No. 13-990

IN THE

Supreme Court of the United States

REPUBLIC OF ARGENTINA,

Petitioner,

—v.—

NML CAPITAL, LTD., ET AL.,

Respondents.

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

BRIEF FOR THE REPUBLIC OF FRANCE AS *AMICUS CURIAE* IN SUPPORT OF THE REPUBLIC OF ARGENTINA'S PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTEREST OF THE *AMICUS CURIAE*[1]

As an active and prominent participant in the financial community, the Republic of France has a substantial interest in issues surrounding international financial stability and global sovereign lending markets.

The Court of Appeals held that the Republic of Argentina's decision to pay only holders of the exchange bonds it issued but not holders of its old bonds (among which are the plaintiffs) constituted a breach of the *pari passu* clause contained in the Republic's 1994 Fiscal Agency Agreement (the "FAA"). Based on that holding, the Court of Appeals affirmed the issuance of an injunction pursuant to which whenever Argentina pays any amount due under the terms of the exchange bonds, it must concurrently, or in advance, make a "ratable payment" to the plaintiffs in respect of the old bonds. In France's view, the Court of Appeals' ruling is based on an erroneous understanding of the meaning of the *pari passu* clause, and contradicts the well-settled mainstream market understanding that a *pari passu* clause does not covenant that all payments will be made by a borrower ratably with the borrower's other unsubordinated debts, but rather provides protection against legal subordination of claims only.

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1. Pursuant to Rules 37.2 and 37.6, counsel of record for all parties received timely notice of *amicus curiae*'s intention to file this brief. *Amicus curiae* files this brief with the written consent of all parties, and copies of the parties' consent letters have been filed. *Amicus* and its counsel state that none of the parties to this case nor their counsel authored this brief in whole or in part, and that no person other than *amicus* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

In upholding the injunction, the Court of Appeals rendered a decision threatening international financial stability in various respects:

First, the *pari passu* clause is a market-standard clause that is used in virtually all sovereign bonds, a large proportion of which are governed by the laws of the State of New York. The injunction that the Court of Appeals affirmed to enforce its interpretation of the *pari passu* clause does not conform with the well-settled expectations of the sovereign debt markets, and accordingly threatens substantial uncertainty and harm in those markets.

Second, France wishes to draw the Court's attention to the adverse consequences that the Court of Appeals' decision will have on the ability of sovereign debtors to engage in orderly and negotiated debt restructuring to prevent default when the sovereign's debt has been deemed unsustainable. The decision grants a veto right to holdout creditors over both a sovereign's voluntary restructuring and future payments on restructured obligations. France has extensive experience in sovereign debt-related issues through its participation in the Paris Club, an informal group of sovereign creditors that deals with the restructuring of official—*i.e.*, intergovernmental—debt.[2]

[2] The Paris Club is comprised of nineteen permanent member states, which, in addition to the United States and France, include Australia, Austria, Belgium, Canada, Denmark, Finland, Germany, Ireland, Italy, Japan, The Netherlands, Norway, The Russian Federation, Spain, Sweden, Switzerland, and the United Kingdom. Other official sector creditors may also actively participate in Paris Club negotiations, subject to the agreement of permanent members and of the sovereign debtor. The International Monetary

Although it does not speak here on behalf of the Paris Club, France, as a long-standing and active member, has participated in the development and application of the Paris Club's principles guiding orderly sovereign restructurings since 1956.[3]

Third, France has a practical concern with the effects of enforcing a *pari passu* clause as though it were a ratable payment clause—effectively preventing other creditors and their financial intermediaries from recovering due claims. France holds significant exposure to sovereign borrowers, particularly to developing countries, as part of its official development aid. The Court of Appeals' interpretation of the *pari passu* clause and its affirmance of the injunctive remedy crafted to enforce that interpretation will have a deleterious effect on the ability of borrower nations to honor their financial commitments to international lenders, including France.

France strongly supports the fair treatment of creditors by borrowers and it does not intervene in support of Argentina's repayment decisions. Moreover, France considers that Argentina should normalize its relations with all of its creditors, both public and private. Nonetheless, because the Court of Appeals' decision threatens wider societal and economic harm, France supports Argentina's petition for a writ of *certiorari*.

Fund ("IMF") and the World Bank are represented at the Paris Club's monthly meetings and attend negotiations as observers.

[3] Since 1956, the Paris Club has reached 429 agreements with 90 sovereign debtors for a total amount of more than $570 billion of restructured sovereign debt. *See Club de Paris*, http://www.clubdeparis.org (last visited March 24, 2014) (every website cited in this brief was last visited on March 24, 2014).

SUMMARY OF THE ARGUMENT

In its petition, Argentina posits that the Court of Appeals' decision raises issues that are of critical importance to sovereigns and their creditors, including to creditors that hold restructured sovereign debt. *See* Petition for Writ of Certiorari at 18, 32-36. This brief is respectfully submitted to explain why France believes that position to be correct, and to outline for this Court the harmful impact that the Court of Appeals' decision could have on sovereign debt markets.

The Court of Appeals' decision is based on an erroneous interpretation of a market-standard clause that appears in virtually all sovereign bonds. In misinterpreting the *pari passu* clause as entitling any creditor to a ratable payment whenever any other creditor is paid, the Court of Appeals disregarded a well-established market understanding that the clause merely provides protection against legal subordination of claims.

If upheld, the injunctive remedy affirmed by the Court of Appeals on the basis of this ill-founded interpretation threatens significant global harm to various public and private interests. It also would disrupt the established practice of orderly sovereign debt restructurings, in which France has acquired extensive experience as an active participant in the Paris Club. In particular, the injunctive remedy threatens to upset the complex balance of interests between sovereign debtors and their creditors, sovereign lenders, bank lenders and bondholders that is generally achieved in a voluntary and orderly restructuring process.

This balance is disturbed by the powerful incentive that the injunctive remedy provides for hold-out creditors to forgo participation in voluntary restructuring and instead to enforce full payment of their debt against an already distressed sovereign debtor. The Court of Appeals' decision will inevitably lead to an increase in the number of hold-out creditors, including so-called "vulture funds," that will seek to leverage the Court of Appeals' decision in future restructurings. Other creditors, including sovereign and private sector lenders that would have otherwise participated in a restructuring may choose not to as long as any payment on the restructured debt could be conditioned on a ratable payment to the hold-out creditors. Consequently, such lenders may also be less willing to extend loans to sovereign debtors in the first place.

Finally, although the Court of Appeals believed that the threat posed by the injunctive remedy would no longer be relevant in light of collective action clauses that are increasingly included in sovereign bond issuances, France respectfully submits that such clauses cannot and will not in fact obviate the significant harms outlined above.

ARGUMENT

I. THE RATABLE PAYMENT INJUNCTION AFFIRMED BY THE COURT OF APPEALS UPSETS WELL-SETTLED MARKET UNDERSTANDING

The *pari passu* clause appears in virtually all sovereign bonds. The form of the clause included in Argentina's defaulted bonds follows one of the market-standard variants. In relevant part, the *pari passu* clause provides that:

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

App. 198 (FAA at 2).

The clause does not have the unequivocal and straightforward meaning assigned to it by the Court of Appeals, that any payment to a given creditor should be made conditional upon equivalent, *pro rata* payments made to other creditors irrespective of their status or participation in previous agreements. The Court of Appeals' analysis ignored the well-settled market understanding that *pari passu* clauses are not ratable payment clauses. *See* G. Mitu Gulati & Kenneth N. Klee, *Sovereign Piracy*, 56 Bus. Law. 635, 637, 640 (2001) (interpretation of the *pari passu* clause in the sovereign context is subject to disagreement but there is a well-established, "clear" interpretation that is not one of a ratable payments clause).

Indeed, France respectfully submits that particular attention should be paid to the longstanding and well-established practices of public and private actors in the sovereign bond markets with respect to the interpretation of the clause, which is quite different from that articulated by the Court of Appeals. The market understanding of a *pari passu* clause—most of which are drafted as a variant of the clause appearing in Argentina's defaulted bonds—is that it is a legal ranking covenant, intended to ensure that the borrower's obligations will rank equally in right of payment among each other, within a particular series of bonds, and with all of the sovereign borrower's other unsubordinated external indebtedness. *See* Brief of the United States of America as *Amicus Curiae* in Support of Reversal at 5, 13-17, *NML Capital, Ltd., v. Rep. of Argentina*, 699 F.3d 246 (2d Cir. 2012) (No. 12-105), ECF No. 238 (The district court's interpretation of the *pari passu* clause "deviate[d] from decades of settled market expectations."). The international capital markets and the major participants in those markets, including France, do not interpret the *pari passu* clause as a covenant that would condition certain creditors' receipt of payments to which they are entitled on the debtor's willingness and ability to pay other creditors.

Consistent with this well-settled understanding of the meaning of the clause, sovereigns have historically restructured their debt through voluntary, contract-based approaches, without any suggestion that, after entering into a comprehensive restructuring with their creditors, the *pari passu* clause would prohibit them from paying participating creditors unless they made ratable payments to hold-outs.[4] Through its extensive participation in sovereign bond markets, and the periodic restructurings historically inherent in that market, France can attest that this standard process of sovereign debt restructuring has never been understood as a violation of the *pari passu* clause.

Beyond New York and English law,[5] this interpretation of the *pari passu* clause is supported by numerous commentators in the civil law jurisdictions of Europe. French legal authorities insist that a contrary interpretation of the *pari passu* clause, such as that espoused by the Court of Appeals is both "difficult to admit" and "lacking support as much as from the practice of financial credits as from doctrinal thoughts."[6] Likewise, German and Italian legal doctrine sides with the

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[4] *See* W.M.C. Weidemaier, *Sovereign debt after NML v Argentina*, 8(2) Capital Mkts. L. J. 123, 127 (2013); Gulati & Klee, *Sovereign Piracy*, at 637.

[5] Philip R. Wood, *Pari Passu Clauses—What Do They Mean?*, Butterworths J. Int'l Banking and Fin. L. 371 (2003). *See also* Financial Markets Law Committee, *Analysis of the role, use and meaning of pari passu clauses in sovereign loan obligations as a matter of English law* (March 1, 2005) at 22, *available at* http://www.fmlc.org/Pages/papers.aspx ("[A]s a matter of English law the ranking interpretation is the proper interpretation of the *pari passu* clause in sovereign debt obligations."); Weidemaier, *Sovereign debt after NML v Argentina*, at 126-27.

[6] Georges Affaki, *Du Sens des mots et du bon sens: de la bonne interprétation de la clause pari passu* [*Of the meaning of words: of the proper interpretation of the pari passu clause*], Mélanges Le Tourneau, Dalloz 2008, at 1-24 (the quotation is a translation from French); *see also* Georges Affaki & Jean Stoufflet, *Chronique de Droit Bancaire International*, 101 Banque et droit 81-90 (2005).

interpretation of the sovereign *pari passu* clause as a legal ranking clause.[7] When a Belgian court erred in interpreting the *pari passu* clause in the same manner as the Court of Appeals, the Belgian legislature clarified the position in accordance with Belgian legal doctrine and market understanding.[8] In light of these considerations, one

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[7] For German doctrine, *see* Prof. Dr. Otto Sandrock, *Griechenland und Zypern in der Finanzkrise: die Rechtsstellung ihrer privaten Finanzinvestoren*, Recht der Internationalen Wirtschaft 16-33 (2014); Alexander Szodruch, *Staateninsolvenz und private Gläubiger* [*State insolvency and private investors*], Rechtsprobleme des Private Sector Involvement bei staatlichen Finanzkrisen im 21. Jahrhundert 181-88 (2008); Dr. Christoph G. Paulus, *Jüngste Entwicklungen im Resolvenzrecht* [*Recent developments in the law of resolvency*], Wertpapiermitteilungen 489 (2013); Christoph Keller, *Umschuldung von Staatsanleihen unter Berücksichtigung der Problematik einer Aggregation aller Anleihegläubiger* [*Restructuring of sovereign bonds in particular in light of aggregation clauses affecting all bondholders*], Die Reform des Schuldverschreibungsrechts [The reform of the German debt securities law] 161-162 (2004); Dr. Otto Palandt & Dr. Christian Grünberg, *Bürgerliches Gesetzbuch (German Civil Code)* § 275, Note 3 (69th ed. 2010); Szodruch, *Staateninsolvenz und private Gläubiger* at 183-85 (citing among others Philip R. Wood, *Law and Practice of International Finance* 186 (1980)); for Italy, *see* Mauro Megliani, *Debitori sovrani e obbligazionisti sovrani* [*Sovereign debt and sovereign bondholders*], 02 Diritto commerciale internazionale 259 (2010).

[8] S*ee* note from Jean-Pierre Buyle & Martine Delierneux, *Contrats de crédit internationaux: clauses "pari passu" et égalité des créanciers* [International credit agreements: pari passu clauses and equal treatment of creditors] *under Arrêt de la cour d'appel de Bruxelles du 19 mars 2004,* T.B.H.-R.D.C. 99-105 (2006); Alain Zenner & I. Peeters, *L'opposabilité des garanties conventionnelles permettant d'échapper au concours* [The enforceability of

must wonder why a rational sovereign debtor would willingly introduce *ex ante* a *pari passu* clause into its sovereign contracts if, as in the Court of Appeals' interpretation, it so significantly constrained the way it services its debt, especially in a distress situation. *See* Gulati & Klee, *Sovereign Piracy*, at 642 (if read as a ratable payment obligation, the *pari passu* clause gives potential hold-outs significant leverage, a power that sovereigns are not likely to have bargained to give away *ex ante*).

The analysis of the Court of Appeals might possibly have been justifiable if, instead of a *pari passu* clause, the Court had been considering a *most favored debt* clause requiring ratable payments between creditors. Such clauses are not unknown to the financial markets, yet did not appear in the Argentinian bonds at issue in this case, and, indeed, are essentially absent from most sovereign bond issuances.

II. THE DECISION OF THE COURT OF APPEALS THREATENS WIDER PUBLIC AND PRIVATE INTERESTS

As Argentina sets forth in its petition for *certiorari*, this case raises systemically important

Contractual guarantees to avoid competition among creditors], J.T. 865-873 (2004). France disagrees with the view expressed by the Court of Appeals of Brussels in the order granted to Elliot Associates, L.P., in 2000 in connection with Peru's debt restructuring. *See Elliott Assocs., L.P.*, General Docket No. 2000/QR/92 (Court of Appeals of Brussels, 8th Chamber, Sept. 26, 2000). In that order, the Court did not reference market understanding of the *pari passu* clause—virtually identical to that at issue in Argentina's bonds—in applying it as a ratable payments clause. Gulati & Klee, *Sovereign Piracy*, at 638.

issues that merit this Court's review. Unlike perhaps any other error of contractual interpretation, the Court of Appeals' error imperils a variety of public and private interests, not least of which are those of sovereign debtors and their creditors, including state lenders and their citizens. By providing strong disincentives to creditors to participate in orderly sovereign debt restructurings, the Court of Appeals' decision impedes the ability of distressed sovereign debtors to restructure their debt when necessary, threatening the stability of the sovereign debt markets themselves. Pet. at 1-3, 6-8, 18, 31-36. In light of the Court of Appeals' apparent disregard of these issues, France respectfully submits this Brief to provide this Court its perspective on these grave concerns.

A. The Court Of Appeals' Decision Will Have A Global Impact

This case is not only about the named plaintiffs and Argentina. To the contrary, the Court of Appeals' decision, if upheld, will have a global impact. New York law is so widely utilized in global finance that it is no exaggeration to characterize it as an international public utility. It applies in a large proportion of outstanding stock of foreign law-governed sovereign bonds, followed by English law. For example, as of March 2009, out of a total of $411 billion of emerging market sovereign bonds, New York law governed a total outstanding amount of $272 billion. *See* Udaibir S. Das et al., *Sovereign Debt Restructurings 1950-2010: Literature Survey, Data, and Stylized Facts*, International Monetary Fund Working Paper No. 12/203 (August 2012) at 41, *available at* http://www.un.org/esa/ffd/ecosoc/debt/2013/IMF_wp12_203.pdf.

Between 1990 and 2011, almost 500 sovereign bonds were issued under New York law by 55 different countries. *See* Michael Bradley & Mitu Gulati, *Collective Action Clauses for the Eurozone,* Review of Finance (2013), at 13-14.

As a result, the Court of Appeals' decision will constitute a precedent in numerous cases involving alleged breaches of *pari passu* clauses and New York law, possibly making it less appealing to issue sovereign bonds under New York law if the interpretation of what used to be "mutually agreeable terms" faces *ex post* legal challenge. *See NML Capital, Ltd. v. Rep. of Argentina*, 727 F.3d 230, 248 (2d Cir. 2013).

The reach of the Court of Appeals' decision is so wide that it may also impact creditors whose bonds are *not* governed by New York law. If, for example, a sovereign borrower has bonds governed by New York law and also has bonds governed by another foreign law, then, following the Court of Appeals' decision, a court could condition payments of bonds governed by the foreign law upon the making of ratable payments on the New York law-governed bonds. The rights of investors holding bonds governed by a different law would thereby be affected by the injunctive remedy upheld by the Court of Appeals on the basis of a New York law-governed contract to which such investors are not a party.

This decision may also impact official bilateral loans contracted by a sovereign if it has a mix of bond, bank and official bilateral borrowing—as do many sovereigns. *See* The World Bank, *International Debt Statistics 2013* (2013) at 24-29, *available at* https://openknowledge.worldbank.org/bitstream

/handle/10986/12226/NonAsciiFileName0.pdf? The mere existence of a New York law-governed bond among a sovereign's borrowing structure may expose payments under its loans to the Court of Appeals' injunctive remedy if the bonds include a common *pari passu* clause that links the ranking of payments on loans and bonds within the scope of the sovereign's external indebtedness.

Further, the unique significance of the injunctive remedy approved by the Court of Appeals is its express impact on private non-parties that form the backbone of the international payments system. The injunction threatens a wide range of private parties with contempt of court if they honor their obligations, whether as agents, participants in the payment chain or custodians. *See NML Capital,* 727 F.3d at 243-45; App. 117 (*NML Capital, Ltd. v. Rep. of Argentina*, Case No. 08-civ-6978 (TPG), Amended February 23, 2012 Order, at 5-6 (S.D.N.Y. Nov. 21, 2012) (ECF No. 425)); *see* W. Mark C. Weidemaier & Anna Gelpern, *Injunctions in Sovereign Debt Litigation* (draft dated Nov. 15, 2013), *available at* http://scholarship.law.georgetown.edu/facpub/1319 (discussing injunctions as a remedy in sovereign debt litigation and their impact on third parties). Many of these entities are outside the United States and certain of them are systemically important entities, central to the global payment and securities clearing systems. It is curious that in seeking to enforce payment rights of a subset of creditors, the Court of Appeals would be willing to risk settlement and payment finality in the global payments and clearing systems, a systemic utility in the global financial system. In an era of global financial system fragility, this seems a heavy burden on a key utility.

In light of the reach that its decision will have and the hundreds of billions of U.S. dollars at stake globally, the Court of Appeals did not correctly address the public interest implications of its decision, resulting in a ruling that may exacerbate sovereign debt crises and in turn threaten international financial stability.

B. The Court Of Appeals' Decision Jeopardizes The Ability Of Sovereign Debtors To Achieve Orderly And Negotiated Restructurings Of Their External Debt

There is no international bankruptcy law to guide the restructuring of a distressed sovereign, as there is for a corporation. Sovereigns cannot be liquidated, their assets cannot be distributed to creditors in accordance with a bankruptcy ladder of priorities, and restructuring terms cannot be enforced by a court or supranational regulatory authority.[9] Absent any sovereign bankruptcy regime, voluntary contract-based mechanisms have evolved based on accepted practices among participants. *See* Das et al., at 12-30, for an overview of the sovereign debt restructuring process. Broadly, these participants are sovereign lenders (primarily in the context of the Paris Club), bank lenders (often working through organized creditor committees, and referred to as the London Club) and bondholders. Modern sovereign restructuring depends on coordination, close dialogue and fair negotiations among all creditors and the sovereign debtor.

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9 Philip R. Wood QC (Hon), *Sovereign insolvency: the bankruptcy ladder of priorities and the pari passu clause*, Tijdschrift voor Financieel Recht, Nr. 3 maart 2012, at 60.

Sovereign debt restructurings remain a traumatic undertaking for the debtor. They are generally used only as a last resort, given their inherent economic and social costs. However, when deemed necessary, they should be carried out quickly and efficiently in order to prevent such costs from escalating further and to restore debt sustainability. *See* International Monetary Fund, *Sovereign Debt Restructuring–Recent Developments and Implications for the Fund's Legal and Policy Framework* (April 26, 2013) at 15-27, *available at* http://www.imf.org/external/np/pp/eng/2013/042613.pdf (hereinafter, the "IMF Report").

The voluntary contract-based mechanism available to a debtor is complex and informed by decades of historical development, its effectiveness driven by a subtle balancing of interests. This mechanism can be rendered ineffective by the slightest shift in incentives to participants.

The Court of Appeals' remedy is a fundamental shift in the incentives to bondholders *not* to participate in a restructuring: if it stands, it will raise significant obstacles to good-faith negotiations and voluntary sovereign debt restructurings precisely because it grants disproportionate power to a small group of hold-out bondholders, to the detriment of the majority of bondholders, in the event of a sovereign debt crisis. In this case, less than eight percent of Argentina's pre-2001 foreign bonds are held by the plaintiffs, while approximately ninety-two percent of Argentina's bondholders participated in its two exchange offers. *See NML Capital, Ltd., v. Rep. of Argentina*, 699 F.3d 246, 253 (2d Cir. 2012).

Often, once a sovereign borrower is known to be in financial difficulty, distressed debt investors purchase bonds from their original holders, either shortly before or after the debt restructuring takes place. In this case, the Court of Appeals noted that plaintiffs had bought their defaulted bonds as recently as June 2010, *i.e.*, almost nine years after Argentina's default. *See id.* at 251.

Some investors, known as "vulture funds," purchase distressed sovereign debt obligations in the secondary markets at deep discount to their face value with the intent of blocking voluntary restructuring of particular classes of debt obligations and also blocking broader debt restructuring carried out through cooperative processes as a means of last resort to restore debt sustainability.[10] They deliberately adopt a non-cooperative stance during the restructuring process by bringing enforcement actions or seeking out-of-court settlements on their claims.

The rights of the majority of creditors would be better protected by eliminating any kind of unfair leverage. Instead, hold-outs' leverage is strengthened by the Court of Appeals' misinterpretation of the *pari passu* clause as imposing a "ratable payment" obligation, where any payment to a restructured creditor made in full (if on a single interest maturity) calls for the full payment of accelerated capital and interest due to hold-outs.

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[10] *See generally* Julian Schumacher et al., *Sovereign Defaults in Court: The Rise of Creditor Litigation 1976-2010* (2013) at 3, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2189997 ("Vulture" funds have accounted for nearly ninety percent of all cases in sovereign debt litigation, and are "particularly likely to initiate legal disputes against Highly Indebted Poor Countries (HIPCs). Of the twenty cases filed against HIPCs, thirteen were filed by 'vultures.'").

Prior to the Court of Appeals' decision, the leverage of hold-out creditors over sovereigns' restructuring efforts had indeed been limited. IMF Report at 31. However, the Court of Appeals has granted hold-out creditors a powerful means of extracting full payment on the non-restructured debt of the borrower. Hold-out creditors thus have the leverage of seeking the injunctive remedy affirmed by the Court of Appeals and thereby blocking payments due to other creditors who voluntarily took part in the restructuring, to the detriment of the interests of the sovereign debtor and of those other creditors. *Id.*; *see also* Horatia Muir Watt, *Private International Law Beyond the Schism*, 2(3) Transnational Legal Theory 347-427 (2011) (discussing the disruptive effect on sovereign funding of a private international law framework that empowers vulture fund hold-out creditors to seek enforcement against debtor states on the basis of erroneous interpretations of *pari passu* clauses as ratable payment clauses, without political accountability); Das et al., at 50 (describing vulture funds).

The legal enforcement advantages conferred to creditors who refuse any restructuring effort, no matter how small their holding of un-restructured debt, are potentially enormous. The Court of Appeals' empowerment of hold-out creditors through injunctive relief, if upheld, will represent a strong disincentive to any future sovereign debt restructurings: it will have a chilling effect on creditors' willingness to grant concessions in order to facilitate voluntary and negotiated debt restructurings as a means of last resort.[11] Private creditors in particular, who otherwise would be

[11] The injunctive remedy upheld by the Court of Appeals has already been relied upon by plaintiffs in

prepared to accede to a restructuring, may thus be discouraged from participating if they believe that hold-out creditors may block payments on the debtors' restructured obligations and therefore refrain from participating in the restructuring.

Finally, it is also worth recalling that the Paris Club, as a pivotal actor in orderly sovereign debt crisis resolution, provides each sovereign creditor participating in a restructuring with guidelines that form the basis of subsequent legally binding bilateral agreements. Notably, Paris Club agreed minutes include a "comparability of treatment" clause, which aims specifically to ensure balanced treatment of the sovereign's debt and fair burden-sharing among *all* external creditors—sovereign lenders, bank lenders and bondholders. As a general rule, the principle of comparability of treatment incorporated in the Paris Club agreed minutes is a crucial touchstone for catalyzing the effective coordination of private creditors and thereby enabling effective, fair and orderly restructurings that will allow the sovereign to attain its objective of debt sustainability and meet payment obligations to all its cooperating creditors. Furthermore, as a matter of equality of treatment, this clause is designed to ensure that claims of official creditors (and ultimately of taxpayers in the lender countries; for example, U.S. or French taxpayers) are not subordinated to those of other, private-sector creditors. Crucially, it facilitates fair burden-sharing among sovereign creditors.

other pending cases. *See, e.g.*, *Export-Import Bank of the Republic of China v. Grenada*, No. 13 Civ. 1450 (HB), 2013 WL 4414875, at *1-3 (S.D.N.Y. Aug. 19, 2013) (denying Grenada's motion to dismiss lender's action for injunctive relief based on breach of *pari passu* clause).

If private creditors are incentivized not to participate in sovereign debt restructuring, bilateral official creditors—and, therefore, their taxpayers—will bear an outsized share of the resulting debt relief burden. As a result, sovereign lenders will be less willing to grant debt relief, resulting in adverse consequences on broader official sector participation in aiding low-income countries in economic distress.

C. The Court Of Appeals' Decision Also Threatens Sovereign Lending, Particularly Development Aid In The Form Of Loans To Developing Countries

Although private funding, notably in the form of bonds, is a growing source of financing for sovereigns, financing *by* sovereigns remains a large component of international financial flows, and is of particular relevance for the most vulnerable countries, notably for the 72 countries eligible to use the concessional financing window of the IMF.[12] Indeed, while private funding for the most vulnerable countries amounted to less than 10% of the total external public and publicly-guaranteed debt stock of these countries as of 2011, bilateral sovereign loans accounted for close to 40%. In addition, sovereign bilateral disbursements represent a steady share of new external financing for these countries, at more than 35% of total disbursements in 2011.[13]

12 *See* International Monetary Fund, *Eligibility To Use The Fund's Facilities For Concessional Financing* (March 15, 2013), *available at* https://www.imf.org/external/np/pp/eng/2013/031813a.pdf.

13 Percentages calculated based on World Bank, World Development Indicators Data, *available at* http://data.worldbank.org/data-catalog/world-development-indicators.

France is a major participant in this funding market and ranks among the largest lenders to low-income countries. As of December 31, 2011, France had a total exposure of EUR 7 billion (including outstanding principal, overdue amounts, and penalty interest but excluding guarantees not called) to the 72 countries eligible to use the IMF's concessional financing window. As of the same date, France's total exposure to more than 100 sovereign debtors amounted to EUR 36 billion. *See* Trésor Direction Générale, *Encours des créances de la France sur les États étrangers au 31 décembre 2011*, *available at* https://www.tresor.economie.gouv.fr/5597_Encours-des-créances-de-la-France-sur-les-Etats-etrangers-au-31-decembre-2011. These lending decisions are made on the assumption that loans will be repaid by the borrower. In line with customary banking practice, France assesses the probability of default and loss given default in connection with these loans. Expectations relating to any restructuring that might arise in the future are based on an assumed orderly sovereign debt restructuring, in the context of an appropriate international forum, including the Paris Club, just as expectations relating to a private borrower would be assessed in light of corporate bankruptcy law.

The injunctive remedy upheld by the Court of Appeals, if it stands, will increase significantly the risk of default on bilateral sovereign loans extended by sovereign lenders. For France, as well as other sovereign lenders, the effects of the Court of Appeals' decision could therefore have a major impact on its policy of development aid in the form of loans. The heightened risk of default on bilateral sovereign loans extended by France, as a result of impediments to orderly sovereign restructuring, would adversely affect the external financing of sovereign borrowers, and of low-income countries in particular. Indeed, the combination of a heightened risk of default with a lower probability of repayment could lead to a reduction in international capital flows and eventually to an increase in the cost for borrowers of external loans driven by a higher cost of risk. *See* Anna Gelpern, Peterson Institute for International Economics, *Sovereign Damage Control*, Policy Brief Number PB13-12, at 12 (2013) ("Until the standards are clear, creditors may attach the same litigation risk premium to both, lending the good apple too little and the bad apple too much.").

D. Contrary To The Court Of Appeals' View, Collective Action Clauses Do Not Resolve The Problems Created By Its Ruling

The Court of Appeals mistakenly determined that collective action clauses "effectively eliminate the possibility of 'hold-out' litigation," and that, therefore, the deleterious effects of its decision—thus implicitly acknowledged by the Court itself—would not impact future sovereign restructurings because most sovereign bonds now contain such clauses. *See NML Capital*, 699 F.3d at 264. To the contrary, the Court of Appeals' decision actually empowers hold-out creditors to threaten orderly sovereign debt restructurings, notwithstanding the prevalence of collective action clauses in international bond issues.

Collective action clauses allow a defined majority of holders of a bond series to bind other holders of that series to a restructuring of that series.

However, these clauses affect only that one series of bonds, and each series involved in the restructuring will need to be amended individually in the same way.

The Court of Appeals was incorrect to surmise that the problem of hold-out creditors is resolved by collective action clauses, and that, in this respect, "it is highly unlikely that in the future sovereigns will find themselves in Argentina's predicament." *Id.*; *see also NML Capital*, 727 F.3d at 247-48.

First, collective action clauses are not universal in sovereign bonds. Even if the clauses were universal in recently issued bonds, older classes of bonds would still exist without the benefits of such clause. This stock of bonds will remain outstanding for many years.

Second, most collective action clauses in existing bonds or under discussion by market participants do not have aggregation features that would allow super-majorities to fully bind all bondholders across different series of bonds. In essence, aggregation provisions allow the aggregation of creditor claims across *all* bonds issued by a sovereign for voting purposes. Depending on the exact drafting of the provision, a defined majority of holders can thereby bind *all* holders of bonds issued by a sovereign and not just one series. Even if aggregation clauses were present in a large proportion of the stock of outstanding sovereign bonds—which is not the case—many of them would still allow series to be excluded from the restructuring based on legitimate concerns about protection of minority rights. Hold-out creditors can therefore—if undeterred—buy up blocking minorities on small issues in order to stall the resolution of a defined class of instruments, and cause serious problems. IMF Report at 28; *see* Jeromin Zettelmeyer et al., *The Greek Debt Exchange: An Autopsy* (September 11, 2012) at 26, 33-34, *available at* http://scholarship.law.duke.edu/faculty_scholarship/2660/; Das et al., at 45 (noting the cases of Dominica in 2004 and Argentina in 2005).

The largest-ever sovereign debt restructuring, of Greek public debt in 2012, has been cited by respondents as an example where hold-out creditors did not have a detrimental effect on voluntary restructuring.[14] This is not accurate, as free-rider, hold-out creditors actually blocked the restructuring of certain classes of Greece's external debt. Of thirty-six bonds governed by foreign (English) law containing collective action clauses that were eligible to participate in the debt exchange, only seventeen bonds were able to be successfully restructured using collective action clauses. IMF Report at 28. Hold-out creditors prevented the operation of the collective action clauses in the remaining bonds, amounting to approximately EUR 6.5 billion in un-restructured claims, or thirty percent of the total value of bonds governed by foreign law. *Id.*

[14] *See* Joint Response Brief of Plaintiffs-Appellees NML Capital, Ltd. and Olifant Fund, Ltd. at 39, *NML Capital, Ltd. v. Rep. of Argentina*, 727 F.3d 230 (2d Cir. 2013) (No. 12-105), ECF No. 821. *But see* Zettelmeyer et al., at 26 (discussing the limitations of using bond-by-bond collective action clauses, as well as the importance of having a stock of debt governed by domestic law, which can unilaterally be used to change the terms of such bonds).

CONCLUSION

The injunctive remedy affirmed by the Court of Appeals constitutes a strong disincentive for bondholders to participate in restructuring, if the creditor is holding a New York law-governed bond and can seek full repayment with the aid of an injunction, and the Court of Appeals was incorrect in its view that collective action clauses solve the problem. For the foregoing reasons, the petition for a writ of *certiorari* should be granted and the Court of Appeals' decision should be reversed.

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