No. 13-990

# In the Supreme Court of the United States

REPUBLIC OF ARGENTINA,
*Petitioners*,

v.

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

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

**BRIEF OF RESPONDENTS EURO BONDHOLDERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI**

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## QUESTION PRESENTED

The Foreign Sovereign Immunities Act ("FSIA") states that foreign state property is immune from "attachment, arrest and execution" unless, among other things, it is located in the United States and used for commercial activity. 28 U.S.C. §§ 1609-1611. Nevertheless, the Second Circuit affirmed injunctions that prohibit Argentina from using its assets located outside of the United States to make payments on its euro-denominated exchange bonds, even though such payments take place outside the United States.

The question presented is:

1. Whether a district court can enter an injunction coercing a foreign sovereign into paying money damages without regard to whether payment would be made with assets that are immune from "attachment, arrest and execution" under FSIA, 28 U.S.C. §§ 1609-1611, particularly where the enjoined activity is conducted exclusively outside the United States.

## RULE 29.6 STATEMENT

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

Knighthead Capital Management, LLC is a Delaware limited liability company. There is neither a parent company to Knighthead Capital Management LLC, nor a publicly held corporation that owns 10% or more of its stock.

Redwood Capital Management, LLC is a Delaware limited liability company. There is neither a parent company to Redwood Capital Management, LLC, nor a publicly held corporation that owns 10% or more of its stock.

Perry Capital, LLC is a Delaware limited liability company. There is neither a parent company to Perry Capital, LLC, nor a publicly held corporation that owns 10% or more of its stock.

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## STATEMENT OF THE CASE

The Second Circuit erroneously affirmed injunctions that prohibit Argentina from using its sovereign assets located overseas to pay its creditors. The injunctions squarely violate the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1609-1611, which states that foreign-state property is immune from attachment, arrest and execution unless it is located in the United States and used for a commercial activity. The Second Circuit's decision is particularly troubling in regard to the payments that Argentina makes on its euro-denominated exchange bonds ("Euro Bonds"), which flow from Argentina to Germany and then either to Belgium or Luxembourg, and thus are entirely immune from attachment under the FSIA. The lower courts nonetheless affirmed unprecedented extraterritorial injunctions that upend the FSIA's carefully constructed immunity scheme.

This case presents vital questions regarding foreign sovereign immunity, the answers to which affect not only Petitioner, the Republic of Argentina, but also other foreign sovereigns, U.S. foreign relations and policy, and numerous foreign third parties that were treated by the courts below as collateral damage.[1] Indeed, in urging reversal of these injunctions, the United States told the Second Circuit that "the extraordinary intrusiveness of the [injunctions] could have adverse effects on our foreign relations and pose reciprocal concerns with respect to U.S. government assets." Pet. App. 188.

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[1] As evidenced by the amicus briefs filed by France, Mexico, Brazil, and Euroclear Bank, S.A./N.V., among others.

### *The Payment Process On The Euro Bonds*

Respondents[2] Euro Bondholders are a group of investors that hold euro-denominated bonds issued by Argentina in its 2005 and 2010 exchanges.[3] The Euro Bonds are paid in euros, and the payment stream flows through foreign entities *entirely* outside of the United States. The Euro Bonds are governed by the laws of England and Wales, and the total notional amount of Euro Bonds issued by Argentina exceeds $10 billion. The Euro Bondholders, therefore, have a substantial interest in this case and a unique perspective on the improper extraterritorial reach of the injunctions.

The record below included clear and uncontroverted evidence that the assets used to make payments on the Euro Bonds never touch the United States, and the payments on those bonds into the

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[2] The Euro Bondholders intervened in the Second Circuit as "Non-Party Intervenors," but that Court later held that intervention was improper and the Euro Bondholders lacked standing. Pet. App. 9. Those holdings were incorrect, but the Euro Bondholders do not think they warrant independent merit review under this Court's Rule 10. The Second Circuit's decision does not affect Argentina's petition because it clearly has standing. The Euro Bondholders understand that there have been discussions between other parties that intervened below and the Clerk's Office, and it was decided that these parties should file as respondents. In any event, this brief complies with the word limits for an amicus brief, and the Euro Bondholders can file as *amici* rather than respondents on the merits, if this Court so directs in the order granting the writ of certiorari.

"Respondents" herein refers only to Plaintiffs-Appellees below.

[3] The Euro Bondholders consist of Knighthead Capital Management, LLC, Redwood Capital Management, LLC, and Perry Capital, LLC (each on behalf of one or more investment funds or accounts managed or advised by it).

clearing system participants take place entirely outside the United States through foreign entities. The Bank of New York Mellon ("BNY Mellon"), the Indenture Trustee for the Euro Bonds, submitted a declaration in the district court describing the payment process. *See* SPE 623-24 ¶ 10 (Binnie Decl.). To make payments on the Euro Bonds, Argentina transfers sovereign funds held in Argentina to a euro deposit account in the name of BNY Luxembourg at Banco Central de la Republica de Argentina ("Banco Central") in Argentina. *Id.* ¶ 10. The funds are then transferred from Banco Central to "a Deutsche Bank account in Frankfurt, Germany, in the name of The Bank of New York Mellon S.A. N.V.," a Belgian entity ('BNYM Brussels'). *Id.* Next, "BNYM Brussels transfers the funds to Euroclear Bank S.A./N.V. ("Euroclear") or Clearstream Banking S.A. ("Clearstream") for distribution to its participants, who then distribute the funds to beneficial holders." *Id.* Euroclear and Clearstream are foreign clearinghouses located in Belgium and Luxembourg, respectively. *Id.* ¶ 8. The entire payment process for the Euro Bonds involves only foreign banks and financial institutions. Thus, at no time from when the funds leave Argentina to when they are paid out to the clearing system participants are those funds, which are the subject matter of the district court's injunction, "in the United States."

The chart below accurately represents the payment process for the Euro Bonds and shows that it does not touch upon the United States.

| EURO BOND PAYMENT PROCESS | |
|---|---|
| **Steps in Foreign Counties** | **Steps in the United States** |
| The Republic of Argentina | |
| Banco Central (Argentina), for BNY Luxembourg | |
| Deutsche Bank (Germany), for BNY Brussels | |
| Euroclear (Belgium) or Clearstream (Luxembourg) | |
| Clearing System Participants | |

***Proceedings Below***

In its November 21, 2012 opinion regarding the injunctions, the district court incorrectly concluded that the payment process on Argentina's exchange bonds "without question takes place in the United States." Pet. App. 134 at 10 n.2. With respect to the Euro Bonds, that conclusion is utterly without support in the record, given the undisputed facts set forth above. Indeed, for any of the performing debt that is the subject of the injunctions, the district court ignored that the only relevant "payment" on the restructured debt is Argentina's transfer of funds to the bondholders' Trustee, which takes place in Argentina.[4] Nevertheless, the district court purported to enjoin Argentina from making payments on all of its exchange bonds, including the Euro Bonds. The district court also specifically identified certain third parties subject to the injunctions, including Euroclear, Clearstream, BNY Luxembourg, and Bank of New York Mellon (London)—all of which are foreign entities outside the jurisdiction of the district court that process payments on the Euro Bonds.

The Euro Bondholders filed a motion to intervene in Argentina's appeal from the district court's November 21, 2012 order, and intervention was granted by the Second Circuit on December 6, 2012. Order, No. 12-105 [Dkt. 552] (2d Cir. Dec. 6, 2012).

On August 23, 2013, the Second Circuit affirmed the amended injunctions. Pet. App. at 2. As an initial matter, the panel held that the Euro Bondholders lacked standing because "their interests are not plausibly affected by the injunctions." *Id.* at 9. On the merits, the panel held that the injunctions do not violate the FSIA because they do not "attach arrest, or execute upon" any property of Argentina. *Id.* at 10. The panel concluded that "[a]bsent further guidance

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[4] As Argentina notes in its Petition, once Argentina pays the bondholders' Trustee in Argentina, its payment on the exchange bonds is complete and the funds become the property of the exchange bondholders. Pet. at 12. Any subsequent transfers made by the Trustee are thus transfers of bondholder property made on behalf of the *bondholders*, and in which plaintiffs have no interest.

from the Supreme Court, we remain convinced that the amended injunctions are consistent with the FSIA. *Id.* at 11.

The panel rejected the arguments raised by the Euro Bondholders and others that the injunctions improperly apply to foreign parties outside of the district court's jurisdiction and violate principles of international comity by requiring foreign parties to violate foreign law. *Id.* at 16-17. Although the panel acknowledged that "the district court misstated that … the Exchange Bond payment 'process, without question takes place in the United States'," if the Euro Bonds, in fact, are paid entirely outside of the United States (as the undisputed record below indicates), it held that the district court's error was of "no moment" because the injunctions enjoin only Argentina and third parties will have an opportunity to challenge the injunctions' extraterritorial scope if summoned to a future contempt proceeding. *Id.* at 18-19 (citation omitted).

## REASONS FOR GRANTING THE PETITION

The Second Circuit erroneously affirmed blanket injunctions that impermissibly reach immune assets of a foreign sovereign. These injunctions are directed at Argentina's sovereign reserves, which are held outside the United States and are used to satisfy Argentina's payments on its Euro Bonds—payments which *do not pass through the United States*. At a minimum as applied to these assets, the decision below is inconsistent with the language, purpose, and history of the FSIA.

The injunctions affirmed by the Second Circuit are unprecedented and improper. They:

- enjoin a foreign sovereign state from making payments outside the United States, including with funds that never touch the United States and that are beyond U.S. jurisdiction;
- threaten foreign independent financial intermediaries outside the United States with contempt if they process any Euro Bonds payments made by Argentina, despite the fact that these entities are bound by contract and by the laws of their own countries to do just that; and
- take the Euro Bondholders as financial hostages—ensuring that they will not get their due payments on the Euro Bonds, unless and until Argentina agrees to Respondents' unreasonable (and illegal) demands.

This attempt to control *foreign* third parties, operating under *foreign law* obligations, transacting with *foreign* immune assets that *do not touch the United States* violates the FSIA, the presumption against extraterritoriality, and the most basic norms of international comity. It should not be tolerated.

As Argentina, the United States, and numerous financial institutions have repeatedly warned, the decision below—if left unreviewed and uncorrected—would spur (and already has spurred) widespread litigation, international tension, and financial unrest. Moreover, the unprecedented extraterritorial reach of the injunctions portends grave consequences for independent third-party financial institutions and the exchange bondholders. The Euro Bondholders thus urge that this Court's review is imperative.[5]

## I. The Second Circuit's Unprecedented Expansion of the FSIA to Reach Foreign Sovereign Assets Located Abroad and Foreign Third Parties Warrants Review

1. For the reasons discussed in the Petition, the FSIA prohibits the injunctions entered in this case. The FSIA provides that a foreign sovereign's property is "immune from attachment, arrest and execution." 28 USC §§ 1609, 1610(a), 1610(d). The FSIA's presumption of immunity from such enforcement contains exceptions for foreign state property that is (1) located "in the United States," (2) "used for a commercial activity in the United States," and (3) meets one of seven other requirements, 28 U.S.C. § 1610(a). Sovereign property located *outside* the United States unquestionably falls outside the court's enforcement authority. *See, e.g., Walters v. Indus. & Comm. Bank of China, Ltd.*, 651 F.3d 280, 289-90 (2d Cir. 2011) (noting that "special protection [is] afforded to the property of a foreign sovereign" under the FSIA because the judicial seizure of sovereign property is viewed as a greater affront to sovereignty than the exercise of jurisdiction over a state by itself).

The decision below disregards the text, purpose, and intent of the FSIA. Respondents do not dispute that the property that the injunctions are directed at is located *outside the United States*—and is thus clearly

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[5] This Court also should grant a writ of certiorari to resolve the questions raised in the petition filed in *Exchange Bondholder Group v. NML Capital, Ltd. et al.*, No. 13-991.

immune under the FSIA.[6] The courts below specifically identified the immune assets that the injunctions target—Argentina's foreign currency reserves. Yet, in utter disregard for the statute's language and intent, the Court unapologetically went on to affirm the injunctions that coerce Argentina into paying Respondents with those same immune assets. This illegal affront on Argentina's sovereign property alone merits review.

Including the Euro Bonds within the scope of the injunctions further underscores the Second Circuit's deliberate disregard of the FSIA and amplifies the need for this Court's review. Indeed, there could hardly be a situation more perfectly fitting within the FSIA's express prohibition of judicial seizure over property located outside the United States than the lower courts' attempt to enjoin payments on the Euro Bonds: payments coming from property that is (i) owned by a foreign Sovereign, (ii) located outside the United States, (iii) used to pay non-USD denominated debt (iv) administered by foreign financial institutions located entirely outside the United States, and (v) governed by foreign law.

It is undisputed that the payment process for the Euro Bonds does not pass through the United States. Payments on the Euro Bonds flow exclusively through foreign entities in Argentina, Germany, and Belgium or

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[6] *See, e.g.*, *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1131-32 (9th Cir. 2010) (holding that property rights were immune under the FSIA because they were not located in the United States); *Autotech Techs. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 750 (7th Cir. 2007) (holding that the FSIA does not authorize execution against a sovereign's property "wherever that property is located around the world.").

Luxembourg. It is also undisputed that the financial intermediaries processing the payments are based outside the United States, are subject to the laws of their own countries, and are not parties to the 1994 Fiscal Agency Agreement ("FAA") governing Respondents' bonds. It likewise is undisputed that Argentina owes a legitimate debt to the Euro Bondholders and its payment to the Euro Bondholders is not only lawful, but contractually required under the Indenture.

Ignoring all of this, the District Court issued the injunctions because in its incorrect view—and in the face of the uncontroverted evidence concerning how the Euro Bonds are actually paid—the payment on the bonds "takes place in the United States." The court made abundantly clear that these injunctions cover any payments on the Euro Bonds, and that foreign financial intermediaries could be held in contempt for aiding and abetting Argentina's violation if they make due payments to the Euro Bondholders.

The Second Circuit acknowledged the district court's factual error, noting that the "misstated that … the Exchange Bond payment 'process, without question takes place in the United States.'" Pet. App. 18 (citation omitted). Yet, the Court waved off the grave FSIA and extraterritorial concerns as questions for another day, reasoning that those could be raised at a future contempt hearing. *Id.* at 19. The panel willfully ignored the fact, however, that third party financial institutions that process payments on Argentina's exchange bonds will not risk contempt by transferring the payments, thus endangering over $20 billion of exchange bonds.

Courts cannot merely choose to turn a blind eye to such fundamental defects and the express will of Congress, promising only to deal with them down the road. Whatever patchwork of quasi-legal and practical justifications the courts below may have cobbled together to enjoin Argentina from paying its exchange bonds, they simply cannot escape the FSIA's direct and express prohibition of enforcement against foreign assets. This Court's review is needed to correct these grave mistakes.

2. The extraterritorial overreach of the injunctions is directly analogous to the overreach of the discovery orders that this Court is currently considering in *Republic of Argentina v. NML Capital, Ltd.*, Case No. 12-842. Both cases concern district courts issuing orders that directly target the assets of a foreign sovereign outside the United States. Those orders entirely disregard the FSIA's prohibition of enforcement over foreign property located abroad.

As the United States stated in its brief in support of reversing the discovery orders, the FSIA's "exclusive focus on property located *within* the United States simply confirms the fundamental proposition that it would be ***unthinkable*** for a U.S. court, acting pursuant to carefully crafted exceptions to immunity under the FSIA, to presume to order the attachment of or execution against property of a foreign sovereign *abroad*." U.S. Discovery Br. at 25 (emphasis added). That conclusion applies with equal force here. Indeed, along with urging the invalidity of the discovery subpoenas, the Government specifically noted its disagreement with the Second Circuit's opinion in *this* case—explaining that the court disregarded the U.S. position and recommendations, and issued an opinion "inconsistent with the FSIA and the well-established understanding of the *pari passu* clause that appeared in the bonds." U.S. Discovery Br. at 6 n.1.

In the discovery case, the United States opposed Respondents' attempts to reach Argentina's sovereign assets below, filed an amicus brief in support of certiorari to this Court, and recently filed its merits-stage amicus brief requesting a reversal of the Second Circuit's opinion. The Government explained that, because enjoining foreign third parties who deal with foreign immune assets by definition is not tailored to aid the court in exercising its limited execution authority provided by the FSIA, such orders simply cannot be allowed to stand. U.S. Discovery Br. at 31-33. After all, "immunity [from attachment] [] inheres in the property itself," and is equally violated where, as in that case, those assets are "in the possession of third parties." *Id*. at 32.

The same conclusion is mandated here, where the courts used the injunctions as a "weapon[] of coercion," through which they could hold innocent third parties hostage and inflict financial pain and legal distress on them until and unless Argentina relinquishes its sovereign rights. *See Nat'l Fed'n of Indep. Business v. Sebelius*, 132 S. Ct. 2566, 2603 (2012) (quoting *Chas. C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 586 (1937)). Such a "deliberate design choice, made in light of the fact that the injunction[s] cannot reach [their] primary target, to induce third parties to pressure Argentina to comply"[7] improperly attempts to circumvent the careful limits on execution established by Congress.

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[7] Mark C. Weidemaier & Anna Gelpern, *Injunctions in Sovereign Debt Litigation* 7, Yale J. on Reg., UNC Legal Studies

In utter disregard for the FSIA's purpose, the Second Circuit unapologetically affirmed injunctions that coerce Argentina into paying Respondents with immune assets, specifically its foreign reserves. Lest there be any doubt about the intent of the injunctions, Respondents have pointed directly to Argentina's foreign reserves when arguing it has the ability to pay. Such an end-run around the FSIA constitutes a "breathtaking assertion of extraterritorial jurisdiction." *Autotech*, 499 F.3d at 750. If there were any doubts concerning these questions, the well-established presumption against extraterritoriality should resolve them in favor of reviewing—and reversing—the Second Circuit's opinion. *See Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1665 (2013) ("nothing in the text of the statute suggests that Congress intended causes of action recognized under it to have extraterritorial reach."). This Court has regularly recognized that "'legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (quoting *Foley Bros, Inc. v. Filardo*, 336 U.S. 281, 285 (1949)). Indeed, "applying the usual presumption against extraterritoriality is even more warranted in this context [], because extending the reach of federal law here would interfere with the sovereignty of foreign nations." Brief of the Clearing House as *Amicus Curiae* in *Republic of Argentina v. NML Capital, Ltd.*, No. 12-842 ("Clearing House Discovery Br.") at 31; *see also Kiobel*, 133 S. Ct. at 1667.

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Research, Working Paper No. 2330914, available at http://bit.ly/1h01Isc (draft dated Nov. 15, 2013).

The injunctions here relate to foreign sovereign assets outside the United States—assets that all agree are immune from attachment. They also purport to bind foreign parties over which the courts lack personal jurisdiction. *See In re Estate of Ferdinand Marcos Human Rights Litig.*, 94 F.3d 539, 545 (9th Cir. 1996) ("an injunction against [the target] in the absence of personal jurisdiction over it would be futile, as the court would be powerless to enforce its injunction"); *see also Canterbury Belts, Ltd. v. Lane Walker Rudkin, Ltd.*, 869 F.2d 34, 40 (2d Cir. 1989) ("[a] district court cannot exercise personal jurisdiction over a nonparty to a litigation, on the basis that the nonparty is acting 'in active concert or participation,' within the meaning of Fed. R. Civ. P. 65(d), with a party who is subject to an injunction, unless personal jurisdiction is established over the nonparty."). Finally, they reach conduct that is legal—and indeed mandated—under the laws of the foreign countries where the foreign third party entities reside and operate. As is the case with the related discovery dispute, "compliance with these injunctions exposes the [foreign third parties] to potential civil [] liability under foreign law." Clearing House Discovery Br. at 31.

"Imposing those types of extraterritorial burdens on nonparties does and should require a clear, affirmative indication from Congress." *Id. See also Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010) ("unless there is the affirmative intention of the Congress clearly expressed to give a statute extraterritorial effect, we must presume it is primarily concerned with domestic conditions.") Congress has given no such indication here. *Id.*

## II. The Decision Below Threatens a Torrent of Foreign Litigation and International Financial Disruption

As explained in the Petition and the briefs filed by the United States below, this case is extraordinarily important to foreign sovereigns, the capital markets, and U.S. foreign relations. *See* Pet. App. 169–71 (U.S. Br.) (the rulings below raise issues of "vital public policy and legal importance … beyond the particular facts of this case"); *see also* U.S. Discovery Br. at 20, 26, 31. It also implicates the interests of independent third parties, including the foreign financial intermediaries and the Euro Bondholders, who are currently being held hostage by the injunctions until and unless Argentina yields to the courts' pressure. If left uncorrected, the decision below would inevitably lead to an onslaught of foreign litigation and inconsistent judgments. It would also undermine the process of voluntary restructuring and would cause future debt holders to refuse debt restructurings, leading to additional litigation and placing the stability of sovereigns, and the world economy, in jeopardy.

### A. If Allowed to Stand, the Decision Below Would Spur Foreign Litigation

If this Court allows the decision below to stand unreviewed, the foreign financial intermediaries that process payments on the Euro Bonds will face a torrent of litigation, because they are bound under contract and under foreign law to pass through payments they receive from Argentina to the rightful owners of those funds under the governing law. For example, Belgium and Luxembourg[8] have enacted legislation designed to respond to this precise scenario, which expressly declares the injunctions unenforceable against several foreign parties.[9] Foreign litigation would in turn result in a morass of inconsistent judgments, under which foreign courts compel the financial third parties to fulfill their contractual responsibilities, while the injunctions purport to require them to do the opposite. It would become impossible for these parties to comply simultaneously with the U.S. injunctions and with their contractual obligations under the governing foreign laws.

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[8] *See* European Commission, EU Clearing and Settlement Legal Certainty Group Questionnaire Horizontal Answers 294 (Apr 24, 2006) ("In accordance with Article 15 of the [Luxembourg] Securities Act, neither an attachment of, nor an enforcement against, nor a conservatory measure with respect to accounts to which securities accounts in the securities settlement system are booked are permitted"). *See also* Article 9 of the Belgian Act of April 28, 1999 implementing the EU Settlement Finality Directive as amended by Article 15 of the Law of November 19, 2004; European Commission, EU Clearing and Settlement Legal Certainty Group Questionnaire Horizontal Answers 294 (Apr 24, 2006)).

[9] Indeed, the Euro Bondholders already have been forced to bring a suit in Belgium against Euroclear and the Brussels branch of the Bank of New York. Although the Second Circuit held that the injunctions do not "directly enjoin" the payment system participants (Pet. App. 17), Euroclear and BNY Brussels have refused to agree to continue transferring Argentina's payments if the injunctions are affirmed, out of fear they will be held in contempt. Thus, the injunctions already have caused substantial confusion and disruption in the international bond markets, further warranting this Court's review.

### B. The Decision Below Violates International Comity And May Harm The Broader Interests Of The United States

It is well established that "a state may not require a person to do an act in another state that is prohibited by the law of that state." *Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 60 (2d Cir. 2004). "[N]or can the person be required to refrain from an act that is required," in a foreign nation by that country's laws. *Reebok Int'l Ltd. v. McLaughlin*, 49 F.3d 1387, 1392 (9th Cir. 1995). The injunctions should therefore be rejected as an impermissible "attempt by an American court to compel a foreign person to violate the laws of a different foreign sovereign on that sovereign's own territory." *In re Sealed Case*, 825 F.2d 494, 498 (D.C. Cir. 1987).

The United States has stated that "[u]ndermining international comity in this way is exactly the kind of harm that FSIA execution immunity is intended to prevent." U.S. Discovery Brief at 19. Such violation of international comity has the very real potential of causing friction between the U.S. and foreign jurisdictions. *See, e.g., Vanity Fair Mills, Inc. v. T. Eaton Co.*, 234 F.2d 633, 647 (2d Cir. 1956) (enjoining activities on foreign soil "should be exercised with great reluctance when it [would] be difficult to secure compliance … or when the exercise of such power is fraught with possibilities of discord and conflict with the authorities of another country."); *In re "Agent Orange" Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 45 (E.D.N.Y. 2005) ("[r]equests for extraterritorial injunctions often raise serious concerns for sovereignty and enforceability which compel denial.").

As many "foreign states base their sovereign immunity decisions on reciprocity," a U.S. court's decision to exercise jurisdiction over a foreign state can "subject the United States to suits abroad" in like circumstances. *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 841 (D.C. Cir. 1984); *see also Nat'l City Bank v. Republic of China*, 348 U.S. 356, 362 (1955) (one basis for foreign sovereign immunity is "reciprocal self-interest"). As the United States recognized in the discovery case, "[t]he United States maintains extensive overseas holdings in support of its worldwide diplomatic, security, and law enforcement missions, and engages in widespread financial transactions (both in the United States and internationally) in connection with those and other activities" and the decision below "could result in less favorable treatment for the United States in various respects when sued abroad." U.S. Discovery Br. at 20.

Indeed, the decision below could inflict significant damage to U.S. foreign policy and international relations more generally. Congress explicitly recognized that "judicial seizure" of a foreign state's property may "be regarded as 'an affront to its dignity and may ... affect our relations with it.'" *Republic of Philippines v. Pimentel*, 553 U.S. 851, 866 (2008) (quoting *Republic of Mexico v. Hoffman*, 324 U.S. 30, 35–36 (1945)). Such perceived affronts, in turn, "may result over the long term in reduced cooperation in a variety of areas" (U.S. Discovery Br. at 22) and may cause foreign regulators to respond.[10]

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[10] *See* Clearing House Discovery Br. at 14-15 (discussing the effects of the recent Second Circuit opinion in *Tire Eng'g & Distrib. L.L.C. v. Bank of China Ltd.*, 740 F.3d 108, 112 (2d Cir.

International relations among foreign nations also hang in the balance. Litigation by plaintiffs is already contributing to chaos abroad. For instance, Elliott Associates caused an international incident in October 2012 when it seized Argentina's flagship naval frigate that was docked in Ghana. This resulted in a standoff at gunpoint when Ghanaian officials attempted to move the ship. The International Tribunal for the Law of Sea was forced to intervene, ruling on December 16 that Ghana was required to "unconditionally release" the vessel. *See* Jude Webber, *Argentina Seeks To Free Bond-Row Ship*, Financial Times, Dec. 16, 2012.

These catastrophic consequences are anything but hypothetical (as the Second Circuit dismissively characterized them). This Court's review is thus warranted to prevent further damage.

### C. The Decision Below Would Also Disrupt the Process of Voluntary Debt Restructuring

The United States, the International Monetary Fund (the "IMF"), and foreign countries have all warned in unison that the "ratable payments" injunctions issued by the district court threaten the international financial system by making it impossible for sovereigns to restructure their debt.

Needless to say, there is no international law or tribunal that can accomplish in the sovereign realm what bankruptcy law does for individual and corporate creditors in the United States and many other countries—an orderly structure for restructuring debt obligations that can no longer be satisfied in full, but

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2014), which prompted immediate response by Jordanian and UAE regulators).

can be satisfied in part. In today's interconnected world, the health of the world economy depends upon the ability of sovereign nations to negotiate a restructuring of sovereign debt. And when a sovereign nation faces a debt crisis and might otherwise default, the principal means by which the sovereign and its creditors resolve the crisis is consensual restructuring through exchange offers. Restructuring allows the sovereign to reduce its debt burden and attempt to revive its economy, which ultimately is in the interests of the sovereign nation, its citizens, *and the creditors*. Responsible creditors understand that something is better than nothing, and that forcing a distressed nation into economic chaos and collapse produces nothing but suffering.

The decisions below will obstruct responsible restructuring by producing a powerful incentive for holdouts to free ride on the sacrifices accepted by other creditors. According to the Second Circuit, holdout creditors that did not participate in Argentina's restructurings are entitled to be paid 100% of what they are owed, even though the 93% of holders exchanged their securities and agreed to substantial reductions of the value of their holdings. The Second Circuit's decision thus creates a perverse incentive (or, in game theory parlance, a "prisoner's dilemma"), in which individual creditors posture to become one of the few holdouts who will ultimately be paid 100%—knowing all along that if too many creditors hold out, then all of them (and the world economy) will be losers. And the multi-jurisdictional legal chaos produced by this case exacerbates the problem, by guaranteeing that any creditors that *do* pursue the responsible course will be punished with injunctions and endless litigation.

As the United States has urged, the incentive scheme produced by these decisions will make voluntary restructuring "substantially more difficult, if not impossible," and will threaten to delay a process where swift action is essential to prevent crises from spreading. Pet. App. 182 (U.S. Br.). If sovereign nations in financial distress are unable to restructure their debt, they will be locked out of the worldwide capital markets, producing utter chaos in the international financial community. As recent years have shown, the list of nations facing this type of crisis has only grown. The list already includes Greece, Ireland, Portugal, Spain, Mexico, Japan, Grenada, Cyprus, Peru, and Nicaragua, among others. These countries—and their citizens—would face unprecedented economic catastrophes if they defaulted and were unable to restructure their debt or find investors to provide the necessary capital to sustain their economies. Moreover, given the intertwined nature of the global economy, such a result likely would lead to chaos in worldwide financial markets and negatively affect even stable nations.

If left uncorrected, the decision below also threatens to wreak financial havoc on any third-party financial institutions, like the Euro Bondholders, which participated in, or purchased debt that was issued through, Argentina's exchanges. Both the IMF and the United States Department of Treasury support and encourage bondholders to participate in sovereign debt restructurings. Here, the exchanges were presented as the only way for creditors to continue receiving payments from Argentina, even after taking a substantial reduction in the value of their holdings, and Argentina has faithfully paid its exchange bonds since 2005. The Second Circuit's decision essentially pulled the rug out from under the exchange bondholders, imposing an understanding of the exchanges that no one shared at the time. Argentina has "declared publicly that it has no intention of ever paying holdout bondholders like NML"—ensuring, if the injunctions were to remain in effect, that the Bondholders would likewise receive no further payments. Alternatively, if Argentina complied with the courts' extortion and paid Respondents, it would most certainly default on $24 billion of exchange bond debt, again resulting in all exchange bondholders (including the Euro Bondholders) facing massive losses.

This Court's review is thus not only necessary, but also pressing.

* * *

The lower courts' creative attempt to circumvent the FSIA's immunity over foreign sovereign assets located outside the United States—and to *create* an unprecedented right to constrain the lawful conduct of foreign third parties operating abroad as a means of coercing said sovereign to relinquish its assets—flies in the face of the statute's incontrovertible text, purpose, and history. It also upends the legitimate expectations of numerous foreign countries and institutions, threatens the financial ruin of many innocent parties (including innocent citizens of affected countries), and dramatically interferes with U.S. foreign relations and policy. Whatever enforcement interest there might be in this context, it is plainly insufficient to justify such a drastic departure from law, policy, fairness, and common sense.

## CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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