No. 13-990

In the
Supreme Court of the United States

REPUBLIC OF ARGENTINA,

Petitioner,

v.

NML CAPITAL, LTD., *et al.*,

Respondents.

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

BRIEF OF *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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INTEREST OF THE AMICI CURIAE[1]

Puente Hnos. Sociedad De Bolsa S.A. ("Puente") is a licensed Argentine securities broker, a leading member of the Argentine financial community, and an active trader of local and sovereign debt issued in Argentina. Puente serves a variety of clients, including individuals with retirement accounts, and families of all income levels. Many of Puente's customers, along with other investors in Argentina, hold provincial and municipal bonds or debt-related securities listed on Argentina's exchanges. These include traded securities representing interests in the exchange bonds issued by the Republic of Argentina in 2005 and 2010, along with related products tied to Argentina's GDP, plus other products whose value will likely be affected by the courts' rulings in this case. As of December 2013, Puente had in its custody approximately $85 million of Exchange Bonds and $960 million in other sovereign, provincial and municipal bonds. On January 4, 2013, Puente submitted an amicus brief to the Second Circuit in support of reversal of the District Court's order defining its ratable payment formula.

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[1] This brief of amici curiae in support of Petitioner's application is filed in accordance with Rule 37.2(a). Petitioner's application for a writ of certiorari was filed on February 18, 2014 and docketed on February 20, 2014. Notice of intent to file this brief was provided to the parties on March 12, 2014. Written consents by all parties to the filing of this brief have been lodged with the Clerk of the Court. No counsel for a party authored this brief in whole or in part; nor did any person other than amici curiae or its members make a monetary contribution to the preparation or submission of this brief.

The Argentine American Chamber of Commerce (the "AACC") is a not-for-profit association founded in 1918 with the goal of advancing commerce and trade between the Argentine Republic and the United States. Since its founding, many members of the financial community and industries of both countries have been members of the AACC. The AACC has no government financial support and derives its resources from membership dues and events.[2]

Amici believe that the Second Circuit's decisions will negatively impact the Argentine economy, and well beyond, if they stand. *Amici* do not deny the rights of bondholders, but urge that the enforcement of those rights should not create further inequalities with other bondholders. *Amici* respectfully submit that the Petition for Writ of Certiorari should be granted and the question of construction of the *pari passu* clause certified to the New York Court of Appeals to provide the highest state court an opportunity to resolve the significant unsettled state law issue.

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[2] The president of the AACC, Carlos E. Alfaro, has advised companies doing business in Argentina for more than twenty-five years.

SUMMARY OF THE ARGUMENT[3]

In the decisions below, the Second Circuit opined on a pivotal New York State law issue its state courts have never addressed, which could have a profound impact on Argentina as well as on New York's position as a global financial center: whether a foreign sovereign is in breach of a boilerplate *pari passu* clause when it makes periodic interest payments on performing debt without simultaneously paying on its defaulted debt. *See NML Capital, LTD. v. Republic of Argentina*, 699 F.3d 246 (2d Cir. 2012) ("*NML I*"); *NML Capital, LTD. v. Republic of Argentina*, 727 F.3d 230 (2d Cir. 2013) ("*NML II*" and with *NML I*, the "Second Circuit Decisions"). The Second Circuit affirmed what the *amici* regard as an erroneous interpretation by the district court of the *pari passu* clause in the 1994 Fiscal Agency Agreement ("FAA") regarding defaulted Argentine bonds governed by New York law. *NML II*, 727 F.3d at 237-38; App. 203. The Second Circuit held the *pari passu* clause compels "ratable payment," meaning that Argentina must pay 100% of accelerated principal and interest (now at least $1.33 billion) to respondent FAA bondholders (the "holdouts")[4] when and if it pays bondholders who participated in the 2005 and 2010 restructuring ("Exchange Bondholders"). *NML II*, 727 F.3d at 237-38. By

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[3] For completeness we note that counsel of record in this submission, Judith S. Kaye, recently participated in a brief on behalf of amici curiae Professors and Practitioners of Arbitration Law opposing Argentina's position in *BG Group PLC v. Republic of Argentina*, -- S. Ct. --, No. 12-138, 2014 WL 838424, at *12 (U.S. Mar. 5, 2014).

[4] Although roughly 92% accepted the restructuring, there are "holdouts" in other jurisdictions as well. *See* n.13 at 22 *infra*.

reading this "ratable payment" remedy into the *pari passu* clause, the lower courts misinterpreted plain language and overlooked long-accepted understanding of *pari passu* clauses as guaranteeing equality of legal rights, not guaranteeing simultaneous payment.

For the reasons outlined below, *amici* respectfully invite the Court to grant Argentina's Petition for Writ of Certiorari and, in particular, to certify the interpretation of the *pari passu* clause to the New York Court of Appeals so it can determine New York law on the meaning of the *pari passu* clause in sovereign bonds:

First, this Court has utilized the certification procedure to good effect in similar situations. As recently as last year, the Court certified important issues of state law where significant federal law issues rested on predicate state law issues. In this instance, the second (federal) question presented in Argentina's Petition, whether the ratable payment injunctions affirmed by the Second Circuit violate the Foreign Sovereign Immunities Act ("FSIA"), rests on construction of the (state) *pari passu* clause. If the provision is construed, as *amici* suggest, to prohibit only legal subordination and not require Argentina to make ratable payments, then the injunctions ordering the ratable payment remedy cannot stand and the Court need not address the FSIA issue. Certifying the question will also obviate the risk that this Court rules on an important FSIA issue based on a construction of state law that the New York Court of Appeals later disavows.

Second, the New York State Constitution created the certification process precisely for instances such as this case, where there is an important unsettled state law issue having the potential of crucially affecting the state's public policy and world-wide standing in financial markets. The *pari passu* clause appears in virtually every sovereign bond. Typically, the bonds specify New York as the law governing sovereign bonds issued in the United States, and English law for sovereign bonds issued elsewhere.

Third, applying New York law, the New York Court of Appeals may well conclude that the Second Circuit misconstrued the *pari passu* clause. The plain language of the provision prohibits legal subordination such that no bond or bondholder can be lowered in "rank." But the provision does not govern timing of payments, much less the ratable payments ordered by the courts below. If affirmed, the Second Circuit's novel interpretation of the provision would handicap sovereigns in any attempt to restructure their debt under New York law because bondholders would have no incentive to participate in an exchange, as holdouts would be guaranteed a windfall and could effectively undo any restructuring that does occur.

In short, the Second Circuit's Decisions allow holdouts to become hold-ups. The New York court should have an opportunity to correct this erroneous result.

ARGUMENT

I. CERTIFICATION IS PARTICULARLY APPROPRIATE WHERE AN IMPORTANT FEDERAL ISSUE HINGES ON AN UNSETTLED STATE LAW QUESTION

This Court has recognized that certification "in the long run save[s] time, energy, and resources and helps build a cooperative judicial federalism." *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974); *see Arizonans for Official English v. Arizona*, 520 U.S. 43, 76 (1997) ("Certification . . . allows a federal court faced with a novel state-law question to put the question directly to the State's highest court, reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response.").[5] The Court has made considerable use of certification where, as here, an unsettled state law issue, that the state's high court has yet to address, must be decided before the Court can determine the federal law question. *See Cline v. Okla. Coal. for Reprod. Justice*, 133 S. Ct. 2887 (2013) (Oklahoma); *United States v. Juvenile Male*, 560 U.S. 558, 560 (2010) (Montana); *Stewart v. Smith*, 534 U.S. 157, 159-60 (2001) (Arizona); *Fiore v. White*, 528 U.S. 23, 25 (1999) (Pennsylvania); *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988) (Virginia); *Elkins*, 435 U.S. at 650-51 (Maryland); *Massachusetts v. Feeney*, 429 U.S. 66, 67 (1976) (Massachusetts); *Aldrich v. Aldrich*, 378 U.S. 540, 542 (1964) (Florida).

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[5] Certification cannot be waived and indeed, certification has been raised by courts *sua sponte*. *See, e.g.*, *Elkins v. Moreno*, 435 U.S. 647, 662 (1978); *Lehman Bros.*, 416 U.S. at 392-93 (Rehnquist, J., concurring) (noting petitioners did not request certification until rehearing at the Second Circuit).

Certification is particularly valuable where the state court's holding could moot the need for this Court to decide the related federal issue. *See Va. Office for Protection & Advocacy v. Stewart*, 131 S. Ct. 1632, 1644 (2011) (Kennedy, J., concurring) ("[C]ertification of questions of state law to the state courts may pretermit an otherwise sensitive federal controversy."); *cf. Elkins*, 435 U.S. at 661-62 (citing constitutional avoidance as a factor supporting certification).

Moreover, because "[f]ederal courts lack competence to rule definitively" on state law, *Arizonans for Official English*, 520 U.S. at 48, certifying the *pari passu* issue to the New York court avoids the risk that this Court will rule on an important issue of federal law based on a pronouncement of state law that the New York court rejects in a later case. *See R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 500 (1941) ("The reign of law is hardly promoted if an unnecessary ruling of a federal court is . . . supplanted by a controlling decision of a state court."). As discussed below, this risk is far from remote — this issue is likely to arise again and, *amici* submit, it is doubtful the New York Court of Appeals would adopt the Second Circuit's *pari passu* construction.

II. THE NEW YORK COURT OF APPEALS SHOULD HAVE AN OPPORTUNITY TO ADDRESS FOR THE FIRST TIME THE SIGNIFICANT STATE LAW ISSUE AT THE CORE OF THIS CASE

In 1985, the New York Constitution was amended to allow the Court of Appeals to "answer questions of New York law certified to it by the Supreme Court of the United States, a court of appeals of the United States or an appellate court of last resort of another state, which may be determinative of the case then pending in the certifying court and which in the opinion of the certifying court are not controlled by precedent in the decisions of the courts of New York."[6] N.Y. Const., art. VI, § (3)(b)(9). In the nearly two decades since its adoption, the process has proved extremely beneficial to the parties, the courts and the law. It has enabled expeditious final resolution of significant New York law issues by the Court of Appeals, thus avoiding the risk inherent in later review by the New York high court of decisions issued by other courts.[7] The efficacy of the process is

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[6] Pursuant to this authority, Section 500.27 of the Rules of the Court of Appeals provides that certification is appropriate when "determinative questions of New York law are involved in a case . . . for which no controlling precedent of the Court of Appeals exists." N.Y. Comp. Codes R. & Regs. tit. 22, § 500.27(a) (2013). This case is a poster-child for such a situation.

[7] Indeed, the New York Court of Appeals is often called upon to answer certified questions implicating important policy concerns. *See, e.g.*, *West-Fair Elec. Contractors v. Aetna Cas. & Sur. Co.*, 87 N.Y.2d 148 (1995) (construing standard contract term and determining whether it violated New York public policy); *Bocre Leasing Corp. v. Gen. Motors Corp.*, 84 N.Y.2d 685, 690 (1995) (considering "[p]ublic policy objectives" in answering certified question); *Westinghouse Elec. Corp. v.*

well illustrated by the frequency with which certification has been used (in recent years close to ten percent of the civil cases annually decided by the Court of Appeals have been by way of certified questions (*see* 4A *Commercial Litigation in New York State Courts* § 56:9 (Robert L. Haig ed., 3d ed. 2010)), and by its efficiency (in 2012, the period from certification to actual disposition was 7.7 months, *see* 2012 Annual Report of the Clerk of the Court of the Court of Appeals of the State of New York).

The *pari passu* issue satisfies every criterion for certification to the New York court. First, the New York court's answer to the certified question could be outcome-determinative. If the court holds the *pari passu* clause bars only legal subordination, then the injunctions requiring that Argentina make "ratable payments" could not stand and the Court would not need to reach the federal question under the FSIA.

Second, there is no controlling New York precedent — indeed, there is no New York precedent on the subject. The parties do not dispute that no New York state court has construed a *pari passu* clause in the sovereign debt context. Indeed, the Second Circuit itself explicitly acknowledged that the meaning is not at all settled. As a result of the Second Circuit's Decisions, there is now a significant controversy over what the provision means under New York law that

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N.Y.C. Transit Auth., 82 N.Y.2d 47, 50, 56 (1993) (considering "that billions of dollars of commercial transactions and thousands of public work contracts are outstanding containing identical or similar . . . provisions"); *Home Ins. Co. v. Am. Home Prods. Corp.*, 75 N.Y.2d 196, 200 (1990) ("[T]he answer to the question certified depends on an analysis of New York's public policy and an application of that policy to the circumstances here.").

cannot be finally resolved until the New York Court of Appeals speaks on the subject.

Third, it is beyond question that the construction of a *pari passu* clause will be an issue that arises again in the courts of New York. *Pari passu* clauses are boilerplate, appearing in most sovereign bonds.[8] New York law typically governs sovereign bonds issued in the United States, and English law typically governs sovereign bonds issued outside the United States. *See* Christopher C. Wheeler & Amir Attaran, *Declawing the Vulture Funds: Rehabilitation of a Comity Defense in Sovereign Debt Litigation*, 39 Stan. J. Int'l L. 253, 259 (2003) (noting that "nearly all" sovereign bonds issued in the United States are governed by New York law). One study found that the provision "appears in virtually every modern sovereign debt contract," including over 90% of bonds issued after 1990. Mark Weidemaier et al., *Origin Myths, Contracts, and the Hunt for Pari Passu*, 38 Law & Soc. Inquiry 72, 73, 84 (2013).

In light of the ubiquity of *pari passu* clauses, the interpretation of the provision here not only will affect sovereigns and bondholders with respect to

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[8] Respondents may assert that *pari passu* clauses in sovereign bonds vary, and thus this decision will have limited impact. This is incorrect. As commentators have explained, though there are "small differences" across sovereign bonds, "[t]he market does not price these differences as meaningful, the lawyers do not understand them as such (mostly, they do not even notice them), and *the only people with an incentive to push these differences are the litigators representing typical holdout investors seeking to maximize their short-term, ex post position*." *See* Stephen J. Choi & G. Mitu Gulati, *Contract as Statute*, 104 Mich. L. Rev. 1129, 1148-50 (2006) (emphasis added).

outstanding sovereign debt, but also will affect how sovereigns choose to issue and structure their bonds in the future and the decision of potential bondholders as to whether and how they will invest in those bonds.

The Second Circuit reasoned that "cases like this one are unlikely to occur in the future because Argentina has been a uniquely recalcitrant debtor and because newer bonds almost universally include collective action clauses ('CACs') which permit a supermajority of bondholders to impose a restructuring on potential holdouts." *NML II*, 727 F.3d at 247. This logic is flawed for several reasons.

Argentina's recalcitrance is not meaningfully unique, but has now been recognized as a necessary feature of a bond exchange in which more than 90 percent of outstanding holders acquiesced. A debt restructuring in this context can never work if the sovereign agrees to pay the bondholders who refuse to exchange in full because, if they did, bondholders would have no incentive to exchange their bonds voluntarily. Significantly as well, CACs do not appear in the billions of dollars of outstanding bonds issued before these newer bonds were issued, and they will be in the market for years if not decades. *See* Wheeler & Attaran, *supra*, at 265 ("most sovereign debt contracts have terms measured in decades"). Moreover, CACs still require certain percentages of bondholders on each issuance to agree to the exchange, which will be significantly more difficult if bondholders understand that they can hold out and invoke the Second Circuit's flawed *pari passu* construction to frustrate any restructuring. Julian Schumacher et al., *Sovereign Defaults in Court: The Rise of Creditor Litigation 1976-2010*, at

23 (Apr. 15, 2013), *available at* http://dx.doi.org/10.2139/ssrn.2189997 ("CACs are no 'wonder-clause', but likely to disappoint the high hopes that some policymakers place on them.")

Finally, certifying this question to the New York court has important public policy implications for the State of New York. In the past, certification has had its greatest value where a policy choice among reasonable alternatives — the province of the state high court — is implicated. *See Elkins*, 435 U.S. at 662 n.16 (holding "immensely important" local public policy issues should "be decided in the first instance by state courts"); *White Plains Coat & Apron Co. v. Cintas Corp.*, 460 F.3d 281, 285 (2d Cir. 2006) (in determining whether to certify a question to the New York Court of Appeals "we carefully assess whether the question implicates issues of state public policy").

Here, as the Second Circuit previously recognized, interpreting the terms of sovereign bonds presents "'an important policy issue for a state that plays a pivotal role in international commerce.'" *NML Capital v. Republic of Argentina*, 621 F.3d 230, 243 (2d Cir. 2010) (citation omitted). And in construing New York law the Court of Appeals has long been attentive to the state's "recognized interest in maintaining and fostering its undisputed status as the preeminent commercial and financial nerve center of the Nation and the world." *Ehrlich-Bober & Co. v. Univ. of Houston*, 49 N.Y.2d 574, 581 (1980); *see In re Southeast Banking Corp.*, 93 N.Y.2d 178, 184 (1999) (considering the "practical policy consequence" of changing the general market understanding of subordination agreements.); *J. Zeevi & Sons, Ltd. v Grindlays Bank (Uganda), Ltd.*, 37 N.Y.2d 220, 227 (1975) ("In order to maintain

[New York's] pre-eminent financial position, it is important that the justified expectations of the parties to the contract be protected."); *Intercont'l Planning, Ltd. v. Daystrom, Inc.*, 24 N.Y.2d 372, 385 (1969) (considering state policy to "encourage use of New York as a national and international business center").

Indeed, having a settled definition of the provision under New York law furthers New York's public policy goal of "[c]larity and predictability . . . in the interpretation of contracts." *Moran v. Erk*, 11 N.Y.3d 452, 457 (2008). This is especially true "with respect to commercial matters where reliance, definiteness and predictability are such important goals of the law itself, designed so that parties may intelligently negotiate and order their rights and duties." *In re Southeast Banking Corp.*, 93 N.Y.2d at 184; *see Ehrlich-Bober & Co.*, 49 N.Y.2d at 581 ("[A]ccess to a convenient forum which dispassionately administers a known, stable, and commercially sophisticated body of law may be considered as much an attraction to conducting business in New York as its unique financial and communications resources.").[9]

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[9] Past experience shows the hazards of the federal courts failing to certify a question that implicates important New York public policy, only to guess wrong on how the New York Court of Appeals would rule. In *Solomon R. Guggenheim Foundation v. Lubell*, 77 N.Y.2d 311 (1991), the New York Court of Appeals held that the trial court had erroneously relied on a Second Circuit decision, *DeWeerth v. Baldinger*, 836 F.2d 103 (2d Cir. 1987), to impose a reasonable diligence requirement in determining whether a museum's claim to recover stolen art was time-barred. *Solomon R. Guggenheim Found.*, 77 N.Y.2d at 318-19. The New York Court of Appeals concluded that the Second Circuit had misconstrued state case law and policy,

The other jurisdiction typically governing sovereign bonds, the United Kingdom, has rejected an attempt to obtain ratable payment injunctions. In *Kensington International Ltd. v. Republic of the Congo*, 2002 No. 1088, [2003] EWHC 2331 (Comm) (Commercial Ct. Apr. 16, 2003) (U.K.), a bondholder attempted to obtain a ratable payment injunction against the Republic of Congo by invoking a *pari passu* clause in bonds that the Republic of the Congo had refused to pay for 17 years. *Id.* ¶ 42. The court denied the injunction on equitable grounds and quoted the Encyclopedia of Banking Law, which explains "'the *pari passu* clause has nothing to do with the time of payment of unsecured indebtedness, since this depends upon contractual maturities. The undertaking is not broken merely because one creditor is, in fact, paid before another.'" *Id.* ¶ 67. Thus, the Second Circuit's Decisions here put sovereigns that have issued bonds pursuant to New York law in a different position from those that have issued bonds specifying English law, raising a grave risk for the continued use of New York law in sovereign bond issuances.

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including New York's "worldwide reputation as a preeminent cultural center." *Id.* at 320-21.

III. THE COURT OF APPEALS WILL LIKELY CONSTRUE THE *PARI PASSU* CLAUSE DIFFERENTLY THAN THE SECOND CIRCUIT

The New York Court of Appeals has a well-developed body of jurisprudence regarding contract interpretation. It has "long adhered to the 'sound rule in the construction of contracts, that where the language is clear, unequivocal and unambiguous, the contract is to be interpreted by its own language.'" *R/S Assocs. v. N.Y. Job Dev. Auth.*, 98 N.Y.2d 29, 32-33 (2002) (quoting *Springsteen v. Samson,* 32 N.Y. 703, 706 (1865)); *Vt. Teddy Bear Co. v. 538 Madison Realty Co.,* 1 N.Y.3d 470, 475 (2004) (quoting *W.W.W. Assocs., Inc. v. Giancontieri,* 77 N.Y.2d 157, 162 (1990)).

A contract is unambiguous if its language has "'a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion.'" *Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 569 (2002) (quoting *Breed v. Ins. Co. of N. Am.,* 46 N.Y.2d 351, 355 (1978)). Thus, "if the agreement on its face is reasonably susceptible of only one meaning, a court is not free to alter the contract to reflect its personal notions of fairness and equity." *Id.* at 569-70.

Equally important, a contract should be "'read as a whole, and every part will be interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose.'" *Beal Sav. Bank v. Sommer*, 8 N.Y.3d 318, 324-25 (2007) (quoting *In re Westmoreland Coal Co. v. Entech, Inc.,* 100 N.Y.2d 352, 358 (2003)); *accord*

Consedine v. Portville Cent. School Dist., 12 N.Y.3d 286, 293 (2009) ("A contract should be read as a whole to ensure that undue emphasis is not placed upon particular words and phrases."). In circumstances where, as here, the contract was negotiated between "sophisticated" parties "'negotiating at arms' length,'" courts must be reluctant to imply any additional terms since they may not make a new contract under the guise of interpreting the writing. *See Vt. Teddy Bear Co.*, 1 N.Y.3d at 475 (citation omitted); *accord Beal Sav. Bank*, 8 N.Y.3d at 324. A reading of the contract should not render any portion meaningless. *Beal Sav. Bank*, 8 N.Y.3d at 324.

Here, the New York court is best suited to apply these well-settled tenets of contract construction under New York law to determine the meaning of the *pari passu* clause, which, *amici* respectfully submit, was wrongly construed by the Second Circuit.

A. Under New York Law, the Second Circuit Misconstrued the *Pari Passu* Clause

The *pari passu* clause states, in pertinent part:

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

App. 198. The Second Circuit referred to the second sentence of this clause as the "Equal Treatment Provision." *NML I*, 699 F.3d at 251.

As discussed above, the starting point for determination of the meaning of the clause under established New York law is the plain language of the terms. The Second Circuit concluded that the first sentence of the *pari passu* clause prohibits the "issuance of other superior debt" and the second sentence prohibits "the giving of priority to other payment obligations." *Id.* at 259. In so holding, the Second Circuit concluded that the first sentence prohibits legal subordination while the second sentence prohibits "more than just formal subordination," *id.* at 258-59[10] — that is, the court read two different types of subordination into the *pari passu* clause.

However, the only reading that gives consistent meaning to both sentences, as well as the provisions of the agreement regarding timing of payment, is that *both* sentences prohibit *legal subordination*, and they each protect a bondholder from discrimination against different third parties. The first sentence

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[10] The Second Circuit held, in the alternative, that Argentina's enactment of the Lock Law breached the Equal Treatment Provision. *NML I*, 699 F.3d at 260. Even if that conclusion were correct it would not provide an explanation of how "ratable payments" could be required under the FAA Bonds. In any event, Argentina has suspended the Lock Law and thus that law can no longer serve as a basis for a finding of breach. *See* App. 204-06. Indeed, the Lock Law that, for a time, barred further exchanges is of no moment here because none of the holdouts have shown any interest in exchanging their old bonds for new ones — their very business objective is to "hold out" and sue in court.

bars changes in legal rank in FAA Bonds "among themselves" — that is, within a particular bond issuance. The second sentence prohibits changes in rank across all other issuances.

Indeed, the term "rank" that appears in both sentences (and thus should be given the same meaning in both sentences, *see, e.g.*, *Finest Invs. v. Sec. Trust Co. of Rochester*, 96 A.D.2d 227, 230 (4th Dep't 1983) ("the same words used in different parts of a writing have the same meaning."), *aff'd*, 61 N.Y.2d 897 (1984)), is defined as "a relative position or status in a group" or "[t]o give a particular order or position to; to classify." The American Heritage Dictionary at 693 (4th ed. 2004). The term "rank" has a meaning of hierarchy; there is no temporal meaning attached to it. Further, "rank" is modified by "*pari passu*" (in the first sentence) and the equivalent "at least equally" (in the second sentence).[11] Therefore, where the FAA states that the "payment obligations . . . shall at all times rank at least equally," this language means that Argentina will not *subordinate* its bondholders' right of payment, without mention of *when* or if such payments may be made. By forcing a repayment of 100% of outstanding holdout indebtedness when any payments were to be made to restructured bondholders, the Second Circuit ignored the terms of

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[11] The Second Circuit noted that "the real dispute is over what constitutes subordination under the *Pari Passu* Clause." *NML I,* 699 F.3d at 258. Black's Law Dictionary (at 1562, 9th ed. 2004) defines subordinate as "to place in a lower rank, class or position," confirming that the repeated use of the word "rank" demonstrates the clause prevents legal or contractual *subordination* of debt, and not that it somehow requires "ratable" payments.

the very contractual clause it was seeking to interpret.

Equally important, the Second Circuit's insertion of a timing requirement into the Equal Treatment Provision renders superfluous other express provisions of the FAA that prescribe the timing of payments due and the remedy for failure to make such payments. *See Beal Sav. Bank*, 8 N.Y.3d at 324; *Ronnen v. Ajax Elec. Motor Corp.*, 88 N.Y.2d 582, 589 (1996) (the New York Court of Appeals has "long and consistently ruled against any construction which would render a contractual provision meaningless or without force or effect"). Paragraph 6(a) of the FAA governs the timing of payments: "[t]he Republic will pay to the Fiscal Agent, the amounts, at the times and for the purpose set forth herein and in the Text of the Securities of a series." Paragraph 12 provides acceleration as the remedy for failure to pay: the "Fiscal Agent shall declare the principal amount of all the Securities of such Series to be due and payable immediately." App. 199-201. These paragraphs would be stripped of meaning if the *pari passu* clause both governed payment timing and required a "ratable" remedy.

Finally, where, as here, a boilerplate term has a meaning understood in its custom and usage, a court may (indeed should) consider that meaning when interpreting an unambiguous contract. *See BP Air Conditioning Corp. v. One Beacon Ins. Grp.*, 8 N.Y.3d 708, 716 (2007) ("[T]he reasonable expectation and purpose of the ordinary business [person] when making an ordinary business contract will be considered in construing a contract." (alteration in original) (internal quotation marks omitted)). The lower courts' reading of the Equal Treatment

Provision to include a requirement for a ratable payment contravenes the long-held understanding that *pari passu* clauses prohibit legal subordination but do not regulate the order or amount of payments made, much less require simultaneous payment to holders of defaulted debt. *See, e.g.*, Richard Wight (with Warren Cooke & Richard Gray), *The LSTA's Complete Credit Agreement Guide* at 267-68 (2009) ("[T]he [*pari passu*] clauses have historically been understood not to force a borrower to make concurrent ratable payments outside of a bankruptcy or insolvency context. Thus, if a borrower wishes to prepay syndicate B without also prepaying syndicate A where both are pari passu, it is free to do so."); United Nations Centre on Transnational Corporations, Advisory Studies, No. 4, Series B, *International Debt Restructuring: Substantive Issues and Techniques*, at 29 (1989); *see also Kensington Int'l Ltd.*, 2002 No. 1088, [2003] EWHC 2331 (Comm) (Commercial Ct. Apr. 16, 2003) (U.K.) (refusing to issue ratable payment injunctions).[12]

[12] Although a Belgian court entered "ratable payments" relief in a case brought by NML affiliate Elliott Associates, Belgium's Parliament subsequently passed legislation effectively overruling that decision. App. 180-81.

B. The Second Circuit's Decisions, If Affirmed, Will Lead to an Untenable Result That Puts Holdouts in a Vastly Advantageous Position Over Exchange Bondholders

Amici respectfully submit that the Second Circuit's interpretation would transform the Equal Treatment Provision from what it purports to be (a provision for "equality" of treatment of the Respondents) into a mechanism securing Respondents vastly *preferred* treatment. In effect, the Second Circuit's interpretation would vouchsafe Respondents an extraordinary windfall — a result that New York law disfavors. *See Cole v. Macklowe*, 99 A.D.3d 595, 596 (1st Dep't 2012) (rejecting construction that "represents a windfall to the defendants that is absurd, not commercially reasonable and contrary to the express terms of the agreement").

It bears emphasis that any economic resources available to Argentina to pay the holdout bonds (and the conclusion below that Argentina had sufficient resources to do so was made absent any documented inquiry) stemmed primarily from the economic sacrifices and voluntary "haircuts" taken by the very Exchange Bondholders now facing extreme disadvantage. To obtain their present securities, each of the Exchange Bondholders (or their predecessors-in-interest) was required to tender its pre-2001 bonds to Argentina. As the Second Circuit noted:

> In 2005, Argentina initiated an exchange offer in which it allowed FAA bondholders to exchange their defaulted bonds for new unsecured and unsubordinated external debt at a rate of 25 to

> 29 cents on the dollar. In exchange for the new debt, participants agreed to forgo various rights and remedies previously available under the FAA. . . .
>
> In 2010, Argentina initiated a second exchange offer with a payment scheme substantially identical to the 2005 offer.

NML I, 699 F.3d at 252. Despite this "haircut," there was 92% participation in the 2005 and 2010 restructuring. As a result of the ratable payment formula, Respondents, as holdouts, would be granted a litigation advantage at the expense of Exchange Bondholders who had accepted heavy discounts on the 1994 bonds they previously held — discounts that paved the way for the improving financial situation, leading the courts below to surmise that Argentina might be able to pay Respondents' outstanding judgments. *See NML II*, 727 F.3d at 246.

Notably, this assumption accounted only for the approximately $1.33 billion owed to Respondents by Argentina and the $3.14 billion due on the Exchange Bonds. The lower courts ignored, among other things, the outstanding claims against Argentina by holdout creditors in other venues,[13] which might

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[13] *E.g.*, *Abaclat v. Republic of Argentina*, ARB/07/5, Decision on Jurisdiction ¶¶ 82, 216 (ICSID Aug. 4, 2011) (60,000 Italian holdout claimants), *available at* http://italaw.com/sites/default/files/case-documents/ita0236.pdf; *Ambiente Ufficio S.p.A. and others v. Argentine Republic*, ARB/08/9, Decision on Jurisdiction and Admissibility (ICSID Feb. 8, 2013), *available at* http://italaw.com/sites/default/files/case-documents/italaw1276.pdf.

The ICSID website discloses that the following is also pending: *Giovanni Alemanni and others v. Argentine Republic* (ICSID Case No. ARB/07/8), an arbitration filed in 2007 and concerning "debt instruments" issued by Argentina. *See*

obligate Argentina to pay *billions* more to FAA bondholders, aside from the costs of likely litigation that will ensue. Moreover, CACs that are typically included in newer bonds do not appear in the billions of dollars of outstanding bonds at issue.

Furthermore, the Second Circuit Decisions may negatively impact future efforts to restructure sovereign debt worldwide. As this Court is doubtless aware, Greece, Italy, Spain and Puerto Rico are still facing potential default; others may follow. "Emerging markets" and developing countries continue to undergo similar crises. Because there is no bankruptcy protection or insolvency regime for sovereigns, it remains vitally important, as a matter of public policy and in order to avoid "domino effects" for other countries, for sovereigns in financial distress to have some means of restructuring their debts. The district court's prior rulings rejecting the holdouts' objections to the 2005 and 2010 exchange offers[14] were largely applauded by financial markets as indicating that the United States courts were prepared to facilitate orderly restructuring of sovereign debt. The Second Circuit's Decisions threaten to undo those benefits, and may discourage orderly sovereign debt restructurings in future cases governed by New York law. By reading the ratable payment remedy into the Equal Treatment Provision, the Second Circuit has given a small percentage of holdouts a chokehold on any

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https://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListPending.

[14] *See H.W. Urban GmbH v. Republic of Argentina*, No. 02 Civ. 5699 (TPG), 2010 U.S. Dist. LEXIS 40580 (S.D.N.Y. Apr. 26, 2010).

restructuring process. *Amici* respectfully submit that this is an erroneous result under New York law and the New York Court of Appeals should be afforded the opportunity to correct it. Even in the unlikely event New York law should so stand, that decision should be shouldered by New York's highest court, not by the federal courts.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Petition for Writ of Certiorari submitted by Petitioner Republic of Argentina, *amici* Puente and the AACC respectfully submit that this Court should grant the petition and certify the *pari passu* question to the New York Court of Appeals.

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