Nos. 13-990, 13-991

In the
Supreme Court of the United States

THE REPUBLIC OF ARGENTINA,

Petitioner,

v.

NML CAPITAL, LTD., *et al.*,

Respondents.

EXCHANGE BONDHOLDER GROUP,

Petitioner,

v.

NML CAPITAL, LTD., *et al.*,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT FINTECH ADVISORY INC. IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Fintech Advisory Inc. supports the grant of certiorari that the Republic of Argentina and the Exchange Bondholder Group are seeking in this case. In its own right, Fintech seeks review of the following questions that arise from the injuries suffered by innocent non-party bondholders as a result of the injunctions issued and affirmed in the courts below:

1. Whether the Courts below erred in interpreting a *pari passu* clause under New York law to require the Republic to pay its holdout creditors all outstanding principal and interest owed on their defaulted debt if the Republic pays the exchange bondholders the routine interest payments that are due to them under the exchange bonds?

2. Whether enjoining a trustee from distributing funds it holds in trust for an innocent non-party bondholder as a remedy to benefit an unrelated private party constitutes a judicial taking of that innocent non-party's property as established in *Stop the Beach Renourishment v. Florida Department of Environmental Protection*, 560 U.S. 2592 (2010)?

3. Whether a federal court injunction that restrains property belonging to a non-party to a litigation in order to provide relief to a party claiming past due money damages for breach of contract is consistent with historically established principles of equity set forth in *Great West Life & Annuity Ins. 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), which limit a federal court's grant of equitable relief to cases that do not

involve contract payments or past due monetary obligations?

4. Whether established principles of equity as set forth in cases such as *Zenith Radio v. Hazeltine Research*, 395 U.S. 100 (1969) are violated upon the issuance of an injunction which broadly encompasses non-parties that engaged in nothing more than routine financial transactions pursuant to pre-existing contracts?

RULE 29.6 STATEMENT

In accordance with this Court's Rule 29.6, Fintech Advisory Inc. states that it is a corporation organized under the laws of Delaware with its principal place of business in New York. There is neither a parent company to Fintech Advisory Inc., nor a publicly held corporation that owns 10% or more of its stock.

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JURISDICTION

Pursuant to 28 U.S.C. § 1254, this Court has jurisdiction with respect to the injunctions set forth in the orders issued by Judge Thomas P. Griesa of the District Court on November 21, 2012, which were affirmed by the court of appeals on August 23, 2013.

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. V:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

A. *Fintech's Holdings of the Exchange Bonds*

When the Republic of Argentina (the "Republic") issued bonds (the "Original Bonds") pursuant to a Fiscal Agency Agreement, dated October 19, 1994 (the "FAA"), Fintech Advisory Inc. ("Fintech") was among the purchasers (the "Original Bondholders"). Fintech purchased approximately $834 million face value of the Original Bonds issued pursuant to the FAA, with coupon rates ranging from 3.0% to 15.5%

and dates of maturity ranging from April 2002 to September 2031. After the Republic defaulted on the Original Bonds on December 24, 2001, the Republic in 2005 and 2010 offered all Original Bondholders the opportunity to exchange their defaulted bonds for new, unsecured, subordinated bonds at substantially reduced values (the "2005 Exchange" or the "2010 Exchange," collectively, the "Exchanges") on which the Republic would begin making payments (the "Exchange Bonds," the holders of which are referred to as "Exchange Bondholders").

During the 2005 Exchange, Fintech exchanged Original Bonds with a principal valued at roughly $638 million for new bonds worth 28% of the face value of the Original Bonds, resulting in a 72% reduction in principal. Fintech's involvement made it one of the largest participants of the 2005 Exchange. While the Republic began paying Fintech regular interest payments in 2005 pursuant to the terms of the 2005 Exchange Bonds and the governing Indenture, these distributions were considerably less than what had been owed to Fintech under the Original Bonds because the 2005 Exchange Bonds were deeply discounted.

In connection with the 2005 Exchange, the Republic enacted Law 26,017 (the "Lock Law") which prohibited the Argentine Executive from reopening the Republic's upcoming exchange offer and stated that "the State shall be prohibited from conducting any type of . . . settlement with respect to" the

Original Bonds.[1] The Lock Law, the rights upon future offerings, and the district court permitting the 2005 Exchange to proceed, together had the effect of assuring the participants of the 2005 Exchange that their decision to exchange their Original Bonds was a sound investment and assured bondholders who participated in the exchange that they would not be disadvantaged for having exchanged their holdings.

In 2010, the Republic offered the Original Bondholders another opportunity to exchange their non-performing Original Bonds, and Fintech again participated in the Republic's voluntary debt restructuring. During the 2010 Exchange, Fintech surrendered the balance of its Original Bonds totaling \$196 million. After the 2010 Exchange, Fintech received new bonds valued at 33.7% of the total face value of the Original Bonds, resulting in a 66.3% reduction in principal through the 2010 Exchange Bonds. In sum, Fintech's Original Bonds had a face value of \$834 million, but after the 2005 and 2010 Exchanges, it held approximately \$247 million in face value of the Exchange Bonds.

As a holder of the Exchange Bonds, Fintech has received regular interest payments from the Republic since 2005. Fintech understands that those payments take place in Argentina, where the Republic transfers funds to an Argentina-based office of the Bank of New York, as Exchange Bondholders' Indenture Trustee (the "Trustee"). *See NML II*, 727

[1] Notably, in 2005 the Second Circuit affirmed the lower court's rejection of NML Capital, Ltd.'s attempt to block the Republic's 2005 Exchange because it was "obviously of critical importance to the economic health of a nation." *EM Ltd. v. Republic of Argentina*, 131 F. App'x 745, 747 (2d Cir. 2005).

F.3d at 239 (quoting lower court's opinion). Upon the Trustee's receipt of those funds, they become property of the bondholders like Fintech in which the Republic has no interest whatsoever.

B. *The District Court's Decisions*

On December 7, 2011, the district court held that the Republic had violated the *pari passu* clause contained in the FAA by continuing to pay the Exchange Bonds without paying the overdue amounts on the Original Bonds held by Respondents NML Capital, Ltd., *et al.* ("Respondents"). Pet. App-70-75. Alternatively, it held that Argentina breached the clause by enacting the Lock Law. *Id*. The district court, however, rejected without prejudice Respondents' request for a "ratable payments" injunction, declining to "do something that would prejudice the rights and opportunities of the people who want to make exchanges [*i.e.*, the Exchange Bondholders]." September 28, 2011 Hearing Tr. (2d Cir. App. A-2117), T40:12-14.

The district court heard NML's "renewed" motion for injunctive relief on February 23, 2012 and granted NML's request for injunctive relief. The injunctions issued by the district court on February 23, 2012 provided that "whenever the Republic pays any amount due under the terms of the [exchange] bonds," it must "concurrently or in advance" pay plaintiffs the same fraction of the amount due to them. *NML I*, 699 F.3d at 254 (the "October 26 Decision"). The district court enjoined "all parties involved, directly or indirectly, in advising upon, preparing, processing, or facilitating any payment on the Exchange Bonds" unless payments were also made to the Original Bondholders. *Id.* at 255. The order described such parties as "Agents" and "Participants" and "prohibited [them] from aiding and abetting any violation of this ORDER, including any further violation by the Republic of its obligations under Paragraph 1 (c) of the FAA, such as any effort to make payments under the terms of the Exchange Bonds without also concurrently or in advance making a Ratable Payment to [Respondents]." *Id.* The district court stayed its rulings to permit review by the Second Circuit.

C. *The Court of Appeals Affirmed Respondents' Interpretation of the* Pari Passu *Clause*

On October 26, 2012, the Second Circuit affirmed in part and remanded in part the district court's February 23, 2012 Order. The October 26 Decision affirmed the lower court's decision holding that the Republic had breached the *pari passu* clause of the FAA. *Id.* at 259. It also affirmed the entry of permanent injunctive relief in favor of Respondents, which are among the 8% of Original Bondholders that refused to participate in the 2005 and 2010 Exchanges.

In its October 26 Decision, the court of appeals expressed "concerns about the Injunctions' application to banks acting as pure intermediaries in the process of sending money from Argentina to the holders of the Exchange Bonds," as well as concerns about "how the challenged order will apply to third parties generally," and subsequently remanded to the district court for further analysis as to the application of the Injunction to third parties. *Id.* at 264.

D. *The District Court On Remand*

Despite being given express instructions by the Second Circuit to determine "how the challenged order will apply to third parties generally," the district court directed a truncated briefing schedule and ultimately issued orders on November 21 and November 26, 2012 which principally reinforced its February 23, 2012 orders.

On November 30, 2012, the Second Circuit granted Fintech's motion to intervene and participate in the appeal of the district court's November 2012 orders (the "November Orders").

E. *The Second Circuit Affirms the November Orders*

On August 23, 2013, the Second Circuit affirmed the injunctions implemented by the district court's November Orders, which prohibit the Trustee and its financial "participants" from disbursing funds rightfully owed to the Exchange Bondholders under the Exchange Bonds without issuing "ratable payments" to Respondents, as holders of the Original Bonds, in an amount in excess of $1.33 billion (the "Injunctions"). *NML II*, 727 F.3d at 238-39. By affirming the lower court's unprecedented rulings, the Second Circuit inequitably permits the property and constitutional rights of the Exchange Bondholders to become ensnared in the efforts to craft a remedy that coerces the Republic to pay Respondents. The Injunctions remain stayed pursuant to the Second Circuit's order. *Id.* at 248.

REASONS FOR GRANTING THE PETITIONS

Respondent Fintech respectfully submits this brief in support of the petitions for writ of certiorari filed by the Republic, No. 13-990,[2] and the Exchange Bondholder Group ("EBG"), No. 13-991,[3] dated February 18, 2014.

The Court should review and reverse the unprecedented Injunctions entered below, which restrain the Republic from making a single interest payment to the Exchange Bondholders, including Fintech, unless the Republic pays Respondents full principal and interest on their Original bonds — separate and distinct contractual obligations that exist solely between the Republic and the Original Bondholders.

First, as the Republic makes clear, these improper orders rest upon the lower courts' misinterpretation of the boilerplate *pari passu* clause in a manner that contradicts long-held market understanding. Rep. Pet. at 19-22. Fintech writes separately to highlight from the perspective of a bondholder the significant negative implications of this incorrect *pari passu* reading, including the complete disincentive it creates on sovereign debt holders to restructure their defaulted obligations. Fintech participated in the 2005 and 2010 Exchanges and surrendered most of the payment stream owed to it under the Original Bonds because of the promise of certainty of payment that came with obligations provided under the

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[2] Citations to the Petition filed by the Republic are referred to herein as "Rep. Pet. at __".

[3] Citations to the Petition filed by the EBG are referred to herein as "EBG Pet. at __".

Exchange Bonds. Indeed, while Fintech's Original Bonds had a face value of $834 million, after its participation in the Exchanges it held approximately $247 million in face value of the Exchange Bonds — resulting in a loss of more than 50% of its initial investment. Fintech made this exchange, however, understanding it had achieved certainty of payment. But the incorrect interpretation of the *pari passu* clause adopted below — which reads the provision as a promise by the Republic not to pay on the Exchange Bonds unless it makes payments on the Original Bonds — destroys that certainty, as it bars the Republic from fulfilling its reduced obligations to Fintech unless it pays creditors who declined to participate in the Exchanges all principal and interest outstanding on their defaulted debt. Neither Fintech nor any other Exchange Bondholder would have incurred this risk (and accepted this reduction) by participating in the Exchanges in the first place had the lower courts' *pari passu* "reading" been the law at the time they took place. The *pari passu* interpretation adopted below thus throws into doubt the continued viability of debt restructurings as a means to resolve sovereign financial crises and imposes grave harm upon any participating third-party creditors. This Court should certify this critical question to the New York Court of Appeals so that it can decide for itself whether reading is consistent with New York law.

Second, the error of the Second Circuit's ruling is demonstrated by the devastating impact of the Injunctions on third parties like Fintech, as it amounts to a constitutional taking of Fintech's property without due process in violation of the Fifth Amendment. *See also* EBG Pet. at 25-29. The Second Circuit has misappropriated Fintech's constitutionally protected property including its contractual rights and investment-backed expectations. In addition, the Injunctions violate the Fifth Amendment by taking Fintech's property for the benefit of other private parties (the Original Bondholders including Respondents), and not the public at large.

Third, by coercing a foreign state to pay Respondents money damages with property that is immune from attachment and execution under the Foreign Sovereign Immunities Act ("FSIA"), the Injunctions are irreconcilable with both the FSIA and the established principles of equity set out in *Great West Life & Annuity Ins. 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), which recognize that federal courts lack the power to grant equitable relief compelling the payment of past due monetary obligations. Rep. Pet. at 22-30; EBG Pet. at 17-21. While Fintech recognizes that Respondents are entitled obtain judgments against the Republic and to try to enforce those judgments with remedies consistent with the FSIA's limits on execution, courts cannot — as the Second Circuit and district court did below — create novel remedies that upend this Court's equity jurisprudence and in addition attempt to circumvent the FSIA's carefully circumscribed property immunities.

Fourth, the Injunctions violate historically settled principles of equity because they declared that a host of non-parties are "covered by" or "bound by" the Injunctions. The Second Circuit made this sweeping declaration in derogation of the rights of these non-parties, with no finding or hearing regarding these parties. Thus, the Injunctions cannot be reconciled with this Court's prior precedent or with principles of equity jurisdiction.

I. The Lower Courts' Interpretation of the *Pari Passu* Clause Under New York Law Is Inconsistent with the Long-held Understanding of Market Participants Including Fintech

By issuing the Injunctions, the lower courts have bestowed Respondents with greater rights under the Original Bonds than they would otherwise have had — full payment of all outstanding principal and interest. Accordingly, the lower courts' existing interpretations of the *pari passu* clause cannot stand. Indeed, under New York law a party "who obtains specific performance of his contract is entitled to no greater rights than he would have had had the contract been performed at the agreed time." *F & F Restaurant Corp. v. Wells, Goode & Benefit, Ltd.*, 61 N.Y.2d 496, 502 (1984) (citing *Bostwick v. Beach*, 105 N.Y. 661, 663 (1887)). As set forth above, the Injunctions grant Respondents a windfall at the expense of the Exchange Bondholders, a result that flows directly from the lower courts' strained and unprecedented interpretation of the *pari passu* clause. The interpretation by the courts below has no basis in New York law, and thus creates precedent in New York that is wildly at odds with market and participants' expectations. Therefore, at minimum, the issue should be addressed by the New York Court of Appeals to determine for itself its own contract law. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 77 (1997) ("Through certification of novel or unsettled questions of state law for authoritative answers by a State's highest court, a federal court may save 'time, energy, and resources and hel[p] build a cooperative judicial federalism.'") (quoting *Lehman Brothers v. Schein*, 416 U.S. 386, 391 (1974)). *See also Elkins v. Moreno*, 435 U.S. 647, 662, n.16 (1978) (*sua sponte* certifying a question of state law because it is "one in which state governments have the highest interest").

Fintech has participated in many restructurings involving debt with *pari passu* clauses and never was the *pari passu* clause viewed as a promise not to pay restructured debt unless payments were also made on defaulted debt. The primary reason Fintech participated in the Exchanges and other restructurings was to obtain assurance and certainty that it would receive payments on its holdings. Fintech's motivations are consistent with the market's investment expectation regarding creditors' voluntary participation in debt restructurings, but the interpretation of the *pari passu* clause and the Injunctions threaten the very certainty for which the Exchange Bondholders bargained. The possibility that holdout creditors can eventually be redeemed in whole under existing *pari passu* clauses governed by New York law will cause potential participants of future restructurings to question the certainty of their commitments. Sovereign and private debtors will be deterred from selecting New York law as the prevailing law for sovereign financings. *See* Rep. Pet. at 19-22, 31-37.

Scholars and media outlets have recognized that the lower courts' interpretation of the *pari passu* clause contravenes long-held market understanding and expectation and destabilizes the bond market and the process of bond restructuring.

– James Mackintosh, *Argentina bond case may change rules*, Fin. Times, Nov. 22, 2012 ("future borrowers would be well advised to avoid issuing bonds under New York law, unless they are happy to run the risk of ending up in the sovereign equivalent of a 19th-century debtors' prison").

– Jonathan Wheatley, *New York law: not what it used to be*, Fin. Times, Nov. 23, 2012 ("Judge Thomas Griesa's ruling that Argentina must pay $1.3bn to holdout creditors has all sorts of implications for sovereign borrowers and lenders. It has also, at a stroke, wiped out the New York law premium. . . .").

– Nouriel Roubini, *From Argentina to Greece: Crisis in the Global Architecture of Orderly Sovereign Debt Restructurings*, Nov. 28, 2012 (as to the Argentine and Greek cases, the "new broad and radical interpretation of the pari passu clause" and in particular the remedies ordered upon the sovereign and associated third parties, "risks destroying the current international regime for the orderly restructurings of sovereign debts of insolvent countries").

– Floyd Norris, *Not Crying for Argentina but Fearful of a Ruling*, New York Times, Aug. 29, 2013 (according to the amicus brief filed by the United States before this Court, "[t]he settled understanding of *pari passu* clauses is that selective repayment does not violate the clause, even if it is the result of sovereign policy").

Notably, the Second Circuit itself has acknowledged that the Exchange Bondholders could not have contemplated the lower courts' interpretation of the *pari passu* clause. "[N]o one seems quite sure what the clause really means, at least in the context of a loan to a sovereign borrower." *NML I*, 699 F.3d at 258 (quoting Lee C. Buchheit, *The Pari Passu Clause Sub Specie Aeternitatis*, 10 Int'l Fin. L. Rev. 11, 11 (1991)). Again, rather than letting the federal courts below determine a meaning of the *pari passu* clause for New York that so upsets the apple cart of long-held understanding, the question should be certified to the New York Court of Appeals as to what the *pari passu* clause means under New York law.

II. The Injunctions Effected a Judicial Taking By Interfering With the Exchange Bondholders' Right to Payment from the Trustee

The Second Circuit opinion contained no discussion of the judicial taking arguments propounded by the Exchange Bondholders other than the one-line *ipse dixit* that the taking argument fails "because the amended injunctions do not deprive Exchange Bondholders of any property." *NML II*, 727 F.3d at 242 n.10. The absence of analysis on this issue by the Second Circuit and the unsettled jurisprudence regarding the law of judicial taking present an opportunity for this Court to clarify the contours of the judicial taking doctrine enunciated in *Stop the Beach Renourishment, Inc. v. Florida Dep't of Envt'l Prot.*, 560 U.S. 702 (2010). *See also* EBG Pet. at 17, 26.

The Injunctions eliminate the Exchange Bondholders' previously unfettered right to receive the payments they are owed, and authorized a judicial taking by "declar[ing] that what was once an established right of private property no longer exists." *Stop the Beach*, 560 U.S. at 715, 130 S. Ct. at 2602. *See also Shelley v. Kraemer*, 334 U.S. 1, 18 (1948) ("the action of the States to which the [Fourteenth] Amendment has reference includes action of state courts and state judicial officials. . . [I]t has never been suggested that state court action is immunized . . . simply because the act is that of the judicial branch of the state government.").

A. *The Injunctions Deprive Fintech of its Property Rights*

The Second Circuit erred in opining (without analysis) that the Injunctions "do not deprive Exchange Bondholders of any property." *NML II*, 727 F.3d at 242 n.10. For the past nine years, the Exchange Bondholders, including Fintech, have possessed unfettered property and contractual rights to receive payments under the Exchange Bonds, which are entirely separate from the Republic's obligations to Respondents under the Original Bonds.

As discussed below, the Injunctions impermissibly restrain and diminish the Exchange Bondholders' property and contract rights.[4] A compensable taking occurs when regulation effectively destroys "one of

[4] The Second Circuit has disregarded the Republic's repeated admission that it is unable to pay the Respondents the amounts required under the Second Circuit's order, and still satisfy its obligations to the Exchange Bondholders. *NML II*, 727 F.3d at 242 n.10.

the most essential sticks in the bundle of rights that are commonly characterized as property." *Hodel v. Irving*, 481 U.S. 704, 716 (1987) (internal citation omitted) (holding that property owners were entitled to compensation where regulation destroyed their right to pass property to heirs). *See also Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979) (property owner entitled to compensation where regulation destroyed their right to exclude others).

Fintech's contractual rights and investment expectations through its holdings of the Exchange Bonds are "property" protected by the Fifth Amendment. *See Ascom Hasler Mailing Sys., Inc. v. U.S. Postal Serv.*, 815 F. Supp. 2d 148, 173-76 (D.D.C. 2011) (citing *Cienega Gardens v. United States*, 331 F.3d 1319, 1330 (Fed. Cir. 2003) (quoting *Lynch v. United States*, 292 U.S. 571, 579 (1934) ("The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a state or the United States"))). By burdening Fintech's property as a mechanism by which to coerce the Republic to distribute payments to Respondents, the Injunctions contravene Fintech's "established property rights" and investment expectations. *See also* EBG Pet. at 24.

By limiting and making contingent the distribution of their property from the Trustee and its agents to the Exchange Bondholders, including Fintech, the Second Circuit has authorized a judicial taking because it has interfered with the Exchange Bondholders' expectation to be paid irrespective of how the Republic addresses its obligations with the Original Bondholders. *See Stop the Beach*, 560 U.S.

at 715, 130 S. Ct. at 2602 (taking occurs when a court declares that "what was once an established right of private property no longer exists."); *United States v. Security Industrial Bank*, 459 U.S. 70, 78 (1982) (noting "substantial doubt" whether the "retroactive destruction" of creditor's liens that existed before the enactment of a lien avoidance provision of the bankruptcy code "comports with the Fifth Amendment").

B. *The Injunctions Contravene Fintech's Property Rights When They Restrain Non-Parties From Distributing Fintech's Money to Fintech*

The Second Circuit has restrained the Trustee's ability to distribute Fintech's own funds to Fintech. These restrictions contravene the Indenture, and impinge upon Fintech's property rights in a manner the Fifth Amendment forbids. It has not been disputed that under the Indenture for the Exchange Bonds, the Trustee, who receives funds from the Republic, holds all monies paid to it under the Indenture "in trust" for itself and the Exchange Bondholders. The beneficial owners of the Exchange Bonds, such as Fintech, hold equitable title to the Trust assets and are the "real owners" of the Trust property. *See, e.g., United States v. Coluccio*, 51 F.3d 337, 341-42 (2d Cir. 1995) ("If she were the beneficiary of such a trust, then she would be "the equitable owner" of those funds") (citing William F. Fratcher, *Scott on Trusts*, § 12.1 (4th ed. 1987)). Therefore, the funds held by the Trustee are no longer the property of the Republic, but rather belong to the Exchange Bondholders and are held by the Trustee for their benefit.

As the Indenture makes clear, the Republic has "no interest whatsoever" in the monies it transfers to the Trustee for the benefit of the Exchange Bondholders, and such property in the Trustee's possession belongs to the Exchange Bondholders. *See* Indenture § 3.5(a) ("such amounts shall be held in trust by the Trustee for the exclusive benefit of the Trustee and the Holders entitled thereto in accordance with their respective interests and the Republic shall have no interest whatsoever in such amounts"). Since June 2005, the Republic has made regular interest payments to the Exchange Bondholders by transferring the required funds to the Trustee. Once the Trustee possesses those funds, it holds those amounts for the benefit of the Exchange Bondholders, including Fintech. As such, any payments made by the Republic to the Trustee belong to the beneficial owners, the Exchange Bondholders such as Fintech, and distribution to them cannot be thwarted in an effort to "assist" Respondents. *See Willis Mgmt. (Vt.), Ltd. v. United States*, 652 F.3d 236, 245 (2d Cir. 2011) (" . . . if a constructive trust properly should be imposed on particular property that was in the possession of the defendant, it was never truly the defendant's property and is not subject to forfeiture . . . "); *Brown v. J.P. Morgan & Co., Inc.*, 265 A.D. 631, 635, 40 N.Y.S. 2d 229, 233 (1st Dep't 1943) (bondholder cannot attach money in the hands of trustee for other bondholders because the money "belongs to the [other] bondholders"), aff'd, 295 N.Y. 867, 67 N.E.2d 263 (1946).

C. *The Injunctions' Interference with Fintech's Property Rights Rises to the Level of a Taking*

The Injunctions improperly subordinate Fintech's right to receive payment under the Exchange Bonds to Respondents' right to payment, barring Fintech from receiving an interest payment unless and until Respondents receive a payment of all monies purportedly due to them. Thus, the Injunctions have deprived Fintech of an important "stick" in its bundle of rights. The practical outcome of the Injunction inevitably will be, at a minimum, a "significant restriction . . . placed upon [the Exchange Bondholders'] use of [their] property," *Maine Educ. Ass'n Benefits Trust v. Cioppa*, 695 F.3d 145, 152 (1st Cir. 2012) (internal citation and quotation omitted), which is clearly a "taking." *See United States Fidelity & Guaranty v. McKeithen*, 226 F.3d 412, 416-20 (5th Cir. 2000) (holding that additional restrictions on insurance company contracts and rates were a taking even though the entirety of the insurance company's business was not affected and only $5 million was at stake during first year) (citing, *inter alia*, *Eastern Enters. v. Apfel*, 524 U.S. 498, 528-29 (1998)); *cf. Brooks Scanlon Co. v. Railroad Commission*, 251 U.S. 396, 399-400 (1920) (forcing a railroad to continue operations indefinitely at a loss violates the Fifth Amendment rights of security holders who have a security interest in the railroad); *Matter of Chicago M, St. P. and P.R. Co.*, 611 F.2d 662, 666 (7th Cir. 1979) (same). Indeed, it is well-settled that an "erosion" of the value of Fintech's assets can rise to the level of a taking. *See e.g.*, *Blanchette v. Connecticut General Ins. Corp.*, 419 U.S. 102, 123-25 (1974). Such an erosion will inevitably occur here as the Injunctions have impaired the liquidity of Fintech's Exchange Bonds, which in turn has eroded their market value. EBG Pet. at 13 (the effect of the Injunctions was to convert the Exchange Bonds "into a markedly different and significantly less desirable investment").

D. *The Injunctions Impermissibly Take Property For Private Use*

This Court also should grant the petitions to establish standards as to whether judicial takings can occur without any arguable public use. Here, the Injunctions deprive Fintech of its property rights for the benefit of Respondents, which consist of only part of the 8% of the Original Bondholders which did not participate in the Exchanges. The Injunctions allow Respondents to surpass all other bondholders and receive preferential accelerated principal and interest payments. Such a taking for a private purpose is impermissible. *See Kelo v. City of New London*, 545 U.S. 469, 477 (2005), *superseded by statute, as recognized in State ex. re. Seabaugh v. Dolan*, 398 S.W. 3d 472 (2013) ("[I]t has long been accepted that the sovereign may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation"); *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 245 (1984) ("A purely private taking could not withstand . . . scrutiny . . . it would serve no legitimate purpose of government and would thus be void"). Indeed, Supreme Court authority holds that State action which places any significant imposition on the private property of one for the private use of another is a core violation of fundamental due process rights.[5] *See also* EBG Pet. at 25-29.

III. The Injunctions Exceed the Equitable Powers of the Federal Courts

As set out in the Exchange Bondholders' Petition, EBG Pet. at 17-21, the equity jurisdiction of the federal courts is limited to the powers that existed at the enactment of the Judiciary Act of 1789. The Injunctions violate these limitations in at least two ways. Additionally, as set out in the Republic's Petition, Rep. Pet. at 23-25, the Injunctions violate the FSIA.

First, in 1789, the federal courts' equity jurisdiction did not include injunctions to enforce money judgments for past damage claims in contract cases. That, however, is precisely the nature of the Injunctions at issue here.

Second, by coercing the Republic to pay Respondents money damages with property that is immune from attachment and execution under the FSIA, the Injunctions are irreconcilable with the FSIA. Rep. Pet. at 22-30; EBG Pet. at 17-21.

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[5] *See Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55, 76-80 (1937) (striking down state administrative order requiring majority of private gas producers to curtail desired production and purchase shortfall from minority of private gas producers with no available market); *Chicago, S.P.M. & O. R. Co. v. Holmberg*, 282 U.S. 162, 166-67 (1930) (order requiring railroad to build underground pass for private benefit of private landowners violated due process); *Missouri Pacific Railway Co. v. Nebraska Bd. of Trans.*, 164 U.S. 403, 417 (1896) (order requiring private railroad to allow private party to construct elevator on its property for private use violated due process).

Third, it is well-established that equitable relief can only be ordered against a party and non-parties who are in "active concert." Here, the Injunctions purport to restrain a host of non-parties who were afforded no right to meaningfully participate in the proceedings leading up to the injunction. These non-parties have erroneously been labeled aiders and abetters for engaging in nothing more than routine financial transactions pursuant to pre-existing contracts. Neither historical principles of equity nor this Court's due process case law permit such an outcome.

A. *The Injunctions Improperly Command Payment of a Contractual Debt*

The Injunctions forbid the Republic from making payments to the Exchange Bondholders unless it pays Respondents under a separate contract. The lower courts erred in imposing this draconian form of equitable relief — enjoining payments to innocent third party creditors to coerce the payment of past due contractual payments to other and unrelated creditors. This form of equitable intrusion contravenes historical principles of equity jurisdiction and this Court's precedent. Certiorari is therefore warranted.

1. Equity Jurisdiction Does Not Encompass Injunctions to Coerce the Payment of Past Due Contractual Debt

The federal courts' equity jurisdiction is "an authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries." *Atlas Life Ins. Co. v. W.I.*

Southern, Inc., 306 U.S. 563, 568 (1939). Thus, it is well-settled that "a major departure from the long tradition of equity practice should not be lightly implied." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982) (citing *Hecht Co. v. Bowles*, 321 U.S. 321 (1944)). The federal courts' equity powers "d[o] not include the power to create remedies previously unknown to equity jurisprudence." *Grupo Mexicano*, 527 U.S. at 332; *see also Chase National Bank v. City of Norwalk, Ohio*, 291 U.S. 431, 437, 54 S. Ct. 475, 477-78 (1934) (applying "established principles of equity jurisdiction and procedure") (citations omitted). As in *De Beers Consol. Mines v. United States*, 325 U.S. 212, 223 (1945), certiorari should be granted here because "[n]o relief of this character has been thought justified in the long history of equity jurisprudence." *Id.*

One of the core limitations on the historic injunctive process is that it "was designed to deter, not to punish." *Hecht*, 321 U.S. at 329. Consistent with this core principle, in *Great West*, an ERISA case, this Court opined that "equitable relief" did not historically include "an injunction to compel the payment of money past due under a contract, or specific performance of a past due monetary obligation. . . ." *Great West*, 534 U.S. at 210-11. This Court further rejected the plaintiff's "lawyerly inventiveness" in recasting its garden-variety contract claims for money damages as claims for injunctive relief. *Id.* at 211 n.1. The Court did so despite recognition that its ruling could well leave the insurers with no remedy. *Id.* at 220 (opinion of

Court), 227 (Ginsburg, J., dissenting).[6] The Court reiterated that "equity would never permit . . . an injunction against failure to pay a simple indebtedness." *Id.* at 216.

Similarly, in *Grupo Mexicano*, this Court recognized that the federal courts may not issue preliminary injunctions freezing a debtor's assets before a creditor obtains judgment. Under traditional equitable principles, federal courts "will not, as a general matter interfere with the debtor's disposition of his property at the instance of a nonjudgment creditor." *Grupo Mexicano*, 527 U.S. at 329. This holding is consistent with prior law admonishing that where an injunction "act[s] against one person for the purpose of punishing or restraining another," *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773, 789 n.22 (1980), such actions also raise due process implications. The Injunctions here effectively punish one person for the acts of another and thus cannot be reconciled with traditional principles of equity jurisdiction.

[6] Notably, the petitioners in *Great West* attempted the same tactic as Respondents herein, and endeavored to portray damages under contract claims as claims for injunctive relief. As *Great West* recognized, however, courts must look past such sleight of hand because "equity would never permit . . . an injunction against failure to pay a simple indebtedness." *Great West*, 534 U.S. at 216. *See also Wal-Mart Stores v. Wells*, 213 F.3d 398, 401 (7th Cir. 2000) (Posner, C.J.) ("A plaintiff cannot convert a claim of damages for breach of contract into an equitable claim by the facile trick of asking the defendant be enjoined from refusing to honor its obligation to pay the plaintiff what the plaintiff is owed under the contract and appending to that request a request for payment of the amount owed. A claim for money due and owing under a contract is 'quintessentially an action at law.'") (citations omitted).

2. The Second Circuit Has Provided No Cognizable Justification for its Injunctions

In an effort to justify the Injunctions, the Second Circuit ruled that "the plaintiffs have no adequate remedy at law because the Republic has made clear its intention to defy any money judgment issued by this Court. Moreover, Argentina has gone considerably farther by passing legislation, the Lock Law, specifically barring payments to FAA bondholders." *NML II*, 727 F.3d at 241 (citation omitted).[7]

Courts, however, restrict the scope of "equitable" remedies even when such restriction leaves the plaintiff with no remedies. *See Great West,* 534 U.S. at 220; *see also Reich v. Cont'l Cas. Co.*, 33 F.3d 754, 757 (7th Cir. 1994) (applying *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993) to restrict the scope of "equitable" remedies even though "pension funds may well be remediless against knowing participants in fiduciary misconduct"). In addition, the Second Circuit simply disregarded the principle that "[m]ere concern over collectibility of any judgment without

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[7] The Second Circuit has not supplied any logic as to why the Republic would obey the Injunctions, rather than pay neither the Original Bondholders nor the Exchange Bondholders, given its purported propensity to "defy" any "money judgment" issued by the same courts. *Id.* This, of course, concretizes the "taking" of Fintech's property. In any event, the supposed "defiance" of a foreign state provides no basis for an injunction against third parties. *See* Brief for the United States as Amicus Curiae in Support of Petitioner, the Republic of Argentina, No. 12-842, at 13 ("Congress fully intended to create rights without remedies, aware that plaintiffs would often have to rely on foreign states to voluntarily comply with U.S. court judgments.") (quoting *Peterson v. Islamic Republic of Iran,* 627 F.3d 1117, 1128 (9th Cir. 2010)).

more is insufficient to warrant injunctive relief." *Robinson v. Nash*, CIV. A. 88-2499 TFH, 1989 WL 44670, at *2 (D.D.C. Apr. 28, 1989). S*ee also Bender v. CenTrust Mortgage Corp*., 51 F.3d 1027, 1030 (11th Cir. 1995), *opinion modified on denial of reh'g*, 60 F.3d 1507 (11th Cir. 1995) ("Bender's concern for the ultimate collectibility of a judgment against RTC and CenTrust Mortgage does not support his asserted right to set aside a fund for "losses and/or damages and costs" while such claims are being resolved); *Centauri Shipping Ltd. v. W. Bulk Carriers KS*, 528 F. Supp. 2d 186, 194 (S.D.N.Y. 2007) (no irreparable injury where plaintiff was seeking a stay to ensure the ability to collect on a money judgment against the defendant).

In short, the Second Circuit failed to provide any basis for extending the equity jurisdiction of the federal courts to bolster a party's claim for past money damages, precisely the type of claim that the *Great West* Court condemned as residing outside the courts' equity jurisdiction.

Respondents here have sought and obtained summary judgment for past due principal and interest payments. The Injunctions require that Respondents be redeemed in whole when the Exchange Bondholders receive another interest payment. No matter how this remedy is characterized, it, in essence, requires the payment of contract damages, a payment that equity does not recognize. The Injunctions therefore run afoul of historical principles of equity because they compel the payment of money, and therefore, this Court should grant the petitions for certiorari.

B. *The Injunctions Violate the FSIA*

Under the FSIA, a foreign sovereign property — particularly property abroad — is immune from "attachment, arrest and execution." Rep. Pet. at 23 (citing, *inter alia*, 28 U.S.C. §§ 1609–1611 and *Peterson*, 627 F.3d at 1131–32). The Injunctions have specifically targeted Argentina's overseas reserves in a manner that the FSIA expressly forbids. Rep. Pet. at 24-25.

Even worse, as set out above, the Injunctions violate historically settled principles of equity jurisdiction and have done so by lodging only one purported justification: that in the absence of the Injunctions the Republic will exercise its sovereign right to protect its overseas reserves, leaving less money available for Respondents. Rep. Pet. at 25 (citing App. 12). The scenario the Second Circuit sought to attack is precisely the scenario the FSIA sought to protect.

As set out more fully in the Republic's brief, the Injunctions serve as a "weapo[n] of coercion." Rep. Pet. at 29 (citing *Nat'l Federation of Indep. Business v. Sebelius*, 132 S. Ct. 2566, 2603 (2012) (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 586 (1937))). This weapon threatens financial instability and confronts the Republic with the Hobson's Choice of paying Respondents from immune overseas reserves or having countless third parties suffer grave harm.

C. *The Injunctions Infringe Upon The Rights of Innocent Non-Parties*

This Court should also grant the petitions so that it can address the extent to which court orders that affect the rights of innocent non-parties disregard historical principles of equity jurisdiction as well as this Court's due process jurisprudence. In this case, as set out above, the Injunctions affect the property rights of non-party Fintech by restraining third-party financial intermediaries. *See NML II*, 727 F.3d at 239, 243. By enjoining these entities, the Exchange Bondholders as the proper recipients of the payments are deprived of their property rights. None of these non-parties, including Fintech, had been a party in the proceedings before the district court or the Second Circuit, and none of them engaged in any discovery or had any meaningful participation in the proceedings before the lower Courts prior to the issuance of the Injunctions.

If this Court does not grant the petitions and the Injunctions are permitted to stand, routine financial transactions, undertaken pursuant to longstanding contracts will be subject to attack, without any prior hearing or due process. Such a result effectuates, with almost no analysis, a dramatic change in existing law that would make New York a less effective place in which to engage in financial transactions.

As set forth above, engrained historical limitations on equity jurisdiction require that the Injunctions be overturned. "'It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.'" *Taylor v. Sturgell*, 553 U.S. 880, 884 (2008) (quoting *Hansberry v. Lee*, 311 U.S. 32, 40 (1940)).[8] Furthermore, the injunctive power is not "so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law." *Regal Knitwear*, 324 U.S. at 13; *Chase Nat. Bank v. City of Norwalk*, 291 U.S. 431, 441 (1934) ("Unless duly summoned to appear in a legal proceeding, a person not a privy [of a party] may rest assured that a judgment recovered therein will not affect his legal rights.").

The Injunctions violate these historically grounded principles of equity jurisdiction by restraining the actions of institutional non-parties including the Trustee, various clearinghouses, and other financial institutions, all of whom are prohibited from transferring funds received from the Republic to the

[8] *See also Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 110 (1969), *superseded by statute*, Patent Misuse Reform Act of 1988, Pub. L. No. 100-703, 102 Stat. 467, *as recognized in In re Recombinant DNA Tech. Patent & Contract Litig*., 850 F. Supp. 769, 773 (S.D. Ind. 1994). This fundamental principle is based on the "'deep-rooted historic tradition that everyone should have his own day in court.'" *Taylor*, 553 U.S. at 892-93 (quoting *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996)). *See Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229, 234 (1917) (reversing an injunction against named defendants who had not been "served with process" because the "injunction operates only in personam"); *Scott v. Donald*, 165 U.S. 107, 117 (1897) ("The decree is also objectionable because it enjoins persons not parties to the suit.").

Exchange Bondholders, including Fintech. *NML II*, 727 F.3d at 239.[9]

As the Second Circuit acknowledged, no injunction can bind non-parties absent a finding that the non-parties were in "active concert or participation" with the Republic within the meaning of Fed. R. Civ. P. 65. *Id.* at 243. The Second Circuit also noted that no such finding had been made. *Id.* Nonetheless, it affirmed the Injunctions on the ground that the lower court's injunction "d[id] not directly enjoin payment system participants." *Id.*

The Second Circuit's contention that non-parties were not "directly enjoin[ed]" is flawed. *Id.* In fact, the Second Circuit acknowledged that the Injunctions "cover . . . the indenture trustee(s), the registered owners, and the clearing systems." *Id.* at 239. The Court unambiguously stated that "[t]hose bound under the operation of Rule 65(d) would include certain entities involved in the system through which Argentina pays Exchange Bondholders." *Id.* The Court went on to describe such "bound" parties as depositaries, clearing systems, and other financial institutions. *Id.* (quoting district court opinion). Remarkably, the Second Circuit found these non-parties "covered" or "bound" by the Injunctions, without any sort of hearing or process. Such a finding is reversible error. *See Lake Shore Asset Mgmt. Ltd. v. Commodity Futures Trading*

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[9] As the Second Circuit itself recognized, albeit in rulings earlier than its most recent one, a sweeping injunction against non-parties should be disfavored. In *Capital Ventures Int'l v. Republic of Argentina*, 282 Fed. App'x 41, 42 (2d Cir. 2008), the Circuit admonished the district court to "take care to craft attachment orders so as to avoid interrupting Argentina's regular payments to [exchange] bondholders."

Comm'n, 511 F.3d 762, 767 (7th Cir. 2007) (decision that party is in "active concert or participation" for purposes of Rule 65 "is a decision that may be made only after the person in question is given notice and an opportunity to be heard"). *See Zenith Radio*, 395 U.S. at 110 ("a nonparty with notice cannot be held in contempt until shown to be in concert or participation. It was error to enter the injunction against Hazeltine, without having made this determination in a proceeding to which Hazeltine was a party"); *Regal Knitwear*, 324 U.S. at 13 (the injunctive power is not "so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law").

In addition, even if it had convened a hearing to protect the rights of Fintech and the financial intermediary non-parties, the Second Circuit could not have defended the Injunctions. Indeed, the word "participate" in Fed. R. Civil P. 65 imposes a high standard, requiring more active culpability than mere "aiding and abetting." *Reves v. Ernst & Young*, 507 U.S. 170, 178 (1993). Yet, the conduct of the parties in the chain of payments to the Exchange Bondholders does not even approach the level of "aiding and abetting." Numerous cases hold that financial institutions such as the Trustee, clearinghouses and other financial institutions do not aid and abet customers when they do nothing more than provide their usual banking services. *See, e.g.*, *Seattle-First National Bank v. Carlstedt*, 800 F.2d 1008, 1011 n.2 (10th Cir. 1986) ("to the extent the counterclaim and amended counterclaim seek to impose aiding and abetting liability under the securities laws on SeaFirst based on routine participation in the loans to the defendants, such claims would not satisfy Rule 9(b)") (citations omitted).[10]

Similarly, the "active concert" prong of Rule 65 requires a finding that the non-party was a conspirator of the enjoined party. *See* Julia K. Schwartz, *"Super Contacts": Invoking Aiding and Abetting Jurisdiction to Hold Foreign Non-Parties in Contempt of Court*, 80 U. Chicago L. Rev. 1961, 1987 (Fall 2013) ("Aiding-and-abetting liability under Rule 65 is unlike other forms of aiding-and-abetting liability in that courts require active concert between the party and the nonparty, rather than merely substantial assistance in the wrongful act.") (citing, *inter alia*, *United Pharmaceutical Corp. v. United States*, 306 F.2d 515, 517 (1st Cir. 1983)). This standard has not been satisfied. *See* p. 30, *supra* (demonstrating that aiding and abetting standard not satisfied). The non-parties which disburse payments to the Exchange Bondholders, such as the Trustee and the Depository Trust & Clearing Corporation unquestionably are independent, arms-length actors that do not act on behalf of the Republic and are bound by contractual obligations which do not flow to the Republic. *See*, *e.g.*, *EM Ltd.*

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[10] *See also In re Amaranth Natural Gas Commodities Litig.*, 730 F.3d 170, 185 (2d Cir. 2013) ("the mere performance of routine clearing services cannot constitute the aiding and abetting of fraud under New York law") (citations omitted); *Metge v. Baehler*, 762 F.2d 621, 625 (8th Cir. 1985) (a party whose actions are routine and part of normal everyday business practices would need a higher degree of knowledge for liability as an aider and abettor to attach); *Rosner v. Bank of China*, 528 F. Supp. 2d 419, 427 (S.D.N.Y. 2007) (bank could not be held liable for aiding and abetting violation when there was "no evidence that [the bank] was doing anything more than providing its usual banking services to a customer").

v. Republic of Argentina, 865 F. Supp. 2d 415, 423 (S.D.N.Y. 2012) ("the Republic had no interest in the funds contained in the accounts . . . [it] lost control over the funds when it made payment").

Finally, under any prong of Rule 65, entities that act independently of the enjoined party cannot be bound by injunctions against that party. *Regal Knitwear,* 324 U.S. at 14. Here, the non-party banks function as "paying agents" of the Trustee, as opposed to "agents" of the Republic. *See* Indenture at § 3.5(a) ("[A]ny trustee paying agents appointed pursuant to this Indenture shall be agents solely of the Trustee, and the Republic shall have no authority over or any direct relationship with any such trustee paying agent or agents"). Thus, these non-parties cannot be deemed to be in "participation" or "active concert" with the Republic, as their duty under the Indenture flows solely to the Exchange Bondholders. *See Parker v. Ryan*, 960 F.2d 543, 546 (5th Cir. 1992) ("if a nonparty asserts an independent interest in the subject property and is not merely acting on behalf of the defendant, then rule 65(d) does not authorize jurisdiction over the party") (citing, *inter alia*, *Heyman v. Kline*, 444 F.2d 65 (2d Cir. 1971)).

CONCLUSION

For the foregoing reasons, this Court should grant the petitions for writ of certiorari filed by the Republic of Argentina and the Exchange Bondholder Group.

Respectfully submitted,

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