No. 12-1494

IN THE

Supreme Court of the United States

REPUBLIC OF ARGENTINA,

Petitioner,

v.

NML CAPITAL, LTD., ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Argentina seeks this Court's review of a decision of the Second Circuit, issued on October 26, 2012, that affirmed in part an injunction specifically enforcing Argentina's contractual promise to "rank" its "payment obligations" under certain bonds "at least equally" with its "obligations" under certain subsequently issued bonds, but also remanded the case for the district court to clarify two aspects of the injunction. In response to the remand, the district court issued an amended injunction, which Argentina and several entities challenged on appeal. On August 23, 2013, the Second Circuit affirmed the amended injunction in all respects.

The questions presented are:

1. Whether the Second Circuit's interlocutory decision regarding the original injunction misapplied its own precedent, which is aligned with that of the other circuits, by holding that the original injunction was not a prohibited "attachment" under the Foreign Sovereign Immunities Act.

2. Whether the district court exceeded its equitable authority by granting the original injunction even though Argentina did not contest that authority in the briefing leading up to the Second Circuit's decision.

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, undersigned counsel state that:

NML Capital, Ltd. is not publicly traded and has no corporate parent and no publicly held corporation owns 10% or more of its stock.

Olifant Fund, Ltd. is not publicly traded; its parent corporation is ABIL, Ltd.; and no publicly held corporation owns 10% or more of its stock.

Pablo Alberto Varela, Lila Ines Burgueno, Mirta Susana Dieguez, Maria Evangelina Carballo, Leandro Daniel Pomilio, Susana Aquerreta, Maria Elena Corral, Teresa Munoz de Corral, Norma Elsa Lavorato, Carmen Irma Lavorato, Cesar Ruben Vazquez, Norma Haydee Gines, and Marta Azucena Vazquez are not corporations, and therefore Rule 29.6 does not require any disclosures with respect to them.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 699 F.3d 246 (Pet. App. A). The court of appeals' subsequent opinion of August 23, 2013 is not yet reported, but is available at 2013 WL 4487563 and is reprinted as an appendix to this brief. The district court's orders (Pet. App. D-F, H-L) are unreported, but the lead order is available at 2011 WL 9522565 (Pet. App. D).

JURISDICTION

The decision of the court of appeals was entered on October 26, 2012. Pet. App. A. The Second Circuit denied Argentina's petition for rehearing en banc on March 26, 2013. Pet. App. B. The jurisdiction of this Court is claimed under 28 U.S.C. § 1254(1).

STATEMENT

Argentina asks this Court to review an interlocutory decision addressing the legality of an injunction that has since been amended, and which is no longer the operative remedy in this case. The Second Cir-

cuit since has affirmed the amended injunction, but that new ruling—which issued five days ago—is not yet before this Court.

Review would be unwarranted even if Argentina's petition were directed to the final decision and not an interlocutory one. Argentina identifies no division of circuit authority. In fact, Argentina demonstrates that the circuits actually are *aligned* as to its first question presented, which concerns the proper standard for determining when an order styled an "injunction" is actually an "attachment" prohibited under the Foreign Sovereign Immunities Act ("FSIA"). And Argentina does not even argue that its second question presented—whether the district court exceeded its equitable authority—implicates a conflict.

The various policy concerns raised by Argentina and its *amici* were comprehensively addressed by the court of appeals and wholly discredited as a basis to reimagine the FSIA in accordance with Argentina's wishes. The court of appeals' August 23, 2013 opinion well explains that Argentina's predicament is both *sui generis* and entirely of its own making and, thus, could be of no continuing importance to anyone but the parties to this unique case.

But even if it had identified a division among the courts of appeals or a substantial policy concern raised by the Second Circuit's decision—and it has not—Argentina's request for this Court's discretionary review still should be denied because Argentina has made clear that it will attempt to evade any order with which it disagrees. Indeed, on the next business day after the Second Circuit's August 23 decision, Argentina's President took to the airwaves to announce a new debt swap plan "aimed at circum-

venting the U.S. court ruling." Camila Russo, *Argentina Plans New York-Buenos Aires Bond Swap*, Bloomberg, Aug. 27, 2013;[1] *see also* Alejandro Lifschitz & Brad Haynes, *Argentina Offers Bond Swap To Skirt U.S. Court Rulings*, Reuters, Aug. 26, 2013.[2] This Court's scarce resources should not be allocated to a litigant that, even as it seeks relief, is making clear that it will attempt to evade this Court's rulings if it does not prevail. The petition should be denied.

1. Beginning in 1994, Argentina issued bonds pursuant to a fiscal agency agreement ("FAA Bonds"). In light of Argentina's notorious history of "numerous defaults on its sovereign obligations" (*EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 466 n.2 (2d Cir. 2007)), investors demanded contractual protections in the event that Argentina once again defaulted. Argentina voluntarily agreed to include those protections. For example, Argentina waived sovereign immunity and consented to the jurisdiction of New York courts with respect to any disputes arising from the bonds. Pet. App. 12-13. Argentina also agreed that such disputes would be governed by New York law. Most relevant here, as the Second Circuit explained, "Argentina[ ] promise[d] . . . not to discriminate against" its obligations under the FAA Bonds in favor of certain other debt obligations. Pet. App. 25 n.10; *see also* BIO App. 7a ("Argentina promised to treat the FAA Bonds at least equally with its other external indebtedness."). Specifically, in the

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[1] http://www.bloomberg.com/news/2013-08-27/argentina-plans-new-york-buenos-aires-bond-swap-on-singer.html.

[2] http://www.reuters.com/article/2013/08/27/argentina-debt-idUSL2N0GR1WC20130827.

Equal Treatment Provision, Argentina promised that "[t]he payment obligations of the Republic under the [FAA Bonds] shall at all times rank at least equally with all its other present and future unsecured and unsubordinated External Indebtedness." Pet. App. 6 (emphasis and internal quotation marks omitted).

2. In 2001, Argentina defaulted again, declaring a "moratorium" against making payments on more than $80 billion in external debt, including the FAA Bonds. Pet. App. 7-8. Argentina has renewed this moratorium each year since 2001. *Id.*

In 2005, Argentina demanded that holders of FAA Bonds extinguish their bonds and take in their place new "Exchange Bonds," worth approximately 25 cents on the dollar and incorporating weaker contract terms. Pet. App. 8-12, 34 n.15. Contrary to the established practice in every other sovereign debt restructuring, Argentina did not negotiate with its creditors to reach fair terms commensurate with Argentina's financial resources. *See* Proposal Resp., Ex. A, at 10 (2d Cir. Apr. 22, 2013) (Dkt. No. 952) (recent analysis by Moody's Investors Service). Instead, Argentina offered the exchange on a take-it-or-leave-it basis, seeking to impose its highly unfavorable terms on unwilling investors. *See id.*

To coerce participation in its exchange, Argentina declared that it had "no intention of resuming payment on any" FAA Bonds. Pet. App. 8. Argentina codified its repudiation of its obligations under the FAA Bonds in Argentine legislation, Law 26,017, or the "Lock Law." The Lock Law forbids Argentina from "conducting any type of in-court, out-of-court or private settlement with respect to the [FAA] bonds." Pet. App. 9. Argentine legislators supporting the Lock Law described the law as relegating the FAA

Bonds to the "peripheral garbage circuit," "at the end of the line" of Argentina's creditors. Supp. App. at SA-296, SA-320 (2d Cir. Apr. 18, 2012) (Dkt. No. 264). Argentina has been unable to identify any other sovereign that has adopted such a law renouncing its prior debts, as part of any restructuring. Yet, even with the threat of the coercive Lock Law, a historically high number of bondholders—representing nearly a quarter of the defaulted debt—refused to particulate in the 2005 exchange offer, more than in any modern restructuring of sovereign debt. Pet. App. 9.

In 2010, Argentina issued a second exchange offer, which was even more punitive than its 2005 offer. Pet. App. 10-11. Argentina again threatened those who declined to participate: "Argentina has opposed vigorously, and intends to continue to oppose," collection efforts and it "does not expect to resume payments." *Id.* Argentina enacted Law 26,547, which temporarily suspended the Lock Law and "prohibited" the government from offering "the holders of government bonds who may have initiated judicial . . . action more favorable treatment than what is offered to those who have not done so." Pet. App. 10 & n.3. After this exchange, 9% of the total face value of the FAA Bonds remained outstanding. Pet. App. 11.

Since the exchange offers, Argentina has made regular, timely payments on the Exchange Bonds but has not made a single payment on the FAA Bonds. It has declared in its filings with the Securities and Exchange Commission that it "classifie[s] [the FAA Bonds] as a separate category from its regular debt" and is "not in a legal . . . position to pay" on those bonds. Pet. App. 24 (quoting Republic of Argentina,

Annual Report (Form 18-K), at 2, 11 (Sept. 30, 2011)).

3. Respondents are individuals and investment funds who own FAA Bonds. Indeed, some Respondents purchased FAA Bonds directly upon their issuance in the 1990s. C.A. App. at A-3457 (2d Cir. Mar. 21, 2012) (Dkt. No. 141). Respondents brought this action in federal district court, consistent with Argentina's express waiver of sovereign immunity and consent to personal jurisdiction and venue in that forum. The action seeks specific performance of the Equal Treatment Provision.

In December 2011, the district court granted partial summary judgment to Respondents, holding that Argentina's course of conduct had breached the Equal Treatment Provision "by relegating [their] bonds to a non-paying class by failing to pay the obligations currently due . . . while at the same time making payments currently due to holders of [the Exchange Bonds]" and by "enact[ing]" the Lock Law. Pet. App. 48-53.

After ordering supplemental briefing on the issue of the appropriate remedy for Argentina's breach of the Equal Treatment Provision, the district court entered a specific performance order (the "Original Injunction") requiring Argentina to make payments on Respondents' FAA Bonds if and when it made payments on the Exchange Bonds. Pet. App. 125.

The district court found that Respondents would be irreparably harmed because, in the absence of equitable relief, the obligations under their FAA Bonds "would remain debased of their contractually-guaranteed status." Pet. App. 123. The equities "strongly support[ed]" the Original Injunction because Argentina "ha[d] engaged in an unprecedent-

ed, systematic scheme of making payments on other external indebtedness, after repudiating its payment obligations to [Respondents]." Pet. App. 124. On the other hand, complying with the Original Injunction would not harm Argentina "[b]ecause the Republic has the financial wherewithal to meet its commitment of providing equal treatment to both [Respondents] . . . and those owed under the terms of the Exchange Bonds." Pet. App. 124. The district court also explained that the Original Injunction would reinforce "[t]he public interest of enforcing contracts and upholding the rule of law." Pet. App. 125.

To effectuate Argentina's performance of the Equal Treatment Provision, the Original Injunction required Argentina, if it made a payment on the Exchange Bonds, to pay the same percentage of the debt it currently owed under Respondents' FAA Bonds. Pet. App. 125-26. For example, Argentina would be required to satisfy half of its debts to Respondents if it chose to pay half of the amounts currently due under the Exchange Bonds. If Argentina decided not to pay anything on the Exchange Bonds, the Original Injunction would not require it to pay anything on the FAA Bonds. But if Argentina paid all that was currently due under the Exchange Bonds, it also would have to pay all that was owed under Respondents' FAA Bonds. The district court also noted that, under Federal Rule of Civil Procedure 65(d), the Original Injunction bound Argentina's agents and others who would participate in or assist the violation of the Injunction. Pet. App. 126.

On March 5, 2012, the district court stayed the Original Injunction pending appeal. Pet. App. 218-20. The district court also ordered, on consent of the parties, a separate preliminary injunction prohibiting Argentina from "tak[ing] any action to evade the

directives of the [Original Injunction,] . . . render [it] ineffective . . . , or diminish the Court's ability to supervise compliance with" it—including "altering or amending" the mechanism of paying the Exchange Bondholders. Pet. App. 220. The latter injunction has not been stayed and remains in effect.

4. Argentina appealed to the United States Court of Appeals for the Second Circuit. Argentina claimed that the Original Injunction violated the FSIA and that Respondents had failed to show irreparable injury. Argentina did not argue that the Injunction otherwise exceeded "the permissible scope of a federal court's equitable powers" (Pet. 28), nor did it cite the two precedents on which that portion of its petition chiefly relies—*Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204 (2002), and *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999).

On October 26, 2012, the Second Circuit affirmed the Original Injunction, in part, and remanded for further proceedings (the "October 26, 2012 decision"). Much of the opinion (Pet. App. 22-28, 30-31) was devoted to questions of contract interpretation, which Argentina does not challenge in this Court. The court had "little difficulty concluding that Argentina breached" the Equal Treatment Provision through a systematic "course of conduct"—including enactment of the Lock Law, annually renewed moratoria on repayment of the FAA Bonds, its SEC filings, and its six-year course of paying on the Exchange Bonds without paying on the FAA Bonds—which ranked Argentina's obligations on the FAA Bonds below its obligations on the Exchange Bonds. Pet. App. 26-27, 35 n.16.

The Second Circuit also held that the FSIA did not bar the Original Injunction. The court explained that the only arguably relevant limitation on the district court's equitable authority—28 U.S.C. § 1609—applied exclusively to "attachment arrest and execution" of sovereign property in the United States. Pet. App. 32. The Second Circuit then quoted its own controlling authority in *S&S Machinery Co. v. Masinexportimport*, 706 F.2d 411 (2d Cir. 1983), for the proposition that "courts are . . . barred from granting 'by injunction, relief which they may not provide by attachment.'" Pet. App. 32 (quoting *S&S Mach.*, 706 F.2d at 418). Applying this settled rule, the court held that Section 1609 did not bar the Original Injunction because it did not "transfer any dominion or control over sovereign property to the court." Pet. App. 33. Indeed, the court reasoned, "[t]he Injunction[ ] do[es] not require Argentina to pay any bondholder any amount of money; nor do[es] [it] limit the other uses to which Argentina may put its fiscal reserves." *Id.*

The Second Circuit also affirmed the district court's conclusion that equitable relief—that is, a specific performance remedy—was appropriate. Damages would be ineffective, the Second Circuit explained, because "Argentina will simply refuse to pay any judgments." Pet. App. 31. The equities and public interest further favored equitable relief because "Argentina's disregard of its legal obligations exceeds any affront to its sovereign powers resulting from the Injunctions." Pet. App. 34. And Argentina has "sufficient funds, including over $40 billion in foreign currency reserves," to pay both Respondents and the Exchange Bondholders. *Id.*

The Second Circuit saw "no abuse of discretion" in the district court's balancing of the traditional equi-

table factors in granting injunctive relief. Pet. App. 34. The court rejected the public policy arguments proffered by Argentina and the United States, which participated as *amicus curiae*. The Original Injunction would not impact future sovereign debt restructurings, the court explained, because (among other reasons) more recent sovereign debt issuances representing "99% of the aggregate value of New York-law bonds issued since 2005" contain collective-action clauses—contractual devices permitting a supermajority of creditors to amend bond terms over the objections of a dissenting minority. Pet. App. 35. Such clauses "effectively eliminate the possibility of 'holdout' litigation." Pet. App. 35.

The Second Circuit remanded to the district court to clarify the Original Injunction in two respects. Pet. App. 37. First, the Second Circuit asked the district court to explain how the Original Injunction's payment "formula is intended to operate." Pet. App. 15. Second, it asked the district court to clarify "how the challenged order will apply to third parties" and to "more precisely determine the third parties to which the Injunction[ ] will apply." Pet. App. 37. The Second Circuit ordered that once the district court had complied with its remand instructions, "the mandate should automatically return to this Court and to our panel for further consideration of the merits of the remedy without need for a new notice of appeal." Pet. App. 37.

While remand proceedings were ongoing before the district court, Argentina filed a petition for rehearing and rehearing en banc. *See* Pet. for Panel Rehearing & Rehearing En Banc (2d Cir. Nov. 14, 2012) (Dkt. No. 453). The Second Circuit denied that petition without calling for a response. *See* Pet. App. 43-47.

5. The district court conducted the remand proceedings and entered a modified version of the Original Injunction (the "Amended Injunction") and a separate opinion addressing the Second Circuit's two requests for clarification. In the separate opinion, the district court articulated its understanding of the payment formula: If "Argentina owes the [Exchange Bondholders] $100,000 in interest and pays 100% of that amount, [Argentina is] require[d] to pay [Respondents] 100% of the accelerated principal plus all accrued interest." Pet. App. 233. In the Amended Injunction, the district court set forth with additional specificity the third parties that could be implicated by Federal Rule of Civil Procedure 65(d) if they act in active concert or participation with Argentina in violating the Amended Injunction. Pet. App. 225-26.

After the district court issued the Amended Injunction, the Second Circuit ordered the parties to submit briefing regarding that Injunction. Order (2d Cir. Nov. 28, 2012) (Dkt. No. 490). At oral argument before the Second Circuit, Argentina's counsel openly declared—while Argentina's Vice President and Minister of Economy sat in the courtroom—that Argentina "would not voluntarily obey" the Amended Injunction. Pet. App. 313. This triggered a request from the Second Circuit for supplemental briefing from Argentina as to what order it *would* obey. Argentina Supp. Briefing Order (2d Cir. Mar. 1, 2013) (Dkt. No. 903). Argentina submitted a proposal for a renewed exchange offer, even less favorable than the 2005 or 2010 exchanges, and promised that, if the Second Circuit ordered this remedy, Argentina would submit to its legislature a request to suspend the Lock Law in order to implement the exchange. *See* Argentina Supp. Br. at 9-10, 15 (2d Cir. Mar. 29, 2013) (Dkt. No. 935).

6. On August 23, 2013, the Second Circuit issued an opinion affirming the Amended Injunction. *NML Capital, Ltd. v. Republic of Argentina*, __ F.3d __, No. 12-105, 2013 WL 4487563 (2d Cir. 2013) (the "August 23, 2013 final decision") (*see* Appendix).

The Second Circuit first rejected Argentina's proposal of a renewed exchange offer, which "ignored the outstanding [FAA] bonds and proposed an entirely new set of substitute bonds." BIO App. 8a. It observed that "no productive proposals [were] forthcoming" from Argentina; "[t]o the contrary, notwithstanding its commitment to resolving disputes involving the FAA in New York courts under New York law, at the February 27, 2013 oral argument, counsel for Argentina told the panel that it 'would not voluntarily obey' the district court's injunctions, even if those injunctions were upheld by this Court." *Id.* This defiance, the Second Circuit noted, was consistent with statements by "Argentina's officials," who "have publicly and repeatedly announced their intention to defy any rulings of this Court and the district court with which they disagree." BIO App. 9a. Among those officials are Argentine President Cristina Fernández de Kirchner, who announced "that Argentina will pay on the Exchange Bonds 'but not one dollar to the "vulture funds,"'" and Economy Minister Hernán Lorenzino, who stated that "'Argentina isn't going to change its position of not paying vulture funds . . . . We will continue to follow that policy despite any ruling that could come out of any jurisdiction.'" BIO App. 9a n.4. "It [was] within this context" that the Second Circuit concluded that the Amended Injunction was well within the district court's discretion. BIO App. 9a.

The Second Circuit rejected Argentina's renewed argument that the Amended Injunction violated the

FSIA, noting that the Amended Injunction—like the Original Injunction—does not "attach, arrest, or execute upon any [Argentine] property." BIO App. 14a-15a. The court also found meritless Argentina's belated assertion that the Amended Injunction exceeded the district court's equitable authority under this Court's decision in *Grupo Mexicano*, explaining that "English chancery courts traditionally had power to issue injunctions and order specific performance when no effective remedy was available at law." BIO App. 16a.

The court next held that any potential harm to the Exchange Bondholders—which would occur only if Argentina chose to comply with the Amended Injunction by paying neither the Exchange Bondholders nor Respondents—did "not make [the] otherwise lawful injunction 'inequitable.'" BIO App. 18a. The district court had already found that Argentina was able to pay all its creditors, and the Second Circuit had already affirmed that finding in its October 26, 2012 decision. Accordingly, the Second Circuit explained that it was "unwilling to permit Argentina's threats to punish third parties to dictate the availably or terms of relief under Rule 65." BIO App. 18a; *see also* BIO App. 27a.

The Second Circuit further concluded that the district court had not abused its discretion by identifying third parties implicated by the Amended Injunction. The court explained that "the district court has issued injunctions against no one except Argentina," which, having waived its immunity and been properly made a party, may be "enjoin[ed] [ ] from committing acts elsewhere." BIO App. 21a. Consistent with this Court's instructions in *Regal Knitwear Co. v. NLRB*, 324 U.S. 9 (1945), "the [A]mended [I]njunction[ ] simply provide[s] notice to payment system participants that they could become liable

through Rule 65 if they assist Argentina in violating the district court's orders." BIO App. 29a.

Finally, the Second Circuit explained that Argentina's claims that the October 26, 2012 interlocutory decision—and the Amended Injunction that followed—would harm the public interest were "speculative, hyperbolic, and almost entirely of the Republic's own making." BIO App. 26a. "Argentina failed to present the district court with any record evidence to support its assertions" that it could not afford to service all of its debts. BIO App. 27a. Financial institutions would not be burdened because the Amended Injunction imposes upon them no duties materially different from those they already routinely carry out in connection with other "U.S. laws." BIO App. 27a. And this "exceptional" case would not establish a precedent for similar injunctions against other sovereigns because of, *inter alia*, the specific language of the clause at issue, Argentina's history as a "uniquely recalcitrant debtor," and subsequent contractual innovations—including collective-action clauses—which have permitted sovereigns to restructure their debt notwithstanding holdouts. BIO App. 30a. In any event, any sovereign that wished to avoid a similar injunction could simply draft a "different *pari passu* clause[ ]." BIO App. 31a. And while the Amended Injunction would have no negative consequences, requiring Argentina to live up to its promise of equal treatment would enhance "the integrity of the capital markets." BIO App. 31a.

The Second Circuit continued its stay of the Amended Injunction "pending the resolution by the Supreme Court of a timely petition for a writ of certiorari." BIO App. 32a. During the period when the Original and Amended Injunctions have been stayed, Argentina has made billions of dollars in payments on the Exchange Bonds, while paying nothing to Re-

spondents. *See*, *e.g.*, Supp. App. at SPE-450-51, SPE-605 (2d Cir. Dec. 28, 2012) (Dkt. Nos. 658, 659). Argentina made many of these payments even after its liability for breach of the Equal Treatment Provision had been conclusively determined by the October 26, 2012 decision.

7. Since the Second Circuit's August 23, 2013 opinion, Argentina's highest officials have made clear their intentions to attempt to defy the orders of the U.S. courts to whose jurisdiction Argentina consented, and even announced a specific plan to evade the Amended Injunction. Appearing on television after the Second Circuit's decision, Argentina's Minister of Economy vowed that Argentina's "policy" of paying on the Exchange Bonds but not paying anything to Respondents "is not going to change." Taos Turner, *Argentine Minister Says Won't Change Plans to Pay Holdout Creditors*, Wall St. J., Aug. 25, 2013.[3]

This was followed by a major address from Argentine President Cristina Fernández de Kirchner, in which she announced a plan aimed at evading the Amended Injunction. Specifically, Argentina would convert the Exchange Bonds, which are paid in New York, into new debt paid in Argentina, in the hopes of shepherding those Bonds outside the reach of the Amended Injunction. *See* Russo, *supra*. The debt swap is "aimed at circumventing the U.S. court ruling." *Id.* President Kirchner announced this scheme notwithstanding the district court's preliminary injunction—to which Argentina agreed—prohibiting Argentina from taking "any action" to "evade" or "render . . . ineffective" the district court's orders. Pet. App. 218-20. This proposal also repudiates the

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[3] http://online.wsj.com/article/BT-CO-20130825-702161.html.

declaration of Francisco Guillermo Eggers, the National Director of the National Bureau of Public Credit of the Ministry of Economy, who, to further Argentina's request to continue a stay pending appeal, declared under penalty of perjury that "the Republic is complying, and will comply[,] with" the preliminary injunction. Supp. App. at SPE-1118 (2d Cir. Dec. 28, 2012) (Dkt. No. 661-1). And it makes a mockery of Argentina's assurance to the Second Circuit—again, to maintain the stay pending appeal—that it was not "devising schemes to evade the injunctions." Argentina Opp. to Pls.' Mot. to Amend Stay at 11-12 (2d Cir. Dec. 3, 2012) (Dkt. No. 518).

REASONS FOR DENYING THE PETITION

I. THIS COURT SHOULD DECLINE TO REVIEW THE SECOND CIRCUIT'S INTERLOCUTORY DECISION

In its August 23, 2013 final decision, the Second Circuit expressed some surprise that Argentina had filed the instant petition in June "notwithstanding that, as of that date, no final order had yet been issued in this case." BIO App. 10a n.6. Indeed, this Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Va. Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., respecting the denial of certiorari). Denial of Argentina's premature petition, in accordance with this Court's sound practice, is appropriate here for at least three reasons.

First, Argentina's petition attacks an injunction, the Original Injunction, that is no longer the operative remedy in this case. *See* BIO App. 8a.

Second, Argentina's contention that the district court lacked power to enter the Original Injunction

was neither raised nor decided in the October 26, 2012 interlocutory decision challenged here. Only later, in its August 23, 2013 final decision, did the Second Circuit consider and reject Argentina's similar objection to the Amended Injunction, correctly noting that "English chancery courts traditionally had power to issue injunctions and order specific performance when no effective remedy was available at law." BIO App. 16a. This Court should not review Argentina's petition without having before it all of the Second Circuit's relevant reasoning.

Finally, Argentina's premature petition raises the specter of piecemeal review of the Second Circuit's judgments. The Second Circuit has currently stayed enforcement of the Amended Injunction "pending the resolution by the Supreme Court of a timely petition for a writ of certiorari." BIO App. 32a. It is likely that review by this Court of the Second Circuit's August 23, 2013 final decision will be sought by Argentina and/or non-party intervenors. The obvious inefficiencies of piecemeal review counsel strongly against granting review in this interlocutory posture.

II. EVEN IF THE PETITION WERE NOT PREMATURE, THIS CASE WOULD NOT MERIT REVIEW

A. The Second Circuit's FSIA Holding Creates No Division Of Authority And Is Correct.

The FSIA provides that, where a foreign state has waived its immunity, "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. §§ 1605(a)(1), 1606. Following such a waiver, the FSIA's *only* arguably relevant limitation on the court's remedial authority is with respect to "at-

tachment arrest and execution" of sovereign property located in the United States. *Id.* § 1609. With respect to its first question presented, Argentina argues that the Original Injunction is not an injunction, but an "attachment," prohibited by the FSIA. Pet. 19-24. This is a splitless request for factbound error correction, where no error has occurred.

1. Argentina does not argue that there is a division of authority as to the proper standard for deciding when an order styled as an "injunction" actually is an "attachment" under the FSIA. As Argentina admits, the few courts to have considered this issue uniformly have applied the same rule, articulated by the Second Circuit in *S&S Machinery Co. v. Masinexportimport*, 706 F.2d 411 (2d Cir. 1983): "'[Courts] may not grant, by injunction, relief which they may not provide by attachment.'" Pet. 19 (quoting *S&S Mach*, 706 F.2d at 418); *accord Janvey v. Libyan Inv. Auth.*, 478 F. App'x 233, 236 (5th Cir. 2012) (per curiam) (court may not issue the "functional[ ] equivalent to an attachment"); *Phx. Consulting Inc. v. Republic of Angola*, 172 F.3d 920 (table), 1998 WL 794854 (D.C. Cir. 1998) (court may not issue a "preliminary injunction" that is "in effect a prejudgment attachment").

Here, the Second Circuit quoted the *S&S Machinery* rule verbatim, and then applied it to the Original Injunction. *See* Pet. App. 32-33 (quoting and applying *S&S Machinery*). Argentina does not argue that the *S&S Machinery* rule is wrong or in conflict with the rule adopted by any other court. Argentina's petition is thus, at most, a request that this Court correct the Second Circuit's alleged "misapplication of a properly stated rule of law," which is not an adequate basis for certiorari review. Sup. Ct. R. 10; *accord Anderson v. Fuller*, 455 U.S. 1028, 1030

(1982) (Stevens, J., respecting the denial of certiorari) (reviewing courts of appeals' application of settled legal rule "would not be an appropriate use of this Court's scarce resources").

Argentina also fails to demonstrate any division among the courts of appeals as to the application of the longstanding *S&S Machinery* rule. In its opinion, the Second Circuit explained that the Original Injunction was not an "attachment" because the Injunction did not entail the court's "exercis[e] [of] dominion over sovereign property," "d[id] not require Argentina to pay any bondholder any amount of money," and "d[id] [not] limit the other uses to which Argentina may put its fiscal reserves." Pet. App. 33. None of the cases Argentina cites is to the contrary.

The *only* out-of-circuit precedential authority that Argentina cites is *Atwood Turnkey Drilling, Inc. v. Petroleo Brasileiro, S.A.*, 875 F.2d 1174 (5th Cir. 1989). But that case did not address whether the order there was an "attachment" under Section 1609 of the FSIA. *Id.* at 1177. Rather, the Fifth Circuit held that the sovereign defendant had validly waived immunity from prejudgment attachment, and that its waiver permitted the district court's order, regardless of whether the order was "an injunction or more traditional method[ ] of attachment." *Id*. Even if *Atwood Turnkey* had held that the order there was an attachment—and it did not—that would be completely consistent with the Second Circuit's October 26, 2012 interlocutory decision, which recognizes that attachments restrain a particular asset. Pet. App. 32. The order in *Atwood Turnkey* required the sovereign to maintain a particular letter of credit. 875 F.2d at 1175-76.

The only other out-of-circuit decisions Argentina relies upon—*Janvey v. Libyan Investment Authority*, 478 F. App'x 233 (5th Cir. 2012) (per curiam), and *Phoenix Consulting Inc. v. Republic of Angola*, 172 F.3d 920 (table), 1998 WL 794854 (D.C. Cir. 1998)—are unpublished opinions affirming district courts' refusals to issue freeze orders directed at *specific* sovereign bank accounts. These decisions also are consistent with the Second Circuit's holding here that an attachment must "exercis[e] dominion over sovereign property." Pet. App. 33. Moreover, *Janvey* and *Phoenix Consulting* could not possibly create a split among the courts of appeals because those decisions lack precedential authority in their own circuits. *See* 5th Cir. R. 47.5.4 ("Unpublished opinions issued on or after January 1, 1996[ ], are not precedent. . . ."); D.C. Cir. R. 32.1(b)(1)(A) ("Unpublished orders or judgments of this court . . . entered before January 1, 2002, are not to be cited as precedent.").

2. Because there is no division of authority, Argentina resorts to arguing that this Court should grant review to correct the Second Circuit's application of its *own* precedent. Even if Argentina were correct that the decision here created an intracircuit conflict, that would provide no basis for this Court's review. *See Wisniewski v. United States*, 353 U.S. 901, 902 (1957) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties."); *accord* Eugene Gressman et al., *Supreme Court Practice* 246 (9th ed. 2007).

In any event, the Second Circuit's holding that an attachment requires the "exercis[e] [of] dominion over sovereign property" is in accord with its own prior decisions. Pet. App. 33. *S&S Machinery* involved a request for a preliminary injunction against a sovereign, requiring it to maintain a particular fi-

nancial asset in the United States. *S&S Mach.*, 706 F.2d at 412. Similarly, in *Stephens v. National Distillers & Chemical Corp.*, 69 F.3d 1226 (2d Cir. 1996), the district court sought to require the sovereign "to place some of [its] assets in the hands of United States courts for an indefinite period." *Id.* at 1229-30. And in *Walters v. Industries & Commercial Bank of China, Ltd.*, 651 F.3d 280, 283 (2d Cir. 2011), the plaintiff requested that the district court order the sovereign to turn over specific sovereign funds. Argentina's effort to portray the Second Circuit's decision here as being at variance with that court's precedents is baseless.

3. Finally, whatever the law in the Second Circuit, the text and legislative history of the FSIA demonstrate that the Second Circuit's decision here is correct. The FSIA grants district courts jurisdiction over sovereigns who have consented to such jurisdiction (28 U.S.C. § 1605(a)(1)), and does not restrict those courts' equitable jurisdiction. To the contrary, Section 1606 of the FSIA explicitly provides that "the foreign state shall be liable in the *same manner* and *to the same extent* as a private individual under like circumstances." *Id.* § 1606 (emphases added). "Consistent with this section, a court could, when circumstances were clearly appropriate, order an injunction or specific performance." H.R. Rep. No. 94-1487, at 21-22 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6621. Here, the district court had ample authority to issue equitable orders directed at Argentina because Argentina consented to the district court's jurisdiction (Pet. App. 49-50), and, moreover, consented to any form of relief permitted by law (Pet. App. 12-13). The district court exercised the authority to which Argentina had consented by issuing an *in personam* equitable decree, which

commands Argentina to rank its obligations on the FAA Bonds at least equally with its obligations under the Exchange Bonds. Pet. App. 125-26.[4]

Argentina's argument that the Original Injunction was really a prohibited "attachment" of sovereign property lacks merit. An "attachment" entails the "seizing of a person's property to secure a judgment or to be sold in satisfaction of a judgment." *Black's Law Dictionary* 145 (9th ed. 2009); *accord* 6 Am. Jur. 2d *Attachment and Garnishment* § 1; *see also* Pet. App. 32 n.13. The Original Injunction required Argentina to specifically perform its obligations under the Equal Treatment Provision. It did not, as Argentina asserts, "requir[e] Argentina to transfer funds" (Pet. 25) or "order" Argentina "to pay a monetary claim" (Pet. 26). The Original Injunction involved no "seizing" of property. Rather, as the Second Circuit explained, Argentina could have complied with the Injunction without ever paying "any amount of money." Pet. App. 33. The Original In-

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[4] Argentina posits (dubiously) that its payments under the Exchange Bonds occur first in Argentina, and therefore characterizes the Original Injunction as "extraterritorial." Pet. 4, 14. Argentina's assertion regarding the payment location under the Exchange Bonds is unsupported by the record. In any event, this point is wholly irrelevant given the district court's indisputably valid *in personam* jurisdiction over Argentina. Injunctions often bind a party's conduct anywhere in the world. *See Chafin v. Chafin*, 133 S. Ct. 1017, 1025 (2013); *accord Microsoft Corp. v. Motorola, Inc.*, 696 F.3d 872, 875, 881-82 (9th Cir. 2012); *Karaha Bodas Co. v. Perusahan Pertambangan Minyak Dan Gas Bumi Negra*, 500 F.3d 111, 119-20 (2d Cir. 2007); *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 915-16 (D.C. Cir. 1984).

junction thus cannot plausibly be characterized as an "attachment."[5]

B. Argentina's Novel Claim That The District Court Lacked Authority To Issue The Injunction Was Not Raised Below And Is Meritless.

Argentina's second question presented concerns another splitless request for error correction, but the decision under review does not address that issue because Argentina did not raise it. In particular, Argentina now asserts that the Original Injunction exceeded "the permissible scope of a federal court's equitable powers" under this Court's decisions in *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204 (2002), and *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999). Pet. 28. Argentina does not even attempt to argue that there is a division of circuit authority on this issue. Pet. 28. And Argentina never so much as mentioned *Great-West* or *Grupo Mexicano* in its principal and reply briefs leading to the October 26, 2012 interlocutory decision, or even in its petition for rehearing en banc. *See* No. 12-105 (2d Cir.) (Dkts. 143, 169, 331, 451). This Court accordingly should "decline to consider" this argument that "petitioner did

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[5] Argentina is similarly wrong when it argues that the Original Injunction was an "attachment" because the Second Circuit "held that the purported harm that [the Injunction] address[es] is the non-payment of plaintiffs' future money *judgments*." Pet. 26 (emphasis added). The Injunction did not remedy Argentina's failure to repay principal and interest—which is the basis of a *separate claim* against Argentina that is still pending before the district court—but rather remedied Argentina's breach of its separate "contractual obligations not to alter the rank of its payment obligations." Pet. App. 32.

not present" to "the Court of Appeals." *Kosak v. United States*, 465 U.S. 848, 850 n.3 (1984). But the argument is meritless in any event.

This Court's decision in *Great-West* has no application to this issue. Neither the Original Injunction nor the Amended Injunction require Argentina to pay any "money past due under a contract" (534 U.S. at 210-11), but rather granted prospective equitable relief mandating that Argentina abide by its contractual obligation to "rank" the "payment obligations" under Respondents' FAA Bonds "at least equally" to its obligations under other bonds. Argentina could comply with either Injunction without paying anything to Respondents, provided that it offered similar treatment to its obligations under the Exchange Bonds. *See* Pet. App. 33.

Courts regularly issue analogous equitable orders to protect contracting parties' bargained-for rights among creditors, even though the ultimate claim that the rights protect could be satisfied by the payment of money. *See, e.g.*, *Safeco Ins. Co. of Am. v. Schwab*, 739 F.2d 431, 433 (9th Cir. 1984); 25 *Williston on Contracts* § 67:88 (4th ed. 2009-2010). Courts have explained that such agreements are enforceable in equity because they constitute an agreement to allocate "bargained-for risk," and the loss of that bargained-for position constitutes irreparable harm. *Bank Midwest, N.A. v. Hypo Real Estate Capital Corp.*, No. 10-232, 2010 WL 4449366, at *6 (S.D.N.Y. Oct. 13, 2010). The Equal Treatment Provision the district court enforced here serves a similar function: It ensures that a sovereign cannot undermine bar-

gained-for equality among payment obligations by giving priority to newly issued obligations.[6]

Nor does *Grupo Mexicano* support Argentina's cause. In that case, the creditor sought a preliminary injunction freezing the debtor's assets because the creditor feared that it would not be able to collect on its yet-to-be-adjudicated note. 527 U.S. at 312. This Court held that the district court could not impose a freeze to prevent the debtor from "devis[ing] away" his property before the court had adjudicated the contract dispute. *Id.* at 321. The proper mechanism for obtaining such relief is a prejudgment attachment. *Id.* at 330-31. In contrast, the Original Injunction here was not *preliminary* relief to secure a future money damage award, as Argentina wrongly asserts. Pet. 30. Rather, it was *permanent* equitable relief for Argentina's breach of the Equal Treatment Provision and to compel Argentina to abide by it go-

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[6] While protection of Respondents' bargained-for position among creditors provides a sufficient basis to affirm the district court's conclusion that Respondents would suffer irreparable harm absent equitable relief, the Second Circuit correctly explained that Argentina's refusal to honor money judgments in other cases gave the district court ample independent justification to support its conclusion that a money damages award would be an inadequate remedy in this case. *See* Restatement (Second) of Contracts § 360 cmt. d. ("Even if damages are adequate in other respects, they will be inadequate if they cannot be collected by judgment and execution."); *accord Pashaian v. Eccelston Props., Ltd.*, 88 F.3d 77, 87 (2d Cir. 1996). As the Second Circuit explained in the August 23, 2013 decision, courts "traditionally had power to issue injunctions and order specific performance when no effective remedy was available at law," and no such effective remedy is available here "because the Republic has made clear its intention to defy any money judgment issued by this Court." BIO App. 16a.

ing forward, rendering *Grupo Mexicano* irrelevant. *See Tide Natural Gas Storage I, L.P. v. Falcon Gas Storage Co.*, No. 10-5821, 2011 WL 4526517, at *11 (S.D.N.Y. Sept. 29, 2011), *reconsideration denied*, 2012 WL 1571412 (S.D.N.Y. May 4, 2012).

Moreover, the district court here issued the Original Injunction after Respondents sought relief in equity, meaning that *Grupo Mexicano* is categorically inapplicable for that additional reason. *See, e.g.*, *Johnson v. Couturier*, 572 F.3d 1067, 1084 (9th Cir. 2009) (*Grupo Mexicano* does not govern "where the suit seeks equitable relief"); *accord, e.g.*, *Kennedy Bldg. Assocs. v. CBS Corp.*, 476 F.3d 530, 535 (8th Cir. 2007); *SEC v. ETS Payphones, Inc.*, 408 F.3d 727, 734 (11th Cir. 2005) (per curiam).

C. The Unique Circumstances Of This Case Present No Issue Of Ongoing Significance.

This Court "has said again and again that the writ of certiorari ought not to be employed to bring here cases which, in their essential impact, concern a restricted and perhaps a unique set of circumstances and do not involve the pronouncement by a Court of Appeals of a general doctrine on which this Court ought to have the last say." *NLRB v. Mexia Textile Mills*, 339 U.S. 563, 573 (1950) (Frankfurter, J., dissenting). Argentina's petition describes the Original Injunction as "unprecedented" and the "first" of its kind (Pet. 19), and that is because Argentina's mistreatment of its creditors likewise is *sui generis*. The Second Circuit based its October 26, 2012 interlocutory decision on Argentina's unique history of "continual disregard for the rights of its FAA creditors," declarations in SEC filings that the Respondents

would never be paid, and repudiation of its obligations under the unprecedented Lock Law and yearly renewed moratoriums. Pet. App. 26-28, 35 n.16. Independent analysts agree that Argentina stands alone in its mistreatment of its creditors. Proposal Resp., Ex. A, at 1-2 ("Argentina was and remains unique in its unilateral and coercive approach to [its] debt restructuring."); Proposal Resp., Ex. I, at 5 ("Argentina finds itself in the present messy situation because of its own behavior, evidenced by more than a decade of unilateral treatment of its creditors." (emphasis omitted)). As the Second Circuit emphasized in its August 23, 2013 opinion, it was only this "extraordinary behavior" that the court determined "was a violation of the particular *pari passu* clause found in the FAA." Pet. App. 29a.

Although Argentina refers to pending litigation against Grenada to suggest a broader reach of the October 26, 2012 interlocutory decision (Pet. 17 n.12), that case only demonstrates that the Second Circuit's decision will provide no precedent for similar injunctions against sovereigns that have not emulated Argentina's unprecedented course of misconduct. Grenada's counsel—*the same law firm representing Argentina here*—ably explained to the district court that the October 26, 2012 interlocutory decision provided no basis for a suit against Grenada because that decision "was based on a moratorium on payment of debt principal, annual legislation renewing that moratorium, statements in prospectuses that the debtor would not make payments on bonds eligible to participate in the restructuring that were not tendered or otherwise restructured, a law prohibiting the debtor from conducting a settlement with

respect to the plaintiffs' debt, and statements in SEC filings that the debtor was not in a legal position to make payments on the bonds at issue in the case." *See* Grenada Mem. at 15, *Exp.-Imp. Bank of China v. Grenada*, No. 13-cv-1450-HB (S.D.N.Y. June 10, 2013) (Dkt. No. 41). Just last week, the district court agreed with this argument and denied the plaintiff's motion for judgment on the pleadings. Op. & Order (S.D.N.Y. Aug. 19, 2013) (Dkt. No. 50). The court explained that even "[a]ssuming *arguendo*" that the provisions in both Grenada's and Argentina's bonds were sufficiently "similar," the facts alleged by the plaintiff fell short of Argentina's misconduct. *Id.* at 5-6.[7]

Argentina nevertheless persists in claiming that the injunctive relief granted on the unique facts of this case will imperil future sovereign restructurings. Pet. 3-4. Recent history suggests otherwise. Aurelius Opp. 20-33. And the Second Circuit accordingly found this claim—like Argentina's other "dire predictions" of "cataclysmic repercussions in the capital markets and the global economy"—"speculative, hyperbolic, and almost entirely of the Republic's own making." BIO App. 26a. As the Second Circuit explained, the prevalence of collective-action clauses in modern debt instruments "effectively eliminate[s]

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[7] The Belgian case referred to in Argentina's petition hardly constitutes "litigation around the globe." Pet. 17. Euro Bondholders, Argentina's *amici* in the present case, initiated a lawsuit against two third-party banks in a transparent collateral attack on the Second Circuit proceedings (Pet. App. 226), which the Belgian court has since declared was "clearly premature" (Letter from Christopher J. Clark to Catherine O'Hagan Wolfe, Attachment at 4 (2d Cir. July 1, 2013) (Dkt. No. 988)).

the possibility of 'holdout' litigation." Pet. App. 35. "[G]oing forward, sovereigns and lenders are free to devise various mechanisms to avoid holdout litigation if that is what they wish to do," including by "draft[ing] different *pari passu* clauses." BIO App. 30a-31a; *see also* BIO App. 29a-30a.

D. Granting Discretionary Review To Argentina While It Renounces Any Willingness To Abide By This Court's Ruling Would Corrode The Rule Of Law.

Beyond its lack of general significance, the petition should be denied for the additional reason that Argentina has made clear that it will seek to flout any adverse judgment this Court issues. Certiorari review is discretionary. *Ross v. Moffitt*, 417 U.S. 600, 617 (1974). This Court's dignity and respect for the rule of law should be paramount considerations in deciding whether to review a case: "A part of the Court's responsibility is to see that [its] resources are allocated in a way that promotes the interests of justice." *Martin v. Dist. of Columbia Court of Appeals*, 506 U.S. 1, 3 (1992) (per curiam) (internal quotation marks omitted). It would not promote justice to render a decision that would be disregarded unless it is rendered in the petitioner's favor.

As the Second Circuit recounted, Argentina's highest governmental officials—including its President—"have publicly and repeatedly announced their intention to defy any rulings of this Court and the district court with which they disagree." BIO App. 9a & n.4. Following the August 23, 2013 opinion, Argentina's officials announced that they would continue the "policy" of paying the Exchange Bonds

timely and in full, while paying nothing on the FAA Bonds, in direct violation of the Amended Injunction. *See supra* 15-16. Nor has this defiant rhetoric stopped at the courthouse steps, as Argentina's counsel declared to the Second Circuit that his client would not "voluntarily obey" the Amended Injunction even if it were affirmed on appeal. Pet. App. 313.

In perhaps Argentina's most blatant disregard for the rule of law yet, on August 26, Argentina's President announced a proposal to convert the Exchange Bonds—which must be paid in New York—into new bonds, with the same terms, but which would be paid in Argentina. *See* Russo, *supra*. President Kirchner left no doubt about the *sole* reason for this plan: to evade the jurisdiction of U.S. courts. Ken Bensinger, *Argentina to Defy U.S. Court with Bond Plan*, L.A. Times, Aug. 28, 2013, at B2.

It would be a gross misallocation of this Court's scarce resources to grant discretionary review to a litigant that has exhibited such disdain for the authority of the United States judicial system—especially a litigant that voluntarily submitted to the jurisdiction of that very system in order to convince investors to lend billions of dollars in the offerings subject to the FAA. A party that seeks review in this Court should be asking this Court to resolve the case in a manner that is binding on *both* parties, not suggesting that the Court become the coin in a game of "heads I win, tails you lose."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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