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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AURELIUS CAPITAL MASTER, LTD., *ET AL.*,

Plaintiffs-Appellants,

v.

REPUBLIC OF ARGENTINA,

Defendant-Appellee,

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

REPLY BRIEF OF APPELLANTS NML CAPITAL, LTD., OLIFANT FUND, LTD., FFI FUND LTD., AND FYI LTD.

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PRELIMINARY STATEMENT

The district court's Vacatur Order vacates the Injunctions here automatically upon satisfaction of two conditions precedent. Who is to determine whether and when those conditions have been satisfied, the Order does not say. The Order seems to presuppose that satisfaction of the two conditions will be so readily and immediately observable to all persons affected by the Injunctions that no one could or ever would dispute that they have been satisfied. But, as the briefing in this case amply demonstrates, that presupposition is incorrect.

First, while the Vacatur Order requires Argentina to "make full payment" to "all plaintiffs that entered into agreements-in-principle with the Republic on or before February 29, 2016," SPA-84, Argentina takes the position that this condition will be satisfied once it states that it has sent the money. But disputes certainly may arise. For instance, with respect to Lead Plaintiffs' agreement-in-principle ("AIP"), Argentina is planning to satisfy a portion of its payment obligations by directing funds from underwriters of its capital-raises to Lead Plaintiffs (A-2368-70), but must pay interest via direct wire transfer (A-2370). And the amount of interest Argentina must wire changes on a daily basis. Proper completion of these payments may generate disagreements, such as whether Argentina has directed the funds appropriately, the underwriters have satisfied their obligations, and the correct amount has actually been paid.

Second, Argentina apparently believes that it may be able to certify full compliance even if it *does not* make full payment. Argentina argues that if it fails to make payment on Lead Plaintiffs' AIP by April 14, and one or more Lead Plaintiffs then exercise their rights under the agreement to terminate, Argentina nonetheless will have satisfied the Vacatur Order's conditions—and triggered automatic lifting of the Injunctions—so long as it makes required payments to the other bondholders that reached settlements by February 29. Lead Plaintiffs bargained for this termination right to ensure prompt payment and to protect themselves if Argentina does not perform as hoped. Certainly Lead Plaintiffs do not believe that their Injunctions should vacate if they exercise a contractual right to which Argentina agreed. And the possibility that Argentina will not pay by the deadline is not remotely hypothetical given that one house of the Argentine Congress has passed a bill conditioning any settlement payments on this Court lifting all Injunctions, and that oral argument will take place on April 13—one day before Argentina's deadline. Whether or not this Court ultimately affirms, if Argentina's Congress requires this Court to confirm vacatur of all Injunctions as precondition to payment, the likelihood of Argentina making payment by April 14 would appear to be remote.

Lifting the Injunctions properly requires findings that the conditions have been satisfied, and only the district court can make them after hearing from the af-

fected parties. Yet the Vacatur Order contemplates no further judicial action—only that the Injunctions that this Court twice affirmed will be automatically vacated. The district court provided no justification for this highly irregular—indeed, unprecedented—springing vacatur mechanism, and its use is certain to make the final vacatur of the Injunctions a process fraught with confusion, uncertainty, and conflicting assertions as to the parties' legal obligations. On that basis alone, this Court can and should vacate the Vacatur Order and instruct the district court to hold a hearing and make findings that (at the moment they are entered, not in the future perfect tense) relate to the well-established legal standard for vacating permanent injunctions. That is as far as the Court needs to go to resolve this expedited appeal.

Argentina protests that, unless this Court affirms the district court's springing vacatur mechanism, all of the agreements-in-principle it has reached will fall through—both because Argentina's Congress is preparing to make such affirmance a condition of the settlement payments, and because Argentina supposedly cannot raise the funds to pay the settlements unless it first has legal certainty that all Injunctions will be vacated. The first objection—that Argentina's Congress is demanding this Court affirm—is a thinly disguised effort at extortion and this Court should not tolerate it, much less allow it to dictate the outcome of this appeal. And the second objection is a falsehood. To the extent that Argentina refuses to make

payments to non-settling FAA Bondholders, the Injunctions preclude Argentina only from paying on the *Exchange Bonds*, and do not prohibit Argentina from raising funds. The Injunctions thus are no obstacle either to Argentina consummating its agreements-in-principle or to payments on the new bonds it soon will issue, which, of course, will not be Exchange Bonds.

The real issue is that Argentina wants, at the same time it makes its settlement payments to FAA Bondholders, also to make its past-due payments on the Exchange Bonds. That is a good thing for Argentina to do, but it does not need the Vacatur Order to accomplish it. It need only comply with the Injunctions' Ratable Payment remedy, or otherwise reach settlements with the remaining non-settling parties. As this Court already has held, Argentina cannot use threats of harm to third parties—or even to itself—to escape its legal obligations or otherwise to affect the equitable relief analysis. The Injunctions should be lifted only after Argentina has demonstrated that there has been a substantial change in circumstances and the district court makes findings that, based on those circumstances, the Injunctions' purpose—compliance with plaintiffs' rights under the Equal Treatment Provision—has been fulfilled and therefore they can be dissolved.

In any event, Argentina's brief makes clear that the agreements-in-principle with more than 85% of the claims covered by Injunctions are a key component of the purportedly changed circumstances here. But Lead Plaintiffs' AIP accounts for

the vast majority of that progress, and it came with a significant condition of its own: If Argentina does not close by April 14, the Lead Plaintiffs may terminate the AIP. If that were to occur, Argentina would have agreements-in-principle with only a small minority of the outstanding claims subject to the Injunctions. That circumstance could not possibly warrant lifting the Injunctions as to the non-settling supermajority. Only after the vast majority of plaintiffs have been paid in accordance with their settlement agreements, and Argentina is well on its way toward resolving the remaining claims through robust, good-faith negotiations, could it possibly be said that the Injunctions have fulfilled their purpose. Until then, the Injunctions remain essential to shield Lead Plaintiffs from irreparable harm, and the district court erred by vacating them.

ARGUMENT

I. The Springing Vacatur Order Impermissibly Denies Bondholders The Right To Be Heard About Whether Argentina Satisfied The Conditions For Vacating The Injunctions.

The Vacatur Order improperly denies Lead Plaintiffs the opportunity to be heard before it dramatically and irrevocably alters the parties' legal positions—total vacatur of their Injunctions—because it will take effect *automatically* when Argentina has satisfied two ambiguous conditions precedent, but the Order does not say who is to judge when that has occurred. *See* Opening Brief of Appellants NML Capital, Ltd., *et al*. ("Opening Br.") 26-32. The Order's opacity on this point

is especially problematic because its conditions involve factual and legal predicates that may be (and already are) disputed by plaintiffs in these actions. The district court erred when it adopted this unsound and untested springing vacatur mechanism. The defense mounted by Argentina and its newfound allies fails.

A. Argentina contends that "[t]he form and timing of the district court's" Vacatur Order were "well within its broad equitable discretion." Argentina Br. 49; *see also* EM Br. 29-30. But "the fact that the judge enjoys broad discretion in shaping [equitable] solutions [does not] relieve him from the obligation to afford [parties] procedural due process." *E.E.O.C. v. Steamship Clerks Union, Local 1066*, 48 F.3d 594, 609 (1st Cir. 1995); *see also Lugo v. Keane*, 15 F.3d 29, 30 (2d Cir. 1994) (per curiam) (collecting cases). These protections obviously include the opportunity to be heard "at a meaningful time." *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972). The Vacatur Order plainly fails this test, as it deprives plaintiffs of the opportunity to challenge whether the conditions have been fulfilled, leaving the parties, banks bound by Rule 65(d), and the public with no clear ruling as to whether and when the Injunctions have lifted.

It is telling that the United States, while opining that the Injunctions ultimately should be vacated, pointedly does not endorse the springing vacatur mechanism and nowhere disputes that all litigants are entitled to be heard *before* any vacatur; the United States instead "takes no position" on such "procedural argu-

ments." U.S. Br 4 n.2. That may be because the United States, which regularly seeks injunctive relief to enforce federal law, recognizes the importance of being able to contest whether circumstances have actually changed to warrant dissolving any of its hard-won injunctions and consent decrees. Indeed, if the United States had obtained an injunction requiring a defendant to engage in an environmental cleanup, it is difficult to imagine the United States supporting a springing vacatur order that provided that the injunction would dissolve automatically once the defendant had declared it had performed the required cleanup. One instead would expect the United States to demand that the injunction remain in place until there was an agreement among the parties or properly-made judicial findings that the cleanup actually had occurred.

Argentina argues that springing-vacatur orders are common, but none of the cases it cites (Argentina Br. 49-50) suggests the propriety of vacatur absent an opportunity to resolve disputed issues relevant to vacatur. Those cases involve conditions that are so "specific," "certain," and "not ambiguous" (*id*. at 49, 51-52) that providing for dissolution "without further judicial review" was within the court's discretion. *Id*. at 51. For example, in *United States v. Diapulse Corp. of America*, 457 F.2d 25 (2d Cir. 1972), the injunction "d[id] not leave" any "doubt" about the "method by which [the impacted party] [could] proceed to correct its violations" to lift the injunction, nor when that would occur—circumstances plainly not present

here. *See id*. at 30. Nor did the lower court allow the enjoined party to determine when it had satisfied the conditions; the court "sensib[ly]" delegated that assessment to an impartial federal agency. *Id*. at 29. And the injunction at issue in *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197 (2d Cir. 1970), expressly contemplated a "final hearing" in the action. *Id*. at 1207.

Argentina's contention that "there can be no ambiguity as to whether the Republic has made 'full payment' on the settlement agreements" is plainly incorrect. Argentina Br. 52.

First, Argentina's certification that it believes it has sent out payment, Argentina Br. 52, is simply not sufficient in the context of multiple multibillion-dollar transactions, with some funds paid by Argentina, without escrow, via underwriters, while interest payments, calculated on a daily basis, are sent separately and directly from Argentina by wire transfer. A-2368-70. Disputes may arise regarding whether Argentina has properly directed the underwriters, whether the underwriters have fulfilled the AIP's requirements, and whether Argentina has paid the correct amount of post-agreement interest, to name a few examples. *See* A-2366-70. There is no reason why the Injunctions must be lifted before anyone (much less *everyone*) certifies actual receipt of payment.

Second, there are already disputes about which bonds are currently subject to agreements-in-principle. Argentina admits this dispute has already arisen with certain bondholders. Argentina Br. 13 n.3.

Third, there clearly is a dispute between Argentina and the Lead Plaintiffs regarding whether Lead Plaintiffs' Injunctions will vacate if they exercise their rights to terminate after April 14. Argentina says, "Yes" (Argentina Br. 57-58); Lead Plaintiffs say, "No" (Opening Br. 45-47; Aurelius Br. 39-49).

Argentina's only response to these concerns is that the district court "retains the power to adjust the terms of an injunction as unforeseen problems or complexities … present themselves." Argentina Br. 52 (quoting *NML Capital, Ltd. v. Republic of Argentina*, 727 F.3d 230, 246 (2d Cir. 2013) ("*NML II*")). But the Vacatur Order does not contemplate any further judicial action; it provides that the Injunctions will be dissolved *automatically* when someone (the Order does not say who; Argentina nominates itself) determines the Order's conditions precedent have been satisfied. And that dissolution may be irreversible. Both the district court and this Court have recognized there is no adequate remedy at law against Argentina, which claims itself immune from contempt sanctions. By the time an affected party returns to district court to object that Argentina had not satisfied the conditions, Argentina could already have re-routed its payment processes for its Exchange Bonds outside of the district court's jurisdiction. *See* Opening Br. 35. That

would leave the parties with no effective remedy, hardly the "orderly … resolution" proposed by the United States. *See* U.S. Br. 4.

Even crediting Argentina's recent assertion that it would not (even in the absence of an Injunction) alter the payment processes on the Exchange Bonds, the consequences that would flow from re-imposition of the Injunctions would be significantly greater than maintaining them until such time as there is a judicial determination that the conditions precedent have been satisfied. Opening Br. 35. This is a commonsense rationale for the commonsense proposition that judicial oversight of the Vacatur Order's conditions precedent should come before the Injunctions are lifted, not after.

B. Unable to defend this procedurally flawed springing Vacatur Order from appellate scrutiny, Argentina asserts waiver. Argentina Br. 48; *see also* EM Br. 29. Argentina is wrong. It would be particularly inappropriate to deem forfeited a party's procedural objections to such an irregular order, arrived at through the perfunctory process that the district court afforded before issuing the Vacatur Order. In any event, Lead Plaintiffs repeatedly asked the district court not to enter an order vacating the Injunctions because circumstances had not yet changed, which necessarily meant that Argentina should not seek vacatur until after these conditions occur and plaintiffs can litigate any disputes. *See, e.g.*, Pls.' Mem. 18-23, No. 08-cv-6978 (S.D.N.Y. Feb. 18, 2016) (D.E. 874). And they asked the district court

to delay imposition of the Vacatur Order for 30 days so that Argentina's conditions could come to fruition following negotiations with the remaining non-settling plaintiffs, thereby mooting any need for these expedited appellate proceedings. *E.g.*, A-2303:3-25, 2272:22-73:24, 2274:14-22. These arguments "plainly brought to the district court's attention all of the facts pertinent" to an objection to the automatic nature of the Vacatur Order. *Bornholdt v. Brady*, 869 F.2d 57, 68 (2d Cir. 1989).

Were that not enough, Argentina *itself* raised the automatic vacatur issue with the district court. A-2266:19-67:1 (Counsel for Argentina: "[T]here are certain objecting parties who believe that the Court should hold a separate hearing down the road after those conditions have been satisfied and only at that time make a determination about whether the injunctions should actually be lifted.").[1] The district court was fully aware of the Vacatur Order's procedural defects, and they are properly before this Court.

[1] This argument also was presented below by other litigants. *E.g.*, Intervenors' Mem. 10-13, No. 08-cv-6978 (S.D.N.Y. Feb. 18, 2016) (D.E. 880); Arag-A Mem. 6-7, No. 14-cv-9855 (S.D.N.Y. Feb. 18, 2016) (D.E. 37); A-2294:15-95:7, 2283:22-84:10 (Mar. 1 hearing).

II. Argentina Has Not Demonstrated Exceptional Circumstances Sufficient To Warrant Vacating The Injunctions.

A. The Injunctions Cannot Be Vacated Except Upon A Showing Of Exceptional Changed Circumstances Demonstrating That The Injunctions' Purposes Have Been Achieved.

To obtain vacatur, Argentina was required to demonstrate "exceptional circumstances," *Motorola Credit Corp. v. Uzan*, 561 F.3d 123, 126 (2d Cir. 2009) (citation omitted), showing "a significant change in the law or facts," *Sierra Club v. U.S. Army Corp of Eng'rs*, 732 F.2d 253, 256 (2d Cir. 1984). *See* Opening Br. 32, 36-38. In addition, a permanent injunction like the ones at issue here "may not be changed in the interest of the defendants if the purposes of the litigation as incorporated in the decree have not been fully achieved," *Sierra Club*, 732 F.3d at 256, or where the conduct to be prevented "will recur absent the injunction," *Building & Constr. Trades Council of Phila. & Vicinty, AFL-CIO v. NLRB*, 64 F.3d 880, 888 (3d Cir. 1995).

Unable to satisfy this standard, Argentina asks this Court to lower the bar for vacating the Injunctions. Each of its arguments fails.

First, Argentina contends that the district court has authority under Federal Rule of Civil Procedure 54(b) to "revis[e] [the Injunctions] at any time" because they "adjudicat[e] fewer than all the claims"—including "plaintiffs' claims for damages." Argentina Br. 28-30; *see also* EM. Br. 24 (arguing that the Injunctions are "preliminary" in nature). But the standard for revising an injunction turns on

whether that injunction is preliminary or permanent, *Sierra Club*, 732 F.2d at 257, not whether there are other claims in the litigation. A permanent injunction is itself "a final judgment with prospective application," *N.Y. State Ass'n for Retarded Children v. Carey*, 706 F.2d 956, 967 (2d Cir. 1983), and it therefore may be modified under Rule 60(b) or not at all. Argentina does not offer a single case modifying *a permanent injunction*, as opposed to some other order, under Rule 54. The United States apparently agrees, citing *Sierra Club* as providing the standard for "modification of an injunctive decree." U.S. Br. 9-10.

In any event, Argentina is correct that "little turns on whether this Court considers the Injunctions … under Rule 54," Argentina Br. 31, because Rule 54 permits reconsideration of a prior decision only if "there is an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent a manifest injustice," *Official Committee of Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP*, 322 F.3d 147, 167 (2d Cir. 2003) (citation and internal quotation marks omitted). Argentina does not even attempt to satisfy this standard, nor could it: The law as laid down by this Court in its prior decisions affirming the Injunctions has not changed, and no new evidence or new claim of manifest injustice undermines this Court's previous decisions. Even the United States, while acknowledging that its interest in filing is driven by disagreement with this Court's previous decisions, U.S. Br. 2 n.1, does not argue that disa-

greement with the Injunctions justifies vacating them. Instead, Argentina rested its motion on "changed circumstances" under Rule 60, and the United States endorses that approach. U.S. Br. 9.

Second, Argentina invokes the Injunctions' reservation of jurisdiction by the district court to "modify and amend [them] as justice requires *to achieve* [*their*] *equitable purposes* and to account for *changing circumstances*." Argentina Br. 30 (quoting SPA-7) (emphases added) (alteration in original). The district court reserved that authority so it could *bolster* the Injunctions "to achieve [their] equitable purposes." SPA-7. The provision does not contemplate *vacatur* of the Injunctions absent a significant change in the law or the facts.

Third, Argentina argues for a "flexible approach" to modifying even final permanent injunctions. Argentina Br. 30-32. But it cites no cases permitting a district court to vacate an injunction that has not achieved its purpose where doing so would leave the plaintiff without any effective remedy. Instead, in each of Argentina's cases, the court ruled that modification was allowed either: (1) because a "change in law" made conduct addressed by the injunction no longer unlawful, *see Sys. Fed'n No. 91, Ry. Emp. Dep't, AFL-CIO v. Wright*, 364 U.S. 642, 648 (1961); or (2) because modification would not impair the injunction's purpose, *see Horne v. Flores*, 557 U.S. 433, 439 (2009) (state was "now fulfilling its statutory obligation by new means"); *King-Seeley Thermos Co. v. Aladdin Indus., Inc.*, 418 F.2d

31, 335 (2d Cir. 1969) (modification was "necessary to achieve the results intended" by the injunction); *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 387 (1992) (modification would "not necessarily violate the basic purpose of the decree"); *Carey*, 706 F.2d at 967 (denying modification improperly "allowed one provision of the Consent Judgment … to override [its] more comprehensive goal").

Far from permitting the vacatur of an injunction necessary to protect a plaintiff's rights, Argentina's cases reaffirm that an injunction "may not be changed in the interests of the defendants if the purposes of the litigation as incorporated in the decree … have not been fully achieved." *King-Seeley*, 418 F.2d at 37 (citation omitted); *see also Carey*, 706 F.2d at 969 (same). Those cases recognize that a "modification must not create or perpetuate [the] violation" that the injunction was intended to remedy, which is precisely what Argentina here proposes to do. *Rufo*, 502 U.S. at 391.

Argentina's cherry-picked references to a "flexible" approach to modification are limited to "institutional reform decrees" in which the "dynamics … differ from those of other cases." *Horne*, 557 U.S. at 448, 450; *see also Rufo*, 502 U.S. at 381; Opening Br. 37-38. The "rigi[d]" approach that this Court has rejected is merely the requirement of a "clear showing of grievous wrong"; the Court has never abandoned the requirement that a meaningful remedy remain. *King-Seeley*, 418 F.2d at 34 (citation omitted). And Argentina ignores that a court's discretion to

modify is "never without limits" based on the need for "[f]irmness and stability." *Wright*, 364 U.S. at 647-48. In short, the law makes no allowance for the vacatur of a permanent injunction without a showing that its purpose has been achieved.

B. Argentina Has Not Demonstrated Materially Changed Circumstances Sufficient To Warrant Vacating The Injunctions.

Argentina has not shown that the Injunctions' purposes have been achieved. *See Sierra Club*, 732 F.2d at 256. Argentina argues that the district court did not clearly err in finding certain facts—specifically, that President Macri has indicated his willingness to negotiate and gave a speech to the Argentine Congress urging approval of the settlements, and that Argentina has currently signed agreements-in-principle "with the vast majority of plaintiffs" (Argentina Br. 32-38)—but these circumstances simply do not demonstrate fulfillment of the Injunctions' purposes.

Contrary to Argentina's contention (Argentina Br. 53-56), the Injunctions' purposes were not to encourage settlement discussions or to punish past recalcitrance (*see id*. at 37, 53; EM Br. 26; Brief for *Amici Curiae* Euro Bondholders ("Euro Bondholders Br.") 11-17), but to "hold Argentina to its contractual obligation of equal treatment" and thus to restore the rank of Argentina's FAA payment

obligations. *NML II*, 727 F.3d at 241 (quoted in Opening Br. 38).[2] Because, even now, Argentina is refusing to honor its payment obligations under the FAA absent the Injunctions, the Injunctions "may not be changed in the interest of" Argentina. *Sierra Club*, 732 F.2d at 256.

1. The Injunctions Remain Necessary To Prevent Irreparable Harm.

This Court and the district court already have concluded that the Injunctions are necessary to prevent irreparable harm, and Argentina does not dispute that remains the case. While Argentina contends that the Equal Treatment Provision did not itself necessarily mandate exactly the same performance required by the Injunctions (Argentina Br. 53-56), Argentina does *not* argue that the Injunctions are no longer necessary to protect Lead Plaintiffs' Equal Treatment rights. They are. *See* Opening Br. 33-38.

Argentina contends that it "currently is not seeking to subordinate the FAA bonds or relegate them to an inferior class." Argentina Br. 55. But Argentina does not promise to honor its payment obligations on the FAA Bonds equally with its obligations under the Exchange Bonds. Just the opposite: Argentina seeks "to re-

[2] Argentina similarly has stated that "the district court entered Injunctions to specifically enforce the *pari passu* clause" (Argentina Opening Brief 4, No. 15-1060(L) (2d. Cir. Aug. 11, 2015) (D.E. 149)), and that this *must* be the Injunctions' purpose for them to be valid (Argentina Reply Brief 2-3, 11-13, No. 15-1060(L) (2d. Cir. Nov. 24, 2015) (D.E. 181)).

sume paying its restructured debt" without paying non-settling FAA Bondholders, including, perhaps, Lead Plaintiffs if they terminate their agreement-in-principle. *Id*. at 46, 56-61 (citation omitted). Because, as Argentina admits, the "conduct … sought to be prevented will recur absent the injunction[s]," *Building & Constr. Trades Council*, 64 F.3d at 888, the district court should not have vacated the Injunctions.

2. The Equities Have Not Yet Changed.

Argentina argues that the balance of the equities has now shifted so as to render the Injunctions inequitable. Argentina Br. 38-45. Argentina principally contends that it has "a completely changed attitude," evidenced by President Macri's openness to negotiation and his advocacy that Congress approve the settlements. *Id*. at 19, 33-38 (citation omitted). But a "change in attitude by the party subjected to the decree is not enough of a change in circumstances to warrant withdrawing the injunction." *Dowell ex rel. Dowell v. Bd. of Educ. of Okla. City Pub. Schs., Indep. Dist. No. 89*, 795 F.2d 1516, 1521 (10th Cir. 1986). Only a party's sustained behavioral reform over "a reasonable period of time, [reflecting] a good faith commitment" to change its ways can suffice. *Moses v. Washington Parish Sch. Bd.*, 379 F.3d 319, 325-27 (5th Cir. 2004).

Argentina has demonstrated no such commitment. It is in a state of unpurged contempt for its violation of the Injunctions. A-244-46. Worse, Argentina

has not addressed its contempt with even a *promise* to purge, but only with a non sequitur. Argentina Br. 45 n.16. Argentina contends that "the contempt order" is "resolve[d]" because *one* condition to purge its contempt—"repeal [of] the Sovereign Payment Law"—is required before the Injunctions lift. *Id.* But repeal of that law is *necessary*, not *sufficient*. The contempt order requires that, "to purge the contempt," Argentina must also "withdraw[] any purported authorization of Nación Fideicomisos, S.A. to act as the indenture trustee, *and* comply[] completely with the February 23, 2012 injunction." A-246 (emphasis added). But the same proposed legislation Argentina touts as approving the settlements threatens that, if this Court does not affirm the Vacatur Order, Argentina will *reaffirm*—the opposite of "withdraw[]," *id.*—the role of Nación Fideicomisos, and continue to make payments to it. Reply Brief of Aurelius Capital Master, Ltd., *et al.* ("Aurelius Reply Br.") Addendum art. 12. The equities have not yet changed.

For the equities to truly change, Argentina must at a minimum actually pay the vast majority of plaintiffs. *See* Opening Br. 38-47. Indeed, Argentina repeatedly touts that it has reached agreements with the "vast majority"—over 85%—of plaintiffs. Argentina Br. 1, 18-19, 23, 36-39, 44; *accord* U.S. Br. 12-13. And yet Argentina argues that the Vacatur Order permits it to obtain vacatur without paying a majority of plaintiffs. Argentina contends that it can refuse to pay Lead Plaintiffs as April 14 comes and goes, triggering their right to terminate, and then (if the

agreement is terminated) to pay *less than 20%* of plaintiffs and thereby automatically vacate Lead Plaintiffs' Injunctions along with everyone else's. Argentina Br. 56-61; *see also* Opening Br. 38-39, 44-47.[3]

Even more importantly, Argentina's commitment to pay anyone subsists only if this Court affirms the Vacatur Order. *See supra* n.3. That can only be understood as an ultimatum—this Court must rule in Argentina's favor or Argentina will "scupper" its own settlements.

That tactic is functionally indistinguishable from the demand Argentina issued when the case was before this Court in 2013 and Argentina audaciously proclaimed it would "not voluntarily obey" any order other than the one it specified. *NML II*, 727 F.3d at 238. That Argentina today remains "willing" to pay its settlements only if this Court affirms the highly problematic springing vacatur mechanism belies any notion that Argentina has changed its spots.

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[3] This scenario is hardly "hypothetical." Argentina Br. 51. Argentina says that the bill passed by the Argentine lower house would approve the settlements only upon "affirmance of the district court's order." *Id.* at 2; *accord id.* at 26, 43, 45; Aurelius Reply Br. Addendum art. 5. But with oral argument in these consolidated appeals scheduled for April 13, it seems unlikely that this Court possibly could provide Argentina the approval it demands to make payments by April 14.

3. Maintaining The Injunctions Will Not Harm Any Party And Will Advance The Public Interest.

Argentina and its amici argue that the Injunctions would harm (a) plaintiffs who have reached agreements-in-principle with Argentina, (b) the Exchange Bondholders, and (c) the Argentine people. Yet Argentina does not, and cannot, deny that all of these impacts are within its control. Moreover, most of the identified "harms" have already been considered and rejected by this Court, for reasons that apply equally today. Argentina's defense of the district court's flawed reasoning cannot be squared with these realties.

a. Argentina first contends that it must access the capital markets to raise the funds necessary to pay its settlements and that this is not possible with the Injunctions in place. Argentina Br. 40. Both of Argentina's premises are wrong. To begin, Argentina does not deny that it has *on hand* many multiples of the dollars needed to pay the settlements. *Id*. at 42. Argentina protests that these dollars are nominally held by its central bank. *Id.* But Argentina has repaid billions of dollars of its foreign debts from the reserves of its juridically-separate central bank, as this Court has recognized. *EM Ltd. v. Banco Cent. de la República Arg.*, 800 F.3d 78, 83-84, 93-94 (2d Cir. 2015), *petition for cert. filed* 84 U.S.L.W. 3390 (U.S. Jan. 7, 2016) (No. 15-872).

Even if Argentina did need to raise capital, the Injunctions do not stand in its way. Indeed, Argentina has raised over $5 billion in 2016 alone, and approximate-

ly $8 billion since 2015—while the Injunctions have been in effect. *See* Aurelius Br. 12, 14; A-1197-99.

Argentina also contends that some of its "settlements are conditioned on vacatur of all injunctions." Argentina Br. 2-3, 14, 40; *see also* EM Br. 13-14; U.S. Br. 13. Setting aside the chicken-and-egg paradox Argentina has created—those settlements cannot be paid until the Injunctions lift, but under the Vacatur Order the Injunctions cannot lift until the settlements are paid—Argentina deliberately imposed this condition on itself. Equity does not support satisfaction of conditions that Argentina authored for its own benefit. *Cf. NML II*, 727 F.3d at 246 (consequences that are "entirely of the Republic's own making" do not weigh against the Injunctions). If Argentina wants to fulfill its settlements, only Argentina—not the Injunctions—"stand[s] in the way." U.S. Br. 13.[4]

Argentina and friends also protest that leaving the Injunctions in place would permit a small number of holdouts to hold hostage all those who have settled, in the hopes of negotiating better terms. Argentina Br. 3, 23, 37; U.S. Br. 13-14; EM Br. 22-23. But Argentina does not identify a single bondholder among the 15% of non-settlers who has refused to negotiate or made outrageous demands. There is

[4] Lead Plaintiffs never "concede[d]" that "leaving the Injunctions in place would impede resolution of this dispute." Argentina Br. 40. NML merely recognized that settling *its* litigation would entail lifting *its* Injunctions. A-1645.

no basis at this point to assume the remaining non-settling plaintiffs will hold anyone "hostage."

b. Argentina and its amici also argue that the Injunctions harm the Exchange Bondholders. Argentina Br. 46; Euro Bondholders Br. 17-19; SPA-64. Indeed, this appears to be the real reason Argentina seeks vacatur: Argentina wants to exit its default on the Exchange Bonds, which would require it to make the past-due payments on those Bonds. Thus, its bill authorizes a capital-raise of over $12 billion—sufficient to fund the settlements *and* to pay the Exchange Bondholders. Aurelius Reply Br. Addendum art. 7. But Argentina does not need vacatur to pay the Exchange Bondholders (who took their bonds on notice of the possibility of an injunction): Argentina can pay the Exchange Bondholders in full, provided it makes a Ratable Payment to plaintiffs with Injunctions, or it can reach negotiated settlement agreements with the remaining 15% of claims who have not yet settled. Opening Br. 42-43. Nothing has changed in this regard—except that complying with the Injunctions should become much easier if Argentina honors its settlement agreements with the vast majority of plaintiffs who hold Injunctions.

c. Like the effects on the Exchange Bondholders and settling creditors, the consequences of the Injunctions for the Argentine people are in the hands of the government that represents them. Argentina Br. 3, 41, 46; EM Br. 16-17. They arise because Argentina has "chosen to default on its Exchange Bonds" ra-

ther than paying what it owes to all of its creditors. A-569. The interests of the Argentine public, like the public interest more generally, are best served by Argentina abiding its contractual agreements. *See NML II*, 727 F.3d at 248.

* * *

Argentina has not shown that circumstances have changed—at least, not yet—in a material way. This Court affirmed the Injunctions because Lead Plaintiffs would suffer irreparable harm in their absence; Argentina's disregard of its FAA payment obligations "exceeds any affront to its sovereign powers resulting from the Injunctions"; and the public interest "is advanced by requiring debtors, including foreign debtors, to pay their debts." *NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246, 261-64 (2d Cir. 2012); *NML II*, 727 F.3d at 241-48. Those material facts remain true, as Argentina does not dispute. The Injunctions are no less equitable today than when they first were issued. Only once Argentina pays Lead Plaintiffs and other plaintiffs with agreements-in-principle under the terms of their agreements and is well on its way to resolving the remaining claims through robust, good-faith negotiations could it possibly be equitable to vacate all Injunctions, including those of holdouts. Opening Br. 47.

III. Argentina Cannot Achieve Vacatur Of All Injunctions If It Eventually Consummates Settlements With Only 20% Of Its Creditors.

The district court justified the Vacatur Order as necessary because Argentina has settled with the "vast majority" of its creditors, SPA-83, but declined to enter a

clarification of that Order to guarantee that the Injunctions will not vacate unless Argentina *actually pays* the vast majority of its creditors.

In its AIP with Lead Plaintiffs, Argentina agreed to give each Lead Plaintiff the right to terminate the AIP as to itself if Argentina did not make payment by April 14. In the event that any Lead Plaintiff exercised that right, Argentina promised that that plaintiff "shall thereupon be restored to [its] respective prior position[]," A-2371, which, in light of the fact that Lead Plaintiffs each were protected by the Injunctions at the time each agreed to the AIP, clearly meant that any terminating plaintiff still would be protected the Injunctions. To be clear, NML and Olifant do not hope to use their termination rights—they hope to be paid on time per the AIP. The termination provision also protects Lead Plaintiffs against unforeseen Argentine mischief, such as legislation from the Argentine Congress that prevents payment by interposing new conditions, which unfortunately is exactly what seems to be under consideration.

Argentina's reading of the Vacatur Order, however, writes that protection out of the AIP, and would allow Argentina to free itself of the Injunctions even if Lead Plaintiffs exercise their termination right, leaving only 20% of creditors having settled. Such an outcome would fatally undermine one of district court's key predicates for the Vacatur Order. This looming dispute regarding Argentina's conciliation efforts of course counsels in favor of eliminating the Vacatur Order's au-

tomatic operation. *See* Part I.A, *supra*. But, at the very least, this Court should remand with instructions to insert the clarification that Lead Plaintiffs requested into the Vacatur Order.

Argentina and its amici oppose this request, but their contentions lack merit.

First, Argentina, EM, and Montreux err when they argue that if the Lead Plaintiffs are allowed to terminate and not lose the protection of the Injunctions it would improperly allow Lead Plaintiffs to "scupper" Argentina's settlements with other creditors. Argentina Br. 58; EM Br. 20. If Argentina sincerely wishes to settle claims with EM, Montreux, and any other bondholder, the Injunctions do not stop Argentina from doing so. The only reason that preserving Lead Plaintiffs' termination right would "scupper" these smaller settlements would be because Argentina has strategically saddled itself with the additional "requirement" that the Injunctions be lifted as to *all* plaintiffs before Argentina consummates a settlement agreement with *any* plaintiff. That condition cannot be wielded to pretermit other plaintiffs' Injunctions. *See* Part II.B.3.a, *supra*. EM and Montreux and Argentina have no right to the enforcement of settlement-agreement terms that affect—indeed, destroy—the rights of third parties.

Moreover, as NML and Olifant explained in their opening brief, *see* Opening Br. 46-47, while the equities possibly could justify vacatur of all Injunctions if the vast majority of plaintiffs had resolved their claims through settlements and been

paid, and Argentina was well on its way to resolving the remaining claims, by resisting the clarification Argentina seeks vacatur under circumstances where the equities would be far different. Neither Argentina nor its supporters can justify vacating all of the Injunctions merely because 20% of creditors agreed to settle with Argentina—and half of those "settled" without experiencing any haircut.

Second, Argentina curiously asserts that Lead Plaintiffs' request for clarification, along with its request in the district court to delay imposition of any order for 30 days, demonstrates "inequitable conduct." Argentina Br. 58. This assertion is rich coming from a party that falsely represented to the Supreme Court of the United States that it would obey the Injunctions if they were affirmed, Reply Br. for Pet'r 13, No. 13-990 (U.S. May 27, 2014), and remains in contempt of court today. It is also disingenuous. Lead Plaintiffs asked the district court to wait 30 days—*i.e.*, until March 31—"so that these remaining plaintiffs can have an opportunity to negotiate with Argentina" and resolve the litigation without ever bringing the issue to this Court. A-2273:5-6. Contrary to Argentina's intimation, Argentina Br. 57, this request plainly was *not* intended to increase the likelihood that Argentina misses the April 14 deadline; it was to accomplish the opposite.

Furthermore, Argentina freely agreed to this termination provision as part of a bargain that brought it more favorable economic terms. New York law—which governs the AIPs, A-2370-71—is clear that contractual counterparties may "nego-

tiate mutually agreeable terms for their transactions, but they will be held to those terms." *NML II*, 727 F.3d at 248. If Argentina wants to meet the deadline, it need only send the wire transfers.

Third, EM and Montreux further suggest that Lead Plaintiffs will not be harmed if the Vacatur Order effectively prevents Lead Plaintiffs from exercising their termination right because "after April 14," Lead Plaintiffs' claims under the AIP begin to accumulate interest "at a higher rate that they purposefully negotiated" with Argentina. EM Br. 19. Not so. Lead Plaintiffs' rights to higher post-April 14 interest and to terminate are complementary: the higher rate of interest is meant to *incentivize* Lead Plaintiffs not to exercise their termination rights, not to *replace* the termination right. Absent the right to terminate after April 14, Lead Plaintiffs would have demanded a smaller haircut than the 25% to which they agreed in the AIP.

Finally, Argentina asserts that this Court lacks jurisdiction to rule on the district court's refusal to amend the Vacatur Order to expressly incorporate Lead Plaintiffs' termination right. Argentina contends that this ruling is non-appealable, either because Lead Plaintiffs requested merely a clarification of the Vacatur Order, or because their dispute regarding the application of their termination rights is not yet ripe. Argentina Br. 58-59. Argentina is wrong on both counts.

First, Lead Plaintiffs did not seek clarification of a "previous order"—the situation Argentina's cases address. Argentina Br. 58-59. They opposed the (appealable) Vacatur Order as impermissible and proposed an alternative, clearer, permissible order. A-2312. This is exactly the sort of "clarification" request that this Court entertained in *United States v. McGinn*, 787 F.3d 116 (2d Cir. 2015), where the district court's restitution judgment could be read to permit an impermissible outcome, *id.* at 131.

Moreover, Lead Plaintiffs' concerns regarding their termination rights certainly are ripe. Argentina makes no contention that this dispute is not "fit[] … for judicial decision," *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 200-01 (1983)—indeed, there is no further factual development needed whether Lead Plaintiffs ought to retain the benefit of the termination rights in the AIP. And Lead Plaintiffs will face "hardship" if this Court "withhold[s] … consideration." *See id.* at 201. If Lead Plaintiffs terminate, then Argentina may quickly re-route payments outside of the district court's jurisdiction after it pays the remaining 20% of plaintiffs. This would effectively prohibit the district court from re-imposing the Injunctions if the Court subsequently decided that Lead Plaintiffs' Injunctions should never have vacated in the first place. *See* Opening Br. 35.

CONCLUSION

For the foregoing reasons, this Court should vacate the Vacatur Order or, in the alternative, remand with instructions to adopt Lead Plaintiffs' proposed clarification of the Vacatur Order.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of March, 2016, a true and correct copy of the foregoing Appellants' Reply Brief as served on all counsel of record in these consolidated appeals via CM/ECF pursuant to Local Rule 25.1 (h)(1) & (2).

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