No. 13-990

In the Supreme Court of the United States

REPUBLIC OF ARGENTINA,

Petitioner,

v.

NML CAPITAL LTD., ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* ITALIAN HOLDERS OF ARGENTINE SOVEREIGN BONDS IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Petitioner the Republic of Argentina ("Argentina") created an extensive legal and economic framework to induce investment in its sovereign bonds. Argentina made promises under the bond instruments and international instruments regarding substantive undertakings and dispute mechanisms. Argentina raised, and benefitted from, billions of dollars through its bond issuances. Argentina made repeated promises that it would not default. Then, for political reasons, Argentina defaulted, deconstructed the frameworks it had put into place, and, in the more than a decade since default, has systematically obstructed all efforts by bondholders to secure meaningful relief.

Amici curiae Italian holders of Argentine sovereign bonds ("Italian Bondholders" or "Bondholders") are more than 50,000 Italian nationals holding over $1 billion in outstanding sovereign bonds issued, and repudiated, by Argentina.[1] A majority of the Italian Bondholders

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[1] Counsel of record for the parties consented to this filing through blanket consents filed with the Court, and received timely notice of the Italian Bondholders' intent to file. No counsel for a party authored this brief in whole or in part, and no such counsel or a party made any monetary contribution intended to fund the preparation or submission of the brief. *Amici curiae* the Italian Bondholders are coordinated, in this proceeding and others, by their designated agent, the Italian organization Task Force Argentina ("TFA"). On the Bondholders' behalf, TFA is bearing the costs for preparing and submitting this brief. *Amici* are prepared to submit a list identifying each individual Bondholder for the record should the Court request it.

are individuals who invested their personal savings in Argentine bonds; many are of retirement age; all invested prior to Argentina's historic 2001 default and confiscatory "Cram Down Law" or "Lock Law." The Bondholders did not accept Argentina's unilaterally-imposed, punitive debt restructuring offers in 2005 and 2010. In the more than a decade since the default, the Bondholders have collectively sought redress for Argentina's deprivation of their rights, and violation of contractual and treaty obligations. Their efforts are ongoing.

It is widely recognized, including by the courts below, that Argentina is engaged in a deliberate campaign to deprive its bondholders of any meaningful remedy. Argentina's efforts in this regard include its brazen refusal to pay lawful court judgments; its disregard for international treaty dispute resolution mechanisms; its calculated removal of assets from jurisdictions, including the United States, where they otherwise would be subject to judicial process; and its engagement in "shell games" with the assets of purportedly separate State-owned entities. Indeed, further to its proclamation below that it "would not voluntarily obey" U.S. court orders, Pet. App. 5, Argentina now argues in its Petition that the "*whole point*" of the Foreign Sovereign Immunities Act ("FSIA") is that "a foreign sovereign may 'refuse to pay.'" Pet. 25 (emphasis in original).

Argentina's defiance of creditors, courts, and the rule of law includes a systematic trampling of U.S. law, and also extends beyond the United States to international proceedings. Since 2006, the Bondholders have pursued treaty-based claims

against Argentina in an international arbitration before the World Bank's International Centre for Settlement of Investment Disputes ("ICSID").[2] The claims arise out of Argentina's breach of obligations under a bilateral investment treaty between Argentina and Italy in connection with Argentina's default, debt restructuring, repudiation by law of its obligations to repay, and related sovereign measures. The Bondholders opted to pursue the arbitration in part due to Argentina's refusal to abide by judgments rendered in U.S. courts.[3]

In the nearly *eight* years since the Bondholders filed their claims at ICSID, Argentina has not merely vigorously opposed the arbitration, but rather has persistently sought—at utter disregard for treaty obligations and due process—to obstruct the proceedings. During a protracted jurisdictional phase, Argentina raised numerous arguments to the effect that the presiding tribunal lacked jurisdiction to hear the claims. In an August 2011 Decision on Jurisdiction and Admissibility, the majority of the tribunal rejected all of Argentina's arguments and

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[2] *See Abaclat and others v. Argentine Republic*, ICSID Case No. ARB/07/5 ("*Abaclat*"). Pursuant to party agreement and a confidentiality order entered by the tribunal, tribunal decisions are publicly available at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListPending (last visited May 7, 2014).

[3] To prevent the running of statutes of limitations for contract claims under the bonds, the Bondholders also filed, and stayed, three breach-of-contract cases at the U.S. District Court for the Southern District of New York ("SDNY"), as discussed below.

held that the ICSID tribunal does, indeed, have jurisdiction to decide the claims on the merits.[4]

Since then, Argentina has further sought to derail the arbitration, deny the Italian Bondholders justice, and even undermine the ICSID system through various measures at odds with governing standards and treaty obligations. Its efforts have included an unfounded attempt to annul the Decision on Jurisdiction (rejected by the ICSID Secretary-General), repeated attempts to disqualify the majority of the tribunal (rejected by the President of the World Bank and the Secretary-General of the Permanent Court of Arbitration), secret violations of a confidentiality order to instigate criminal processes against victim Bondholders, and repeated refusals to pay its equal share of arbitration costs assessed by ICSID. Notwithstanding Argentina's ongoing efforts to delay and obstruct, the ICSID case is now nearing the conclusion of the merits and damages phase, with a final hearing scheduled for June 2014.

The Italian Bondholders have a compelling interest in this case due to their pending claims against Argentina in international and U.S. fora; Argentina's repudiation of its obligations and the Bondholders' rights in those proceedings; and the enforcement challenges that Argentina likely will impose in the event the Bondholders obtain an award or judgment in their favor. The Bondholders have a sizeable interest in holding Argentina

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[4] *Abaclat*, Decision on Jurisdiction and Admissibility (Aug. 4, 2011) ("Decision on Jurisdiction"), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListPending.

accountable for the treaty and contractual obligations *vis-à-vis* its bonds that Argentina willingly undertook, benefited greatly from, and unilaterally violated. The Bondholders also have a profound interest in the enforceability of U.S. court orders and judgments, and in eliminating Argentina's abuses of the U.S. judicial system and international treaty regimes to evade its creditors. These interests are directly implicated by this case.

STATEMENT OF THE CASE

A. Argentina Brazenly Affirms Its Decade-Long Defiance Of Creditors And Courts

Argentina repeatedly laments that these proceedings are "deeply offensive" to its sovereignty and "dignity." *See, e.g.*, Pet. 1, 2, 6, 32, 37. At the same time, Argentina unabashedly affirms its refusal to comply with billions of dollars of U.S. court judgments, and indeed suggests that the "*whole point*" of the FSIA is to enable such contempt for legal obligations and orders. *Id.* at 25 (emphasis in original); *see also id.* at 3 (arguing the FSIA "plainly contemplates that some money debts will remain unsatisfied"). Argentina also effectively concedes the finding below that it possesses the means to satisfy the bondholder judgments it has so long evaded—while remarkably claiming that Argentina, rather than its creditors, has been held "hostage" by these proceedings. *See id.* at 11, 12, 30.

Argentina's notorious defiance of creditors and courts in the last decade stands in stark contrast to the measures that it undertook in the 1990s to induce investment in its bonds. Argentina

established a sovereign finance strategy focused on the placement of its bonds in foreign capital markets, including with the Italian Bondholders and other retail investors. Argentina adopted an extensive legal and economic framework for its bond issuances, and made promises—in laws, contracts, and treaties—to entice investors to purchase the bonds. As the Second Circuit found:

> In order to enhance the marketability of the bonds, Argentina made a series of promises to the purchasers. Argentina promised periodic interest payments. Argentina promised that the bonds would be governed by New York law. Argentina promised that, in the event of default, unpaid interest and principal would become due in full. Argentina promised that any disputes concerning the bonds could be adjudicated in the courts of New York. Argentina promised that each bond would be transferrable and payable to the transferee, regardless of whether it was a university endowment, a so-called "vulture fund," or a widow or an orphan. Finally, Argentina promised to treat the FAA Bonds at least equally with its other external indebtedness.

Pet. App. 2-3. Argentina provided similar promises under treaties ratified by the United States and other States, including Argentina and Italy. Argentina further cloaked itself in a garb of legitimacy by registering bond issuances with the United States Securities and Exchange Commission ("SEC") pursuant to U.S. securities laws.

As the courts below repeatedly have found, Argentina turned all such promises into a "dead letter" through its historic default and subsequent sovereign measures cementing the repudiation of its debt obligations—among them, Argentina's unilateral implementation of punitive exchange offers without negotiating with creditors, and its enactment of the "Lock Law" to prohibit any other form of payment to bondholders, including in satisfaction of domestic or foreign court judgments.

In its Petition, Argentina cites the cumulative participation levels in its restructuring, but glosses over the fact that it needed two separate exchange offers over five years to reach them. *See* Pet. 7. Argentina claims that the Lock Law was enacted to "ensur[e] that bondholders who held out would not be treated better than bondholders who accepted the exchange," *id.*, but offers no response to the findings below that Argentina enacted the Lock Law "in order to exert additional pressure on bondholders to accept the exchange offer." Pet. App. 34. Further, the Lock Law "codified . . . [Argentina's] intention to defy any money judgment issued by this Court." *Id.* at 42-43. Argentina also disregards the role that its evasion of court judgments, and corresponding litigation fatigue among bondholders, played in compelling some bondholders to accept essentially the same restructuring terms in 2010 that they had rejected in 2005.

It is such "extraordinary behavior" by Argentina that led the courts below to conclude that "this case is an exceptional one" warranting the injunctions at issue. *Id.* at 25-26. Remarkably, however, Argentina repeatedly suggests that its longstanding misconduct

has somehow come to an end because it "repeal[ed]" the Lock Law, "so even if it once somehow supported the injunctions, it clearly no longer does." Pet. 19, 22; *see also id.* at 36 ("In any event, the Lock Law is now gone."). To the contrary, the express language of the legislation that Argentina enacted in 2013 to suspend the Lock Law refutes the significance that Argentina would ascribe to it.

Argentine Law No. 26,886 provides in Article 7 that certain provisions of the Lock Law "are *suspended until* the Federal Congress declares the termination of the restructuring process for the government-issued debt." Pet. App. 206 (emphasis added). In other words, the Lock Law is *temporarily suspended* pending the conclusion of Argentina's projected third exchange offer. Thus, the 2013 law serves the same purpose as a nearly identical law that Argentina enacted in connection with the second exchange offer. As the Second Circuit found, "[t]o overcome the Lock Law's prohibition against reopening the exchange, Argentina temporarily suspended the Lock Law" in 2010 by enacting the so-called "Lock Law Suspension." Pet. App. 35. Argentina lifted that suspension, and reinstated the full force of the Lock Law, as soon it had concluded the second exchange offer. There is no reason to expect that Argentina will act any differently once it has concluded an anticipated third exchange offer. Indeed, the terms of Law No. 26,886 confirm that Argentina's purported "repeal" of the Lock Law is short-lived.

Argentina's claim that "the Lock Law is now gone" is disingenuous, at best. *See* Pet. 36. Its inaccurate portrayal of its own laws before this Court

only underscores the lengths to which Argentina will go to deprive bondholders of any meaningful relief. Regrettably, Argentina has made clear through the years that it will not meet its contractual, judicial, or treaty obligations unless compelled to do so—at lasting prejudice to bondholders, and to the U.S. and international legal and financial systems.

B. With Continued Disregard For Legal Obligations And Norms, Argentina Obstructs The Italian Bondholders' Efforts To Recover Their Investments

Confronted with Argentina's historic default and punitive debt restructuring, the Italian Bondholders rejected Argentina's exchange offers—as the Second Circuit confirmed, they were "completely within their rights" to do. Pet. App. 60 n.15. Instead, the Bondholders organized to pursue their treaty and contract rights through arbitration and litigation. In large part as a result of Argentina's calculated strategy to delay and impede progress, those efforts are unnecessarily protracted and ongoing.

1. Treaty Claims In International Arbitration

In September 2006, the Bondholders initiated arbitration proceedings at ICSID under the auspices of the World Bank pursuant to (i) the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States ("ICSID Convention"), a multilateral treaty formulated by the Executive Directors of the World Bank and currently

ratified by 150 States;[5] and (ii) a bilateral investment treaty between Argentina and Italy ("Argentina-Italy BIT").[6]

The Bondholders' treaty claims arise from Argentina's breach of obligations under the Argentina-Italy BIT in connection with Argentina's default, debt restructuring, Lock Law, and related sovereign measures. Argentina's treaty breaches include the violation of its obligation not to expropriate the investments of Italian nationals without payment of prompt, adequate, and effective compensation; to accord fair and equitable treatment; and to accord treatment no less favorable than that accorded Argentine national investors.

The ICSID arbitration is the first of its kind to involve tens of thousands of individual claimants pursuing claims on a collective basis.[7] Argentina has vigorously opposed the case and, incredibly, sought to portray itself as the victim in the arbitration, arguing that the Bondholders' pursuit of treaty

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[5] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 575 U.N.T.S. 159.

[6] Agreement on the Promotion and Protection of Investments, It.-Arg., May 22, 1990 (entered into force Oct. 14, 1993).

[7] When the claims were filed, the Italian Bondholders numbered approximately 180,000, representing $4.4 billion in holdings—at the time, roughly twenty percent of the total principal amount of defaulted bonds not tendered into Argentina's 2005 exchange offer. Further to Argentina's dilatory tactics and the reopening of its exchange offer in 2010, which required as a precondition that tendering bondholders abandon any claims against Argentina, thousands of bondholders have since withdrawn from the case.

claims through collective action is illegitimate and in violation of Argentina's due process rights.

During a lengthy jurisdictional phase lasting nearly five years, Argentina asserted as a defense (among nearly a dozen others) that the forum selection clauses in the bond contracts precluded the tribunal's exercise of jurisdiction over the treaty claims. That is, Argentina argued that the ICSID case should be dismissed and the Bondholders required to pursue litigation in designated national courts, including the SDNY—the very same courts where Argentina refuses to abide by any judgment whatsoever. Argentina made no mention of its longstanding evasion of national court judgments when urging the ICSID tribunal to dismiss the treaty case in favor of such proceedings.

In 2011, the tribunal ruled in a comprehensive Decision on Jurisdiction that it has jurisdiction to hear the claims. The tribunal considered and rejected all of Argentina's objections, including with respect to the forum selection clauses. *See, e.g.*, *Abaclat*, Decision on Jurisdiction, ¶¶ 696-712 (summarizing the tribunal's conclusions with respect to each jurisdictional objection); *id.* ¶ 499 (ruling that "the presence of forum selection clauses in the contractual bond documents is irrelevant for the assessment of the existence and/or validity of Argentina's consent to ICSID arbitration").

Following the Decision on Jurisdiction, the case has advanced to the final merits and damages

phase.[8] Once again, Argentina has gone to great lengths to contest and prolong the case at every step of the process—at times, through extraordinary measures in defiance of established procedures, tribunal orders, and governing legal standards. For example, Argentina:

- Sought to annul the Decision on Jurisdiction contrary to established principles under the ICSID Convention, whereby a tribunal decision confirming jurisdiction over a case is not subject to annulment. The request was rejected by the ICSID Secretary-General.[9]
- Sought to disqualify a majority of the arbitral tribunal on two separate occasions, first in 2011 and again in 2013. The disqualification requests were rejected for lack of merit by the President of the World Bank and the Secretary-General of the Permanent Court of Arbitration.[10]

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[8] Professor Joseph E. Stiglitz, who has submitted an *amicus curiae* brief in support of Argentina in this proceeding, also serves as an expert for Argentina in the ICSID arbitration.

[9] *See* Press Release, TFA, Bondholders Secure Two New Victories over Argentina at ICSID (Dec. 30, 2011), http://www.tfargentina.it/icsid.php.

[10] *See Abaclat*, Decision on the Proposal to Disqualify a Majority of the Tribunal (Feb. 4, 2014), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListPending; *Abaclat*, Recommendation Pursuant to the Request by ICSID dated November 18, 2011 on the Respondent's Proposal for the Disqualification of Professor Pierre Tercier and Professor Albert Jan van den Berg (Dec. 19, 2011), http://italaw.com/cases/35.

- Disclosed tens of thousands of pages of personal Bondholder documents, in violation of a confidentiality order, to instigate unfounded criminal investigations against a number of Bondholders. The investigations were dismissed.[11]
- Repeatedly refused to pay Argentina's required one-half share of significant arbitration costs assessed by ICSID. The Bondholders have been compelled to shoulder the entire cost burden to avoid a suspension of the case.[12]

Argentina's continued disregard for the Bondholders' rights, applicable treaty obligations, and tribunal orders in the ICSID arbitration mirrors its disdainful repudiation of obligations and orders in U.S. courts. Similarly, in other ICSID cases that have proceeded to a final award, Argentina refused for years to pay the awards rendered against it. In the words of leading U.S. arbitrator and former President of the International Court of Justice, Judge Stephen Schwebel, Argentina's chosen approach to the arbitration process constitutes a "challenge to the viability of the ICSID system."[13]

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[11] *See Abaclat,* Procedural Order No. 13 (Sept. 27, 2012), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListPending.

[12] *See* Press Release, TFA, Argentina Repudiates Obligation to Pay ICSID Costs; Task Force Argentina Makes Payment and the Case Advances, (Oct. 24, 2012), http://www.tfargentina.it/icsid.php.

[13] Alison Ross, *Argentina poses "Serious Threat" to ICSID Arbitration*, Latin Lawyer, Nov. 24, 2009,

Notwithstanding Argentina's campaign to deny the Italian Bondholders justice, the Bondholders have persevered in their treaty claims. The parties recently concluded a written submission phase, and the tribunal is scheduled to hold a final hearing on the merits and damages in June 2014.

2. Contract Claims And Regulatory Measures In The United States

The Italian Bondholders also have taken steps to preserve breach-of-contract claims from expiration under applicable statutes of limitations, per national laws governing the bond contracts. In the United States, the Bondholders filed three actions before the SDNY to preserve such claims—one action for bond contracts governed by New York and English law, one for contracts governed by German law, and one for contracts governed by Argentine law.[14] In all three cases, the Bondholders secured a stay pending the completion of the ICSID arbitration. As the Bondholders explained in their motion papers, they were compelled to file the actions raising contract rights (not treaty claims) because Argentina had

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http://latinlawyer.com/news/article/27300/argentina-poses-serious-threat-icsid-arbitration/.

[14] *See Agritech S.R.L. v. Republic of Argentina*, No. 1:06-cv-15393-TPG (S.D.N.Y. filed Dec. 22, 2006); *A. Gandola & C. S.P.A. v. Republic of Argentina*, No. 1:08-cv-09506-TPG (S.D.N.Y. filed Nov. 5, 2008); *Diocesi Patriarcato di Venezia v. Republic of Argentina*, No. 1:10-cv-01598-UA (S.D.N.Y. filed Feb. 25, 2010). The Bondholders have opted out of all U.S. class actions against Argentina arising out of its 2001 default. The Bondholders also have taken steps outside of the United States to preserve claims under bond contracts governed by the laws of Argentina, Italy, Spain, and Switzerland.

refused to enter into an agreement to toll the statutes of limitations pending the outcome of the treaty arbitration. The Bondholders intend to pursue these contract actions only to the extent they are not made whole at ICSID. The cases remain stayed.

In addition, the Italian Bondholders informed U.S. regulatory authorities as to inaccurate and misleading representations by Argentina in its securities filings, including in connection with its 2010 exchange offer. In a series of letters to the Division of Corporation Finance at SEC, the Bondholders informed the SEC that Argentina's SEC filings had vastly understated the number of Italian Bondholders pursuing claims in the ICSID arbitration and the total value of their claims, among other misrepresentations and distortions.[15]

The Italian Bondholders also informed Argentina directly of these inaccuracies, but Argentina took no steps to correct them, or even to respond to the Bondholders' concerns. Instead, Argentina proceeded unilaterally with its 2010 exchange offer on the basis of the inaccurate information already provided, and without even contacting the Bondholders—let alone consulting with them, as Argentina's SEC filings claimed. The Italian Bondholders learned of the 2010 exchange offer terms from publicly available sources. The Bondholders expect the same from Argentina's projected third exchange offer.

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[15] The Italian Bondholders are prepared to provide copies of these letters for the record should the Court request it.

ARGUMENT

A. Argentina's Extraordinary Misconduct And Contempt For The Rule Of Law Justify The Holdings Below

Argentina pities itself the victim—claiming, remarkably, that it "has not behaved like a contumacious litigant," Pet. 37, and that the FSIA "is not an invitation to creative judicial maneuvering." *Id.* at 3. Argentina decries the "weapon of coercion" that it sees in the lower court's injunctions, while complaining that compliance with them is "offensive"—but not impossible. *Id.* at 29 (quotation omitted), 32. Unable to refute the findings below that it possesses the means to pay the amounts at issue, Argentina seeks to elevate this matter to one that transcends its own wrongdoing, with "consequences [that] go well beyond Argentina." Pet. 3. Argentina's purported concerns for the well-being of the global financial system and system of cooperative resolution of sovereign debt crises, *id.* at 17, 33, ring hollow in view of Argentina's damaging legacy to sovereign debt practice.

Argentina struck similar notes in its arguments below, which the Second Circuit carefully considered—and properly rejected. As the court found, "what the consequences predicted by Argentina have in common is that they are speculative, hyperbolic, and almost entirely of the Republic's own making." Pet. App. 22. Indeed, the court rejected that the injunction orders specific to this case would lead to the larger parade of horribles that Argentina invokes:

> [T]his case is an exceptional one with little apparent bearing on transactions that can be expected in the future. Our decision here does not control the interpretation of all *pari passu* clauses or the obligations of other sovereign debtors under *pari passu* clauses in other debt instruments. . . . We simply affirm the district court's conclusion that Argentina's extraordinary behavior was a violation of the particular *pari passu* clause found in the FAA.

Pet. App. 25-26.

Argentina further suggests that the injunctions "conflict with traditional principles of equity." Pet. 2. To the contrary, equitable considerations weigh decidedly in favor of the many bondholder plaintiffs who have been denied justice, denied any guaranteed protections of the rule of law, and denied the full value of their investments for more than a decade, as the courts below properly found. *See, e.g.*, Pet. App. 22-27, 59-61.

One of the four principal objectives of the FSIA enumerated in its legislative history is to "provide the judgment creditor some remedy if, after a reasonable period, a foreign state or its enterprise failed to satisfy a final judgment." H.R. Rep. No. 94-1487, at 8 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6606. That objective surely is not served here by permitting Argentina to continue to evade billions of dollars in judgments while flaunting the provisions of the FSIA. Argentina, which has defied the rule of law, cannot take refuge in a law the Congress designed to achieve sovereign

accountability in certain circumstances—circumstances which apply here. Moreover, the purported "tensions" in foreign relations that Argentina argues the FSIA is meant to avoid are entirely self-inflicted by Argentina, not U.S. courts. *See* Pet. 2, 3, 32.

Given Argentina's uniquely egregious conduct in this case and others, the courts below fashioned equitable relief appropriately tailored to these circumstances to hold Argentina accountable for its serial breaches—of contracts, judgments, and other promises long since turned into a dead letter. Argentina's efforts to evade such injunctive measures should be rejected. The decisions below should stand.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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