No. 13-991

IN THE

Supreme Court of the United States

EXCHANGE BONDHOLDER GROUP,

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

REPLY BRIEF

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AMENDED LIST OF PARTIES[1]

The petitioner in this case is the Exchange Bondholder Group (the "EBG"),[2] whose membership is comprised of the following holders of Argentine sovereign debt instruments facing default as a result of the lower courts' rulings: Gramercy Argentina Opportunity Fund, Ltd.; Gramercy Emerging Markets Fund; Gramercy Distressed Opportunity Fund II, L.P.; Gramercy Local Currency Emerging Market Debt Master Fund; Gramercy Opportunity Fund – Special Opportunities II Offshore SP; Gramercy Opportunity Fund – Special Opportunities II SP; Gramercy Opportunity Fund – Special Opportunities SP; Gramercy U.S. Dollar Emerging Market Debt Master Fund; AllianceBernstein L.P. on behalf of ACMBernstein – Global High Yield Portfolio; iShares Emerging Markets High Yield Bond Fund; iShares J.P. Morgan USD Emerging Markets Bond Fund; BGF Emerging Markets Bond Fund.

The Republic of Argentina (defendant-appellant below) has also submitted a petition separately, and is being served as a respondent. Fintech Advisory, Inc. (non-

1. This Amended List of Parties amends the EBG's List of Parties at page ii of its Amended Petition filed March 20, 2014.

2. As of May 27, 2014, the EBG members filing this Reply hold, in the aggregate, hundreds of millions of dollars in Exchange Bonds at face value. This statement amends and updates the statement at page 3 of the EBG's Amended Petition (filed March 20, 2014) which stated that the EBG members were owed over $1 billion on outstanding Exchange Bonds. The EBG's statements that the Exchange Bondholders as a group are owed over $24 billion on outstanding Exchange Bonds remain correct to the best of the EBG's knowledge and information.

party appellant below), which has submitted a respondent brief in support of both the EBG's and the Republic of Argentina's petitions, is being served as a respondent. The Euro Bondholders group (intervenor below), which has submitted a respondent brief in support of the Republic of Argentina's petition, is being served as a respondent. The Euro Bondholders group consists of Knighthead Capital Management, LLC; Redwood Capital Management, LLC; and Perry Capital, LLC.

The remaining respondents are (i) NML Capital, Ltd.; Aurelius Capital Master, Ltd.; Blue Angel Capital I LLC; Aurelius Opportunities Fund II, LLC; Pablo Alberto Varela; Lila Ines Burgueno; Mirta Susana Dieguez; Maria Evangelina Carballo; Leandro Daniel Pomilio; Susana Aquerreta; Maria Elena Corral; Teresa Munoz de Corral; Norma Elsa Lavorato; Carmen Irma Lavorato; Cesar Ruben Vazquez; Norma Haydee Gines; Marta Azucena Vazquez; and Olifant Fund, Ltd. (plaintiffs-appellees below) (collectively, "Respondents"); (ii) The Bank of New York Mellon, as Indenture Trustee (non-party appellant below); and (iii) Ice Canyon LLC (intervenor below). Unless otherwise noted, "Respondents" herein refers only to plaintiffs-appellees.

AMENDED CORPORATE DISCLOSURE STATEMENT[1]

None of the members of the EBG are nongovernmental corporations.

Gramercy Argentina Opportunity Fund, Ltd. is a Cayman Islands exempted company. It is not publicly traded and no publicly traded corporation owns 10% or more of its stock.

Gramercy Emerging Markets Fund is a Cayman Islands exempted company. It is not publicly traded and no publicly traded corporation owns 10% or more of its stock.

Gramercy Distressed Opportunity Fund II, L.P. is a Cayman Islands limited partnership. It is not a corporation.

Gramercy Local Currency Emerging Market Debt Master Fund is a Cayman Islands exempted company. It is not publicly traded and no publicly traded corporation owns 10% or more of its stock.

Gramercy Opportunity Fund – Special Opportunities II Offshore SP is a Cayman Islands exempted company. It is not publicly traded and no publicly traded corporation owns 10% or more of its stock.

Gramercy Opportunity Fund – Special Opportunities II SP is a Cayman Islands exempted company. It is not

1. This Amended Corporate Disclosure Statements amends the EBG's Corporate Disclosure Statement at page iv of its Amended Petition filed March 20, 2014.

publicly traded and no publicly traded corporation owns 10% or more of its stock.

Gramercy Opportunity Fund – Special Opportunities SP is a Cayman Islands exempted company. It is not publicly traded and no publicly traded corporation owns 10% or more of its stock.

Gramercy U.S. Dollar Emerging Market Debt Master Fund is a Cayman Islands exempted company. It is not publicly traded and no publicly traded corporation owns 10% or more of its stock.

AllianceBernstein L.P. is a limited partnership organized and existing under the laws of the State of Delaware. AllianceBernstein L.P. joins in this petition on behalf of ACMBernstein – Global High Yield Portfolio, which is a *fond commun de placement* ("FCP") created under the laws of Luxembourg. Neither AllianceBernstein L.P. nor ACMBernstein – Global High Yield Portfolio are corporations.

iShares Emerging Markets High Yield Bond Fund is an investment fund and is not a corporation.

iShares J.P. Morgan USD Emerging Markets Bond Fund is an investment fund and is not a corporation

BGF Emerging Markets Bond Fund is an investment fund and is not a corporation.

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The Exchange Bondholder Group's ("EBG") petition demonstrated that the Second Circuit's decision violated clear limitations on federal courts' equitable powers – as articulated by this Court in *Grupo Mexicano* and *Great-West* – by sanctioning injunctions purporting to prevent the Republic of Argentina (the "Republic") from paying lawful debts owed to Exchange Bondholders in order to compel the Republic to make past-due cash payments to Respondents (the "Injunctions"). The Injunctions flout the fundamental constitutional precept proscribing governmental action that encumbers the property of one citizen for the *private* benefit of another. The EBG also demonstrated that the court of appeals abdicated its obligation to consider the harm that the Injunctions must inevitably cause to innocent third-party Exchange Bondholders in attempting to confer that private benefit.

The court of appeals' extreme departure from this Court's precedent and the accepted and usual course of judicial proceedings on important questions of federal law raises compelling questions warranting review. Also worthy of review is the Second Circuit's decision that Petitioners lack appellate standing, despite the indisputable harm Petitioners have suffered and continue to face from the Injunctions. That ruling conflicts with other courts of appeals' decisions concerning nonparty appellate standing, requiring guidance and clarification from this Court.

Respondents articulate no sound basis for denying review. Instead, they largely ignore the legal authorities Petitioners cite, and offer little more than semantic assurances that the Exchange Bondholders are not "bound" by the Injunctions (despite Respondents' implicit

threats of enforcement against Petitioners) and claim that the palpable injuries Petitioners have sustained were caused not by the Injunctions, but rather by the Republic's *response to them*. Similarly, Respondents' blithe assertion that the EBG should sue the Republic when the Injunctions inevitably trigger a multi-billion dollar default is utterly untenable in light of Respondents' own tortured history of failed efforts to collect judgments from the Republic. The EBG respectfully submits that the Court should grant its petition.

A. The Decision Below Improperly Expands Equitable Jurisdiction in an Extreme Departure from Proper Judicial Authority.

Respondents erroneously contend (Br. in Opp. (May 7, 2014) ("Opp.") at 15-16) that the EBG did not contest the district court's equitable power to enter the Injunctions (*see* EBG Motion to Vacate Br., S.D.N.Y. No. 08-CV-6978 (TPG), Dkt. No. 401, at 6-7, 10-11; EBG Br., 2d Cir. No. 12-105, Dkt. No. 642, at 20-23), but ultimately concede that the Republic raised the issue (Opp. at 16 n.7). *See also* Arg. App.-12; Arg. Br., 2d Cir. No. 12-105, Dkt No. 657 at 24-25; Bank of New York Mellon Br., 2d Cir. 12-105, Dkt. No. 637 at 37-40. Regardless, the question of the lower court's equitable authority pertains to subject matter jurisdiction, *see Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204, 220-21, 224 (2002), and therefore cannot be waived; indeed, it can be raised by the Court *sua sponte*. *Id.*; *Gonzalez v. Thaler*, 132 S. Ct. 641, 648 (2012).

Respondents' only further response to the EBG's analysis of *Great-West* and *Grupo Mexicano de Desarollo*

S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308 (1999), is to cite a thirty-year-old opinion of the Ninth Circuit and a treatise excerpt dealing with specific enforcement of indemnity contracts. Opp. at 16 (*citing Safeco Ins. Co. of Am. v. Schwab*, 739 F.2d 431, 433 (9th Cir. 1984); 25 *Williston on Contracts* § 67:88 (4th ed.)). Both citations are inapposite, because neither addresses orders directing payment of past-due monetary obligations. In any event, this Court's decisions, which flatly prohibit the Injunctions, are controlling.

Respondents' attempt to distinguish *Great-West* in its opposition to the Republic's petition (on the grounds that this case does not involve past-due payments (*see* Br. in Opp. of NML Capital, Ltd. ("NML"), No. 13-990 (May 7, 2014) ("Opp. Arg.") at 28-29), is equally unavailing. The amounts owed to Respondents have been "past-due" since the Republic's default in 2001. The Second Circuit, while ignoring this Court's controlling authority in *Great-West* and *Grupo Mexicano*, so noted at least four times.[1]

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1. Appendix to Pet. for Cert. of Republic of Argentina, No. 13-990 (Arg. at 1), App.-6 (finding that when the Republic defaulted on the FAA Bonds in 2001, the "unpaid interest and principal [] bec[a]me due in full"); Arg. App.-8 (Injunctions' "ratable payment" formula requires the Republic to "pay plaintiffs the same percentage of what is then due on the FAA Bonds."); Arg. App.-9 ("if Argentina pays Exchange Bondholders 100% . . . it must also pay plaintiffs 100% of the roughly $1.33 billion of principal and accrued interest that they are currently due."); Arg. App-13 ("the amount currently owed to plaintiffs by Argentina as a result of its persistent defaults is the accelerated principal plus interest. . . . the first creditor is differently situated from other creditors in terms of what is currently due to it under its contract").

The EBG established in its petition that the Second Circuit erred in concluding that it need not consider the harmful effects of the Injunctions on the non-party Exchange Bondholders because the Republic's threat of disobedience, not the Injunctions, was the true source of any injury. EBG Pet. at 22-24, 29 n.2. Respondents fail to address this argument and the supporting case law on the merits, instead simply repeating that the Republic is ultimately responsible for any injury. Opp. at 16-17. This is semantics. But for the Injunctions, the Exchange Bondholders would not be at the mercy of a choice by the Republic between two inevitable outcomes: (1) default, or (2) seizure of their property by judicial edict. *See* EBG Pet. at 12-15. Indeed, the district court deliberately crafted the Injunctions to create this Hobson's choice for the Republic and thereby leverage the Exchange Bondholders' property rights against the Republic's sovereign or "Foreign Sovereign Immunities Act" immunity. *See* 2d Cir. App. A-2290, A-2333 (2/23/12 Hearing Tr. T32:1-2, T44:13-19). But the salient point is that, without the Injunctions, there is no harm or potential harm to the Exchange Bondholders; therefore, as a matter of law, the lower courts were duty-bound to consider the third-party injury caused by the Injunctions. They failed to do so.[2]

Respondents repeatedly note that the Republic warned that litigation could interfere with Exchange Bond payments. Opp. at 3, 8, 17, 19. But this begs the

2. Respondents' effort to salvage the lower court's reliance on the precedentially-irrelevant *Reynolds* case fails. *See* EBG Pet. at 23-24. Respondents cite no authority for their purported legal principle that nonparties can be deprived of their property rights by courts attempting to coerce recalcitrant parties to pay ordinary private contract debts or judgments. *See* 2d Cir. App. A-2296-97, A-2321 (2/23/12 Hearing Tr., T7:2-6, T7:24-8:5, T32:1-2).

ultimate question of the legality of the Injunctions under Federal law, given that the "warning" fell far short of advising Exchange Bondholders that they faced a realistic prospect of having their property effectively seized by unprecedented and unlawful injunctions.[3]

B. The Decision Below Sanctions an Impermissible Taking of Nonparties' Private Property for the Private Benefit of Civil Litigants.

Like the Second Circuit, Respondents avoid grappling with the weighty Fifth Amendment issues (and the relevant legal authority) simply by asserting that the Injunctions have no effect on the EBG. Opp. at 13-14, 18. But in fact the Injunctions judicially engraft otherwise non-existent conditions on the Exchange Bondholders' rights that will inevitably lead to loss of property, and they do so with the express purpose of helping Respondents collect a private judgment. *See* EBG Pet. at 12-15. Respondents cite no legal support for such an order.

The district court's "finding" (which was based solely on the Republic's silence) that the Republic has sufficient

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3. Respondents' irrelevant statements suggesting that the Exchange Bondholders were responsible for the Lock Law (Opp. at 5, 17) are not supported by the record. The document cited by Respondents merely states that the Lock Law was the Republic's response to concerns expressed by creditors that holdouts might secure more advantageous treatment. *See* 2d Cir. App.-850. Respondents' statements also contradict Respondent NML's claim that the Republic passed the Lock Law in 2005 in an effort to pressure bondholders to accept the 2005 Exchange Offer (Opp. Arg. at 6), and Respondents' statement that EBG member Gramercy declined the 2005 Offer (Opp. at 4).

funds to pay both Respondents and the Exchange Bondholders is counter-factual, belied by the record, and disputed by the Republic. *See* EBG Pet. at 14 n.14; Arg. Pet. at 11, 32. Respondents' further assurance that the EBG retains its right to sue the Republic when it defaults is meaningless in light of the Republic's history of refusing to pay judgments. *See* EBG Pet. at 29 n.22.

The *Omnia*, *Huntleigh*, and *Parrish* decisions Respondents cite (*see* Opp. at 19) are readily distinguishable. All three cases involved impairment of private property rights that was incidental to legitimate governmental exercise of regulatory powers for ***public*** benefit. The Injunctions, in contrast, involve exercise of judicial power for the ***private*** benefit of one group of ***private*** citizens at the expense of another.

Respondents claim that this Court's acceptance of the EBG's Fifth Amendment arguments would "overturn decades of precedent" and "re-constitutionalize a right of contract." Opp. at 19. To the contrary, it would reinforce one of the bedrock principles of our Republic – that the government cannot encumber the private property rights of its citizens for the benefit of other private citizens. *See* EBG Pet. at 26-27.[4]

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4. Respondents' invocation of the Tucker Act (Opp. at 19) is meritless. The Tucker Act pertains to "just compensation" for takings for a public purpose. "Just compensation" is not the issue here; rather, the Injunctions' taking of the EBG's private property for private use is absolutely forbidden, whether or not "just compensation" is paid. The Tucker Act does not apply to such claims. *See Rumber v. Dist. of Columbia*, 487 F.3d 941, 944 (D.C. Cir. 2007); *see also United States v. Tohono O'Odham Nation*, 131 S. Ct. 1723, 1729 (2011).

C. Respondents Offer No Sound Basis for Denying the Petition on Standing Grounds.

The discussion above establishes that, contrary to the Second Circuit's cursory footnote discussion, the Injunctions have had, and continue to threaten, a direct and substantial adverse impact on the EBG sufficient to confer standing. *See Heckler v. Mathews*, 465 U.S. 728, 738 (1984) (to establish standing, appellant must show "actual *or threatened* injury.") (internal quotations omitted) (emphasis added); *ASARCO Inc. v. Kadish*, 490 U.S. 605, 618 (1989) (finding appellate standing where petitioners faced immediate threat to continuing validity of mineral leases granted under procedures ruled improper by state court); *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 581 (1985) ("If the injury is certainly impending, that is enough.") (internal quotations omitted).[5]

If this Court finds standing, it can review the merits of the EBG's petition, notwithstanding that the lower courts denied party status to the EBG. *See Bryant v. Yellen*, 447 U.S. 352, 366-68 (1980) (nonparties at district court level had appellate standing). *See also, e.g.,* EBG Pet. at 30-32 (citing cases); *Samnorwood Ind. Sch. Dist. v. Tex. Educ. Agency*, 533 F.3d 258, 264-66 (5th Cir. 2008) (nonparties had appellate standing where their "actions [we]re collaterally constrained" by order); *Pediatric Specialty Care, Inc. v. Ark. Dep't of Human Servs.*, 364 F.3d 925, 932-33 (8th Cir. 2004) (nonparty "directly and adversely affect[ed] by the injunction" had appellate

5. The direct impact of the Injunctions on the EBG readily distinguishes the authorities cited on page 9 of Respondents' opposition.

standing despite not intervening below); *S.E.C. v. Basic Energy & Affiliated Resources, Inc.*, 273 F.3d 657, 665 (6th Cir. 2001) (nonparty investors had appellate standing due to financial stake in court's order); *E.E.O.C. v. Pan Am. World Airways, Inc.*, 897 F.2d 1499, 1504 (9th Cir. 1990) (nonparties with stake in outcome had appellate standing) ("it would be a cruel irony to bar an appeal from an order denying permission to participate in litigation for the very reason that the would-be appellants did not participate below").

Unlike the petitioner in the *Izumi* case cited by Respondents (Opp. at 10-11), the EBG's petition raises standing as a separate "question presented." *See Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 34 (1993) (per curiam); EBG Pet. at i. Thus, the Court can consider the merits of the EBG's appeal. *See, e.g., Bryant*, 447 U.S. at 368 (considering merits after finding standing).

Here, standing is tightly bound to the merits of the petition, which addresses whether the Injunctions injure or imminently threaten to injure the EBG. *See* EBG Pet. at 21-25, 31. Consequently, the Court's consideration of the merits will necessarily and simultaneously resolve the standing question; this case "is in the class of those where standing and the merits are inextricably intertwined." *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 243 (1983) (internal quotations omitted).

Respondents' assertion that the Second Circuit's decision was "highly factbound" (Opp. at 2, 9, 11-12, 15) is erroneous. Petitioners seek this Court's review of important *legal* issues, which can be accomplished without

resolving any disputed issues of fact. For example, the EBG has a purely legal challenge to the Second Circuit's ruling that the EBG cannot challenge the Injunctions because it is a creditor. *See* Arg. App.-8-9. The EBG does not dispute that it is a creditor; rather, it disputes the Second Circuit's legal conclusion that, as a matter of law, creditors cannot be affected by injunctions restricting payments owed to them. EBG Pet. at 30-31. Tellingly, Respondents fail to provide a single example of a factual dispute that the Court would need to decide to address the merits of the EBG's petition.

In addressing the circuit split arising from the Second Circuit's standing ruling, Respondents ignore the *Kirschenbaum* case and fail to distinguish *Yielding, Holy Land*, and *Piper Funds*. *See* EBG Pet. at 30-32; Opp. at 12-13. This case *does* involve "specific asset[s] belonging to EBG," Opp. at 12 (namely, the specific Exchange Bonds owned by the EBG and encumbered by the Injunctions), and the Injunctions place concrete "limitations on EBG's right to sue Argentina," *id*. *See* Pet. at 29 n.22.

Respondents' assertion that the issues of non-party standing do not warrant this Court's attention (Opp. at 11-14) is belied by leading commentary. *See* Wright & Miller, 15A *Fed'l Practice & Procedure*, § 3902.1 (2d ed.) ("these cases clearly establish that nonparties can achieve standing to appeal by a variety of methods in a variety of circumstances . . . There is not yet enough experience to suggest clear rules that can be applied easily in all circumstances.").

Respondents do not deny that they would seek to hold EBG members in contempt for violating the Injunctions if

petitioners sought to receive payments on the Exchange Bonds absent payment to Respondents. *See* Opp. at 13. Respondents thereby effectively concede that they view the EBG as being bound by the Injunctions, and thus their efforts to distinguish the *Devlin* and *Abortion Rights Mobilization* cases fail. *See* Opp. at 14. Moreover, Respondents have served Exchange Bondholders with subpoenas and obtained court orders requiring disclosure of all information concerning any effort by the Republic to pay the Exchange Bondholders without paying Respondents. *See, e.g.,* S.D.N.Y. No. 08-CV-06978(TPG), Dkt. No. 446-1 (subpoena to Exchange Bondholder Fintech Advisory, Inc.); Dkt. No. 487 (Order [enforcing subpoena]). Such discovery is plainly designed by Respondents to police the Exchange Bondholders' conduct as entities "bound" by the Injunctions.

At a minimum, Respondents acknowledge by their silence their position that the EBG faces a choice between complying with the Injunctions by refusing any Exchange Bond payments the Republic may tender, and risking contempt of Court. Respondents ignore the *Ferdinand Marcos* case, which holds that non-parties confronting that very quandary do in fact have standing. *See* EBG Pet. at 31.

Respectfully submitted,

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