12-105-cv(L)

12-109 -cv (CON), 12-111-cv (CON), 12-157-cv (CON), 12-158-cv (CON), 12-163-cv (CON), 12-164-cv (CON), 12-170-cv (CON), 12-176-cv (CON), 12-185-cv (CON), 12-189-cv (CON), 12-214-cv (CON), 12-909-cv (CON), 12-914-cv (CON), 12-916-cv (CON), 12-919-cv (CON), 12-920-cv (CON), 12-923-cv (CON), 12-924-cv (CON), 12-926-cv (CON), 12-939-cv (CON), 12-943-cv (CON), 12-951-cv (CON), 12-968-cv (CON), 12-971-cv (CON), 12-4694-cv (CON), 12-4829-cv (CON), 12-4865-cv (CON)

United States Court of Appeals for the Second Circuit

NML CAPITAL, LTD., AURELIUS CAPITAL MASTER, LTD., ACP MASTER, LTD.,
(*continued on inside cover*)

Plaintiffs-Appellees,

v.

REPUBLIC OF ARGENTINA,

Defendant-Appellant,

THE BANK OF NEW YORK MELLON, as Indenture Trustee, EXCHANGE BONDHOLDERS GROUP, FINTECH ADVISORY INC.,

Non-Party Appellants,

EURO BONDHOLDERS, ICE CANYON LLC,

Intervenors.

On Appeal from the United States District Court for the Southern District of New York

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BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES, URGING AFFIRMANCE

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(*Plaintiffs-Appellees Continued*)

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.,

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed.R.App.P. 26.1, the Washington Legal Foundation (WLF) states that it is a nonprofit corporation organized under § 501(c)(3) of the Internal Revenue Code. WLF has no parent corporation and does not issue stock, and no publicly held company enjoys a 10% or greater ownership interest.

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BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS/APPELLEES, URGING AFFIRMANCE

INTERESTS OF *AMICUS CURIAE*

The interests of the Washington Legal Foundation (WLF) are set out more fully in the accompanying motion for leave to file this brief.[1] In brief, WLF is a public interest law and policy center with supporters in all 50 states. WLF regularly appears before federal and state courts to promote economic liberty, free enterprise, and a limited and accountable government.

In particular, WLF has litigated in support of legal standards that ensure equal treatment of all creditors and prevent debtors from favoring some creditors at the expense of others. *See, e.g., Indiana State Police Pension Trust v. Chrysler LLC*, 576 F.3d 108 (2d Cir.), *vacated and remanded as moot*, 130 S. Ct. 1015 (2009); *Capital Ventures Int'l v. Republic of Argentina*, 652 F.3d 266 (2d Cir. 2011). WLF also filed an *amicus curiae* brief in this matter in April 2012, in connection with Appellant's previous appeal to this Court. WLF has also published monographs regarding legal issues raised when foreign governments default on their debt. *See, e.g.*, Hal S. Scott, *Sovereign Debt Default: Cry for the*

[1] Pursuant to Local Rule 29.1, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, contributed monetarily to the preparation and submission of this brief.

United States, Not Argentina, WLF WORKING PAPER SERIES NO. 140 (Washington Legal Foundation, 2006).

WLF is concerned that the legal position espoused here by Appellant Argentina would eliminate important constraints on Argentina's ability to flout the payment requests of its creditors. This Court has repeatedly commented on Argentina's "appalling record of keeping its promises to its creditors." *NML Capital, Ltd. v. Banco Central de la Republica Argentina*, 652 F.3d 172, 196 (2d Cir. 2011). The Court's October 26, 2012 decision directed Argentina to provide equal treatment to all of its bondholders, including Appellees. Yet Argentina's brief focuses almost exclusively on reasons why it should be permitted to make *no* payments to Appellees while continuing to make payments to other bondholders.

WLF writes separately to focus on objections raised by other bondholders to the injunctive relief granted by the district court. Those objections are not well taken. While WLF supports efforts to ensure that Argentina honors its contractual commitments to all of its bondholders, the district court's injunction does not infringe on the contractual and/or constitutional rights of those holding bonds issued pursuant to the 2005 and 2010 exchange agreements. Despite the Court's October 26, 2012 opinion confirming that Argentina is required by the terms of its bonds to pay Appellees if it makes payments to other bondholders, Argentina paid

more than $3 billion in December 2012 to holders of Exchange Bonds while once again paying nothing to Appellees. WLF does not believe that those bondholders possess any constitutional right to maintain that unbalanced state of affairs.

STATEMENT OF THE CASE

In 1994, Argentina issued sovereign bonds pursuant to the Fiscal Agency Agreement ("FAA Bonds"). It defaulted on the FAA Bonds (and all its foreign debt) in 2001 and has not thereafter made any payments on the FAA Bonds. Appellees are the owners of a substantial number of FAA Bonds whose unpaid principal and interest amount to more than $1.3 billion. Argentina does not contest the legitimacy of Appellee's claims for payment.

In 2005, Argentina tendered a take-it-or-leave-it exchange offer to all FAA Bondholders. It offered to give them newly-issued bonds (the "Exchange Bonds") in exchange for the FAA Bonds, with the former worth but a small fraction of the latter. To induce acceptance, Argentina vowed that it would never repay its obligations under any FAA Bonds that were not tendered. Its vow was evidenced by Law 26,017 (commonly known as the "Lock Law"), adopted by the Argentina legislature in 2005. The Lock Law prohibits "any type" of settlement with respect to non-tendered FAA Bonds. Argentina did not offer to negotiate the terms of the exchange, and only 76% of all FAA Bonds had been tendered when the exchange

offer closed in June 2005. Argentina tendered a second exchange offer on similar terms in 2010, and temporarily suspended the Lock Law during the period of the second exchange. Appellees did not tender their bonds.

Since 2005, Argentina has made timely payments on all Exchange Bonds. In compliance with the Lock Law, it has made no payments on the FAA Bonds. During that period, Argentina's economy has boomed. The district court found that Argentina now has sufficient resources to honor all foreign debt obligations, including its obligations under the FAA Bonds.

Appellees filed suit against Argentina on their defaulted FAA Bonds at various times from 2009 to 2011. Appellees alleged that Argentina breached a provision of the FAA Bonds referred to by Appellees as the Equal Treatment Provision, by discriminating against the holders of FAA Bonds.[2] Between December 2011 and February 2012, the district court granted motions for partial

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[2] Paragraph 1(c) of the FAA provides:

> The Secutities 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.*

SPA-10-11 (emphasis added). The second, italicized sentence (the "Equal Treatment Provision") is the one on which Appellees rely.

summary judgment filed by Appellees, concluding that Argentina had breached the Equal Treatment Provision and that Appellees were entitled to specific performance of the provision.

On October 26, 2012, this Court affirmed the district court's judgment. *NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246, 250 (2d Cir. 2012). In particular, the Court upheld both the district court's holding that Argentina had violated the Equal Treatment Provision and its injunctive relief, and found that the injunctions did not violate the Foreign Sovereign Immunities Act (FSIA). *Id.* It remanded the case to the district court "for such proceedings as are necessary to address the operation of the payment formula and the Injunctions' application to third parties and intermediary banks." *Id.* at 265.

On remand, the Exchange Bondholders Group (EBG), a group consisting of more than 50 entities that own Exchange Bonds, filed a motion on November 16, 2012 for "permission to appear as Interested Non-Parties."[3] The motion marked the Exchange Bond holders' first appearance in these proceedings; despite having notice of this lawsuit since its inception, the EBG members did not seek to

[3] Several current EBG members joined the group following completion of district court proceedings and have not previously sought leave to intervene in these proceedings. Accordingly, those members should not be recognized as Appellants in this Court.

participate either in the district court's initial consideration of Appellees' request for an injunction, or in Argentina's appeal to this Court from the district court's grant of injunctive relief.

The district court permitted EBG to file a brief with respect to the two issues still open for review on remand. Instead, EBG filed a motion pursuant to Fed.R.Civ.P. 60(b)(4) to vacate the district court's February 23, 2012 injunction; its November 16, 2012 memorandum of law focused primarily on issues related to its motion to vacate rather than on the two remanded issues.

On November 21, the district court issued the orders that are the subject of this appeal. The orders clarified how the "Ratable Payments" (which would be payable to Appellees under the Equal Treatment Provision in the event that Argentina made payments to holders of Exchange Bonds) were to be computed, and spelled out the applicability of the district court's Injunction to various third parties. Holders of Exchange Bonds were *not* among the entities found by the district court to be participants in Argentina's payment transactions and thus subject to the Injunction pursuant to Fed.R.Civ.P. 65(d)(2). In short, they are not among the entities to whom the Injunction perforce applies.[4] Six days later, on

[4] Accordingly, those bondholders are not among the "third parties" to which the Court referred when it instructed the district court on remand to address "the Injunction's application to third parties and intermediary banks." 699 F.3d at

November 27, the district court denied EBG's motion to appear as interested non-parties, as well as its Rule 60(b)(4) motion to vacate.

On November 27, EBG filed a notice of appeal from the district court's November 21 and November 27 orders. It also filed with this Court an Emergency Motion to Appear as Non-Parties. On November 28, the Court granted the motion to appear, "for the purpose of appealing orders entered by the district court on 11/21/12 and for the purpose of seeking a stay pending appeal." Dkt Entry #482.[5] It assigned Docket No. 12-4694 to EBG's appeal.

On December 13, 2012 the Court granted EBG's motion to consolidate Docket No. 12-4694 with Argentina's on-going appellate proceedings, Docket No. 12-105(L). *See* Dkt Entry #580. At no time did the Court indicate that EBG's appeal from the November 27 denial of its motions (which sought to reopen issues previously ruled on by the Court) would be part of the expedited and consolidated proceedings. In other words, the Court's agreement to allow EBG to participate in this appeal cannot be viewed as an agreement by the Court to reconsider its

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265. EBG members could, of course, be held to account under Rule 65(d)(2) if they participated with Argentina in transactions designed to violate the Injnuction.

[5] The Court also entered an order staying the Injunction pending appeal and directed that the appeals of Argentina, EBG, and other non-party appellants be heard on an expedited basis.

October 26 decision affirming the district court February 2012 decision to grant injunctive relief.[6]

SUMMARY OF ARGUMENT

This appeal addresses two very limited issues: (1) the district court's clarification regarding how the Ratable Payment formula operates; and (2) the extent to which the district court's injunction should be held applicable to third parties, including intermediary banks. Significant portions of the briefs filed by EBG and Fintech (collectively, "EBG") address other issues. In particular, EBG asserts: (1) Argentina should not be required to make *any* Ratable Payments to Appellees because any such requirement would violate their Fifth Amendment rights by adversely affecting their property interests; and (2) the district court's Injunction is void because it was issued without first providing Exchange Bondholders with notice and an adequate opportunity to be heard. Those assertions are meritless because they were first asserted in the district court only *after* this Court affirmed the district court's judgment. That decision is the law of the case, regardless of whatever arguments EBG may now wish to introduce. The Court's October 26 decision affirmed the district court's decision that injunctive

[6] The Court later granted motions to intervene (or to appear as non-party appellants) filed by other bondholders, including Fintech Advisory Inc., ICE Canyon LLC, and the "Euro Bondholders."

relief was warranted. 699 F.3d at 262-64. It also affirmed the district court's determination that enforcement of the Equal Treatment Provision warranted a requirement that Argentina make Ratable Payments to Appellees, *id*.; the relevant issue on this appeal is ascertaining the formula for determining the size of required Ratable Payments. If EBG was unhappy with the Court's October 26 decision, it should have raised its constitutional arguments in an *amicus* brief supporting Argentina's petition for rehearing *en banc*.

In any event, the constitutional claims raised by EBG are without merit for reasons quite apart from their tardiness. EBG asserts that bondholders' contractual right to collect interest and principal from Argentina is a property right protectable under the Fifth Amendment. Even if that assertion is correct, EBG has no colorable claim that bondholders' constitutional rights have been violated because the Injunctions do not threaten to deprive them of any property. Nothing in the district court's November 21 orders lessens bondholders' rights to demand payment from Argentina and, in the event of nonpayment, to file suit to obtain a money judgment for all outstanding principal and interest. EBG may be correct that the Injunctions decrease the market value of their bonds by making it somewhat less likely that Argentina will repay the bonds when they come due. But the indirect effects of court decisions on property values has never been

deemed sufficient to raise Fifth Amendment concerns. Moreover, the decision regarding whether to make payments is Argentina's and Argentina's alone; this Court affirmed the district court's determination that Argentina has more than sufficient foreign currency reserves to pay both Appellees and holders of Exchange Bonds, should it choose to do so.

EBG's procedural due process arguments fare no better. Bondholders had adequate notice of these proceedings and could have sought to intervene years ago if they believed that their property rights were threatened. Having sat on their rights for years, EBG members are in no position now to complain that their rights were inadequately represented in the court proceedings. EBG contends that bondholders were "necessary" parties, that the district court on its own initiative should have added all holders of Exchange Bonds as parties, and that the court lacked jurisdiction to consider an award of injunctive relief in their absence. Neither the case law nor Fed.R.Civ.P. 19(a)(1) provides any support for that contention. Individuals and entities are neither necessary nor indispensable parties when proposed injunctive relief does not apply directly to them and when the judgment does no more than alter the position of one with whom they have a contractual relationship. In any event, given their status as nonparties, EBG members were not entitled to file a Rule 60 motion for relief from judgment.

ARGUMENT

I. EBG's CONSTITUTIONAL AND EQUITABLE ARGUMENTS RAISE ISSUES THAT WERE DECIDED IN THE EARLIER APPEAL

EBG's brief focuses almost exclusively on claims that are not still open for review. EBG argues that the Injunction unduly burdens its property rights, in violation of "principles of equity," EBG Br. at 17-20; its rights under the Due Process Clause, *id*. at 29-34; and its rights under the Fifth Amendment's Takings Clause. *Id.* at 34-35. EBG also argues that the Injunction must be vacated pursuant to Rule 60(b)(4) because the Exchange Bondholders were granted neither adequate notice nor an opportunity to be heard regarding injunctive relief, *id.* at 36-40, and because the district court failed to add the Exchange Bondholders as "necessary" parties." *Id.* at 40-44. Noticeably absent from those claims is any assertion that the Injunction applies to or in any way binds Exchange Bondholders; indeed, the Injunction self-evidently has no application to bondholders. None of EBG's claims touches upon the two issues that are still open for review by the Court: "the operation of the [Ratable Payment] formula and the injunctions' application to third parties and intermediary banks." 699 F.3d at 265. Under those circumstances, there is no reason for the Court to reopen those issues by considering the arguments raised in EBG's brief.

The Court has already signaled that it does not intend to address the issues raised by EBG. In its order granting EBG's motion to appear in these proceedings, the Court said that it was permitting EBG to appear "for the purpose of appealing orders entered by the district court on 11/21/12 and for the purpose of seeking a stay pending appeal." Dkt. Entry #482. The November 21 orders were the ones in which the district court addressed the two issues this Court directed it to address on remand. EBG had sought to raise other issues before the district court – the issues now pressed by EBG in its opening brief – by means of a Rule 60 motion for relief from judgment. The district court denied that motion on November 27. By specifying that it was permitting EBG to appear in these proceedings for the purpose of appealing only those orders entered on November 21 and not those entered on November 27, the Court made clear that it was not authorizing EBG to use its Rule 60 motion as a vehicle for relitigating issues resolved by the Court's October 26 decision.[7]

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[7] EBG is entitled to appeal the denial of its Rule 60 motion, subject to an abuse-of-discretion review standard. *Grace v. Bank Leumi Trust Co. of New York*, 443 F.3d 180, 187 (2006). But that right to appeal does not include the right to reopen previously resolved issues that happened to be referenced in the motion. Moreover, the district court's order denying the Rule 60 motion to vacate the decision granting injunctive relief could not have constituted an abuse of discretion, given that the order was issued only weeks after this Court affirmed the decision.

EBG's brief is a thinly disguised effort to relitigate the propriety of injunctive relief. It argues that requiring Argentina to make Ratable Payments will impair the value of its property by increasing the likelihood that Argentina will default on its Exchange Bond interest payments. But that issue has already been decided; the Court's October 26 decision affirmed the district court's injunction requiring Ratable Payments. The only issue remaining to be decided is the appropriate formula for computing payments. EBG does not deny that its members waited until after the Court's October 26 decision to attempt to participate in this lawsuit, despite having been fully aware of the suit ever since its filing. Just because EBG is finally ready to litigate the injunctive relief issue is not a reason for the Court to re-open a previously decided issue. Had EBG wished to contest the propriety of granting injunctive relief to Appellees, it should have filed an *amicus curiae* brief in support of Argentina's pending petition for rehearing *en banc*. The Court should not countenance EBG's belated efforts to insert these previously decided issues into the current appeal.

II. THE INJUNCTION DOES NOT VIOLATE EBG'S SUBSTANTIVE DUE PROCESS RIGHTS

EBG's constitutional and equitable arguments should not, in any event, detain the Court at length. Should the Court decide to consider those arguments, it

will quickly determine that they are without merit.

EBG argues that the Injunction violates its members' substantive due process rights by "using the Exchange Bondholders' property for the private benefit of the Plaintiffs." EBG Br. at 29-30. The due process argument falters because EBG has failed to demonstrate how its members' property is restrained by the Injunction.

As bondholders, EBG's members have contractual rights to demand payment from Argentina and, in the event of nonpayment, to file suit to obtain a money judgment for all outstanding principal and interest. The Injunction does not restrain that property right in any way. In response to the Injunction, it is possible that Argentina may decide not to make interest payments to Exchange Bondholders. But that possibility has always existed: even before the district court issued its Injunction, Argentina was free to decide to cease payments. Indeed, Argentina's checkered history as a serial bond-defaulter well illustrates that point.[8]

If A and B are both creditors of C (who is not in bankruptcy) and A collects a judgment from C, B may thereafter have a more difficult time recovering his

[8] This Court has repeatedly commented on Argentina's "appalling record of keeping its promises to creditors." *NML Capital, Ltd. v. Banco Central de la Republica Argentina*, 652 F.3d 172, 196 (2d Cir. 2011).

funds from C. But the law has never deemed such collection activity to constitute an infringement on B's property rights. Thus, in *MasterCard Int'l Inc. v. Visa Int'l Serv. Ass'n, Inc.*, 471 F.3d 377 (2d Cir. 2006), both MasterCard and Visa signed exclusive sponsorship rights with FIFA, the worldwide governing body of soccer. When MasterCard filed suit against FIFA to enforce its sponsorship contract (which it alleged pre-dated Visa's contract), Visa objected on the ground that enforcement of the MasterCard contract might prevent FIFA from carrying out its later contractual commitments to Visa. The Court deemed that objection insufficient to warrant Visa's intervention in a breach-of-contract dispute in which it had no substantive role. The Court explained that even though the result of the Mastercard lawsuit might be to reduce the value of Visa's contractual rights:

> Any such harm [to Visa] would result from FIFA's alleged conduct in awarding Visa sponsorship rights it could not legally give. . . . Unfortunately for Visa, there is nothing it can do about the fact that MasterCard's prior contractual rights with FIFA may preclude FIFA's ability to grant the sponsorship rights to Visa. Visa's problems here are due to FIFA's alleged actions.

Id. at 387-388. Similarly, any harm to EBG's members caused by judicial enforcement of Appellees' contractual rights should not be deemed a violation of those members' substantive rights; that harm is simply a reflection of the fact that judgments entered against an individual routinely end up affecting others who

maintain a close relationship with that individual.

Courts have long recognized that the Fifth Amendment's Due Process Clause has a substantive component, that it "guarantees more than fair process." *Washington v. Glucksburg*, 521 U.S. 702, 719 (1997). However, the courts have been extremely reluctant to recognize substantive due process rights; they are generally limited to "fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty." *Id.* at 720. The Second Circuit has joined many other federal appeals courts in holding that contractual rights generally do not warrant substantive due process protection. *See, e.g., Local 342 v. Town Board*, 31 F.3d 1191 (2d Cir. 1994) ("We do not think, however, that simple, state-law contractual rights, without more, are worthy of substantive due process protection."). Because EBG's due process claims rest on nothing more than an alleged interference with its members' contractual rights, they do not warrant substantive due process protection.

III. THE INJUNCTION DOES NOT VIOLATE THE TAKINGS CLAUSE

The Fifth Amendment's Takings Clause requires the federal government to provide "just compensation" whenever it takes private property for a public purpose. EBG argues that the Injunction imposes a "significant restriction" on

Exchange Bondholders' use of their property (*i.e.*, their contractual right to payment from Argentina), that the restriction constitutes a Fifth Amendment "taking," and that they are thus entitled to compensation for their loss. EBG Br. at 34.

WLF notes initially that case law is unclear regarding whether a court decision can constitute a "taking" for Fifth Amendment purposes.[9] Even assuming that the district court's Injunction is subject to challenge under the Takings Clause, this is not the appropriate forum to be raising such a claim. The Fifth Amendment "does not proscribe the taking of property" but instead "only proscribes taking without just compensation." *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985). Just compensation need not "be paid in advance of, or contemporaneously with, the taking; all that is required is that a reasonable, certain and adequate provision for obtaining compensation exist at the time of the taking." *Id.* When the government has provided such a procedure, the property owner may not claim a violation of the Takings Clause "until it has used the procedure and been denied just compensation." *Id.* at 195.

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[9] The Supreme Court addressed the "judicial taking" issue several years ago but was unable to resolve it; no single opinion could garner the support of at least five Justices. *See Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envt'l Protection*, 130 S. Ct. 2592 (2010).

Federal law prescribes a procedure for property owners to submit claims to the federal government for Takings Clause compensation. Under the Tucker Act, 28 U.S. C. § 1491(a)(1), aggrieved property owners may file an action seeking compensation from the United States in the Court of Federal Claims. Unless and until the Court of Federal Claims has denied a compensation claim by EBG members based on damage allegedly caused to their property by the district court's injunction, their Takings Clause claims in this Court are "premature." *Williamson Cty.*, 473 U.S. at 195.

Moreover, EBG has submitted woefully inadequate evidence to support a takings claim. EBG does not assert that the federal government has confiscated or otherwise taken control of its members' property; rather, it asserts that the Injunction has imposed "significant restrictions" on its property that have caused the property to decrease in value. EBG Br. at 34. When government regulation *permanently* deprives a property owner of *all* economically beneficial use of his property, the loss is automatically deemed compensable under the Takings Clause. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992). But except in that relatively rare situation:

> [N]o magic formula enables a court to judge, in every case, whether a given government interference with property is a taking. In view of the nearly infinite variety of ways in which government actions or regulations can

> affect property interests, the Court has recognized few invariable rules in this area.

Arkansas Game & Fish Comm'n v. United States, 133 S. Ct. 511, 518 (2012). Among the many factors considered by courts in determining whether government regulation of property constitutes a compensable taking, the three most frequently cited are "the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations." *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 83 (1980). If the economic impact of the regulation is not extremely significant (in general, a diminution in value of more than 75%), the regulation will virtually never be compensable. *See, e.g. Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926) (rejecting Takings Clause challenge to municipal zoning restrictions imposed on real property).

EBG makes no effort to discuss the factors it deems significant in establishing its taking claim or in quantifying those factors. It makes no effort, for example, to demonstrate the "reasonable investment-backed expectations" of its members[10] or to quantify the percentage decrease in the value of Exchange Bonds

[10] The expectations of Exchange Bondholders were undoubtedly colored by events that occurred at the time of the 2005 exchange offer. Those accepting the exchange offer were well aware that holdouts were continuing to assert their rights to enforce the FAA Bonds. The prospectus for the exchange offer stated that there could be "no assurance" that litigation by holdouts would not interfere with payments. Gramercy, a holdout in 2005 but now a leader in the EBG, predicted in

allegedly attributable to the Injunction. It states no more than that the Injunction imposes a "significant restriction" on the "use of their property." EBG Br. at 34. Such allegations come nowhere close to establishing a Takings Clause violation.

IV. THIS COURT HAS ALREADY DETERMINED THAT THE INJUNCTION IS EQUITABLE

EBG also asserts that the Injunction should be lifted because it violates "fundamental principles of equity" by imposing "undue burdens" on the property of third-parties. EBG Br. at 17-29. This "principles of equity" claim was argued at length and decided against Argentina in the first appeal; the Court should not permit EBG to re-litigate the issue.

EBG is correct that courts, when deciding whether to grant injunctive relief, should consider the effects of the injunction on third parties. The impact on third parties is part of the "public interest" factor, one of the four factors that courts take into account when considering whether to grant injunctive relief. 699 F.3d at 261. But EBG is incorrect in suggesting that neither the district court nor this Court considered the public interest (including impact on third parties) before deciding that injunctive relief was warranted. This Court stated, "Turning to Argentina's argument that the balance of equities and the public interest tilt in its favor, we see

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a January 14, 2005 press release that it would achieve "success" against Argentina in its "litigation and collection efforts."

no abuse of discretion in the district court's conclusion to the contrary." *Id.* at 263.

The Court held explicitly that injunctive relief would *not* cause undue disruption in financial markets. *Id.* In reaching that conclusion, the Court explicitly relied on uncontested evidence that Argentina "had sufficient funds, including over $40 billion in foreign currency reserves, to pay plaintiffs the judgments they are due." *Id.* In other words, if Argentina does not pay its interest obligations on the Exchange Bonds, it will be because it chooses not to, not because the Injunction will place Argentina in a position from which it will be financially unable to pay. EBG has presented the Court with no explanation regarding why it should reconsider its prior decision, rendered little more than two months ago.

Although EBG's "equity" argument focuses primarily on why the Injunction should be lifted entirely, it also focuses on provisions in the district court's November 21 order clarifying what entities the Injunction should be applicable to – particularly the provision applying the Injunction to Bank of New York Mellon (BNYM). EBG asserts that title to funds transferred from Argentina to BNYM shifts immediately to the bondholder who is the intended ultimate beneficiary of those funds. Thus, it asserts, if Argentina makes payments to BNYM without

simultaneously making Ratable Payments to Appellees, Exchange Bondholders may find themselves in a situation in which for an extended period they cannot (due to the Injunction) gain access to their own funds. Even if EBG's "title to funds" assertion is correct, there is little reason to assume that Argentina will act in the way EBG posits. Once the stay has been lifted, Argentina would be in violation of the Injunction were it to pay BNYM without paying Appellees. Yet EBG itself has assured the Court that it would be "impossible for the Republic to 'evade' the Injunction," EBG Stay Pending Appeal Br. at 4, and counsel for Argentina has repeatedly assured the courts that no violation of the Injunction is contemplated.[11]

Nor is there reason to assume that Argentina, to avoid violating the injunction, will cease all payments to the Exchange Bondholders. Argentina's brief includes an explicit offer that, if Appellees will agree to an exchange along the lines of the 2005 and 2010 exchanges, Argentina will arrange to amend the Lock Law so as to permit interest payments to Appellees. That offer puts the lie to

[11] There is at least one other reason why the situation posited by EBG is unlikely to occur: BNYM's has indicated that it would not accept Exchange Bond payments from Argentina were the Injunction to take effect. *See* BNYM Br. at 42. BNYM, of course, in its role as trustee for the bondholders, participates directly with Argentina in the distribution of Exchange Bond payments and thus qualifies under Fed.R.Civ.P. 65(d)(2) as a "person bound" by the Injunction.

the repeated claim that Argentina's hands are tied by the Lock Law and that it could not (under Argentinian law) pay Appellees even if it wanted to. If Argentinian leaders are able to obtain quick legislative revision of the Lock Law in order to permit exchange-offer payments to Appellees, then they are equally capable of obtaining complete repeal of the Lock Law.

V. EXCHANGE BONDHOLDERS HAVE NOT BEEN DENIED ANY PROCEDURAL RIGHTS

EBG also argues that the Injunction must be vacated pursuant to Rule 60(b)(4) because the Exchange Bondholders were granted neither adequate notice nor an opportunity to be heard regarding injunctive relief, EBG Br. at 36-40, and because the district court failed to add the Exchange Bondholders as "necessary" parties. *Id.* at 40-44. Neither objection is well taken.

Both arguments should be denied for untimeliness. EBG's members have been well aware of this litigation for years, yet they made no effort to participate until November 2012, after this Court had affirmed the district court's entry of permanent injunctive relief against Argentina. In *Mastercard Int'l*, this Court held that a non-party's motion to intervene in district court proceedings was properly denied as untimely when filed "on the eve of the preliminary injunction hearing." 471 F.3d at 390. Here, the initial effort to participate was not filed until much

later in proceedings – *after* the entry of final judgment and *after* that judgment was affirmed on appeal. *MasterCard Int'l* listed several factors to consider in determining timeliness; the number one factor was "the length of time the applicant knew or should have known of its interest before making the motion." *Id.* That factor should be dispositive here; in light of EBG members' uncontested awareness of these proceedings throughout the years that it was pending, their delay in seeking to participate cannot be excused.

EBG contends that its failure to seek to participate is irrelevant because the district court was required *sua sponte* to add all Exchange Bondholders as "necessary" parties. EBG Br. at 43. It contends that the district court's failure to do so (and to provide bondholders with notice of the suit and an opportunity to be heard) renders the judgment "void" and thus subject to a motion for relief from judgment under Fed.R.Civ.P. 60(b)(4). *Id.* at 36-40. Those contentions finds no support in Rule 19 or case law. Rule 19(a) lists certain persons whose joinder to a lawsuit is "required" if they are subject to service of process, including a person who "claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may as a practical matter impair or impede the person's ability to protect the interest." Fed.R.Civ.P. 19(a)(1)(B)(i). For all the reasons explained in the prior sections of this brief, EBG's members do

not fall within the category of persons describe in Rule 19(a)(1)(B)(i). Just as in *Mastercard Int'l*, any impairment of the interests of EBG's members arises from enforcement of the terms of the contract entered into between Appellees and Argentina, not from their absence from this lawsuit. *MasterCard Int'l*, 471 F.3d at 387-88. EBG's failure to call *MasterCard Int'l* to the Court's attention is difficult to understand, particularly given that the Court in *MasterCard Int'l* went to great lengths to distinguish the analysis of Rule 19 set forth in *Crouse-Hinds Co. v. Internorth, Inc.*, 634 F.2d 690 (2d Cir. 1980), the decision on which EBG principally relies. *Id.* at 386-87.

Moreover, even if the Exchange Bondholders were deemed "necessary" or "indispensable" parties under Rule 19 (which they clearly were not), such a finding would not render the district court's judgment void. The most that would occur is that the Exchange Bondholder would be declared not to be bound by the judgment. (But of course, the district court did not purport to bind them in any way.) The judgment would nonetheless continue to be binding between Appellees and Argentina. The Advisory Committee Notes to Rule 19 could not be clearer on this point. Rule 19 was amended in 1966 in large part to overturn court decisions that had determined that the failure to join an indispensable party "deprived the court of the power to adjudicate as between the parties already joined." The

Advisory Committee Notes that accompanied the 1966 amendments to Rule 19 stated unequivocally:

> It is true that an adjudication between the parties before the court may on occasion adversely affect the absent person as a practical matter, or leave a party exposed to a later inconsistent recovery by the absent person. Those are factors which should be considered in deciding whether the action should proceed, or should rather be dismissed; *but they do not themselves negate the court's power to adjudicate as between the parties who have been joined.*

Advisory Committee Notes to Rule 19, 1966 Amendment (emphasis added).

Finally, WLF notes that this Court has recognized a "well-established rule that litigants, who are neither a party, nor a party's legal representative to a judgment, lack standing to question a judgment under Rule 60(b)." *Grace*, 443 F.3d at 189. While the Court has on occasion carved out "exceedingly narrow exception[s]" to that rule, *id.*, EBG has done nothing to demonstrate that it qualifies for such an exception.

CONCLUSION

The Washington Legal Foundation respectfully requests that the Court affirm the judgment of the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed.R.App.P. 32(a)(7)©, I hereby certify that the foregoing brief of WLF is in 14-point proportionately spaced Times New Roman type. According to the word processing system used to prepare this brief (WordPerfect X5), the word count of the brief is 6,041 words, not including the corporate disclosure statement, table of contents, table of authorities, certificate of service, and this certificate of compliance.

/s/ Richard A. Samp
Richard A. Samp

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of January, 2013, I electronically filed the brief of *amicus curiae* Washington Legal Foundation with the Clerk of the Court for the U.S. Court of Appeals for the Second Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Richard A. Samp
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