No. 12-1494

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

REPLY BRIEF OF PETITIONER

JONATHAN I. BLACKMAN
Counsel of Record
CARMINE D. BOCCUZZI
MICHAEL M. BRENNAN
DANIEL J. NORTHROP
CLEARY GOTTLIEB STEEN & HAMILTON LLP
One Liberty Plaza
New York, New York 10006
(212) 225-2000
jblackman@cgsh.com

Counsel for Petitioner Republic of Argentina

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Rules and Statutes

Other Authorities

REPLY BRIEF OF PETITIONER

Respondents mischaracterize the issues raised by the Petition as insignificant questions on which the courts of appeals are in agreement. Respondents are wrong. The Petition presents questions of federal law of extraordinary significance to the interests of Argentina, the United States, other foreign states, and the international capital markets and payment system: can a federal court, consistent with either the Foreign Sovereign Immunities Act ("FSIA") or the general limits on its traditional equity powers, enjoin a foreign sovereign from using, in its own territory, property immune from the process of U.S. courts, unless the sovereign satisfies a monetary claim with equally immune property? The Injunctions present these questions because they purport to empower a U.S. court to reach over the borders of Argentina and restrain the Republic from servicing more than $24 billion in performing, restructured debt, unless the Republic first pays billions of dollars to satisfy respondents' money damages claims. Before the Second Circuit's decision, no court had ever suggested that the answer to these questions could possibly be yes.

The United States thinks the issues are critical: it filed two briefs urging the court of appeals to vacate the unprecedented Injunctions, because they rest on a patently erroneous reading of the boilerplate pari passu clause contained in nearly all sovereign bond contracts and vastly exceed the limitations that the FSIA imposes on U.S. courts' enforcement powers. So does the Republic of France, which – citing the "wider societal and economic harm" threatened by the Second

Circuit's ruling – has filed an *amicus* brief in support of the Petition. France *Amicus* at 3. So do third parties directly harmed by the Injunctions, including participants in the international payment system threatened by their coercive effect, and holders of more than $24 billion in restructured Argentine debt whose unconditional payment rights have been jeopardized.[1]

Respondents are wrong that the Petition is premature. In affirming the Injunctions, the Second Circuit decided legal questions in conflict with this Court and other circuits. While the legal issues presented were further illuminated by the court of appeals' second opinion of August 23, 2013, the Second Circuit *sua sponte* stayed the expanded injunctions it affirmed there "pending [the] resolution by the Supreme Court of a timely petition for a writ of *certiorari*." BIO App. at 25. Argentina intends to file such a petition unless the court of appeals grants rehearing *en banc*. The Court may therefore wish to hold this Petition pending a petition directed to the court of appeals' second opinion, and join them for disposition.

1. Trying to minimize the significance of the Second Circuit's unprecedented ruling, respondents mischaracterize the decision as raising only the "factbound" question of whether the Injunctions literally constitute an "attachment" under the FSIA.

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[1] Joshua Goodman, *IMF Should Ask U.S. to Review Argentina Case: Lagarde*, Bloomberg, Jul. 20, 2013 (IMF Managing Director noting "detrimental consequences" decision "would have on [the IMF's] ability to discharge [its] mandate, which is intended to maintain financial stability in the world.").

NML Opp. at 17-23; *see also* Aurelius Opp. at 9-13. To the contrary, the Petition squarely presents the purely legal question whether a court, in instances where no sovereign funds can be reached by traditional creditor remedies due to the FSIA's property immunities (because no such funds are in the United States), can nevertheless enjoin a sovereign's extraterritorial use of immune funds to coerce it into satisfying a money damages claim? Under prior Second Circuit precedent and the decisions of other circuits, including *Atwood Turnkey Drilling, Inc. v. Petroleo Brasileiro, S.A.*, 875 F.2d 1174 (5th Cir. 1989),[2] the answer is clearly no, because such an injunction would effect the same result as an enforcement device barred by the FSIA. Pet. at 23-24.

While circuit decisions applying FSIA property immunities to injunctive relief have concerned injunctions that effected the same result as pre-judgment attachments, *see id.*, respondents cannot contest that such immunities extend beyond attachments to *all* methods of judgment enforcement. *See Walters v. Indus. & Commercial Bank of China, Ltd.*, 651 F.3d 280, 283 (2d Cir. 2011) (affirming denial of *in personam* turnover order as violative of § 1610);

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[2] Respondents invite the Court to ignore *Janvey v. Libyan Inv. Auth.*, 478 F. App'x 233 (5th Cir. 2012), and *Phoenix Consulting Inc. v. Republic of Angola*, 172 F.3d 920 (D.C. Cir. 1998), because they are unpublished. NML Opp. at 20; Aurelius Opp. at 13. They are nevertheless part of the consistent line of authority, until the decision below, that an injunction need not operate as an attachment to fall afoul of the FSIA. *See Johnson v. United States*, 529 U.S. 694, 699 n.3 (2000) (unpublished decision evidences conflict); *Lynce v. Mathis*, 519 U.S. 433, 436 (1997).

Philippine Export & Foreign Loan Guarantee Corp. v. Chuidan, 267 Cal. Rptr. 457, 1099 (Cal. Ct. App. 1990) (rejecting motion to assign sovereign property located outside United States as valid exercise of *in personam* jurisdiction: "[t]o hold otherwise would be to . . . provide the creditor that which he could not straightforwardly achieve through ordinary creditors' remedies, namely execution upon foreign property").[3] The Injunctions accordingly contravene the FSIA, because by restraining the Republic's use of its immune funds in order to compel the Republic to pay respondents' monetary claims, they seek to accomplish the same result as a state-law "turnover" order directed at immune funds located outside the United States, which all courts agree would violate the FSIA. *See, e.g.*, N.Y. C.P.L.R. § 5225(a) (turnovers direct debtor on pain of contempt to directly pay creditor money "sufficient to satisfy the judgment"). The Second Circuit conceded that the Injunctions were entered *for that very reason*. Pet. at 24-25.

Respondents are wrong to assert – in the face of decisions by three courts of appeals – that the "policy

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[3] Respondents are therefore wrong to claim that FSIA property immunities apply only to *in rem* remedies, Aurelius Opp. at 9, and are limited to "attachment, arrest, and execution," *id.* at 15. As the sole basis for U.S. courts to grant and enforce judgments against foreign states and their property, the FSIA applies to *all enforcement remedies*, including both *in rem* remedies that target specific property and *in personam* orders directed to a debtor himself. Pet. at 19-23. Contrary to respondents' assertion, NML Opp. at 21, the *Walters* turnover petition was directed to "all funds . . . necessary to satisfy" the creditor's judgment. 651 F.3d at 291 n.8.

concerns that prompted the FSIA" support the new rule created by the Second Circuit. Aurelius Opp. at 16; *see also* NML Opp. at 21. Just the opposite. Congress afforded foreign-state property immunity from enforcement remedies even broader than the immunity from jurisdiction afforded sovereigns precisely because judicial interference with sovereign property represents a "greater affront" to a state's sovereignty and dignity than jurisdiction over an action's merits. Pet. at 21. Those property immunities, which are consistent with immunity laws around the world, stem from principles of comity and serve to avoid conflict between the United States and other countries and ensure that U.S. property is afforded similar protections abroad. US Br. at 24, 28-29.[4] The Injunctions' restraint of billions of the Republic's dollars *in its own Treasury* represents an unprecedented interference with a foreign state's property within its own borders, *cf. Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (statutes presumed not to apply extraterritorially), and is a greater "affront" than could be accomplished by traditional creditor remedies.

Nor are respondents helped by their invocation of FSIA Section 1606, which provides that a "foreign state shall be liable in the same manner and to the same extent as a private individual under like

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[4] The United States' views concerning FSIA interpretation "are of considerable interest to the Court," and "its opinion on the implications of" a particular application of the FSIA "might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy." *Republic of Austria v. Altmann*, 541 U.S. 677, 701-02 (2004). The Second Circuit entirely disregarded them.

circumstances." 28 U.S.C. § 1606. The Injunctions are not a liability-creating rule of substantive law, but a court-ordered *remedy* to *enforce* monetary claims (respondents themselves called their pari passu theory an "enhanced judgment enforcement mechanism[]," Pet. at 26). *See Rubin v. Islamic Republic of Iran*, 637 F.3d 783, 797 (7th Cir. 2011) ("Although [a state] may be found liable in the same manner as any other private defendant, the options for executing a judgment remain limited."); US Br. at 27-28.

2. Respondents try to further downplay the significance of the unprecedented Injunctions by calling the second question presented – whether a federal court may exercise its "equitable" powers to compel a foreign sovereign to pay a definite, contract-based monetary claim – a "splitless request for error correction." NML Opp. at 23; *see also* Aurelius Opp. at 18. Respondents are again wrong. The Second Circuit's decision directly conflicts with this Court's holding in *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002), that courts may not grant injunctions compelling payment of a definite, past-due debt absent narrow exceptions that even respondents do not contend apply here. The decision created a new exception to that rule for foreign states that do not voluntarily pay U.S. judgments. Pet. App. at 31-32. In reaching this conclusion, the court of appeals nullified Congress's policy choice – previously followed by five courts of appeals – to leave judgment satisfaction to the discretion of foreign states where no property subject to an immunity exception exists. Pet. at 21-22.

Respondents argue that *Great-West* has "no application" here because the Injunctions – which compel the payment of the exact sum respondents claim is due on their bonds – are also ostensibly intended to provide equal "rank" to payment obligations in those bonds. NML Opp. at 24; Aurelius Opp. at 19-20. But as the Second Circuit recognized by noting that respondents' claims *could* readily be reduced to a money judgment, Pet. App. at 31, this wordplay is meaningless. The Injunctions are "designed to remedy Argentina's *failure to pay bondholders*," *id.* at 5 (emphasis added), by compelling the Republic to pay respondents out of its general fisc past-due principal and interest, *i.e.*, money damages, Pet. at 31-32. Although the Second Circuit held, incorrectly, that the Republic breached its promise to rank respondents' bonds equally, the court declined to view this purported breach as causing respondents irreparable harm,[5] instead justifying its grant of equitable relief solely on the basis that the Republic's anticipated non-payment of respondents' *future* money judgments renders respondents' remedy at law inadequate. Pet. at 28-31.

That unprecedented holding improperly overrides Congress's deliberate choice in the FSIA to limit enforcement remedies by granting sovereign property blanket immunity from enforcement, subject to a few

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[5] NML, an indisputably *unsecured* creditor, asserts that courts "regularly" issue equitable orders when a creditor loses a bargained-for position. As it did below, NML supports this proposition only with cases involving the specific enforcement of *secured* creditors' rights. NML Opp. at 24. The Second Circuit correctly declined to accept this argument.

explicit exceptions. *Id.* at 19-20; US Br. at 24. As the Second, Fifth, Seventh, Ninth, and D.C. Circuits have all recognized, this congressional choice created a right *without a remedy* when – as here – a sovereign is subject to U.S. jurisdiction, but its property is immune from judgment execution. Pet. at 21-22; *Conn. Bank of Comm. v. Republic of Congo*, 309 F.3d 240, 252 (5th Cir. 2002). The court of appeals lacked the discretion to circumvent Congressional intent with its "equitable" powers. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2607 (2012) ("[The] touchstone for any decision about remedy is legislative intent, for a court cannot use its remedial powers to circumvent the intent of the legislature."). This error was not a misapplication of a properly stated rule of law, Aurelius Opp. at 19, but the creation of a new exception to longstanding equitable principles that makes a foreign sovereign's invocation of its statutory immunities the basis for awarding "equitable" relief intended to evade those immunities. Pet. at 32-34.

Respondents are wrong that the Republic failed to raise this issue below. Any issue "'pressed or passed upon below'" by a federal court is subject to this Court's broad discretion over the questions it chooses to take on certiorari. *Verizon Commc'ns, Inc. v. F.C.C.*, 535 U.S. 467, 530 (2002) (*quoting United States v. Williams*, 504 U.S. 36, 41 (1992)). The Republic consistently argued that equitable relief is inappropriate because respondents' only harm is monetary, and that the difficulties of judgment enforcement imposed by the FSIA do not alter that conclusion. Republic Brief at 56-57, No. 12-105-cv(L) (2d Cir. Mar. 21, 2012) (respondents have adequate remedy at law and are not irreparably harmed,

notwithstanding "difficulty in collecting on money judgments . . . because of FSIA"); Reply Brief at 33, No. 12-105-cv(L) (2d Cir. Apr. 25, 2012) (pursuit of attachable property "is the remedy at law that Congress provided to plaintiffs" in the FSIA). That the Republic is now citing additional cases to support this argument is irrelevant. *See, e.g., Yee v. City of Escondido, Cal.*, 503 U.S. 519, 535 (1992) (petitioners who raised claim below "could have formulated any argument they liked in support of that claim here"). Indeed, the Second Circuit noted the Republic's argument and passed on it when it held that damages were an ineffective remedy at law because "Argentina will simply refuse to pay any judgments." Pet. App. at 31-32.

3. The decision also warrants this Court's review because of its destructive impact on the nation and people of Argentina, Argentina's *$75 billion* debt restructuring, and the sovereign debt restructuring process going forward. The Injunctions purport to enjoin the Republic from servicing more than *$24 billion* of its restructured debt,[6] unless the Republic pays respondents' alleged money damages of *over $1.3 billion* on their defaulted debt (and, unless this "relief" is vacated, the Republic will be exposed in actions by other "holdout" plaintiffs to similar claims for a total of *over $15 billion*). The magnitude of this court-imposed threat to a foreign state is staggering: the Republic either will face over $24 billion in legal claims that the

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[6] Contrary to respondents' contention, NML Opp. at 22 n.4, the record establishes that Argentina's payments take place outside the United States, *see* JA-2288.

Injunctions forbid it to pay or the potential of having its Central Bank's reserves of $37 billion depleted by over 40% to pay the "holdouts." Argentine officials' expressions of grave concern at the prospect of the nation's debt service being disrupted are not "defiance," as the Second Circuit would have it: the Republic has followed the rulings of U.S. courts, and its vital interests deserve this Court's attention.

Moreover, and as demonstrated further by *amici*, the threatened harm extends beyond the Republic to countless third parties, including the holders of the Republic's restructured debt, who the Injunctions make a "leverage" device for enforcing respondents' monetary claims, *see* Euro Bondholders *Amicus* at 1; Exchange Bondholder *Amicus* at 1, 9-11; Fintech *Amicus* at 7-22, and participants in the international payment system, including those located outside the United States, *see* Caja de Valores *Amicus* at 7-10. Even if respondents were correct that the impact of the decision is somehow limited to the "unique" case of Argentina, NML Opp. at 26-29; Aurelius Opp. at 21-33, the Court's review would be warranted because of these effects alone.

But respondents are wrong: as explained by the governments and institutions charged with overseeing the stability of the international financial system, the decision poses a significant threat to the sustainability of the debt restructuring process for all foreign states going forward. *See* US *En Banc* at 4 ("[T]he creation of new rights and new vehicles for enforcement alters and destabilizes the landscape of sovereign debt restructuring."); France *Amicus* at 10 (decision "will have a chilling effect on creditors' willingness to grant concessions in order to facilitate voluntary and

negotiated debt restructurings as a means of last resort"); Pet. at 17-18 (citing, *inter alia*, 2013 IMF Sovereign Debt Restructuring Report). Those governments and institutions recognize that the ostensible basis for the Injunctions – the boilerplate pari passu clause – is found in nearly all sovereign debt agreements. Nothing in the Second Circuit's decision limits the seismic shift in the enforcement of sovereign debt caused by its holding that a U.S. court can use its "equitable" powers to compel a foreign state to pay a monetary claim.[7]

Like the Second Circuit, respondents wrongly assert that Collective Action Clauses ("CACs") mean that "this won't happen again." Aurelius Opp. at 24-28. The United States, a principal proponent for the inclusion of CACs in sovereign debt, *id.* at 24-25, told the Second Circuit that CACs will *not* solve the problems created by the decision, because, *inter alia*, *CACs do not exist in billions of dollars of outstanding debt*. US *En Banc* at 4 ("most bonds issued under New York law before 2005 lack collective action clauses, and the United States expects many to be in the market for the foreseeable future"). Even in debt containing a CAC, the decision undercuts any incentive to restructure in the first place, since any holdout can now invoke its alleged right to payment in full before any participants get their discounted payments. And to date, the limited experience with CACs shows that they fail to prevent

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[7] That the Second Circuit incorrectly held that the meaning of the *boilerplate* pari passu clause "varies" based on its exact wording, Aurelius Opp. at 22, does not *limit* the court's ruling. Rather, it licenses courts to "interpret" minor variances in boilerplate to impose unprecedented worldwide injunctions.

creditors from blocking a material portion of debt from being restructured. *See* France *Amicus* at 17-20 (CACs ineffective in preventing holdouts from blocking restructuring of 30% of Greece's foreign-law bonds); *see also* US *En Banc* at 5; US Br. at 5.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

JONATHAN I. BLACKMAN
Counsel of Record
CARMINE D. BOCCUZZI
MICHAEL M. BRENNAN
DANIEL J. NORTHROP
CLEARY GOTTLIEB STEEN & HAMILTON LLP
One Liberty Plaza
New York, New York 10006
(212) 225-2000
jblackman@cgsh.com

Attorneys for Petitioner
Republic of Argentina