VALID" NOTWITHSTANDING THEIR INVALIDITY UNDER VENEZUELAN LAW

Given the 2020 Notes' invalidity under "the law of the issuer's jurisdiction," UCC § 8-110 precludes any application of New York law to render them valid and enforceable. It would make no sense for New York law, via UCC § 8-110(a)(1), to require the application of Venezuelan law in deference to the "significant polic[y]" implications for Venezuela, UCC § 8-110, Comment 2, only to then enforce, as if valid, a security that is invalid and unenforceable under Venezuelan law. Nor would it make sense to conclude that New York's common law choice-of-law principles require application of Venezuelan law to determine the Governing Documents' validity only to vitiate that choice by application of a contrary doctrine. The PDVSA Parties are thus unaware of any New York statutory provision or common law theory that could render the Governing Documents enforceable notwithstanding their invalidity under Venezuelan law.

CONCLUSION

For these reasons, this Court should answer the first question in the affirmative. In the alternative, this Court should answer the second question in the affirmative. Finally, this Court should answer the third question in the negative.

Dated: March 27, 2023

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.

ADDENDUM – RELEVANT STATUTORY PROVISIONS

General Obligations Law § 5-1401

1. The parties to any contract, agreement or undertaking, contingent or otherwise, in consideration of, or relating to any obligation arising out of a transaction covering in the aggregate not less than two hundred fifty thousand dollars, including a transaction otherwise covered by subsection (a) of section 1-301 of the uniform commercial code, may agree that the law of this state shall govern their rights and duties in whole or in part, whether or not such contract, agreement or undertaking bears a reasonable relation to this state. This section shall not apply to any contract, agreement or undertaking (a) for labor or personal services, (b) relating to any transaction for personal, family or household services, or (c) to the extent provided to the contrary in subsection (c) of section 1-301 of the uniform commercial code.

2. Nothing contained in this section shall be construed to limit or deny the enforcement of any provision respecting choice of law in any other contract, agreement or undertaking.

UCC § 1-301

(a) Except as otherwise provided in this section, when a transaction bears a reasonable relation to this state and also to another state or nation, the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties so long as none of the parties to the transaction is a consumer and a resident of New York. Where a consumer is a resident of the state of New York, New York state law shall apply.

(b) In the absence of an agreement effective under subsection (a), and except as provided in subsection (c), this act applies to transactions bearing an appropriate relation to this state.

(c) If one of the following provisions of this act specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law so specified:

(1) Section 2-402;

(2) Sections 2-A-105 and 2-A-106;

(3) Section 4-102;

(4) Section 4-A-507;

(5) Section 5-116;

(6) Section 8-110; and

(7) Sections 9-301 through 9-307.

UCC § 8-110

(a) The local law of the issuer's jurisdiction, as specified in subsection (d), governs:

(1) the validity of a security;

(2) the rights and duties of the issuer with respect to registration of transfer;

(3) the effectiveness of registration of transfer by the issuer;

(4) whether the issuer owes any duties to an adverse claimant to a security; and

(5) whether an adverse claim can be asserted against a person to whom transfer of a certificated or uncertificated security is registered or a person who obtains control of an uncertificated security.

(b) The local law of the securities intermediary's jurisdiction, as specified in subsection (e), governs:

(1) acquisition of a security entitlement from the securities intermediary;

(2) the rights and duties of the securities intermediary and entitlement holder arising out of a security entitlement;

(3) whether the securities intermediary owes any duties to an adverse claimant to a security entitlement; and

(4) whether an adverse claim can be asserted against a person who acquires a security entitlement from the securities

intermediary or a person who purchases a security entitlement or interest therein from an entitlement holder.

(c) Except with respect to cooperative interests, the local law of the jurisdiction in which a security certificate is located at the time of delivery governs whether an adverse claim can be asserted against a person to whom the security certificate is delivered.

(d) "Issuer's jurisdiction" means the jurisdiction under which the issuer of the security is organized or, if permitted by the law of that jurisdiction, the law of another jurisdiction specified by the issuer. An issuer organized under the law of this State may specify the law of another jurisdiction as the law governing the matters specified in subsection (a)(2) through (5).

(e) The following rules determine a "securities intermediary's jurisdiction" for purposes of this section:

(1) If an agreement between the securities intermediary and its entitlement holder governing the securities account expressly provides that a particular jurisdiction is the securities intermediary's jurisdiction for purposes of this part, this article, or this act, that jurisdiction is the securities intermediary's jurisdiction.

(2) If paragraph (1) does not apply and an agreement between the securities intermediary and its entitlement holder governing the securities account expressly provides that the agreement is governed by the law of a particular jurisdiction, that jurisdiction is the securities intermediary's jurisdiction.

(3) If neither paragraph (1) nor paragraph (2) apply and an agreement between the securities intermediary and its entitlement holder governing the securities account expressly provides that the securities account is maintained at an office in a particular jurisdiction, that jurisdiction is the securities intermediary's jurisdiction.

(4) If none of the preceding paragraphs apply, the securities intermediary's jurisdiction is the jurisdiction in which the office identified in an account statement as the office serving the entitlement holder's account is located.

(5) If none of the preceding paragraphs apply, the securities intermediary's jurisdiction is the jurisdiction in which the chief executive office of the securities intermediary is located.

(f) A securities intermediary's jurisdiction is not determined by the physical location of certificates representing financial assets, or by the jurisdiction in which is organized the issuer of the financial asset with respect to which an entitlement holder has a security entitlement, or by the location of facilities for data processing or other record keeping concerning the account.

UCC § 8-202

(a) Even against a purchaser for value and without notice, the terms of a certificated security include terms stated on the certificate and terms made part of the security by reference on the certificate to another instrument, indenture, or document or to a constitution, statute, ordinance, rule, regulation, order, or the like, to the extent the terms referred to do not conflict with terms stated on the certificate. A reference under this subsection does not of itself charge a purchaser for value with notice of a defect going to the validity of the security, even if the certificate expressly states that a person accepting it admits notice. The terms of an uncertificated security include those stated in any instrument, indenture, or document or in a constitution, statute, ordinance, rule, regulation, order, or the like, pursuant to which the security is issued.

(b) The following rules apply if an issuer asserts that a security is not valid:

(1) A security other than one issued by a government or governmental subdivision, agency, or instrumentality, even though issued with a defect going to its validity, is valid in the hands of a purchaser for value and without notice of the particular defect unless the defect involves a violation of a constitutional provision. In that case, the security is valid in the hands of a purchaser for value and without notice of the defect, other than one who takes by original issue.

(2) Paragraph (1) applies to an issuer that is a government or governmental subdivision, agency, or instrumentality only if

there has been substantial compliance with the legal requirements governing the issue or the issuer has received a substantial consideration for the issue as a whole or for the particular security and a stated purpose of the issue is one for which the issuer has power to borrow money or issue the security.

(c) Except as otherwise provided in Section 8-205, lack of genuineness of a certificated security is a complete defense, even against a purchaser for value and without notice.

(d) All other defenses of the issuer of a security, including nondelivery and conditional delivery of a security, are ineffective against a purchaser for value who has taken the security without notice of the particular defense.

(e) This section does not affect the right of a party to cancel a contract for a security "when, as and if issued" or "when distributed" in the event of a material change in the character of the security that is the subject of the contract or in the plan or arrangement pursuant to which the security is to be issued or distributed.

(f) If a security is held by a securities intermediary against whom an entitlement holder has a security entitlement with respect to the security, the issuer may not assert any defense that the issuer could not assert if the entitlement holder held the security directly.

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 13,601.

I further certify that this document complies with the typeface requirements 500.l(j) and the type-style requirements of 500.1 because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman Font.

Dated: March 27, 2023
New York, New York

Kurt Hansson

Kurt W. Hansson