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

REPLY BRIEF OF PETITIONER

JONATHAN I. BLACKMAN
CARMINE D. BOCCUZZI, JR.
MICHAEL M. BRENNAN
CLEARY GOTTLIEB
STEEN & HAMILTON LLP
One Liberty Plaza
New York, NY 10006
(212) 225-2000

PAUL D. CLEMENT
Counsel of Record
ZACHARY D. TRIPP
BARBARA A. SMITH
BANCROFT PLLC
1919 M Street NW
Suite 470
Washington, DC 20036
(202) 234-0090
pclement@bancroftpllc.com

Counsel for Petitioner

May 27, 2014

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statute

Other Authorities

REPLY BRIEF

This case raises "two issues of vital public policy and legal importance … that extend far beyond the particular facts of this case." App. 169–70 (U.S. Br.); Brazil Br. 7 ("utmost import to the international order"); France Br. 11 ("global impact"); Mexico Br. 1 ("jeopardize[s] the economy of a sovereign nation"). Because no sovereign bankruptcy regime exists, voluntarily restructuring is critical for Nations in crisis to obtain some fresh start while also protecting creditors. Stiglitz Br. 1–2. Respondents' effort to treat Argentina's restructuring as *malum in se* thus blinks reality. Creditors can hold out, but the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1609–1611, limits their ability to enforce judgments.

The decisions below turn this system on its head. The injunctions empower holdouts to profit off the exchange bondholders' sacrifice, mandating payment in full—including to vulture funds that purchased bonds post-default for pennies on the dollar. And to coerce payment, the injunctions hold hostage the 92% of bondholders who participated in the restructuring by taking substantial haircuts. If Respondents' gambit succeeds here, it will make restructuring "substantially more difficult, if not impossible." App. 182 (U.S. Br.).

Respondents[1] argue that this Court should deny certiorari because Argentina will disregard any adverse order. Respondents are doubly wrong. As a

[1] "Respondents" refers only to Plaintiffs-Appellees.

legal matter, doubts about whether a foreign sovereign will comply illustrate that the lower courts have exceeded their authority. Attachment of a sovereign's commercial property in the United States raises no question of whether the sovereign will comply; it is readily enforceable, strictly territorial, and engenders no diplomatic strife. Injunctions coercing payment with assets that are by definition beyond the reach of the FSIA—including core sovereign funds within the sovereign's own territory—are a different matter entirely. Such injunctions present serious enforcement problems, have significant extraterritorial effects, and generate precisely the tensions the FSIA was designed to avoid.

Respondents are also wrong on the facts. Argentina's recourse to judicial review does not represent unwillingness to comply with its legal obligations, but it shows Argentina's struggle to continue honoring its debts to the exchange bondholders. Contrary to Respondents' assertions, absent relief Argentina will comply with the injunctions; though, since Argentina lacks the financial resources to pay the holdouts in full (what would amount to $15 billion) while also servicing its restructured debt to 92% of bondholders, Argentina will have to face, objectively, a serious and imminent risk of default. Argentina reaffirms its commitment to continue honoring its debts, and hopes not to be forced to face the risk of defaulting. These severe consequences can be avoided if this Court applies its ordinary criteria to grant certiorari: This case involves issues of the utmost importance to the

United States, foreign affairs, and the international financial markets.

I. This Court Should Grant Certiorari And Certify The Merits Question To The New York Court of Appeals.

This Court should certify the merits question to the New York Court of Appeals. "The *pari passu* question satisfies every criterion for certification to the New York court." Puente Br. 9. There is no controlling New York precedent, it is "a pivotal New York State law issue," *id.* at 3, and the interpretation below "deviates from decades of settled market expectations," App. 170 (U.S. Br.).

Contrary to Respondents' arguments, the question is properly presented. The *pari passu* question was "pressed [and] passed upon" by the Second Circuit, thus preserving it. *Verizon Comm'ns, Inc. v. FCC*, 535 U.S. 467, 530 (2002) (quotation marks omitted). Indeed, this case springs from Respondents' assertions about the meaning of the *pari passu* clause, and the Exchange Bondholder Group sought certification of a similar question. Doc. 632 at 2 (Dec. 27, 2012). "Certification cannot be waived and indeed, certification has been raised by courts *sua sponte*," Puente Br. 6 n.5, as this Court did in *Cline v. Oklahoma Coalition for Reproductive Justice*, 133 S. Ct. 2887 (2013).

Respondents argue that the question is "academic" because Argentina allegedly breached even the "formal ranking" interpretation by enacting the so-called Lock Law, and the ratable payments injunctions merely remedy Argentina's breach. Aurelius BIO 15, 19. The "ratable payments"

injunctions are predicated on the "equal payments" interpretation embraced below. If the New York Court rejects that interpretation, a remand would be needed to reconsider the remedy, potentially "pretermit[ing] an otherwise sensitive federal controversy" about the meaning of the FSIA. Puente Br. 7 (citing *Va. Office for Prot. & Advocacy v. Stewart*, 131 S. Ct. 1632, 1644 (2011) (Kennedy, J. concurring)). Moreover, Argentina's position is that it never breached and, regardless, the Lock Law is now gone. Respondents assert that "the Lock Law's 'repeal' is illusory," as it "has merely been temporarily 'suspended.'" NML BIO 20. But suspension and repeal are functionally identical. To reinstate the Law, the Argentine Congress would need to pass new legislation.

NML argues that *pari passu* clauses are not "fungible." NML BIO 20–21. But they appear in virtually all outstanding sovereign bonds and Argentina's *pari passu* clause "follows one of the market-standard variants." France Br. 6; *see also* App. 170 (U.S. Br.) ("a boilerplate provision"). An empirical review found that Argentina's variant was the second most common, appearing in nearly half of issuances since 2000. Mark Weidemaier et al., *Origin Myths, Contracts, and the Hunt for* Pari Passu, 38 Law & Soc. Inquiry 72, 84 (2013). The lower courts' rulings thus impact billions of dollars of New York law bonds.[2] *E.g.,* Brazil Br. 1 (Brazil has

[2] Collective action clauses ("CACs") also do not solve the holdout problems caused by the misreading below. *Infra* Part III.

approximately $36 billion in New York law bonds with similar *pari passu* language). New York's highest court, not the Second Circuit, should have the final say regarding whether to disrupt settled market understandings of this widespread provision.

II. This Court Should Grant Certiorari To Resolve The Remedies Question.

If the Court does not certify the *pari passu* question, it should grant certiorari to consider the enormously consequential and clearly erroneous view of the FSIA embraced below. App. 169 (U.S. Br.) (a "vital" question); Brazil Br. 7 ("a blatant end run" around the FSIA); Mexico Br. 2 (injunctions "plac[e] the economic policies of a sister sovereign nation at the mercy of holdout creditors in a way never contemplated under the FSIA").

Respondents assert this question is "factbound," *e.g.,* NML BIO 3, but the breadth of their arguments belies that. Respondents argue that there is no FSIA violation because the injunctions operate *in personam* and do not exercise dominion over specific property. NML BIO 25; Aurelius BIO 22–24. This argument proves far too much. An injunction directly ordering a foreign sovereign to pay would be equally *in personam* and non-specific. But such a naked command to pay is clearly forbidden because it transparently circumvents the FSIA's enforcement immunities. *See Walters v. Indus. & Commercial*

Bank of China, Ltd., 651 F.3d 280, 296–97 (2d Cir. 2011).[3]

NML argues that the injunctions are "*less* offensive to [Argentina's] sovereign dignity" than *in rem* orders because Argentina has "leeway" to choose whether to default or pay Respondents with non-executable property. NML BIO 26–27. But *sovereigns* are best positioned to judge what offends sovereign dignity, and they view these orders as *uniquely* offensive. *See* App. 188 (U.S. Br.) ("extraordinary intrusiveness … could have adverse effects on our foreign relations"); Brazil Br. 7 ("an affront to the sovereignty and dignity of foreign nations"); Mexico Br. 2 ("flatly inconsistent with … international comity").

Like other sovereigns, *e.g.,* Brazil Br. 10, Argentina waived its immunities in reliance on the FSIA's scheme limiting enforcement to attachment or execution upon commercial property in the United States. But to coerce Argentina, the district court disregarded those limits and threatened a "super-embargo," barring Argentina from servicing its debts. Mark C. Weidemaier & Anna Gelpern, *Injunctions in Sovereign Debt Litigation*, 31 Yale J. Reg. ___

[3] Under Respondents' rhetoric, if a sovereign insisted on its rights and refused to turn over immune property, it would be "flouting" judicial authority like a "fugitive." NML BIO 36–37; Aurelius BIO 24; Judges Br. 4–5. The need to resort to such name-calling underscores the FSIA violation, as the FSIA's limited remedies minimize diplomatic friction and speculation about voluntary compliance. *See Af-Cap, Inc. v. Republic of Congo*, 462 F.3d 417, 427–28 (5th Cir. 2006) (rejecting "fugitive" analogy).

(forthcoming 2014) (manuscript at 32–38), http://bit.ly/1jEg7hs; *see also* Euro Bondholders Br. 6–7, 15; Mexico Br. 15–16; Caja de Valores Br. 8–10. In imposing such harsh consequences—with extraterritorial effects including within Argentina's own territory—the district court overstepped its authority and offended "the dignity of all nations that have issued debt in the United States on the premise that the letter and purpose of the FSIA would be respected." Brazil Br. 10.

Respondents cite legislative history permitting injunctions if "clearly appropriate." H.R. Rep. No. 94-1487, at 22 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6621 ("House Report"); *e.g.,* NML BIO 24, 27. But "[a]n injunction restraining a sovereign's use of property that the FSIA expressly provides is immune from execution is inconsistent with the structure of the FSIA and thus not 'clearly appropriate.'" App. 190 (U.S. Br.). The House Report also distinguishes between "order[ing]" specific performance and "enforc[ing] such an order," as contempt sanctions are themselves limited by foreign sovereign immunity. House Report 22. These injunctions disregard those limitations entirely.

Respondents dismiss extraterritoriality concerns by noting that courts may command *individuals* "'to take action even outside the United States, and may back up any such command with sanctions.'" NML BIO 30 (quoting *Chafin v. Chafin*, 133 S. Ct. 1017, 1025 (2013)). But *sovereigns* are not ordinary individuals and—even before the FSIA—this rule would not apply when there could be "interference with the sovereignty of another nation." *Steele v.*

Bulova Watch Co., 344 U.S. 280, 289 (1952). In circumventing this limitation and the FSIA, the injunctions below create precisely the comity and foreign relations concerns this Court and Congress have sought to avoid.

Finally, Respondents cite no case supporting their circular effort to transform a statutory immunity into the "irreparable injury" needed for an injunction designed to circumvent that very immunity.[4] That is no surprise, because Respondents' effort flouts Congress' intent. NML asserts that it is "Argentina's persistent efforts to frustrate collection, not the FSIA alone, that make money damages meaningless here." NML BIO 29 (quotation marks omitted). But Argentina has "frustrated" NML's collection efforts simply by insisting on its sovereign immunities in the United States and abroad to protect the integrity of the restructuring which 92% of creditors accepted. That NML's aggressive collection efforts overstep sovereign immunity law worldwide is a reason to reject those efforts, not eviscerate sovereign immunity.

III. This Case Is Extraordinarily Important.

1. This case is extraordinarily important on its facts alone. By misreading Argentina's *pari passu* clause, the injunctions threaten a G20 nation with default unless it pays Respondents billions of dollars with property the FSIA puts beyond the district

[4] The question presented squarely encompasses arguments that the injunctions exceed courts' equitable powers. Pet. ii.

court's reach. This is offensive, unprecedented, and enormously consequential. Exchange bondholders in the United States and worldwide face massive losses, and millions of ordinary Argentine citizens face severe consequences.

The claims of holdouts with the same purported *pari passu* rights exceed $15 billion and Respondents provide no support for their assertion that the decisions below will not "automatically implicate" other holdout debt. Aurelius BIO 25. Indeed, Respondents' own *amici* demand an additional $1 billion, Italian Bondholders Br. 1, vividly illustrating that Respondents' demands are the tip of the iceberg.

Argentina's $28.2 billion in reserves cannot be exclusively used to serve Respondents' claims, as they suggest. Among other purposes, reserves are needed to stabilize the currency, pay other debts, including to exchange bondholders and multilateral financial institutions, finance imports from the United States and other markets, and facilitate operations of hundreds of U.S. companies operating in Argentina.[5] Argentina cannot pay $15 billion to holdouts, reducing its reserves more than 50%, and still have the resources to comply with its other

[5] Approximately 500 American companies currently operate in Argentina. The United States is the main source of foreign direct investment and a key supplier of goods and services of the country. U.S. Commercial Serv., *Doing Business in Argentina* 1 (2013), http://www.buyusainfo.net/docs/x_2403504.pdf.

financial commitments and economic and social obligations.[6]

Aurelius suggests that Argentina could pay by expropriating property, including retirees' pension funds. Aurelius BIO 25–26. This starkly highlights the vulture funds' business model of buying distressed debt for pennies on the dollar then seeking to profit off the suffering of the less fortunate. *See* Jubilee Br. 1–2. It also underscores the FSIA violation. This mere suggestion is an affront, and all resources Argentina could potentially expropriate for Respondents' benefit are immune from attachment, arrest, or execution.

2. The injunctions are more broadly important because they undermine the voluntary "system of cooperative resolution of sovereign debt crises." App. 170 (U.S. Br.); *see* Brazil Br. 7 ("will cast a shadow over the global sovereign debt market"); France Br. 10–11 ("rais[e] systemically important issues"); Mexico Br. 2 ("will inevitably render future restructurings of sovereign debt more difficult"); Stiglitz Br. 1 ("severely imped[e] potential debt restructurings under standard debt contracts");

[6] Respondents complain that Argentina did not introduce evidence below on its inability to pay. But district courts have no business acting as bankruptcy courts for foreign nations and judging the financial health of a co-equal sovereign; the FSIA only permits inquiry into whether the sovereign has commercial property in the United States. Moreover, forcing a sovereign to disclose sensitive and confidential financial information causes diplomatic friction that the FSIA's scheme studiously avoids.

Jubilee Br. 7 ("will intensify and prolong the suffering of the poor").

Respondents argue that the text of Argentina's *pari passu* clause limits these ramifications. *E.g.*, Aurelius BIO 33. But materially identical language appears in nearly half of modern bonds. *Supra* p. 4. Respondents notably do not foreswear their ability to seek the same relief from sovereigns with slightly different clauses. Indeed, Respondents preserve that flexibility by arguing that the injunctions are a "remedy for Argentina's breach" and need not align exactly with the promise itself. Aurelius BIO 15.

CACs also do not solve the holdout problems the courts created below. Brazil Br. 18 (the "injunctions are a game-changer against which CACs provide no protection."); France Br. 21 (CACs "do not resolve the problem."); Mexico Br. 28 ("strongly disagree[ing]" that CACs solve the holdout problem); Stiglitz Br. 11 ("empirical work confirms the limited usefulness of CACs for addressing the holdout problem."). "Since CACs operate only on one series of bonds," would-be holdouts can capture an individual issue typically by acquiring a 25% position. Brazil Br. 20.[7] This is "relatively inexpensive compared to the potential reward," particularly because distressed bonds are deeply discounted. *Id.*; *see* France Br. 22–23; Mexico Br. 26. Perniciously, the injunctions enable holdouts

[7] Clauses allowing collective action across series would only marginally increase the costs of holding out, as "deaggregation" is typically triggered by a 33% vote on an individual series. Brazil Br. 22. Such clauses are rare in New York law bonds. France Br. 22.

not only to "'free ride' on the sacrifice of creditors who restructure bonds in default, but also [to] hold those same creditors as financial hostages, *after* the restructuring." Brazil Br. 20. These perverse incentives make voluntary restructuring "substantially more difficult, if not impossible," App. 182 (U.S. Br.); *see* Stiglitz Br. 1–2.

Recognizing the importance of this case to the United States, this Court could call for the views of the Solicitor General. The Aurelius Respondents remarkably suggest that the United States' views are not worth hearing. *See* Aurelius BIO 21–22. To the extent they mean that the United States has already indicated that the decisions below are important and wrong, that is a basis for granting outright. To the extent Aurelius suggests that the United States' views on the FSIA are unimportant, this Court's practice is to the contrary.[8]

* * *

Respondents argue that this Court should deny certiorari because Argentina will not comply with an adverse ruling. *E.g.,* NML BIO 2, 36–37. That claim is wrong and underscores that the orders below have surpassed the limits imposed by the FSIA. To be

---

[8] *E.g., OBB Personenverkehr AG v. Sachs*, ___ S. Ct. ___, No. 13-1067 (May 19, 2014); *Republic of Argentina v. NML Capital, Ltd.*, 133 S. Ct. 1855 (2013); *Rubin v. Islamic Republic of Iran*, 132 S. Ct. 1619 (2012); *EM Ltd. v. Republic of Argentina,* 132 S. Ct. 1133 (2012); *Bank Melli Iran N.Y. Representative Office v. Weinstein*, 131 S. Ct. 3012 (2011); *Republica Bolivariana de Venezuela v. DRFP L.L.C.*, 131 S. Ct. 2479 (2011); *Kingdom of Spain v. Estate of Cassirer*, 131 S. Ct. 1717 (2011).

clear, absent relief Argentina will comply with the orders under review. Given Argentina's inability to pay the holdouts in full—what would amount to $15 billion—while also servicing its performing debts, compliance will force the country to face a serious and imminent risk of default, with grave ramifications for Argentina, the exchange bondholders, and the capital markets.

The fact that Respondents must speculate about compliance also highlights the FSIA violation. The FSIA avoids orders of dubious enforceability and the diplomatic tensions they engender. If Respondents had attached commercial property in the United States, there would have been no dispute about compliance. But orders directed at a foreign sovereign and its immune assets abroad are another matter. Indeed, the threats to Argentina, the exchange bondholders, their trustee, and the international clearing systems illustrate the challenges of enforcement and the diplomatic tensions they produce. Injunctions designed to evade the FSIA thus cause precisely the harms the FSIA was designed to prevent.

CONCLUSION

This Court should grant and certify the *pari passu* question to the New York Court of Appeals or grant the remedies question.

Respectfully submitted,

PAUL D. CLEMENT
Counsel of Record
ZACHARY D. TRIPP
BARBARA A. SMITH
BANCROFT PLLC
1919 M Street NW
Suite 470
Washington, DC 20036
(202) 234-0090
pclement@bancroftpllc.com

JONATHAN I. BLACKMAN
CARMINE D. BOCCUZZI, JR.
MICHAEL M. BRENNAN
CLEARY GOTTLIEB
STEEN & HAMILTON LLP
One Liberty Plaza
New York, NY 10006

Counsel for Petitioner

May 27, 2014