To be argued by
WALTER RIEMAN
Time requested: 30 minutes

CTQ-2022-03

In the Court of Appeals of the State of New York

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

Plaintiffs-Counter-Defendants-Appellants,

—against—

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

Defendants-Counter-Claimants-Respondents.

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June 2, 2023

Corporate Disclosure Statement

Pursuant to Rule 500.1(f) of this Court's Rules of Practice, Respondents state that Respondents' parents, subsidiaries, and affiliates are as follows.

MUFG Union Bank, NA[1]

Parent: U.S. Bancorp

Subsidiaries and Affiliates:

111 Tower Investors, Inc.

Banctech Processing Services, LLC

Bento Technologies, Inc.

BondResource Partners, LLC

BondResource Partners, LP

CenPOS, LLC

Daimler Title Co.

DM Liens Inc.

DSL Service Company

Eclipse Funding LLC

EFS Depositary Nominees Limited

Elavon Canada Company

[1] MUFG Union Bank, NA merged with and into U.S. Bank National Association, effective May 26, 2023, with U.S. Bank as the surviving bank. To the extent that this merger necessitates any amendments to the Corporate Disclosure Statement, Respondents will file an amended Corporate Disclosure Statement promptly.

Elavon Digital (GB) Limited

Elavon Digital Europe Limited

Elavon European Holdings B.V.

Elavon Financial Services DAC

Elavon Latin American Holdings, LLC

Elavon Puerto Rico, Inc.

Elavon, Inc.

Fairfield Financial Group, Inc.

Finn Title Co.

First Bank LaCrosse Building Corp.

First LaCrosse Properties

First Payment System Holdings, Inc

First Payment Systems, LLC

Firstar Capital Corporation

Firstar Development, LLC

Firstar Realty, L.L.C.

Fixed Income Client Solutions LLC

FSV Payment Systems, Inc.

HighMark Capital Management, Inc.

HTD Leasing LLC

HVT, Inc.

Integrated Logistics, LLC

Mercantile Mortgage Financial Company

Midwest Indemnity Inc.

Mississippi Valley Company

MMCA Lease Services, Inc.

Norse Nordics AB

NuMaMe, LLC

One Eleven Investors LLC

Park Bank Initiatives, Inc.

PFM Asset Management LLC

PFM Financial Services LLC

PFM Fund Distributors, Inc.

Pomona Financial Services, Inc.

Pullman Transformation, Inc.

Quintillion Services Limited

Red Sky Risk Services, LLC

RTRT, Inc.

Rushmore Loan Solutions, LLC

SCBD, LLC

SCDA, LLC

SCFD LLC

SFS Lien Agent, LLC

Syncada Asia Pacific Private Limited

Syncada Canada ULC

Syncada India Operations Private Limited

Syncada LLC

Talech Belize Limited

Talech International Limited

Talech Lithuania, UAB

Talech, Inc.

Tarquad Corporation

The California-Sansome Corporation

The Miami Valley Insurance Company

TLT Leasing Corp.

TMTT, Inc.

Travelator Inc.

U.S. Bancorp Asset Management, Inc.

U.S. Bancorp Community Development Corporation

U.S. Bancorp Community Investment Corporation

U.S. Bancorp Fund Services, LLC

U.S. Bancorp Government Leasing and Finance, Inc.

U.S. Bancorp Insurance Company, Inc.

U.S. Bancorp Insurance Services, LLC

U.S. Bancorp Investments, Inc.

U.S. Bancorp Missouri Low-Income Housing Tax Credit Fund, L.L.C.

U.S. Bancorp Municipal Lending and Finance, Inc.

U.S. Bank Global Corporate Trust Limited

U.S. Bank Global Fund Services (Cayman) Limited

U.S. Bank Global Fund Services (Guernsey) Limited

U.S. Bank Global Fund Services (Ireland) Limited

U.S. Bank Global Fund Services (Luxembourg) S.a.r.l.

U.S. Bank National Association

U.S. Bank Trust Company, National Association

U.S. Bank Trust National Association

U.S. Bank Trust National Association SD

U.S. Bank Trustees Limited

UBOC Community Development Corporation

UnionBanc Investment Services LLC

UnionBanCal Mortgage Corporation

USB Americas Holdings Company

USB Capital IX

USB European Holdings Company

USB Investment Services (Holdings) Limited

USB Leasing LLC

USB Leasing LT

USB Nominees (GCT) Limited

USB Nominees (UK) Limited

USB Realty Corp.

USB Securities Data Services Limited

USB Service Company Holdings, Inc.

USBCDE, LLC

VT Inc.

Wideworld Payment Solutions, LLC

GLAS Americas LLC

Parent: GLAS USA LLC, wholly owned by GLAS Holdings Limited

Subsidiaries and Affiliates:

GLAS SAS

GLAS SAS, Frankfurt Branch

GLAS SAS, London Branch

GLAS Specialist Services Limited

GLAS Trust Company LLC

GLAS Trust Corporation Limited

GLAS Trustees Limited

Global Loan Agency Services Australia Nominees Pty Ltd

Global Loan Agency Services Australia Pty Ltd

Global Loan Agency Services Australia Specialist Activities Pty Ltd

Global Loan Agency Services GmbH

Global Loan Agency Services Limited

Global Loan Agency Services Singapore Pte. Ltd.

International II SIF SICAF SA

Levine Leichtman Capital Partners Europe II SCSp

LLCP Europe II Partnership Holdco, LLC

Unicorn Bidco Limited

Unicorn Cayman GP Ltd

Unicorn Co-Invest Co., L.P.

Unicorn Midco 1 Limited

Unicorn Midco 2 Limited

Unicorn Topco Limited

Unicorn US Debt Holdco L.P

Statement of Related Litigation

Petróleos de Venezuela S.A. v. *MUFG Union Bank, N.A.*, Nos. 20-3858, 20-4127 (2d Cir.), are the appeals in which the Second Circuit certified the questions of New York law at issue here to this Court. Apart from those appeals, no related litigation is pending before any court.

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7 William D. Hawkland et al., Uniform Commercial Code Series
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8 David Frisch, Lawrence's Anderson on the U.C.C. § 8-101:4 (3d
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Scott FitzGibbon & Donald W. Glazer, *Legal Opinions in Corporate Transactions: The Opinion on Agreements and Instruments*, 12 J. Corp. L. 657 (1987) 58

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James Steven Rogers, *Policy Perspectives on Revised UCC Article 8*, 43 UCLA L. Rev. 1431 (1996) 2

Glossary

2017 Notes	The 5.25% Senior Notes due 2017 and the 8.5% Senior Notes due 2017, issued by PDVSA.
2020 Notes or Notes	The 8.5% Senior Secured Notes due 2020 issued by PDVSA pursuant to the Indenture.
Collateral	The 50.1% interest in CITGO Holding pledged by PDVH under the Pledge Agreement.
Collateral Agent	GLAS Americas LLC, as collateral agent under the Governing Documents.
Exchange Offer	The 2016 tender offer under which PDVSA exchanged 2017 Notes for 2020 Notes.
Global Notes	The Global Notes that evidence the obligations of PDVSA and PDVSA Petróleo to registered holders of the 2020 Notes, A-1128.
Governing Documents	The Indenture, Pledge Agreement, and Global Notes.
Indenture	The Indenture governing the Notes, A-1037.
Offering Circular	The Offering Circular for the Notes filed with the SEC, A-995.
PDVH	PDV Holding, Inc.
PDVSA	Petróleos de Venezuela, S.A.
Pledge Agreement or Pledge	The Pledge and Security Agreement under which PDVH pledged the Collateral as security for the Notes, A-1153.
Trustee	MUFG Union Bank, N.A., as trustee under the Governing Documents.
Republic	The Bolivarian Republic of Venezuela.

Questions Presented

The Second Circuit certified the following questions to this Court.

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'?

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?

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

A-44.

Summary of Argument

The questions presented here are of enormous consequence to the New York market for securities of foreign sovereigns, foreign state-owned enterprises like PDVSA, and foreign issuers generally. The Notes in dispute were issued and marketed by PDVSA in New York; they are required to be performed in New York; and—by the parties' agreement—they are governed by the substantive law of New York. There is no dispute that the Governing Documents are enforceable under that substantive law. Applying New York law to this New York–centered transaction, as the parties agreed to do, would further this State's interests in the reliable enforcement of choice-of-law provisions, the principled application of its "center of gravity" test, and the preservation of its status as an international financial center.

In contrast, the ruling Appellants urge would gravely undermine these fundamental legal principles and public policies. Appellants ask the Court to open the door to their claims that the Governing Documents are unenforceable and void under what they claim to be the law of Venezuela. But they do not cite any case in which a court has refused to enforce a security issued in New York on the ground that the issuance violated the law

of another jurisdiction. A ruling in Appellants' favor would cast a cloud on the enforceability of the many billions of dollars in securities issued in New York by foreign issuers and would discourage investment in such securities. It would unreasonably burden investors—including small investors—with the need to conduct due diligence into potentially unclear issues of foreign law. And it would invite unscrupulous issuers to make opportunistic claims about foreign law to avoid repaying their debts.

That danger is particularly acute for issuers that are foreign sovereigns or foreign state-owned enterprises. A foreign sovereign can attempt to change, manipulate, or mischaracterize its own laws and can then, as happened here, demand that U.S. courts defer to its own strategically driven positions about its laws. Choice-of-law provisions designating New York law, if rigorously enforced, reduce the vulnerability of investors to such issuer abuse, reduce borrowing costs to foreign sovereigns and foreign state-owned enterprises, expand access to credit for such issuers, and result in bonds that trade at a premium to bonds governed by the law of a foreign issuer's home jurisdiction. *See* 2d Cir. No. 20-3858 (this appeal), ECF 136, JA-4419¶23; *see id.* JA-4415-25¶¶15-38.

The facts here illustrate these concerns. Appellants contend that the Governing Documents are unenforceable because they allegedly violated a provision of the Venezuelan Constitution requiring prior legislative approval of "contracts of national public interest." Neither the district court nor the Second Circuit found that the Governing Documents violated that constitutional provision; those courts did not reach any issue of Venezuelan law.

Appellants' litigation position is squarely contrary to their own representations to investors when the Notes were issued that the Governing Documents were duly approved and enforceable. Their position is contrary to unqualified contemporaneous opinions to the same effect by PDVSA's counsel, the New York and Caracas offices of Hogan Lovells, which were made available for reliance by investors acquiring the Notes. And it is contrary to the pre-litigation writings of Appellants' own expert, which stated unequivocally that the Venezuelan constitutional provision Appellants now cite does not apply to PDVSA. Moreover, contrary to Appellants' characterization of the Exchange Offer as an unprecedented transaction that for the first time put at risk PDVSA's continuing control of CITGO, its supposed foreign "crown jewel," PDVSA and its subsidiaries have routinely

issued debt in the United States over many decades totaling billions of dollars that would imperil its continuing ownership of CITGO in case of default. The New York courts should not encourage issuers to try to avoid their debts by abandoning their own previous commitments and representations.

The Court should hold, as Judge Failla of the U.S. District Court did in this case, that the Governing Documents are governed by the substantive law of New York.

First, New York's substantive law applies because the parties selected that law. The Governing Documents all contain clear choice-of-law provisions substantially identical to provisions that this Court has enforced under the common law and section 5-1401 of the General Obligations Law. Application of New York law would further the State's "overriding and paramount interest" in maintaining its status as an international financial and commercial center, *J. Zeevi & Sons, Ltd.* v. *Grindlays Bank (Uganda) Ltd.*, 37 N.Y.2d 220, 227 (1975), and its "overarching principle of providing certainty and finality to contracting parties," *Ministers & Missionaries Ben. Bd.* v. *Snow*, 26 N.Y.3d 466, 472 (2015). New York law also applies for the

independent reason that New York was the center of gravity of the Exchange Offer and the Governing Documents.

Second, section 8-110 of New York's Uniform Commercial Code does not support application of Venezuelan law to Appellants' challenge to the enforceability of the Governing Documents. Section 8-110 provides that the law of the jurisdiction of a security's issuer applies to questions about the "validity" of the security. As Judge Failla correctly held, the statutory term "validity" refers only to compliance with corporate-law formalities—such as approval of a security pursuant to a corporation's charter or by-laws—or corporate laws specific to the issuance of securities. There is no dispute that the Governing Documents are valid under this standard.

Third, none of the common-law choice-of-law principles Appellants cite support the application of Venezuelan law. A contractual agreement to apply New York law should be enforced irrespective of "any conflicts analysis." *Ministers*, 26 N.Y.3d at 474. And Judge Failla correctly rejected Appellants' contentions that any New York choice-of-law rule requires application of Venezuelan law.

Statement of the Case

Judge Failla granted summary judgment to the Trustee and the Collateral Agent based upon the undisputed evidence and the parties' statements of undisputed facts. A-2287 n.1. The Second Circuit did not disturb any of her findings. This Court should accordingly answer the certified questions "[i]n view of the District Court's assessment of the undisputed facts." *Capitol Recs., Inc.* v. *Naxos of Am., Inc.*, 4 N.Y.3d 540, 546 (2005).

A. The Parties

PDVSA is a corporation organized under the law of Venezuela. A-2287-89, 2294; A-1855¶4; A-1858¶14. The Republic owns all of PDVSA's common stock. A-2288; A-7. Judge Failla did not find that PDVSA is (as Appellants claim) a "government agency," PDVSA Br. 1. Just the opposite: she found that PDVSA is *not* a "Government department[] or agenc[y]," but a "Decentralized entit[y]" with "a legal personality of [its] own" distinct from that of the Republic. A-2289 n.2. PDVSA Petróleo, the guarantor, is a Venezuelan corporation and a wholly owned subsidiary of PDVSA. A-2289; A-7.

PDVH, the pledgor, is also a wholly owned subsidiary of PDVSA. A-2289. It is the sole owner of CITGO Holding, Inc., which in turn is the sole owner of CITGO Petroleum Corp. *Id.* PDVH, CITGO Holding, and CITGO Petroleum are incorporated in Delaware and have their principal place of business in Houston. *Id.*; A-1859-60¶¶21, 23; A-8. Neither CITGO Holding nor CITGO Petroleum has assets or operations in Venezuela. A-1860-61¶¶24-25, 30.

Respondents are the Trustee and the Collateral Agent under the Governing Documents. A-2289-90; A-1861¶33. The Trustee is a U.S. national bank with offices in New York; the Collateral Agent is organized under New York law and has offices in New York. A-2289-90; A-1861¶¶31-32.

B. The 2016 Exchange Offer

PDVSA issued the 2020 Notes pursuant to an Exchange Offer for a series of earlier-issued PDVSA notes due in 2017. A-2291; A-1862¶¶39, 41. The 2017 Notes were denominated in U.S. dollars, contained New York choice-of-law provisions, and were held in substantial part by non-Venezuelan investors in the United States and elsewhere. A-2285; A-1863-1865¶¶46-53; A-2773¶156; A-896¶¶1-2.

On September 16, 2016, PDVSA announced the Exchange Offer, in which it offered to exchange 2017 Notes for newly issued 2020 Notes. A-2293; A-754¶30. To induce investors to participate in the Exchange Offer, PDVSA Br. 9, the 2020 Notes were secured by PDVH's pledge of a 50.1% equity interest in CITGO Holding. A-2293-94; A-1893-94¶¶115-20; A-2767¶¶121-22. The governing bodies of each of the Appellants approved the Exchange Offer and the Governing Documents. A-2286; A-1880-82¶¶74-80; 1887¶96; A-9.

The Exchange Offer closed in October 2016. A-10; A-1908¶164. Participating investors tendered approximately 40% of the 2017 Notes, A-2296, and PDVSA issued $3.4 billion of new 2020 Notes in exchange. A-2293-95; A-755¶36, A-1908-1909¶165.

The Exchange provided significant benefits to PDVSA. It granted PDVSA a three-year extension on the maturity of 2017 Notes that were tendered into the Exchange Offer. PDVSA indicated at the time, and has subsequently reaffirmed, that if an insufficient number of investors had tendered their 2017 Notes into the Exchange, PDVSA would have defaulted on the 2017 Notes in 2017. PDVSA Br. 12; A-1630.

Such a default would have had calamitous consequences for the Republic and PDVSA. A default on the 2017 Notes would have triggered cross-acceleration provisions in, and probable default on, debt issued by CITGO Holding. A-184. Holders of defaulted 2017 Notes and defaulted debt of CITGO Holding, all of which was governed by New York law and enforceable in U.S. courts, A-1466¶¶46-48, would have been sought money judgments from U.S. courts. They would then have sought to enforce their judgments through judicial foreclosure on, and sale of, PDVSA's equity interest in PDVH and CITGO Holding's equity interest in CITGO Petroleum.

In that way, default by PDVSA on the 2017 Notes could have led directly to the Republic's loss of its indirect beneficial ownership of CITGO Petroleum, which it characterizes as its foreign "crown jewel." PDVSA Br. 1, 6, 48. Investors thus could reasonably have viewed the Exchange Offer as furthering the interests of the Republic and the Venezuelan people by enabling them to avoid those consequences.

Subsequent events illustrate how the Exchange Offer benefited PDVSA. The Republic and PDVSA ultimately defaulted on many of their obligations to other creditors. Some of those creditors are currently on the

verge of forcing a judicial sale of PDVSA's shares in PDVH, and thereby depriving PDVSA and the Republic of their indirect beneficial ownership of CITGO Petroleum. *See, e.g.*, *Crystallex Int'l Corp.* v. *Bolivarian Republic of Venez.*, No. 1:17-mc-00151 (D. Del.), ECF No. 481. The U.S. Government has indicated that it will probably allow such a judicial sale to occur. *Id.*, ECF No. 553, at 7. The Exchange Offer allowed PDVSA to avoid these consequences in 2017 and to buy time in the ultimately disappointed hope that PDVSA might be able to solve its financial problems.

New York was the "center of gravity" of the Exchange Offer. A-2347-2348; *see also* A-19. The negotiations and the closing occurred in New York. A-2295; A-1887-88¶99; A-1905¶150; A-2437¶15(f); A-2770¶138. All principal and interest payments are required to be made in New York; the Notes are enforceable in courts in New York; the Notes are administered by New York–based registrars, transfer agents, paying agents, and depositary; and the Trustee and the Collateral Agent have offices in New York. A-2289-90, 2294-95, 2347-48; A-1701¶19; A-1864-65¶¶49-53; A-1908-16¶¶157-191. PDVSA's financial advisor, Credit Suisse, solicited tenders from its New York offices. A-1901¶133; A-2772-73¶¶151-52, 154-56. The Collateral Agent at all times held the Collateral in its New York vault,

A-2294-95; A-1911¶176, and the Global Notes were deposited with a custodian in New York and are registered in the name of a New York holder of record. A-2295; A-1915-16¶¶189, 194.

The parties agreed that the Governing Documents would be governed by New York law. A-1912-13¶¶180-182. For example, the Indenture provides:

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

A-1912-13¶181 (all-caps in original altered).

Appellants represented that the Governing Documents were enforceable in accordance with their terms, and they nowhere disclosed any risk that the transaction might be deemed to violate Venezuelan law. A-1917-20¶¶198-206. PDVSA's legal counsel, the New York and Caracas offices of Hogan Lovells, gave unqualified opinion letters to the same effect under New York and Venezuelan law and opined that the Governing Documents required no approval by "any governmental agency or

governmental authority in Venezuela." A-1982-86¶¶339-45; A-2815-16¶¶359-63. Hogan Lovells privately gave PDVSA the same advice. A-2813¶¶349-56.

C. The September 2016 Resolution of the Venezuelan National Assembly Did Not Declare That the Exchange Offer or the Governing Documents Were Illegal or Unenforceable

The Exchange Offer occurred in a period of political uncertainty in Venezuela. In 2016 and for more than two years thereafter, the United States recognized the administration of Nicolás Maduro as the legitimate government of Venezuela. A-2292; A-1873-78¶¶67-71. In 2015, the year before the Exchange Offer, however, opposition parties had won a majority of seats in Venezuela's legislature, the National Assembly. A-2292; A-1879-80¶72.

The National Assembly criticized the transaction, and in particular the pledge of CITGO Holding shares. On September 27, 2016, it adopted a resolution purporting to "summon" the Minister of Petroleum "to explain the terms of this bond swap transaction"; to "reject categorically" a pledge of CITGO Holding stock; to call for an investigation of the transaction; and to urge PDVSA to develop a plan to refinance its debt. A-87; A-2295-96; A-759-60¶¶63-65.

Appellants assert that the National Assembly thereby "[r]eject[ed]" the Exchange Offer. PDVSA Br. 9. But as Judge Failla found, neither the Resolution nor any other statement by the National Assembly prior to closing of the Exchange Offer asserted that, as Appellants now contend, the Exchange Offer was invalid or unlawful or that the transaction involved a "contract of national interest" under the Venezuelan Constitution requiring National Assembly approval. A-2319. In April 2019, the Special Attorney General of the Guaidó administration (discussed below p. 22) acknowledged that the Resolution "did not declare the unlawfulness of that [2020] Bond." A-2325 n.9; A-1813¶160.

The National Assembly had compelling reasons for its choice in September 2016 not to declare the Exchange Offer illegal. Had it done so, Hogan Lovells would almost certainly have withdrawn or severely qualified its legal opinions; Credit Suisse would probably have withdrawn as PDVSA's financial advisor, *see* A-2437¶14; and the federal securities laws would have required supplemental risk disclosures to investors. If the Exchange Offer had collapsed in the wake of such events, PDVSA would have defaulted on its 2017 Notes in 2017 with the dire consequences described at p. 10 above. The most reasonable inference is that the National Assembly did not want to be

responsible for these consequences and therefore deliberately refrained from declaring the Exchange Offer to be illegal, thereby stopping it. A-1982-86¶¶339-45, 359-63, A-2437.

Appellants cite a separate resolution passed by the National Assembly in May 2016, several months before the Exchange Offer, asserting its authority to authorize contracts of national interest. PDVSA Br. 8. But that resolution made no mention of PDVSA or any other state-owned company. As Judge Failla explained, the May 2016 resolution, "by its own language, did not apply to [the Governing Documents]." A-2317.

Appellants also assert that another resolution, adopted by the National Assembly on October 15, 2019, "confirmed [the National Assembly's] prior finding" that the 2020 Notes violated Article 150. PDVSA Br. 12. But as Judge Failla found, neither of the resolutions adopted before the Exchange Offer closed made any such finding. A-2320-21. The October 2019 Resolution, made on the eve of PDVSA's default on the Notes, represented a transparent effort by the National Assembly, recognizing that the 2016 Resolution did not state that the Exchange Offer was unlawful, to rewrite that resolution retroactively in anticipation of imminent litigation over the Notes. The October 2019 Resolution thus exemplifies the reasons

this Court should enforce New York choice-of-law principles in a way that prevents foreign sovereigns from attempting to undermine the enforceability of securities that were issued in New York and that contain New York choice-of-law provisions through manipulative governmental actions.

D. The Governing Documents Were Consistent with Venezuelan Law and Appellants' Decades-Long and Unquestioned Practice

Judge Failla declined to decide whether the Governing Documents are "contracts of national interest" under Article 150 of the Venezuelan Constitution. A-2290 n.3. The Second Circuit likewise made no finding regarding Venezuelan law. Appellants, however, ask this Court to find that the Exchange Offer was invalid under Venezuelan law and to answer the certified questions on that basis. *E.g.*, PDVSA Br. 1, 5-8.

This Court need not reach any issue of Venezuelan law to resolve this appeal. Respondents are, however, constrained to explain briefly that Appellants' interpretation of Venezuelan law mischaracterizes the record.

The Venezuelan Constitution does not define "contract of national interest." A-12. But more than a decade before the Exchange Offer, the Constitutional Chamber of Venezuela's high court authoritatively defined that term to *exclude* contracts involving state-owned corporations such as

PDVSA. *See* A-1280-81¶15-16; A-1308-15¶¶87-88, 93-94, 99-101, 104. As Appellants' own Venezuelan legal expert acknowledged in multiple publications before this litigation, the Constitutional Chamber's decision "*established a binding interpretation* and reduced the category of 'contracts of public interest' [under Article 150] … to those signed or agreed to by the Republic, … *excluding from such classification public contracts signed by … national public companies, such as PDVSA*." A-1370¶29. PDVSA's own Venezuelan lawyers reached the same conclusion in their opinion letters delivered to Respondents and in a separate memorandum to PDVSA in which they opined that "[c]onclusively, the Exchange Offer, including the Pledge, *is not subject to the approval of the National Assembly as provided by article 150 of the Venezuelan Constitution*." A-1980¶335; A-1988-92¶¶349-55 (emphasis added).

Appellants assert that PDVSA had never previously pledged "strategic assets" without National Assembly authorization. PDVSA Br. 7. But this carefully worded assertion is grossly misleading. In the nearly 50 years since PDVSA was founded, PDVSA and its subsidiaries have *never once sought or obtained* authorization from the National Assembly for any of the billions of dollars of debt they have issued in the United States and

elsewhere. A default on that debt would have imperiled PDVSA's control of CITGO Petroleum, its sole material U.S. asset. Indeed, CITGO Petroleum and CITGO Holding have repeatedly issued billions of dollars of debt secured by equity in CITGO Petroleum and by CITGO Petroleum's principal assets—the same assets ultimately at issue in this litigation—without seeking or obtaining National Assembly approval, and they continued to do so even while this litigation has been pending. A-2003¶381; A-2034-36¶¶443, 449; A-2040¶458; A-2043-47¶¶468-69, 471-72, 475; A-2047¶475; A-2053-54¶¶497-98; A-2048¶477; A-2054¶499. Not one of those transactions has ever been challenged in any court as illegal or unenforceable. A-3564¶377; A-3565¶380; A-2003¶380.

E. Investors Had Every Reason to Believe That the Governing Documents Were Lawful and Enforceable

Appellants suggest that investors who participated in the Exchange Offer were or should have been aware that the legality of the Governing Documents was subject to dispute. PDVSA Br. 9-10. Again, Judge Failla made no such findings, and the Court need not consider this issue. Moreover, the record shows that such investors had every reason to believe that the Governing Documents were legal and enforceable.

Appellants themselves represented to investors that the Governing Documents were lawful and enforceable and did not disclose any risk to the contrary. *See* pp. 12-13, above. PDVSA and PDVSA Petróleo represented in the Indenture that "all things necessary to make this Indenture a valid agreement" had "been done" and that each of them had "done all things necessary to make the Notes" their "valid obligations." A-1918¶¶199-200. PDVH represented that it had "full power and authority, and all governmental licenses, authorizations, consents and approvals, to execute and deliver" the Pledge Agreement "and to perform its obligations thereunder," and that the Pledge had "been duly executed and delivered by it and constitutes its legal, valid and binding obligation enforceable against it in accordance with its terms." A-1918¶201. Each Appellant made similar representations in Officer's Certificates delivered at issuance to Respondents and, including representations that the "execution, delivery and performance" of the Governing Documents were "within the corporate powers of [such Transaction Party] and have been duly authorized." A-1920¶¶206; A-2763¶101. Nor did the extensive risk factor disclosures in the Offering Circular state that the Governing Documents might be deemed invalid, illegal, or unauthorized. A-1981-82¶¶338.

The vast majority of commentary about the Exchange Offer made no mention of any risk of illegality or invalidity. A-2817¶¶366-75. Other analysts explicitly concluded that the transaction posed no legal risk. *See* A-2818¶370 ("The operation is clearly legal in terms of Venezuelan law"); A-2819¶375 (J.P. Morgan did "not believe the National Assembly has explicit purview of PDVSA's finance operations."). One Venezuelan analyst—later a member of PDVSA's ad hoc Board when this action was commenced—advised investors that the Notes were "a very safe bond and that's why we're recommending it." A-2819¶372-73. Extensive additional evidence shows that the parties to the Exchange Offer and their advisers believed that the offer was fully lawful. A-1270¶8; A-1426¶¶11-12; A-1980-81¶¶334-37; A-3464¶140; A-1982-86¶¶339-45, A-359-63.[2]

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[2] In April 2016, Venezuelan officials announced that a referendum would occur on whether Maduro should be removed from office. Holly K. Sonneland, *Explainer: What Is the Recall Referendun Process in Venezuela?*, AS-COA.org (Apr. 28, 2016), https://www.as-coa.org/articles/explainer-what-recall-referendum-process-venezuela/; *see also* A-3319:3-12. Maduro officials suspended the referendum on the day before the last day on which investors could submit tenders into the Exchange Offer. John Kirby, Spokesperson, U.S. Dep't of State, Daily Press Briefing 18 (Oct. 21, 2016); Anatoly Kurmanaev, *Venezuelan Electoral Officials Suspend Presidential Recall Bid*, Wall St. J. (Oct. 21, 2016), https://www.wsj.com/articles/venezuela-electoral-officials-suspend-presidential-recall-referendum-process-1477010629. Thus, during the period when investors were deciding whether to participate in the Exchange Offer, they had reason to believe that Maduro might shortly be removed from office. The international financial community hoped for a transition to democratic governance and an end to Maduro's economically harmful policies. *E.g.*, S.D.N.Y. No. 1:19-cv-10023, ECF 120-1¶37; *see also* A-3330:20-1331:2.

Appellants' contention that "[a]round the same time, the United States similarly expressed concern 'that the National Assembly has not been allowed to carry out its rightful role,'" PDVSA Br. 10, is misleading. Those statements were made months before the Exchange Offer and had nothing to do with the Exchange Offer or with PDVSA. A-2103; A-2108-09. The United States has never expressed a view about the legality of the Exchange Offer. On the contrary, the United States expressly took "no position on the operation of Venezuelan law" in this litigation. A-2116.

Appellants also suggest that most of the 2017 Notes were not tendered in the exchange due to alleged "widespread uncertainty" about the Notes. PDVSA Br. 6. Again, however, Judge Failla made no such finding. Participants in the Exchange Offer exchanged bonds due in 2017 for bonds due in 2020. A-2293-96. Granting a three-year extension of maturity to a debtor that was concededly on the verge of default was risky. Investors could also have been worried that PDVSA would try to obstruct enforcement of the security interest protecting the 2020 Notes (as has in fact occurred). It would have been entirely rational for an owner of 2017 Notes to decide not to participate in the Exchange Offer, to hope that *other* investors would participate in the Exchange Offer, and to hope that PDVSA—having

obtained this debt relief—would pay off the still-outstanding, untendered 2017 Notes in full and on time. That is in fact what occurred. A-2774¶166.

F. Subsequent Political Developments in Venezuela

In 2018, two years after the Exchange Offer, Maduro claimed victory in a Presidential election that was widely viewed as fraudulent. A-51-52¶3; A-56¶23; A-771¶116. In January 2019, the National Assembly declared the presidency vacant and named Juan Guaidó as interim president. A-2296-97. The United States recognized the Guaidó administration as the legitimate government of the Republic. A-2296-97; A-1628; A-1766.

In December 2022, the National Assembly refused to extend Mr. Guaidó's term as interim president and created a committee to oversee Venezuelan overseas assets, including PDVH and its subsidiaries. Kejal Vyas, *Venezuela's U.S.-Backed Opposition Removes Juan Guaidó as Its Leader*, Wall St. J. (Dec. 30, 2022), https://www.wsj.com/articles/venezuelas-u-s-backed-opposition-removes-juan-guaido-as-its-leader-11672441327.

G. PDVSA's 2019 Default

Prior to October 2019, PDVSA made all payments due on the 2020 Notes. A-2296; A-1495-96¶¶211-17.

On October 27, 2019, PDVSA failed to make a $913 million payment due under the Notes. A-2298; A-1944¶¶259-61. All unpaid principal and interest are now due and owing. A-1947¶271.

H. Proceedings in the District Court

Appellants commenced this action two days after PDVSA's payment default. They sought a declaration that the Governing Documents were "invalid, illegal, null and void *ab initio*, and thus unenforceable" because, they alleged, Article 150 of the Venezuelan Constitution required that they be approved by the National Assembly. A-2298; A-76¶83; A-78¶94. Respondents asserted counterclaims arising from PDVSA's payment default. A-2299; A-117-18¶112.

At Judge Failla's request, the United States submitted a Statement of Interest. The United States took no position on whether enforcing the Governing Documents would be consistent with U.S. law and policy, A-2123, or on any issue of Venezuelan law, A-2116. It emphasized that "the law and policy of the United States generally favors certainty in lawful contractual relations and an orderly process for restructuring sovereign debts for which creditors can legitimately expect payment." *Id.*

Judge Failla granted summary judgment to the Trustee and the Collateral Agent, A-2351-52, and entered judgment awarding approximately $1.93 billion to the Trustee and authorizing foreclosure on and sale of the Collateral. A-2356. She subsequently stayed foreclosure pending appeal. A-2361-67.

Judge Failla rejected Appellants' argument that the federal act of state doctrine required her to refuse to enforce the Governing Documents. A-2311-27. She concluded that the act of state doctrine does not require U.S. courts to enforce a foreign sovereign's purported expropriation of assets outside its own territory. A-2311-27.

Judge Failla further held that New York's substantive law governs the Governing Documents under New York's "center of gravity" or "grouping of contacts" approach and that no New York choice-of-law rule required application of Venezuelan law to the parties' dispute. A-2331-49.

First, Judge Failla rejected Appellants' argument that the transaction was "invalid" under N.Y. UCC section 8-110.

Second, Judge Failla rejected Appellants' claim that they lacked "actual authority" to issue the Notes. She reasoned that Appellants' Boards of Directors had actual authority to bind the corporations, and that the

absence of legislative approval did not create a dispute about actual authority. A-2339-44.

Third, Judge Failla rejected Appellants' argument that the Notes are unenforceable on grounds of alleged illegality. She reasoned that the Governing Documents are legal under the law of New York, where they were made and to be performed. A-2344-49.

Judge Failla did not reach other issues raised in Respondents' motion. *See* A-112-15¶¶96-106; A-142-47¶¶221-240, 248-53A-1648-50.

I. The Second Circuit's Ruling

Appellants argued on appeal that (i) the Governing Documents were unenforceable under the federal act of state doctrine, and alternatively, (ii) the substantive law of Venezuela applied to their claims by virtue of N.Y. UCC section 8-110 and common-law principles of actual authority and illegality. A-20-21.

The Second Circuit held that the act of state doctrine does not apply because that doctrine does not "require a departure from ordinary choice-of-law analysis in determining the legal consequences of a foreign sovereign act." A-24.

Turning to choice of law, the Second Circuit decided to certify issues of New York law to this Court. A-24-41. The court noted that these issues are "of utmost importance to the State of New York given its standing as the world's preeminent commercial and financial center," and recognized "New York's interest in promoting and preserving this status, and in maintaining predictability for parties." A-42.

In addressing UCC section 8-110, the Second Circuit noted two factors that could support Respondents' positions. *First*, the court noted "a thread of New York caselaw" indicating that in light of the contractual provisions calling for application of New York law, section 8-110 has no bearing on this case. A-31-33 (citing *IRB-Brasil*, 20 N.Y.3d at 313, and *Ministers*, 26 N.Y.3d at 470). The court noted New York's "general rule" of enforcing choice-of-law provisions, "even to issues of contract validity and the parties' ability to execute the agreement." A-35.

Second, the court identified an additional "factor [that] causes us to approach the PDV Entities' section 8-110 argument with caution: the absence of any cases applying the statute." A-34. As the court reasoned, "[c]onsidering the volume of securities activity in New York," if "validity" under section 8-110 had a meaning as broad as Appellants argued, "one

would expect to find a trove of New York decisions applying the statute." A-35.

Argument

I. The Substantive Law of New York Law Governs This Action

The substantive law of New York governs this action because the parties selected that law and because, as Judge Failla found, New York is the center of gravity of the Exchange Offer and the Governing Documents.

A. The Parties Agreed to the Application of New York Law

This Court has consistently upheld and enforced agreements to apply New York law, both as a matter of common law and pursuant to section 5-1401 of the General Obligations Law. *See, e.g.*, *IRB-Brasil Resseguros, S.A.* v. *Inepar Invs., S.A.*, 20 N.Y.3d 310, 316 (2012). It has also repeatedly emphasized the important public policy of this State of "encouraging a predictable contractual choice of New York commercial law and, crucially, of eliminating uncertainty regarding the governing law." *Id.*; *see also J. Zeevi*, 37 N.Y.2d at 227 (noting New York's "overriding and paramount interest" in maintaining its status as "an international clearinghouse and market place for a plethora of international transactions").

Under section 5-1401, the parties to any contract involving at least $250,000 "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." The statute specifies certain exceptions, including an exception to the extent provided to the contrary in N.Y. UCC section 1-105(2).

"The goal of General Obligations Law § 5-1401 was to promote and preserve New York's status as a commercial center and to maintain predictability for the parties." *IRB-Brasil*, 20 N.Y.3d at 315-16. The Court there pointed to a statement in the Sponsor's Memorandum explaining that "[i]n order to encourage the parties of significant commercial, mercantile or financial contracts to choose New York law, it is important … that the parties be certain that their choice of law will not be rejected by a New York Court." *Id.* at 314 (quoting Bill Jacket, L. 1984, ch. 421). The Legislature was concerned that decisions overriding the parties' agreed choice of New York law "would affect the standing of New York as a commercial and financial center," and it enacted the statute "to promote and preserve" that standing. *Id.* at 314-15. Likewise, in *Ministers*, the Court emphasized "New York's overarching principle of providing certainty and finality to contracting parties." *Ministers*, 26 N.Y.3d at 472.

In light of these important State policies, this Court has firmly enforced contractual agreements to apply New York law. In *IRB-Brasil*, 20 N.Y.3d at 313, an action to enforce a guarantee given by a Brazilian corporation that by its terms was governed by New York law, the Brazilian guarantor argued that the guaranty was "void under Brazilian law because it was never authorized by [the guarantor's] board of directors," as Brazilian corporate law allegedly required. The Court held that section 5-1401 forbade any consideration of Brazilian law. *Id.* at 315.

Likewise, in *Ministers*, the Court held that "New York courts should not engage in *any conflicts analysis* where the parties include a choice-of-law provision in their contract, even if the contract is one that does not fall within General Obligations Law § 5-1401." *Ministers*, 26 N.Y.3d at 474 (emphasis added). "[B]y including a choice-of-law provision in their contracts, the parties intended for *only* New York substantive law to apply"—and the law of "no other state." *Id.* at 475-76 (emphasis added). Accordingly, the Court held, the parties' agreement to apply New York law overrode an otherwise applicable statute, EPTL 3-5.1(b)(2), that would have required application of another state's law. *Id.* at 474. The Court reasoned:

> To do otherwise—by applying New York's statutory conflict-of-laws principles, even if doing so results in the application of the

> substantive law of another state—would contravene the primary purpose of including a choice-of-law provision in a contract—namely, to avoid a conflict-of-laws analysis and its associated time and expense. Such an interpretation would also interfere with, and ignore, the parties' intent, contrary to the basic tenets of contract interpretation.

Id. at 475; *see also 2138747 Ontario, Inc.* v. *Samsung C & T Corp.*, 144 A.D.3d 122, 128 (1st Dep't 2016) (holding that under *Ministers*, courts are "prohibited from engaging in a conflict-of-law analysis where the parties include a choice-of-law provision in their contract"), *aff'd*, 31 N.Y.3d 372 (2018).

These authorities compel the application here of New York's substantive law. The parties agreed in the Governing Documents to the application of New York law. Under this Court's consistent holdings, that agreement provides for the application of New York law to this dispute, and the law of "no other state." *Ministers*, 26 N.Y.3d at 476. As we discuss below, Appellants' contention that their challenge to the enforceability of the Governing Documents should nevertheless be governed by Venezuelan law under UCC section 8-110 and purported common-law conflicts rules is without merit. *See* Points II and III, below.

B. New York Was the Center of Gravity of the Exchange Offer and the Governing Documents

In contract cases, absent a choice-of-law agreement by the parties, New York law determines the applicable law under the "'center of gravity' or 'grouping of contacts'" test. *Zurich Ins. Co.* v. *Shearson Lehman Hutton, Inc.*, 84 N.Y.2d 309, 317 (1994) (quoting *Auten* v. *Auten*, 308 N.Y. 155, 160 (1954)). The relevant contacts are: (1) the place of contracting; (2) the place of negotiation of the contract; (3) the place of performance; (4) the location of the subject matter of the contract; and (5) the domicile or place of business of the contracting parties. *Zurich*, 84 N.Y.2d at 317.

Here, as Judge Failla concluded, this analysis "overwhelmingly favors the application of New York law to this dispute." A-2348. As Judge Failla found, the contracting and negotiation took place almost entirely in New York by New York–based parties and advisors. A-2347; A-2769-74¶¶132-163. New York was the place of performance, as the Governing Documents require all payments under the Notes to be made in New York. A-2347; A-1910¶173; *see Republic of Arg.* v. *Weltover, Inc.*, 504 U.S. 607, 608 (1992) (New York was the "place of performance" because bonds designated "accounts in New York as the place of payment"). The "subject matter" of the Exchange Offer—i.e., the Global Notes and the Collateral—is located in

New York. A-2347; A-1911¶¶176, 189; *see Philips Credit Corp.* v. *Regent Health Grp.*, 953 F. Supp. 482, 504 (S.D.N.Y. 1997) ("[T]he location of the collateral that secures a contract for the repayment of money typically determines the location of the subject matter of the contract."). And all parties to the Governing Documents other than Appellants are located in New York. A-2347-48.

These New York contacts far outweigh the bare fact that PDVSA and PDVSA Petróleo are Venezuelan companies. A-2348; *see, e.g.*, *Bank Leumi Tr. Co. of N.Y.* v. *Wulkan*, 735 F. Supp. 72, 76 (S.D.N.Y. 1990) (applying New York, rather than Israeli, law to claims arising from a guaranty where the "drafting, negotiation and execution of the [g]uaranty and the obligations guaranteed thereby took place in New York" even though the plaintiff bank was wholly owned by an Israeli parent and employed Israelis). PDVSA and PDVSA Petróleo chose, for their own benefit, to seek financing from international investors in the New York capital markets and to take advantage of the breadth and reliability of those markets and the sophistication and independence of the New York and U.S. judiciaries. It may not now escape the natural consequences of that choice.

II. Appellants' Challenge to the Enforceability of the Governing Documents Does Not Raise Any Issue of "Validity" Under UCC Section 8-110

Appellants argue that Venezuelan law applies here by virtue of UCC section 8-110(a)(1), (d), under which "[t]he local law of the issuer's jurisdiction … governs … the validity of a security." Appellants' challenge to the enforceability of the Governing Documents, however, does not raise any issue of "validity" as section 8-110 uses that term. Accordingly, section 8-110 does not require the application of Venezuelan law to this action.

Judge Failla held that the "validity" of a corporate security as that term is used in section 8-110 pertains to corporate-law formalities—such as approval of the security pursuant to governing corporate law or the corporation's charter or by-laws—or corporate laws specific to the issuance of securities, and not to the broader question of whether the security complies with laws of "general applicability." A-2336-39. As Judge Failla held, because Appellants' claim that National Assembly approval was required under Venezuelan law "does not fall within Article 8's concept of 'validity,'" section 8-110 has "no bearing" on this case. A-2338.

This Court should likewise hold that section 8-110 does not require consideration of Venezuelan law. Judge Failla's ruling is correct

under ordinary principles of contract interpretation and furthers the important State policies that underlie *IRB-Brasil* and *Ministers*.

A. Judge Failla Correctly Interpreted UCC Section 8-110

1. Customary Usage

"[W]ords of technical or special meaning" as used in a statute should be construed "with regard for their established legal significance." *Chauca* v. *Abraham*, 30 N.Y.3d 325, 331 (2017); *People* v. *Litto*, 8 N.Y.3d 692, 697 (2007) (statute should be interpreted "in the light of conditions existing at the time of its passage and construed as the courts would have construed it soon after its passage").

Judge Failla's interpretation of "validity" is consistent with longstanding usage by transactional lawyers in the context of securities issuances. As one commentator explained a decade before the Legislature adopted current Article 8:

> The opinion that stock has been "validly issued" means that the corporation has sold or otherwise transferred the stock in compliance with the corporate law of its state of incorporation and its charter and by-laws, as then in effect, and that the corporation has not taken any step that deprives the stock of its "validly issued" status. ***The opinion does not cover compliance with other laws*** nor does it mean that the directors who approved the stock issuance complied with their fiduciary obligations.

Scott FitzGibbon & Donald W. Glazer, *Legal Opinions in Corporate Transactions: The Opinion that Stock is Duly Authorized, Validly Issued, Fully Paid and Nonassessable*, 43 Wash. & Lee L. Rev 863, 874-75 (1986) (emphasis added); *see also id.* at 876 ("[T]he 'validly issued' opinion does not confirm compliance with all requirements of law."); *id.* at 877 n.55 ("'validly issued' only covers compliance with corporate law"); Frank E. Babb et al., *Legal Opinions to Third Parties in Corporate Transactions*, 32 Bus. Law 553, 567 (1977) ("The validly issued part of this opinion is an affirmative opinion the shares were issued in accord with the Business Corporation Laws of the Company's state of incorporation and the Charter Documents and by-laws of the issuer.").

This usage of "valid" dates back to James Fuld's often-cited 1973 article on opinion letters:

> I believe it would be useful if there were an adjective which means that ***an agreement has been properly executed and is in existence, without any conclusion as to binding, enforceable or lawful aspects***, and I suggest that "valid" may be a desirable word for this purpose.

James J. Fuld, *Legal Opinions in Business Transactions—An Attempt to Bring Some Order Out of Some Chaos*, 28 Bus. L. 915, 928 (1973) (emphasis added). As Fuld explained, an opinion that a security was "validly issued"

addresses "whether the directors duly authorized the issuance of the shares in accordance with the statute, charter, by-laws and any applicable agreement in effect at the time of such issuance." *Id.* at 933.

Appellants contend, relying principally on dictionary definitions, that "validity" should be interpreted broadly to mean "[l]egal sufficiency, in contradistinction to mere regularity," PDVSA Br. 20 (quoting Black's Law Dictionary 1719 (4th ed. 1951)), or "[l]egal strength, force, or authority," *id.* (quoting Webster's New Int'l Dictionary of the English Language 2814 (2d ed. 1935)). But as discussed above, pp. 35-36, the term "validity" has been consistently defined more narrowly in the context of securities issuances. This narrow definition is also reflected in dictionary definitions Appellants do not cite. *See Valid*, Gilbert Law Dictionary (1st ed. 1994) (defining "valid" as "executed with proper formalities"); *Valid*, Oxford Modern English Dictionary (1993) (substantially the same).

2. Legislative History

The legislative history supports the same result. The Bill Jacket for the 1997 statute adopting section 8-110 defines "validity" as "validity in the sense of corporate or other authority to issue securities," i.e., "in the sense of having been issued pursuant to appropriate corporate or similar

action." Bill Jacket, 1997 A.B. 6619, ch. 566, Comm. Rep't 22; *see generally* *Bohlen* v. *DiNapoli*, 34 N.Y.3d 434, 442 (2020) (court properly considered bill jacket to confirm legislative intent); *Riley* v. *County of Broome*, 95 N.Y.2d 455, 462 (2000) (legislative history is appropriately considered even if "the language of [the statute] is clear").

As Judge Failla reasoned, the legislative history of Article 8 further underscores the narrow scope of "validity" under section 8-110. The official prefatory note to Article 8 explains that the Article "is in no sense a comprehensive codification of the law governing securities or transactions in securities. Although Article 8 deals with some aspects of the rights of securities holders against issuers, most of that relationship is governed not by Article 8, but by corporation, securities, and contract law." Prefatory Note to Revised Article 8 at III.B (1994). The statement of "legislative intent and declaration" in the 1997 New York statute that enacted new Article 8 similarly emphasizes that Article 8 "simply deals with the mechanisms by which interests in securities are transferred and the rights and duties of those who are involved in the transfer process." Act to Amend the UCC, ch. 566, § 1, 1997 N.Y. Laws 3287, 3288.

The narrow scope of Article 8 was widely described by commentators before the Legislature enacted the Article in 1997. *See, e.g.*, James Steven Rogers, *Revised UCC Article 8: Why It's Needed, What It Does at 1*, U.C.C. Bull., Dec. 1994, at 1 ("State corporate and contract laws establish the rights that owners of equity and debt securities have against issuers …. Article 8 is different. It sets the ground rules for implementing transfers and resolves disputes that may arise when different people claim conflicting interests."); 7 William D. Hawkland et al., Uniform Commercial Code Series § 8-101:5 (2023) ("Hawkland & Rogers") (noting that the "rights that an investor has against the issuer of a security are beyond the scope of Article 8" and instead are "governed by state corporation law and contract law."); 8 David Frisch, Lawrence's Anderson on the U.C.C. § 8-101:4 (3d ed. 2022) ("Revised Article 8's only purpose is to deal with the mechanisms by which interests in securities are transferred, as well as to specify the rights and duties of those who are involved in the transfer process.").

Section 8-110's predecessor, prior section 8-106 (adopted by the Legislature in 1962), was likewise understood to limit the scope of "validity" to internal corporate approvals and corporate laws going to the issuance of securities. As the earlier editions of the Hawkland treatise explained, the

term was "usually construed to mean whether the applicable statutes and requirements set out in the issuer's organizational documents have been complied with in issuing the security." Hawkland & Rogers, app. A at § 8-106:2 [Prior] (citing James B. Halpern, *Defining the "Validity" of a "Security" under Article 8*, 12 UCC Law J. 195 (1980)). In contrast, "[q]uestions going beyond the formal requisites of a security … were treated as going beyond the internal affairs of a corporation and, therefore, not automatically governed by the law of the jurisdiction of organization of the issuer." Halpern, 12 UCC Law J. at 197.

The broad interpretation of "validity" Appellants urge also would undermine the purpose of section 8-110 to "allow[] issuers, investors and securities intermediaries to determine in advance—with certainty and predictability—the substantive law that will govern their rights and obligations … in connection with the issuance, ownership and transfer of securities …." Bill Jacket, 1997 A.B. 6619, ch. 566, Comm. Rep't 21-22; *see also id.* (emphasizing that under prior law parties must "guess what substantive law will govern some of their most fundamental rights and duties," and that such "legal uncertainty operates as a deadweight cost on the economy, increasing the cost of capital for issuers"). As the leading

treatise reasons, a broad interpretation of "validity" under section 8-110 would undermine certainty by "carving out an enormous and ill-defined exception to the general principles of choice of law recognized by both the U.C.C. and general law." Hawkland & Rogers, § 8-110:2.

3. The Hawkland Treatise

The Hawkland treatise, on which Judge Failla relied, similarly emphasizes the narrow focus of "validity" under section 8-110. It explains that the term refers to "whether issuance of the securities had been 'duly authorized.'" A-2336. Likewise, the treatise explains that "the concept of 'validity' … must have a narrower scope than one might encounter in other legal contexts, e.g., in a dispute about whether the obligations represented by the security is 'enforceable' or 'legal, valid, and binding.'" Hawkland & Rogers, § 8:202-6 (cited in A-2336).

Consistent with this definition, the Hawkland treatise explains that "validity" as used in section 8-110 refers only to "procedural or other requirements for issuance of securities," and does not encompass laws of "general applicability" that "render[] unenforceable a certain category of promises to pay money." Hawkland & Rogers, § 8-110:2. It illustrates the definition of validity with a hypothetical that in Judge Failla's words, "maps

almost perfectly onto the facts of the instant action." A-2337-38. The hypothetical says that section 8-110 would not require the application of a foreign "statute or law (Law X) that renders unenforceable a certain category of promises to pay money" that "does not deal with the procedural or other requirements for issuance of securities." *Id.* (quoting Law X hypothetical in full). As Judge Failla reasoned, Article 150 of the Venezuelan Constitution, like the hypothetical Law X, applies to a "broad category of contracts" (so-called "contracts of national interest"), and "has nothing specifically to do with the issuance of securities." A-2338.

The Hawkland treatise's discussion is entitled to great weight. Professor Rogers, a principal author of the treatise, was the lead Reviser of the version of Article 8 adopted by this State in 1997. *See* James Steven Rogers, *Policy Perspectives on Revised UCC Article 8*, 43 UCLA L. Rev. 1431, 1433 (1996). The relevant sections of the treatise—including the Law X hypothetical—were published in 1996, a year before the Legislature adopted Article 8. *See* ADD-1. Such a "contemporaneous interpretation of a statute is entitled to considerable weight in discerning legislative intent." *Knight-Ridder Broad., Inc.* v. *Greenberg*, 70 N.Y.2d 151, 158 (1987).

Appellants cite criticism of Judge Failla's ruling by the treatise's current editor, Carl Bjerre, PDVSA Br. 29, 30, but Professor Bjerre's analysis is of recent vintage and sheds no light on the purpose of the Legislature when it adopted section 8-110. Bjerre was not a drafter of section 8-110 or any other section of Article 8. Nor was he the author of the portions of the treatise that were available to the Legislature when it adopted section 8-110 and that were cited by Judge Failla (including the Law X hypothetical). Carl S. Bjerre, *Investment Securities*, 76 Bus. Law. 1371, 1380 n.41 (2021). Bjerre asserts that "validity" should be interpreted to mean "going to the nature of the obligor and its internal processes." *Id.* at 1379. But Bjerre cites no authority for that definition. Nor does he explain, even under his own novel interpretation, how a purported requirement that PDVSA obtain approval from the National Assembly can be said to pertain to PDVSA's "internal processes."

4. Absence of Reported Case Law

The absence of reported decisions construing section 8-110 evidences the narrow scope of that provision, as Judge Failla noted. A-2339 n.14. The Second Circuit reiterated that point. See above pp. 26-27. Appellants nowhere address the point.

If section 8-110 (and section 8-106 before it) meant what Appellants say, then countless delinquent foreign issuers would have been incentivized to attempt to escape their obligations by asserting that the issuance violated the law of the issuer's jurisdiction. The ALI promulgated section 8-110 in 1994, 19 years ago, and section 8-106 in 1957, 66 years ago. Article 8 has been adopted by nearly all 50 states. Yet in all that time no court to our knowledge has construed the term "validity" as broadly as Appellants now urge, and no New York court has even addressed a claim that a security of a foreign issuer was unenforceable under the law of the issuer's home jurisdiction. *See* A-2339 n.14.

5. Appellants' Reliance on UCC Section 8-202 Is Misplaced

Section 8-202 of the UCC does not, as Appellants argue, suggest that the definition of "validity" in section 8-110 is broader than the interpretation Judge Failla adopted. *See* A-2336.

Appellants note a reference in section 8-202(b)(1) to the consequence of an asserted "defect involv[ing] a violation of a constitutional provision." PDVSA Br. 21. Section 8-202(b)(1), however, merely sets forth the circumstances in which a security is enforceable despite an alleged "defect" going to validity. Nothing in that section (or any other UCC section)

supports Appellants' suggestion that *all* alleged constitutional violations necessarily involve "validity." Indeed, Appellants conceded in the Second Circuit that not all alleged constitutional violations bear on "validity"—a concession that is fatal to their argument. A-2411-12.

As Judge Failla reasoned, "the types of constitutional provisions contemplated by section 8-202 are those that specifically address the requirements for the issuance of securities, as opposed to provisions that might more generally govern contracts." A-2336. As an example of a constitutional provision that could bear on validity, the court noted state constitutional provisions prohibiting the issuance of watered stock, which "specifically address the requirements for the issuance of securities." *Id.* (citing *Am. Sec. Transfer, Inc.* v. *Pantheon Indus., Inc.*, 871 F. Supp. 400, 405 (D. Colo. 1994) (citing a state constitutional provision prohibiting issuance of watered stock); *see also* Idaho Const. art. XI, § 9 (same)). By contrast, as noted, Article 150 of the Venezuelan Constitution applies broadly to "contracts of national public interest," not merely debt issuances or securities, and thus does not address "validity" as used in Article 8.

Appellants' reliance on *Board of Commissioners* v. *E.H. Rollins & Sons*, 173 U.S. 255 (1899), and *Board of Commissioners* v. *Potter*, 142 U.S.

355 (1892), both cited in the Official Comments to section 8-202, is misplaced. The Comments do not cite these cases to define "validity," but instead for the specific purpose of providing background to the "conditions [imposed by section 8-202] for an estoppel against a government issuer." UCC § 8-202 cmt. 3. The "estoppel by recitals" doctrine addressed in those cases is not limited to UCC validity, but extends broadly to recitals of all kinds. Those cases, which involved non-corporate issuers (unlike Appellants) and did not involve laws of "general applicability" like Article 150, have no bearing here.

B. Judge Failla's Interpretation Is Consistent with Fundamental New York Legal Principles and Legislative Policies

Judge Failla's interpretation of "validity" is consistent with other aspects of New York law and important New York public policies, while Appellants' interpretation undermines them.

First, Judge Failla's ruling is consistent with the purposes of the UCC of encouraging party autonomy and freedom of contract. UCC § 1-103(a)(2) (providing that the UCC is intended to encourage "the continued expansion of commercial practices through custom, usage, and agreement of the parties"). In contrast, Appellants' interpretation impedes the ability of parties to enter into enforceable choice-of-law agreements.

Second, Judge Failla's ruling is consistent with "[t]he goal of General Obligations Law § 5-1401 … to promote and preserve New York's status as a commercial center and to maintain predictability for the parties." *IRB-Brasil*, 20 N.Y.3d at 315; *see also Ministers*, 26 N.Y.3d at 472. In contrast, Appellants' position would undermine predictability and detrimentally "affect the standing of New York as a commercial and financial center." *IRB-Brasil*, 20 N.Y.3d at 316 (quoting Sponsor's Mem., N.Y. Bill Jacket, L. 1984, Ch. 421). Under their position, investors in securities issued in New York and subject by their terms to New York law could not rely on the applicability of New York law. Instead, they would be vulnerable to claims by foreign issuers that the security is allegedly unenforceable under an entirely different legal regime. Faced with that risk, investors would be incentivized to look to more reliable and predictable markets and governing law.

Upholding Judge Failla's ruling would not transform this State into "a safe haven for unscrupulous authoritarian regimes to execute illegal transactions that violate their own constitutions." PDVSA Br. 2. Instead, it will merely affirm longstanding law in this State. Appellants do not and cannot contend that the parade of horribles they invoke has come to pass.

Third, Judge Failla's interpretation is consistent with the internal affairs doctrine. Under that doctrine, certain issues internal to a corporation are governed by the laws of the jurisdiction of incorporation. By contrast, the internal affairs doctrine does not apply to the corporation's relationship with creditors and other third parties. Restatement (Second) of Conflict of Laws § 302, cmt. a (the law of the jurisdiction of incorporation governs "the relations inter se of the corporation, its shareholders, directors, officers or agents" as opposed to "matters affect[ing] the interests of the corporation's creditors"); *Mindspirit, LLC* v. *Evalueserve Ltd.*, 346 F. Supp. 3d 552, 581 (S.D.N.Y. 2018) (because the plaintiff's "breach of contract claim concerns the rights of a third party external to the corporation … the 'internal affairs doctrine is inapplicable here'").

Fourth, Judge Failla's ruling is consistent with New York's longstanding rejection of the ultra vires doctrine, under which the risk that a corporation has acted beyond its legal powers falls on the corporation's counterparties rather than on the corporation itself. *See* pp. 53-54, below.

C. Appellants Do Not Raise Any Question of "Validity"

Under the correct reading of section 8-110, there is no dispute about the "validity" of the Notes. The Notes were approved by Appellants'

Boards of Directors and, with respect to PDVSA, by the Republic as its sole shareholder (through what the United States at the time recognized as its legitimate government), all in accordance with the PDVSA Parties' charters and by-laws and Venezuelan corporate law. The General Counsel of each of PDVSA and PDVSA Petróleo certified that the signatories to the Governing Documents were authorized officers, directors, or agents of PDVSA and PDVSA Petróleo. *See* A-1880¶74; A-1884-87¶¶88-96; A-1921¶¶108-10; *see also* A-2293. These approvals establish that 2020 Notes were "duly authorized" and "valid." By contrast, Article 150 of the Venezuelan Constitution is not part of Venezuelan corporate law or a provision specific to the issuance of securities. Instead, it is a principle of contract law that, according to Appellants, renders the Governing Documents illegal. Article 150 therefore does not bear on the "validity" of the Notes within the meaning of section 8-110.

Appellants conceded in the Second Circuit that "validity" means "duly authorized" and is properly limited to "corporate or other authority to issue securities." A-2376 (quoting Bill Jacket, 1997 A.B. 6619, ch. 566). They argue, however, that National Assembly authorization under Article 150 should be viewed as a matter of "validity" on the ground that the Notes were

not "duly authorized" if they were not approved by the National Assembly. A-2375-76. But they cite no authority suggesting that validity, in the case of a corporate issuer such as PDVSA, includes approvals by governmental entities that are external to that corporate issuer, such as the National Assembly, or compliance with general legal restrictions on certain contracts such as those purportedly imposed by Article 150. On the contrary, as discussed above, the Hawkland treatise and longstanding usage make clear that "duly authorized" pertains only to internal corporate approvals in accordance with applicable corporate law and the corporation's charter and by-laws, not external governmental approvals or other legal requirements of general applicability. *See* pp. 35-43, above.

Appellants argue that Article 150 should be deemed to relate to validity because it implicates important Venezuelan public policies. PDVSA Br. 24-25. That is a red herring. Nothing in the statute or any authority Appellants cite suggests that the scope of "validity" is determined by the asserted importance of a foreign law. Many general laws governing contracts—for example, laws against fraud—are important and can void securities contracts, but they are not matters of "validity" under section 8-110. Comment 2 to section 8-110, which Appellants cite, notes only that

questions of validity "may implicate significant policies of the issuer's jurisdiction of incorporation," PDVSA Br. 33; it does not say, as Appellants suggest, that any significant policies of that jurisdiction are, for that reason, matters of "validity."

III. None of the Common-Law Doctrines That Appellants Invoke Requires Application of Venezuelan Law

A. Appellants' Claims Do Not Implicate Actual Authority

Appellants' argument that their authority to issue the Notes should be governed by Venezuelan law, PDVSA Br. at 39-43, is misplaced because, as Judge Failla correctly held, their claims do not implicate "actual authority" in the ordinary sense of a "relationship between a principal and its agent." A-2343-44. *See, e.g.*, *N.Y. Cmty. Bank* v. *Woodhaven Assocs., LLC*, 137 A.D.3d 1231, 1233 (2d Dep't 2016) ("Actual authority granted to an agent to bind his principal is created by direct manifestations from the principal to the agent ….''). It is irrelevant whether PDVSA had authority to bind the National Assembly or the Republic, because the Governing Documents do not purport to bind them.

The federal cases Appellants cite, PDVSA Br. 41-42, involve an agent's authority to bind a principal—a matter that is not at issue here. In

Export-Import Bank v. *Central Bank*, 2017 WL 1378271 (S.D.N.Y. Apr. 12, 2017), the court addressed whether that the Central Bank of Liberia was authorized to incur debt on behalf of the Republic of Liberia. The decision in *Storr* v. *National Defence Security Council*, 1997 WL 633405 (S.D.N.Y. Oct. 14, 1997), *aff'd*, 164 F.3d 619 (2d Cir. 1998), involved whether a government agency had authority to issue notes payable by the Bank of Indonesia and the Republic of Indonesia. *Anglo-Iberia Underwriting Management Co.* v. *PT Jamsostek*, 1998 WL 289711 (S.D.N.Y. June 4, 1998), *aff'd in part*, 235 F. App'x 776 (2d Cir. 2007), similarly involved the authority of a purported agent (the defendant's former employee) to take action that purported to bind the alleged principal (the employer).

No similar issue is presented in this case. There is no claim that Appellants were agents of the National Assembly or the Republic, nor that the Notes were issued in the name of the Republic. There is no claim, nor could there be, that the Boards of Directors of Appellants lacked authority to act on Appellants' behalf.

These cases are inapplicable for the additional reason that in applying foreign law, they relied upon the "most significant relationship" test to determine that the foreign law applied. *See, e.g.*, *Exp.-Imp. Bank*, 2017

WL 1378271, at *3 ("CBL has the most significant relationship with the transaction at issue"). Here, Judge Failla concluded that New York has the most significant relationship to the transaction because that was the center of gravity of the Exchange Offer and the Governing Documents. A-2346-49. As this Court has held, "[t]he purpose of grouping contacts is to establish which State has the most significant relationship to the transaction and the parties." *Zurich*, 84 N.Y.2d at 317.

Appellants also argue that if PDVSA lacked the authority to enter into the Exchange Offer, the Governing Documents could not be ratified because "[a] principal cannot ratify an agent's act that the principal itself could not have authorized." PDVSA Br. 49 (quoting *In re N.Y. State Med. Transporters Ass'n, Inc.* v. *Perales*, 77 N.Y.2d 126, 131-32 (1990)). No issue of ratification is presented to this Court. And for the reasons discussed above, the principal-agent relationship is irrelevant.

B. New York Law Bars Appellants' "Capacity" Argument

Appellants' contention that Venezuelan law governs their "capacity, power, and authority" to enter into the Governing Documents, PDVSA Br. 38-40, is contrary to New York choice-of-law rules.

The defense of ultra vires has been disfavored in this State for more than a century. *See Vought* v. *E. Bldg. & Loan Ass'n*, 172 N.Y. 508, 518 (1902). As this Court explained there

> [when corporations] in their contracts and dealings, break over the restraints imposed upon them by their charters … their exemption from liability cannot be claimed on the mere ground that they have no attributes nor facilities which render it possible for them thus to act. While [corporations] have no right to violate their charters, yet they have capacity to do so, and are bound by their acts where a repudiation of them would result in manifest wrong to innocent parties, and especially where the offender alleges its own wrong to avoid a just responsibility.

Id. The Legislature strengthened and codified the State's rejection of the defense in 1961 in Business Corporation Law § 203(a), which provides that, with exceptions not applicable here, "[n]o act of a corporation …, otherwise lawful, shall be invalid by reason of the fact that the corporation was without capacity or power to do such act."

New York's abolition of the defense of corporate incapacity applies to issues of corporate capacity and contract formation involving foreign as well as domestic corporations and to the enforceability of choice-of-law provisions in contracts with foreign corporations. *Commodities & Mins. Enter. Ltd.* v. *CVG Ferrominera Orinoco, C.A.*, 49 F.4th 802, 816 (2d Cir. 2022) (applying New York choice-of-law clause to whether Venezuelan

state-owned business was authorized to enter into contracts); *Sphere Drake Ins.* v. *Clarendon Nat'l Ins.*, 263 F.3d 26, 32 n.3 (2d. Cir. 2001) (applying New York choice-of-law clauses to issues of "contract formation"); *Int'l Minerals & Res., S.A.* v. *Pappas*, 96 F.3d 586, 592 (2d Cir. 1996) (under New York conflict of law rules, a choice-of-law clause governed "contract formation issue[s]"); *Baron* v. *Port Auth.*, 105 F. Supp. 2d 271, 275 (S.D.N.Y. 2000), *aff'd*, 271 F.3d 81 (2d Cir. 2001) ("When the case involves substantive issues of law such as contract formation, New York courts give 'controlling effect to the law of the jurisdiction which has the greatest concern with, or interest in, the specific issue raised in the litigation.'"); *Broder* v. *O'Brien*, 60 Misc. 2d 1039, 1040 (Sup. Ct. Oswego Cnty. 1969) (applying law of state where transaction occurred to issues of capacity under the "most significant contacts" test).

This Court's decision in *Indosuez International Finance B.V.* v. *National Reserve Bank*, 98 N.Y.2d 238 (2002), cited in PDVSA Br. 39-40, is on point. There, the Court rejected, under "this state's substantive law of agency," the argument by the defendant, a Russian corporation, that financial contracts entered into in New York should be deemed unenforceable because they were "null and void under Russian law" due to

lack of approval by the corporation's "accountant general." *Id.* at 243, 245. The Court held that New York law applied because this State "has the paramount interest in the enforceability of the transactions." *Id.* at 244-45. While *Indosuez* involved apparent authority, the issue of capacity equally implicates this State's interest in enforcing financial transactions centered here.

New York's decision to abolish the ultra vires defense is consistent with the law in many other jurisdictions. As one scholar has explained, the proposition that each party's "personal law" must govern its capacity to contract is rooted in a "distant feudal past" and is now "unjustifiable" in "this commercial and mobile age," and benefits only those that "conveniently claim an incapacity" at the expense of "those dealing with them in reliance on the law of the transaction." Albert A. Ehrenzweig, Treatise on the Conflict of Laws § 178, at 476-77, 479 (1962).

Appellants' reliance on *Schnabel* v. *Trilegiant Corp.*, 697 F.3d 110, 119 (2d Cir. 2012), and *Worthington* v. *JetSmarter, Inc.*, 2019 WL 4933635 (S.D.N.Y. Oct. 7, 2019), for the proposition that issues of capacity cannot be governed by the law selected by the parties' agreement, PDVSA Br. 40, is misplaced. The Second Circuit has since clarified that where there

is "no dispute that the choice-of-law clause is included in the [agreement], which both parties signed … the ordinary rule—that choice-of-law clauses are separated out from contracts for questions of validity—applies in full force." *Commodities*, 49 F.4th at 817. The issue in *Schnabel* was not capacity or validity, but whether the party challenging the contract had in fact assented to its terms (in that case, the terms of a "clickwrap" agreement that the consumer was unlikely to have read). *Schnabel*, 697 F.3d at 119-21. Here, Appellants undisputedly assented to the Governing Documents, including their choice-of-law clauses. In any event, as discussed above, New York law applies here, as Judge Failla held, under the "center of gravity" test irrespective of the parties' agreement on choice of law.

The remaining authorities on which Appellants rely, PDVSA Br. 41, are likewise inapposite. The Delaume treatise they cite in turn relies on *Goodman* v. *Deutsche-Atlantische Telegraphen Gesellschaft*, 166 Misc. 509 (Sup. Ct. Kings Cnty. 1938), which held that the authority of a German borrower was governed by German law because the agreement so provided. *Id.* at 510. The 140-year-old decision in *Canada Southern Railway Co.* v. *Gebhard*, 109 U.S. 527, 537 (1883), sheds no light on the current state of New York law. And Appellants' reliance on the American Bar Association's

Third-Party Legal Opinion Report is misplaced. "Authorization" in the context of legal opinions refers to whether a "corporate body has approved the agreement or instrument in the manner required by corporate law, the charter, and the by-laws." Scott FitzGibbon & Donald W. Glazer, *Legal Opinions in Corporate Transactions: The Opinion on Agreements and Instruments*, 12 J. Corp. L. 657, 660-61 (1987). There is no dispute that that occurred here.

C. Under New York Law, Respondents Are Not Bound by Alleged Venezuelan-Law Limitations on Appellants' "Power to Contract"

Appellants contend that because PDVSA is owned by the Republic, its contracting counterparties are "chargeable" with knowledge of any Venezuelan law purportedly limiting its capacity to contract. PDVSA Br. 43-45. But Appellants have not identified any New York law charging parties contracting in New York with foreign corporations with knowledge of foreign law, let alone parties to agreements governing securities that were issued in New York and explicitly governed by certain New York choice-of-law provisions.

The cases Appellants cite are inapposite because they involve domestic governments, not corporations or foreign governments. In *Parsa* v.

State, 64 N.Y.2d 143, 146-47 (1984), this Court held that, in the case of a New York contract between the State and a State employee, the employee was chargeable with knowledge of the law of New York. The case did not address a foreign corporation that contractually agreed to be bound by New York law in a New York–centered transaction. Likewise, in *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380, 384 (1947), the Supreme Court held that equitable estoppel did not protect private parties from the risk of invalidation in their dealings with an agency of the U.S. government. Nothing in the case suggests that a foreign state-owned corporation may escape its obligations under a contract centered in New York and containing New York choice-of-law provisions by claiming that it lacked capacity to enter into the contract under foreign law.

The decision in *Northrop Grumman Ship Systems, Inc.* v. *Ministry of Defense*, 575 F.3d 491 (5th Cir. 2009), PDVSA Br. 44-45, is similarly inapposite. The court there held that the Republic of Venezuela was not bound by a settlement reached by its Mississippi attorney where the attorney lacked settlement authority under the law of both Mississippi and Venezuela. *Id.* at 500. Here, as discussed above, pp. 50-51, there is no claim that Appellants had authority to bind the Republic.

D. The Center of Gravity Standard Does Not Require Application of Venezuelan Law

Appellants' argument that Venezuela law should apply under the "grouping of contacts" or "center of gravity" standard because of Venezuela's interest in the issue of PDVSA's contractual authority, PDVSA Br. 45-48, does not require a different result. To begin with, as discussed above, pp. 28-31, this Court has made clear that where, as here, the parties contractually agree to the application of New York law, that contractual choice of law requires application of the substantive law of New York. *See Ministers*, 26 N.Y.3d at 475. Appellants' suggestion that *Haag* v. *Barnes*, 9 N.Y.2d 554, 559-60 (1961), and *Cargill, Inc.* v. *Charles Kowsky Res., Inc.*, 949 F.2d 51, 55 (2d Cir. 1991), PDVSA Br. 46, permit the parties' choice of law to be overridden is misplaced because both cases long predate *IRB-Brasil* and *Ministers*.

Even apart from the parties' contractual election of New York law, Judge Failla correctly concluded that on the undisputed facts, New York's "center of gravity" principles require the law of New York, not that of Venezuela, to apply to the Notes. Here, the relevant factors, see above p. 32, all point to New York as the locus of the transaction.

Appellants argue that Venezuelan law should apply because Venezuela allegedly has a greater interest than New York in "PDVSA's authority to enter into the Governing Documents." PDVSA Br. 48. But as this Court held in *Indosuez*, cited in PDVSA Br. 46, in a dispute between parties to a New York–centered transactions denominated in U.S. dollars, New York "has the paramount interest in the enforceability of the transactions." *Indosuez*, 98 N.Y.2d 238 at 244-46. New York's connections to the Governing Documents are even more substantial than its connections to the transactions at issue in *Indosuez*, where the Russian bank's contractual counterparty was a Netherlands corporation and not all of the transactions included New York choice-of-law or choice-of-forum provisions. *Indosuez*, 98 N.Y.2d at 243-44; *see also Ehrlich-Bober Co.* v. *Univ. of Hous.*, 49 N.Y.2d 574, 580 (1980) (declining to apply Texas law restricting where University of Houston could be sued because it conflicted with New York's public policy of preserving its status as a financial center).

Venezuela's purported interest in obtaining National Assembly approval for the issuance of Notes is further limited by the fact that, as discussed above, p. 18, PDVSA and its subsidiaries have a long and consistent history of issuing billions of dollars in debt in the United States

and elsewhere without seeking National Assembly approval. These transactions include both debt secured by controlling interests in CITGO Holding and CITGO Petroleum and their assets, and unsecured debt issued to U.S. investors that, if unpaid, would put PDVSA's indirect beneficial ownership of those entities at risk. A-2046-54¶¶473-99; *see also* pp. 10, 17. New York choice-of-law principles cannot give foreign issuers carte blanche to declare novel principles of alleged public policy that they themselves have repeatedly disregarded.

E. Alleged Venezuelan Public Policy Cannot Override the Parties' Choice of New York Law

Appellants argue that the parties' agreement to apply New York's substantive law should be disregarded in light of the asserted public policy interests of Venezuela. PDVSA Br. 50-55. But that argument is foreclosed by *IRB-Brasil* and *Ministers*, which preclude "any conflicts analysis where the parties include a choice-of-law provision in their contract." *Ministers*, 26 N.Y.3d at 474.

"Since *Ministers* was handed down, … the courts of New York have refused to consider the public policy of *foreign states* … to overturn an otherwise valid contractual choice of law provision." *Capstone Logistics Holdings, Inc.* v. *Navarrete*, 2018 WL 6786338, at *22 (S.D.N.Y. Oct. 25,

2018). In *Capstone*, the court held that Delaware law, the law chosen by the parties, applied to plaintiffs' claims for breach of a contractual restrictive covenant, although the defendants were residents of California and California public policy allegedly prohibited such covenants. *Id.* at *22-26. Likewise, in *ABB, Inc.* v. *Havtech, LLC*, 176 A.D.3d 580, 581 (1st Dep't 2019), the First Department declined to give effect to public policy of Maryland protecting equipment dealers based in that state. The court explained that "[n]on-New York statutes do not invalidate contracts that chose New York law and are valid and enforceable under New York law." *Id.* And in *BDC Management Services, LLP* v. *Singer*, 2016 WL 75603, at *7 (Sup. Ct. N.Y. Cnty. Jan. 07, 2016), the court held that *Ministers* "precludes this court from considering New Jersey law" in a dispute over the regulation of dental offices in New Jersey. *See also Marine Midland Bank, N.A.* v. *United Mo. Bank, N.A.*, 223 A.D.2d 119, 124 (1st Dep't 1996) (rejecting defendant's argument that Kansas public policy could override a New York choice-of-law clause); *Hamilton Capital VII, LLC, I* v. *Khorrami, LLP*, 2015 WL 4920281, at *6 (Sup. Ct. N.Y. Cnty. Aug. 17, 2015) (Section 5-1401 and *IRB* forbid consideration of California Constitution provision regarding usury, in case involving California borrower); *Willis Re Inc.* v. *Herriott*, 550 F. Supp. 3d 68,

93 (S.D.N.Y. 2021) (holding that any "argument that California law should apply notwithstanding the New York choice-of-law provisions in the [contracts] appears to be foreclosed by *Ministers & Missionaries*."); *Supply & Bldg. Co.* v. *Estee Lauder Int'l, Inc.*, 2000 WL 223838, at *3 (S.D.N.Y. Feb. 25, 2000) (declining to give effect to public policy of Kuwait with respect to contract performed there because "the clear provisions of section 5-1401 make no exception for a foreign state's public policy").

This Court's decision in *Welsbach Electric Corp.* v. *MasTec North American, Inc.*, 7 N.Y.3d 624 (2006), PDVSA Br. 50, 52, 53, is inapposite because it did not suggest that the public policy of another jurisdiction could override the parties' agreement to apply New York law. Instead, the Court considered—and rejected—an argument that New York public policy precluded application of the foreign law selected by the parties. *Welsbach*, 7 N.Y.3d at 627-30; *see also Brown & Brown, Inc.* v. *Johnson*, 25 N.Y.3d 364, 369 (2015) (holding that "the public policy of this State" rendered the parties' election of Florida law unenforceable).

The lower federal court cases on which Appellants rely likewise do not support their position. PDVSA Br. 50-53. Some of these cases predate *Ministers* by decades. *See Bus. Incentives Co.* v. *Sony Corp. of Am.*,

397 F. Supp. 63 (S.D.N.Y. 1975); *In re Penn-Dixie Indus., Inc.*, 22 B.R. 794, 797 (Bankr. S.D.N.Y. 1982). As to *Medicrea USA, Inc.* v. *K2M Spine, Inc.*, 2018 WL 3407702 (S.D.N.Y. Feb. 7, 2018), as another judge in the Southern District of New York has pointed out, the court in that case "failed to acknowledge the game-changing New York Court of Appeals decision and continued to rely on pre-*Ministers & Missionaries* authorities." *Willis Re*, 550 F. Supp. 3d at 93. *Medtronic, Inc.* v. *Walland*, 2021 WL 4131657, at *4-6 (S.D.N.Y. Sept. 10, 2021), erroneously relied on *Welsbach* and *Brown*, both of which involved the entirely distinct issue of whether the public policy of *New York* could override the parties' contractual agreement to apply the law of *another* state.

Appellants' reliance on Restatement (Second) of Conflict of Laws § 187(2)(b) is likewise misplaced. Under the Restatement, courts may refuse to enforce contractual choice-of-law provisions where applying the law of the jurisdiction chosen by the parties would be contrary to a "fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which … would be the state of the applicable law in the absence of an effective choice of law by the parties." But as discussed above, the law of New York, not Venezuela, would apply

even if the parties had not agreed to the application of that law. Moreover, as the cases cited above make clear, New York law, to the extent it recognizes a public policy exception at all, considers only the public policy of New York, not that of other jurisdictions. *Willis Re*, 550 F. Supp. 3d at 96. Finally, as discussed above, pp. 61-62, New York has a greater interest in the enforceability of the Governing Documents than does Venezuela.

F. Venezuelan Law Does Not Apply Under Choice-of-Law Principles Concerning Alleged Illegality

Appellants' final argument is that the defense of illegality requires consideration of Venezuelan law. Judge Failla held that this defense was inapplicable because the contracts were made in and to be performed in New York. A-2346-49. Appellants, citing Restatement (Second) of Conflict of Laws § 202, cmt. c (1972), argue that Judge Failla overlooked alleged "illegal acts *related to* the making" of the Governing Documents that occurred in Venezuela. PDVSA. Br. 57 (emphasis added).

Their argument is not well taken. To begin with, to the extent that the federal cases Appellants cite, including *Korea Life Insurance Co.* v. *Morgan Guaranty Trust Co. of New York*, 269 F. Supp. 2d 424 (S.D.N.Y. 2003), require consideration of whether a contract including a New York choice-of-law provision is illegal under the law of another jurisdiction, they

are no longer good law in light of *IRB-Brasil* and *Ministers*, which forbid any choice-of-law analysis when the parties have chosen New York law. *See* pp. 28-31, above. Moreover, the nineteenth-century decision of this Court on which *Korea Life* principally relied did not address the enforceability in New York of a contract allegedly illegal under the law of another jurisdiction, but instead addressed the entirely distinct question of whether restitution or other equitable relief was available in favor of a party to a contract that was illegal under this State's law. *Korea Life*, 269 F. Supp. 2d at 441-42 (citing *Tracy* v. *Talmage*, 14 N.Y. 162, 179 (1856)).

Appellants' reliance on the Restatement is misplaced because the focus of the Restatement is on alleged illegality in the "making" or "performance" of the contract. *See* Restatement (Second) of Conflict of Laws § 202 cmts. b-c, e-f. And as Judge Failla found, the location of both the making and the performance of the Governing Documents is New York. A-2347-48. Appellants' vague references to allegedly illegal acts in Venezuela, such as the "direction" of the transaction by the Maduro regime and unspecified acts by PDVSA and PDVSA Petróleo to "execute" the transaction, PDVSA Br. 56, are unsupported by Judge Failla's findings.

Finally, the circumstances in which a court might arguably refrain from enforcing a contract on grounds of alleged illegality in another jurisdiction do not exist here. *See JPMorgan Chase Bank, N.A.* v. *Controladora Comercial Mexicana S.A.B. De C.V.*, 2010 WL 4868142, at *12-15 (Sup. Ct. N.Y. Cnty. Mar. 16, 2010) (rejecting defense of illegality under Mexican law where contract was not malum in se, was not executory, and party raising defense was in pari delicto) (cited in PDVSA Br. 56). Here, a failure to obtain legislature approval of a securities issuance pursuant to a provision of Venezuelan law is not malum in se, as it is not "evil in itself" and could only be made illegal by positive law. *See Parmely* v. *Showdy*, 148 N.Y.S. 1086, 1090-91 (Sup. Ct. Oneida Cnty. 1914) (contract violating state constitution was "in no sense of the word a contract malum in se"). The Governing Documents are not executory, and Appellants have never argued otherwise. *See Controladora*, 2010 WL 4868142, at *14 (noting that a party's unsatisfied obligation to pay money does not render a contract executory). Finally, Appellants are at least in pari delicto with respect to an alleged violation of the law of their own jurisdiction. As in *Korea Life* and *Controladora*, Appellants expressly represented that the Governing Documents were lawful and enforceable, *see* above pp. 12-13, 19, and, as

Venezuelan entities, PDVSA and PDVSA Petróleo are "charged with at least as much familiarity, if not more, with [Venezuelan] law as [Respondents]." *Korea Life*, 269 F. Supp. 2d at 442; *Controladora*, 2010 WL 4868142, at *14.

Conclusion

This Court should answer the certified questions as follows:

1. Appellants' argument that the Governing Documents are invalid and unenforceable for lack of approval by the National Assembly does not raise any issue of "validity" that New York Uniform Commercial Code section 8-110(a)(1) requires to be determined under Venezuelan law.
2. Appellants have not identified any principle of New York common law supported by the record that requires a New York court to apply Venezuelan substantive law rather than New York's substantive law in determining the legality or enforceability of the Governing Documents.
3. Appellants have not identified any reason supported by the record that the Governing Documents are not enforceable under New York law.

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Certificate of Compliance

I hereby certify pursuant to 22 NYCRR Part 500.13(c)(3) that the foregoing brief was prepared on a computer using Microsoft Word. A proportionally spaced typeface was used, as follows:

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