CTQ-2022-00003

COURT OF APPEALS

STATE OF NEW YORK

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

Plaintiffs-Counter-Defendants-Appellants,

– against –

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

Defendants-Counter-Claimants-Respondents.

QUESTIONS CERTIFIED BY THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT, DOCKET NOS. 20-3858-CV(L) AND 20-4127-CV(CON)

BRIEF OF *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION IN SUPPORT OF MUFG UNION BANK, N.A. AND GLAS AMERICAS LLC

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STATEMENT UNDER RULE 500.1(f)

Pursuant to Rule 500.1(f) of this Court's Rules of Practice, the Chamber of Commerce of the United States of America ("Chamber") states that it is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation. The Chamber is affiliated with the Center for International Private Enterprise and the U.S. Chamber of Commerce Foundation. Its subsidiaries include CC1, LLC; CC2, LLC; USIBC Global Private Limited; Article III Films, LLC; and Madison County Record, LLC.

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INTEREST OF AMICI CURIAE[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Securities Industry and Financial Markets Association ("SIFMA") is the leading securities industry trade association that represents the interests of hundreds of securities firms, banks, and asset managers, including those active in sovereign-debt markets. On behalf of the industry's one million employees, SIFMA champions policies and practices that foster a strong financial industry while promoting trust in financial markets, investor opportunity, capital formation, job creation, and

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[1] Pursuant to Rule 500.23(a)(4)(iii), *amici curiae* state that no party's counsel contributed content to the proposed *amici curiae* brief or participated in the preparation of this brief, and no party, party's counsel, or other person or entity other than *amici curiae*, their members, and their counsel contributed money that was intended to fund the preparation or submission of this brief. *Amici*'s counsel has discussed the timing for *amicus* briefs and the positions taken in this *amici* brief with counsel for Defendants-Counter-Claimants-Respondents.

economic growth. SIFMA serves as an industry-coordinating body to promote fair and orderly markets, efficient market operations and resiliency, and informed regulatory compliance. With offices in New York and Washington, D.C., SIFMA is the U.S. regional member of the Global Financial Markets Association.

The Chamber and SIFMA have strong interests in ensuring that New York's securities markets function efficiently. This includes New York's sovereign-debt market, as the members of SIFMA, the Chamber, and countless others rely on the predictable and efficient nature of New York's financial system to do business. Given that New York is one of the world's largest markets and New York law governs approximately *half* of the foreign sovereign bonds issued by emerging-market countries (valued at nearly $800 billion), predictability in the application of laws governing contracts and securities is essential.

For the reasons discussed below, *amici* submit this brief in support of Defendants-Counter-Claimants-Respondents ("Respondents"), whose position as to the certified questions is consistent with how securities markets and the sovereign-debt market function. Adopting Respondents' position will maintain New York's position as a stable, respected center of global commerce. Adopting Appellants' position will have the opposite effect, and will undermine both securities markets and New York's commercial and financial standing. Thus, given their interests and the interests of their respective members, *amici* respectfully submit that the Court

should answer the first certified question by holding that Appellants' argument that the 2020 Notes and related Governing Documents are invalid and unenforceable for lack of approval by Venezuela's National Assembly does not raise any issue or question of "validity" that New York Uniform Commercial Code ("UCC") section 8-110(a)(1) requires to be determined under foreign law.

INTRODUCTION

In this "Billion-Dollar Choice-of-Law" dispute,[2] the U.S. Court of Appeals for the Second Circuit has certified to this Court three questions "of utmost importance to the State of New York given its standing as the world's preeminent commercial and financial center." A-42.

Amici address the first question certified to this Court: whether Appellants' argument that the Governing Documents are unenforceable for lack of approval by Venezuela's National Assembly implicates the "validity" of those documents within the meaning of UCC section 8-110(a)(1), an issue that section 8-110 would be determined under foreign (here, Venezuelan) law. Appellants insist it does, even though the Governing Documents expressly require the application of New York

[2] John F. Coyle, *The Billion-Dollar Choice-of-Law Question*, Transnational Litigation Blog (Oct. 24, 2022), https://tlblog.org/the-billion-dollar-choice-of-law-question.

law, were denominated in U.S. dollars, and were in large part held by investors based in the United States and elsewhere outside of Venezuela.

Amici respectfully disagree. As the UCC uses the term, "validity" is not implicated at all here, because "validity" under UCC section 8-110(a)(1) only refers to the question whether a security was issued in accordance with an issuer's internal corporate requirements, such as its charter, bylaws, and organizational documents.

Accepting Appellants' position would require New York courts to wade into murky questions of foreign law, depths the courts are ill-equipped to plumb and that New York courts have held should be avoided in other contexts, absent some compelling reason. *E.g.*, *Cooper v. Ateliers de la Motobecane, S.A.*, 57 N.Y.2d 408, 416 (1982) (international arbitration) ; *Est. Of Kainer v. UBS AG*, 175 A.D.3d 403, 405 (2019), *aff'd*, 37 N.Y.3d 460 (2021) (forum non conveniens). There is no reason for a foray into foreign law here. Nothing in the text, history, or contemporaneous understanding of UCC section 8-110(a)(1)—or, for that matter, the sparse case law interpreting it—suggests that inquiry into Venezuelan law is appropriate or required. The Court should adopt Respondents' interpretation.

Moreover, sound economic and social policy overwhelmingly support Respondents' interpretation of UCC section 8-110(a)(1). As the Second Circuit recognized in certifying the questions presented, the State of New York has an "interest in promoting and preserving [the state's] status" as a center for global

finance "and in maintaining predictability for parties" engaged in international business transactions. A-42. Respondents' interpretation of UCC section 8-110(a)(1) helps further those interests by upholding the settled expectation of parties that New York law *will* govern the enforceability of financial instruments designating that body of law to govern the relevant financial instruments.

Upsetting that expectation would significantly disrupt the more than $45 *trillion* sovereign-debt securities market, conjuring the specter of unscrupulous sovereigns manipulating their own law to avoid paying their debts. As a result, under Appellants' novel interpretation of UCC section 8-110, the borrowing costs for all foreign sovereigns could go up regardless, since unsettled expectations in one part of the sovereign-debt securities market affects participation and pricing in another part. Appellants' approach will also reduce private investment in countries that could be viewed (justifiably or not) as being likely to render their sovereign-debt obligations unenforceable through domestic legislative action. Because Appellants' unprecedented interpretation of UCC section 8-110 risks these chaotic disruptions and more, the Court should reject it.

ARGUMENT

I. Background: Sovereign Debt and Sovereign-Debt Markets

To understand the scope and implications of the questions certified in this case, it is helpful to understand the role that sovereign debt plays in the global economy, and how sovereign-debt markets function.

Sovereign debt allows national governments to borrow from lenders so those governments can spend beyond what they have raised through taxation or other forms of revenue generation. In one way or another, the practice of sovereign debt has been around for over 1,000 years,[3] making the sovereign-debt market "the oldest and largest bond market in existence." Leonardo Martinez, et al., *Sovereign Debt* at 5 (Int'l Monetary Fund Working Paper WP/22/122, June 2022). "As of end-2018, the amount of global debt securities issued by general government[s] exceeded $45 trillion." *Id.* For at least the past 200 years, New York and London have been the "two dominant trading centers" for sovereign-debt securities.[4]

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[3] *See* Sovereign Debt: A Guide for Economists and Practitioners 8 (S. Ali Abbas et al. eds, 2020) ("[B]orrowing agreements with states were first concluded with regularity in the period 1000–1400 AD. Loans, such as those provided by Italian bankers to Edward III during the Hundred Years' War (1337–1443), were short term and bore high interest rates. Only after 1500 were territorial states able to borrow long term.").

[4] Josefin Meyer, et al., *Sovereign Bonds Since Waterloo* 1, n.3 (Nat'l Bureau of Econ. Rsch., Working Paper 25543 (revised Jan. 2022), www.nber.org/papers/w25543.

Although "[s]overeign borrowing and borrowing by private parties (households and corporations) have broadly similar motives," the two are very different. Martinez, et al., *supra*, at 3.[5] Given "the unique powers of the sovereign" and the role foreign states play in shaping international relations and macroeconomic policy, sovereign debt is "a unique asset class." *Id.* at 28. For instance, governments borrow to finance massive development projects, cover budget deficits, or to further still other important governmental purposes. Given the sorts of purposes leading to sovereign borrowings, "the flow of capital to sovereign debtors is exceptionally important to the world economy." Lee C. Buchheit & G. Mitu Gulati, *Responsible Sovereign Lending and Borrowing*, 73 Law & Contemp. Probs. 63, 64 (2010).

While some sovereigns borrow from other governments or international organizations, it is very common for foreign sovereigns to borrow from private-sector entities involved in international capital markets, either by taking out direct loans or (most commonly) by issuing government-backed securities, such as the 2020 Notes at issue in this proceeding. *See generally* S. Ali Abbas et al., *supra*, at 86. These private entities purchase sovereign-issued securities in a primary market. In turn, private investors participate in secondary markets that "convert government securities which arise from long-term financing needs into the liquid instruments

[5] www.imf.org/en/Publications/WP/Issues/2022/06/17/Sovereign-Debt-519809.

demanded by market participants for portfolio or collateral purposes." Martinez et al., *supra*, at 5.[6]

Predictability and settled expectations are required for these primary and secondary sovereign-debt markets to function, given that the two markets "support each other, as higher liquidity in secondary markets improves participation (and prices) in primary markets as securities become easier to offload while issuing at key maturities in primary markets can support the growth of secondary markets by creating a benchmark yield curve to anchor prices." *Id.* (citation omitted).

As in any market, investors participating in the sovereign-debt market depend on predictable background rules upon which risks can be evaluated and decisions can be made. For example, it has been expected and accepted that a sovereign-debt instrument governed by New York law will be interpreted using the "general principles of New York law" that apply to ordinary contract disputes governed by New York law. *NML Cap. V. Republic of Argentina*, 17 N.Y.3d 250, 257 (2011). There are numerous sources of uncertainty that come into play when evaluating sovereign debt exchanged on primary and secondary markets, including the political characteristics of a sovereign issuer, the liquidity of a sovereign's domestic-debt

[6] *See, e.g.*, Philip J. Power, *Sovereign Debt: The Rise of the Secondary Market and its Implications for Future Restructurings*, 64 Fordham L. Rev. 2701, 2715–19 (1996) (discussing a secondary market for sovereign debt and its operation).

market, and the interrelationship between a sovereign's debt market and the international debt market. An investor's ability to know what legal rules will apply to a financial instrument stated to be governed by New York law should not be among the unknowns—there, the law should provide certainty.

II. Under UCC Section 8-110, "Validity" Relates Only To Corporate-Law Formalities, And Thus No Application Of Foreign Law Is Necessary In This Case Because There Is No Question Of "Validity"

As Respondents correctly argue, the term "validity" in the context of UCC section 8-110(a) has a specific and technical meaning, one that is confirmed by the text, legislative material, and other authoritative sources providing contemporaneous interpretation of the provision.

A. "Validity" as used in U.C.C. section 8-110(a) is a corporate-law term of art (Resp. Br. at 35–37), and it refers to "whether issuance of the securities had been 'duly authorized.'" 7 William D. Hawkland, et al., Uniform Commercial Code Series § 8-110:2 (2020) ("Hawkland Treatise"). "[D]uly authorized," in turn, means "that the proper corporate body has approved the agreement or instrument in the manner required by corporate law, the charter, and the by-laws." Scott FitzGibbon & Donald W. Glazer, *Legal Opinions in Corporate Transactions: The Opinion on Agreements and Instruments*, 12 J. Corp. L. 657, 661 (1987).

In other words, the statute's use of the term "validity" – in the context of the commercial transactions that it was designed to govern – makes clear that UCC

section 8-110(a)'s narrow focus is whether an issuer's issuance or transfer of a security is consistent with the "local law" governing that issuer's corporate structure and internal governance. *See* Resp. Br. 35–37; *e.g.*, *In re Singh*, 2007 WL 2917235, at *6 (Bankr. D.N.J. Oct. 4, 2007) (applying New Jersey's version of UCC section 8-110(a)(1) to determine the substantive law applicable to a stock certificate's "validity"). Conversely, a question of "validity" plainly "does not confirm compliance with all requirements of law." 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, 876 (1986). Instead, as Respondents detail, UCC Article 8, including section 8-110(a) in particular, was meant to govern how security interests are evidenced and legally transferred, and whether it was done in line with an issuer's internal rules.

B. The legislative history confirms this plain and customary meaning of "validity." *Cf. Riley v. County of Broome*, 95 N.Y.2d 455, 462 (2000) ("[I]t is appropriate to examine the legislative history even though the language of [the statute] is clear"); *see also Wegmans Food Mkts., Inc. v. Tax Appeals Trib. of the State of N.Y.*, 33 N.Y.3d 587, 606 (2019) (Wilson, J., dissenting) ("Our precedents do not definitively establish any hierarchy among the[] several tools of statutory interpretation"). The legislative history – which was meant to both "give[] guidance to the courts on the terms used in the[] bill" containing section 8-110(a)(1) and

"meet[] the concerns of investors for greater clarity," Weinstein, Memorandum in Support of A.B. 6619 (1997) – is in fact unusually one-sided.

Today's section 8-110(a) of the New York Uniform Commercial Code was adopted in 1997, which enacted the "Revised Article 8." N.Y. Bill Jacket, 1997 A.B. 6619, Ch. 566. This "new Article 8 [was written to] provide[] *clearer rules* that govern . . . conflicts of law" and other securities-related issues. New York State Assembly Standing Comm. On Judiciary, 1997 Annual Report (Dec. 31, 1997), https://assembly.state.ny.us/Reports/PandC/1997judiciary.html (emphasis added) (discussing legislative amendment to UCC Article 8). Given the Legislature's commitment to providing "clearer rules" to meet the concerns of investors, Appellants' argument that UCC section 8-110(a)(1) is a vehicle for bringing foreign-law enforceability challenges to securities governed by New York choice-of-law clauses strains credulity. As both this Court and the United States Supreme Court have recognized, "legislative bodies generally do not 'hide elephants in mouseholes.'" *Cruz v. TD Bank, N.A.*, 22 N.Y.3d 61, 72 (2013) (quoting *Whitman v. Am. Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001)).

Indeed, there is no indication anywhere that Article 8 was directed at a broader conception of enforceability. Not in the memorandum in support of Assembly Bill 6619 (which contained the provision that would become UCC section 8-110). Not in the Bill Jacket for the 1997 statute adopting section 8-110. Not in the 1997

Assembly Judiciary Committee Annual Report summarizing the changes to UCC Article 8. And not in the prefatory note to Article 8.

On the contrary, the relevant legislative material shows that UCC 8-110(a)(1) and the rest of UCC Article 8 do *not* address legality or enforceability; instead, the material makes it clear that "most of th[e] relationship [between securities holders and issuers] is governed . . . by corporation, securities, and contract law," rather than the UCC. Prefatory Note to Revised Article 8 at III.B (1994) ("Prefatory Note"); *see also id.* ("Article 8 is in no sense a comprehensive codification of the law governing securities or transactions in securities.").

This specific conception of UCC section 8-110 is consistent with Article 8's overall narrow focus. As the Bill Jacket explains, Article 8 was intended to "govern how interests in securities are evidenced and how they are transferred in the current securities market." N.Y. Bill Jacket, 1997 A.B. 6619, Ch. 566, p. 3. The provisions within Article 8 simply do not go beyond this narrow scope. *See* Prefatory Note (ascribing narrow scope to UCC section 8-110(a)(1)).

Appellants attempt to downplay the significance of the 1997 revision by claiming that the Legislature left the text of section 8-110 "substantially unchanged." Reply Br. 10 n. 4. That argument does not hold water, given the Legislature's clear statement that both present-day UCC section 8-110(a)(1) and its predecessor had the same narrow meaning that Respondents and *amici* ask the Court to adopt. In the Bill

Jacket for the 1997 statute adopting section 8-110, the Legislature indeed provided that:

> The "validity of a security," *which in both Prior and Revised Article 8 refers to validity in the sense of corporate or other authority to issue securities*, is not included in the list of issues for which the applicable law can be chosen. This lack of choice is consistent with Prior Article 8 and the prevailing view that the law under which an issuer is organized must govern whether a security issued by that entity is valid, in the sense of having been issued pursuant to appropriate corporate or other similar action.

N.Y. Bill Jacket, 1997 A.B. 6619, Ch. 566, p. 53. A "[B]ill [J]acket confirms . . . the principal legislative intent" of a law. *Bohlen v. DiNapoli*, 34 N.Y.3d 434, 442 (2020); *Altman v. 285 W. Fourth LLC*, 31 N.Y.3d 178, 185 (2018) ("The bill jacket demonstrates . . . the legislative intent[.]"). As such, this evidence is authoritative proof that Respondents' interpretation of UCC section 8-110(a)(1) is correct, and that Appellants' irregular reading of the statute should be rejected.[7]

C. The same understanding is evident in contemporaneous interpretations of UCC section 8-110, specifically the Hawkland Treatise. The relevant sections of the

[7] The Bill Jacket also contradicts Appellants' contention that the 1973 opinion letter of James Fuld advocated a meaning of "validity" that "did not yet exist in statutory law." Reply Br. 9. *See also* Resp. Br. 36 (discussing James J. Fuld, *Legal Opinions in Business Transactions—An Attempt to Bring Some Order Out of Some Chaos*, 28 Bus. Law. 915, 928 (1973)). Because the Bill Jacket demonstrates that the Legislature understood "*both* Prior and Revised Article 8" as "refer[ing] to validity in the sense of corporate or other authority to issue securities," it is clear that questions of "validity" under the UCC have always been narrow in scope. Fuld's article is simply consistent with this long-established understanding.

treatise were published only a year before the New York Legislature enacted the present-day UCC section 8-110 and the rest of Article 8. The treatise sections were authored by James Steven Rogers, the professor who served as lead Reviser of the version of UCC Article 8 that New York adopted in 1997. As a result, the Hawkland Treatise's contemporaneous interpretations of section 8-110(a)(1) are "entitled to considerable weight in discerning legislative intent." *Vatore v. Comm'r of Consumer Affairs. of City of N.Y.*, 83 N.Y.2d 645, 651 (1994); *e.g.*, *Worthy Lending LLC v. New Style Contrs., Inc.*, 39 N.Y.3d 99, 103 (2022) (Wilson, J.) (relying on "clear commentary on the relevant [UCC] sections").

The Hawkland Treatise confirms that "validity" in the context of UCC section 8-110(a)(1) refers only to "procedural or other requirements for issuance of securities." Hawkland Treatise § 8-110:2. Consequently, "validity" has "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.'" *Id.* § 8-202:6. And the Treatise expressly states that a "question of enforceability," precisely the issue Appellants raise (Appellants' Br. 4), is "not the type of issue to which subsection 8-110(a) refers in using the word 'validity.'" *Id.* § 8-110:2. To place questions of enforceability or legality under the rubric of UCC section 8-110(a)(1) would "carv[e] out an enormous and ill-defined exception

to the general principles of choice of law recognized by both the UCC and general law" that no one ever intended. *Id.*

* * * *

Respondents, the Second Circuit, and the district court all noted "the absence of any case law supporting [Appellants'] broad interpretation of 'validity' in the section 8-110 context." A-2339 n.14; *see* Resp. Br. 43 ("The absence of reported decisions construing section 8-110 evidences the narrow scope of that provision."). What little case law there is reflects the limited meaning of "validity" as directed to the issuer's authority to issue a security under its internal rules. *See Singh*, 2007 WL 2917235, at *6 (applying New Jersey UCC section 8-110(a)(1) and examining date ascribed to stock certificate under the law of the issuer's jurisdiction as a question of "validity").

In short, because UCC section 8-110(a)(1) refers only to the narrow question of whether a security was issued pursuant to appropriate corporate action, the Court should answer the first certified question by holding that no question of "validity" within the meaning of section 8-110(a)(1) is raised in this case.

III. Appellants' Interpretation Will Dramatically Disrupt The Sovereign Debt Market, Generate Market Uncertainty, And Defeat The Purpose Of Selecting New York Law To Govern Such Instruments

The question implicated in this case is one of international significance, as it involves entrenched and conflicting interests of multiple sovereign states, with

serious implications for the sovereign debt market, and the ability of sovereigns, sovereign-owned enterprises, and private entities to borrow money through instruments subject to New York law.[8]

Reading UCC section 8-110(a)(1) narrowly, as written and intended, will maintain predictability in the sovereign-debt market by ensuring that parties know New York substantive law will apply to their securities when those securities select New York law. Appellants' interpretation of the UCC will have the opposite effect, injecting uncertainty into the market, making participation in the market more expensive, increasing the likelihood and costs of litigation, and ultimately undermining the contemporary sovereign-debt system.

Respondents' narrow interpretation of section 8-110(a)(1), endorsed by *amici*, is simple: When the question is whether a security was issued according to the issuer's internal corporate rules, the law of the issuer's jurisdiction applies, but matters such as the interpretation or enforceability of the debt agreement and instruments are governed by the substantive law of the jurisdiction chosen by the parties through a security's choice-of-law clause.

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[8] It's unsurprising that this dispute has garnered considerable attention. *E.g.*, David Landau, *The PDVSA Bonds, Autocracy, and the Venezuelan Constitution*, Transnational Litigation Blog (Nov. 22, 2022), https://tlblog.org/the-pdvsa-bonds-autocracy-and-the-venezuelan-constitution; W. Mark C. Weidemaier & Mitu Gulati, *Unlawfully-Issued Sovereign Debt*, 61 Va. J. Int'l L. 553 (2021).

Appellants' interpretation, by contrast, introduces serious unpredictability. For example, though Appellants insist that their "challenge to the validity of the Governing Documents . . . raises a core 'validity' issue," they offer no non-conclusory explanation for why (or, for that matter, what a "core" validity issue is or why that descriptor matters) or indeed any limiting principle. Nor, more fundamentally, do they offer a definition of what "validity" means under UCC section 8-110(a)(1). Instead, they insist that their objection must be important enough to count as a "'validity' issue" because their objection to the enforceability of the 2020 Notes and the Governing Documents turns on Venezuela's constitutional law. *See* Appellants' Br. 17–25; Reply Br. 13–17.

Of course, sovereigns will always be able to argue that their legal regimes are important and that, to quote Appellants, they have "the paramount interest . . . in protecting [the] public fisc." But while a sovereign has an interest in managing its fisc, it also has an interest in maintaining predictability in debt instruments, since it is exceedingly unlikely that investors will invest in a security for which the applicable law is not clear and certain. And regardless, a sovereign's interest in its public fisc does not permit that sovereign to inject provisions into contracts that they did not obtain at the negotiating table. Indeed, this Court's consistent instruction has been that, "when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms." *U.S. Bank Nat'l*

Ass'n v. DLJ Mortg. Cap., Inc., 38 N.Y.3d 169, 178 (2022) (citing *Nomura Home Equity Loan, Inc., Series 2006–FM2 v. Nomura Credit & Cap., Inc.*, 30 N.Y.3d 572, 581 (2017), and *W.W.W. Assoc. v. Giancontieri*, 77 N.Y.2d 157, 162 (1990)). Here, Appellants are seeking a benefit for which they never bargained or paid. That cannot be the law of New York, especially when doing so will likely undermine the primary and secondary debt markets by permitting issuers to condition their obligations on the vagaries of a foreign state's laws—which foreign-state debtors themselves are likely to interpret in a biased way.

Indeed, if Appellants' arguments suffice to override the application of New York law in this case, then every lender that has selected or might in the future select New York law for resolving sovereign debt disputes will face the same risk that contractually negotiated and settled expectations will be disrupted by a self-interested foreign government motivated by "protecting its public fisc," Reply Br. 2, as presumably all foreign governments are.

Appellants' proposed rule will thus have dramatic consequences in at least three respects. *First*, it would harm current sovereign-debt lenders. As noted above, given the risks necessarily attendant on lending to foreign sovereigns, the market has relatively few participants. Those lenders would, under Appellants' rule, suddenly face increased lending costs if they select New York because they would need to seek foreign legal advice to attempt to discern the content of foreign law before

agreeing to any investment. This problem will particularly harm investors and lenders who have already participated in bond markets under agreements like the Governing Documents. Those participants will see their justifiable expectations overturned and the value of their bonds, likely, diminished.

The problems are likely to be even more severe than that, since Appellants' interpretation of UCC section 8-110(a)(1) in no way precludes a foreign sovereign from issuing securities under its laws and then subsequently voiding those securities under its own laws to avoid its contractual obligations. Here, Appellants argue that Article 150 of Venezuela's Constitution renders the Governing Documents and 2020 Notes unenforceable, because Venezuela's National Assembly did not affirmatively approve the Notes. If Appellants can render the Governing Documents and 2020 Notes unenforceable by remaining silent as the 2020 Notes are being issued and then claiming they are invalid only *after* the Notes have been issued, then there is nothing to stop other foreign-sovereign borrowers from doing the same, or by voiding securities by affirmatively changing their own domestic law in retroactive fashion. Indeed, if the Court endorses the approach sponsored by Appellants here, lenders will have to build into their expectations the very real risk that a borrower, upon defaulting, will either (1) make post-hoc claims that a security is invalid because the issuer did not affirmatively state that the bonds they issued were valid, or (2) enact an internal law seeking to excuse the default after the fact by a legal rule rendering

the underlying instrument unenforceable. These concerns are precisely why a federal court recently *rejected* the notion that Venezuelan substantive law should determine whether the property of PDVSA (appellant in this case) can be levied upon to satisfy judgments against Venezuela. *Tidewater Investment SRL, v. Bolivarian Republic of Venezuela*, 2023 WL 7182179, at *8 n.9 (D. Del. Nov. 1, 2023) ("In the context of a foreign sovereign judgment debtor, [applying the substantive law of a debtor's home forum] would give rise to the prospect of the debtor shaping or altering its laws to permit it to evade collection efforts, in the knowledge that U.S. courts might be required to apply such law notwithstanding their inequitable impact.").

Forcing New York's financial sector into this position would do much more than contradict the value New York has historically placed on predictability and a "desire to avoid unfamiliar foreign law" in the context of international business transactions, *Cooper, S.A.*, 57 N.Y.2d at 416 (1982); *Ehrlich-Bober & Co. v. Univ. of Houston*, 49 N.Y.2d 574, 582 (1980) (rejecting approach that would "require New York financial institutions in the future to review the laws of every jurisdiction before consenting to do business").

Second, Appellants' position will harm *future* sovereign borrowers. While certain current borrowers may be able to achieve a quick fix to limiting their existing debt obligations, it comes at the expense of every sovereign that may need to seek

debt-financing in the future. Sovereigns often seek to access the U.S. financial system to obtain much-needed capital from New York-based lenders, capital not available in their own markets. Because Appellants' proposed rule will inject uncertainty into the enforceability of debt instruments in the sovereign-debt market, it would likely increase the borrowing costs for all sovereigns as lenders seek higher premiums for offering credit subject to massive uncertainty. Indeed, if defaulting sovereigns are permitted to render their debt obligations unenforceable through legal changes enacted through legislatures that they control, credit may become unavailable entirely.[9]

Third, Appellants' interpretation of section 8-110(a) will also impose costs on New York's judiciary. Uncertainty in the law will lead to increased litigation, specifically over the content of foreign law and the implications that foreign law has on contracts containing New York choice-of-law and forum-selection clauses. Of course, discerning the content of foreign law is often difficult. As the United States Supreme Court recently recognized, "no single formula or rule will fit all cases in which a foreign government describes its own law." *Animal Sci. Prod., Inc. v. Hebei*

[9] Without citation to authority, Appellants argue that doctrines such as "non-retroactivity, estoppel, and unjust enrichment," Reply Br. 2, would prevent such scenarios. But foreign states can easily make their laws retroactive, and it is unclear whether the other doctrines referenced would be available in suits against foreign sovereigns that could be immune from suit, depending on the circumstances. *See* 28 U.S.C. §§ 1602, *et seq.* (Foreign Sovereign Immunities Act).

Welcome Pharm. Co., 138 S. Ct. 1865, 1873 (2018). Without the clear and narrow rule that UCC section 8-110(a)(1) already contains, New York courts will be required to reach conclusions on complicated and hotly contested questions of foreign law, including the question of how much to rely on a self-interested sovereign government's interpretation of its own law. *E.g.*, *id.* ("When a foreign government makes conflicting statements, or, as here, offers an account in the context of litigation, there may be cause for caution in evaluating the foreign government's submission.").

These likely implications of Appellants' proposed rule highlight the careful consideration required in this case. In the transnational context, the Court has previously preferred rules that avoid such difficult questions unless addressing them is necessary. *See Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 480 (1984) (forum non conveniens); *Cooper, S.A.*, 57 N.Y.2d at 416 (international arbitration); *see also Crown Cork & Seal Co. v. Rheem Mfg. Co.*, 64 A.D.2d 545, 545 (1st Dep't 1978) ("It would, in the circumstances, constitute an unnecessary burden on our courts to be compelled to apply foreign law, as the case demands, in our courts."). The Court should do so here as well.

IV. Appellants' Position Will Harm New York's Status As A Global Commercial and Financial Center

Not only would Appellants' proposed rule risk significant disruption in the sovereign-debt market, it would jeopardize New York's role as a chosen forum for sovereign-debt transactions.

New York "is a financial capital of the world, serving as an international clearinghouse and market place for a plethora of international transactions, such as to be so recognized by our decisional law." *J. Zeevi & Sons v. Grindlays Bank (Uganda)*, 37 N.Y.2d 220, 227 (1975) ("New York has an overriding and paramount interest in the outcome of this litigation."). Thus, in circumstances such as the ones presented here, the Court has recognized the Legislature's concern for "the standing of New York as a commercial and financial center." *IRB-Brasil Resseguros, S.A. v. Inepar Invs., S.A.*, 20 N.Y.3d 310, 314 (2012) (Lippman, C.J.). That concern is a national one. *See Allied Bank Int'l v. Banco Credito Agricola de Cartago*, 757 F.2d 516, 521 (2d Cir. 1985) ("The United States has an interest in maintaining New York's status as one of the foremost commercial centers in the world.").

Given the consequences that the first certified question has for New York's position as a financial center, *amici* respectfully submit that UCC section 8-110(a)(1) should be interpreted narrowly as discussed above and as Respondents contend. Doing so will keep securities markets predictable, and will allow New York to maintain its place as a leader on international finance and sovereign lending.

CONCLUSION

For the foregoing reasons, the Court should answer the first certified question as follows:

> 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 8-100(a)(1) requires to be determined under Venezuelan law.

Dated: November 9, 2023
New York, New York

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant Rule 500.13(c)(1) of the Rules of Practice of the Court of Appeals of the State of New York, I hereby certify that, according to the word count of the word-processing system used to prepare this brief, the total word count for all printed text in the body of the brief exclusive of the material omitted under Rule 500.13(c)(3), is 5,451 words.

This brief was prepared with Microsoft Word using Times New Roman proportionally spaced typeface in 14-point font.

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STATE OF NEW YORK	)		**AFFIDAVIT OF SERVICE**
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I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

On November 9, 2023

deponent served the within: **BRIEF OF AMICI CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION IN SUPPORT OF MUFG UNION BANK, N.A. AND GLAS AMERICAS LLC**

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the address(es) designated by said attorney(s) for that purpose by depositing **3** true copy(ies) of same, enclosed in a properly addressed wrapper in an Overnight Next Day Air Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of New York.

Sworn to before me on November 9, 2023

Mariana Braylovskiy

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