No. 13-

IN THE

# Supreme Court of the United States

EXCHANGE BONDHOLDER GROUP,

*Petitioner,*

*v.*

NNL CAPITAL, LTD., *et al.*,

*Respondents.*

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

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

Petitioner supports the grant of certiorari that the Republic of Argentina is seeking in this same case. In its own right, Petitioner seeks review of the following questions that arise from the injuries suffered by innocent non-party bondholders as a result of the injunctions issued and affirmed in the courts below:

1. Where a foreign nation has refused to make payments to holders of its defaulted debt instruments, whether a federal court can coerce payment by issuing an injunction preventing a non-party trustee from paying non-party holders of the sovereign's non-defaulted debt instruments unless the sovereign also satisfies in full the claims of the defaulted debt holders, thereby imposing otherwise non-existent conditions on the payment rights of the non-parties and creating a grave risk of default.

2. Whether the Fifth Amendment's prohibitions against government deprivations and takings of private property solely for the purpose of conferring a private benefit bar a federal court from granting equitable relief that conditions the payment rights of the non-party, non-defaulted debt holders on the sovereign's payment of overdue sums to parties who are holders of the defaulted debt.

3. Whether non-party holders of debt instruments have standing to appeal the district court's entry of an order that prohibits payments on those specific debt instruments—and no others—until the debtor has satisfied unrelated overdue payments on other debt instruments.

## LIST OF PARTIES

The petitioner in this case is the Exchange Bondholder Group (the "EBG"), whose membership is comprised of the following holders of Argentine sovereign debt instruments facing default as a result of the lower courts' rulings: Gramercy Funds Management LLC; Gramercy Argentina Opportunity Fund, Ltd.; Gramercy Distressed Debt Master Fund; Gramercy Distressed Opportunity Fund, Ltd.; Gramercy Distressed Opportunity Fund II, L.P.; Gramercy Emerging Markets Fund; Gramercy Local Currency Emerging Market Debt Master Fund; Gramercy Master Fund; Gramercy Opportunity Fund - Special Opportunities II Offshore SP; Gramercy Opportunity Fund – Special Opportunities II SP; Gramercy Opportunity Fund - Special Opportunities SP; Gramercy U.S. Dollar Emerging Market Debt Master Fund; Gramercy Select Master Fund; Massachusetts Financial Services Company d/b/a MFS Investment Management; MFS Diversified Income Fund; MFS Emerging Markets Debt Fund; MFS High Yield Opportunities Fund; MFS Emerging Markets Debt Local Currency Fund; MFS Global Bond Fund; MFS Multimarket Income Trust; MFS Charter Income Trust; MFS Meridian Funds – Emerging Markets Debt Fund; MFS Meridian Funds – High Yield Fund; MFS Meridian Funds – Global Bond Fund; MFS Meridian Funds – Emerging Markets Debt Local Currency Fund; MFS Investment Management Co. (Lux), S.a.r.l., on behalf of (i) MFS Investment Funds – Emerging Markets Debt Fund, and (ii) MFS Investment Funds – Emerging Markets Debt Local Currency Fund II; MFS Heritage Trust Company Collective Investment Trust – Emerging Markets Debt Fund; MFS Emerging Markets Debt LLC; Brevan Howard Asset Management LLP and Brevan

Howard Master Fund Limited; AllianceBernstein L.P. on behalf of certain accounts managed by AllianceBernstein L.P. and its affiliates; BlackRock Balanced Capital Portfolio of BlackRock Series Fund, Inc.; BlackRock Balanced Capital Fund, Inc.; BlackRock Strategic Income Opportunities Portfolio; BlackRock Balanced Capital V.I. Fund; BlackRock Total Return Portfolio; BlackRock Total Return V.I. Fund; iShares Emerging Markets High Yield Bond Fund; iShares J.P. Morgan USD Emerging Markets Bond Fund; BlackRock Emerging Markets Bond Fund; BlackRock Emerging Markets Fund; BGF Emerging Markets Bond Fund; Emerging Markets Fixed Income Fund B; Strategic Income Opportunities Bond Fund; and Fixed Income Fundamental Trading Fund Three.

The Republic of Argentina (defendant-appellant below) has also submitted a petition separately, and is being served as a respondent. The remaining respondents are (i) NML Capital, Ltd.; Aurelius Capital 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) (collectively, "Respondents"); (ii) The Bank of New York Mellon, as Indenture Trustee; and Fintech Advisory, Inc. (non-party appellants below); and (iii) Euro Bondholders and ICE Canyon LLC (intervenors below).

## CORPORATE DISCLOSURE STATEMENT

EBG member BlackRock Balanced Capital Fund, Inc. is a nongovernmental corporation. It has no parent corporation. The following entities directly or indirectly own 10% or more of BlackRock Balanced Capital Fund, Inc.'s stock: (i) Merrill Lynch Pierce Fenner & Smith, Inc.; and (ii) State Street Bank TTEE Cust (FBO) ADP Access. None of the remaining members of the EBG are nongovernmental corporations.

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## PETITION FOR A WRIT OF CERTIORARI

The Exchange Bondholder Group (the "EBG") 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 of Argentina (the "Republic"), and trustee Bank of New York ("BNY"), from paying interest and principal due to the EBG members on their Exchange Bonds, which they acquired following the Republic's economic collapse in 2001, without simultaneously making "ratable payments" to Respondents that exceed $1.33 billion (the "Injunctions"). The EBG also supports the Republic's petition for certiorari filed in this same case.

## OPINIONS BELOW

The opinion of the court of appeals is reported at 727 F.3d 230. Pet. App-1.[1] The court of appeals' prior opinion in this action is reported at 699 F.3d 246. Pet. App-29. The district court's orders (Pet. App. C, D & E) are unreported; the district court's November 21, 2012 orders are available electronically at 2012 WL 5895650 and 2012 WL 5895786 (Pet. App-117-37).

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1. Concurrently with the filing of this petition, the Republic has filed a separate, lead petition for review of the same rulings. Citations to the Republic's appendix appear as "Pet. App-__." Because the operative rulings of the courts below are reproduced in the Republic's appendix, the EBG has not reproduced those materials in its appendix. Other materials relevant to the EBG's petition are contained in the appendix submitted herewith. Citations to the EBG's appendix appear as "EBG App-_." Citations to the record below appear as "2d Cir. App. __".

## JURISDICTION

The decision of the court of appeals was entered on August 23, 2013. Pet. App. A. The Second Circuit denied the EBG's timely motion for rehearing and rehearing *en banc* on November 19, 2013. EBG App. A. This Court has jurisdiction under 28 U.S.C. §1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. V:

> No person shall … be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Relevant provisions of the Foreign Sovereign Immunities Act, 28 U.S.C. §§1604, 1605(a), 1606, 1609, and 1610(a) and (d), are reprinted at Pet. App. H.

## STATEMENT OF THE CASE

### A. The FAA Bonds and the Exchange Offers

The district court had original jurisdiction of this action pursuant to 28 U.S.C. §1330. Between 1994 and 2001, the Republic issued debt securities totaling approximately $82 billion pursuant to a Fiscal Agency Agreement ("FAA") (the "FAA Bonds"). Pet. App-31-33. The Republic defaulted on the FAA Bonds in 2001, and has not made payments on them since.

In 2005 and 2010, the Republic initiated exchange offers whereby FAA Bondholders, including Respondents, could replace their FAA Bonds with new, unsecured and unsubordinated external debt with a principal amount equal to approximately one-third of the amount of the FAA Bonds (the "Exchange Bonds"). Pet. App-33-37. The vast majority of FAA Bondholders elected to participate in these exchange offers and become "Exchange Bondholders." *Id.* After the 2010 exchange offer, holders of over 91% of the par value of the FAA Bonds had accepted Exchange Bonds, enabling the Republic to restructure approximately $74.5 billion of debt. *Id.* In agreeing to accept a significant discount on the face value of their FAA Bonds in 2005 and 2010, Exchange Bondholders relied on the Republic's willingness and ability to make payments on the Exchange Bonds. *See, e.g.,* Declaration of Robert Koenigsberger, dated Nov. 16, 2012 ("Koenigsberger Dec."), ¶4 (2d Cir. App., SPE-1139).

The Exchange Bondholders comprise a wide swath of the investing public, including pension funds, charitable foundations, and endowments. *See* Koenigsberger Dec., ¶7. The outstanding amounts owed to Exchange Bondholders totals over $24 billion, over $1 billion of which will be owed to EBG members. *See* Press Release, "Argentina Announces Results of Successful Exchange Offer," (2d Cir. App. A-1252); Notice of Completion of 2010 Exchange Offer, (2d Cir. App. A-1257). To date, the Republic has fully honored its obligations under the Exchange Bonds. Pet. App-37. There is, moreover, overwhelming political and scholarly consensus that voluntary sovereign debt restructurings of this kind are critical to the stability of the global economy. *See e.g.* U.S. *Amicus* Br., No. 12-105-cv-(L) [dkt. 653], at 3-5, 7-8 (2d Cir. Dec. 28, 2012);

Republic of France *Amicus* Br. No. 12-1494, at 10-17 (S. Ct. July 26, 2013); Declaration of Stephen Choi, Nov. 16, 2012 ("Choi Dec."), EBG App. B, ¶¶21-24.

### B. The Republic's Payment Mechanism

The mechanism that the Republic uses to make payments on the Exchange Bonds is set forth in the 2005 Trust Indenture (the "Indenture"), between the Republic and The Bank of New York.[2] *See* 2d Cir. App. A-2280. The Trustee is a fiduciary of the Exchange Bondholders, and not an agent of the Republic. Declaration of Matias Isasa, Feb. 1, 2012 ("Isasa Dec."), ¶4 (2d Cir. App. A-2286). Pursuant to the Indenture, the Republic makes principal and interest payments on the Exchange Bonds to the Trustee in Argentina, which receives them in trust for the Exchange Bondholders. Indenture, §3.1 (2d Cir. App. SPE-626). Once money has been transferred to the Trustee, it is the property of the Exchange Bondholders, "and the Republic shall have no interest whatsoever in such amounts." *Id.*, §3.5; Isasa Dec., ¶4.

### C. The Lock Law

In conjunction with the 2005 Exchange Offer, the Republic enacted Law 26,017 (the "Lock Law"), which expressly prohibited the executive from reopening Argentina's upcoming exchange offers and stated that "the State shall be prohibited from conducting any type of . . . settlement with respect to" the FAA Bonds. The Lock Law thus assured bondholders who participated

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2. Bank of New York is the predecessor of the current Trustee, Bank of New York Mellon ("BNYM").

in the exchange that they would not be treated unfairly as compared to those who held out. Pet. App-33-34. Numerous Argentine officials, including President Cristina Fernández de Kirchner, have stated publicly that they will not pay "one dollar" to FAA Bondholders such as Respondents. *See* Nate Raymond, *U.S. Judge Warns Argentina to Comply with Bondholder Court Order*, Reuters, Nov. 9, 2012, available at http://www.reuters.com/article/2012/11/09/argentina-bonds-idUSL1E8M97CC20121109.

**D. The District Court's Injunction against Payments to the Exchange Bondholders Absent Payments to Respondents.**

Respondents are among the small percentage of holdout FAA Bondholders who have refused to accept Exchange Bonds, opting instead to litigate against the Republic for over a decade seeking to collect the full principal amount of their FAA Bonds, plus past due and penalty interest.[3] *See, e.g., NML Capital v. Republic of Argentina*, 2005 WL 743086 (S.D.N.Y. Mar. 31, 2005). The non-individual Respondents are serial "holdout" investors who purchased FAA Bonds on the secondary market for pennies on the dollar as recently as June 2010. Pet. App-31.[4] Respondents' *modus operandi* is to speculate by

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3. Since the face amount of Respondents' FAA Bonds is only $428 million, the lion's share of $1.33 billion claimed by Respondents represents interest on interest. *See* Petition for Certiorari, *Republic of Argentina v. NML Capital Ltd.*, No. 12-1494, at 11 (S. Ct. June 24, 2013)("6/24/13 Pet.").

4. Lead respondent NML Capital, Ltd. ("NML") reportedly paid 15-30 cents on the dollar for its FAA Bonds. *See* Kambiz

bringing litigation to compel full payment on defaulted sovereign debt after the vast majority of other creditors have accepted a restructuring.[5] In 2008, lead respondent NML initiated the instant actions, alleging breaches of contract by Republic and seeking only money damages for unpaid principal and interest. Complaint, No. 08-CV-6978 [dkt. 1], at 16-17 (S.D.N.Y. Aug. 5, 2008).

After years of unsuccessful efforts to enforce money judgments against the Republic, NML switched tactics following the 2010 exchange offer. In an attempt to circumvent the Republic's sovereign immunity, NML recast its legal claims as claims in equity. First, NML amended its complaint to add claims for equitable relief while declining to reduce a September 28, 2011 summary judgment ruling—awarding all principal and interest owed under the FAA Bonds—to a money judgment. *See* Opinion, Sept. 28, 2011 (2d Cir. App. A-2096). Second, on the same day it moved for summary judgment on the question of whether the Republic had breached the "Equal Treatment

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Foroohar, *The Opportunist*, Bloomberg Markets, Feb. 2008, available at http://elliottprofiles.com/pdf/BloombergMarkets-TheOpportunistFebruary2008Eprint.pdf. The Republic notes that NML's estimated cost basis in FAA Bonds is only $48.7 million. *See* 6/24/13 Pet., at 11.

5. Respondent NML is controlled by Elliott Capital Management ("Elliott"), a hedge fund that has made billions of dollars by buying distressed debt at a deep discount and then demanding full payment after restructurings, often employing aggressive litigation tactics. *See, e.g.,* Foroohar, *supra*, at 4. In addition to the Republic, Elliott has sued Peru, the Democratic Republic of Congo, and the Republic of Panama in attempts collect the par value of defaulted debt purchased at a deep discount. *See id.* at 5; *Elliott Assocs., L.P. v. Republic of Panama*, No. 96-civ-5514 (S.D.N.Y. 1996).

Provision" in the FAA's "*pari passu*" clause, *see* Pet. App-32, and requested a remedy of specific performance for that breach. The specific performance that NML sought took the form of an injunction prohibiting the Republic from making payments to Exchange Bondholders without first paying NML in full on its pre-judgment claims. NML further requested that the injunction be made specifically applicable to banks involved in the Exchange Bonds' payment chain. In this way, NML hoped to force the Republic to choose between satisfying NML's claim and defaulting on the Exchange Bonds. *See* 2/23/2012 Hearing Tr. (2d Cir. App. A-2333), T44:13-19 (counsel for NML explaining that "if you sign this order . . . Argentina is going to pay the exchange bondholders because it cannot afford not to . . . and when it does so, it will pay the NML bondholders").

On December 7, 2011, the district court held that the Republic had violated the *pari passu* clause by continuing to pay the Exchange Bonds without paying the overdue amounts on NML's FAA Bonds. Pet. App-70-75. Alternatively, it held that Argentina breached the clause by enacting the Lock Law. *Id*. The court, however, initially rejected without prejudice Respondents' request for a "ratable payments" injunction, citing an unwillingness to "do something that would prejudice the rights and opportunities of the people who want to make exchanges [*i.e.*, the Exchange Bondholders]." 9/28/2011 Hearing Tr. (2d Cir. App. A-2117), T40:12-14.

The district court heard NML's "renewed" motion for injunctive relief on February 23, 2012. By this point, numerous other holdouts (the rest of Respondents here) had joined NML and moved for substantially identical

relief. At the hearing, the court emphasized that (i) there was no legal authority for the requested injunction; (ii) it lacked the power to impose an otherwise non-existent condition on the Exchange Bondholders' rights to receive payments by requiring simultaneous payments to Respondents;[6] and (iii) the requested injunction would impermissibly interfere with the Exchange Bondholders' property rights.[7] By the end of the hearing, however, the district court announced that it deemed coercing the Republic into paying Respondents' private contract debt[8] more important than safeguarding the rights of

6. NML's counsel has admitted that the Injunctions would engraft a "condition" on the Exchange Bondholders' ability to enjoy their own property that otherwise does not exist. 2/23/12 Hearing Tr. (2d Cir. App. A-2290), T5:12-17. As the district court observed, the Exchange Bondholders' "right to be paid," *id.,* T11:10-11, is "not conditional on [Respondents] getting paid." *Id.,* T13:10-12.

7. *Id.*, T7:2-6, T7:24-8:5 (noting Injunctions "present[] a very serious problem"; "use the *pari passu* clause to interfere with the payment to the exchangers" without supporting legal authority; and "would obviously present an impediment, a condition" to Exchange Bondholders' otherwise unconditional right to receive payments); *id.*, T11:25-12:2 (noting that *pari passu* clause did not mean that "Republic is forbidden to pay the exchange offers unless they pay [Respondents]"); *id.*, T13:5-12 (stating that "[t]he rights of the exchangers were not conditional on [Respondents] getting paid under the *pari passu* clause."); *id.*, T15:25-16:2 ("I am sticking to my position. I think that I cannot interfere with the rights of the exchange offers by putting conditions on them or impediments on them.").

8. *Id.*, T31:1-3 (noting that "nobody really has any hope that the Republic will honestly honor its obligations without some *unusual mechanisms*. That's why this is being done.") (emphasis added); *id.,* T32:1-2 (Injunctions were designed to help Respondents "finally get some leverage").

the innocent Exchange Bondholders.[9] The court then entered what it bluntly labeled a problematic injunction, and suggested that it would be reversed on appeal.[10] The Republic appealed the Injunctions.[11]

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9. *Id.*, T48:12-49:10 (noting five separate times that Injunctions have "problems" and "problems on appeal" but concluding that compelling Republic to pay Respondents' private contract debt "overrid[es]" Exchange Bondholders' rights).

10. *Id.*

11. Prior to the district court's ruling, an appellate court in England upheld a ruling categorically rejecting the key argument underlying Respondents' claims - that a *pari passu* clause entitles creditors to injunctive relief. *See Kensington Int'l Ltd. v. Republic of the Congo*, [2003] EWHC 2331 (Comm), ¶¶93-97 (declining to grant injunctive relief preventing payments to third party creditors, stating "I view with disquiet in the circumstances of this case a situation in which third parties are potentially exposed to penal consequences which could never be visited upon the defendant to whom the order is actually directed"); *affirmed,* [2003] EWCA Civ. 709. A German court has similarly declined to grant the type of relief requested by Respondents. *See German court rules in Argentina's favor against 'Vulture Funds,'* Buenos Aires Herald, July 11, 2013, available at http://www .buenosairesherald.com/article/135798/german-court-rules-in-argentina-favour-against-vulture-funds-. The vast majority of commentators and legal scholars also reject Respondents' interpretation of the *pari passu* clause. *See, e.g.*, P.R. Wood, *Pari Passu Clauses – What Do They Mean?*, Butterworths J. Int'l Banking & Fin. 371 (2003); G.M. Gulati & K.N. Klee, *Sovereign Piracy,* 56 Bus. L. 635 (2001); United Nations Centre on Transnational Corporations, Advisory Studies, No. 4, Series B, *International Debt Restructuring: Substantive Issues and Techniques* (1989) at 4 ("[*Pari passu*] clauses do not, of course, obligate the borrower to repay all of its debt at the same time.").

### E. The Second Circuit's Affirmance of Respondents' Interpretation of the *Pari Passu* Clause.

On October 26, 2012, the Second Circuit affirmed the district court's outlier interpretation of the *pari passu* clause, holding that the clause "prohibits Argentina, as bond *payor*, from paying on other bonds without paying on the FAA Bonds." Pet. App-47-53. It also affirmed the remedy, holding that injunctions preventing the Republic from making payments on the Exchange Bonds without making a "ratable payment" to Respondents were consistent with the Foreign Sovereign Immunities Act ("FSIA") and traditional principles of equity. *Id.* at App-55-62. The court of appeals, however, remanded the case, instructing the district court to clarify the Injunctions' effects on third parties and the "ratable payment" formula by which Respondents would be paid. *Id.* at App-62-63.

### F. The District Court's Injunctions on Remand.

The district court held a hearing on November 9, 2012. As it ordered, Respondents filed a supplemental memorandum in support of injunctive relief on November 13, 2012. The court allowed just three days for opposition papers, and on November 16, 2012, the EBG filed motions to vacate the February 23, 2012 injunction pursuant to Federal Rule of Civil Procedure 60(b)(4) and for leave to appear as an interested non-party. On November 21, 2012, the district court entered orders amending and reinforcing the February 23, 2012 orders. Pet. App-117-24.

The district court's amended Injunctions prohibit the Republic from making payments to the Exchange

Bondholders unless it "concurrently or in advance" makes a "Ratable Payment" to Respondents. Pet. App-120-23. The court interpreted "Ratable Payment" to mean the payment of all principal, interest and penalties owed on Respondents' FAA Bonds—an amount Respondents claim exceeds $1.33 billion. *Id.* at App-6, App-120. Moreover, the Injunctions bind all "persons or entities who . . . assist the Republic in fulfilling its payment obligations under the Exchange Bonds," including BNYM, the clearing system, Depository Trust Company, and any other transfer or paying agents, except for "intermediary banks" under N.Y. U.C.C. Art. 4-A-503. Pet. App-120-22; Pet. App-7. All such persons or entities are enjoined from taking any action to "aid[] and abet[] any violation" of the Injunctions—*i.e.*, from taking any steps to facilitate the delivery of payments under the Exchange Bonds unless the Republic has made a Ratable Payment to Respondents. Pet. App-121. Further, the Injunctions prohibit the Republic from "taking any action to evade" its obligations thereunder, "including, but not limited to, altering or amending the processes or specific transfer mechanisms by which it makes payments on the Exchange Bonds, without obtaining prior approval [from] the Court." *Id.* at App-123. Respondents interpret this provision as prohibiting the Exchange Bondholders from accepting payment even if it somehow could be tendered, *see* Appellees' Motion to Vacate the Stay, No. 12-105 [dkt. 1020], at 7, 13 (2d Cir. Oct. 15, 2013); Choi Dec., ¶14, which would never occur because no international bank would risk contempt.

On November 26, 2012, the district court denied the EBG's motions to vacate and for leave to appear as interested non-parties. Orders, Nov. 26, 2012 (2d Cir. App. SPE-1425-26). The EBG immediately appealed the

November 21 and 26 orders, and on November 28, 2012, the Second Circuit granted EBG's emergency motion to intervene as interested non-parties and stayed the Injunctions pending appeal. Orders, No. 12-105 [dkt. 490, 491] (2d Cir. Nov. 28, 2012). The appeal was briefed on an expedited schedule, with oral argument on February 27, 2013.

### G. The Second Circuit's Affirmance.

On August 23, 2013, the Second Circuit affirmed the Injunctions in their entirety, rejecting – without discussion or analysis – the EBG's arguments that the Injunctions impermissibly harm innocent third parties and violate the EBG's Fifth Amendment rights. Pet. App-14 & n.10. The court did so although it had previously admonished the district court to "take care to craft attachment orders so as to avoid interrupting Argentina's regular payments to [exchange] bondholders." *Capital Ventures Int'l v. Republic of Argentina*, 282 Fed. Appx. 41, 42 (2d Cir. 2008). The court of appeals also concluded, with one judge dissenting, that the EBG's interests are not "plausibly affected" by the Injunctions and, therefore, the EBG did not have appellate standing "because a creditor's interest in getting paid is not cognizably affected by an order for a debtor to pay a different creditor." Pet. App-8-10 & n.7. On November 19, 2013, the court of appeals denied EBG's petition for panel rehearing and rehearing *en banc*. EBG Pet. A.

### H. The Impact of the Injunctions.

The Injunctions have the purpose and effect of conscripting the non-party Exchange Bondholders' property into the service of enforcing Respondents'

private contractual rights. They engraft a new condition – full satisfaction of Respondents' monetary claims against the Republic – on the Exchange Bondholders' previously unconditional rights to payment. Moreover, the *entry alone* of the Injunctions resulted in drastic devaluation of the Exchange Bondholders' property because the Bonds were converted into a markedly different and significantly less desirable investment. *See* Choi Dec., EBG. App. B, ¶¶8-22; Supplemental Declaration of Stephen Choi, dated Nov. 26, 2012, EBG App. C, ¶¶14-21.

It is undisputed that the Exchange Bondholders are entitled to full and timely payments under the Exchange Bonds, and that those payments, once transferred from the Republic to BNYM in Argentina, are the legal and exclusive property of the Exchange Bondholders. But the Injunctions ensure that the Exchange Bondholders will lose substantial property rights. First, the Republic could, in full compliance with the Injunctions, refuse to pay both Respondents and the Exchange Bondholders. In that event, the Exchange Bondholders will have been deprived of their property and the Injunctions will have turned a relatively minor, decade-old default on $428 million of Respondents' FAA Bonds owed to fewer than one percent of FAA Bondholders into a cataclysmic default on over $24 billion in Exchange Bonds, with potentially devastating consequences for international sovereign debt markets and the global economy. *See* Choi Dec., EBG App. C, ¶¶8-22. A default on this scale would spur an avalanche of follow-on litigation involving the Exchange Bondholders, multiple banks, and the Republic – which indeed may be Respondents' objective.[12]

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12. Respondents have reportedly purchased credit default swaps that would enable them to profit from the Republic's

Second, any scenario in which the Republic pays both the Exchange Bondholders and the Respondents is highly implausible given the Republic's emphatically stated refusal ever to pay Respondents on the FAA Bonds,[13] and the fact that the Republic lacks the resources to pay both the FAA and Exchange Bonds in full.[14] Even if the Republic

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default on the Exchange Bonds. They are, in essence, betting that the Injunctions will trigger a default. *See* Choi Dec. EBG App. C, ¶18; *Vulture Fund Goes For Broke: it Bet $100 Million on New Default*, ámbito.com, (2d Cir. App, SPE-1157). While this issue was raised in the EBG's November 16, 2012 district court submission, Respondents have not denied purchasing such swaps.

13. Following entry of the October 2012 Opinion, the Republic's Minister of Economy announced that "[w]e are never going to pay the vulture funds. Those who think otherwise have understood nothing." *See NML Capital, Ltd. v. Republic of Argentina*, No. 12-105 [dkt. 506-8], at 32 (2d Cir. Nov. 30, 2012); *see also* Statement of the Case, §C, *supra*.

14. The Republic is economically insolvent, with foreign currency reserves of only $28 billion, *see* Taos Turner, *Argentina's Currency Reserves Rise by $24 million,* Wall St. J., Feb. 13, 2014, against external indebtedness totaling over $133 billion. *See* World Bank Data, available at http://databank.worldbank.org/data/Views/Reports/ReportWidgetCustom.aspx? Report_Name=Table-2-SDDS-2009&Id=4c68c79361. Although it has managed to service these debts in recent years, the Injunctions will render that impossible. If the Injunctions are affirmed, the Republic will be required to immediately make Ratable Payments of $7.5 billion (comprising Respondents' $1.33 billion claim and $6 billion in claims by other FAA Bondholders who have followed NML's lead in obtaining *pari passu* injunctions in separate litigation). The holders of a further $11.2 billion in outstanding, untendered FAA Bonds will likely seek similar orders, generating an additional, immediately due, ratable payment claim for $15 billion (reflecting penalty interest). Satisfaction of these $22.5 billion in FAA Bond

attempted to remit payments to the Exchange Bondholders but not Respondents – a practical impossibility, *see* Choi Dec., EBG App. B, ¶14 – the Injunctions would indefinitely freeze the Exchange Bondholders' funds at BNYM. This result would obtain despite the fact that Respondents have no legal or equitable interest in the Exchange Bonds, and even though the Exchange Bondholders (i) are plainly without fault; (ii) owe no obligation to Respondents; and (iii) have already absorbed a massive discount on their original investment to facilitate the Republic's debt restructuring and ensure greater certainty of payment.

## REASONS FOR GRANTING THE PETITION

The EBG supports the grant of certiorari sought by the Republic in its petition on February 18, 2014. The EBG separately seeks review to remedy the enormous corollary injuries that imminently threaten innocent non-parties as a result of the Injunctions, which raise fundamental issues of national significance concerning the proper scope of the

claims will leave only $5.5 billion to service the Republic's remaining indebtedness, which includes liabilities of (i) $10 billion to the Paris Club, *see* Ian Mount, *Argentina: One Debt-Pile Down, Many More to Go*, Financial Times Beyondbrics Blog, July 31, 2012, http://blogs.ft.com/beyond-brics/2012/07/31/argentina-one-debtpile-down-many-more-to-go/#axzz2JEHCHI1d; (ii) $16.4 billion to the World Bank and Inter-American Development Bank, *see* International Bank for Reconstruction and Development: Summary of Current Loans for Argentina, June 30, 2013, available at http://finances.worldbank.org/countries/Argentina; (iii) $22.9 billion in pending ICSID arbitrations, *see* Form 18-K; 2012 Annual Report of the Republic of Argentina, available at http://www.sec.gov/Archives/edgar/data/914021/000090342311000486/roa-18k_0928.html; and, of course, (iv) its obligations on $24 billion of currently performing Exchange Bonds.

federal judiciary's equitable and constitutional power to imperil the private property interests of some citizens for the private benefit of others.

First, this case presents the important and unsettled question of whether a federal court has the power to enter an injunction that intentionally takes and uses the private property of unoffending non-parties to a contract dispute as leverage to coerce payment of an otherwise uncollectable money judgment for the sole benefit of private litigants. As the Republic's petition shows, when the inability to collect a debt arises from enforcement immunities enjoyed by sovereign debtors, the FSIA prohibits such an injunction, as do traditional equitable principles. The instant Petition focuses on clarifying the parameters of the federal courts' equity powers – an issue that has received notable attention from the Court in recent years. *See Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002) (federal courts' equity powers do not permit injunctions to compel contract payments or specific performance of past due monetary obligations); *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999) (federal courts' equitable powers are limited to those existing at enactment of Judiciary Act of 1789 and do not include power to grant preliminary injunction freezing assets in creditor-debtor litigation).

Second, this Petition raises questions of national importance under the Due Process and Takings Clauses of the Fifth Amendment. The EBG members have fundamental constitutional rights protecting them from government action that seizes their property for the benefit of other private citizens. This concept is deeply

rooted in both the basic precepts of our Constitution and this Court's jurisprudence. And because this case involves *judicial* action, it affords the opportunity to revisit important questions that recently divided the Court in *Stop the Beach Renourishment, Inc. v. Florida Dep't of Environmental Protection,* 560 U.S. 702 (2010), which grappled with substantive due process and takings principles in the context of judicial rulings affecting private property rights.

In addition to indisputably warranting this Court's review, these violations of the constitutional rights of non-parties underline the reasons for granting the Republic's petition. The threat of severe losses to non-parties is part and parcel of the Injunctions' attempt to coerce the Republic into paying Respondents in violation of the FSIA. Hearing the case also will serve another, highly pragmatic purpose: the Injunctions, if left undisturbed, will threaten the stability of billions of dollars of existing sovereign debt restructurings.

## I. THE INJUNCTIONS EXCEED THE EQUITABLE POWERS OF THE FEDERAL COURTS.

### A. The Injunctions Improperly Command Payment of a Contractual Debt.

The Injunctions direct the Republic to pay Respondents if it makes payments to the Exchange Bondholders, and to refrain from paying the Exchange Bondholders unless it pays Respondents. Pet. App-120. Because this form of equitable relief – enjoining payments to innocent third-party creditors to coerce contractual payments to other creditors – was unknown to the English chancery courts

at enactment of the Judiciary Act of 1789, the court below lacked authority to grant it. By upholding the Injunctions, the court below decided an important federal question in a manner that conflicts with this Court's precedent, and sanctioned radical departure from the accepted and usual course of judicial proceedings. Certiorari is therefore warranted.

"[T]he Framers approached equity with suspicion," emphasizing that the federal courts' equity jurisdiction extended only to the claims and remedies previously established under English precedent, and did not include broad remedial powers. *Missouri v. Jenkins*, 515 U.S. 70, 128-30 (1995) (Thomas, J., concurring). *See Atlas Life Ins. Co. v. W.I. Southern, Inc.*, 306 U.S. 563, 568 (1939) (equity jurisdiction conferred by Judiciary Act of 1789 "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."). Thus, the federal courts' equity powers "d[o] not include the power to create remedies previously unknown to equity jurisprudence." *Grupo Mexicano,* 527 U.S. at 332.

In *Great-West*, the Court held that the federal courts lacked equitable power to order specific performance of a reimbursement provision benefiting the insurer of an ERISA employee benefit plan, under 29 U.S.C. §1132(a)(3). It reasoned that the statute only authorized "equitable relief," which did not historically include "an injunction to compel the payment of money past due under a contract, or specific performance of a past due monetary obligation . . . ." 534 U.S. at 210-11. The Court further rejected the plaintiff's "lawyerly inventiveness"

in recasting its garden-variety contract claims for money damages as claims for injunctive relief. *Id.* at 211 n.1. It did so despite recognition that its ruling could well leave the insurers with no remedy. *Id.* at 220 (opinion of Court), 227 (Ginsburg, J., dissenting).

Similarly, Respondents assert a contractual right to receive payments on FAA Bonds whenever the Republic makes payments to the Exchange Bondholders. Although Respondents sought and obtained summary judgment for past due principal and interest payments, they have purposefully avoided securing a money judgment in an effort to portray unexceptional claims for contract damages as claims for equitable relief. As *Great-West* recognized, however, courts must look past such sleight of hand because "equity would never permit . . . an injunction against failure to pay a simple indebtedness." *Id.* at 216. Similar to *Great-West*, the result may be that the Republic can pay the Exchange Bondholders and withhold payment from Respondents with impunity due to the strictures of the FSIA. *See, e.g., FG Hemisphere Assocs., LLC v. Dem. Rep. Congo*, 637 F.3d 373, 377 (D.C. Cir. 2011) ("[A] court may have jurisdiction over an action against a foreign state and yet be unable to enforce its judgment" and plaintiffs in such cases "must rely on the government's diplomatic efforts, or a foreign sovereign's generosity, to satisfy a judgment."); *De Letelier v. Rep. of Chile*, 748 F.2d 790, 791, 798-99 (2d Cir. 1984) (FSIA barred remedy of collecting judgment redressing political terrorism because "[t]o rule otherwise here would only illustrate once again that hard cases make bad law"). But as *Great-West* teaches, absence of a remedy is no basis to broaden the bounds of equitable relief. 534 U.S. 217-18. Any such expansion is a matter for Congress. *Id.* at 220-21; *Grupo Mexicano*, 527 U.S. at 329.

Respondents' protracted litigation has caused the Republic and the courts below understandable frustration. Respondents are, however, ordinary civil litigants owed a money debt, and they are entitled only to ordinary civil rulings and recovery in money damages. Pet. App-45-47. Their debtor happens to be a sovereign nation (a fact known to Respondents when they speculatively purchased defaulted FAA Bonds, and reflected in the discounted price they paid), and by purposeful design of Congress in the FSIA, that status bars the usual methods of collection available against non-sovereign debtors. Consequently, like thousands of other civil litigants, Respondents have a right to recover funds that is difficult or impossible to enforce. Although that is unfortunate, it is also consistent with the realities of our legal system and Congress's judgment in enacting the FSIA. The proper solution to Respondents' problem is not to ignore hundreds of years of equity jurisprudence (and the FSIA), by shifting Respondents' misfortune onto the vast majority of heavily discounted Exchange Bondholders. *See Penn. Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) ("In general it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders.") (Holmes, J.).

In *Grupo Mexicano*, the Court reached an analogous result in holding that federal courts may not issue preliminary injunctions freezing a debtor's assets before a creditor obtains judgment. The Court noted that, under traditional equitable principles, federal courts "will not, as a general matter interfere with the debtor's disposition of his property at the instance of a nonjudgment creditor." 527 U.S. at 329. That is precisely what the Injunctions do in this case. Respondents have, with "lawyerly inventiveness,"

declined to reduce their claims here to money judgment,[15] yet the district court enjoined the Republic from allocating its assets – which are not only immune but also insufficient to satisfy the Exchange Bondholders and the remainder of its outstanding unsubordinated debt – amongst its various creditors as it sees fit. As *Grupo Mexicano* recognized, the federal courts lack equitable power to deprive the Republic of that freedom. *See* 527 U.S. at 322 ("[T]here is absolutely nothing new about debtors' . . . seeking to favor some creditors over others."); Story, 1 Commentaries on Equity Jurisprudence, §12 ("[A] debtor may prefer one creditor to another, in discharging his debts, when his assets are wholly insufficient to pay all the debts.") (cited in *Grupo Mexicano*, 527 U.S. at 321-22). This Court should therefore grant this petition to establish the proper scope of the federal courts' equity powers.

### B. The Injunctions Ignore Indisputable Injury to Non-Parties.

There is no authority for the court of appeals' view that it could disregard hardship to a non-party caused by an injunction based on who causes that hardship or how it is caused. The court acknowledged that an injunction

15. Respondents have, however, obtained money judgments in a large number of related cases against the Republic. *EM Ltd v. Republic of Argentina*, 695 F.3d 201, 203 (2d Cir. 2012) (beginning in 2003 NML filed eleven actions against the Republic, obtaining five money judgments totaling $1.6 billion and summary judgment in six actions on claims totaling over $900 million); *EM Ltd. v. Republic of Argentina*, 865 F. Supp. 2d 415, 417 (S.D.N.Y. 2012) (Respondent Aurelius Capital Master, Ltd. had eleven final judgments against the Republic for $1.2 billion and pending cases seeking further money judgments).

may not place unreasonable burdens on third parties. Pet. App-13. It did not disagree that the district court's effort to secure payment of the $1.33 billion Respondents claim on their defaulted FAA Bonds was virtually certain to result in default on *$24 billion* in Exchange Bonds held by innocent non-parties, and that the Injunctions altered the *status quo ante* to place third-party Exchange Bondholders directly in this harm's way. Instead, the Second Circuit formalistically stated that it was not the *Injunctions* that exposed the Exchange Bondholders to catastrophic financial loss, but "Argentina's threats" to disobey them. Pet. App-14. It announced it could disregard the Injunctions' consequences because "[t]his type of harm—harm threatened to third parties by a party subject to an injunction who avows not to obey it—does not make an otherwise lawful injunction 'inequitable.'" *Id.*

Courts sitting in equity must *always* "ensure that extraordinary equitable remedies will not become the engines of injustice," *Bhd. of Locomotive Eng'rs v. Missouri-Kansas-Texas R. Co.*, 363 U.S. 528, 532 (1960), and adhere to "the governing principle that it is the duty of a court of equity granting injunctive relief to do so upon conditions that will protect all … whose interests the injunction may affect." *Inland Steel Co. v. United States*, 306 U.S. 153, 157 (1939). Likewise, "the court must consider the extent to which the judgment may *as a practical matter* impair or impede [a non-party's] ability to protect his interest." *Provident Tradesman Bank Trust Co. v. Patterson*, 390 U.S. 102, 110 (1968) (footnotes omitted; emphasis added). Specific performance cannot be compelled "if under *all* the circumstances it would be inequitable to do so." *Texas v. New Mexico*, 482 U.S. 124, 131 (1987) (emphasis added).

In view of these principles, the Second Circuit's statement that the multi-billion dollar default the Injunctions will cause is not the "type of harm" that can "make an otherwise lawful injunction 'inequitable,'" Pet. App-14, is an extreme departure from the proper course of judicial proceedings. The lone cited authority, *Reynolds v. Int'l Amateur Athletic Federation*, 505 U.S. 1301 (1992), is a three-paragraph opinion by former Justice Stevens, sitting as Circuit Justice, that cites no law and pertains to a matter heard on an emergent basis. It therefore lacks precedential value.[16] Nor does *Reynolds* provide persuasive authority here: In *Reynolds*, the defendant hoped to coerce the court into denying a preliminary injunction by threatening to take purely "*voluntary and intentional*" action against non-parties if the injunction were granted. *See Reynolds v. Int'l Amateur Athletic Fed'n*, 841 F. Supp. 1444, 1455 (S.D. Ohio 1992) (emphasis in original). The court refused to permit this threat to influence its ruling, holding that a defendant may not hold non-parties "hostage against an unfavorable decision from" a federal court. *Id.* at 1455, *aff'd,* 505 U.S. at 1302.

Here, it is not the Republic, but the district court that is taking non-parties hostage. The original injunction

16. *See*, *e.g.*, *Martin v. Diguglielmo*, 644 F. Supp. 2d 612, 619 (W.D. Pa. 2008) ("[T]he case is a decision rendered by a single [Supreme Court Justice], and hence of no binding force upon the federal courts.") (referencing *Bandy v. United States*, 82 S. Ct. 11 (1961) (Douglas, J., in chambers)); *Territorial Court of Virgin Islands v. Richards*, 674 F. Supp. 180, 181 n.2 (D.V.I. 1987) ("since he was sitting as a Circuit Justice, his decision does not carry the precedential value of an opinion of the United States Supreme Court.") (referencing *Becker v. United States*, 451 U.S. 1306 (1981) (Rehnquist, J., in chambers)).

in *Reynolds* did not address or purport to impact non-party interests in any way. It was the *defendant* that threatened to harm non-parties if the injunction was granted. In contrast, before the Injunctions, the Republic serviced the Exchange Bonds according to their terms, and Respondents' dispute was of no moment to the Exchange Bondholders. No harm was threatened to the EBG until the district court crafted unprecedented Injunctions that explicitly targeted their property out of all of the Republic's outstanding unsubordinated debt and deliberately used their property as leverage against the Republic attempting to circumvent the FSIA. Here, unlike *Reynolds*, it is the *courts,* not the defendant, that have threatened the non-party Exchange Bondholders and their property.

Further, the court of appeals noted that *Reynolds* involved harm to non-parties resulting from a party's threat to *disobey* an injunction. Pet. App-14. In this case, however, the Injunctions only require the Republic to pay Respondents if it pays the Exchange Bondholders; paying neither does not violate – indeed it fully complies with – the Injunctions. *See* Pet. App-58 ("The Injunctions do not require Argentina to pay any bondholder any amount of money."). Thus, *Reynolds* is inapposite because the EBG is injured if the Republic *obeys* the Injunctions.

Finally, while obviously not a Circuit split, in the international context of sovereign debt restructuring that is so important to the foreign relations of the United States, *see* U.S. *Amicus* Br., Pet. App-170, App-182-85, the Second Circuit's decision to ignore limits on equitable power and disregard the harm to non-parties stands in stark contrast to the decision upheld by the Court of Appeals of England and Wales, *Kensington, supra*, [2003]

EWCA Civ. 709. There, the court refused to order Congo's compliance with a *pari passu* clause virtually identical to the provision at issue here. *Kensington* approved a lower court finding that the property rights of non-parties, similarly situated to the Exchange Bondholders, should not be jettisoned in pursuit of collecting an ordinary contract debt from a sovereign nation: "I do not regard it as an appropriate exercise of my discretion . . . to make an order compliance with which can only realistically be achieved by coercion of third parties." *Id.* at 7.

## II. THE INJUNCTIONS VIOLATE THE FIFTH AMENDMENT BY SUBSTANTIALLY BURDENING THE EXCHANGE BONDHOLDERS' PROPERTY TO FACILITATE COLLECTION OF A PRIVATE DEBT.

This case presents the important question of whether the Fifth Amendment prohibits a district court from deliberately interfering with the property rights of private non-parties to secure a private litigant's recovery on an unpaid debt. The court of appeals rejected—without explanation—over two centuries of this Court's jurisprudence holding that the Due Process and Takings Clauses forbid government action that places any significant imposition on the private property of one person for the private benefit of another. *See* Pet. App-14 n.10. Review is necessary to protect the sanctity of private property ownership[17] and resultant limitations imposed upon judicial power by the Constitution.

17. The Exchange Bondholders' contract rights and the funds they are entitled to receive pursuant thereto constitute "property" within the meaning of the Fifth Amendment, which "is addressed to every sort of [property] interest the citizen may possess." *United States v. Gen. Motors Corp.*, 323 U.S. 373, 387 (1945).

Together, the Due Process Clause and Takings Clause serve to protect "the security of Property," which Alexander Hamilton described as one of the "great obj[ects] of Gov[ernment]." 1 Records of the Federal Convention of 1787, at 302 (M. Farrand ed., 1934). In recent years, the Court has been divided on whether substantive due process or takings principles provide the proper analytical framework for redress of improper judicial action (here, the Injunctions)[18] that significantly interferes with private property rights. *Compare Stop the Beach*, 560 U.S. at 713-28 (Scalia, J.), *with id.* at 734-42 (Kennedy, J., concurring). The Court has been consistently united, however, on the bedrock tenet – whether derived from the Due Process or the Takings Clause – that "the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B* . . . ." *Kelo v. City of New London*, 545 U.S. 469, 477 (2005). This rule reflects a fundamental limitation on government power that flows from "the great first principles of the social compact," *Calder v. Bull*, 3 Dall. 386, 388 (1798), and has been repeatedly reaffirmed. *E.g., Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 245 (1984) ("A purely private taking could not withstand . . .scrutiny . . .; it would serve no legitimate purpose of government and would thus be void.").

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18. Judicial orders indisputably constitute governmental action for purposes of the Fifth Amendment. *See, e.g., Stop the Beach*, 560 U.S. at 714 ("It would be absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat. Our precedents provide no support for the proposition that takings effected by the judicial branch are entitled to special treatment, and in fact suggest the contrary.").

Indeed, the Court has held that government action placing any significant imposition on the private property of one person for the private benefit of another is a core violation of fundamental property rights that is *never* justified. For example, in *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55, 58 (1937), the Texas Railroad Commission limited the amount of sweet gas that landowners could produce from privately owned wells. The limitations were intended solely to create a product market for other private well-owners. *Id.* at 77. Concluding that the regulation effectively stripped the first group of well-owners of private property rights for the private benefit of the second group, the Court invalidated the law. *Id.* at 80.

Similarly, the Injunctions impair, condition, and will ultimately extinguish the Exchange Bondholders' private right to bond payments in a targeted and deliberate effort to aid Respondents in collection of a purely private contract debt. Nor is there any dispute that the Injunctions have severely impaired the Exchange Bondholders' property and its value. *See* Statement of Case, *supra*, §H. Just as the government action in *Thompson* interfered with private rights in order to create a product market for private citizens who would otherwise have none, *see* 300 U.S. at 78, the Injunctions here severely degrade the Exchange Bondholders' private property rights to create a "mechanism for enforcement" for FAA Bondholders beyond those Congress contemplated in the FSIA or permits under traditional rules of equity. 2/23/12 Hearing Tr. (2d Cir. App. A-2290), T7:3. As *Thompson* demonstrates, that result is constitutionally prohibited. *See also Chi., St. Paul, Minn. & Omaha Ry. Co. v. Holmberg*, 282 U.S. 162, 166-67 (1930) (vacating order requiring railroad to build underground pass for benefit

of private landowners); *Mo. Pac. Ry. Co. v. Nebraska*, 164 U.S. 403, 417 (1896) (vacating order requiring railroad to allow private party to construct elevator on its property for private use). Moreover, the Injunctions are all the more arbitrary and irrational because they single out the Exchange Bonds – from all the Republic's outstanding unsubordinated debt – as the lever for coercing payment from the Republic, notwithstanding that the district court's interpretation of the *pari passu* clause applies equally to those instruments.

The court of appeals dispensed with over fifty pages of briefing on these issues with a cryptic footnote that "the amended injunctions do not deprive Exchange Bondholders of any property." Pet. App-14 n.10. Yet, as noted above, all the record evidence pointed to a marked deprivation of property.[19] The court's Orwellian pronouncement does not change that fact.[20] Moreover, even temporary deprivations

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19. To the extent the court of appeals' conclusion rested on the formalistic reasoning that the deprivation of the Exchange Bondholders' property will technically be caused by the Republic, rather than the Injunctions, such distinctions have no place in constitutional jurisprudence. "In determining what is due process of law, regard must be had to substance, not to form." *Chi., B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 235 (1897).

20. Respondents argue that, if the Republic should offer to replace the Exchange Bondholders' securities with new bonds issued and payable exclusively in Argentina, the Exchange Bondholders would violate the Injunctions if they accepted that offer. Appellees' Motion to Vacate the Stay, No. 12-105 [dkt. 1020], at 7, 13 (2d Cir. Oct. 15, 2013)("[A]ny step towards implementing" a swap plan "constitutes a violation of the Anti-Evasion Order."). That argument effectively acknowledges that the Injunctions significantly compromise the Exchange Bondholders' property rights.

and takings of private property, which fall well short of outright seizure run afoul of the Fifth Amendment. *E.g., First English Evangelical Lutheran Church of Glendale v. Los Angeles Cnty.*, 482 U.S. 304, 318 (1987) (explaining that even "'temporary' takings . . .are not different in kind from permanent takings . . .").

## III. THE EBG HAS STANDING TO APPEAL.

The court of appeals' divided ruling[21] that the EBG lacked standing to appeal because it was not "bound by" or "plausibly affected" by the Injunctions presents a further important issue that conflicts with those of other courts of appeal. The Injunctions, as noted, yielded grave consequences for the EBG, its unconditional right to payment on the Exchange Bonds, and the value of its investments. As the dissent below correctly recognized, such tangible consequences establish that the EBG is "plausibly affected" by the Injunctions. Pet. App-10 n.7. Indeed, the court of appeals earlier recognized that the Injunctions were likely to infringe upon non-parties' rights when it remanded for consideration of that very issue. Pet. App-62-63.[22]

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21. Judge Pooler's disagreement on the standing issue was stated in a footnote in lieu of a dissenting opinion. Pet. App-10 n.7.

22. The Second Circuit's statement that the EBG can sue the Republic if the Injunctions lead to default, Pet. App-9, underscores that the EBG's interests *are* affected by the Injunctions. If the Republic is forced into default on both the Exchange and FAA Bonds in response to the Injunctions, the court will have already caused grave losses to the Exchange Bondholders. Moreover, an EBG suit against the Republic would be futile; any judgment would go unsatisfied, as demonstrated by Respondents' failure to collect monetary judgments against the Republic to date. The only

The Second Circuit's ruling conflicts with authority from other circuits holding that a non-party's interests as a creditor of the Republic are alone sufficient to confer standing where the interests are directly affected by a judgment. *See, e.g.*, *United States v. Holy Land Found. for Relief & Dev.*, 445 F.3d 771, 780-81 (5th Cir. 2006), *upheld on this ground en banc*, 493 F.3d 469, 472 (5th Cir. 2007) (judgment creditors had standing to appeal restraining order indefinitely freezing assets of foundation accused of ties to terrorism); *United States v. Yielding*, 657 F.3d 722, 726, 728-29 (8th Cir. 2011) (third-party creditors had standing to appeal restitution order and "a due process right to an opportunity to have their competing claims adjudicated"); *In re Piper Funds, Inc., Inst'l Gov't Income Portfolio Litig.*, 71 F.3d 298, 300-301 (8th Cir. 1995) ("A nonparty normally has standing to appeal when it is adversely affected by an injunction," where non-party was enjoined from arbitrating its claim).[23]

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meaningful opportunity that the EBG has to protect its rights is *now*, before the Injunctions take effect.

23. The two cases cited by the Second Circuit, Pet. App-9, are not to the contrary. *See Dish Network Corp. v. DBSD N. Am., Inc.*, 634 F.3d 79, 90 (2d Cir. 2010) (applying heightened standard for appellate standing based on former Bankruptcy Act, and holding creditor had appellate standing to challenge bankruptcy plan due to direct financial interest, even where creditor's legal argument, if correct, could result in it receiving less money); *Evanston Ins. Co. v. Fred A. Tucker & Co., Inc.*, 872 F.2d 278, 280 (9th Cir. 1989) (defendant and third-party defendant lacked standing to appeal declaratory judgment because their liability under settlement agreement in separate state action was tied to outcome of declaratory judgment action).

Further, the decision below conflicts with decisions recognizing that where non-parties will be bound by a court's order, *see supra* n.23, they have standing to appeal based on a legitimate argument that the court exceeded its authority. *See U.S. Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 77 (1988) (nonparties subject to subpoenas *duces tecum* had standing to appeal issuing court's subject matter jurisdiction); *United States v. Kirschenbaum*, 156 F.3d 784, 794 (7th Cir. 1998) ("Non-parties who are bound by a court's equitable decrees have a right to move to have the order dissolved.").

Indeed, in Respondents' view, the Injunctions would prohibit the EBG from accepting payments on the Exchange Bonds anywhere in the world, because it would constitute circumvention by acting in "active concert or participation" with the Republic. Fed. R. Civ. P. 65(d)(2)(c). Thus, the EBG's only alternative to compliance (*i.e.*, refusing payments in the unlikely event they were tendered) would be to violate the Injunctions and thereby risk contempt. The decision below conflicts with those of other Circuits recognizing appellate standing where such a conundrum exists. *See In re Estate of Ferdinand Marcos Human Rights Litig.*, 94 F.3d 539, 544 (9th Cir. 1996) (non-party had appellate standing where sufficient injury-in-fact entailed choice of adhering to injunction or risking contempt).

Finally, the EBG's direct interest in this appeal and its significant participation at the district and circuit court levels entitle it to appellate standing. This Court has "never. . .restricted the right to appeal to named parties to the litigation," recognizing that non-parties may have appellate standing absent formal intervention. *E.g.*, *Devlin*

*v. Scardelletti*, 536 U.S. 1, 6-11 (2002) (non-named class member who objected to settlement had standing to appeal absent intervention); *Kirschenbaum*, *supra*, 156 F.3d at 794 (defendant's wife, who had not sought to intervene in district court, had standing to appeal denial of motion to modify restraining order insofar as it froze income from property in her name).

## CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

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# APPENDIX

## APPENDIX A — CORRECTED ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED NOVEMBER 19, 2013

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CORRECTED ORDER

Docket Nos: 12-105 (L), 12-109(C), 12-111(C), 12-157(C), 12-158(C), 12-163(C), 12-164(C), 12-170(C), 12-176(C), 12-185(C), 12-189(C), 12-214(C), 12-909(C), 12-914(C), 12-916(C), 12-919(C), 12-920(C), 12-923(C), 12-924(C), 12-926(C), 12-939(C), 12-943(C), 12-951(C), 12-968(C), 12-971(C), 12-4694(C), 12-4829(C), 12-4865(C)

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 19th day of November, two thousand thirteen,

NML Capital, Ltd., Aurelius Capital Master, Ltd., ACP Master, Ltd., Blue Angel Capital I LLC, Aurelius Opportunities Fund II, LLC, Pablo Alberto Varela, Lila Ines Burgueno, Mirta Susana Dieguez, Maria Evangelina Carballo, Leandro Daniel Pomilio, Susana Aquerreta, Maria Elena Corral, Teresa Munoz De Corral, Norma Elsa Lavorato, Carmen Irma Lavorato, Cesar Ruben Vazquez, Norma Haydee Gines, Marta Azucena Vazquez, Olifant Fund, LTD.,

*Plaintiffs-Appellees,*

v.

The Republic of Argentina,

*Defendant-Appellant,*

The Bank of New York Mellon, as Indenture Trustee, Exchange Bondholder Group, Fintech Advisory Inc.,

*Non-Party Appellants,*

Euro Bondholders, ICE Canyon LLC,

*Intervenors.*

Non-Party Appellant Exchange Bondholder Group, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk
/s/

## APPENDIX B — DECLARATION OF STEPHEN CHOI IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK, DATED NOVEMBER 16, 2012

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NML CAPITAL, LTD.,

*Plaintiff,*

– against –

THE REPUBLIC OF ARGENTINA,

*Defendant.*

08 Civ. 6978 (TPG)
09 Civ. 1707 (TPG)
09 Civ. 1708 (TPG)

**DECLARATION OF STEPHEN CHOI**

Pursuant to 28 U.S.C. § 1746, Stephen Choi declares as follows:

1. I am the Murray and Kathleen Bring Professor of Law at the New York University Law School. I received a Ph.D. in economics with a focus on corporate finance and industrial organization from Harvard University in 1997. I received a J.D. from Harvard Law School in 1994 where I graduated first in my class and was a Supervising

Editor of the Harvard Law Review. While at Harvard Law School I was awarded the Fay Diploma, the Sears Prize, and the Irving Oberman Memorial Award. Before joining the New York University Law School faculty I was the Roger J. Traynor Professor of Law at the University of California, Berkeley Law School.

2. My primary research focus is in the area of securities regulation. I have published over 50 articles in journals including the Yale Law Journal, Stanford Law Review, California Law Review, Columbia Law Review, University of Chicago Law Review, Michigan Law Review, Southern California Law Review, Journal of Empirical Legal Studies, Journal of Legal Studies, and Journal of Law, Economics, and Organization. Several of my papers have been recognized by Corporate Practice Commentator's annual survey as one of the ten best articles in the areas of corporate and securities law. I am also the co-author of a casebook on securities regulations used in law schools in the United States (Securities Regulations: Cases and Analysis 3rd Edition, published by Foundation Press).

3. I have written several articles that deal directly with sovereign bonds, sovereign bond covenants, and the pricing of sovereign bonds. These articles are:

- The Dynamics of Contract Evolution, forthcoming New York University Law Review (with Mitu Gulati and Eric Posner)

- The Evolution of Contractual Terms in Sovereign Bonds, forthcoming Journal of Legal Analysis (with Mitu Gulati and Eric Posner)

- Pricing Terms in Sovereign Debt Contracts: a Greek Case Study with Implications for the European Crisis Resolution Mechanism, 6 Capital Markets Law Journal 163 (2011) (with Mitu Gulati and Eric Posner)

- Contract as Statute, 104 Mich. L. Rev. 1129 (2006) (with Mitu Gulati) [cited in *NML Capital, Ltd. v. The Republic of Argentina* (2nd Cir., October 26, 2012)].

- Innovation in Boilerplate Contracts: The Case of Sovereign Bonds, 53 Emory L. J. 929 (2004) (with Mitu Gulati)

- Why Lawyers Need to Take a Closer Look at Exit Consents, International Financial Law Review 15 (September 2003) (with Mitu Gulati)

4. I have taught securities regulation since I entered legal academia and presently teach the course at NYU to over 100 students. I taught corporation law a number of times while a professor at the University of California, Berkeley Law School. I will teach corporation law next spring at NYU. I was the chair of the Association of American Law Schools' section on Securities Regulation for 2006-2007, a member of the Board of Directors of the American Law and Economics Association for 2007-2010, and a former term member of the U.S. Council on Foreign Relations for 2000-2005. In addition, I have made numerous presentations relating to corporate and securities issues.

5. I am being compensated at a rate of $900 per hour for my independent review, analysis, and testimony provided in this case. My compensation is not contingent upon my conclusions or on the outcome of this matter.

6. I have been asked by counsel at Gramercy Funds Management LLC to give an opinion on the effect of the Second Circuit's opinion in *NML Capital Ltd. v. The Republic of Argentina* (2nd Cir., October 26, 2012) and this court's February 2012 injunction on the risk of non-payment facing those holders of the Republic's sovereign bonds that exchanged their bonds during the 2005 and 2010 Argentine exchange offers (the "Exchange bondholders"). I have also been asked to give an opinion on the impact of non-payment on the Exchange bondholders. Lastly, I have been asked to give an opinion on the effect of the Second Circuit's *NML Capital* opinion on the ability of sovereigns that face financial distress to restructure their sovereign debt.

7. Based on my analysis of relevant news articles, the Republic's history with defaults, price and yield data on the Exchange bonds, and credit rating agency ratings for the Republic's sovereign debt, I conclude that the Second Circuit's *NML Capital* opinion and this court's February 2012 injunction materially increase the risk of non-payment for the Exchange bondholders. Non-payment would have an immediate and irreversible negative impact on the Exchange bondholders. Lastly, the Second Circuit's *NML Capital* opinion materially undermines the ability of sovereigns in financial distress to engineer value-increasing debt restructurings that would benefit the sovereign and the group of all sovereign debt holders.

Material Increase in Risk of Non-Payment for Exchange Bond Holders

8. I base my opinion that the Second Circuit's *NML Capital* opinion and this court's February 2012 injunction materially increase the risk of non-payment for the Exchange bondholders on several factors.

9. First, the Republic President Cristina Fernández de Kirchner and members of her cabinet have expressed publicly their strong opposition to making any payments to NML Capital and other holdout bondholders.[1]

10. Second, history supports the credibility of the public pronouncements of the Republic's President and her cabinet that the Republic will not pay the holdout creditors. The Republic's relationship with outside creditors is one marked with a long history of many incidents where the Republic either defaulted or came close to defaulting (avoided only through restructuring) on its sovereign debt obligations. In the 1820s, the Republic defaulted on bonds it had sold on the London stock exchange. In the 1890s, the Republic again defaulted on its sovereign debt, leading to the collapse of London's Barings Brothers bank, an underwriter for the Republic's bond issuances and the Republic's primary creditor. In 1956, the Republic threatened to default on its sovereign debt. The resulting debt restructuring negotiations between the Republic and

1. *See* Brief of Plaintiffs In Response to the Remand From the Court of Appeals in *NML Capital, Ltd. v. The Republic of Argentina* dated November 13, 2012 at p. 1-2.

various creditors led to the creation of the Paris Club, an informal group of official sector creditors from many of the world's largest economies including the United States, France, Germany, Canada, and Australia among others. After borrowing extensively in the 1970s, the Republic again faced the prospect of default in 1982, along with several other Latin American countries, leading to restructuring with foreign and multilateral lenders. More recently, the Republic defaulted on approximately $81 billion of sovereign debt in 2001, to date the largest sovereign default in history.

11. Indeed, the Republic's past history with defaults and debt restructuring is so extensive that the Second Circuit in *EM Ltd. v. Republic of Argentina*, 473 F.3d 463 (2007), took explicit notice of the Republic's "numerous" defaults and what it termed the Republic's "diplomacy of default". *Id.* at 466 n2.

12. Third, not only does the Republic's past history with defaults demonstrate the Republic's willingness to forego payment on its debt, the Republic's own laws make it likely that the country will refuse to pay the holdout creditors. In particular the Lock Law (Argentine Law 26,017) prohibits the Republic from reopening the swap process (Article 2) and entering into a settlement with the holdout creditors (Article 3). The Lock Law thus prohibits the Republic from engaging in any settlement with the holdout creditors. While the Republic has suspended the Lock Law in the past, the public pronouncements of the Republic's President and members of her cabinet with respect to the holdout creditors make this an unlikely prospect.

13. The strong statements on the part of the Republic's President and members of her cabinet coupled with the Republic's history of defaults make it likely that any requirement imposed on the Republic to pay the holdout creditors will result in the Republic simply refusing to make payment to the holdout creditors. This court's February 2012 injunction provides that "[w]henever the Republic pays any amount due under the terms of the [Exchange] bonds," it must "concurrently or in advance" pay NML Capital and the other holdout creditors a "Ratable Payment". The court's injunction takes two separate obligations (the obligation to pay the Exchange bondholders and the obligation to pay NML Capital and the other holdout creditors) and makes satisfaction of one obligation (payment to NML Capital and the other holdouts) a precondition to satisfy the other obligation (payment to the Exchange bondholders). Consequently, the injunction forces the Republic to pay both the holdout creditors and the Exchange bondholders or to pay neither of them. The February 2012 injunction also prohibits "all parties involved, directly or indirectly, in advising upon, preparing, processing, or facilitating any payment on the Exchange Bonds" from "aiding and abetting" any effort to make payments to the Exchange Bonds without also making a "Ratable Payment" to NML Capital. NML Capital has currently proposed orders to the court modifying the February 2012 injunction, among other things, to make clear that the aiding and abetting provision of the injunction applies to the Bank of New York Mellon, Cede & Co. and The Bank of New York Depositary (Nominees) Limited, clearing corporations and systems, depositaries, settlement agents, trustee paying agents,

transfer agents, and attorneys and other agents among others.[2]

14. If the Republic adheres to its position of not paying the holdout creditors and also complies with this court's February 2012 injunction, the Republic must stop payment to the Exchange bondholders. Even if the Republic were to transfer money to the Bank of New York Mellon and other intermediaries earmarked for the Exchange bondholders, the February 2012 injunction would prohibit these intermediaries from transferring the money onto the Exchange bondholders without also paying NML Capital. Instead of being rewarded for their sacrifice in 2005 and 2010 in taking a large "haircut" in value when they turned their bonds in for the Exchange bonds, the Exchange bondholders now face a materially increased risk of non-payment because of the February 2012 injunction and the Second Circuit's *NML Capital* opinion related to the injunction. As this court indicated on November 9, 2012, other means exist to enforce an obligation to bondholders.[3] The February 2012 injunction is different from more traditional means of enforcement in that it imposes a material increase in the risk of non-payment on another class of bondholders, the Exchange bondholders, as the means to obtain payment for another class of bondholders, NML Capital and the other holdouts.

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2. *See* Proposed Order Amending the February 23, 2012 Order filed on November 13, 2012 (Exhibits A, B, C, and D).

3. *See* Transcript of Proceedings before Judge Griesa in *NML Capital Ltd. v. The Republic of Argentina* dated November 9, 2012 at p. 18.

15. Objective market evidence corroborates the material increase in the likelihood of non-payment for the Exchange bonds after the Second Circuit's *NML Capital* opinion. The Republic's Global 8.75% 2017 US dollar denominated bonds, one of the Exchange bonds, dropped in price from $100.053 on October 25, 2012, the day before the Second Circuit's decision, to $90.157 on October 26, 2012—for a drop of 9.9%. By November 2, 2012, one week after the Second Circuit's *NML Capital* opinion, the price had dropped to $76.483, for a drop from October 25, 2012 of 23.6% (data source: Bloomberg). Similarly, the spread on the Global 8.75% 2017 US dollar denominated bonds compared with the yield on generic US Government 10-year bonds as measured on October 25, 2012 increased by 304 basis points as of October 26, 2012 and by 779 basis points as of November 2, 2012 (data source: Bloomberg).[4]

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4. I did not examine the price and spreads for all of the Exchange bonds as they likely reacted similarly to the Second Circuit's *NML Capital* opinion. As a robustness check, I examined the prices and spreads for the Republic's Discount Bonds 8.28% 2033 USD (2005 Issue), another Exchange bond. The price for the Republic's Discount Bonds 8.28% 2033 USD (2005 Issue) dropped from $80.428 on October 25, 2012 to $72.125 on October 26, 2012—for a drop of 10.324%. By November 2, 2012, one week after the Second Circuit's *NML Capital* opinion, the price of the Republic's Discount Bonds 8.28% 2033 USD (2005 Issue) had dropped to $61.278, for a drop from October 25, 2012 of 23.8% (data source: Bloomberg). The spread on the Republic's Discount Bonds 8.28% 2033 USD (2005 Issue) as measured on October 25, 2012 increased by 150 basis points as of October 26, 2012 and by 374 basis points as of November 2, 2012 (data source: Bloomberg).

16. Consistent with the dramatic drop in Exchange bond prices and corresponding increases in yield spreads, Bloomberg reported on November 16, 2012 that "[t]he cost to insure Argentine debt against default rose 132 basis points to 2,656 basis points yesterday, according to data compiled by Bloomberg. The credit-default swaps imply a 84.8 percent probability Argentina will default in five years, based on the assumption investors will recover 25 percent of the par value of the bond."[5]

17. Credit rating agencies also recognized the significantly increased risk of default for the Exchange bonds following the Second Circuit's *NML Capital* opinion. Explicitly citing the Second Circuit's *NML Capital* opinion, Standard & Poor's cut its sovereign rating of the Republic from B to B-, moving the Republic further into junk bond territory, and also assigned a negative outlook on the country. S&P reported that: "'The negative outlook indicates at least a one-in-three chance of a downgrade over the next 12 months'".[6] Fitch's similarly placed the Republic's Long-term foreign currency Issuer Default Rating of "B", Short-term Issuer Default Rating of "B" and the international bonds issued under New York Law on a negative ratings watch in response to the Second Circuit's *NML Capital* ruling.

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5. Drew Benson, Greek Insolvency Overwhelmed by Argentina's Default Risk, Bloomberg, November 16, 2012.

6. Ken Parks, S&P Cuts Argentina Ratings on Debt Payment, Economics Risks, WSJ.com, October 30, 2012.

18. In sum, several market metrics for the Exchange bonds indicate a significantly increased risk of default following the Second Circuit's *NML Capital* opinion. The risk of default has increased so much that Bloomberg reported on November 16, 2012 that the yields for the Republic's euro-denominated bonds now exceeds the yields for similar-maturity Greek bonds.[7] Indeed, even Elliot, the parent of NML Capital, is making a bet on default. A recent news article indicates that Elliot acquired approximately $100 million of credit default swaps that pay off only if Argentina defaults on its obligations to the Exchange bondholders.[8]

Irreversible Negative Impacts of a Non-Payment by the Republic

19. Non-payment of principal and interest will have immediate and irreversible negative effects on the Exchange bondholders. At a minimum, the Exchange bondholders will not receive the principal and interest

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7. *See* Drew Benson, Greek Insolvency Overwhelmed by Argentina's Default Risk, Bloomberg, November 16, 2012 ("Argentina's bond yields are eclipsing those of Greece for the first time since the European nation's debt restructuring in March, as speculation increases the South American country will opt to default rather than settle with its so-called holdout creditors.").

8. *See* Vulture Fund Goes for Broke: It Bet US $100 Million on a New Default, ambito.com, November 15, 2012 ("It seems the Elliot vulture fund acquired approximately US$100 million of these CDS, as well as some short term agreements. They are taking it all. And they've stacked the deck because they have the best information about what is happening in the legal arena.").

due to them, imposing financial hardship on many of the Exchange bondholders that require the payment to meet their own debt and other obligations. Non-payment will also result in a likely large decline in the price of the Exchange bonds and a reduction in the liquidity of the secondary market for the Exchange bonds, making it difficult if not impossible for Exchange bondholders to exit their positions through sales to other investors. As discussed above, the mere prospect of non-payment or default after the Second Circuit's *NML Capital* opinion has resulted in large decreases in Exchange bond prices. Once investor confidence in The Republic is diminished by an actual incident of non-payment or default, it may take a significant amount time for that confidence to be restored—leading the market for the Exchange bonds to remain depressed even if the Republic were to resume payments on the Exchange bonds. Many of the Exchange bondholders themselves are investment entities required to mark to market the value of their Exchange bonds, thereby affecting the net asset value of these investment entities to outside investors. The reduction in the net asset value, in turn, may cause the investment entities to lose some of these outside investors.

20. Non-payment will also result in uncertainties for investors in the Exchange bonds, complicating valuation of the bonds as well as accounting treatment for the bonds. Many investors insure the value of their bonds against the risk of default through credit default swaps. Non-payment or default may trigger these credit default swaps, causing a ripple effect as the negative effect of non-payment or default are passed on to the counterparties of the credit

default swaps. Some of these counterparties in turn may themselves have purchased credit default swaps which then may get triggered, leading to a further transfer of the effects of non-payment or default to yet another round of counterparties. Once various credit default swaps are triggered across numerous market participants, even if the Republic were to resume payments to the Exchange bondholders, unwinding the payments under the credit default swaps across multiple market participants will be difficult if not impossible (for example if a counterparty in the chain goes insolvent due to the triggering of a credit default swap). The complex, often non-transparent inter-linkages across different financial institutions through credit default swaps played a large role in the uncertainties about the exact exposures of individual financial institutions to mortgage-backed securities and related instruments during the recent financial crisis, resulting in a loss of investor confidence that exacerbated the crisis.[9]

21. The negative impacts of default in one country can have significant negative systemic consequences on countries and investors worldwide. Countries and financial institutions today are highly interlinked. The negative effect of a non-payment or default on sovereign

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9. *See* Patricia A. McCoy, Andrey D. Pavlov & Susan M. Wachter, Systemic Risk Through Securitization: The Result of Deregulation and Regulatory Failure, 41 Conn. L. Rev. 1327, 1363 (2009) ("The central problem is that the CDS market creates daisy chains of counterparty liability, whereby one buyer relies on the solvency of its seller to cover the buyer's own CDS exposure to another buyer down the chain.").

debt obligations on the Republic's economy will have spillover effects on the economies of countries that trade with and otherwise do business in the Republic. Global financial institutions often take on significant quantities of sovereign debt onto their balance sheets. The default on the part of one sovereign may then weaken the balance sheet of these financial institutions and require the financial institutions to increase their liquid capital reserves, leading the institutions to withdraw liquid assets held in other financial institutions. This in turn will spread the impact of the default and resulting liquidity problems to these other financial institutions. Investors fearful that a financial institution faces insolvency due to its sovereign debt exposure may lose confidence in the financial institution and seek to withdraw their money from the institution, further weakening the institution and leading the financial institution to withdraw even more liquid assets from other financial institutions, widening the negative impact of the default. Banks may also not know the exposure of other banks to the bad sovereign debt, leading banks to become cautious about lending each other money, leading to drastic reductions in interbank lending and liquidity. Constricting liquidity may then cause financial institutions to lend less money to the private sector generally, causing a contraction of business in all areas of the world where the financial institutions make loans, pushing countries into recession and raising the risk of default by other sovereigns.

22. Once multiple financial institutions face liquidity problems (and may indeed become insolvent), investors lose confidence, and financial institutions constrict their lending to each other and to borrowers in the economy,

the resulting economic downward spiral makes reversing the systemic impact of a sovereign default difficult if not impossible. Not only will sovereign default harm the specific bond issuance whose payments are suspended or reduced, sovereign default can thus have large negative consequences for the global economy.

Negative Impact on Ability of Sovereigns to Restructure

23. Given the large negative impact of non-payment or default, sovereigns and creditors benefit from consensual restructuring through exchange offers during times when the sovereigns are unable to meet all their financial obligations and otherwise might default. When creditors make loans to a sovereign, the expectation on the part of all parties is that the sovereign's economy will grow and the sovereign will make full payment to the creditors. But sovereigns, much like corporate issuers, can face financial distress. In such situations, reducing the debt burden for a sovereign may give the sovereign time to change policies and turn around its economy, allowing eventually greater payments to the group of all creditors than if the sovereign simply defaulted. The United States government has recognized the value-increasing function of voluntary restructurings and pursues a policy in favor of the "orderly and consensual restructuring of sovereign debt" in situations where a sovereign is unable to meet all its financial obligations.[10]

10. *See* Statement of Interest of the United States in the *Macrotecnic International Corp. v. Republic of Argentina* and *EM Ltd. v. Republic of Argentina* litigation dated January 12, 2004 at p. 2.

24. Holdouts pose a very real risk to the process of value-increasing restructurings. Although an exchange offer may be beneficial to the group of all creditors, an individual creditor may profit more by demanding a disproportionately greater payment than the amount received by the rest of the creditors in a restructuring. Being paid more than a proportionate amount, however, is not sustainable. Once other investors realize that a holdout creditor stands to make more individually, other investors will also adopt a holdout strategy. And the higher price demanded by an increasing number of holdouts ultimately may cause a restructuring to fail, to the detriment of both the sovereign and all the outstanding creditors.

25. The Second Circuit in the *NML Capital* opinion cited the growing use of collective action clauses (CACs) as a solution to the holdout problem. Instead of relying on individual decisions on the part of bondholders in an exchange offer whether to tender their bonds in an exchange offer, the application of a collective action clause binds all bondholders of a specific bond issuance to a change in the payment terms of a bond so long as a defined percentage of the aggregate principal amount of the bonds, typically 75%, vote in favor of the restructuring. The growing use of CACs however, does not eliminate the threat of holdouts and in the case of many sovereigns may only minimally reduce the threat of holdouts for several reasons.

26. Collective action clauses rose in prevalence in New York law governed bonds after Mexico's adoption of a CAC in a sovereign bond issuance in 2003. Nonetheless,

many bond issuances prior to 2003 with unanimity action clauses (UACs) are still outstanding today. In addition, not all countries immediately shifted to using a CAC after Mexico's adoption in 2003. For a study I co-authored with Mitu Gulati and Eric Posner in the Journal of Legal Analysis, we developed a dataset of sovereign bond issuances and their contract terms (the "Choi-Gulati-Posner dataset").[11] Of the 257 issuances in the Choi-Gulati-Posner dataset of New York law governed bonds that have a maturity date of 2013 or later (excluding bonds issued by the Republic), 192 or 74.7% had a CAC. Thus, 65 or 25.3% of New York law governed bond issuances with a maturity date of 2013 or later employ a UAC for changes to payment related terms. In aggregate, the 65 sovereign issuances with UACs still outstanding today represent a principal amount, measured at the time of offering, of $45.8 billion.[12] The ongoing presence of numerous bond issuances with UACs today continues to make restructuring through

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11. *See* Stephen J. Choi, Mitu Gulati, and Eric Posner, The Evolution of Contractual Terms in Sovereign Bonds, forthcoming Journal of Legal Analysis. The dataset was originally developed in Stephen Choi and Mitu Gulati, Innovation in Boilerplate Contracts: The Case of Sovereign Bonds, 53 Emory L. J. 929 (2004).

12. Note that Choi-Gulati-Posner dataset is not comprehensive of all New York law governed issuances. We attempted to make the dataset as comprehensive as possible, collecting bond information from Thompson ONE Banker. Nonetheless, we may miss some New York law governed issuances and thus the $45.8 billion aggregate offering amount number likely understates the principal amount issued under bonds governed by UACs that are still outstanding today.

exchange offers an important method for sovereigns to engage in debt workouts when the sovereigns encounter distress.

27. Second, even for sovereign bond issuances that incorporate a CAC, the ability to work out a debt restructuring through an exchange offer remains important. CACs work best when there are only a small number of large bondholders who are able to coordinate with one another in agreeing to a sovereign debt restructuring. Where there are different bond issuances and numerous bondholders of these issuances, even reaching the typical 75% threshold of aggregate principal of outstanding bonds to change payment terms found in most CACs can be difficult. Evidence exists that many foreign holders of the Republic's bonds were small, individual investors. After the Republic defaulted on its debt obligations in 2001, 180,000 Italian holders of defaulted Argentine debt pursued arbitration through ICSID through Task Force Argentina.[13] Where the bondholders are small and dispersed, individual bondholders will face a collective action problem in determining whether a restructuring offer is good for the group of bondholders. Each bondholder will individually bear the full cost of research while the benefit from taking an informed vote will accrue to the entire group of bondholders. Moreover, each individual bondholder may think that their vote is unlikely to be the pivotal vote in a CAC vote, leading them to act with rational

13. *See Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5 (dated August 4, 2011).

apathy toward the vote.[14] Compounding the problems of collective action and rational apathy, bondholders, to the extent large in number, will also face significant costs in communicating and coordinating with one another. Even a value-increasing restructuring therefore may fail when bondholders are required to vote pursuant to a CAC.

28. Third, many sovereign bond issuances containing a CAC bind only the bondholders of a particular bond issuance. If a sovereign has multiple bond issuances, a vote under a CAC to restructure one bond issuance will bind only the bondholders of that particular issuance. Holdouts may focus their attention in purchasing the bonds of another bond issuance—seeking to obtain greater than 25% of the principal of the outstanding bonds—thereby blocking restructuring for that particular bond issuance under a CAC even as bondholders in other issuances agree to restructure. Of course, once other bondholders realize that a holdout in a particular issuance refuses to restructure, this will diminish the incentive of these other bondholders to vote in favor of a restructuring and take a haircut in value for their own bond issuances, undermining the restructuring efforts.

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14. Many have written on the problems of collective action and rational apathy in the context of shareholder voting in the corporate context. *See, e.g.*, Stephen M. Bainbridge, Redirecting State Takeover Laws at Proxy Contests, 1992 Wis. L. Rev. 1071, 1079-80 (1992) ("[M]ost shareholders' holdings are too small to have any significant effect on the vote's outcome. Accordingly, shareholders can be expected to assign a relatively low value to the expected benefits of careful consideration. Shareholders are thus rationally apathetic. For the average shareholder, the necessary investment of time and effort in making informed voting decisions simply is not worthwhile.").

29. Aggregation clauses that aggregate the vote across all of a sovereign's bond issuances and, upon a successful vote, bind all bondholders across these different issuances have the potential to reduce the holdout problem that may plague sovereigns with multiple bond issuances. Limits nonetheless exist on the ability of aggregation clauses to address the holdout problem for CACs. Most bond issuances under New York law today that use a CAC do not contain an aggregation clause. Of the 192 sovereign bond issuances under New York law with a maturity date of 2013 or later with a CAC in the Choi-Gulati-Posner dataset (excluding bonds issued by the Republic), only 7 (or 3.7%) had an aggregation clause. Moreover, the typical aggregation clause requires an affirmative vote in favor of a payment term modification on the part of 75% of the aggregate principal amount of debt securities across all the different issuances of debt securities as well as the affirmative vote of more than 66 2/3% of the aggregate principal amount of the debt securities in *each* particular issuance. As a result, even if a sovereign bond issuance includes an aggregation clause, a holdout can still defeat an aggregation provision by purchasing over 33 1/3% of the bonds of a specific bond issuance.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 16, 2012, in New York, New York.

/s/____________________________

STEPHEN CHOI

**Materials Relied Upon**

**News Articles**

Drew Benson, Greek Insolvency Overwhelmed by Argentina's Default Risk, Bloomberg, November 16, 2012.

Ken Parks, S&P Cuts Argentina Ratings on Debt Payment, Economics Risks, WSJ.com, October 30, 2012.

Reuters, Fitch Puts Argentina Ratings on Watch Negative, October 30, 2012.

Vulture Fund Goes for Broke: It Bet US $100 Million on a New Default, ambito.com, November 15, 2012.

**Court and Arbitration Materials**

*Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5 (dated August 4, 2011).

*EM Ltd. v. Republic of Argentina*, 473 F.3d 463 (2007).

*NML Capital Ltd. v. The Republic of Argentina* (2nd Cir., October 26, 2012).

Order dated February 23, 2012 in *NML Capital Ltd. v. The Republic of Argentina* (S.D.N.Y.).

Proposed Order Amending the February 23, 2012 Order filed on November 13, 2012 (Exhibits A, B, C, and D).

Statement of Interest of the United States in the *Macrotecnic International Corp. v. Republic of Argentina* and *EM Ltd. v. Republic of Argentina* litigation dated January 12, 2004.

**Data**

Bloomberg data on prices and yields for Argentina's Global 8.75% 2017 US dollar denominated bonds, Argentina's Discount Bonds 8.28% 2033 USD (2005 Issue), and generic U.S. government 10-year bonds.

Choi-Gulati-Posner NY-Law Governed Sovereign Bond dataset.

**Academic Articles**

Stephen M. Bainbridge, Redirecting State Takeover Laws at Proxy Contests, 1992 Wis. L. Rev. 1071 (1992).

Stephen J. Choi, Mitu Gulati, and Eric A. Posner, The Dynamics of Contract Evolution, forthcoming New York University Law Review.

Stephen J. Choi, Mitu Gulati, and Eric A. Posner, The Evolution of Contractual Terms in Sovereign Bonds, forthcoming Journal of Legal Analysis.

Stephen J. Choi, Mitu Gulati, and Eric A. Posner, Pricing Terms in Sovereign Debt Contracts: a Greek Case Study with Implications for the European Crisis Resolution Mechanism, 6 Capital Markets Law Journal 163 (2011).

Stephen J. Choi and Mitu Gulati, Contract as Statute, 104 Mich. L. Rev. 1129 (2006) (with Mitu Gulati) [cited in *NML Capital, Ltd. v. The Republic of Argentina* (2nd Cir., October 26, 2012)].

Stephen J. Choi and Mitu Gulati, Innovation in Boilerplate Contracts: The Case of Sovereign Bonds, 53 Emory L. J. 929 (2004).

Stephen J. Choi and Mitu Gulati, Why Lawyers Need to Take a Closer Look at Exit Consents, International Financial Law Review 15 (September 2003).

Patricia A. McCoy, Andrey D. Pavlov & Susan M. Wachter, Systemic Risk Through Securitization: The Result of Deregulation and Regulatory Failure, 41 Conn. L. Rev. 1327 (2009).

**Other**

Lock Law (Argentine Law 26,017).

## APPENDIX C — SUPPLEMENTAL DECLARATION OF STEPHEN CHOI IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED NOVEMBER 26, 2012

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

NML CAPITAL, LTD., AURELIUS CAPITAL MASTER, LTD., ACP MASTER, LTD., BLUE ANGEL CAPITAL I LLC, AURELIUS OPPORTUNITIES FUND II, LLC, PABLO ALBERTO VARELA, LILA INES BURGUENO, MIRTA SUSANA DIEGUEZ, MARIA EVANGELINA CARBALLO, LEANDRO DANIEL POMILIO, SUSANA AZQUERRETA, CARMEN IRMA LAVORATO, CESAR RUBEN VAZQUEZ, NORMA HAYDEE GINES, MARTA AZUCENA VAZQUEZ, OLIFANT FUND, LTD.,

*Plaintiffs-Appellees*,

v.

THE REPUBLIC OF ARGENTINA,

*Defendant-Appellant*.

**Nos. 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)

*Appendix C*

**SUPPLEMENTAL DECLARATION OF STEPHEN CHOI**

Pursuant to 28 U.S.C. § 1746, Stephen Choi declares as follows:

1. I am the Murray and Kathleen Bring Professor of Law at the New York University School of Law.

2. I am being compensated at a rate of $900 per hour for my independent review, analysis, and testimony provided in this case. My compensation is not contingent upon my conclusions or on the outcome of this matter.

3. I previously submitted a declaration dated November 16, 2012 to the Southern District of New York in the matter of *NML Capital Ltd. v. The Republic of Argentina* (Judge Griesa) (my "Prior Declaration").

4. This declaration supplements my Prior Declaration and makes four points:

- Judge Griesa issued an order on November 21, 2012 requiring, among other things, that the Republic of Argentina (the "Republic") make "Ratable Payment" to NML Capital if the Republic made payment to the holders (the "Exchange Bondholders") of certain debt securities (the "Exchange Bonds") issued by the Republic in 2005 and 2010 pursuant to trust indentures dated June 2, 2005 and April 30, 2010 (together, the "Indenture"). Even if the Republic wanted to defy this order, the application

of this order to participants in the payment system effectively makes it impossible for the Republic to do so unilaterally. Thus, there is no realistic danger that the Republic will violate Judge Griesa's November 21, 2012 order.

- Objective market evidence since the filing of my Prior Declaration indicates that (i) after the filing of briefs and other documents (including my Prior Declaration) by parties opposing the plaintiffs on November 16, 2012, the market reflected a statistically significant decrease in the perceived risk of default for the Exchange Bonds; and (ii) after Judge Griesa's November 21, 2012 order, the market reflected a statistically significant increase in the perceived risk of default.

- The effect of Judge Griesa's November 21, 2012 order and his refusal to stay execution of the order on increasing the risk of default for the Exchange Bonds imposes negative and irreversible consequences on the Exchange Bondholders.

- The overall effect of Judge Griesa's order on November 21, 2012 as well as the Second Circuit's *NML Capital Ltd. v. The Republic of Argentina* decision on October 26, 2012 will be to reduce the ability of sovereigns in economic and financial distress to engage in efficient, value-increasing restructurings. Because those decisions make efficient, value-increasing restructurings now more difficult under New York law both sovereigns

> and investors are injured, thereby increasing the likelihood that sovereigns that traditionally issued bonds under New York law will switch to English law and possibly other jurisdictions including local law.

<u>Argentina's Inability to Defy Judge Griesa's Orders</u>

5. Judge Griesa's order dated November 21, 2012 requires the Republic to make a Ratable Payment to NML Capital whenever it makes payment to the Exchange Bondholders. The order defines Ratable Payment to mean 100% of the amount due to NML Capital at the time of the payment to Exchange Bondholders, or in this case approximately $1.3 billion. The order also prohibits certain "Participants" from aiding and abetting any violation of the order. The order defines Participants to include, among others, the indenture trustee, clearing corporations and systems, depositaries, and transfer agents. Given the wide applicability of the order to Participants, many of which operate inside the United States, the Republic as a practical matter has no means available to violate the order unilaterally. There is no mechanism whereby the Republic could pay the Exchange Bondholders directly outside of the existing payment system; indeed, the Republic has no means to know the identities and holdings of all Exchange Bondholders even if it wanted to pay them through some other mechanism.

6. Under the Indenture, the Republic is required to transmit payments owed to the Exchange Bondholders to the Bank of New York Mellon ("BNY Mellon"), which serves

as the indenture trustee. As indenture trustee, BNY Mellon's duty of loyalty runs to the Exchange Bondholders, and not to the Republic. The Republic has only an arm's length relationship with, and no control over, BNY Mellon. *See* Brief of BNY Mellon dated November 16, 2012 at p. 1.

7. As indenture trustee, BNY Mellon transfers funds to certain clearinghouses that then distribute the funds to their participants, which then distribute the funds to the beneficial holders of Exchange Bonds. Bonds with an ISIN beginning with "US" are cleared through the Depository Trust Company ("DTC"), which is a subsidiary of the domestic clearinghouse Depository Trust & Clearing Corporation. Cede & Co., the nominee of DTC, is the registered owner of those bonds. *See* Declaration of Kevin F. Binnie of the Bank of New York Mellon Regarding the Payment Processes for Global Bonds Issued Pursuant to That Certain Trust Indenture dated June 2, 2005, and the First Supplemental Indenture dated as of April 30, 2010, dated November 16, 2012. DTC receives from BNY Mellon all funds payable with respect to bonds cleared by DTC. The funds then flow to DTC's participant brokers and then to the beneficial holders of the Exchange Bonds. *See id.* at ¶ 12.

8. According to the November 16, 2012 letter from counsel for DTC to the district court, the "Participants" of DTC comprise approximately 525 banks and brokerage houses. *See* Letter from Counsel for DTC dated November 16, 2012 at p. 1. The beneficial owners of the Exchange Bonds and the amounts held by them change as often as every business day due to purchases and sales of the

bonds. Thus, the only way that payment to the beneficial owners can be effected is through the automated system of clearinghouse DTC and its Participants. The Republic, which does not control or deal directly with DTC, would have no way on its own of identifying the beneficial owners and the amounts held by them at any given time. In any event, DTC's automated system and network of 525 banks and brokerages would be required for the payments to be made to the Exchange Bondholders in the correct amounts.

9. DTC has confirmed that the Republic is not a Participant of DTC. *See* Letter from Counsel for DTC dated November 16, 2012 at p. 2-3. In the November 16, 2012 letter, the counsel for DTC wrote that: "Argentina can issue no instructions to DTC; nor could DTC take any such instructions if it did." *Id*. at p. 2. As with BNY Mellon, the Republic lacks influence over DTC and would not have the ability to enlist DTC's assistance in defying Judge Griesa's November 21, 2012 Ratable Payment order. Because use of DTC's automated system is necessary to make payments to the Exchange Bondholders, and DTC is enjoined by Judge Griesa's order from cooperating with the Republic in changing the payment mechanism, it would be impossible for the Republic to circumvent the order. The Republic is not capable of altering the payment mechanism: it has neither the means nor the knowledge to do so.

10. Even if DTC desired to assist the Republic in preventing payment to NML Capital and directing payments solely to the Exchange Bondholders, DTC lacks the capability to do so. DTC receives instructions from a paying agent in its system (here, BNY Mellon), and complies with those instructions through what DTC

describes as "a largely ministerial, *automated* task". *See* Letter from Counsel for DTC dated November 16, 2012 at p. 3 (emphasis added). In its letter to the District Court, DTC explained that it does not have the ability to compare any particular fund transfer with any other transfers to ensure that the Plaintiffs' bonds are paid as ordered by the district court, or that the Republic or Participants have (or have not) complied with the Ratable Payment Formula. *See id.* at p. 3. The corollary of this statement is that DTC would, by virtue of the automated nature of its payment system, be unable to collude with the Republic to prevent Ratable Payment to NML Capital. Thus, in addition to the fact that DTC is subject to jurisdiction in New York and therefore must comply with any orders, it would not be possible for DTC to work with the Republic to ensure that only certain beneficial owners were paid, to the exclusion of others.

11. Similarly, to effectuate payment to the Exchange Bondholders without paying Plaintiffs, BNY Mellon would need to disobey the District Court's orders and risk being held in contempt, which is highly unlikely given that BNY Mellon is subject to jurisdiction in New York. Moreover, if any attempt were made to remove BNY Mellon as indenture trustee and replace it with another trustee (which would be exceedingly difficult in any event, *see* Indenture Section 5.9(c) (requiring majority vote of holders of each Series of Exchange Bonds to replace trustee)), the court could simply enjoin the new trustee as well. The Republic thus lacks any influence over BNY Mellon to cause BNY Mellon to disregard Judge Griesa's November 21, 2012 order.

12. Moreover, given the cross-default provisions in the Indenture, it would be futile for the Republic to attempt to circumvent Judge Griesa's orders. Bonds with an ISIN beginning with "XS" are cleared through Euroclear N.V. and Clearstream Banking S.A., both foreign clearinghouses. *See* Declaration of Kevin F. Binnie dated November 16, 2012 at ¶ 8. The Republic might in theory seek to circumvent Judge Griesa's November 21, 2012 order and the U.S. payment system by paying solely those Exchange Bondholders holding bonds clearing through foreign clearinghouses. However, if the Republic were to make payments on only the subset of foreign cleared Exchange Bonds, it would cause a cross-default due to the failure to pay the U.S. cleared Exchange Bonds under Section 4.1(i) and (iii) of the Indenture, making the debt owed under the Exchange Bonds immediately due and payable pursuant to the conditions of Section 4.2 of the Indenture.

13. Because the Republic lacks the ability to pay the Exchange bondholders directly, there is no realistic danger that the Republic will defy Judge Griesa's orders with respect to making a "ratable payment" to NML Capital whenever the Republic makes payment to the Exchange bondholders.

Market Response

14. In my Prior Declaration, I reported on objective market evidence that the Second Circuit's *NML Capital* decision on October 26, 2012 showing the perception of significantly increased risk of default to the Exchange

Bondholders. Among other things, the price of the Exchange Bonds dropped precipitously after the Second Circuit's *NML Capital* decision. The yield spread, using the generic US Government 10-year bonds as tracked by Bloomberg as the benchmark, also increased for the Exchange Bonds after the decision.

15. For purposes of this declaration, I examined how the price and spread of the Exchange Bonds changed around two subsequent events: (a) the filing of the briefs and other documents with Judge Griesa on November 16, 2012—an event that may have given the market hope that Judge Griesa would reconsider his treatment of the Exchange Bondholders; and (b) Judge Griesa's November 21, 2012 order amending his prior February 23, 2012 order that, among other things, ordered the Republic to pay NML Capital a "Ratable Payment" whenever the Republic paid any amount to the Exchange bondholders and the court's corresponding decision on November 21, 2012 to lift its stay of the February 23, 2012 order—both of which would be expected to lead the market to again increase its assessment of the risk of default on the Exchange Bonds.

16. To assess the impact on the market for the Exchange Bonds of the filing of briefs, declarations, and other documents with Judge Griesa on November 16, 2012, I looked at the change in bond prices from November 16, 2012 to November 19, 2012, the next trading day. The Republic's Global 8.75% 2017 US dollar denominated bonds, one of the Exchange Bonds, increased in price from $73.148 on November 16, 2012 to $77.108 on November 19, 2012—for an increase of 5.4%. To assess the magnitude of this increase,

I calculated the standard deviation in the percentage change in daily bond prices for the Republic's Global 8.75% 2017 US dollar denominated bonds from January 1, 2012 to September 30, 2012 as a baseline of comparison. The magnitude of the 5.4 percentage point increase in the price was over five standard deviations above the mean daily percentage change in price during the January 1, 2012 to September 30, 2012 time period—indicating that the change was both large in magnitude and statistically significant.[1]

17. Similarly, the spread on the Global 8.75% 2017 US dollar denominated bonds compared with the yield on generic US Government 10-year bonds decreased by 157 basis points from November 16 to November19, 2012 (data source: Bloomberg). To assess the magnitude of this decrease, I calculated the standard deviation in the daily change in spreads for the Republic's Global 8.75%

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1. I did not examine the price for all of the Exchange bonds as they likely reacted similarly to events affecting the risk of default. As a robustness check, I examined the prices for the Republic's Discount Bonds 8.28% 2033 USD (2005 Issue), another Exchange bond. The Discount Bonds 8.28% 2033 USD (2005 Issue) increased in price from $57.753 on November 16, 2012 to $62.128 on November 19, 2012—for an increase of 7.6%. To assess the magnitude of this increase, I calculated the standard deviation in the daily percentage change in bond prices for the Republic's Discount Bonds 8.28% 2033 USD (2005 Issue) from January 1, 2012 to September 30, 2012 as a baseline of comparison. The magnitude of the 7.6 percentage point increase in the price was over five standard deviations above the mean daily percentage change in price during the January 1, 2012 to September 30, 2012 time period—indicating that the change was both large in magnitude and statistically significant.

2017 US dollar denominated bonds from January 1, 2012 to September 30, 2012 as a baseline of comparison. The magnitude of the 157 basis point decrease in the spread was over five standard deviations in magnitude above the mean daily change in spread during the January 1, 2012 to September 30, 2012 time period—indicating that the change was both large in magnitude and statistically significant.

18. Consistent with the change in the Exchange Bond prices and corresponding changes in yield spreads, the cost to insure the Republic's debt, as measured by the Argentine 5-year credit default swaps, decreased from 2,663 basis points on November 16, 2012 down to 2,342 basis points on November 19, 2012, for a drop of 321 basis points. The increase in price, decrease in spread, and drop in the cost to insure the Republic's debt afterthe filing of briefs and other documents with Judge Griesa on November 16, 2012 indicate that the market hoped that Judge Griesa would reconsider his position with respect to the Exchange Bondholders, decreasing the risk of default for the Exchange Bonds.

19. To assess the impact on the market for the Exchange Bonds of Judge Griesa's order dated November 21, 2012 requiring the Republic to make Ratable Payment, I looked at the change in bond prices from November 21, 2012 to November 23, 2012, the next trading day after Thanksgiving. The Republic's Global 8.75% 2017 US dollar denominated bonds decreased in price from $77.784 on November 21, 2012 to $71 on November 23, 2012—for a decrease of 8.7%. The magnitude of the 8.7 percentage

point decrease in the price was over nine standard deviations above the mean daily percentage change in price during the January 1, 2012 to September 30, 2012 time period—indicating that the change was both large in magnitude and statistically significant.[2]

20. Similarly, the spread on the Global 8.75% 2017 US dollar denominated bonds compared with the yield on generic US Government 10-year bonds as measured on November 21, 2012 increased by 268 basis points from November 21 to November 23, 2012. The magnitude of the 268 basis point increase in the spread was over nine standard deviations in magnitude above the mean daily change in spread during the January 1, 2012 to September 30, 2012 time period—indicating that the change was both large in magnitude and statistically significant.

21. Consistent with the change in the Exchange Bond prices and corresponding changes in yield spreads, the cost to insure the Republic's debt increased from 2,455 basis points on November 21, 2012 to 3,003 basis points on November 23, 2012, for an increase of 548 basis points. The

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2. As a robustness check, I examined the prices for the Republic's Discount Bonds 8.28% 2033 USD (2005 Issue). The Discount Bonds 8.28% 2033 USD (2005 Issue) decreased in price from $62.603 on November 21, 2012 to $55 on November 23, 2012 (the next trading day)—for a decrease of 12.1%. The magnitude of the 12.1 percentage point decrease in the price was over nine standard deviations above the mean daily percentage change in price during the January 1, 2012 to September 30, 2012 time period—indicating that the change was both large in magnitude and statistically significant.

decrease in price, increase in spread, and increase in the cost to insure the Republic's debt following Judge Griesa's order on November 21, 2012 requiring Ratable Payment indicate that the market viewed the order as leading to a marked increase in the risk of default for the Exchange Bonds.

Irreversible Harm

22. The material increase in the risk of default as a result of Judge Griesa's order on November 21, 2012 requiring Ratable Payment and his refusal to stay the execution of this order pending appeal to the Second Circuit will have an irreversible negative impact on the Exchange Bondholders. As I discussed in my Prior Declaration, any actual default will likely trigger credit default swaps and cross default clauses that will be difficult if not impossible to undo even if the Republic eventually resumes payment to the Exchange Bondholders. In addition, as discussed above, the market price of the Exchange Bonds and related indicators such as default insurance costs have shown extreme volatility in reaction to developments in the litigation. Such extreme volatility discourages purchases of the bonds and thereby reduces liquidity leading to even greater volatility. As discussed below, to the extent that investors must sell in such erratic market conditions, they will likely be forced to lock-in losses.

23. Irreversible harm from the material increase in risk of default will also affect those Exchange Bondholders that are private investment funds, hedge funds and mutual funds. My understanding, for example, is that the

Exchange Bondholder Group (EBG) consists of, among others, Gramercy Funds Management LLC, Massachusetts Financial Services Company d/b/a MFS Investment Management, Brevan Howard Asset Management LLP, SW Asset Management, LLC, and AllianceBernstein L.P.

24. The entities managing private investment funds, hedge funds and mutual funds generally adopt internal risk management practices that limit their ability to invest fund assets in certain types of securities that pose heightened risks. Hedge funds, for example, will employ internal risk management guidelines that focus on market, credit, and liquidity risks among other risks.[3] After a default, or even a material increase in the risk of default, the Exchange Bonds would likely pose both increased market and credit risk, due to the risk of default, and liquidity risk, due to the resulting disruption in the market for Exchange Bonds that may make it difficult for a fund to exit its investment in the bonds at other than a fire sale price. The heightened market, credit, and liquidity risk would force investors in the Exchange Bonds to liquidate their positions to comply with their internal risk management guidelines. This forced liquidation, in turn, will lock in the loss to the Exchange Bondholders. Even if the Second Circuit eventually overrules Judge Griesa's November 21, 2012

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3. *See* Report of the Asset Manager's Committee to the President's Working Group on Financial Markets, Best Practices for the Hedge Fund Industry (January 15, 2009); *see also* Dechert, LLP, Risk Management by U.S. Mutual Funds Facing European Sovereign Debt Risk 1 (March 2012) (noting that most mutual funds following the 2007-08 financial crisis "have taken steps to address risk management in a more systemic and comprehensive manner.").

order, it would be too late for those fund investors forced to sell and thereby lock in their losses. The impact of Judge Griesa's order will be to take away irreversibly from the fund investors in the Exchange Bonds the flexibility of holding onto the bonds to see whether the Second Circuit will reverse Judge Griesa's orders.

25. The drop in value of the Exchange Bonds due to the material increase in the risk of default also will cause the net asset value of many of those Exchange Bondholders that are hedge funds and mutual funds to drop. The drop in the net asset value will cause investors to pull out of these funds. The market for investor dollars is highly competitive. The drop in net asset value will harm the reputation of the fund investors in the Exchange Bonds, making it more difficult for the fund investors in the Exchange Bonds to obtain new investor dollars. Even if the Second Circuit were to reverse Judge Griesa's orders, the fund investors will not easily rebuild reputations once they are diminished.

26. Some private investment funds, hedge funds and mutual funds holding Exchange Bonds employ strategies tracking one of several emerging market indices that encompass the Exchange Bonds. These indices include but are not limited to the J.P. Morgan Emerging Markets Bond Index Global and the J.P. Morgan Global Bond Index-Emerging Markets Global Diversified. If the Exchange Bonds become "non-performing" debt because their coupons are not paid, they may be dropped from these indices, or their importance in the indices may be reduced. If that happens, many funds may be forced to sell to

maintain their investment strategies. Moreover, exchange traded funds that track one of the indices will automatically be forced to sell their Exchange Bond holdings once the indices eliminate or reduce the weighting of the Exchange Bonds.

27. Banks and insurance companies may also hold Exchange Bonds. The increasing risk of default and corresponding drop in Argentina's sovereign credit rating may negatively affect the ability of banks and insurance companies to hold the debt as well as use the debt to satisfy regulatory capital requirements. Banks and insurance companies therefore may also face pressure to sell their Exchange Bond holdings to comply with regulatory requirements.

28. The collective impact of private investment funds, hedge funds, mutual funds, exchange traded funds, and banks and insurance companies all selling their Exchange Bond holdings at the same time in a market already facing large price declines and volatility will further worsen the market for the Exchange Bonds. The spiraling negative impact on the market is worsened by the fact that potential buyers of the Exchange Bonds in such an environment may worry that they will need to join NML Capital's long pursuit of the Republic to obtain payment—leaving few actual buyers in the marketplace.

29. Judge Griesa's order on November 21, 2012 requiring Ratable Payment and his refusal to stay the execution of this order pending appeal to the Second Circuit will also have irreversible and negative effects on U.S. investors

beyond the direct investors in the Exchange Bonds. My understanding is that the corporate debt funding rate for many Argentine corporations is benchmarked to the Republic's sovereign debt yield. Rising yields for the Republic's sovereign debt therefore increases the cost of financing, including rolling over existing debt, for these corporations. A wide group of U.S. investors that invest in Argentine corporate securities will then face large losses as the Argentine corporations are either unable to roll over their debt or only at significantly higher borrowing costs.

30. I have spoken with a representative of one of the EBG's members, who confirmed the likely consequences of Judge Griesa's November 21, 2012 order.

Flight to English and Other Law

31. As discussed in my Prior Declaration, the effect of Judge Griesa's orders will be to make restructurings more difficult for sovereigns in economic and financial distress. The possibility of restructuring works to the benefit of both the sovereign and the group of all creditors. Despite this benefit, individual creditors may refuse to restructure their debt because holding out after the Second Circuit's *NML Capital* decision on October 26, 2012 now gives the creditor a higher return. As I discussed in my Prior Declaration, many New York law-governed sovereign bonds outstanding today lack a collective action clause (CAC). Even the presence of a CAC clause does not ensure that value-increasing restructurings will take place, particularly in the absence of an Aggregation Clause that binds not only one issuance of bonds but also all the different outstanding issuances of a sovereign's outstanding debt.

32. In addition to the failings of CACs that I pointed out in my Prior Declaration, the uncertainties inherent in whether a CAC vote will receive the necessary 75% of outstanding principal amount to trigger the CAC will deter many investors for voting in favor of restructuring under a CAC. Suppose an investor is faced with a favorable exchange offer from a sovereign to restructure the sovereign's debt in times of economic and financial distress. The investor may nonetheless worry that less than 75% of the outstanding principal amount will agree to the exchange offer and vote in favor of the restructuring under a CAC. If the investor exchanges its bonds and votes in favor of the CAC but the vote fails to reach the required 75% threshold, the investor will be left with less valuable exchanged bonds while other investors that did not exchange their bonds (the holdouts) will still hold the more valuable, original bonds. Investors that realize this possibility may simply choose to vote against even a favorable restructuring.

33. Without the ability to restructure debt, sovereigns that fall into economic and financial distress may not have the ability to obtain new financing and pull themselves out of their economic problems—leading to less money for creditors than if restructuring were a realistic possibility. The overall effect of Judge Griesa's November 21, 2012 order and the Second Circuit's October 26, 2012 *NML Capital* decision will thus give sovereign issuers an incentive to leave the New York market and seek to issue sovereign debt under English law or even local law. To the extent either English law or local law adopt a narrower interpretation of the *pari passu* clause not based on equal payment and thus allow for more efficient restructuring

than under present New York law, the selection of English law or local law at the time of the issuance will maximize the joint welfare of both the sovereign and its creditors.[4]

34. Market price data demonstrates the relative desirability of issuing under a different regime other than under New York law following the Second Circuit's NML Capital decision. Shortly after the October 26, 2012 decision, bonds issued by the Republic under local law that historically traded at a higher spread (based on the US Generic Government 10-Year Yield as tracked by Bloomberg) compared with the Exchange Bonds which were issued under New York law, commenced trading at a lower spread compared with the Exchange Bonds. As of November 23, 2012, the spread for the Argentina Bonar 7% 2017 USD (Local Law) bond was 320 basis points *lower* than the spread for the Argentina Global 8.75% 2017 USD New York law-governed bond.

35. Anecdotal evidence also exists that, in the wake of Judge Griesa's orders and the Second Circuit's NML Capital decision, sovereign issuers are increasingly considering shifting new issuances away from the New York market to avoid the prospect of future restructurings governed under New York law. For example, after making a reference to CACs, which I noted in my Prior Declaration will not eliminate holdouts, the Pakistani Daily Times

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4. For example, the Financial Markets Law Committee, an independent committee of legal experts that act as a bridge to the UK courts, has recommended against the equal payment interpretation of the *Pari Passu* clause. *See* Financial Markets Law Committee, Issue 79-*Pari Passu* Clauses (March 2005).

reported that Richard Segal, emerging markets analyst at Jefferies, stated that: "In the meantime debtors will seek to avoid US jurisdictions when considering restructurings."[5]

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 26, 2012, in New York, New York.

/s/____________________
STEPHEN CHOI

5. *See* Investment focus: Argentine case adds to sovereign debt doubts, Daily Times dated November 25, 2012.

**Materials Relied Upon**

**Court Materials**

Brief of BNY Mellon dated November 16, 2012.

Declaration of Kevin F. Binnie of the Bank of New York Mellon Regarding the Payment Processes for Global Bonds Issued Pursuant to That Certain Trust Indenture dated June 2, 2005, and the First Supplemental Indenture dated as of April 30, 2010, dated November 16, 2012.

Declaration of Stephen Choi dated November 16, 2012.

Letter from Counsel for DTC dated November 16, 2012.

*NML Capital Ltd. v. The Republic of Argentina* (2nd Cir., October 26, 2012).

**Articles and Reports**

Dechert, LLP, Risk Management by U.S. Mutual Funds Facing European Sovereign Debt Risk 1 (March 2012).

Financial Markets Law Committee, Issue 79-*Pari Passu* Clauses (March 2005).

Report of the Asset Manager's Committee to the President's Working Group on Financial Markets, Best Practices for the Hedge Fund Industry (January 15, 2009).

*Appendix C*

**News Articles**

Investment focus: Argentine case adds to sovereign debt doubts, Daily Times dated November 25, 2012.

**Data**

Bloomberg data on prices and yields for Argentina's Global 8.75% 2017 US dollar denominated bonds, Argentina's Discount Bonds 8.28% 2033 USD (2005 Issue), Argentina's Bonar 7% 2017 USD (Local Law), and generic U.S. government 10-year bonds.

Bloomberg data on Argentine 5-year credit default swaps.

**Other Materials**

Republic of Argentina Trust indentures dated June 2, 2005 and April 30, 2010.