No. 13-990

In the Supreme Court of the United States

REPUBLIC OF ARGENTINA,

Petitioner,

v.

NML CAPITAL, LTD., ET AL.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF FOR THE AURELIUS RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should certify to the New York Court of Appeals a question of state contract law, where Argentina failed to request certification until after the Second Circuit decided the state-law question, and where that court made clear that the state-law question does not affect this case's outcome.

2. Whether the Foreign Sovereign Immunities Act's prohibition on the "attachment," "arrest," or "execution" of "property in the United States of a foreign state," 28 U.S.C. § 1609, was violated when the Second Circuit upheld an injunction that does not impose any restriction on specific Argentine property, but requires Argentina to comply with its contractual commitment to "rank" its "payment obligations" to respondent "at least equally" with its "payment obligations" under subsequently issued bonds.

RULE 29.6 STATEMENT

Aurelius Capital Master, Ltd. (ACM), is an exempted company with limited liability incorporated in the Cayman Islands. Aurelius Capital International, Ltd., is the parent of ACM. No publicly held corporation owns 10% or more, directly or indirectly, of ACM.

Aurelius Opportunities Fund II, LLC, is a limited liability company organized and existing under the laws of the State of Delaware. It is not a corporation.

ACP Master, Ltd., is an exempted company with limited liability incorporated in the Cayman Islands. Aurelius Capital Partners, LP, is the parent of ACP Master, Ltd. Aurelius Capital GP, LLC, is the sole general partner of Aurelius Capital Partners, LP, and is the indirect parent of ACP Master, Ltd. No publicly held corporation owns 10% or more, directly or indirectly, of ACP Master, Ltd.

Blue Angel Capital I LLC is a limited liability company organized and existing under the laws of the State of Delaware. It is not a corporation.

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BRIEF FOR THE AURELIUS RESPONDENTS IN OPPOSITION

Respondents Aurelius Capital Master, Ltd., ACP Master, Ltd., Aurelius Opportunities Fund II, LLC, and Blue Angel Capital I LLC respectfully oppose the petition for a writ of certiorari, for the reasons stated below, as well as those stated in the briefs in opposition filed by other plaintiff-respondents.

STATEMENT

This is a breach-of-contract case. The promise at issue is a covenant requiring Argentina to treat its payment obligations on respondents' bonds equally with its payment obligations on certain other debts.[1] The purpose of this "equal-treatment" provision—which is distinct from Argentina's promises to make interest payments and repay principal—was to assure bondholders that, come what may, their payment obligations would rank at least equally with others. Argentina broke that promise. The district court entered injunctions requiring Argentina to honor it.

In its final bid to escape (or delay) accountability for violating that covenant, Argentina makes two arguments. First, Argentina claims it never prom-

[1] We use "respondents" to refer to the plaintiffs below. Bank of New York Mellon is a defendant-respondent but has filed nothing in this Court. Certain non-parties also mistakenly claim to be respondents, as discussed in Part IV of the argument section of this brief.

ised equal treatment. But Argentina knows this Court would not seriously entertain a petition seeking review of a fact-bound question of state contract law, much less one on which both lower courts have unanimously and repeatedly agreed. So Argentina takes a different tack: It demands a do-over in state court. The problems with that transparent and untimely request are numerous and obvious. In any event, and contrary to Argentina's breathless assertions, this case is anything but the "boilerplate" archetype for all sovereign debt disputes.

Second, Argentina contends that the FSIA's restriction on "attachment arrest and execution" of sovereign property prohibits U.S. courts from specifically enforcing the contractual equal-treatment promise. As Argentina recognizes, however, this argument implicates no circuit conflict, and even the United States has conceded that injunctions against sovereigns could be proper in certain factual circumstances, making the second question just as fact-bound as the first. In any event, there is no error to correct: These *in personam* injunctions flow directly from the district court's unquestioned jurisdiction to adjudicate liability—authority Argentina granted by explicitly waiving sovereign immunity. They are not even in the same ballpark as *in rem* writs of attachment, arrest, or execution that seek to satisfy a money judgment.

A. Argentina's Contract and Breach

1. This case concerns a contract (the Fiscal Agency Agreement, or FAA) under which Argentina issued bonds in the 1990s. Bond buyers recognized that Argentina had "default[ed] on its sovereign

obligations" "numerous" times over the past two centuries, "through what [one] might term a diplomacy of default." *EM Ltd.* v. *Republic of Argentina*, 473 F.3d 463, 466 n.2 (2d Cir. 2007). To induce investors to buy despite that history, Argentina put investor-friendly terms in its FAA contract.

First, Argentina expressly waived its sovereign immunity every way it could. It waived its immunity from the jurisdiction of this Nation's courts. Pet. App. 203 ("The Republic hereby irrevocably waives and agrees not to plead any immunity from the jurisdiction of any such court . . . ."). Separately, it waived any immunity it might have from enforcement of our courts' judgments anywhere in the world: "To the extent that the Republic . . . shall be entitled . . . *in any jurisdiction* in which . . . any suit . . . may at any time be brought solely for the purpose of enforcing . . . [a U.S.] Judgment, to any immunity from . . . execution of a judgment or from any other legal or judicial process or remedy . . . *the Republic has . . . irrevocably waived such immunity to the fullest extent permitted by the laws of such jurisdiction*." C.A. App. A204 (emphasis added).

Second, Argentina submitted to the laws and the courts of New York. Pet. App. 201, 203. And it knew firsthand what New York law means. Just three years earlier, two federal courts had rejected Argentina's claim for FSIA immunity involving still other bonds on which it had defaulted. *Weltover, Inc.* v. *Republic of Argentina*, 941 F.2d 145 (2d Cir. 1991), aff'd, 504 U.S. 607 (1992). Enforcement of investors' contracts with a sovereign, the Second Circuit had already said, was essential to New York's status as a "preeminent commercial center." *Id.* at 153.

Third, Argentina included the "*pari passu* clause" at issue here. That clause provides:

> The Securities will constitute . . . direct, unconditional, unsecured and unsubordinated obligations of the Republic and shall at all times rank pari passu and without any preference among themselves. The payment obligations of the Republic under the Securities shall at all times rank at least equally with all its other present and future unsecured and unsubordinated External Indebtedness . . . .

Pet. App. 198. This clause is more investor-friendly than other *pari passu* clauses. Subsequent Argentine bonds, for example, eliminated the "payment obligations" language that the court of appeals found important here. See Pet. App. 49-50 (opinion); C.A. App. A1197, A1235 (subsequent bonds). This clause also is materially different from that found in many other sovereigns' bonds. See *infra* at 15-16.

2. In 2001, Argentina defaulted on its bonds governed by the FAA contract. Since then, it has not paid FAA bondholders a dime. Pet. App. 33. To the contrary, Argentina has taken extraordinary and unprecedented steps to deny them their contractual rights.

Unlike the vast majority of sovereign bonds outstanding today, the FAA bonds did not include a "collective action clause" (CAC) that would allow a contractually prescribed majority of bondholders to bind all bondholders to a restructuring on particular terms. Nor is there an international sovereign

bankruptcy regime allowing "cram-down" of plans of reorganization on unconsenting creditors.

Nevertheless, it is Argentina's position—advanced in this Court less than a month ago—that "holdouts like [respondents] are free to litigate to collect more, but *foreign states cannot fairly be expected to prefer them to the creditors who restructured*." Reply Brief for Petitioner 3, *Republic of Argentina* v. *NML Capital, Ltd.*, No. 12-842 (filed April 14, 2014) ("12-842 Reply Br.") (emphasis added). That is, Argentina claims entitlement to treat *non-consenting* creditors in a restructuring the same as or worse than *consenting* creditors. Yet Argentina has never pointed to anything in the contract or any provision of U.S. or New York law (or even international law) that says that.

Under international norms and International Monetary Fund (IMF) policy, Argentine "authorities were expected to negotiate with creditor committees." International Monetary Fund, *Sovereign Debt Restructuring—Recent Developments and Implications for the Fund's Legal and Policy Framework* 36 (Apr. 26, 2013), http://bit.ly/1kdQF0u ("IMF Report"). But that didn't happen: "[N]o constructive dialogue was observed and the authorities presented a non-negotiated offer." *Ibid.* Argentina made investors a take-it-or-leave-it offer to accept new bonds that would pay 25-29 cents for every dollar investors were owed, Pet. App. 34—materially less than poorer nations like Ecuador and Côte d'Ivoire have paid in the wake of defaults. Udaibir S. Das et al., *Sovereign Debt Restructurings 1950-2010: Literature Survey, Data, and Stylized Facts*, IMF Working Paper No. 12/203, at 37 (Aug. 2012).

In its prospectus for the new "exchange bonds," Argentina declared that it "has no intention of resuming payment on any" FAA bonds. Pet. App. 34. And it enacted legislation, dubbed the "Lock Law," cementing that position. That legislation forbade paying the FAA bonds, swapping them for new bonds, or settling with FAA bondholders. Pet. App 34-35. Accordingly, in SEC filings, Argentina proclaimed that its FAA bonds belonged to a separate category of its debt, which Argentina was not "in a legal . . . position to pay." Pet. App. 38 (quotation marks omitted). The message to investors was clear: Accept pennies on the dollar, or get nothing.

In 2005, just 76% of investors traded their pre-default bonds for the new exchange bonds. Pet. App. 35. Reflecting the onerous terms Argentina had proposed, the "default was unprecedented for its . . . low recovery rate . . . and large residual holdout." J.F. Hornbeck, Cong. Research Serv., R41029, *Argentina's Defaulted Sovereign Debt: Dealing with the "Holdouts"* 5 (Apr. 25, 2013) ("CRS Report"). Both logic and history show why even 76% of investors accepted such a paltry offer: Litigation to enforce promises made by a sovereign is arduous and expensive, causing many investors to despair of ever prevailing in enforcing the sovereign promises.

Argentina reprised this process in 2010. It temporarily "suspended" the Lock Law and re-opened its 2005 exchange offer. Pet. App. 35-36. By the end of 2010, participation in the bond exchange rose to almost 92%. Pet. App. 36-37. Argentina has made regular payments under the terms of the exchange bonds, including billions of dollars while these ap-

peals have been pending. It has paid the FAA bondholders nothing.

B. This Case Seeking Specific Performance

Respondents hold defaulted, non-exchanged bonds governed by the FAA.[2] They sued Argentina because it had breached a provision of the FAA's *pari passu* clause known as the Equal-Treatment Provision. That provision requires Argentina to "rank" its "payment obligations" under respondents' bonds "at least equally" to the exchange bonds. Respondents sought an injunction ordering specific performance. Pet. App. 37-38.

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[2] Throughout their briefs, Argentina and its *amici* stoop to irrelevant ad hominems. *E.g.*, Pet. 8. Malefactors cannot avoid accountability simply by maligning those that have the courage of their convictions, the resources to litigate against the lawless, and the willingness to entrust their fate to the judicial system rather than accept a settlement they considered grossly inadequate. Moreover, it is legally irrelevant whether respondents purchased their FAA bonds at par (as some of them did) or at a discount (as some of them did). If secondary purchasers had fewer contractual rights and remedies than their sellers had, the bond markets would collapse, since bonds would be worth more in the hands of would-be sellers than in the hand of would-be buyers. See Jill E. Fisch & Caroline M. Gentile, *Vultures or Vanguards?: The Role of Litigation in Sovereign Debt Restructuring*, 53 Emory L.J. 1043, 1047 (2004) (noting that so-called "vulture funds" "serve as a check on opportunistic defaults and onerous restructuring terms," "promote the functioning of the international capital markets," "increase capital flows to sovereign debtors," and "increas[e] liquidity in the market for sovereign debt").

1. The district court entered summary judgment for respondents in December 2011. Pet. App. 80. It held that Argentina had breached the Equal-Treatment Provision by lowering the rank of the FAA bonds, both by enacting the Lock Law and by persistently refusing to pay on the FAA bonds while paying on the exchange bonds. Pet. App. 81.

Two months later, in an intensely fact-bound ruling, the district court determined that the injunctions at issue here were an appropriate remedy within the district court's wide equitable discretion. *E.g.*, Pet. App. 102-03. The injunctions order Argentina to specifically perform its promise to "rank" its "payment obligations" to respondents "at least equally" with its other debt. Argentina must, if and when it makes a payment on the exchange bonds, make a "ratable payment" to respondents. Pet. App. 104. The injunctions "do not require Argentina to pay any bondholder any amount of money." Pet. App. 58. Argentina may comply by, for example, paying both respondents and the exchange bondholders nothing, for that is equal ranking of payment obligations.

2. In October 2012, the court of appeals affirmed in part and remanded. Pet. App. 29. First, the court of appeals agreed with the district court that Argentina was in breach of the Equal-Treatment Provision. There, as here, *e.g.*, Pet. 10, Argentina contended that *pari passu* clauses were mere "boilerplate." Pet. App. 47. But the court of appeals, citing a catalog of authorities, disagreed. Pet. App. 48. "[T]he preferred construction of *pari passu* clauses in the sovereign debt context is far from general, uniform and unvarying." Pet. App. 48 (quotation marks omitted).

Thus, the court of appeals proceeded to construe the particular *pari passu* clause in the FAA. The first sentence, it held, "prohibits Argentina, as bond *issuer*, from formally subordinating the bonds." Pet. App. 50 (emphasis in original). But that could not be the meaning of the entire clause, the court explained, as there is a second sentence. Pet. App. 49. That second sentence—the Equal-Treatment Provision—"prohibits Argentina, as bond *payor*, from paying on other bonds without paying on the FAA bonds." Pet. App. 50 (emphasis in original). Argentina had breached the Equal-Treatment Provision through a multi-year "course of conduct" that included refusing to pay respondents while repeatedly paying the exchange bondholders, declaring through its executive that Argentina would never pay respondents, and enacting the Lock Law. Pet. App. 51-53, 61 n.16.

In the alternative, the court held that, even were Argentina's construction of the Equal-Treatment Provision correct, Argentina still would be in breach. Argentina had argued there, as it does here, Pet. 21-22, that the Equal-Treatment Provision "refers only to legal subordination and that none occurred here because any claims that may arise from [Argentina's] restructured debt have no priority in any court of law over claims arising out of [Argentina's] unrestructured debt." Pet. App. 49 (quotation marks omitted). But, the court of appeals recognized, Argentina has imposed precisely this sort of "legal subordination" by codifying its refusal to pay into Argentine law (the Lock Law). Pet. App. 52.

Second, the court of appeals rejected Argentina's contention that the injunctions violate the FSIA. The FSIA, the court recognized, bars only "'attach-

ment arrest [or] execution'" of Argentina's property. Pet. App. 57 (quoting 28 U.S.C. § 1609). "Each of these three terms," the court explained, "refers to a court's seizure and control over specific property." Pet. App. 57. The injunctions, by contrast, seize or control no property. "They affect Argentina's property only incidentally to the extent that [they] prohibit[] Argentina from transferring money to some bondholders and not others." Pet. App. 58. And "[a] federal court sitting as a court of equity having personal jurisdiction over a party has power to enjoin him from committing acts elsewhere." Pet. App. 59 (quotation marks omitted).

The court of appeals ordered a limited remand on two questions not at issue here. Pet. App. 63.

Meanwhile, Argentina sought this Court's review. No. 12-1494 (petition filed June 24, 2013). As in its current petition, Argentina asserted that the injunctions violate the FSIA. It also presented the question—not presented in its current petition—whether the injunctions independently are unlawful because they exceed the district court's equitable powers. The Court denied that petition. 134 S. Ct. 201 (2013).

3. In November 2012, the district court resolved the two issues that the court of appeals had remanded. Pet. App. 125-37. First, it clarified the nature of the "ratable payment" remedy. Pet. App. 126-30. If Argentina pays the exchange bondholders 100% of what they are due under their bonds, it must pay respondents 100% of what is due under their FAA bonds—approximately $1.3 billion plus accruing interest. Pet. App. 130. And, if Argentina pays the

exchange bondholders 50% (for example) of what they are due, then it must pay respondents only 50% of what they are due. Second, the court clarified how the injunctions would, by automatic operation of Federal Rule of Civil Procedure 65(d), bind third parties. Pet. App. 133-36.

4. Argentina again appealed. For the first time, it asked the court of appeals to certify a question to the New York Court of Appeals: "Does violation of a pari passu clause support the remedy at issue in this case . . . ?" Arg. Br. 54-55 (2d Cir. Dec. 28, 2012) (Dkt. No. 657). That is not the same question that Argentina now asks this Court to certify. The former concerned how to remedy Argentina's breach; the latter concerns whether there is any breach in the first place. See Pet. ii.

The court of appeals affirmed. It confirmed that the FSIA does not prohibit the injunctions. Far from effecting the "attachment arrest [or] execution" of immune property, the injunctions "allow Argentina to pay its FAA debts with whatever resources it likes." Pet. App. 11. The court declined to certify any question to the New York Court of Appeals. Order (2d Cir. Jan. 10, 2013) (Dkt. No. 777).

The court also addressed Argentina's premonitions that affirming the injunctions would cause the sky to fall—in Argentina or in sovereign restructurings generally—concluding that those claims are "speculative, hyperbolic, and almost entirely of [Argentina's] own making." Pet. App. 22. Argentina echoes many of the same premonitions now in its petition, most notably:

- Argentina's assertion that it "may" not be able to pay both respondents and the exchange bondholders, see Pet. 11, 18, 29, 33, was rejected on the basis of the factual record. The Second Circuit explained that Argentina "makes no real argument" that it cannot pay and that Argentina presented no evidence on this issue in the district court, which found as fact that Argentina was able to pay. Pet. App. 23.

- Argentina's claim that the injunctions will imperil future sovereign debt restructurings, see Pet. 18, 33, 34-36, was likewise rejected, with the court noting that it might reach a different result on different facts. "[T]his case is an exceptional one with little apparent bearing on transactions that can be expected in the future," the court held. Pet. App. 25. "We simply affirm the district court's conclusion that Argentina's extraordinary behavior was a violation of the particular *pari passu* clause found in the FAA." Pet. App. 25-26.

- Argentina's contention that "the outcome of this case threatens to steer bond issuers away from the New York marketplace," see Pet. 16, was exactly backward: "[M]aintaining New York's status as one of the foremost commercial centers is *advanced* by requiring debtors, including foreign debtors, to pay their debts." Pet. App. 27 (emphasis added).

REASONS FOR DENYING THE PETITION

I. The Certification Question Is Untimely And Inconsequential

Unhappy with two lower federal courts' unanimous reading of the Equal-Treatment Provision, Argentina now asks this Court to certify this "simple question of contract interpretation" to the New York Court of Appeals. Pet. App. 47 (quotation marks omitted). The perils of affording such a "do-over" are obvious. Moreover, this question is not determinative of this litigation: The Second Circuit held in the alternative that Argentina would lose even under Argentina's *own* construction of the Equal-Treatment Provision. In any event, the Second Circuit was correct in interpreting the contract to give each of the two sentences in the FAA's *pari passu* clause distinct meaning.

1. This Court is the first court to which Argentina has presented this question. Although Argentina (belatedly) asked the court of appeals to "certify a *pari passu* question," Pet. 15, that was a different question—not whether there was a breach, but whether the breach justified the remedy. See *supra* at 11. The certification question thus was not "pressed or passed upon below." See *Duignan* v. *United States*, 274 U.S. 195, 200 (1927).

What is more, Argentina did not ask the lower courts to certify *any* question until both had rejected its reading of the Equal-Treatment Provision. Certification exists to "build a cooperative judicial federalism," *Lehman Bros.* v. *Schein*, 416 U.S. 386, 391 (1974), not to let litigants play until they win. This

Court does not allow "state-court losers" to resurrect their arguments in federal court. See *Exxon Mobil Corp.* v. *Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005). Nor should it allow federal-court losers to seek a second (really, third) chance in state court.

Why does Argentina now make this extraordinary request? Its new counsel understands that this Court virtually never grants review of a state-law question at all, much less one on which two lower federal courts have agreed. *Stenberg* v. *Carhart*, 530 U.S. 914, 940 (2000). That longstanding practice "reflect[s]" the Court's "belief that district courts and courts of appeals are better schooled in and more able to interpret the laws of their respective States." *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 500 (1985). That principle is especially valid here. The Southern District of New York and the Second Circuit have vast expertise in New York commercial disputes. The appellate panel consisted of three New York-based judges.

2. Certification is further unwarranted because it would not affect the outcome of the case. The court of appeals held that, "even under Argentina's interpretation," "the Republic breached the Provision" by enacting the Lock Law. Pet. App. 52. The question is therefore not "determinative" and thus is unfit for certification. N.Y. Comp. Codes R. & Regs. tit. 22 § 500.27(a); accord *Stenberg*, 530 U.S. at 945. Instead of "sav[ing] time, energy, and resources," as it should, *Lehman Bros.*, 416 U.S. at 391, certification here would only drag out this long-running case (which, since the injunctions are stayed pending disposition of this petition, is among Argentina's highest objectives).

Argentina's attempts to confront this alternative holding are meritless. First, it contends that it has suspended the Lock Law. Pet. 22; accord Puente Br. 17 n.10. That is sleight-of-hand. When Argentina "suspended" the Lock Law, it merely substituted a different means of subordinating respondents' bonds. The same statute that suspended the Lock Law "forbid[s]" Argentina from paying respondents according to their contract. Pet. App. 205. Argentina may pay respondents only on terms that are no "more favorable" than the terms of the original exchange offer. Pet. App. 204. In any event, the "suspension" is merely temporary, Pet. App. 206, so the Lock Law no doubt will reappear when it suits Argentina's purposes.

Second, Argentina contends that a breach of the Equal-Treatment Provision "provide[s] no basis for injunctions requiring 'ratable payments.'" Pet. 22; accord France Br. 7; Puente Br. 17-19 & nn.10-11. But, as the court of appeals recognized, respondents do not interpret the Equal-Treatment Provision to *require* ratable payments. Pet. App. 51 n.10. Rather, the district court exercised its substantial equitable discretion to choose "ratable payments as a *remedy* for Argentina's breach." Pet. App. 51 n.10. There is no reason for this Court to second-guess the district court's fact-bound exercise of that discretion, particularly against the backdrop of Argentina's extraordinary conduct.

3. Contrary to Argentina's suggestion, *pari passu* clauses are not "boilerplate." See Pet. 1, 2, 10, 13, 20. Some sovereign bonds—including those of the United States, *e.g.*, 31 C.F.R. §§ 351.0-.87, and of *amicus* Mexico, Mex. Br. 5 n.4—do not include them

at all. Many bonds that do include them use materially different language. Indeed, the study on which Argentina relies recognizes that there are "at least" three broad "versions" of the *pari passu* clause. Mark Weidemaier et al., *Origin Myths, Contracts, and the Hunt for* Pari Passu, 38 Law & Soc. Inquiry 72, 84 (2013) ("*Origin Myths*"). The FAA's "version" is not even the most common one. *Ibid.* Commenting on the same study, one report concluded that a *different* version is "found in the majority of bonds issued over the past two decades and in almost all bonds issued earlier." Moody's Investors Service, *US Court Ruling on Argentina's Debt Could Have Limited Implications for Sovereign Debt Restructurings* 2 (Dec. 6, 2012). And this more-common version "poses a lower risk of holdout litigation" than the FAA's version does. *Ibid.* Hence, to construe one *pari passu* clause is not to construe them all.

Even bonds containing a similar "version" of the *pari passu* clause might differ in dispositive ways. See *Origin Myths* 84 (describing categories that "might state" certain generic language "or something to that effect"). In contracts as in statutes, "a single word" may make the difference. See *United States* v. *Turkette*, 452 U.S. 576, 581 (1981).

Finally, the court of appeals' holding advances—not "endanger[s]," Pet. 22—New York's "status as the law of choice for sovereign debt," *ibid.* In particular, Argentina's *amici* believe that sovereign bond issuances will flock to the United Kingdom, which has declined to order remedies like the injunctions here. Puente Br. 14; Stiglitz Br. 16. But markets need both lenders and borrowers, and bond buyers will be less willing to lend (or will demand greater returns)

under law that offers them fewer protections. And it dignifies both groups to enforce contracts as they are written. "[U]nilateral attempt[s] to repudiate private, commercial obligations [are] inconsistent with the orderly resolution of international debt problems. [They are] similarly contrary to the interests of the United States." *Allied Bank Int'l* v. *Banco Credito Agricola de Cartago*, 757 F.2d 516, 522 (2d Cir. 1985).

4. Certification is unnecessary because the court of appeals was correct. As Argentina appears to concede, Pet. 21-22, a valid interpretation must give effect to both sentences in the *pari passu* clause. And, as the court of appeals explained, the main difference between the sentences is that the first involves "Securities," whereas the second sentence—the Equal-Treatment Provision—involves "payment obligations." Pet. App. 50. Thus, the first prevents Argentina, "as bond *issuer*," from formally subordinating the FAA bonds. *Ibid.* But the second speaks to Argentina "as bond *payor*" and prohibits it from giving priority to other payment obligations. *Ibid.*

Argentina's proposed interpretation—presented here for the first time—ignores that important distinction. Pet. 22; see also Puente Br. 17-19. The court of appeals did not "read two different types of subordination" into the FAA's *pari passu* clause. Puente Br. 17. Rather, it distinguished between subordination of "Securities" and subordination of "payment obligations," as the text requires. Pet. App. 50. And Puente's arguments about timing, Puente Br. 18-19, misconstrue the court of appeals' holding, see Pet. App. 51 n.10.

II. The Court Of Appeals' FSIA Holding Conflicts Neither With The Holdings Of Other Courts Nor With The Statute

The second question Argentina presents—whether the injunctions in this case violate the FSIA's limitation on "attachment arrest and execution"—does not warrant certiorari.

1. Last summer, Argentina told this Court that the Second Circuit's FSIA holding "cannot be reconciled with other Circuits' rulings." Petition for Certiorari 19, *Republic of Argentina* v. *NML Capital, Ltd.*, No. 12-1494 (filed June 24, 2013). It now recognizes that there is no circuit split. See Pet. 26-27.

2. Argentina's grievance is that the court of appeals misapplied the FSIA to the facts of this case. Requests for simple error correction ordinarily do not warrant certiorari. *Tolan* v. *Cotton*, No. 13-551, slip op. 1 (May 5, 2014) (Alito, J., concurring in the judgment). In any event, there is no error to correct here.

a. When construing the FSIA, this Court "begin[s], as always, with the text of the statute." *Permanent Mission of India to the United Nations* v. *City of New York*, 551 U.S. 193, 197 (2007). See also Oral Arg. Tr., *Republic of Argentina* v. *NML Capital, Ltd.*, No. 12-842, at 18 (Apr. 21, 2014) ("No. 12-842 Oral Arg. Tr.") ("JUSTICE SCALIA: What provision of the statute controls here?"); but see 12-842 Reply Br., *supra*, *passim* (quoting the allegedly controlling provision *not once*). The text of the FSIA affords sovereigns two distinct immunities. First, sovereigns

may be "immune from the *jurisdiction* of the courts of the United States." 28 U.S.C. § 1604 (emphasis added). Second, their "property in the United States" may be "immune from *attachment arrest and execution*." *Id.* § 1609 (emphasis added).

The first FSIA immunity, immunity from jurisdiction, does not apply here because Argentina waived it. See *supra* at 3. Accordingly, the FSIA provides that Argentina "shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606. In imposing such liability, "[u]nless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction." *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398 (1946). Because U.S. courts have jurisdiction over Argentina, they therefore may issue an injunction against it. The FSIA's drafters specifically contemplated as much. H.R. Rep. No. 94-1487, at 22 (1976) ("House Report") ("Consistent with [Section 1606], a court could, when circumstances were clearly appropriate, order an injunction or specific performance.").[3]

Argentina thus claims that the injunctions conflict with the second FSIA immunity. That

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[3] The *amicus* brief the United States filed below conceded the general propriety of injunctions but argued that "[a] court may issue an injunction against a sovereign only if it is 'clearly appropriate'" and that "[a]n injunction restraining a sovereign's use of property that the FSIA expressly provides is immune from execution is inconsistent with the structure of the FSIA and thus not 'clearly appropriate.'" Pet. App. 190.

immunity proscribes "attachment arrest and execution" against certain sovereign property in the United States. 28 U.S.C. § 1609. But the injunctions are not an "attachment," an "arrest," or an "execution." Each term has a well-defined meaning. As the court of appeals explained, none encompasses the injunctions. Pet. App. 57-58 & n.13. And those meanings apply here, for, "absent other indication, Congress intends to incorporate the well-settled meaning of the common-law terms it uses." *Sekhar* v. *United States*, 133 S. Ct. 2720, 2724 (2013) (quotation marks omitted). Argentina does not even try to explain how the injunctions constitute a prohibited "attachment arrest [or] execution." That is where this case should end.

Moreover, as the State Department's Acting Legal Adviser explained, "there are lots of methods" that a plaintiff might use when faced with "foreign governments [that do not] pay . . . a judgment" and there is "no attachable or executionable item in connection" with that judgment. Hearing on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the H. Comm. on the Judiciary, 93d Cong. 26 (1973) (testimony of Charles N. Brower). His successor added: "[W]hen the foreign state enters the marketplace . . . , there is no justification in modern international law for allowing the foreign state to avoid the economic costs of the agreements which it may breach." Hearing on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the H. Comm. on the Judiciary, 94th Cong. 27 (1976) (statement of Monroe Leigh, Legal Adviser, Department of State). Congress was told directly when considering the FSIA that its

"structure" would *not* forbid other remedies just because attachment, arrest, and execution were unavailable, yet Argentina now urges the opposite conclusion.

Since Argentina filed its petition, the United States has filed an *amicus* brief in a related case contending that the bar against "attachment arrest and execution" limits *discovery*. U.S. Br., *Republic of Argentina* v. *NML Capital, Ltd.*, No. 12-842 (Mar. 3, 2014); see Brazil Br. 9, 12; Euro Bondholders Br. 11-12 (quoting same). But, as the Aurelius Respondents explained in their *amicus* brief in the discovery case, the United States' views are deeply flawed.

In reality, invocations of the United States' position in the discovery case—and repeated references to the United States' *amicus* brief filed in this case below, *e.g.*, Pet. 5, 7, 10, 18, 20, 21, 30-35—are a thinly veiled plea for this Court to call for the views of the Solicitor General. A CVSG would itself be a tactical victory for Argentina and its allies, because it would allow Argentina to make additional payments on the exchange bonds while the injunctions remain stayed pending review. But a CVSG would not substantially facilitate this Court's consideration of the petition. The Solicitor General has no special insight into whether New York has a paramount interest in the underlying state-law contract issue. Even on the FSIA question, the United States has no expertise to offer on the prevalence of this particular *pari passu* clause in other sovereigns' debt contracts, which is the linchpin of Argentina's (erroneous) claim that the FSIA question is important. In any event, the United States' views on the FSIA are well known—it voiced them at length below and just

weeks ago to this Court in *Republic of Argentina* v. *NML Capital, Ltd.*, No. 12-842 (argued Apr. 21, 2014), and Argentina has provided this Court with the United States' brief filed in the court below, Pet. App. 166-97. With respect, it is clear that the Solicitor General's mode of interpretation lacks grounding in the text of the FSIA, but instead requires one to gaze "more broadly" on the purported "structure" of the Act. No. 12-842 Oral Arg. Tr. 18. Moreover, the Solicitor General's views "merit no special deference," as interpretation of the FSIA is "a pure question of statutory construction." *Republic of Austria* v. *Altmann*, 541 U.S. 677, 701 (2004) (quotation marks omitted).

b. Argentina contends that, even if the injunctions are not technically an "attachment, arrest, or execution" barred by the FSIA, they have the same "effect," and are thus prohibited. Pet. 26. Wrong again.

Attachments and like remedies are "in the nature of an action *in rem*." *Cent. Loan & Trust Co.* v. *Campbell Comm'n Co.*, 173 U.S. 84, 97 (1899). They operate directly against the defendant's property. Injunctions, by contrast, are "mandate[s] operating *in personam*." *Nken* v. *Holder*, 556 U.S. 418, 428 (2009) (quotation marks omitted). They are "issued against a party, not a piece of property," and "do[] not have the effect of placing the property in the court's custody." *Bogosian* v. *Woloohojian Realty Corp.*, 923 F.2d 898, 901 (1st Cir. 1991) (Breyer, C.J.). And, whereas attachments, arrests, and executions are self-enforcing—the constable eventu-

ally takes possession of the property—injunctions are not. *Ibid.*[4]

This distinction is reflected in the policy choice that Congress codified in the FSIA. *In rem* remedies, such as attachments, arrests, and executions, present concerns that *in personam* remedies do not. This Court long has recognized that "'judicial *seizure*'" of property "may be regarded as 'an affront to [a sovereign's] dignity.'" *Republic of Philippines* v. *Pimentel*, 553 U.S. 851, 866 (2008) (emphasis added) (quoting *Republic of Mexico* v. *Hoffman*, 324 U.S. 30, 35-36 (1945)). That "indignity" arises only when a court "ousts the possession of a foreign state." *Hoffman*, 324 U.S. at 38.

The injunctions here—which flow directly from the district court's unquestioned authority to adjudicate liability—fall squarely on the *in personam* side of this line. Unlike an *in rem* remedy, which directly targets specific property, the injunctions "affect Argentina's property only incidentally to the extent that [they] prohibit[] Argentina from transferring money to some bondholders and not others." Pet. App. 58. Likewise, the injunctions "do not transfer

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[4] Recognizing that, unlike an "attachment arrest [or] execution," Argentina could simply thumb its nose at the injunctions, the Second Circuit remanded for the district court to clarify "how the challenged order will apply to third parties" by which Argentina makes exchange bond payments. Pet. App. 62. Both lower courts held that the injunctions bind not only Argentina but, under Federal Rule of Civil Procedure 65(d), persons who receive notice and are in "active concert or participation" with Argentina's violation of the injunction.

any dominion or control over sovereign property to the court." Pet. App. 58. This difference between ordering Argentina to keep a promise and forcibly seizing its property is more than just "skip[ping] a step," Pet. 27—it is fundamental.

Indeed, Argentina may comply with the injunctions without using any assets. Argentina protests that this choice, to pay all of its investors or none, "is no choice at all." Pet. 29. But it is a choice—the very choice that Argentina's breach of its promise to "rank" its "payment obligations" "equal[ly]" prescribes for it. See Pet. App. 198.[5] Like every deadbeat debtor, Argentina seeks sympathy by claiming that it will inflict hardship to hold it to its own promise. But Argentina's claim (even if it were true) that this choice is difficult does not change the fact that it made this promise and thereby lured investors.

c. Significantly, the injunctions do not target specific property. Pet. App. 11 ("[T]he injunctions allow Argentina to pay its FAA debts with whatever resources it likes."). Argentina complains that, for this reason, the injunctions "conflict[] with the FSIA's immunity scheme, which is property-specific." Pet. 27. *But that is our point*. The "immunity scheme" of Section 1609 covers only property-specific remedies; the *in personam* injunctions are different.

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[5] Argentina's invocation of *Louisiana* v. *Jumel*, 107 U.S. 711 (1883), is misguided; state sovereign immunity is distinct from, and often stricter than, foreign sovereign immunity. *Coll. Sav. Bank* v. *Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686 n.4 (1999).

Granting a non-property-specific remedy is precisely how one *complies* with the FSIA, while fully respecting its limitations on property-specific remedies.

In a logical contradiction, Argentina simultaneously argues that the injunctions *are* property-specific, as they purportedly "commandeer[] . . . Argentina's reserves." Pet. 1; accord Pet. i, 2, 18, 24, 26, 32; Mex. Br. 13 n.10. Nonsense. The courts below considered Argentina's reserves only in the process of weighing the equities in the case. Pet. App. 59-60, 141. Respondents have cited the size of Argentina's reserves to that end alone. It is equitable for Argentina to pay respondents the $1.3 billion it owes them in light of its ample resources—reserves and otherwise. See Pet. App. 60 ("[Argentina] had sufficient funds, *including* over $40 billion in foreign currency reserves." (emphasis added)). Notably, the district court found—and the court of appeals affirmed—that Argentina introduced no evidence disputing its ability to pay respondents. Pet. App. 22-23, 60. Thus, Argentina forfeited any arguments based on its financial condition.

Argentina also misstates the financial impact of this case. The injunctions here involve bonds on which Argentina owes approximately $1.3 billion (plus accruing interest). Pet. App. 6. They do not automatically implicate the "over $15 billion" that Argentina contends it owes on all its defaulted debt. Pet. 9.

In any event, Argentina's reserves are just the beginning of the story. Argentina has found the assets to make many billions of dollars' worth of regular payments on the exchange bonds even dur-

ing the appellate phases of this case, and many billions more before then. Furthermore, Argentina recently "expropriate[d] 51 percent of [a major Argentine] oil and gas company"; it "nationalized Argentina's private pension funds," and "nationaliz[ed] [a] Spanish-owned flag air carrier"; and it "owns or participates in companies in . . . oil and gas, electricity generation, transport, paper production, banking," and other sectors. U.S. Dep't of State, *2013 Investment Climate Statement—Argentina* (Feb. 2013), http://1.usa.gov/1rLEPj1. Again, Argentina seeks sympathy by suggesting that it will be *hard* to keep its promise and then contorts the point into an assertion that it will be *impossible* to do so (which is not at all true). To raise an impossibility defense in this Court, without presenting any evidence to substantiate this point below, underscores the inappropriateness of this case for review.[6]

d. Argentina and its *amici* contend that the injunctions here are inequitable in various ways and are extraterritorial. All of those contentions fail.

First, Argentina asserts that, because respondents could obtain a supposedly adequate remedy at law (a money judgment), the courts below erred in entering an equitable remedy. Pet. 25-26; accord Fintech Br. 21-25; Mex. Br. 18-20. But the injunc-

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[6] Further demonstrating the unsuitability of this case for review, the *amicus* briefs supporting Argentina overflow with factual assertions—*precisely because* Argentina failed to make a factual record on those points in the courts below. It is no more this Court's role to rescue Argentina from its litigation tactics than to rescue it from its promises.

tions do not seek redress for Argentina's simple failure to pay. See *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U.S. 204, 216 (2002) (prohibiting "injunction[s] against failure to pay a simple indebtedness"). Instead, respondents' grievance is that Argentina has violated its separate promise to "rank" its "payment obligations" "equal[ly]." See Pet. App. 198. Argentina may honor that promise by paying everyone or by paying no one. There may be consequences if Argentina pays no one, but that is not a flaw in the injunctions.

Second, Argentina complains that the injunctions threaten "countless third parties" with "grave harm." Pet. 29; accord Mex. Br. 15-16. But Argentina doesn't care about harm to others; it just wants to pick its victims. Besides, the exchange bondholders bought their bonds fully aware of the Equal-Treatment Provision and its potential to limit exchange bond payments. C.A. App. A466, A991 (exchange bond prospectuses warning of this risk). And, if Argentina abides by the injunctions, no harm can befall the trustee and other financial institutions, which face contempt only if they work in "active concert or participation" with Argentina to violate a court order. Fed. R. Civ. P. 65(d)(2)(C). "[H]arm threatened to third parties by a party subject to an injunction who avows not to obey it" does not render an injunction "'inequitable.'" Pet. App. 14.

Third, Argentina's *amici* protest that the injunctions "would transform the Equal Treatment Provision from . . . a provision for 'equality' . . . into a mechanism securing Respondents vastly *preferred* treatment." Puente Br. 21; accord Stiglitz Br. 6.

There is no "equality," however, in giving the exchange bondholders what they were promised but saddling respondents with something less than what *they* were promised. As Judge Friendly observed, "[e]quality among creditors who have lawfully bargained for different treatment is not equity but its opposite." *Chem. Bank N.Y. Trust Co.* v. *Kheel*, 369 F.2d 845, 848 (2d Cir. 1966) (Friendly, J., concurring).

Fourth, Argentina asserts that "the injunctions give rise to extraterritoriality concerns." Pet. 26; accord Caja Br. 3-8; Euro Bondholders Br. 13-14; Euroclear Br. 11-12. But the injunctions operate *in personam*, and, where *in personam* jurisdiction is proper, courts "may command [a defendant] to take action even outside the United States." *Chafin* v. *Chafin*, 133 S. Ct. 1017, 1025 (2013). The presumption against extraterritoriality applies only to *statutes* that "regulate conduct" abroad or "afford relief" based on events abroad. *Kiobel* v. *Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013). What regulates Argentina's conduct here is its own contract—in which it submitted to New York law and waived immunity—not the FSIA.

III. This Case Will Not Jeopardize Foreign Relations Or The World Economy

For years, Argentina has prophesied that this case would unleash horrible plagues on the world's economy and the United States' place in it. Since the district court first entered the injunctions more than two years ago, however, the opposite has proved true.

1. The decision below does not threaten the United States' foreign-relations interests. In arguing otherwise, Argentina and its *amici* continue to conflate the *in personam* injunctions with an *in rem* "seiz[ure]" of "foreign sovereign property." Pet. 31; accord Brazil Br. 9; Euro Bondholders Br. 18; Mex. Br. 17. In fact, Argentina elides that distinction by selectively paraphrasing the sources it cites. Argentina states that "coercive measures" "'could cause significant foreign relations problems,'" Pet. 31, but the House Report actually says that "*execution*" could cause those problems, House Report 31 (emphasis added).[7] As explained above, *supra* at 23, these are not the same thing.

International law underscores this distinction and its relevance. The United Nations Convention on Jurisdictional Immunities of States and Their Property generally "reflect[s] current international norms and practices regarding foreign state immunity." Mex. Br. 17 (quotation marks omitted). That Convention, like the FSIA, limits only "measures of constraint, such as attachment, arrest or execution." G.A. Res. 59/38, art. 19, U.N. Doc. A/RES/59/38 (Dec. 2, 2004). Injunctions are permissible. *Id.* art. 24(1). Any other applications of comity are dubious, as, "from the earliest times, authorities have recognized that the obligation of comity expires when the strong public policies of the forum are vitiated by the for-

[7] Likewise, compare Pet. 27 ("a remedial order") with *Autotech Techs. LP* v. *Integral Research & Dev. Corp.*, 499 F.3d 737, 750 (7th Cir. 2007) ("writ" of "execution").

eign act." *Laker Airways Ltd.* v. *Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (D.C. Cir. 1984).[8]

Nor is reciprocity a concern. See Pet. 31; Brazil Br. 12; Euro Bondholders Br. 18. "[I]n practice," one commentator has observed, "very few courts have expressly referred to [reciprocity] as the basis for immunity." Xiaodong Yang, State Immunity in International Law 57 (2012). Reciprocity generally applies only if the executive of the other nation says so, and only on a nation-by-nation basis. *E.g.*, State Immunity Act, 1985, s. 17 (Sing.); State Immunity Act, 1978, c. 33, § 15 (U.K.). And, to the extent that the United States even waives its immunity to suit in foreign courts, the United States would never go to the "notably unprecedented" lengths Argentina has to breach its contractual obligations (see CRS Report 11), especially not after consenting to jurisdiction in the courts of another nation for any lawsuits alleging such a breach.

2. Argentina—not respondents—would "undermine the voluntary system of cooperative resolution of sovereign debt crises." See Pet. 33 (quotation marks omitted). In respondents' world, sovereigns freely make promises, investors freely accept them,

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[8] Some *amici* contend that, if Argentina violates the injunctions, the financial institutions that work for it must either risk contempt or breach their contracts under foreign law. Euroclear Br. 8-11; Euro Bondholders Br. 17. But legal impossibility is a defense to breach, see *Organizacion JD Ltda.* v. *U.S. Dep't of Justice*, 18 F.3d 91, 95 (2d Cir. 1994) (per curiam), and these institutions apparently have exculpatory clauses in their contracts, Pet. App. 16 n.11.

and courts enforce them consistent with the sovereign immunity law on the books. In Argentina's world, sovereigns make and break promises when expedient, unilaterally dictate their terms when restructuring, obey court orders when they want, and treat the absence of international sovereign bankruptcy regimes as a reason why U.S. courts should make things up as they go along. Only respondents' world features the "contractual, market-based approach to sovereign debt restructuring," which "respect[s] creditor property rights," and which the Paris Club and the Institute of International Finance—both praised by *amici*, Brazil Br. 15; France Br. 18—"work to strengthen." Press Release, Paris Club and Institute of International Finance, Meeting of the Paris Club with Representatives of Non Paris Club Bilateral Creditors and Representatives of the Private Sector (Oct. 22, 2013), http://bit.ly/1gMff9r.

Argentina and its *amici* also err in suggesting that this case should yield the same result that a "sovereign bankruptcy regime" would. See Pet. i, 18, 33; accord, *e.g.*, Jubilee Br. 7-11; Stiglitz Br. 8-9. No sovereign bankruptcy regime exists largely because "the United States" has "turn[ed] away from" proposals to invent one. Sean Hagan, *Designing a Legal Framework to Restructure Sovereign Debt*, 36 Geo. J. Int'l L. 299, 391 (2005). Instead, "the United States was only willing to embrace the 'contractual approach.'" *Id.* at 390. Those who would have this Court import purported bankruptcy logic into contract cases like this one represent the losing side in a long-running policy debate. See Hal S. Scott, *A Bankruptcy Procedure for Sovereign Debtors?*, 37 Int'l

Law. 103, 112-28 (2003) (summarizing the debate). This Nation's courts exist to state what the law is, not what certain observers think it should be.

3. The holdings below will not have the broad effect that Argentina and its *amici* predict. The court of appeals correctly emphasized that "this case is an exceptional one with little apparent bearing on [future] transactions," Pet. App. 25, for three main reasons.

a. "Argentina has been a uniquely recalcitrant debtor." Pet. App. 26. The court of appeals conditioned the relief in this case on Argentina's "extraordinary behavior." Pet. App. 26. A chorus of disinterested parties has recognized that Argentina is without peer in its mistreatment of private-sector creditors. *E.g.*, CRS Report 11 ("[T]he Argentine case involved methods, processes, and deep discounts that were notably unprecedented."); Institute of International Finance, *Capital Markets Monitor* 5 (Apr. 2013) ("Argentina finds itself in the present messy situation because of its own behavior . . . . Fortunately, this has been a very rare case in the recent history of sovereign debt restructuring." (emphasis omitted)); Moody's Investors Service, *The Role of Holdout Creditors and CACs in Sovereign Debt Restructurings* 2 (Apr. 10, 2013) ("Moody's 2013 Report") ("Argentina was and remains unique in its unilateral and coercive approach to the debt restructuring."). Argentina's "strategy seems a highly undesirable model for other countries contemplating a sovereign default," and others have "opted for variations on more conventional approaches." CRS Report 14.

b. The court of appeals confined its holding to "[t]he particular language of the FAA's *pari passu* clause." Pet. App. 27. By its terms, the holding "does not control . . . the obligations of other sovereign debtors under *pari passu* clauses in other debt instruments." Pet. App. 25; see *supra* at 15-16 (explaining why *pari passu* clauses are not "boilerplate"). And, going forward, sovereigns may "draft different *pari passu* clauses that support the goal of avoiding holdout creditors" if they wish. Pet. App. 27. Italy, for example, has recently deleted language in its bonds that referred to ratable payments. IMF Report 31 n.35. There is no basis for this Court to review the remedies available for breach of an idiosyncratic contract provision when normal contract bargaining can respond far more nimbly.

c. The bonds at issue here are among the dwindling breed of sovereign bonds that lack a "collective action clause." CACs "effectively eliminate the possibility of 'holdout' litigation," Pet. App. 61, by giving a supermajority of bondholders the right to impose a restructuring on an unwilling minority. The U.S. Department of the Treasury began touting CACs in 2002 as a way to "prevent a small minority from delaying or otherwise disrupting a[restructuring] agreement." John B. Taylor, *Sovereign Debt Restructuring: A U.S. Perspective* (Apr. 2, 2002), http://bit.ly/1lspZdm. The Group of Ten nations (including *amicus* France) followed suit. Group of Ten, *Report of the G-10 Working Group on Contractual Clauses* (Sept. 26, 2002), http://bit.ly/1dRA83H. Indeed, substantially all newer bonds—"99% of the aggregate value of New York-law bonds

issued since January 2005," Pet. App. 61—contain CACs.

The United States promoted CACs, in part, because they "represent a decentralized, market-oriented approach [in which] both the contracts and the workout process described by the contracts are determined by the borrowers and lenders on their own terms." Taylor, *supra*. That is, rather than imposing a one-size-fits-all approach, CACs allow issuers and investors to bargain over the terms that best fit each bond issuance. And this bargain is struck *ex ante*. That, in turn, reduces disputes *ex post*, both by creditors and by sovereigns attempting to dictate the terms of their restructurings unilaterally, as Argentina has done here. For these reasons, CACs can respond more precisely to the prospect of holdout litigation than any categorical rule can.

Argentina and its *amici* claim that this case is important despite the prevalence of CACs because some older bonds do not contain CACs. Pet. 35; France Br. 22; Mex. Br. 25; Stiglitz Br. 11. Even according to Argentina's expert, however, only one-fourth of outstanding New York-law bond issuances fit that description. Supp. App. SPE-1133 (2d Cir. Dec. 28, 2012) (Dkt. No. 661-1). That number is shrinking every day as old bonds mature or are redeemed.

Some CACs have operated series-by-series, rather than across all of a sovereign's bonds (see Pet. 35; Brazil Br. 19-20, 21-22; France Br. 22-23; Stiglitz Br. 10-11), but CACs increasingly include "aggregation clauses" that operate across multiple series. See Moody's 2013 Report 11. Even if bonds lack these

clauses, restructuring can still proceed. For example, in Greece's restructuring, which postdated the injunctions in this case and achieved 97% acceptance, IMF Report 27, a significant proportion of the holders of bonds whose CACs were not triggered nonetheless exchanged their bonds. To the extent that CACs do not wholly resolve collective-action issues, they "are evolving and becoming more 'aggressive,' and so may still offer the best opportunity to resolve[] sovereign defaults in the absence of a supranational resolution system." CRS Report 14.

In any event, there are innumerable ways for a sovereign to resolve its debts without CACs. The IMF explains that sovereigns can limit litigation risk by engaging in "timely good faith negotiation." IMF Report 11. Sovereigns can also take unilateral action, for example, by declaring a participation threshold, such that its offer to any creditor would be conditioned on some minimum percentage agreeing to the deal. See *id.* at 31.

4. The holdings below are particularly unlikely to affect investments by sovereign lenders or by institutions like the IMF. Contra Pet. 34; France Br. 19-21; Stiglitz Br. 14-15. This case does not involve that issue. Pet. App. 24-25, 53. Moreover, the IMF has a "long history" of enjoying "preferred creditor status." International Monetary Fund, *IMF Executive Board Discusses Financial Risk in the Fund and the Level of Precautionary Balances*, PIN No. 04/16 (Mar. 5, 2004), http://bit.ly/1lG6ZZb. Sovereign creditors, too, have tools that private investors lack, such as the incentive of resumed emergency lending. In any event, the outcome would hinge on facts that some future court would assess.

Developing nations, many of which rely on official-sector investment, thus face no threat. Quite the opposite: Ruling for Argentina would discourage private investors from lending to developing nations, leading to "higher borrowing costs." *Elliott Assocs., L.P.* v. *Banco de la Nacion*, 194 F.3d 363, 380 (2d Cir. 1999). And that would "cause significant harm to . . . developing nations and their institutions seeking to borrow capital in New York." *Ibid.*

IV. The Euro Bondholders And Fintech Are Not Proper Petitioners Or Respondents

Only a petitioner or cross-petitioner may raise issues in this Court. The Euro Bondholders and Fintech did not file a petition or cross-petition. They have filed briefs as respondents in support of Argentina's petition. But the court of appeals denied their motions to intervene, Pet. App. 9, and those rulings "do not . . . warrant independent merit review under this Court's Rule 10," Euro Bondholders Br. 2 n.2; accord *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 510 U.S. 27, 33 (1993) (per curiam). There is no need to consider any issue raised by the Euro Bondholders or Fintech.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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