No. ______

In the Supreme Court of the United States

REPUBLIC OF ARGENTINA,
Petitioner,

v.

NML CAPITAL, LTD. et al.,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI AND VOLUME 1 OF APPENDIX

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QUESTIONS PRESENTED

1. The Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. § 1602 *et seq*., which provides the sole basis for obtaining jurisdiction over, and enforcing a judgment against, a foreign state, affords immunity to the property of a foreign state from attachment, "attachment in aid of execution," and execution, except where that property is located "in the United States" and "used for a commercial activity in the United States." 28 U.S.C. §§ 1609, 1610(a), 1610(d).

Whether a court may evade these FSIA immunities by enjoining a foreign state's use of its property *outside* the United States and therefore beyond the scope of enforcement permitted by the FSIA, unless the foreign state satisfies a monetary claim by transferring to plaintiffs other property also located *outside* the United States and equally beyond the scope of FSIA enforcement?

2. Whether a federal court may issue a pre-judgment injunction compelling a foreign state to pay a definite, contract-based monetary claim, notwithstanding the Court's holding in *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210-11 (2002), that traditional equitable relief does *not* include injunctions designed "to compel the payment of money past due under a contract, or specific performance of a past due monetary obligation"?

LIST OF PARTIES

The petitioner in this case is the Republic of Argentina (defendant-appellant below). The respondents are 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, and Olifant Fund, Ltd. (plaintiffs-appellees below).

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Republic of Argentina (the "Republic") respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit affirming district court Orders that enjoin the Republic from paying – outside the United States – $24 billion of its public debt, unless the Republic makes – with property also located outside the United States – "ratable payments" to plaintiffs, who hold other, defaulted Republic debt (the "Extraterritorial Payment Injunctions" or "Injunctions").

OPINIONS BELOW

The opinion of the court of appeals is reported at 699 F.3d 246 (Pet. App. A). The district court's orders (Pet. App. D-F, H-L) are unreported, but one is electronically published at 2011 WL 9522565 (Pet. App. D).

JURISDICTION

The decision of the court of appeals was entered on October 26, 2012. Pet. App. A. A petition for rehearing *en banc* was denied on March 26, 2013. Pet. App. B. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions, 28 U.S.C. §§ 1604, 1605(a), 1606, 1609, and 1610(a) and (d), are reprinted at Pet. App. W-AA.

STATEMENT OF THE CASE

This Petition presents an issue of federal statutory interpretation of immense importance to all sovereigns, their creditors, and the international financial markets generally, on which the Second Circuit took a position that is irreconcilable with prior appellate precedent and the clear intent of Congress. The Second Circuit held that, where a sovereign will not voluntarily pay a money judgment on its defaulted debt – a situation specifically contemplated by Congress in drafting the FSIA to afford sovereign property broad immunity from attachment and execution unless it is both located *in the United States* and used for a commercial activity *in the United States* – a district court may use its pre-judgment equitable powers to enjoin that sovereign from *making payments outside the United States* to other creditors, unless the sovereign also pays the plaintiffs holding its defaulted debt.[1] The decision runs contrary to the rulings of several courts of appeals – including the Second Circuit itself – that a court cannot grant by injunction an enforcement remedy that it could not provide by an execution device, because to do

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[1] The court characterized the relief granted as specific performance of a contract provision, the so-called pari passu clause, but conceded that the "ratable payments" it ordered on the defaulted debt were not required by the contract itself. *See* Pet. App. A at 25 n.10.

so would render those property immunities a nullity. *See S&S Mach. Co. v. Masinexportimport*, 706 F.2d 411, 418 (2d Cir. 1983); *Atwood Turnkey Drilling, Inc. v. Petroleo Brasileiro, S.A.*, 875 F.2d 1174, 1177 (5th Cir. 1989); *Phoenix Consulting Inc. v. Republic of Angola*, 172 F.3d 920, at *1 (D.C. Cir. 1998). The ruling, unless reversed, would stand as a precedent that permits U.S. courts to use their coercive powers to restrain sovereign property located outside the United States.

The Second Circuit decision warrants review because it represents an unprecedented intrusion into the activities of a foreign state within its own territory that raises significant foreign relations concerns for the United States. By purporting to enjoin payment on performing restructured debt unless payment is made to holders of defaulted unrestructured debt, the decision also imperils the voluntary sovereign debt restructuring process supported by both the United States and the rest of the international financial community. Because there is no bankruptcy law for insolvent or financially distressed sovereign states, that voluntary restructuring process, coupled with modern sovereign immunity laws, is the only means by which sovereigns can emerge from debt crises of the kind that over recent decades have affected numerous states, including Russia, Mexico, Belize, Grenada, South Korea, Ecuador, Jamaica, Dominican Republic, Uruguay, Zambia, Slovenia, Croatia, Nicaragua, Peru, Liberia, Iraq, and Greece, and may potentially affect other European states like Spain, Portugal, and Italy. These restructurings, which follow the internationally-recognized principle of inter-creditor equity, depend entirely on a state's ability to service restructured debt,

and would be rendered impossible if "holdout" creditors owning unrestructured debt could obtain orders from U.S. courts that enjoin foreign sovereigns from paying their restructured debt with property located outside the United States unless the "holdouts" were paid on better terms. No creditor would ever voluntarily agree to grant debt relief to a country if it knew that "holdouts" could hold its right to payment hostage by such orders. More broadly, extraterritorial orders purporting to dictate the disposition of a foreign state's assets – effectively ordering a Legislature to appropriate funds and its Treasury to spend those funds on one activity, on pain of not being able to spend funds on another activity – would be a profound insult to international comity and an open invitation to the courts of other nations to issue similar orders dictating the fiscal activities of the United States. The FSIA was enacted to prevent this kind of international collision.

In light of the novel Injunctions' threat to the stability of the international financial system, as well as the extraordinary foreign relations and sovereign immunity concerns they raise, the United States submitted a brief to the Second Circuit urging reversal. *See* United States *Amicus* Br. ("US Br.") at 11, 18, *NML Capital, Ltd. v. Republic of Argentina*, No. 12-105-cv(L) (2d Cir. Apr. 4, 2012) (Injunctions are "likely to disrupt financial markets for a considerable period," and "undermine the orderly consensual restructuring process the United States has been at pains to foster for several decades"); *id.* at 4-5 (this appeal raises "issues of vital public policy and legal importance to the United States that extend beyond the particular facts of this case"). The court of appeals ignored that brief, along with a second U.S. brief requesting *en banc*

reversal of the unprecedented Injunctions. This Court should heed these weighty concerns and review the Second Circuit's decision.

A. Background

After a prolonged economic recession that reached its nadir in 2002, the Republic experienced the worst economic, institutional, and social crisis of its modern history, marked by an enduring recession, fiscal imbalance, and lack of access to the international capital markets. *See* Decl. of Noemi C. LaGreca ¶¶ 4-13, *EM Ltd. v. Republic of Argentina*, No. 03 Civ. 2507 (TPG) (S.D.N.Y. June 11, 2003); Decl. of Federico Carlos Molina ¶ 3, *NML Capital, Ltd. v. Republic of Argentina*, No. 03 Civ. 8845 (TPG) (S.D.N.Y. Mar. 24, 2005); *see also* Paul Blustein, *And the Money Kept Rolling In (and Out): Wall Street, the IMF, and the Bankrupting of Argentina* 1 (2005) (describing collapse of Argentine economy in 2001 as "one of the most spectacular in modern history"). With its economy in ruins, the country suffered social and political turmoil: riots in the streets of Buenos Aires left dozens dead and four presidents resigned within a two-week period. *See id.*[2]

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[2] The Argentine crisis has been described as the "worst-case scenario" in eight centuries of modern financial crises. *See* Carmen M. Reinhart & Kenneth S. Rogoff, *This Time is Different: A Panoramic View of Eight Centuries of Financial Crises*, at 51 (2008), *available at* http://www.economics.harvard.edu/files/faculty/51_This_Time_Is_Different.pdf; *see also* Ross P. Buckley, *The Bankruptcy of Nations: An Idea Whose Time Has Come*, 43 Int'l Law. 1189, 1196 (2009) ("The living standards of over one-half of the Argentine people fell below the poverty line, and over a third

By the end of 2001, this crisis made it impossible for the Republic to service its overwhelming debt burden – some $80 billion in public external debt alone – while maintaining basic governmental services necessary for the health, welfare, and safety of the Argentine populace. Unable to service its debts, the Republic had no choice but to defer interest and principal payments to its bondholders. Like many nations that have faced economic crisis and unsustainable indebtedness, including the United States in the early days of the Constitution, *see generally* Forrest McDonald, *Alexander Hamilton: A Biography* 163-88 (1979), the Republic was forced to seek restructuring of both its external and internal public debt.[3]

Because there is no bankruptcy regime for insolvent states, the Republic restructured its external debt on an entirely voluntary basis, as many other countries

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could not afford basic food. . . . Adults were rioting and breaking into supermarkets, regularly, in search of food.").

[3] The United States, the international financial community, and the federal courts have all recognized the importance of voluntary sovereign debt restructuring. *See, e.g.*, US Br. at 6-10; Statement of Interest of the United States, *Macrotecnic Int'l Corp. v. Republic of Argentina*, No. 02 Civ. 5932 (TPG), 2004 WL 5475206, at *2-6 (S.D.N.Y. Jan. 12, 2004); *H.W. Urban GmbH v. Republic of Argentina*, No. 02 Civ. 5699 (TPG), 2003 WL 21058254, at *2 (S.D.N.Y. May 12, 2003) ("[A]n important channel for attempting to resolve the Argentine debt problem will undoubtedly be the effort to negotiate a debt restructuring plan."); *cf. Pravin Banker Assocs., Ltd. v. Banco Popular del Peru*, 109 F.3d 850, 855 (2d Cir. 1997) ("[T]he United States encourages participation in, and advocates the success of, IMF foreign debt resolution procedures . . .").

have done and will do in the future, unless the decision below prevents them from doing so. Consistent with U.S. policy favoring the orderly and consensual restructuring of sovereign debt, the Republic restructured its unsustainable debt burden through two global exchange offers in 2005 and 2010, in which participating holders exchanged old, nonperforming debt for new, performing debt with lower interest rates, reduced principal, and/or longer maturities. The exchange offers were extended to all holders of eligible debt – including respondents – on the same terms, and reflected the Republic's commitment to treat its private creditors equitably. Owners tendered approximately 92% of the aggregate eligible debt in the exchange offers, making the Republic's sovereign debt restructuring the largest in history at that time. *See* Republic of Argentina, Annual Report (Form 18-K), at 17 (Sept. 30, 2011), *available at* http://www.sec.gov/Archives/edgar/data/914021/000090342311000486/roa-18k_0928.htm. Respondents declined to participate in either restructuring.

B. Respondent NML

Plaintiff-Respondent NML is a Cayman Islands hedge fund, established exclusively to buy distressed Republic debt, that acquired beneficial interests in Republic bonds[4] at a deep discount both immediately before, and well after, the Republic suspended payments on its unsustainable external debt in

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[4] The technical term for what NML and the other respondents hold is a "security entitlement," but the terms "debt," "bonds," and "bondholders" are used for simplicity's sake.

December 2001. NML and similar "vulture" hedge funds seek to take advantage of the absence of sovereign bankruptcy protection by bringing lawsuits for the face value of defaulted sovereign debt, obtaining judgments on which interest continues to run indefinitely, and then using aggressive means to try to execute them.[5]

NML has used these aggressive tactics against the Republic, while at the same time continuing to speculate in nonperforming Republic debt, filing a new complaint against the Republic as recently as 2009 on more than $100 million of defaulted Republic debt that it purchased in late 2008. *See NML Capital, Ltd. v. Republic of Argentina*, No. 09 Civ. 1708 (TPG) (S.D.N.Y. compl. filed Feb. 24, 2009). NML's enforcement tactics include a series of execution attempts against property of the Republic and other entities that the federal courts have in most cases

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[5] *See, e.g.*, Press Release, Office of the High Commissioner for Human Rights, *'Vulture Funds' – UN expert on foreign debt welcomes landmark law to address profiteering* (Apr. 20, 2010), *available at* http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=9976&LangID=E (last visited June 24, 2013) ("[T]he profiteering of 'vulture funds' [has been] at the expense of both the citizens of distressed debtor countries and the taxpayers of countries that have supported international debt relief efforts . . . . 'Vulture funds' have exploited the voluntary nature of international debt relief schemes by acquiring defaulted sovereign debt at deeply discounted prices and then seeking repayment of the full value of the debt through litigation, seizure of assets or political pressure.") (internal quotation marks omitted).

rejected as violating the FSIA's property immunities,[6] and an attempt in March 2005 to disrupt the settlement of the Republic's global exchange offer by an *ex parte* attachment of the nonperforming bonds tendered by their beneficial owners into that exchange. *See EM Ltd. v. Republic of Argentina*, 131 F. App'x 745, 747 (2d Cir. 2005) (affirming vacatur of this attachment).

C. Invoking The Boilerplate Pari Passu Clause, The District Court Enters Injunctions Conditioning The Republic's Extraterritorial Debt Service Upon Payment In Full To Plaintiffs

Following the Republic's second restructuring of its defaulted indebtedness, NML moved in October 2010

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[6] *See, e.g.*, *NML Capital, Ltd. v. Banco Central de la República Argentina*, 652 F.3d 172, 196-97 (2d Cir. 2011) (rejecting NML's attempt to attach property of Central Bank of Argentina), *cert. denied*, 133 S. Ct. 23 (2012); *Aurelius Capital Partners, LP v. Republic of Argentina*, 584 F.3d 120, 124, 130-31 (2d Cir. 2009) (rejecting attempt by NML to execute on Argentine social security funds because the Republic had not "used [the funds] for a commercial activity in the United States"); *EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 465-66 (2d Cir. 2007) (rejecting NML's attempt to attach property of the Central Bank of Argentina); *NML Capital, Ltd. v. Spaceport Sys. Int'l., L.P.*, 788 F. Supp. 2d 1111, 1127 (C.D. Cal. 2011) (rejecting NML's attempt to execute on satellite jointly launched by Argentine space agency, NASA, and other nations' space agencies); *NML Capital, Ltd. v. Republic of Argentina*, No. 04-00197 (CKK), 2005 U.S. Dist. LEXIS 47027 (D.D.C. Aug. 3, 2005) (vacating NML's *ex parte* attachments of diplomatic and military property in Washington, D.C. and Maryland).

seeking an unprecedented injunction preventing the Republic from servicing its restructured debt, unless the Republic makes a "ratable payment" to NML, which NML defined as payment in full on its pre-judgment claims. The purported basis for this relief was a boilerplate provision – the "pari passu" clause – in the Republic's 1994 Fiscal Agency Agreement ("FAA") governing the New York law bonds owned by respondents. That standard clause, found alike in sovereign and non-sovereign unsecured debt agreements, provides:

> The Securities [the debt issued under the FAA] will constitute . . . direct, unconditional, unsecured and unsubordinated obligations of the Republic and shall at all times rank *pari passu* and without any preference among themselves. The payment obligations of the Republic under the Securities shall at all times rank at least equally with all its other present and future unsecured and unsubordinated External Indebtedness (as defined in this Agreement).

A-157.[7]

For decades, the pari passu clause has been a standard part of loan documentation, commonly understood to prohibit a borrower from creating unsecured debt ranking senior in legal right of payment. *See* Philip R. Wood, *Pari Passu Clauses –*

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[7] References to "A-" refer to the Joint Appendix filed in the Second Circuit. *NML Capital, Ltd. v. Republic of Argentina*, No. 12-105-cv(L) (2d Cir. Mar. 21, 2012).

What Do They Mean?, Butterworths J. of Int'l Banking and Fin. L. 371, 371 (2003) (A-1917). The clause was *not* understood to regulate the order or amount of payments made to creditors, or to require pro rata payments to creditors. *See* United Nations Centre on Transnational Corporations, Advisory Studies, No. 4, Series B, *International Debt Restructuring: Substantive Issues and Techniques*, at 29 (1989) (A-1877) ("[Pari passu] clauses do not, of course, obligate the borrower to repay all of its debt at the same time.").

Notwithstanding this consistent understanding of the pari passu clause, NML argued that the clause required it to be paid full principal and interest on its unrestructured, defaulted debt whenever a single, periodic payment of interest was paid on any performing, restructured Republic debt. (NML claims that it is entitled to principal, interest, and interest on interest totaling $720 million on bonds that it purchased on the secondary market for an estimated $48.7 million.)[8] On December 7, 2011, the district court held that the Republic violated the pari passu clause by enacting legislation limiting the Argentine Executive's

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[8] Following NML's lead, plaintiffs in ten other cases have demanded and obtained the same injunctions as NML (the "me too" plaintiffs). Together with NML, the "me too" plaintiffs comprise the respondents here. If the Injunctions are not vacated, other holders of the Republic's defaulted debt will likely demand similar relief, and the Republic's exposure will increase to many multiples of the $1.44 billion respondents claim below. There are over $6 billion of claims and judgments in the district court alone, and $11.2 billion in defaulted untendered debt remains outstanding – a figure that balloons to over $15 billion with the inclusion of penalty interest.

ability to reopen the 2005 Exchange Offer and settle with holdout creditors,[9] and further violates the clause "when it ma[kes] payments currently due under the Exchange Bonds, while persisting in its refusal to satisfy its payment obligations currently due under NML's Bonds." Pet. App. D at 52. This ruling, unprecedented in any common law court, runs counter to the positions expressed by the private and public sectors, including the United States, the Federal Reserve, and the New York Clearing House Association ("Clearing House"), which have characterized NML's reading of the clause as contrary to market understanding, New York law, U.S. policy, and the public interest. *See* Statement of Interest of United States ("2004 US Br.") at 15 (A-1780); Mem. of Law of *Amicus Curiae* Federal Reserve at 5, 13 (A-1795, A-1803); Mem. of *Amicus Curiae* the Clearing House at 4 (A-1813).[10] The district court denied NML's motion

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[9] Neither this legislation, the so-called "Lock Law," nor any other Argentine legislative enactment repudiated respondents' debt, which remains enforceable in U.S. courts. In fact, all budget laws enacted since 2003, the year in which the Republic began the process of restructuring its debt, include a mandate from Congress to the President to restructure the debt until all debt in default is fully restructured. Consistent with accepted principles of inter-creditor equity, Argentine law prohibits any restructuring or other resolution that would treat holdout creditors like respondents better than holders of other debt.

[10] Despite the ubiquity of pari passu provisions in both private sector bonds and sovereign debt instruments governed by New York and English law since the 19th century, *no* creditor during this period had ever suggested that the pari passu clause prevented payment of restructured debt if creditors who declined to participate in restructurings remained unpaid, or otherwise

for injunctive relief without prejudice, in part due to its concern that it could not "do something that would prejudice the rights and opportunities of the people who want to make exchanges," *i.e.*, holders of $24 billion of restructured Republic debt. Pet. App. G at 111.

NML promptly "renewed" its motion for injunctive relief, which the district court heard on February 23, 2012. At that hearing, the district court forthrightly acknowledged that it saw no "legal authority for . . . saying to the Republic, you cannot pay the exchange offer people unless you pay NML." Pet. App. M at 165; *see also id.* at 169 (THE COURT: "The rights of the exchangers were not conditional on NML getting paid under the pari passu clause."). Nor did the court dispute (indeed, it apparently simply ignored) that the injunctive relief sought was improper under the FSIA, which restricts creditor attachment and execution to sovereign property that is located *in the United States* and used here for a commercial activity, *see* 28 U.S.C.

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conditioned the payment of one creditor on payment to another. *See* 2004 US Br. at 12 (A-1777) ("The customary inclusion of *pari passu* provisions in sovereign debt instruments throughout the 1980s and 1990s was never viewed as a barrier to the resolution of sovereign defaults on foreign loans through the negotiation of consensual rescheduling and restructuring agreements."). NML's litigation strategy had been invented by its affiliate Elliott Associates when Elliott obtained an *ex parte* injunction from a Belgian court in September 2000 that prevented Peru from paying new debt issued to creditors who had agreed to participate in Peru's restructuring, unless Peru made a "pro rata" payment to Elliott. *See Elliott Assocs. L.P. v. Banco de la Nacion*, General Docket No. 2000/QR/92 (Appeals Ct. of Brussels Sept. 26, 2000) (A-1357-60).

§§ 1609, 1610(a), 1610(d) (Pet. App. Z at 294, AA at 295, 298), because the Republic's payment of its restructured debt takes place *in Argentina*, A-2282-85; A-2288. The district court nonetheless signed NML's proposed injunction, because, in its view, unpaid judgments against the Republic by holdout creditors like NML were an "overriding problem" that justified granting a permanent injunction against the payment of its restructured debt. *See* Pet. App. M at 207. In response to the Republic's stressing that there is no authority to enjoin payments to restructured debt holders, the district court candidly stated, "[t]hat's all well and good. The thing is the Republic has been in here for years saying no." *Id.* at 188. The court continued:

> There are *lots of problems with this pari passu argument* at this point, *lots of problems*. But there is a way that the plaintiffs are seeking after all these years to *finally get some leverage* so that they might have hope of getting paid.

Id. at 198 (emphasis added).

The district court was therefore quite open about its rationale: it was not acting on an analysis of either the FSIA, the law of pari passu, or the legal requirements for injunctive relief, but ultimately, out of frustration that, despite two successful debt restructurings that both it and the Second Circuit had upheld, there remained a hard core of holdout creditors whose litigation efforts – precisely *because* of the limitations imposed on sovereign execution by the FSIA – had been largely unsuccessful.

D. The Second Circuit Largely Affirms The Orders

On October 26, 2012, the Second Circuit affirmed the Injunctions to the extent they condition the Republic's service of its performing debt upon the Republic making a "ratable payment" to plaintiffs.[11] Pet. App. A at 37. The court held, in a ruling without precedent by a U.S. court, that the pari passu clause at issue both prevents the Republic from formally subordinating the FAA bonds by issuing superior debt,

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[11] The Second Circuit remanded for further proceedings concerning two aspects of the Injunctions so that it could further consider "the merits of the remedy." Pet. App. A at 38. *First*, the court asked for clarification of how the Injunctions are "to operate" with respect to the "ratable payments" to be paid to plaintiffs when the Republic makes a scheduled payment on its performing debt. *Id.* at 15. *Second*, the court, expressing serious "concerns" about the effect of the Injunctions on third parties, directed the district court to "determine the third parties to which the Injunctions will apply" so that it could assess "whether the Injunctions' application to them is reasonable." *Id.* at 37. On November 21, 2012, the district court held that the "ratable payment" component of the Injunctions required payment in full to plaintiffs on their defaulted debt if the Republic made a single, scheduled interest payment on its restructured debt. Pet. App. O at 224-33. In addition, the court entered Amended Injunctions, over the objections of the Republic, numerous holders of the Republic's restructured debt, the Trustee for the exchange bondholders, The Federal Reserve Bank of New York, the Clearing House, and The Depository Trust Company. Pet. App. P at 230. The Amended Injunctions purport to bind not only the Republic, but also the numerous entities in the international payment system that process payments from the Trustee to holders of the Republic's restructured debt. *Id.* at 237-40. The appeal of that decision by the Republic, the Trustee, and certain exchange bondholders is pending in the Second Circuit.

and “prohibits Argentina . . . from paying on other bonds without paying on the FAA [b]onds,” *id.* at 25. In reaching this conclusion the Second Circuit summarily dismissed as “potentially biased” the market understanding of the clause, which was supported not only by the Republic, but also *amici* the United States and the Clearing House.

In a decision avowedly prompted by frustration with the numerous decisions, including its own, *upholding* Argentina’s immunity defenses under the FSIA to numerous execution attempts by holdout creditors, the Second Circuit ruled that equitable relief was appropriate, notwithstanding the monetary nature of the purported harm, because “monetary damages are an ineffective remedy” given the difficulty judgment creditors have had in collecting from Argentina. *Id.* at 31. The court further held that the Injunctions do not run afoul of the FSIA’s property immunities because they are not technically “attachments” and they “would not deprive Argentina of control over any of its property,” *id.* at 32, although their avowed purpose is to dictate Argentina’s disposition of its property in order to coerce the payment of respondents’ monetary claims.

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari because the Second Circuit’s decision runs contrary to its own decisions and those of other circuits, the text, structure, history, and purpose of the FSIA, and the expressed interests and views of the U.S. Government, all of which oppose the Second Circuit’s holding that the FSIA permits courts to enter injunctions that restrain

a sovereign's use of its property outside the United States. The Second Circuit's decision has created confusion among the courts of appeals on the FSIA's application to equitable remedies as a collection device, imperils the foreign relations of the United States and its own rights as a litigant abroad, and threatens to produce ancillary litigation around the globe. In fact, certain exchange bondholders have already initiated related proceedings in Belgium to ensure that payments to them are not subject to the Second Circuit's ruling. The decision also conflicts with this Court's consistent line of authority holding that equitable relief is inappropriate to order payment of purely monetary claims.

That the issues raised in the decision are of critical importance to sovereigns and their numerous creditors, including restructured debt holders, who hold hundreds of billions of dollars of debt subject to New York law, has been demonstrated by the international financial community's reaction to it. The United States, in its brief supporting the Republic's petition for panel rehearing and rehearing *en banc*, stated that the decision "contravenes the FSIA" and "threatens core U.S. policy regarding international debt restructuring," and warned that the "effect could extend well beyond Argentina."[12] *See* United States En Banc Br. at 3, 6, *NML Capital, Ltd. v. Republic of Argentina*, No. 12-

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[12] The effect of the decision has already extended to other foreign states. Relying on the Second Circuit's ruling, a judgment creditor in March 2013 initiated proceedings in the District Court for the Southern District of New York to enjoin Grenada from servicing its restructured debt. *See* Complaint, *Exp.-Imp. Bank of China v. Grenada*, No. 13-Civ-1450 (HB) (S.D.N.Y. Mar. 4, 2013).

105-cv(L) (2d Cir. Dec. 28, 2012); *see also* Stephen M. Davidoff, *In Court Battle, a Game of Brinksmanship with Argentina*, N.Y. Times, Nov. 27, 2012 ("The ability of a country to achieve a workout and avoid this type of guerrilla action just got harder and more uncertain at a time of debt restructuring in Europe. This is not supposed to happen. . . . The [FSIA] . . . was enacted to avoid this.").

The International Monetary Fund ("IMF"), of which the United States is the largest member, and other states have expressed similar concerns, noting that the ruling "risk[s] undermining the sovereign debt restructuring process." IMF, *Sovereign Debt Restructuring – Recent Developments and Implications for the Funds Legal and Policy Framework*, at 31, Apr. 26, 2013, *available at* http://www.imf.org/external/np/pp/eng/2013/042613.pdf; *see also id.* (stating that the ruling discourages creditors from participating in voluntary restructurings and "increase[s] the risk that holdouts will multiply . . . due to inter-creditor equity concerns"); Joe Leahy, *Brazil warns on Argentina debt ruling*, Fin. Times, Nov. 29, 2012 ("Brazil's central bank governor[] has warned that [the injunctions] ordering Argentina to pay so-called 'holdout' creditors sets a negative precedent that could hurt sovereign debt negotiations elsewhere."); *see also* Nouriel Roubini, *From Argentina to Greece: Crisis in the Global Architecture of Orderly Sovereign Debt Restructurings*, Nov. 28, 2012 (the Injunctions "risk[] destroying the current international regime for the orderly restructuring of sovereign debts of insolvent countries"). It is imperative that this Court review and reverse the Second Circuit's erroneous ruling on these vitally important issues.

I. THE SECOND CIRCUIT'S ERRONEOUS DECISION CANNOT BE RECONCILED WITH OTHER CIRCUITS' RULINGS AND ITS OWN PRIOR RULINGS ON THE FSIA'S LIMITATIONS ON EQUITABLE RELIEF

The Second Circuit's decision is the first time a U.S. court has upheld injunctions restraining a sovereign's use of its own property *outside* the United States – where such property is indisputably immune from attachment and execution under the FSIA. The decision cannot be reconciled with that court's precedent, which, in line with the Fifth and D.C. Circuits, holds that courts "may not grant, by injunction, relief which they may not provide by attachment," *S&S Mach.*, 706 F.2d at 418; *see also Atwood Turnkey Drilling*, 875 F.2d at 1177; *Phoenix Consulting*, 172 F.3d at *1. In reaching this unprecedented conclusion, the Second Circuit failed even to address the position of the United States, which, in addition to noting that the Injunctions run afoul of this principle, showed that they contravene the purpose and structure of the FSIA, and harm the foreign relations of the United States. *See* US Br. at 20-30. This Court's review is needed to correct these errors and to harmonize the decisions of the courts of appeal.

The FSIA sets forth the sole, comprehensive scheme for obtaining and enforcing a judgment against a foreign state in U.S. courts. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 433 (1989); *Af-Cap, Inc. v. Republic of Congo*, 462 F.3d 417, 428 (5th Cir. 2006); *see also* H.R. Rep. No. 94-1487, at 5 (1976), *reprinted in* 1976 U.S.C.A.A.N. 6604, 6610-11

(FSIA "prescribes . . . [the] circumstances under which attachment and execution may be obtained against the property of foreign states to satisfy a judgment"). Its enactment in 1976 codified a *partial* lowering of the absolute immunity from suit and execution previously granted to foreign states at common law as "a matter of grace and comity." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983); *see also De Letelier v. Republic of Chile*, 748 F.2d 790, 799 (2d Cir. 1984) ("Congress passed the FSIA on the background of the views of sovereignty expressed in the 1945 charter of the United Nations and the 1972 enactment of the European Convention, which left the availability of execution totally up to the debtor state, and its own understanding as the legislative history demonstrates, that prior to 1976 property of foreign states was absolutely immune from execution.").

Under the FSIA, a foreign state is immune from jurisdiction unless a statutory exception to immunity exists, 28 U.S.C. § 1604 (Pet. App. W), and, separately, foreign state property is "immune from attachment arrest and execution" unless it is located in the United States and used here for a commercial activity, 28 U.S.C. §§ 1609, 1610(a), 1610(d) (Pet. App. Z, AA at 295, 298). Property located *outside* the United States accordingly lies beyond the reach of a U.S. court's enforcement authority. *See Autotech Techs. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 750 (7th Cir. 2007) ("The FSIA did not purport to authorize execution against a foreign sovereign's property, or that of its instrumentality, wherever that property is located around the world. We would need some hint from Congress before we felt justified in adopting such a breathtaking assertion of extraterritorial

jurisdiction."); *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1131-32 (9th Cir. 2010) (affirming denial of motion to compel assignment of foreign state's payment rights located in France because targeted property was not located in the United States, and was thus immune under the FSIA).

As courts of appeals have unanimously recognized, the exceptions to the FSIA's property immunities are narrower than the exceptions to jurisdictional immunity, because at the time the FSIA was enacted "the international community viewed execution against a foreign state's property as a greater affront to its sovereignty than merely permitting jurisdiction over the merits of an action." *Conn. Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 256 (5th Cir. 2002); *see also Republic of Philippines v. Pimentel*, 553 U.S. 851, 866 (2008) ("[P]re-FSIA, common law doctrine dictated that courts defer to executive determination of immunity because '[t]he judicial seizure' of the property of a friendly state may be regarded as 'an affront to its dignity and may . . . affect our relations with it.'") (citation omitted); *Peterson*, 627 F.3d at 1127-28 ("Congress was aware that, although the restrictive theory of sovereign immunity from suit had become an accepted principle of international law by the time of the FSIA's enactment, 'the enforcement of judgments against foreign state property remain[ed] a somewhat controversial subject.'") (citation omitted).

The FSIA's framework thus reflects a "deliberate policy choice on the part of Congress," US Br. at 24, whereby "Congress fully intended to create rights without remedies, aware that plaintiffs would often have to rely on foreign states to voluntarily comply

with U.S. court judgments." *Peterson*, 627 F.3d at 1128 (*citing Autotech Techs.*, 499 F.3d at 749); *FG Hemisphere Assocs., LLC v. Democratic Republic of Congo*, 637 F.3d 373, 377 (D.C. Cir. 2011) (outside narrow exceptions to immunity, "a plaintiff must rely on the government's diplomatic efforts, or a foreign sovereign's generosity, to satisfy a judgment"); *De Letelier*, 748 F.2d at 790 ("[S]ince it was not Congress' purpose to lift execution immunity wholly and completely, a right without a remedy does exist in [certain] circumstances.").[13]

While the statute specifically refers to "attachment arrest and execution" in Section 1609, there is no indication that Congress meant for the immunities embodied in the FSIA to protect sovereign property from those creditor remedies, but to expose that same property to pre-judgment "equitable" restraints that also effectively function as execution devices. As the United States noted below:

> [P]arties cannot avoid the limitations deliberately imposed by Congress on judicial execution authority and expand the scope of remedies available to them in an action against a sovereign simply by refraining from asking the court to reduce their claims to judgment. There is no indication in the statutory text or history that Congress intended for litigants to be able to

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[13] These rules apply even where the state has waived its immunity under the FSIA, as Argentina did in the documentation governing respondents' bonds. *See EM Ltd.*, 473 F.3d at 481 n.19; 28 U.S.C. § 1610 (Pet. App. AA).

> sidestep sections 1609-1611 by seeking an injunction that restrains the sovereign's use of immune assets until a judgment is satisfied, rather than an order of execution against those same assets.

US Br. at 28.

The Second, Fifth and, D.C. Circuits have accordingly held that district courts may not avoid the FSIA's property immunities by achieving through injunction what they are prohibited from doing under their limited FSIA attachment and execution authority. *See S&S Mach.*, 706 F.2d at 418 (courts "may not grant, by injunction, relief which they may not provide by attachment"); *Stephens v. Nat'l Distillers & Chem. Corp.*, 69 F.3d 1226, 1229-30 (2d Cir. 1996) (order directing foreign state to pay pre-answer security requirement violates FSIA; "the prohibition against attachments should apply broadly"); *Atwood Turnkey Drilling*, 875 F.2d at 1177 (FSIA property immunity applies where the "purpose of [an] injunction is to secure the payment of a judgment"); *Janvey v. Libyan Inv. Auth.*, 478 F. App'x 233, 236 (5th Cir. 2012) ("Because the preliminary injunction sought by the Receiver is functionally equivalent to an attachment, the Receiver's motion cannot be granted."); *Phoenix Consulting*, 172 F.3d at *1 ("[T]o the extent the preliminary injunction sought to prevent the Republic of Angola from transferring money, it constituted in effect a prejudgment attachment in violation of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1609 and 1610."). As the Second Circuit correctly reasoned in *S&S Machinery*, permitting courts to enter equitable remedies that satisfy monetary claims would render

the FSIA's property immunity "meaningless," and permit them to "eviscerate its protections . . . by denominating their restraints as injunctions against the . . . use of property rather than as attachments of that property;" a court's use of "*any other means* to effect the same result" as an attachment "could only . . . result[] in the disingenuous flouting of the FSIA['s]" immunity. 706 F.2d at 418 (emphasis added).

The Second Circuit nonetheless affirmed the Extraterritorial Payment Injunctions, which have both the effect and the expressed intention of flouting the FSIA's execution immunities by restraining the Republic's use of property upon which plaintiffs cannot execute in order to compel the Republic to turn over to plaintiffs other property upon which plaintiffs are barred from executing. *See* US Br. at 24-25 ("If plaintiffs were to reduce their claims to money judgment, they would be prevented from seeking to attach the funds utilized to pay the exchange bonds under the FSIA's strictures on enforcement of judgments[.] . . . Presumably in an effort to avoid these restrictions, plaintiffs-appellees chose instead to move for equitable relief that purports to constrain Argentina's use of such property."); Pet. App. A at 13 (suggesting that the Republic pay plaintiffs with Central Bank reserves, which the Second Circuit has twice declared immune from their attachment attempts, *see NML Capital, Ltd. v. Banco Central de la República Argentina*, 652 F.3d 172, 196-97 (2d Cir. 2011), *cert. denied*, 133 S. Ct. 23 (2012); *EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 465-66 (2d Cir. 2007). The Second Circuit was candid in subsequently noting at oral argument that the Injunctions were designed to circumvent the FSIA's property protections,

stating that "if there weren't sovereign concerns, a court might very well tell a debtor that it was to pay the money into the court and the court would distribute it," but "the Court is not empowered to do that, so it has taken this step" of enjoining payments to the exchange bondholders instead, in order to coerce the same forbidden result. Pet. App. BB at 379.

The decision below thus directly conflicts with the text, structure, history, and purpose of the FSIA as well as the previously uniform line of authority applying it, which mandate that equitable remedies be consistent with the FSIA's property immunities. Although the Injunctions "do not formally effectuate a transfer of property interests, [they] have the practical effect of requiring Argentina to transfer funds amounting to the balance of principal and interest owed to plaintiffs[] on the next occasion that it makes a payment on the exchange bonds," US Br. at 25.[14]

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[14] The Injunctions therefore essentially invade the Treasury of a foreign sovereign, and commandeer its Legislative and Executive branches – based on an unprecedented reading of a boilerplate clause – to appropriate funds for a specific purpose while forbidding their appropriation for another purpose unless the first appropriation is made. Commandeering the legislature of a U.S. state would be clearly impermissible for a federal court under the Tenth Amendment. *See New York v. United States*, 505 U.S. 144, 161 (1992) ("Congress may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program'") (citing *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 288 (1981)). *A fortiori*, Congress could not have intended to permit such judicial commandeering of a *foreign* state as a remedy, cut from whole cloth, for the purported breach of a private creditor's contract "right."

Such an order plainly "effects the same result" as an improper execution device – it is the functional equivalent of a "turnover" order, which is clearly barred as to property outside the scope of Section 1610 of the FSIA. *See Walters v. Indus. & Commercial Bank of China, Ltd.*, 651 F.3d 280, 283 (2d Cir. 2011) (affirming denial of turnover order as violative of § 1610). That this improper "enhanced judgment enforcement mechanism[]," to use NML's own words, A-210, is not "activated" unless the Republic makes a payment on its exchange bonds is irrelevant: an order to pay a monetary claim is an order to pay a monetary claim, regardless of when that order goes into effect. It is difficult to characterize the Injunctions as anything *but* a collection device, when the court of appeals itself held that the purported harm that they address is the non-payment of plaintiffs' future money *judgments. See* Pet. App. A at 31.

The Second Circuit tried to square its ruling with the FSIA and its holding in *S&S Machinery* by reasoning that the Injunctions "direct Argentina to comply with its contractual obligations" and "do not operate as attachments," because they "can be complied with without the court's ever exercising dominion over sovereign property," *id.* at 32-33; *see also id.* at 33 ("[T]he injunctions do not transfer any dominion or control over sovereign property to the court. Accordingly, [they] do not violate § 1609."). But that formalistic wordplay ignores the practical "result" of the Injunctions, which would permit courts to "eviscerate [the FSIA's] protections" by entering pre-judgment restraints that function as execution devices, even where no attachable property exists. *S&S Mach.*, 706 F.2d at 418. Under the court of appeals ruling,

whenever a court determines that, in its view, a foreign state's debts have gone unsatisfied for long enough, it could simply order the sovereign to "specifically perform" its promise to pay, thereby nullifying Congress's policy choice to broadly protect foreign state property from enforcement devices.

In any event, the Second Circuit was wrong even under its own formulation: the Injunctions *do* subject the Republic's property to the "control" of the court – at all times they restrain the Republic from using its funds to pay holders of its restructured debt. That the Republic can use its funds for other purposes or avoid the effect of the restraint by making a "ratable" payment to plaintiffs does not change the fact that the Injunctions prevent the Republic from using its funds as it wishes within its own territorial borders, and thereby subject the funds to the court's dominion in the most blatant possible way. The court's "dominion" over the funds used to pay the restructured debt holders is patent from the very fact that the Injunctions also purport to restrain those specific funds in the hands of all banks through which they might subsequently flow. Pet. App. I at 126-27.

The United States observed below that, in addition to suffering from their facial impropriety under the FSIA, the Injunctions are also highly problematic because they are "particularly likely to raise foreign relations tensions," as the laws of many nations do not even allow a court to enter an injunction against a foreign state, let alone one that "not only purport[s] to exercise jurisdiction over foreign state property, but also ha[s] the effect of dictating to a sovereign state the implementation of its sovereign debt policy within its

own territory." US Br. at 29. It is hard to conceive of a greater irritant to foreign states and comity than an order of one nation's courts to another nation on such matters that go to the core of the definition of sovereignty. *Cf. Peterson*, 627 F.3d at 1128 ("In light of the special sensitivities implicated by executing against foreign state property, courts should proceed carefully in enforcement actions against foreign states . . . ."); *Rubin v. Islamic Republic of Iran*, 637 F.3d 783, 791 (7th Cir. 2011) ("Questions of foreign-sovereign immunity are sensitive, and lower-court mistakes about the availability of immunity can have foreign-policy implications.").

II. THE SECOND CIRCUIT EXCEEDED ITS EQUITABLE POWERS IN GRANTING INJUNCTIVE RELIEF AND SPECIFIC PERFORMANCE

The Extraterritorial Payment Injunctions are also directly at odds with this Court's precedent concerning the permissible scope of a federal court's equitable powers. That consistent line of authority mandates that courts may not grant equitable remedies where an adequate remedy exists at law, *Sampson v. Murray*, 415 U.S. 61, 88 (1974), or where such remedies did not exist at the time the Judiciary Act of 1789 was enacted, *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318-19 (1999). Consequently, an injunction will not lie to compel performance of a past due debt, which is the paradigmatic claim at law. *See Great-West Life*, 534 U.S. at 210-11. The Injunctions, which, in order to redress a purely monetary harm, enjoin the Republic from paying one group of creditors unless it makes a "ratable" payment

to another creditor group, violate each of these fundamental precepts. Under the Second Circuit's decision, any sovereign debtor that makes it harder for a creditor to enforce a judgment by invoking the FSIA's immunities – which is exactly what the FSIA does – could be subjected to this form of equitable "relief." The effect, like the court of appeals' threshold violation of the FSIA in permitting such Injunctions, would be to license judicial nullification of the FSIA's limits on judicial authority by permitting courts to use equitable remedies to penalize foreign state debtors for raising the FSIA immunities conferred on them by Congress.

This Court has long held that the jurisdiction of the federal courts "is an authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries." *Grupo Mexicano*, 527 U.S. at 318 (quoting *Atlas Life Ins. Co. v. W.I. Southern, Inc.*, 306 U.S. 563, 568 (1939)). *See also, e.g.*, *Guar. Trust Co. v. York*, 326 U.S. 99, 105 (1945). Accordingly, "the substantive prerequisites for obtaining an equitable remedy as well as the general availability of injunctive relief are not altered by [Rule 65] and depend on traditional principles of equity jurisdiction." *Grupo Mexicano*, 527 U.S. at 318-19 (quoting 11A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure* § 2941 (2d ed. 1995)). The "equitable powers conferred by the Judiciary Act of 1789 did not include the power to create remedies previously unknown to equity jurisprudence." *Grupo Mexicano*, 527 U.S. at 332. Any inquiry to determine whether a federal court has properly exercised its equitable jurisdiction must

therefore necessarily ask whether the relief being sought was "traditionally accorded by courts of equity" or, conversely, courts of law. *Id.* at 319.

The Injunctions cannot be reconciled with the basic principle, repeatedly reaffirmed by this Court, that federal courts may not grant equitable remedies where, as here, there is an adequate remedy *at law*, and thus no threat of irreparable harm. "Money damages are, of course, the classic form of *legal* relief" and are to be ordered where they provide an adequate remedy at law. *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255 (1993) (emphasis in original); *see also Sampson*, 415 U.S. at 88 ("[T]he basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies.") (quoting *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506-07 (1959)). Such harm necessarily only exists – and equitable relief is accordingly only warranted – where "a monetary award *cannot* be adequate compensation." *Jayaraj v. Scappini*, 66 F.3d 36, 39 (2d Cir. 1995) (emphasis added) (citation omitted); *see also Liberty Lincoln-Mercury, Inc. v. Ford Motor Co.*, 562 F.3d 553, 557 (3d Cir. 2009).

Here, as the Second Circuit acknowledged, these actions concern monetary claims for past due amounts that can be – and have been – reduced to an exact dollar amount, and the function of the Injunctions is solely to satisfy those claims. That is the very definition of reparable harm, and it renders the Injunctions irreconcilable with this Court's precedents, which observe that relief "typically available in equity" did *not* include injunctions designed "to compel the payment of money past due under a contract, or specific

performance of a past due monetary obligation," except where, "unlike the present case, [the court] sought to prevent future losses that either were incalculable or would be greater than the sum awarded." *Great-West Life*, 534 U.S. at 210-11; *Grupo Mexicano*, 527 U.S. at 319-20 (recognizing "the substantive rule that a general creditor (one without a judgment) had no cognizable interest, either at law or in equity, in the property of his debtor, and therefore could not interfere with the debtor's use of that property"). The Second Circuit's decision "permits (what equity would never permit) an injunction against failure to pay a simple indebtedness." *Great-West Life*, 534 U.S. at 216.

Plaintiffs' strategic decision to label and structure their requested relief as "equitable" in nature does not alter this conclusion. As this Court has instructed, courts must look past the form to the substance of the relief at issue, "since any claim for legal relief can, with lawyerly inventiveness, be phrased in terms of an injunction." *Id.* at 211 n.1. *See also Bowen v. Massachusetts*, 487 U.S. 879, 915-16 (1988) (Scalia, J., dissenting) ("[T]he line between damages and specific relief must surely be drawn on the basis of the substance of the claim, and not its mere form. It does not take much lawyerly inventiveness to convert a claim for payment of a past due sum (damages) into a prayer for an injunction against refusing to pay the sum, or for a declaration that the sum must be paid, or for an order reversing the agency's decision not to pay."). The Second Circuit failed to heed this directive in affirming the Extraterritorial Payment Injunctions, which improperly "convert a claim of damages from breach of contract into an equitable claim by the facile trick of asking that the defendant be enjoined from"

honoring its obligations to other creditors "and appending to that request a request for payment of the amount owed." *Wal-Mart Stores, Inc. v. Wells*, 213 F.3d 398, 401 (7th Cir. 2000) (Posner, J.); *see also Great-West Life*, 534 U.S. at 210 ("Almost invariably . . . suits seeking (whether by judgment, injunction, or declaration) to compel the defendant to pay a sum of money to the plaintiff are suits for money damages, as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant's breach of legal duty." (quoting *Bowen*, 487 U.S. at 918-19 (Scalia, J., dissenting)) (quotation omitted).

The court of appeals ruled that equitable relief compelling the payment of a monetary claim was nonetheless appropriate because it assumed that Argentina would refuse voluntarily to pay plaintiffs' *future* judgments, and held that plaintiffs' remedy at law was therefore inadequate. *See* Pet. App. A at 31. This unprecedented conclusion is wholly unsupported by this Court's equity jurisprudence,[15] and, as noted above, would render the FSIA's property immunities a nullity. The import of this circular reasoning is that a sovereign's invocation of the immunities afforded to it

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[15] The sole case cited by the Second Circuit as support for this ruling, *Pashaian v. Eccelston Props., Ltd.*, 88 F.3d 77, 82 (2d Cir. 1996), is wholly inapposite. That decision held only that a *judgment creditor* may *preliminarily* enjoin its *private* debtor from disposing of property that the debtor transferred "with actual intent . . . to hinder, delay, or defraud either present or future creditors." The ruling provides no support for a *pre-judgment*, *permanent* injunction purporting to compel a *sovereign* to comply with past due contractual obligations.

under the FSIA enables a court to grant relief intended to circumvent those very immunities. This cannot be correct, and is why, as a matter of law, difficulty in collecting on money judgments against a sovereign because of sovereign immunity cannot amount to an inadequate remedy at law. *Cf. Sampson*, 415 U.S. at 90 ("Mere injuries, however substantial, in terms of money, time, and energy necessarily expended in the absence of [an injunctive relief], are not enough" to constitute irreparable harm.) (citation omitted).

A sovereign's non-payment of judgments was specifically contemplated by Congress when it afforded sovereign property absolute immunity from execution, subject to a few exceptions. Courts have accordingly recognized that the FSIA reflects a deliberate congressional choice to create a right without a remedy in circumstances where there is jurisdiction over a foreign state for purposes of obtaining a judgment, but its property is immune from attempts to execute the judgment, and that outside of the limited immunity exceptions, creditors must rely on a sovereign to *voluntarily* pay any judgments against it. *Walters*, 651 F.3d at 289; *see supra* at 21-22. Plaintiffs have been vigorously pursuing attachment and execution of the Republic's allegedly commercial property in the United States. That is the remedy at law that Congress provided to plaintiffs when it enacted the FSIA, and it cannot be circumvented by a grant of broader relief on purported equitable grounds. As the Second Circuit itself has recognized, "equity has its limits; it may fill certain gaps in a statute, but it should not be used to

enlarge substantive rights and powers."[16] *In re Bernard L. Madoff Inv. Sec. LLC*, No. 11-5044, slip op. at 58 (2d Cir. June 20, 2013).

CONCLUSION

For the reasons set forth above, a writ of certiorari should be granted.

Respectfully submitted,

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[16] The inequity of the "relief" granted below is also patent: the Injunctions place a judge-made condition on the property rights of one group of private creditors – the exchange bondholders – to give leverage to a wholly separate group of other private creditors, *i.e.*, respondents here.