

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

NML Capital, Ltd., Aurelius Capital Master,
Ltd., ACP 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,
Olifant Fund, LTD.,

Plaintiffs-Appellees,

v.

The Republic of Argentina,

Defendant-Appellant,

The Bank of New York Mellon, as Indenture
Trustee,

Non-Party Appellant,

Exchange Bondholder Group, Fintech
Advisory Inc., Euro Bondholders,

Intervenors.

Dkt. No. 12-105(L)

**THE UNITED STATES OF AMERICA'S MEMORANDUM IN
SUPPORT OF ITS MOTION FOR LEAVE TO FILE A BRIEF AS
AMICUS CURIAE, IF AUTHORIZED BY THE SOLICITOR
GENERAL, IN SUPPORT OF THE REPUBLIC OF ARGENTINA'S
PETITION FOR PANEL REHEARING AND REHEARING EN
BANC**

Pursuant to Rules 27, 35, and 40 of the Federal Rules of Appellate Procedure and Local Rule 27.1, the United States of America, on behalf of the Department of the Treasury and the Department of State, hereby seeks leave to file a brief as *amicus curiae* in support of defendant-appellant Republic of Argentina's petition for panel rehearing and rehearing *en banc*. If leave is granted, and the Solicitor General authorizes the filing of an *amicus* brief, the United States proposes to file its brief no later than December 28, 2012. The United States respectfully requests that the Court not dispose of defendant-appellant's petition pending consideration of any brief filed by the United States.

1. In this motion, the United States seeks leave to file an *amicus* brief in support of the Republic of Argentina's petition for panel rehearing and rehearing *en banc* of the Court's October 26, 2012, decision (the "October 26 Decision") in the above-captioned appeal. The October 26 Decision affirmed the district court's ruling that Argentina violated the *pari passu* clause in its sovereign debt instrument. The October 26 Decision also affirmed the district court's order requiring the Republic of Argentina to make ratable payments to the plaintiffs

whenever it made payments to bondholders who held debt exchanged during Argentina's 2005 and 2010 exchange offers. Finally, in the October 26 Decision, the Court remanded the case to the district court for further proceedings regarding the amount of the payments that the Republic of Argentina would be ordered to make to the plaintiffs, and the extent to which third parties and intermediary banks would be subject to the district court's remedial order. The Court ordered that after the district court addressed the issues on remand, the mandate would automatically return to the same panel of the Court pursuant to *United States v. Jacobson*, 15 F.3d 19, 22 (2d Cir. 1994).

2. The United States, on behalf of the Department of the Treasury and the Department of State, filed a brief as *amicus curiae* in this appeal on April 4, 2012, in support of reversal of the district court's orders.

3. On November 13, 2012, the Republic of Argentina filed a petition for panel rehearing and rehearing *en banc*. In its petition, the Republic of Argentina argues, consistent with its earlier position, that the Court's interpretation of the *pari passu* clause was incorrect and also that the scope of relief ordered by the district court exceeds the permissible bounds of the Foreign Sovereign Immunities Act of 1976 ("FSIA"). The Court has not acted on the petition at this time.

4. On November 21, 2012, the district court issued an order in response to the Court's remand. The district court's November 21 order required the

Republic of Argentina to pay into escrow 100 percent of the amounts due on the defaulted bonds if it made a scheduled payment on the exchange bonds on December 15, 2012. The district court's November 21 order also clarified that the injunction applies to a broad range of third parties.

5. As directed by the October 26 Decision, the appeal automatically returned to the Court pursuant to *United States v. Jacobson*, 15 F.3d 19, 22 (2d Cir. 1994). On November 28, 2012, the Court issued an order reinstating the appeal and staying the district court's November 21, 2012, orders. The Court ordered expedited briefing and set oral argument for February 27, 2013.

6. The clause at issue in the Court's October 26 Decision—referred to as the *pari passu* clause—is contained in a number of sovereign debt instruments. The interpretation of this clause, first by the United States District Court for the Southern District of New York and then by the panel of this Court, is contrary to United States economic policy and inconsistent with the settled market understanding of this provision. As the United States explained in its April 2012 *amicus* brief, the district court's interpretation of the *pari passu* clause, affirmed by the panel in its October 26 Decision, may adversely affect future voluntary sovereign debt restructurings, the stability of international financial markets, and the repayment of loans extended by international financial institutions.

7. In addition, as the United States explained in its *amicus* brief, this appeal also raises significant issues regarding foreign sovereign immunity under the FSIA, particularly immunity from enforcement of judgments against the property of foreign states. *See* 28 U.S.C. §§ 1609-1611. Specifically, the scope of relief set forth in the district court's orders of February 23, 2012, and affirmed by the Court's October 26 Decision, exceeded the permissible scope of the district court's jurisdiction when that court directed a sovereign state to marshal assets that are immune from the court's exercise of its execution powers under the FSIA, restrained the sovereign's use of such immune property, and commanded the sovereign to refrain from altering its processes for servicing its debt obligations to third parties not before the court.

8. For these reasons, the United States is considering whether to file an *amicus* brief in support of the Republic of Argentina's petition for panel rehearing and rehearing *en banc*. Any such filing would require approval by the Solicitor General of the United States. 28 C.F.R. § 0.20(c). Accordingly, the United States respectfully requests leave to file such an *amicus* brief. If leave is granted, and the Solicitor General authorizes the filing of a brief, the United States will file its brief no later than December 28, 2012. The requested period will permit the Solicitor General to evaluate whether it would be appropriate for the United States to file an *amicus* brief in support of the petition, and, if so, the position that the United States

would take in such a submission. This extension would also permit the Solicitor General sufficient time to undertake the interagency consultations necessary to make these determinations.

9. The United States has conferred with counsel for defendant-appellant Republic of Argentina and for plaintiffs-appellees regarding its motion for leave to file an amicus brief in support of the petition. Defendant-appellant Republic of Argentina consents to this motion. Plaintiffs-appellees take no position with respect to this motion, but reserve the right to file a response.

CONCLUSION

For the foregoing reasons, the United States seeks leave to file an *amicus* brief in support of the defendant-appellant Republic of Argentina's petition for panel rehearing and rehearing *en banc*. If leave is granted, and the Solicitor General authorizes the filing of an *amicus* brief, the United States proposes to file its brief no later than December 28, 2012. The United States respectfully requests that the Court not dispose of defendant-appellant's petition pending consideration of any brief filed by the United States.

Dated: New York, New York
December 13, 2012

Respectfully submitted,

PREET BHARARA
United States Attorney for the
Southern District of New York

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