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 THE VARELA RESPONDENTS

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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 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

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, and Marta Azucena Vazquez are not corporations.

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STATEMENT

This case is about a rogue sovereign debtor whose "uniquely recalcitrant" behavior has injured investors and threatens all future sovereign restructurings. Argentina came to the United States, waived its sovereign immunities, and promised that it would not discriminate against one set of payment obligations under its bonds in favor of another. Yet here we are. Argentina ignored international norms for sovereign-debt restructurings that call for good-faith negotiations between a sovereign debtor and its creditors, presented creditors with a paltry restructuring offer, and said "take it or leave it." Argentina then delivered on its threats never to negotiate with or pay creditors who rejected the offer, while continually paying those who bowed to its ultimatum. The nation codified these threats in the infamous Lock

[1] "Respondents" alone collectively refers to all plaintiff-respondents to Argentina's petition: NML Capital, Ltd., the Aurelius entities, Olifant Fund, Ltd., and the Varela Respondents.

Law, on which the Argentine courts have relied to refuse to recognize these creditors' valid claims. The courts below properly recognized that this conduct breached the terms of Argentina's bond contracts, and that the only way to remedy Argentina's breach was through specific performance.

The Varela Respondents, as Argentine citizens, are painfully familiar with their country's behavior. They are among the respondents whose claims for specific performance were vindicated in the lower courts. They are middle-class investors who bought their country's bonds in relatively small amounts (between $25,000 and $90,000) for their retirement and general savings, and did so before the bonds went into default in late December 2001. For them, this lawsuit is not about reaping any "windfall." It simply seeks to hold Argentina to its contractual promises.

The reasons for denying Argentina's petition are readily apparent, as the briefs in opposition submitted by other respondents demonstrate. The Varela Respondents will not restate those points in this brief.

Instead, the Varela Respondents submit this brief to address several distinct contentions made by Argentina and its *amici*.

First is Argentina's shameful effort to pitch this litigation as a struggle between a sovereign nation and a so-called "vulture fund." This *ad hominem* attack is utterly irrelevant, as Argentina's bond covenants apply to all bondholders. It is also grossly inaccurate, especially as applied to the Varela Respondents. They are individual Argentine citizens who purchased relatively small lots of bonds, and did

so *before* Argentina defaulted in 2001. In other words, the decision below gives relief not only to what Argentina self-servingly calls "vulture funds," but also to aggrieved individuals.

The second erroneous contention—and most crucial from a public policy perspective—is the notion that the decision below will harm sovereign debt restructurings by encouraging creditors to embrace a "holdout" strategy of spurning restructuring offers in search of a higher payout. Putting aside the fact that 99% of New York law sovereign bonds have Collective Action Clauses designed to compel all holders to accept the terms of an offer when the offer is acceptable to a certain threshold number of holders, this argument ignores three important facts about sovereign restructurings: that there have always been holdout creditors, that sovereigns have found ways to resolve the claims of holdout creditors, and that all creditors of sovereigns know that there has always been a significant chance that the sovereign debtor would give holdout creditors a different or better deal. These facts are widely known and have not impeded other sovereign debt restructurings, before or after Argentina's. The decision below introduced no new incentives into the world of sovereign debt restructuring and should pose no obstacle to any sovereign that negotiates in good faith with its creditors. Indeed, if the decision below is overturned, it would create a powerful new incentive for sovereign debtors to emulate Argentina's coercive behavior and threaten the future of voluntary sovereign debt restructurings.

Third, contrary to the protests of Argentina and its *amici*, the disputed Injunction does not infringe on Argentina's sovereignty. Argentina waived its

sovereign immunities and consented to be sued in U.S. courts. That Argentina now regrets this decision is no reason not to hold Argentina to the terms of its contract.

Finally, as the Second Circuit explained, the Injunction enjoins only Argentina. This fact alone defeats the third parties' due process contentions. These entities are "bound" only in the sense that the Federal Rules of Civil Procedure prohibit anyone from knowingly assisting an injunction's target to violate that same injunction.

Argentina's petition should be denied.

1. Argentina historically has had difficulty living up to its financial obligations. *EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 466 n.2 (2d Cir. 2007) (cataloguing Argentina's "diplomacy of default" through at least five actual or threatened defaults). After it emerged from another round of debt restructuring in 1992, Argentina again sought to borrow money in debt markets around the world. As one might expect, this was not an easy sales pitch.

But Argentina again assured investors that this time was different. In its 1994 Fiscal Agency Agreement governing the bonds in this case ("FAA Bonds"), Argentina purported to bind its hands against future mischief by providing that New York law would govern the interpretation of the FAA Bonds, that any disputes would be litigated in New York courts, and that its sovereign immunity would prevent neither a suit nor a subsequent attempt to collect on any judgment. Pet. App. 38. Each of these procedural protections aimed to assure investors that Argentina could not manipulate its legal system to avoid the consequences of a future default.

Argentina also offered a further substantive protection to investors, the Equal Treatment Provision: Argentina promised that its "payment obligations … under the [FAA Bonds] shall at all times rank at least equally with all its other present and future unsecured and unsubordinated External Indebtedness." Pet. App. 32. This promise—made *in addition to* its promise to repay principal and interest—assured investors that Argentina would not discriminate against payment obligations under the FAA Bonds in favor of another set.

Investors of all stripes purchased FAA Bonds, among them the 13 Varela Respondents, who purchased their FAA Bonds as early as December 1998 and before Argentina's 2001 default. Pet. App. 31; *see also* C.A. Joint App. ("J.A.") A-3416, 3425, 3434, 3447, 3457, 3470.[2]

2. Argentina defaulted on the FAA Bonds in late December 2001. Pet. App. 33. Then, after making no payments for more than two years, Argentina began to prepare for a debt exchange. Argentina promised the International Monetary Fund ("IMF")—which at the time was lending Argentina significant sums—that it would "engage in constructive negotiations with all representative creditor groups" before launching an exchange offer. Argentina—Letter of Intent and Addendum to the Technical Memorandum of Understanding, IMF (Mar. 10, 2004) ("Letter of Intent"), http://www.imf.org/external/np/loi/2004/arg/02/index.htm. It promised, in other words, to fol-

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[2] One of the Varela Respondents purchased FAA Bonds in 2003, but did so only to replace Argentine-law bonds that had been acquired prior to the default.

low international norms, endorsed by the G-20 and the IMF, regarding sovereign debt restructurings, which entail "regular dialogue," "creditor committee[s]," and "timely good faith negotiations." *See* Inst. of Int'l Fin., *Principles for Stable Capital Flows and Fair Debt Restructuring in Emerging Markets* 11-14 (2005); IMF, *Fund Policy on Lending Into Arrears to Private Creditors—Further Consideration of the Good Faith Criterion* 8-9 (2002) ("IMF Lending Into Arrears"), http://www.imf.org/external/pubs/ft/privcred/073002.pdf.

But Argentina broke that promise, too. Brazenly eschewing constructive dialogue with its creditors and reneging on its commitment to the international community, Argentina presented a "non-negotiated" and non-negotiable offer to FAA Bondholders in 2005. IMF, *Sovereign Debt Restructuring—Recent Developments & Implications For The Fund's Legal & Policy Framework* 36 (Apr. 26, 2013) ("2013 IMF Report"), https://www.imf.org/external/np/pp/eng/2013/042613.pdf. It "offered" to exchange defaulted FAA bonds for "Exchange Bonds," which were worth roughly one-quarter as much as the FAA Bonds but which Argentina would actually pay. Pet. App. 33-34. To convince FAA Bondholders to accept this low-ball offer, Argentina vowed not to pay one penny—*ever*—to any FAA Bondholder who did not participate in the exchange. *Id.* at 34 (The Government "has no intention of resuming payment on any bonds eligible to participate.").

The country backed up those threats with legislation, passing Law 26,017—the Lock Law—which prohibited the Argentine government from settling with FAA Bondholders who did not enter the Exchange. Pet. App. 34-35. Despite these threats, only

76% of FAA Bondholders accepted Argentina's offer, a historically low figure. *See id.* at 35; Elana Duggar, *The Role of Holdout Creditors and CACs in Sovereign Debt Restructurings* 9 Ex.8, Moody's Investors Serv. (Apr. 10, 2013) (C.A. Dkt. #950, Ex. A); Udaibir Das *et al.*, *Sovereign Debt Restructurings 1950–2010: Concepts, Literature Survey, and Stylized Fact* 24-25 tbl.4 (IMF Working Paper 12/203 2012), http://www.imf.org/external/pubs/ft/wp/2012/wp12203.pdf.[3]

Argentina repeated this effort in 2010, offering to exchange FAA bonds on even more unfavorable terms despite dramatically improved economic conditions in Argentina, again vowing never to pay non-participating FAA Bondholders, and passing a law, Law 26,547, that again prohibited the Argentine government from honoring its obligations to bondholders who did not participate. Pet. App. 35-36. Despite having received no payments for nearly a decade, more than 30 percent of the remaining FAA Bondholders rejected the 2010 exchange. The total

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[3] Even the 76% figure likely overstates the level of voluntary participation, as "almost all Argentine domestic investors" accepted the 2005 exchange offer, meaning that nearly half of non-Argentine entities declined the offer. *See* Embassy of Argentina, Q&A, Assessing Argentina's first debt restructuring offer: Not a bad deal after all (last accessed May 2, 2014) ("[A]lmost all Argentine domestic investors (99 percent) accepted the deal."), http://embassyofargentina.us/embassyofargentina.us/email/120725 debtrestructuring.htm; J.F. Hornbeck, Cong. Research Serv., *Argentina's Sovereign Debt Restructuring* 3 (Oct. 19, 2004) (noting that 47% of Argentina's $81 billion in defaulted FAA Bonds was held by Argentines and implying that only $23 billion of the $43 billion in FAA Bonds held by non-Argentines entered the 2005 exchange).

participation in the 2005 and 2010 exchanges was 93 percent. *Ibid.*; Duggar, *supra*, at 9 Ex.8.

Argentina has made regular payments on the Exchange Bonds, on time and in full, since they were issued. But, in furtherance of its "sovereign policies," Pet. 32, it has not paid a cent to, or attempted to negotiate with, FAA Bondholders who did not participate in the exchange offers. Pet. App. 37.

3. The Varela Respondents were among the FAA Bondholders who rejected Argentina's offers and, in 2011, sued Argentina for payment and for breach of the Equal Treatment Provision. J.A. A-3495. During hearings before the district court, Argentina declined to present evidence that it could not afford to honor its obligations, despite the district court's explicit invitation that it do so. J.A. A-2321 ("I would very much appreciate a balance sheet, a current balance sheet of Argentina."). After concluding that Argentina breached the Provision in December 2011, Pet. App. 70-75, on February 23, 2012, the district court issued the Injunction in the various respondents' actions, ordering Argentina to abide by its commitment not to discriminate against respondents' bonds, *id.* at 94-99.

Argentina appealed, and the Second Circuit affirmed the bulk of the district court's judgment. Pet. App. 30. Specifically, it concluded that Argentina has the financial wherewithal to honor its obligations. *Id.* at 60. The court remanded and the district court amended the Injunction to identify which third parties would likely be acting in "active concert or participation" with Argentina if it violated the In-

junction. *Id.* at 147-154.[4] Argentina again appealed, and the Second Circuit again affirmed—this time completely. *Id.* at 2. The court stayed the Injunction pending this Court's resolution of Argentina's petition. Pet. App. 28.

REASONS FOR DENYING THE PETITION

I. THE INJUNCTION IS AN APPROPRIATE REMEDY FOR ALL INVESTORS

Argentina and its *amici* argue at length that the Injunction is inequitable or otherwise inappropriate because respondents are "vulture funds." Pet. 8; Jubilee Br. 1; France Br. 5. Such characterizations are unhelpful to this Court and legally irrelevant, as the Equal Treatment Provision protects each and every FAA Bondholder "regardless of whether it was a university endowment, a so-called 'vulture fund,' or a widow or an orphan." Pet. App. 3.

In any event, the Varela Respondents are not investment funds, "vulture" or otherwise. They are individual Argentine citizens who purchased relatively small amounts of FAA Bonds. J.A. A-3416, 3425, 3434, 3447, 3457, 3470. Many purchased their FAA Bonds years before Argentina's 2001 default. *Ibid.*; Pet. App. 31. Argentina thus presents no reason why the Injunction is inequitable or inappropriate as applied to them.

To the extent that a bondholder's identity is relevant to equity, the Injunction is a particularly equitable remedy for the Varela Respondents because, absent such relief, the Varela Respondents would be

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[4] Such clarification was necessary given Argentina's historical disregard of court orders.

left without any effective remedy whatsoever, let alone an "adequate remedy." *See* Pet. App. 12. Argentina has, with the assistance of expensive and sophisticated counsel, spirited assets out of the United States to attempt to evade attachment. *See The Government Is Protecting Itself From Attachment*, La Nacion (Feb. 5, 2004).[5] At the end of the day, it is easier for a sovereign to hide its assets than it is for a creditor to find them. And chasing Argentina around the globe is prohibitively expensive for individual bondholders like the Varela Respondents.

That is why individual investors seek antidiscriminatory contractual provisions like the Equal Treatment Provision. As even Argentina's ally, Joseph Stiglitz, recognizes, antidiscrimination provisions "make[] good economic sense: For financial markets to function, participants must have some assurance that one set of bondholders will not be ranked above or below another." Stiglitz Br. 5. Argentina would have this Court disregard these assurances as empty words. But this Court has long held that written contracts ought to be enforced. *Moulor v. Am. Life Ins. Co.*, 111 U.S. 335, 340-41, 4 S. Ct. 466, 469 (1884) (Where a contract is valid, "the duty of the court is to enforce it according to its terms"); *see also Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 150 (2009) ("[I]t is black-letter law that the terms of an unambiguous private contract must be enforced ….").[6] If Argentina didn't really intend to

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[5] *See also* Br. for Respondent at 11, *Republic of Argentina v. NML Capital Ltd.*, No. 12-842 (U.S. Mar. 26, 2014).

[6] *See also* Br. of Competitive Enterprise Institute & Former State Department Officials as Amici Curiae in Support of Re-

maintain the equal "rank" of its "payment obligations" under the FAA Bonds—even under its own understanding of the Equal Treatment Provision—it should never have promised to do so.

In a last gasp, Argentina and others contend that the Injunction would provide an inequitable "windfall" to respondents, presumably because some respondents purchased many of their FAA Bonds on the secondary market following Argentina's default at then-prevailing market prices. Pet. 1; Fintech Br. 10. This argument is wrong and in any event irrelevant. Purchasers in the secondary market have the same rights as those investors who purchased directly upon issuance—regardless of the bond's price. *See Elliott Assoc. L.P. v. Banco de la Nacion*, 194 F.3d 363, 380 (2d Cir. 1999) ("A well-developed market of secondary purchasers of defaulted sovereign debt would thereby be disrupted and perhaps destroyed even though its existence provides incentives for primary lenders to continue to lend to high-risk countries."). But even if post-default purchasers somehow received diminished legal rights, this proposition has no bearing as to the Varela Respondents, all but one of whom purchased their FAA Bonds *before* Argentina's 2001 default, as early as December 1998.[7]

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spondent at 33, *Republic of Argentina v. NML Capital Ltd.*, No. 12-842 (U.S. Mar. 30, 2014) ("Indeed, this is *the* core principle of international law; *pacta sunt servanda*.").

[7] Fintech, an Exchange Bondholder, purports also to be a pre-default creditor, Fintech Br. 1, presumably to make its participation in Argentina's exchanges appear altruistic. But Fintech's carefully worded declarations in the courts below

II. THE SECOND CIRCUIT'S DECISION WILL NOT HARM SOVEREIGN DEBT RESTRUCTURINGS

Argentina and its *amici* insist that the Injunction will "undermine the voluntary system of cooperative resolution of sovereign debt crises." Pet. 33; *see also* Stiglitz Br. 1; Brazil Br. 14; Mexico Br. 23-24; France Br. 15. The Second Circuit properly dismissed these points as "speculative, hyperbolic, and almost entirely of [Argentina's] own making." Pet. App. 22. Indeed, far from a broad pronouncement on the propriety of injunctions against sovereigns, the Second Circuit made clear that its finding of breach and the issuance of the Injunction was appropriate only in light of Argentina's specific, and uniquely egregious, misconduct: violating the norms of sovereign-debt restructuring, ignoring court orders, and refusing to honor its obligations despite its unquestioned ability to pay. Such a remedy might not be appropriate as applied to any other sovereign debtor that followed international norms, could not afford to pay its creditors, or complied with court orders. And even if this

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make clear that it purchased only a fraction its FAA Bonds prior to Argentina's default. C.A. Supp. App. ("Supp. App.") SPE-1161 ("Fintech was among the Republic's original bondholders. Fintech later purchased approximately $834 million face value of [FAA Bonds]."); SPE-1162 (suggesting that Fintech traded all of its FAA Bonds in the 2005 Exchange, and later exchanged additional FAA Bonds in the 2010 Exchange). Moreover, Fintech maintains substantial investments in the regulated Argentine telecommunications industry, which surely benefit from friendly relations with the Argentine government. *See* Daniele Lepido & Manuel Baigorri, *Martinez Buys Telecom Argentina Control for $960 Million*, Bloomberg (Nov. 14, 2013), http://www.bloomberg.com/news/2013-11-14/telecom-italia-agrees-to-sell-argentina-unit-for-960-million.html.

ruling could conceivably be applied outside of the context of Argentina, none of the horribles predicted by Argentina and its *amici* will come to pass.

1. The concerns raised by Argentina and its *amici* are premised on a fundamental misreading of the Second Circuit's decision. The decision does not stand for the sweeping proposition that, whenever a sovereign with an equal treatment provision in its bonds is about to pay one set of debts but not another, the unpaid creditor can race to the courthouse and receive an injunction prohibiting the sovereign from paying its other debts unless it also pays the unpaid creditor in full. It also does not, in the words of one *amicus*, automatically grant injunctions to "creditors who refuse to deal, no matter the consequences, no matter the efforts by the debtor to restructure that debt." Stiglitz Br. 5; *see also* France Br. 12-13; Brazil Br. 16-17.[8]

Rather, both aspects of the Second Circuit's decision—the finding that Argentina breached the Equal Treatment Provision and that equitable relief was an appropriate remedy—were inextricably interwoven with Argentina's pervasive, decade-long and entirely unique misconduct.

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[8] Professor Stiglitz's brief neglects to mention that he is currently employed by Argentina as an expert witness in an arbitration before the International Center for Settlement of Investment Disputes. *See* Claimants' Document Requests for Phase 2, at 54, 55, 59, 60, 73, 74, *Abaclat & Others v. Argentine Republic*, ICSID Case No. ARB/07/5 (Jan. 25, 2013) (referring to "expert Stiglitz"), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC3153_En&caseId=C95.

First, the Second Circuit's breach analysis was based on Argentina's unabashed repudiation of its obligations to FAA Bondholders. The court did not establish any across-the-board standard categorically addressing how a sovereign debtor might breach any equal treatment provision. Pet. App. 61 n.16. The court instead concluded that "[t]he particular language of the FAA's [Equal Treatment Provision] dictated a certain result in this case." Pet. App. 27. The court then held only that Argentina's particular "course of conduct"—its unprecedented "executive declarations" that it would never honor its obligations under the FAA Bonds and "legislative enactments," including the Lock Law—breached the Provision; indeed, the court concluded that Argentina had breached the Provision even under Argentina's own interpretation of it. Pet. App. 52-53, 61 n.16. Moreover, the court explicitly declined to hold that "a breach would occur with any nonpayment that is coupled with payment on other debt" or that a "'legislative enactment' alone could result in a breach." Pet. App. 61 n.16.

Indeed, the one other court that has ruled on an alleged breach of an equal treatment provision—the district court in *Export-Import Bank of the Republic of China v. Grenada*, No. 13-cv-1450, 2013 WL 4414875 (S.D.N.Y. Aug. 19, 2013)—recognized the narrow scope of the Second Circuit's decision. That court explained that Grenada's payment of one set of bonds, coupled with a statement that it would not pay the plaintiff's debt "'unless resources become available,'" "fail[ed] to establish Grenada's liability under [the decision below]." *Id.* at *4. To the contrary, the court ordered the parties to proceed to discovery "so that a factual record may be developed" regarding Grenada's alleged breach. *Id.* at *1.

Second, even if the Second Circuit's breach analysis were as sweeping as Argentina contends, breach alone would not automatically entitle the creditor to an injunction similar to the Injunction issued below. This Court has made clear that "specific performance is never demandable as a matter of absolute right, but as one which rests entirely in judicial discretion." *Texas v. New Mexico*, 482 U.S. 124, 131, (1987). A court is *never* required to grant specific performance, or an injunction having a similar effect, "'if under all the circumstances it would be inequitable to do so.'" *Ibid.* (quoting *Wesley v. Eells*, 177 U.S. 370, 376 (1900)); *see also Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982) (an injunction "'is not a remedy which issues as of course'" (quoting *Harrisonville v. W. S. Dickey Clay Mfg. Co.*, 289 U.S. 334, 337-38 (1933))); *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944) ("The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility, rather than rigidity, has distinguished it.").

An injunction was clearly appropriate on the unique facts of this case. Argentina refused to negotiate with creditors prior to the 2005 and 2010 exchanges, demonstrating its "unique," "unilateral[,] and coercive approach to … debt restructuring," Duggar, *supra*, at 1, an approach that Argentina has maintained throughout this litigation, *see* Pet. App. 5 ("In sum, no productive proposals have been forthcoming."); *see also* 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) (explaining that Argentina did not "engage in constructive negotiations with all representative creditor groups"). Argentina has vowed

to disobey—or, as Argentina's attorneys put it, "not voluntarily obey"—any judicial order with which it disagrees, despite submitting to the jurisdiction of U.S. courts. *Ibid.* It has taken the highly unusual—indeed, unique—steps of telling investors that it has "no intention of resuming payment on any bonds eligible to participate" in an exchange offer, *id.* at 34, and then passing legislation prohibiting its government—and the Argentine judiciary—from recognizing its obligations under the FAA Bonds, *id.* at 52.[9] And, above all, Argentina has presented no good reason for refusing to pay, as Argentina unquestionably has the financial resources to do so. Pet. App. 23, 60.

The Injunction against Argentina thus plainly was warranted on these unprecedented facts. But that conclusion has no bearing on other nations that default on their debts. Unless another sovereign not only refuses to pay, but also follows the trail blazed by Argentina—and shows similarly defiant "disregard for its legal obligations" despite ample financial resources, Pet. App. 59—no other sovereign will ever face the prospect of a similar injunction without a full opportunity to distinguish its conduct from that of Argentina.[10]

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[9] In contrast, other nations that have informed investors that they would not pay nonexchanged debt have indicated that they would do so only because they lacked the resources to pay. *See, e.g.*, *Grenada*, 2013 WL 4414875, at *4 ("Grenada will not pay any non-tendered Eligible Claims unless resources become available to do so.").

[10] Mexico and Brazil recognize that the decision below turns on Argentina's conduct and financial position. In recent disclosures to the Securities & Exchange Commission, both countries explained to investors that they could not "predict" "how [the

2. Argentina and its friends argue that, if permitted to stand, the decision below "will have a chilling effect on … *voluntary and negotiated* debt restructurings." Pet. 33 (emphasis added); *see also* Brazil Br. 17; Mexico Br. 23-24; Stiglitz Br. 14; France Br. 14.[11] Their obsessive focus on the effect of non-participating creditors on sovereign restructurings is misplaced. The real peril to international norms comes not from Argentina's creditors or the fact-bound ruling below, but from any further adoption of Argentina's "unilateral and coercive" approach to restructuring.

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lower court's] judgment will be applied or implemented" with respect to their own similar equal treatment clauses. United Mexican States, Pricing Supplement, at PS-9 (Jan. 9, 2014), http://www.sec.gov/Archives/edgar/data/101368/000119312514008099/d657042d424b2.htm; Federative Republic of Brazil, Prospectus Supplement, at S-7 (Oct. 23, 2013) ("Brazil Prospectus"), http://www.sec.gov/Archives/edgar/data/205317/000119312513410549/d615647d424b5.htm.

[11] Though Argentina's Exchange Bondholders—non-parties Fintech and the Euro Bondholders—state forthrightly their financial stake in this litigation, the Republic of France presents itself as merely having "a substantial interest in issues surrounding international financial stability and global sovereign lending markets." France Br. 1. France fails to mention that, as a member of the Paris Club, *id.* at 2, it is one of Argentina's substantial creditors. Indeed, roughly concurrently with the filing of France's brief, Argentina offered to repay the $10 billion it owes to the Paris Club. Pablo Gonzalez & Camila Russo, "Argentina Bonds Rally After Paris Club Sets Date for Debt Talks," Bloomberg (Mar. 14, 2014), http://www.bloomberg.com/news/2014-03-1414/argentina-awaits-notice-from-paris-club-to-begin-formal-talks.html.

As Argentina recognizes, there is no statutory "bankruptcy regime" for sovereign debtors. Pet. 7. If sovereign debtors are unable to pay all their debts, they must rely on voluntary arrangements with their creditors. To facilitate this trust-intensive endeavor, the international community, including the G-20 and the IMF, recognizes that creditors and debtors must come together, negotiate in good faith, and "reach a collaborative agreement." *See* Brazil Br. 17; *see also* France Br. 14 ("Modern sovereign restructuring depends on coordination, close dialogue and fair negotiations among all creditors and the sovereign debtor."); Inst. of Int'l Fin., *supra*, at 11-14. Similarly, the IMF "advise[s] members seeking a debt restructuring to engage in a constructive dialogue with their creditors, so as to maximize … broad creditor support." IMF Lending Into Arrears, *supra*, at 8-9. That is because "the extent of litigation against sovereign debtors may largely depend on the actions of the sovereign debtors themselves." Legal Dep't, IMF, *Recent Developments in Sovereign Debt Litigation & Debt Relief Processes* 2 (Mar. 22, 2004).

International norms recognize that both creditors and sovereigns have incentives to cooperate. During restructuring negotiations, the sovereign wants to offer as little as possible, while attracting as many creditors as possible to minimize its total debt burden. In contrast, private creditors want the sovereign to offer as much as possible, provided that the sovereign's resulting debt burden is sustainable. Private creditors' potential recovery value is limited by a sovereign's ability to pay: if the sovereign offers to pay too much, it might soon default on these restructured obligations, and the parties would return to square one. *See* 2013 IMF Report, *supra*, at 23-24 (referring to "repeated restructurings" where initial

restructuring "do[es] not restore debt sustainability").

This voluntary process has been largely successful. Since 1997, Argentina's 2005 restructuring was one of only two that failed to attract support from at least 90% of the sovereign's creditors.[12] *See* Duggar, *supra*, at 8. Indeed, nearly three-quarters of restructurings since 1997 have received at least 95% participation, with the average restructuring concluding 18 months after the sovereign's default. *Id.* at 4, 8.

Argentina chose another path. Despite its promise to the IMF and its creditors that it would negotiate with its creditors[13] and entreaties from the United States,[14] it presented a take-it-or-leave-it offer far below what its then-recovered economy could afford

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[12] Only the restructuring of Dominica, a Caribbean nation of approximately 70,000 people, had a lower acceptance rate. *See* Das, *supra*, at 29 n.20. But, even with this lower participation rate, Dominica "paid all interest falling due into an escrow account" "as a sign of good faith" to these non-participating creditors. Duggar, *supra*, at 10.

[13] *See* Letter of Intent, *supra* ("We will deal constructively and transparently with creditors ...."); *ibid.* ("[I]t is our intention to discuss with creditors all aspects of the debt exchange offer ....").

[14] In a speech in April 2004, Under Secretary of the Treasury John Taylor explained the United States' position: "We have emphasized that debt negotiations between Argentina and its private creditors must be transparent and have the give-and-take needed to encourage creditors to participate in the debt exchange." *See* John B. Taylor, Address to Fitch's Latin American Conference (Apr. 27, 2004), http://www.treasury.gov/press-center/press-releases/Pages/js1476.aspx.

to pay.[15] As a result, nearly a quarter of Argentina's creditors chose not to participate in the 2005 Bond Exchange—an acceptance rate far below previous sovereign restructurings—even though Argentina's offer did not close until more than 40 months after it first defaulted. Duggar, *supra*, at 4, 9; Das *et al., supra*, at 24. Argentina then passed the Lock Law, an act constituting the "literal[] … repudiation of its legal obligations." *EM Ltd. v. Republic of Argentina*, 720 F. Supp. 2d 273, 279 (S.D.N.Y. 2010), *rev'd on other grounds*, 652 F.3d 172 (2d Cir. 2011). Through such arm-twisting—over the course of an additional five years—Argentina was finally able to bring creditor participation over 90% in its 2010 exchange. But that "achievement" likely had more to do with Argentina's decade of non-payment than any perception of fairness.[16] As third parties have recognized, "the case of Argentina was and remains unique in its unilateral and coercive approach to the debt restructuring." Duggar, *supra*, at 1.

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[15] *See* SPE-1352 (memorandum from current member of Exchange Bondholder Group, Gramercy, criticizing the 2005 exchange offer as "unilateral in nature," "not a result of good faith negotiations," and "not consistent with Argentina's capacity to pay").

[16] Indeed, the Argentine media has placed the 2010 exchange in an even more suspicious light. One outlet reports that Argentina opened the 2010 exchange only after Gramercy—the one-time holdout creditor that became the leader of the 2010 exchange offer and now a member of the Exchange Bondholder Group in this Court—provided Argentina's Vice President Amado Boudou with "illegal commissions." Marcelo Bonelli, *Boudou is Splattered By An Obscure Foreign Pact with a Fund*, Clarin (Oct. 18, 2013), *available at* http://rolfjkoch.blogspot.com/2013/10/boudou-is-splattered-by-obscure-foreign.html.

If this Court condones Argentina's behavior by disturbing the decision below, Argentina's "unilateral and coercive" approach to restructurings may soon become the norm. Argentina's *amici* explain that the current system of sovereign-debt restructuring is "complex and informed by decades of historical development" and "[t]his mechanism can be rendered ineffective by the slightest shift in incentives to participants." France Br. 15. Prior to Argentina's 2005 exchange—and, indeed, since then—nations have achieved substantial creditor participation through good-faith negotiations. *See, e.g.*, Inst. for Int'l. Fin., *Principles for Stable Capital Flows & Fair Debt Restructuring: Report on Implementation by the Principles Consultative Group* 11 (Oct. 2013) ("Principles Consultative Group") (discussing Belize's 2013 restructuring as model of success through good-faith negotiations). Indeed, many may have done so for fear of the consequences of not dealing in good faith with their creditors. But, if Argentina shows the world that a sovereign need not negotiate in good faith, sovereign debtors will face a "shift in incentives" away from negotiations, and towards outright repudiation.[17] *See* Arturo C. Porzecanski, *From*

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[17] Indeed, Belize recently came close to embracing the Argentine model, when it unilaterally suggested an onerous restructuring offer to its creditors in mid-2012. Adam Williams & Ye Xie, *Belize Rejecting Argentine Default Model Spurs Bond Rally*, Bloomberg (Jan. 14, 2013), http://www.bloomberg.com/news/2013-01-14/belize-rejecting-argentine-default-model-spurs-region-best-rally.html. Although Belize ultimately backed off the ledge when creditors balked at this offer, negotiated with its creditors, and successfully restructured 100% of its bonds, *ibid.*, who is to say that, under the Argentine precedent, a future sovereign would come to its senses.

Rogue Creditors to Rogue Debtors: Implications of Argentina's Default, 6 Chi. J. Int'l L. 311, 331 (2005) ("The case of Argentina suggests that much of the academic and policy making literature has ignored the realistic possibility that rogue sovereign debtors, rather than rogue private creditors, are the ones that pose the greatest threat to the integrity and efficiency of the international financial architecture.").

3. Argentina and its *amici* also contend that affirming the decision below will empower so-called "holdout" creditors to thwart future restructurings. Nonsense. This contention ignores the fact that there have *always* been creditors that choose not to participate in a sovereign's proposed restructuring, and there has *always* been a very good chance that those non-participating creditors would receive more favorable terms, or even would be paid on time and in full. It also ignores the simple truth that not every creditor can be a "holdout"—if all creditors choose not to participate in a restructuring, then nobody gets paid and all are worse off. The decision below thus did not introduce a new element that will impede restructurings. Indeed, the two restructurings since the district court issued its Injunctions—those of Greece and Belize—amply demonstrate that creditors are willing to accept a fair restructuring offer arrived at through good-faith negotiations.

a. According to the submissions by Argentina and its *amici*, non-participating creditors appear to be the scourge of the international financial community—thwarting restructurings at every turn. *See* Pet. 35; Brazil Br. 20-21; France Br. 2; Mexico Br. 4; Stiglitz Br. 6-7; Jubilee Br. 10-11. Argentina and its friends are mistaken.

First, Argentina's *amicus* Jubilee incorrectly asserts "[t]he presence of even a single holdout can deter otherwise cooperative creditors from agreeing to restructure a country's debt." Jubilee Br. 10-11. In nearly every one of the 34 sovereign-debt restructuring since 1997, there have been creditors who chose not to participate in the restructuring. Across these restructurings, the average creditor participation rate was 95%. Duggar, *supra*, at 8. In other words, the average *non-participation* rate was 5%. Indeed, only 7 of the 34 restructurings eventually achieved 100% participation. *Ibid.* Yet creditors apparently were not deterred from participating in the other 27 restructurings. This history thus refutes any notion that "a single holdout" could deter other creditors from participating in a restructuring.

Second, this history also belies Professor Stiglitz's contention that "no creditors would opt for partial payment at the beginning of the restructuring process when they can hold out for full payment at the end." Stiglitz Br. 7. Professor Stiglitz is apparently unaware that many sovereigns have paid non-participating creditors in full after voluntary restructurings. Indeed, at least four nations—Uruguay, the Dominican Republic, Greece, and Ecuador (in 1999)—paid non-participating creditors on time and in full. Duggar, *supra*, at 10 (Ecuador and Greece); Federico Sturzenegger & Jeromin Zettelmeyer, *Defaults & Lessons From A Decade of Crises* 158 (2007) (Uruguay); IMF, Marketing & Capital Markets Dep't, *A Survey of Experiences with Emerging Market Sovereign Debt Restructurings* 16 (June 5, 2012) (Dominican Republic). Thus, creditors contemplating whether to participate in a proposed restructuring have *always* had the option to "hold out

for full payment." Yet they participated, and in large numbers.[18]

b. Nor will the decision below increase creditors' desire not to participate in a restructuring.

First, as explained above, because there is no "absolute right" to equitable relief, creditors cannot guarantee that they will receive an injunction similar to the Injunction here, and courts might well not issue one without first finding serious misbehavior similar to Argentina's. *See supra* pp. 16-20. So to the extent that the decision below could increase creditors' incentives not to participate in a restructuring, it would do so only if the sovereign followed Argentina's recalcitrant path.

Second, for a variety of reasons, creditors may have different price thresholds for accepting a restructuring offer. For instance, many creditors lack the resources to support a prolonged holdout strategy. *See* Jill E. Fisch & Caroline M. Gentile, *Vultures or Vanguards?: The Role of Litigation in Sovereign Debt Restructuring* 53 Emory L.J. 1047, 1075-76 (listing the diverging investment strategies among mutual funds, hedge funds, retail investors, and institutional investors). Some institutions, by their own policies, cannot hold defaulted debts in their

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[18] Besides reflecting ignorance of or inattention to history, Professor Stiglitz's submission is flatly inconsistent with the rule of law. To hold out for full payment at the end is merely to make a sovereign honor the contract it freely entered into. In the absence of any sovereign bankruptcy scheme, Professor Stiglitz apparently would have courts make up *ad hoc* exceptions to contractual promises. Whether good or bad economic policy, that certainly is not law.

portfolios. As the litigation between Argentina and its creditors has shown, *see* Br. for Respondent at 13, *Republic of Argentina v. NML Capital Ltd.*, No. 12-842 (U.S. Mar. 26, 2014), litigating against a foreign government comes with numerous uncertainties and risk, *see* Pet. 1.[19] Moreover, prior to any hypothetical payoff, non-participating creditors would be forced to tie up their scarce capital in the sovereign debtor's defaulted debt, which, because of the limited market for such debt, would be difficult to resell. *See* Dimitri Vayanos, *Flight to Quality, Flight to Liquidity, and the Pricing of Risk* 2 (Nat'l Bureau of Econ. Research, Working Paper No. 10327, 2004) ("[O]ne cost of illiquidity is to make an asset riskier, and more sensitive to the [market's] volatility."), http://www.nber.org/papers/w10327.pdf; Fisch, *supra*, at 1077 ("Banks and other institutional investors record the values of their portfolios of sovereign bonds at market prices, often daily ...."). Put together—the cost of pursuing a sovereign and the capital tied up in difficult-to-sell bonds—the economic costs of not accepting a sovereign's initial offer can be a prohibitive burden. But then again, so can the costs of accepting a restructuring offer far beneath the sovereign's capacity to pay.

Third, even if the decision below somehow caused market participants to change their business models or risk profiles—the prerequisite to Argentina's "everyone will hold out" argument—the market would quickly relearn that not everyone can hold out. In its simplest terms, a "holdout" creditor stands to profit

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[19] Individual investors, such as the Varela Respondents, do not typically mark-to-market and accordingly their price point may be higher than other investors--this distinction is entirely known and accounted for in the sovereign debt market.

only if the sovereign is otherwise able to restructure the vast majority its debt, as that is the deal from which the creditor is "holding out" for better terms. If suddenly everyone in the market held out for a better deal, then there would be no deal, and everyone would lose. Sophisticated financial institutions already realize the self-defeating nature of this strategy, and the current equilibrium will remain stable or will quickly return.

c. Even if the decision below did increase a creditor's incentive to reject a restructuring offer, sovereigns can overcome collective-action concerns through well-tested, common sense practices without changing a word in their bond contracts, both of which Argentina ignored in its 2005 and 2010 exchanges.

First, working with creditor committees is one measure sovereigns have used "to conclude the debt restructurings fairly quickly." *See* Principles Consultative Group, *supra*, at 15 (describing recent experience of Grenada and Belize). Argentina, however, chose not to negotiate with the numerous creditor groups that formed following its 2001 default. *See* Das, *et al.*, *supra*, at 24 tbl.4; Porzecanski, *supra*, at 324 ("[T]he government failed to recognize—never mind negotiate with—such a committee ….").

Second, sovereigns can also increase participation unilaterally by requiring a high minimum-participation condition in their restructuring offers. Such conditions provide that a restructuring will not close unless a certain percentage of creditors participate, a condition that has "been used in most debt exchange offers since the mid-1990s," including Greece's 2012 restructuring. *See* Jeromin Zettelmeyer, *et al.*, *The Greek Debt Restructuring: An Autopsy*

12 (July 2013), http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5343&context=facultyscholarship. Argentina elected not to pursue this course, J.A. A-678 (2005 Prospectus), notwithstanding its promise to the IMF that it would do so, *see* Letter of Intent, *supra* (promising to include an "appropriate minimum participation threshold necessary for a broadly supported restructuring"). Had it done so—and coupled these conditions with good-faith negotiations—Argentina would have learned that "the presence of a minimum participation threshold alone may be enough to deal with the collective action problem" of dispersed bondholders. Ran Bi, *et al.*, *The Problem that Wasn't: Coordination Failures in Sovereign Debt Restructurings* 4 (Nov. 2011), http://www.imf.org/external/pubs/ft/wp/2011/wp11265.pdf.[20]

d. The recent restructurings of Greece and Belize—both of which closed *after* the district court first issued the Injunction in February 2012—demonstrate that the decision below will not harm restructurings. Greece conducted the largest restructuring in history in mid-2012, achieving 96.6% creditor participation. Although Argentina and its *amici* note that certain series of Greek bonds did not attract sufficient creditor participation to trigger the bonds' collective action clauses, Pet. 35; France Br. 23; Mexico Br. 27; Stiglitz Br. 11, that by no means suggests that the Greek restructuring was a failure. To the contrary—creditor participation was on par

[20] Moreover, newer bond issuances will benefit from collective action clauses, which were not present in the FAA Bonds. *See* Br. in Opposition for Aurelius Respondents.

with other successful restructurings. *See* Duggar, *supra*, at 8 ("The average creditor participation rate was 95%.").[21] And in the case of Belize, creditors did not withhold support out of fear that some creditors might not participate. To the contrary, Belize successfully used a collective action clause in its bonds to achieve 100% participation among its creditors. *Id.* at 9.

"Holdout" creditors were no barrier to either Greece or Belize, even after those creditors were aware of the Injunction here. If holdouts posed no threat in those cases, there is no reason to believe they should do so in future restructurings.

4. Two *amici* contend that the decision below will harm poor nations that cannot afford to service their obligations absent "debt relief" or restructuring. Jubilee Br. 1; Stiglitz Br. 4 ("Poor countries are typically at a huge disadvantage in bargaining with big multinational lenders."). They are mistaken. The Second Circuit explained that the Injunction was equitable because Argentina has the wherewithal to pay respondents and its other creditors. Pet. App. 23, 60. Argentina presented no evidence—none—that it lacked for resources. *Ibid.* Nor could it do so: it is a G-20 country with billions of dollars in liquid cash reserves, plenty of other assets, and the political

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[21] Greece's participation rate likely would have been even higher had it not offered a single restructuring package to all creditors, regardless of different terms among different series, which meant that bonds maturing sooner experienced a much larger haircut than bonds maturing later. *See* Zettelmeyer, *supra*, at 21.

will to expropriate property to its own benefit, be it an oil company[22] or a pension fund.[23]

Far from harming poor nations, the decision below ensures that they will be able to bargain with creditors for cheaper loans. *Amicus* France asks "why a rational sovereign debtor would willingly introduce *ex ante* a *pari passu* clause into its sovereign contracts if, as in the Court of Appeals' interpretation, it so significantly constrained the way it services its debt." France Br. 10. The answer is obvious: sovereign debtors bind themselves in exchange for more favorable borrowing terms. *See* Fisch, *supra*, at 1054 ("If creditors cannot protect themselves from opportunistic defaults, access to loans will be restricted and borrowing costs will be higher."). Perhaps that is why, in its recent debt issuance, Brazil again chose to issue debt governed by New York law and to maintain the same language in its version of the equal treatment provision. *See* Brazil Prospectus, *supra,* at S-3, 5.[24]

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[22] *See* Hugh Bronstein, *Argentina Nationalizes Oil Company YPF*, Reuters (May 4, 2012), http://www.reuters.com/article/2012/05/04/us-argentina-ypf-idUSBRE8421GV20120504.

[23] *See* Alexei Barrionuevo, *Argentina Nationalizes $30 Billion in Private Pensions*, N.Y. Times (Oct. 21, 2008), http://www.nytimes.com/2008/10/22/business/worldbusiness/22argentina.html?_r=0.

[24] Rather than change the text of its equal treatment provision or contractually prohibit creditors from seeking an injunction to enforce the provision, Brazil merely identified the possibility of an injunction as a "risk factor." Brazil Prospectus, *supra*, at S-7.

III. THE INJUNCTION DOES NOT INFRINGE ON ARGENTINA'S SOVEREIGNTY

With no meritorious contention that the Second Circuit committed any legal error—as made clear in the briefs in opposition filed by other respondents—or that the decision violates any public-policy concern, Argentina's only other contention is that the Injunction offends Argentina's "sovereign dignity." *See* Pet. 18; *see also* Brazil Br. 7.[25] Given that Argentina has told a federal court—to its face—that it will not "voluntarily obey" any order it dislikes, Pet. App. 5, the Varela Respondents question whether in this situation Argentina should be accorded any dignity, sovereign or otherwise.

In any event, Argentina waived its sovereign immunity and voluntarily submitted to the jurisdiction of the U.S. courts. Pet. App. 2, 59. And under the law to which Argentina consented, this meant that Argentina would be "liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606. In particular, like any other litigant, Argentina consented to the possibility of being subjected to an "injunction or specific performance" if such relief was "clearly appropriate." H.R. Rep. No. 94-1487, at 21-22 (1976).

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[25] Brazil's reliance on sovereign dignity is highly ironic, given the numerous press reports suggesting that Argentina purchased Brazil's support in this litigation by removing trade barriers for key Brazilian industries. *See* Rich Samp, *Is Argentina Paying for Amicus Briefs in Foreign Debt Case Before U.S. Supreme Court?*, Forbes (Mar. 19, 2014), http://www.forbes.com/sites/wlf/2014/03/19/is-argentina-paying-for-amicus-briefs-in-foreign-debt-case-before-u-s-supreme-court/ (linking to Brazilian news sources and English-language translations thereof).

If Argentina's sense of self-worth—its "sovereign dignity"—is so fragile that it cannot withstand consented-to adjudications, then perhaps Argentina should have borrowed money elsewhere.[26]

Indeed, Argentina's name-calling—this "vulture" nonsense—is a mere ploy to divert attention from one simple truth: Argentina stands apart in the community of nations as a "uniquely recalcitrant debtor." Pet. App. 26; *see also* Duggar, *supra*, at 1 ("[T]he case of Argentina was and remains unique in its unilateral and coercive approach to the debt restructuring."). *Amici* contest this point, arguing that "Argentina's recalcitrance is not meaningfully unique." Puente Br. 11.[27] But this is belied by independent voices. Moody's analysis of sovereign bond

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[26] It is for this reason that Brazil's threat to enforce its employment laws against the United States via an injunction has nothing to do with either "comity" or "reciprocity." *See* Brazil Br. 12-13. The Injunction here was appropriate only because Argentina specifically promised to "rank" its "payment obligations" under the FAA Bonds "at least equally" to its obligations under other debt. Brazil's hypothetical does not suggest that the United States has placed any similar covenant in its employment contracts in Brazil.

[27] Such assertions by Puente or the other Argentine *amicus*, Caja de Valores, should be taken with a grain of salt. Both entities would be Argentina's key accomplices in any scheme by Argentina to evade the Injunction by rerouting Exchange Bond payments through Argentina. *See* Camila Russo, *Argentina Plans New York-Buenos Aires Bond Swap*, Bloomberg (Aug. 27, 2013) (describing proposal by Argentina to "swap holders of New York-law bonds into debt governed by local legislation" that is "aimed at circumventing the U.S. court ruling"), http://www.bloomberg.com/news/2013-08-27/argentina-plans-new-york-buenos-aires-bond-swap-on-singer.html.

exchanges over the past decade and a half shows that "only one case—that of Argentina—resulted in persistent litigation." Duggar, *supra*, at 2.

IV. THE INJUNCTION DID NOT ENJOIN THIRD-PARTY PAYMENT INTERMEDIARIES

Third parties that process payments on some series of Exchange Bonds—Euroclear[28] and Caja de Valores—complain that they have been unfairly swept into this case and now find themselves enjoined from making payments on the Exchange Bonds, which will result in yet another parade of horribles. *See* Euroclear Br. 3-8; Caja Br. 1-2, 8-10; *see also* Fintech Br. 27-32. Euroclear and Caja are mistaken, as the Injunction enjoins *only* Argentina. Moreover, it will not be difficult for these institutions to withhold their assistance should Argentina attempt to violate the Injunction. The international payment system will not risk explosion -- indeed, it would not be materially affected.

1. At the outset, the issues raised by Euroclear and Caja—*amici* both in this Court and in the court below—are not properly before this Court. This Court's *certiorari* jurisdiction is limited to questions presented by a "party," 28 U.S.C. § 1254(1), and *ami-*

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[28] Euroclear suggests that it does not have financial arrangements with Argentina. *See* Euroclear Br. 2 ("Euroclear Ban does not act on behalf of securities issuers."). This statement is almost certainly misleading. Euroclear markets itself to securities issuers, like Argentina, purporting to "streamline [an] issuance," "increase investor loyalty," and "rais[e] market efficiency." *See* Euroclear, Effortless Yet Effective Securities Issuance, https://www.euroclear.com/en/services/issuing-securities.html (last visited Apr. 17, 2014). Surely Euroclear does not do these things gratis.

ci are not parties entitled to petition, *Auto Workers v. Scofield*, 382 U.S. 205, 209 (1965). Argentina's petition does not raise any issues with respect to these payment intermediaries. And the only payment intermediary below that had standing to challenge the Injunction—the Bank of New York Mellon, Pet. App. 9—has not petitioned for review of that issue. Thus, the question whether the Injunction may apply to payment intermediaries at all is not before this Court.

2. In any event, neither Euroclear nor Caja has been enjoined, rendering irrelevant Euroclear's due process argument. *See* Euroclear Br. 3-8. As the Second Circuit explained, "the district court has issued injunctions against no one except Argentina." Pet. App. 16. Their real complaint—which is not before this Court—is with the Federal Rules of Civil Procedure, which prohibit any person from working in "active concert or participation" with an enjoined party to violate an injunction, regardless of whether they are identified in the relevant injunction. Fed. R. Civ. P. 65(d)(2)(C). The portions of the Injunction that the payment participants complain about—¶¶ 2(e)-(f), Pet. App. 151-52—"simply provide notice to payment system participants that they *could* become liable through Rule 65 if they assist Argentina in violating the district court's orders." Pet. App. 16 (emphasis added). Of course, such notice does not constitute an "'adjudication of liability.'" *Id.* at 17 (quoting *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 180 (1973)). If these third parties elect to aid Argentina's violation of the Injunction, they will face no consequences until after "'a full opportunity at a hearing, after adequate notice, to present evidence.'" *Ibid.*

But Euroclear, Caja, and other third parties that might fall under Rule 65(d)'s umbrella need not risk a contempt hearing to discover whether they have obligations if Argentina attempts to violate the Injunction. As this Court has explained, district courts may provide parties with "clarification" of their duties under an injunction in light of "transactions [that] raise doubts as to the applicability of the injunction." *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 15 (1945). Indeed, the Injunction itself provides that "any non-party that has received proper notice of this ORDER … and that requires clarification as to its duties, if any, under this ORDER may make an application to this Court …. Such clarification will be promptly provided." Pet. App. 153. The district court here thus made sure that no third party would face an "unwitting contempt[]." *Regal Knitwear*, 324 U.S. at 15.

3. Even if Euroclear and Caja do have obligations under the Injunction, compliance would not be difficult, and certainly would not "disrupt international bond markets and payments systems." Caja Br. 8. The U.S. counterpart to Euroclear and Caja, the Depository Trust Company, explained to the district court that it could identify and stop payments on the Exchange Bonds if it were provided with the Bonds' identification number. Supp. App. SPE-1290-91. Those identification numbers are called a CUSIP number in the United States and an ISIN number in Europe. *See* ISIN, Broker Dealers ("This identifier, often in the form of an ISIN number code or a CUSIP number code, enables a prospective investor to type via a computer or trading terminal one's unique code and view the company's basic information."), http://isin.net/broker-dealers (last visited Apr. 25, 2014). The record shows that Argentina's Exchange

Bonds are associated with a particular ISIN number. *See* Supp. App. SPE-527, 529, 537. Thus, armed with the bond identification number, complying with the injunction could become "a largely ministerial, automated task." SPE-1291.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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