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 IN OPPOSITION FOR RESPONDENTS NML CAPITAL, LTD., AND OLIFANT FUND, LTD.

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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 held that the state-law question does not affect this case's outcome because Argentina breached the contractual provision under its own interpretation of that provision.

2. Whether the Second Circuit misapplied 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, by upholding 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 respondents "at least equally" with its "payment obligations" under subsequently issued bonds.

RULE 29.6 STATEMENT

NML Capital, Ltd., is not publicly traded and has no corporate parent; no publicly held corporation owns 10% or more of its stock.

Olifant Fund, Ltd., is not publicly traded; its parent corporation is ABIL, Ltd., and no publicly held corporation owns 10% or more of its stock.

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BRIEF IN OPPOSITION

Respondents NML Capital, Ltd., and Olifant Fund, Ltd. ("respondents"), respectfully submit that the petition for a writ of certiorari should be denied.

OPINIONS BELOW

The court of appeals' August 23, 2013, opinion is reported at 727 F.3d 230 (Pet. App. 1). The court of appeals' October 26, 2012, opinion is reported at 699 F.3d 246 (Pet. App. 29). The district court's orders (Pet. App. 70-165) are unreported, but the lead order is available at 2012 WL 5895784 (Pet. App. 117), and the accompanying opinion is available at 2012 WL 5895786 (Pet. App. 125).

JURISDICTION

The court of appeals entered judgment on August 23, 2013, C.A. Dkt. #1006, and denied Argentina's petition for rehearing en banc on November 19, 2013, Pet. App. 68. Argentina invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT

Argentina's petition purports to seek authoritative guidance concerning application of state contract law and a federal statute, from the New York Court of Appeals and this Court, respectively. But in reality its request is quite different. Argentina already has made clear that it will not obey any adverse decision on the questions it presents, and will defy or evade the injunctions entered below (collectively, the "Injunction") *even if* upheld in this appeal. Pet. App. 5. Argentina ultimately is not interested in *any* court's views concerning those questions. By Argentina's lights, *it* has the final word, and it will recognize a judicial ruling *only if* it accords with Argentina's conclusions.

That alone is reason enough to deny the petition. This Court does not grant review to render decisions that the parties are free to ignore. To the contrary, it has "been the firm and unvarying practice of Constitutional Courts to render no judgments not binding and conclusive on the parties"—"and none that are subject to later review or alteration" even by *this* republic's government, much less that of *another* nation. *Chi. & S. Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 113-14 (1948). But even aside from Argentina's pledge to flout any unfavorable ruling, its request for review is meritless.

Unlike in its prior, interlocutory petition for a writ of certiorari, Argentina now does not even pretend that the decision below implicates a lower-court conflict on any federal issue. Indeed, its first question presented concerns only *state* law: whether Argentina's actions breached a particular provision of a specific bond contract. Argentina urges this Court to certify that question to the New York courts, but its

request comes far too late. Argentina never suggested certification of any issue until *after* the Second Circuit had decided that Argentina had breached its contractual obligations—and even then it proposed certifying a *different* question, regarding only remedies, not the issue it tenders now concerning breach. Even if properly presented, Argentina's certification request is meritless. The question it raises is academic here, and irrelevant to nearly all future sovereign-debt disputes. And even if the state-law question were as important as Argentina alleges, the state courts stand ready to address it in due course.

The solitary *federal* question Argentina raises—and the only issue it asks *this* Court to decide—is equally undeserving of review. Argentina claims that the Injunction violates the prohibition in the Foreign Sovereign Immunities Act ("FSIA") on the "attachment," "arrest," or "execution" of "property in the United States of a foreign state." 28 U.S.C. § 1609. But as the Second Circuit correctly held, the Injunction does none of those things. It does not exercise dominion over any sovereign property, but merely holds Argentina to its commitment to treat its debts to respondents equally with its other obligations. Argentina cites no decision that confronted a similar issue, much less one that contradicts that holding. At bottom, Argentina seeks only factbound review of the Second Circuit's application of the FSIA to this case's unique circumstances. But it demonstrates no error either in the Second Circuit's legal analysis, or in the district court's factual findings on which the court of appeals relied.

Argentina's dire warnings of the Injunction's catastrophic consequences are mere bluster. The Second Circuit correctly dismissed those alleged effects

as "speculative, hyperbolic, and almost entirely of the Republic's own making." Pet. App. 22. And none of them justifies granting review to a litigant that has vowed to evade any decision it does not like.

Argentina's petition should be denied.

1. Argentina has a long "history of defaulting on, or requiring restructuring of, its sovereign obligations." *EM Ltd.* v. *Republic of Argentina*, 473 F.3d 463, 466 n.2 (2d Cir. 2007). This case concerns bonds (the "Agreement Bonds") that Argentina issued starting in 1994, pursuant to a Fiscal Agency Agreement (the "Agreement"), which it now refuses to honor.

To reassure investors wary of the Republic's track record, Argentina made several promises in the Agreement to protect investors if Argentina defaulted again. Argentina agreed that New York law would govern the Agreement Bonds, with disputes adjudicated in New York courts, and expressly waived—indeed, promised not to claim—its sovereign immunity to those courts' jurisdiction or to any attempt to execute on a judgment. Pet. App. 3, 38, 59, 201, 203; C.A. Joint App. ("J.A.") A-204. Argentina also included a clause protecting holders of Agreement Bonds from having Argentina's obligations to them subordinated to its obligations to other creditors:

> 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* (as defined in this Agreement).

Pet. App. 198 (emphases added). This clause's second sentence—the "Equal-Treatment Provision," *id.* at 33—lies at the center of this dispute.

2. In 2001, Argentina launched the largest sovereign default in history, declaring a "moratorium" on repayment of debts totaling more than $80 billion, including the Agreement Bonds. Pet. App. 33. "Each year since then, Argentina has passed legislation renewing the moratorium and has made no principal or interest payments on the defaulted debt." *Ibid.*

For years following its 2001 default, Argentina refused to pay, or even negotiate with, its Agreement Bond creditors. Then, in 2005, Argentina made a take-it-or-leave-it exchange offer: It proposed that holders of Agreement Bonds trade them for new bonds worth "25 to 29 cents on the dollar." Pet. App. 34. This "unilateral and coercive approach" to debt restructuring diverged from the typical practice that enabled other restructurings to be "resolved quickly, without severe creditor coordination problems, and involving little litigation," C.A. Dkt. #952, Ex. A, at 1-2, and breached Argentina's commitments to the IMF to "engage in constructive negotiations with all representative creditor groups," P. Gerson, *et al.*, IMF, *Argentina: Ex Post Assessment of Longer-Term Program Engagement and Ex Post Evaluation of Exceptional Access* 16 (July 11, 2006).[1]

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[1] The bonds offered in the 2005 exchange—unlike the Agreement Bonds—also included collective-action clauses, which empower a supermajority of bondholders to bind the minority to the terms of a restructuring. Pet. App. 37.

Argentina's 2005 exchange offer was so unappealing that creditors holding nearly one-quarter of the outstanding value of the Agreement Bonds refused to participate. Pet. App. 35. "[T]o exert additional pressure on bondholders to accept" its exchange offer, Argentina enacted Law 26,017—the "Lock Law"—*forbidding* Argentina from making payments on the Agreement Bonds. *Id.* at 34-35. As Argentine legislators explained, the Lock Law relegated the Agreement Bonds to the "peripheral garbage circuit," "at the end of the line" of Argentina's obligations. C.A. Supp. App. SA-296, SA-320 (Dkt. #264). Argentina's highest court has held that the Lock Law and annually renewed repayment moratoriums bar recognition of U.S. judgments in Argentine courts. *See* Pet. App. 38; *Claren Corp. c/ E.N.*, C. 462, XLVII (Mar. 6, 2014).

In 2010, Argentina offered Agreement Bondholders who did not accept the 2005 exchange offer another opportunity to exchange their Agreement Bonds for new bonds. Pet. App. 35-36. As with the 2005 exchange, Argentina's 2010 offer was not open to negotiation, and Argentina vowed, again, never to pay on the Agreement Bonds. *Ibid.* To facilitate the 2010 exchange, Argentina temporarily suspended the Lock Law, while still "prohibit[ing]" any payments on the Agreement Bonds. *Id.* at 35 & n.3.

Since 2001, Argentina has made no payments on the Agreement Bonds. Indeed, it has declared in filings with the Securities and Exchange Commission ("SEC") that it "classifie[s] [the Agreement Bonds] as a separate category from its regular debt" and is "not in a legal … position to pay" on them. Pet. App. 52. In contrast, it has made regular, timely payments on

the bonds issued in the 2005 and 2010 exchanges (the "Exchange Bonds"). *See ibid.*; Pet. 8.

3. NML and Olifant are funds that invest money on behalf of institutions—charities, pension funds, hospitals, and university endowments—and are beneficial owners of Agreement Bonds, which they purchased in the secondary market. J.A. A-372-87, 3736-41. After Argentina refused to honor its obligations under the Agreement Bonds, respondents separately commenced this litigation in the Southern District of New York. Respondents' complaints each asserted two distinct claims: (1) for money judgment, based on Argentina's failure to timely pay its obligations—which remains pending in the district court; and (2) for specific performance of the Equal-Treatment Provision, based on Argentina's failure to "rank" its payment obligations on the Agreement Bonds "at least equally" with its obligations under the Exchange Bonds. *E.g.*, J.A. A-1601-22.

The district court granted summary judgment on the second claim, holding that Argentina's course of conduct—including its enactment of the Lock Law, and its continued payment on the Exchange Bonds while not paying on the Agreement Bonds—violated the Equal-Treatment Provision by "rank[ing]" Argentina's payment obligations on the Exchange Bonds above its obligations on the Agreement Bonds. Pet. App. 74.

After ordering supplemental briefing on the proper remedy, the district court entered the original Injunction in each case requiring Argentina to honor its obligations on the Agreement Bonds at the same time, and to the same extent, that it honored obligations on the Exchange Bonds. Pet. App. 88, 107. The Injunction mandates that, whenever Argentina

makes a payment on the Exchange Bonds, it must pay the same percentage of the debt it currently owes on respondents' Agreement Bonds. *Id.* at 91. The court found that Argentina has "the financial wherewithal to meet its commitment" on both the Agreement Bonds and the Exchange Bonds. *Id.* at 90.[2]

4. Argentina appealed the Injunction to the Second Circuit. It did not ask that court to certify any question to New York's courts. Instead, Argentina argued the merits, claiming that it had not breached the Equal-Treatment Provision, and that the Injunction violated the FSIA.

In October 2012, the Second Circuit affirmed the Injunction in substantial part. Pet. App. 29. It rejected Argentina's claim that the Equal-Treatment Provision was merely "boilerplate," finding that the meaning of so-called "*pari passu* clauses" was "neither well settled nor uniformly acted upon." *Id.* at 49. After carefully examining the Provision's text and Argentina's actions, the Second Circuit had "little difficulty concluding that Argentina breached" the Provision. *Id.* at 53. "The record amply supports a finding that Argentina effectively has ranked its payment obligations to [respondents] below those of" holders of Exchange Bonds through its enactment of the Lock Law, annually renewed moratoriums, SEC filings, and its pattern of paying on the Exchange Bonds without paying on the Agreement Bonds. *Id.* at 51-52. It was this entire "course of conduct"—including but not limited to its discriminatory pay-

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[2] Identical orders were entered in cases involving other plaintiff-respondents.

ments and the Lock Law—that breached the Provision. *Id.* at 61 n.16. Moreover, "even under Argentina's interpretation"—under which the Equal-Treatment Provision bars only "'legal subordination'" of the Agreement Bonds to other debt—"the Republic breached the Provision." *Id.* at 52 (citation omitted).

The Second Circuit also rejected Argentina's claim that the Injunction violated the FSIA. The only arguably relevant limitation on the district court's equitable authority, 28 U.S.C. § 1609, prohibited "attachment," "arrest," or "execution" of sovereign property in the United States. Pet. App. 58-59. As the Second Circuit noted, courts also are "barred from granting 'by injunction, relief which they may not provide by attachment.'" *Id.* at 58 (citation omitted). The court concluded that the Injunction, however, does not "attach, arrest, or execute upon any property." *Ibid.* It simply "direct[s] Argentina to comply with its contractual obligations not to alter the rank of its payment obligations," and "affect[s] Argentina's property only incidentally to the extent that the order prohibits Argentina from transferring money to some bondholders and not others." *Ibid.* And it "can be complied with without the court's ever exercising dominion over sovereign property." *Ibid.*

The Second Circuit also affirmed the district court's conclusion that specific performance was appropriate. "[I]t is clear," the court held, "that monetary damages are an ineffective remedy," because "Argentina will simply refuse to pay any judgments." Pet. App. 56. The public interest also favored injunctive relief because "Argentina's disregard of its legal obligations exceeds any affront to its sovereign powers resulting from the Injunctions." *Id.* at 59. And the record supported the district court's factual find-

ing that Argentina has "sufficient funds" to pay both respondents and the holders of Exchange Bonds ("Exchange Bondholders"). *Id.* at 60. The Second Circuit rejected Argentina's claim that the Injunction would undermine future sovereign-debt restructurings. *Id.* at 60-61. Among other reasons, nearly all new bonds issued under New York law contain collective-action clauses, effectively precluding a small percentage of creditors from holding out and preventing restructurings. *Ibid.*

Although the Second Circuit affirmed the Injunction, it remanded for the limited purpose of clarifying two narrow aspects of the Injunction: (1) the payment formula governing how much Argentina must pay on the Agreement Bonds if it pays on the Exchange Bonds, and (2) which third parties the Injunction binds. Pet. App. 63.

Argentina sought panel or en banc rehearing, which was denied. Pet. App. 64-67.

5. On remand, the district court clarified the two issues identified by the Second Circuit. Pet. App. 125. Argentina again appealed. While the Second Circuit had already held (in the prior appeal) that Argentina had breached the Equal-Treatment Provision, in its second appeal Argentina briefly asked the court, for the first time, to certify a state-law question to the New York Court of Appeals, concerning the proper remedy for Argentina's breach. C.A. Argentina Br. 54-55 (Dkt. #657) (urging certification of whether "violation of a pari passu clause support[s] the remedy at issue in this case, *i.e.*, enjoining payments to third party creditors (and transfers by participants in the funds transfer system) unless the

debtor pays other creditors 100% of what they are owed").[3]

At oral argument, Argentina's counsel informed the Second Circuit that Argentina "would not voluntarily obey" the Injunction, even if it was affirmed. Pet. App. 5. This statement was consistent with statements by Argentina's President and other high ministers that Argentina would "pay on the Exchange Bonds 'but not one dollar to the vulture funds'" "'despite any ruling.'" *Ibid.* The court ordered supplemental briefing to determine what order Argentina *would* obey. C.A. Dkt. #903. Argentina responded by proposing yet another exchange offer—on terms even less favorable than the 2005 or 2010 exchanges. *See* Argentina Supp. Br. 9-10, 15 (C.A. Dkt. #935).

In August 2013, the Second Circuit issued the decision from which Argentina now petitions. After noting Argentina's pronouncements both before the court and in public that it would not comply with the Injunction if affirmed (Pet. App. 5 & n.4), the Second Circuit rejected all of Argentina's challenges to the clarified Injunction. It did not certify Argentina's proposed state-law question. The court reiterated its holding that the Injunction does not violate the FSIA. *Id.* at 10-11. It also rejected Argentina's assertion that the Injunction would harm the Exchange Bondholders: They would be injured only if Argentina chose to respond to the Injunction by defaulting on the Exchange Bonds, and the court was "unwill-

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[3] Certain non-party Exchange Bondholders separately moved for certification of a different question, which was denied. C.A. Dkt. #632, 777.

ing to permit Argentina's threats to punish third parties to dictate the availability or terms of relief." *Id.* at 13-14, 22-24.

The Second Circuit also found unpersuasive Argentina's claims that the Injunction would harm the public interest, which the court deemed "speculative, hyperbolic, and almost entirely of the Republic's own making." Pet. App. 22. The Injunction would not "imperil future sovereign-debt restructurings" because this "exceptional" case turned on the particular language of the Equal-Treatment Provision and on Argentina's history as a "uniquely recalcitrant debtor." *Id.* at 25-26. Moreover, the Court observed, numerous contractual mechanisms (*e.g.*, collective action clauses) can facilitate a sovereign's restructuring of its debts despite holdouts. *Id.* at 26-27. Sovereigns that wish to avoid similar injunctions can simply draft their debt contracts "different[ly]." *Id.* at 27.[4]

6. The next business day, Argentina's President appeared on television to announce two new actions. First, Argentina would reopen the exchange offer that respondents had thrice rejected.[5] To execute

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[4] While the second appeal was pending—before the Second Circuit issued its decision—Argentina filed an interlocutory petition for a writ of certiorari challenging the Second Circuit's October 2012 decision, Pet. for Cert., No. 12-1494 (June 24, 2013), which was denied, 134 S. Ct. 201 (2013). The Second Circuit stayed the Injunction pending disposition of Argentina's current petition. Pet. App. 6.

[5] Camila Russo, *Argentina Plans New York-Buenos Aires Bond Swap*, Bloomberg (Aug. 27, 2013), http://www.bloomberg.com/news/2013-08-27/argentina-plans-new-york-buenos-aires-bond-swap-on-singer.html.

the new exchange, the Argentine legislature suspended the Lock Law, as it had done in 2010. Law 26,886 (Pet. App. 204-07). As with the 2010 Lock Law suspension, however, the 2013 suspension prohibited the Argentine Executive from paying on the Agreement Bonds. Pet. App. 205. Second, the Argentine President announced a new plan to move the place of payment under the Exchange Bonds from New York to Argentina. The President admitted that this scheme was "aimed at circumventing the U.S. court ruling." Russo, *supra*.

7. Argentina again sought panel or en banc rehearing, which was denied. Pet. App. 68-69.

REASONS FOR DENYING THE PETITION

Argentina's petition satisfies none of this Court's certiorari criteria. Its primary ground for seeking review does not implicate any federal question at all. Indeed, the first question presented does not even ask this Court to review any judgment or to decide any legal issue. Instead, Argentina asks the Court to open a back door for Argentina to relitigate in *state* court a *state*-law contract-interpretation issue—which, until losing on appeal, Argentina was content to litigate in a federal forum. That request comes far too late, and it is a transparent effort to delay Argentina's day of reckoning and to circumvent deferential review of lower courts' decisions whether to certify questions to state courts. In any event, certification is unwarranted here. The question Argentina proposes does not affect the outcome of this case and will have little if any effect on future sovereign-debt disputes.

Argentina's second question—whether the Injunction violates the FSIA's prohibition on attaching,

arresting, or executing upon a foreign state's property in this country—is no more certworthy. Argentina alleges no circuit conflict, and seeks only factbound review of the lower courts' application of the FSIA. Argentina fails, however, to demonstrate any error in the lower courts' legal analysis, much less one warranting certiorari. The Injunction does not assert control over any Argentine property, and merely requires the Republic to fulfill its contractual duty to rank its payment obligations to respondents at least equally with its obligations to others.

As the Second Circuit recognized, the purported practical consequences of the Injunction that Argentina alleges are unfounded and, in any event, problems of Argentina's own making. The decision below will not foment a new financial crisis or force Argentina to default on other debt; as the lower courts found, Argentina is perfectly capable of paying its debts, if it chooses. Nor will the Second Circuit's holding undermine future debt restructurings. The court's ruling is expressly limited to the particular terms of *this* Agreement and Argentina's unprecedented behavior.

The issues Argentina tenders are not certworthy. But even if they were, Argentina has forfeited any claim to discretionary review by proclaiming its intention to defy the decision below if upheld.

I. ARGENTINA'S REQUEST TO CERTIFY A QUESTION OF STATE CONTRACT LAW IS PROCEDURALLY IMPROPER AND MERITLESS.

Argentina's opening request that the Court certify a question to the New York courts to resolve this case on state-law grounds speaks volumes about the strength of its case for this Court's review of any federal question. Its certification request, moreover, is procedurally improper and substantively meritless.

A. This Court should not entertain Argentina's certification request at all because it is untimely, and improperly seeks to circumvent abuse-of-discretion review of lower courts' certification decisions.

1. The point of certifying "novel or unsettled questions of state law for authoritative answers by a State's highest court" is to enable "a federal court [to] *save* 'time, energy, and resources and help build a cooperative federalism.'" *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 77 (1997) (emphasis added) (quoting *Lehman Bros.* v. *Schein*, 416 U.S. 386, 391 (1974)). Those objectives are thwarted, not furthered, by permitting parties that have *lost* in federal court on a state-law issue to seek a re-do in state court. *See Boyd Rosene & Assocs., Inc.* v. *Kan. Mun. Gas Agency*, 178 F.3d 1363, 1365 (10th Cir. 1999). Certifying a state-law issue *after* the federal courts have decided it is generally "inefficient and wasteful of the parties' and the federal courts' previously expended time, energy, and resources." *Ibid.*

Instead, "'[t]he appropriate time to seek certification of a state-law issue is *before*'" the federal court "'resolves the issue, not *after* receiving an unfavorable ruling." *City of Columbus* v. *Hotels.com, LP*, 693 F.3d 642, 654 (6th Cir. 2012) (emphases added); *ac-*

cord Pacheco v. *Shelter Mut. Ins. Co.*, 583 F.3d 735, 738 (10th Cir. 2009); *Thompson* v. *Paul*, 547 F.3d 1055, 1065 (9th Cir. 2008). "The practice of requesting certification *after* an adverse judgment has been entered" thus "should be discouraged." *Perkins* v. *Clark Equip. Co.*, 823 F.2d 207, 210 (8th Cir. 1987) (emphasis added).[6]

Argentina bypassed the appropriate opportunity to seek certification. It never requested certification in its first appeal, where the contract-interpretation question was at issue. C.A. Argentina Br. (Dkt. #143); C.A. Argentina Reply Br. (Dkt. #331). Instead, it waited to suggest certification until its *second* appeal, where only the district court's *clarification* of the Injunction was at issue—and even then proposed certifying a *different* question (regarding the appropriate remedy) than the one it tenders in this Court (concerning only *breach*). C.A. Argentina Br. 54-57 (Dkt. #657); *cf.* Pet. ii.

Argentina's certification request thus comes far too late. Having invited two federal courts to expend their scarce resources deciding an issue, Argentina cannot demand a do-over in state court. Far from saving federal courts' time, certification would waste the effort the courts below already spent. And it would encourage future litigants to "gamble" with state-law issues, *Perkins*, 823 F.2d at 210—trying their luck in federal court, and saving certification as a fallback strategy.

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[6] Ordinarily, certification should be sought in the district court, *see City of Columbus*, 693 F.3d at 654, but New York's certification rule does not provide for certification by district courts, *see* N.Y. Comp. Codes R. & Regs. tit. 22, § 500.27(a).

2. Even if Argentina had timely proposed certification below, its request that this Court itself certify a state-law issue is deliberately designed to evade the deferential standard of review for certification rulings. Argentina does not ask this Court to review the Second Circuit's refusal to certify a question, but instead to certify a question in the first instance. Pet. ii, 19. That is no accident. Whether to certify a question "rests in the sound discretion of the federal court." *Lehman Bros.*, 416 U.S. at 391. A decision not to certify a question thus is reviewed only for *abuse* of that discretion. *See*, *e.g.*, *City of Columbus*, 693 F.3d at 654; *Anderson* v. *Hess Corp.*, 649 F.3d 891, 895 (8th Cir. 2011); *Thompson*, 547 F.3d at 1059; *U.S. Steel Corp.* v. *M. DeMatteo Constr. Co.*, 315 F.3d 43, 53-54 (1st Cir. 2002).

By asking this Court *itself* to certify a question, Argentina aims to sidestep that deferential standard. It should not be allowed to end-run the deference due to lower courts' assessment of the necessity *vel non* of state-court guidance.

3. Argentina's sole authority (Pet. 19-20) for asking the Court to certify a question at this late stage, *Cline* v. *Oklahoma Coalition for Reproductive Justice*, 133 S. Ct. 2887 (2013), only illustrates why certification here is inappropriate. In *Cline*, the Oklahoma Supreme Court declared a state statute "facially unconstitutional." 292 P.3d 27 (Okla. 2012) (per curiam). But its three-paragraph decision contained no discussion of the state statute's scope, leaving the law's meaning on critical points unclear, *id.* at 27-28, and prompting a dispute in the certiorari-stage briefing concerning the state law's interpretation, *see* Br. in Opp. 10-13, No. 12-1094 (May 28, 2013); Reply Br. 1-6, No. 12-1094 (June 3, 2013). Rather than resolve

the facial validity of a state law without definitive guidance as to its meaning, this Court certified two questions concerning the statute's interpretation to the state court. 133 S. Ct. at 2887.

Certification in *Cline* furthered certification's purposes in ways that it plainly would not here. *Cline arose* in state court, and thus did not involve a party's attempt to relitigate an issue in state court already decided by a federal court; certification saved the federal courts from expending any resources resolving the merits. *See* 134 S. Ct. 550 (2013) (dismissing writ as improvidently granted). In contrast, two federal courts have already considered Argentina's issues. Moreover, inviting Oklahoma's highest court to clarify the state law's scope showed respect for state courts' authority to interpret state laws, enabling them to avoid a collision with the federal Constitution. Here, certification if anything does the opposite. New York contract law is not about to be invalidated; this case concerns the interpretation of a single contract. And it hardly shows respect to a sovereign State to solicit its views when the party seeking certification has proclaimed that it *will not obey* an adverse ruling. *Supra* at 11.

B. In any event, certification here is entirely unnecessary. Certification is not "obligatory" whenever "there is doubt as to local law," *Lehman Bros.*, 416 U.S. at 390-91—much less whenever a party merely *claims* state law is unclear. Instead, the Court's "settled and firm policy" is to "defe[r] to regional courts of appeals in matters that involve the construction of state law." *Bowen* v. *Massachusetts*, 487 U.S. 879, 908 (1988). The Court will accept the relevant circuit's interpretation of state law unless it is "unreasonable," *Propper* v. *Clark*, 337 U.S. 472, 486-

87 (1949), "even if [*de novo*] examination of the state-law issue … might have justified a different conclusion," *Bishop* v. *Wood*, 426 U.S. 341, 346 (1976). Argentina fails to show why the Court should abandon that "settled and firm policy" here.

Certification, in fact, would be pointless because the question Argentina proposes is academic. It asks the Court to certify the question whether Argentina is "in breach of" a generic "*pari passu* clause," rather than the specific terms of the Equal-Treatment Provision. Pet. ii. But, as the Second Circuit explained, "even under *Argentina's* interpretation," Argentina's "course of conduct"—including, *inter alia*, enactment of the Lock Law barring Argentina from making any payment to respondents—breached its obligations. Pet. App. 52 (emphasis added). Argentina does not deny that the Lock Law violated the Equal-Treatment Provision, claiming instead that the Lock Law's "repeal" erased this breach. Pet. 19, 22. But that "repeal" is illusory. As Argentina concedes, the Lock Law has merely been temporarily "suspended," *id.* at 22, to allow Argentina to implement its latest dimes-on-the-dollar bond exchange. And the suspension's terms still prohibit Argentina from making any payments on the Agreement Bonds. Pet. App. 205; *see id.* at 89-90.[7]

Argentina thus is left to argue that the decision below will affect *other* cases, and will jeopardize New York's primacy in global financial markets. That as-

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[7] Argentina also suggests that such breach via the Lock Law could not justify the remedy of compelling ratable payments. Pet. 22. But the scope of the remedy lies beyond Argentina's proposed question. *Id.* at ii.

sertion is baseless. Argentina's claim (like its proposed question) assumes that all so-called "*pari passu*" provisions are fungible. Pet. 20-22. The decision below refutes that assertion. As the Second Circuit made clear, there is no "boilerplate" *pari passu* clause, Pet. App. 47, and the meaning of the myriad variants is "neither well settled nor uniformly acted upon." *Id.* at 49. Argentina's own authorities below recognize a diversity of views regarding the meaning of such clauses in sovereign-debt contracts. *See* J.A. A-1882-83. The Second Circuit's analysis thus rested on a careful parsing of the "particular language" at issue here, and on Argentina's specific course of conduct repudiating its obligations. Pet. App. 27; *see id.* at 49-53. Based on that analysis, the Second Circuit "ha[d] little difficulty concluding that Argentina breached" the Equal-Treatment Provision. *Id.* at 53.

That conclusion is entirely correct, and, contrary to Argentina's claim (at 17), consistent with the interpretations adopted by *every* court that has decided the issue.[8] In any event, the court's ruling did not announce any across-the-board rule for all *pari passu* clauses. The Second Circuit stressed that its ruling "*does not control* the interpretation of all *pari passu*

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[8] *See Red Mountain Fin., Inc.* v. *Democratic Republic of Congo*, No. 00-0164 (C.D. Cal. May 29, 2001) (J.A. A-1369-72); *Elliott Assocs. L.P.* v. *Banco de la Nacion*, General Docket No. 2000/QR/92 (Court of Appeals of Brussels 8th Chamber Sept. 26, 2000) (J.A. A-1357-60); *LNC Invs. LLC* v. *Republic of Nicaragua*, Folio 2000 No. 1061, R.K. 240/03 (Commercial Ct. of Brussels Sept. 11, 2003) (J.A. A-1334-53). *Kensington International Ltd.* v. *Republic of the Congo*, 2002 No. 1088 [2003] EWHC 2331 (Comm) (Commercial Ct. Apr. 16, 2003) (U.K.), which Argentina cites, did not interpret an equal-treatment provision, and denied relief based on other equitable factors.

clauses or the obligations of other sovereign debt instruments." Pet. App. 25-26 (emphasis added). The court reserved judgment, moreover, on the issue Argentina and the United States deemed most significant: whether preferential payments *simpliciter* would breach the Equal-Treatment Provision, absent other indicia of subordination. *Id.* at 61 n.16.

Even if lower courts misinterpret the Second Circuit's ruling as sweeping more broadly, state courts can correct that error. The New York Court of Appeals still has final say on New York law. *See*, *e.g.*, *United States* v. *Old Dominion Boat Club*, 630 F.3d 1039, 1043 (D.C. Cir. 2011); *Jaworowski* v. *Ciasulli*, 490 F.3d 331, 332 n.1 (3d Cir. 2007). If the state-law issue Argentina raises were as important and recurring as it claims, state courts could address it in due course.

II. THE SECOND CIRCUIT'S HOLDING THAT THE INJUNCTION IS NOT A PROHIBITED ATTACHMENT, ARREST, OR EXECUTION IMPLICATES NO CIRCUIT CONFLICT AND CORRECTLY APPLIED SETTLED LAW.

The lone *federal* issue Argentina presents—whether the Injunction violates the FSIA's bar on the "attachment," "arrest," or "execution" of "property in the United States of a foreign state," 28 U.S.C. § 1609; *id.* §§ 1610-1611; *see* Pet. ii, 22-31—does not satisfy any of this Court's certiorari criteria. Argentina does not allege any lower-court conflict. It seeks only factbound error correction, but there is no error to correct.

A. Unlike in its prior petition, Pet. for Cert. 19-28, No. 12-1494, Argentina now abandons any pretense of a lower-court conflict concerning the FSIA.

It cites no case that even purportedly held a comparable injunction invalid under the FSIA. Pet. 22-31. And the cases from other circuits Argentina does cite stand only for abstract principles with which the Second Circuit *agrees*.

The petition cites several cases for the proposition that Congress intended to allow suits against foreign sovereigns but to withhold a court-enforced remedy under certain circumstances. Pet. 23-24. But the Second Circuit *accepts* that premise. *See Walters* v. *Indus. & Commercial Bank of China, Ltd.*, 651 F.3d 280, 289 (2d Cir. 2011) ("the asymmetry between jurisdiction and execution immunity in the FSIA reflects a deliberate congressional choice to create a 'right without a remedy'").

Argentina also cites two unpublished cases holding that federal courts cannot grant an attachment, arrest, or execution that the FSIA forbids simply by styling the order as an injunction. Pet. 26-27. As Argentina concedes, however, the Second Circuit accepts that principle as well, and reiterated it *in this case*. *Id.* at 26; Pet. App. 58.

The Second Circuit thus already agrees with other courts on the general principles Argentina invokes. Those principles, moreover, merely beg rather than answer the critical question here: whether the Injunction *is* an attachment, arrest, or execution of immune property forbidden by the FSIA.

B. Argentina's petition thus seeks review of a purported "misapplication of a properly stated rule of law," which does not warrant review. Sup. Ct. R. 10. In any event, the Second Circuit's factbound ruling that the Injunction complies with the FSIA is correct.

1. Section 1606 of the FSIA provides that a "foreign state" that waives its immunity "shall be liable in the same manner and to the same extent as a private individual under like circumstances," with exceptions not applicable here. 28 U.S.C. § 1606; *see id.* § 1605(a)(1). Because Argentina undisputedly waived its immunity from suit, it is liable no less than any other litigant for breaching its contractual commitments, and its liability is judicially enforceable—by injunction if necessary—except as specifically provided in the FSIA. The legislative history confirms that, in appropriate circumstances, courts may "order an injunction or specific performance" against a foreign state unless an exception in the FSIA applies. H.R. Rep. No. 94-1487, at 22 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6621.

Here, the district court found, and the Second Circuit agreed, that Argentina's ongoing breach of the Equal-Treatment Provision could appropriately be remedied by an injunction requiring Argentina to fulfill its contractual commitment to rank its payment obligations to respondents equally with those under the Exchange Bonds. Pet. App. 56-57, 59-62, 89-91. The only question under the FSIA, therefore, is whether any other FSIA provision prohibits such an injunction. None does.

As the Second Circuit correctly concluded, the Injunction does not transgress the FSIA's prohibition on "'attachment,'" "'arrest,'" and "'execution'" of "'property in the United States of a foreign state.'" 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." *Ibid.* An "'attachment'" involves the "'seizing of a person's property to secure a judgment or to be sold

in satisfaction of a judgment.'" *Id.* at 57 n.13 (quoting *Black's Law Dictionary* 123 (9th ed. 2009) ("*Black's*"). An "arrest" is "'[a] seizure or forcible restraint.'" *Ibid.* (quoting *Black's* 124). And "[e]xecution" is "an act of dominion over specific property by an authorized officer of the court," usually in the form of "seizing and selling the judgment debtor's property." *Ibid.* (citation omitted).

None of those terms accurately describes the Injunction. As the Second Circuit explained, the Injunction involves no "seizure" of Argentina's property. Pet. App. 57. It does not "transfer any dominion or control over sovereign property to the court" or "limit the other uses to which Argentina may put its fiscal reserves," and does not even "require Argentina to pay any bondholder any amount of money." *Id.* at 58. And it "can be complied with without the court's ever exercising dominion over sovereign property." *Ibid*. The Injunction is instead an *in personam* decree, requiring Argentina to rank its payment obligations under respondents' Agreement Bonds at least equally with its obligations under the Exchange Bonds. *Ibid*. It thus simply "command[s] [Argentina] to take certain actions and prohibit[s] it from taking others"—"the classic modus operandi of injunctive relief." *Charlesbank Equity Fund II* v. *Blinds to Go, Inc.*, 370 F.3d 151, 157 (1st Cir. 2004).

2. Argentina's attempts to show that the Injunction nevertheless constitutes a prohibited "attachment," "arrest," or "execution" of immune property (28 U.S.C. § 1609) are unavailing.

a. Argentina first contends that the Injunction amounts to an attachment because it "target[s]" specific immune property: Argentina's foreign-currency reserves. Pet. 24. But the Injunction does no such

thing. As the Second Circuit explained, if Argentina chooses to comply by paying on both the Exchange Bonds and the Agreement Bonds, it may do so "with whatever resources it likes." Pet. App. 11. The Second Circuit mentioned Argentina's reserves only because the immense volume of those reserves—which constitute only a fraction of its ample resources—demonstrates that Argentina can afford to honor its obligations. *Id.* at 60; *see also infra* at 30-31.

Argentina curiously attacks this flexibility that the Injunction affords to Argentina, claiming that "the FSIA's immunity scheme … is property-specific." Pet. 27. But the fact that the *prohibitions* against attachments apply to certain types of property, *see* 28 U.S.C. §§ 1609-1611, is hardly a reason why a sovereign cannot choose to use those assets to satisfy a judgment or comply with an injunction. The leeway that the Injunction provides, allowing Argentina to choose which assets to deploy to comply (if it even chooses to pay its debts), makes the Injunction *less* intrusive into Argentina's affairs and *less* offensive to its sovereign dignity.

In any event, Argentina's purportedly "targeted" property is not immune. Section 1609's prohibition on attachment, arrest, or execution applies only to "property *in the United States* of a foreign state." 28 U.S.C. § 1609 (emphasis added). By its terms, Section 1609 has no application to property *outside* the United States. That Argentina's reserves "are locat-

ed abroad" (Pet. 24) thus *removes* them from Section 1609's protection.[9]

b. Argentina alternatively argues that the Injunction is close enough to an attachment, arrest, or execution because it is just as "offensive" to Argentina and "achieve[s] the same result" as those remedies. Pet. 27, 29-30. These claims, too, are incorrect.

The Injunction is much *less* offensive to foreign states than an attachment, arrest, or execution. Unlike those remedies—by which a court seizes or asserts control over property to satisfy an obligation—the Injunction leaves Argentina free to decide whether to pay its creditors, and if so, with what assets. More fundamentally, the offense Argentina takes at the Injunction is immaterial. The FSIA forbids attachments, arrests, and executions of immune property, not any *other* action that is self-servingly deemed inconvenient by a foreign state—much less a state that has unequivocally waived its immunity. The legislative history confirms that Congress contemplated injunctions against other nations, foreclosing any claim that the FSIA forbids them. *See* H.R. Rep. No. 94-1487, at 21-22.

Nor is the Injunction's *effect* equivalent to an attachment. Pet. 29-30. Allowing Argentina to choose whether to honor its obligations and with what resources looks nothing like an order seizing specific assets. Moreover, the choice Argentina faces is en-

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[9] Argentina also suggests that its reserves are immune under Section 1611, which establishes special provisions for central-bank property. Pet. 4-5, 17, 24. But Argentina did not argue below that those special provisions bar the Injunction, and the Second Circuit never addressed that issue.

tirely of its own making. It voluntarily promised to "rank" its obligations on the Agreement Bonds "at least equally" with obligations on subsequently issued debt.

Contrary to Argentina's claim (at 28-29), *Louisiana* v. *Jumel*, 107 U.S. 711 (1883), refutes rather than reinforces its argument. In *Jumel*, creditors sought an order requiring Louisiana to pay its debts, even though the State had not waived its immunity to jurisdiction. In holding that such relief was unavailable, the Court contrasted that case with one where "a state submits itself … to the jurisdiction of a court." *Id.* at 728. In *that* event, *Jumel* explained, "jurisdiction may be used to give full effect to what the state has by its act of submission allowed to be done." *Ibid.* That is precisely the circumstance here: Argentina expressly waived its immunity to federal jurisdiction; federal courts, accordingly, are fully empowered to issue an injunction against it.

3. Argentina briefly claims that the Injunction contravenes general equitable principles, and it assails the "lower courts' analysis of the injunction factors." Pet. 25. These even more factbound attacks have no bearing on the question presented and, in any case, are meritless.

Argentina first suggests that the Injunction lies beyond traditional injunctive relief because it "'compels the payment of money past due under a contract.'" Pet. 25 (quoting *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U.S. 204, 210-11 (2002)). That is both wrong and irrelevant. The Injunction does *not* require Argentina to pay "money past due" on the Agreement Bonds; that is the subject of respondents' separate money-damages claim, which has not been reduced to judgment. The Injunction

redresses Argentina's breach of its *independent* promise not to subordinate its obligations to respondents beneath other obligations. Courts regularly enforce such promises in equity—precisely because provisions allocating priority among creditors are relevant only if the debtor has insufficient recoverable assets to satisfy a money judgment. *See*, *e.g.*, *Safeco Ins. Co. of Am.* v. *Schwab*, 739 F.2d 431, 433 (9th Cir. 1984); 25 *Williston on Contracts* § 67:88 (4th ed. 2009-2010); *see also* Pet. App. 12.

In any event, whether the relief granted by the Injunction was "traditionally [a]vailable" at equity (Pet. 25) is beside the point. Unlike the statute addressed in *Great-West Life*, the FSIA does not confine remedies to those "typically available in equity." 534 U.S. at 210 (emphasis and citation omitted). It merely proscribes *particular* classes of remedies: attachments, arrests, and executions. Because the Injunction does not impose any of those remedies, it is not forbidden by the FSIA, under which sovereigns are "liable in the same manner and to the same extent as a private individual." 28 U.S.C. § 1606.

There is no more merit to Argentina's claim that, by holding legal remedies inadequate based on the unenforceability of a money judgment, the Second Circuit transformed the FSIA's central feature into a "defect" broadly justifying equitable relief. Pet. 25-26. The Second Circuit correctly concluded that "monetary damages are an ineffective remedy" *here* to redress Argentina's breach of the Equal-Treatment Provision because "Argentina will simply refuse to pay any judgments," and "has done so in this case by, in effect, closing the doors of its courts to judgment creditors." Pet. App. 56-57. It thus is Argentina's "persistent efforts to frustrate collec-

tion," not the FSIA alone, that make money damages meaningless here. Moreover, whatever the *reason* that collecting damages is not feasible, the *fact* that "they cannot be collected by judgment and execution" renders them "inadequate." *Id.* at 57 (quoting Restatement (Second) of Contracts § 360 cmt. d)).

Argentina's last-ditch claim that the Injunction raises "extraterritoriality concerns" because it affects Argentina's use of its assets abroad is a makeweight. Pet. 26. A federal court with personal jurisdiction over a defendant unquestionably "may command her to take action even outside the United States, and may back up any such command with sanctions." *Chafin* v. *Chafin*, 133 S. Ct. 1017, 1025 (2013); *see also* Pet. App. 17. Argentina has unequivocally consented to the district court's personal jurisdiction. And the only foreign nation whose "'internal affairs'" are affected by the Injunction (Pet. 26 (citation omitted)) is Argentina.

III. ARGENTINA'S SPECULATION AS TO THE INJUNCTION'S EFFECTS IS UNFOUNDED AND DOES NOT MERIT THIS COURT'S REVIEW.

Unable to show that the decision below implicates any lower-court conflict or clearly misapplied the FSIA, Argentina falls back on unsupported, self-serving forecasts of the Injunction's purportedly catastrophic consequences. As the court of appeals explained, however, Argentina's doomsday predictions are "speculative, hyperbolic, and almost entirely of the Republic's own making." Pet. App. 22.

A. Argentina first claims that the Injunction forces the Republic to violate its own "sovereign policies." Pet. 32; *see id.* at 1, 17. That is merely an attempt to clothe Argentina's disregard of its contractual commitments with sovereign dignity.

The "policies" to which Argentina refers are simply its decisions to repudiate its obligations to respondents, while electing to pay other creditors on time and in full—in direct contravention of the Equal-Treatment Provision. That Argentina would prefer not to honor its commitments hardly makes the dispute certworthy. *Every* foreign state haled into court and ordered to satisfy a legal duty it has breached would prefer not to comply. That does not mean every similarly factbound FSIA case merits review. To the contrary, as Congress recognized by entrusting district courts to hear cases against foreign states, *see* 28 U.S.C. § 1330, the lower courts are perfectly capable of deciding sovereign-immunity disputes in the first instance. Absent some exceptional circumstance, such as a circuit conflict, this Court's intervention is unwarranted.

B. Argentina asserts that the Injunction threatens a "renewed financial crisis" in the Republic and will cause massive losses to third parties. Pet. 32-33. This is baseless hyperbole. The district court invited Argentina to present evidence of hardships it would face if forced to honor all of its obligations. *See* Hr'g Tr. 32-33, No. 03-8845 (S.D.N.Y. Mar. 16, 2012) (Dkt. #453). But Argentina declined the invitation and offered nothing to substantiate its assertions.

Based on the evidence that *was* presented, the district court found that Argentina *can* afford to pay its obligations to respondents and Exchange Bondholders: "[T]he Republic has the financial wherewithal to meet its commitment of providing equal treatment to both NML (and similarly situated creditors) and those owed under the terms of the Exchange Bonds." Pet. App. 90. The Second Circuit affirmed this finding, noting that "nothing in the rec-

ord supports Argentina's blanket assertion that the Injunctions will plunge the Republic into a new financial and economic crisis," and that Argentina "certainly fail[ed] to demonstrate that the district court's finding to the contrary was clearly erroneous." *Id.* at 60; *see also id.* at 22-23.

Even now, Argentina offers nothing to refute the district court's finding. Nor could it. Argentina is a wealthy G-20 nation, with ample resources to honor its obligations. Indeed, it has continued to demonstrate its ability to pay obligations when it pleases, paying approximately $4.7 billion to Exchange Bondholders since October 2012 and reportedly offering billions of dollars in cash and new bonds to other creditors.[10]

For the same reasons, Argentina's allegation that it will be "pushed into default" on the Exchange Bonds (Pet. 18) by the Injunction is equally unfounded. The courts below found that Argentina *can* pay both those obligations and its debts to respondents. Pet. App. 22-23, 60, 90. And Argentina has repeatedly reiterated its commitment to paying its Exchange Bond debts; its President publicly promised to seek to evade the Injunction rather than default on the Exchange Bonds. *Supra* at 11. The specter that Ar-

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[10] *See*, *e.g.*, *Cristina Fernandez Wants France to Lobby Before the Paris Club*, MercoPress (Mar. 7, 2014) http://en.mercopress.com/2014/03/07/cristina-fernandez-wants-france-to-lobby-before-the-paris-club (offer to pay creditors $2 billion plus additional bonds); Ken Parks, *Argentina Reaches $677M Investment Dispute Settlement*, WSJ.com (Oct. 18, 2013), http://online.wsj.com/article/BT-CO-20131018-705467.html; Stanley Reed & Raphael Minder, *Repsol in $5 Billion Settlement with Argentina*, N.Y. Times (Feb. 26, 2014), at B2.

gentina might *choose* not to pay Exchange Bondholders is merely a "threa[t] to punish third parties," which cannot "dictate the availability or terms of [equitable] relief." Pet. App. 14.

Argentina's further conjecture that it could be forced to repay *other* creditors who declined to accept exchanges, "cut[ting] Argentina's reserves approximately in half," is unfounded and ultimately irrelevant. The Injunction implicates $1.33 billion in Agreement Bonds plus interest. Pet. App. 6. If other creditors request injunctions involving additional debt, or if Argentina's financial condition unexpectedly deteriorates, Argentina can present evidence regarding those facts to the district court, which can tailor relief as appropriate.

C. Argentina finally warns that the Injunction will undermine sovereign-debt restructurings. Pet. 33. But as the Second Circuit explained, "it is highly unlikely that in the future sovereigns will find themselves in Argentina's predicament." Pet. App. 61. For several reasons, the future significance of a decision interpreting the particular bond language at issue here is limited.

1. Argentina's argument assumes that other nations' creditors will forgo consensual restructuring agreements and count on securing injunctive relief similar to the Injunction here. That makes little sense given the narrow ruling below. And it ignores creditors' demonstrated willingness to restructure debts on fair terms through good-faith negotiations. Moreover, the prospect that holdout creditors might receive a better deal has not precluded other creditors' participation in restructurings. *See* Varela Br. in Opp. Part II.

Indeed, in the overwhelming majority of cases, holdout litigation will be closed to creditors. Sovereign bonds issued under New York law now "almost universally include collective action clauses … which permit a supermajority of bondholders to impose a restructuring on potential holdouts." Pet. App. 26. These clauses, not present in the Agreement, "effectively eliminate the possibility of 'holdout' litigation." *Id.* at 61. Such provisions have been included in more than 97% of sovereign bonds issued in New York since 2005—representing 99% of the aggregate value of bonds issued—"including Argentina's 2005 and 2010 Exchange Bonds." *Ibid.* Legacy bonds lacking collective-action provisions are vanishingly rare. Just in the two-plus years *since* the district court entered the original Injunction, nations from Belize to Greece have completed restructurings, relying on collective-action clauses and months of good-faith negotiations. *See* C.A. Dkt. #952, Ex. A., at 4, 12. And this approach succeeded, with 97% of investors participating in Greece's restructuring and 100% in Belize's. *Id.* at 9.

Argentina responds that collective-action clauses "'do not … eliminate holdouts in sovereign-debt restructuring,'" and that "the decisions below make it harder to obtain the needed supermajority in the first place" by giving creditors "incentives to hold out." Pet. 35 (citation omitted). But it cites not one nation that found it "harder to obtain the needed supermajority" to trigger a collective-action clause because of the decisions below. And even if holdouts purchase a sufficient percentage of bonds from a single series to prevent others from triggering a collective-action clause, *ibid.*, that would not preclude oth-

er creditors in that series from agreeing to restructure and "a restructuring failure on one series would still allow restructuring of the remainder of a sovereign's debt," Pet. App. 26. Greece's experience demonstrates that a restructuring can succeed even where "more than half of all foreign-law bonds … fail[] to get the needed votes" to trigger collective-action clauses. Pet. 35. Indeed, it also showed that creditors will voluntarily restructure even if holdouts are paid on schedule. C.A. Dkt. #952, Ex. A, at 10.

2. The Second Circuit, moreover, expressly limited its ruling to the "particular" terms of the Agreement. Pet. App. 25-26. The Equal-Treatment Provision's "particular language … dictated a certain result in this case." *Id.* at 27. The court's decision "does not control" the outcomes of other cases involving different provisions, *id.* at 25, and there is no reason to assume other courts will interpret the decision below as doing so. And, "going forward, sovereigns and lenders are free to devise various mechanisms to avoid holdout litigation if that is what they wish to do," including by "draft[ing] different *pari passu* clauses that support the goal of avoiding holdout creditors." *Id.* at 27. Indeed, Argentina *itself* has done so. The 2005 and 2010 Exchange Bonds make no promises regarding the rank of "payment obligations." *See* J.A. A-1197, A-1235.

3. Not only are the Agreement's terms increasingly uncommon, but Argentina's conduct breaching its obligations is also *sui generis*. The Second Circuit confined its decision to Argentina's "extraordinary behavior," including the unprecedented "combination of Argentina's executive declarations and legislative enactments" repudiating its obligations. Pet. App.

26, 52. Independent analysts agree that "Argentina was and remains unique in its unilateral and coercive approach to [its] debt restructuring." C.A. Dkt. #952, Ex. A, at 2. Indeed, in the only case of which respondents are aware in which a creditor invoked the Second Circuit's October 2012 ruling to seek a similar injunction, the debtor—Grenada—successfully argued that even though it had paid only creditors that had accepted its restructuring proposals, its behavior was distinguishable from Argentina's. *See* Grenada Mem. 15, *Exp.-Imp. Bank of China* v. *Grenada*, No. 13-1450 (S.D.N.Y. June 10, 2013) (Dkt. #41); *Exp.-Imp. Bank of China* v. *Grenada*, No. 13-1450, 2013 WL 4414875, at *4 (S.D.N.Y. Aug. 19, 2013) (Second Circuit "specifically left open the question of whether 'a breach would occur with any non-payment that is coupled with payment on other debt'" or "whether 'legislative enactment' alone could result in a breach." (citation omitted)).[11]

IV. THIS COURT SHOULD NOT GRANT REVIEW FOR A LITIGANT THAT HAS VOWED TO DEFY OR EVADE A FEDERAL-COURT INJUNCTION.

Argentina's open promise to defy federal-court orders erases any doubt that Argentina's petition should be denied. Litigants who flout courts' authority forfeit any right to "call upon [courts'] resources" to decide their claims. *Molinaro* v. *New Jersey*, 396

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[11] Argentina speculates that the Injunction "could 'impede the repayment of loans'" made by international financial institutions such as the International Monetary Fund (IMF). Pet. 34 (citation omitted). But, as Argentina concedes (*ibid.*), the Second Circuit expressly reserved judgment on that issue. Pet. App. 53.

U.S. 365, 366 (1970) (per curiam). Here, Argentina's highest officials "have publicly and repeatedly announced their intention to defy any rulings of this Court and the district court with which they disagree." Pet. App. 5 & n.4. Argentina informed the Second Circuit that it "'would not voluntarily obey' the district court's injunctions, *even if* those injunctions were upheld." *Id.* at 5 (emphasis added). And its President has since detailed a plan to evade the Injunction if it is not overturned. *See* Russo, *supra*. The Court should not reward Argentina's disrespect for judicial authority by granting it discretionary review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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May 7, 2014