No. 13-990

IN THE

Supreme Court of the United States

REPUBLIC OF ARGENTINA,

Petitioner,

v.

NML CAPITAL LTD., *et al.*,

Respondents.

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

BRIEF OF FORMER FEDERAL JUDGES AS *AMICI CURIAE* IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI OF THE REPUBLIC OF ARGENTINA

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With the Court's leave, former federal judges Alfred J. Lechner, Jr., Michael W. McConnell, Paul G. Cassell, Michael Chertoff, Mark Filip, and Michael B. Mukasey, submit this brief as *amici curiae* opposing the Republic of Argentina's ("Argentina") petition for writ of certiorari.[1]

INTEREST OF *AMICI CURIAE*

Alfred J. Lechner, Jr. was a judge of the United States District Court for the District of New Jersey from 1986 to 2001. Prior to that, he was a superior court judge for the State of New Jersey from 1984 to 1986. Currently, Mr. Lechner is a partner at White & Case LLP in New York.

Michael W. McConnell was a judge of the United States Court of Appeals for the Tenth Circuit from 2002 to 2009. Prior to that, he was an Assistant Solicitor General of the United States from 1983 to 1985, a professor of law at the University of Chicago from 1985 to 1996, and professor of law at the S.J. Quinney College of Law at the University of Utah from 1997 to 2009. Since 2009, Mr. McConnell has been Director of the Constitutional Law Center at Stanford Law School as well as a Senior Fellow at the Hoover Institution.

Paul G. Cassell was a judge of the United States District Court for the District of Utah from 2002 to 2009.

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1. Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. This brief was entirely paid for by *amici* and their counsel. Pursuant to Supreme Court Rule 37.2, *amici curiae* state that Petitioner and Respondents, upon timely receipt of *amici*'s intent to file this brief, have consented to its filing.

Prior to that, he was an Associate Attorney General of the United States from 1986 to 1988 and an Assistant United States Attorney for the Eastern District of Virginia from 1988 to 1991. From 1992 to 2002 and 2007 to the present, Mr. Cassell was a professor of law at the S.J. Quinney College of Law at the University of Utah.

Michael Chertoff was a judge of the United States Court of Appeals for the Third Circuit from 2003 to 2005. Prior to that, he was the United States Attorney for the District of New Jersey from 1990 to 1994, a partner in the New Jersey office of Latham & Watkins LLP from 1994 to 2001, and an Assistant Attorney General of the United States from 2001 to 2003. From 2005 to 2009, Mr. Chertoff served as Secretary of the Department of Homeland Security. Since 2009, he has been a senior of counsel at Covington & Burling LLP in Washington, D.C. and co-founder and chairman of the Chertoff Group.[2]

Mark Filip was a judge of the United States District Court for the Northern District of Illinois from 2004 to 2008. Prior to that, he was an Assistant United States Attorney for the Northern District of Illinois from 1995 to 1999 and a partner in the Chicago office of Skadden, Arps, Slate, Meagher & Flom from 1999 to 2004. From 2008 to 2009, he served as Deputy Attorney General of the United States and also briefly served as acting Attorney General of the United States prior to the confirmation of Attorney General Eric H. Holder, Jr. Since 2009, Mr. Filip has been a partner at Kirland & Ellis LLP in Chicago.

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2. Respondent NML Capital, Ltd.'s parent company, Elliott Management Corporation, is a client of Mr. Chertoff's law firm and a client of the Chertoff Group.

Michael B. Mukasey was a judge of the United States District Court for the Southern District of New York from 1987 to 2006; he served as Chief Judge of that court from 2000 to 2006. From 2007 to 2009, Mr. Mukasey served as Attorney General of the United States. Since 2009, he has been a partner at Debevoise & Plimpton LLP in New York.

Collectively, *amici curiae* have presided over hundreds of federal trials, and handled thousands of cases, civil and criminal, and heard numerous appeals. They share a continuing interest in the welfare of the federal court system, and in the efficient and effective use of its resources. They offer their collective experience, in particular their perspective as lower court judges who have dealt with recalcitrant parties who seek to undermine the authority of judicial proceedings by refusing to comply with court determinations.

SUMMARY OF THE ARGUMENT

During oral argument in the Second Circuit in February 2013, Argentina's lawyer in this matter had the following exchange with a member of the panel: "So the answer is you will not obey any order but the one you propose?" U.S. Circuit Judge Reena Raggi asked The Republic of Argentina's ("Argentina") counsel, Jonathan I. Blackman. "We would not voluntarily obey such an order," Mr. Blackman responded. Hernan Lorenzino, Argentina's minister of economy, and Amado Boudou, its Vice President, sat at counsel table as Argentina's lawyer gave that answer. This incident crystallized what was already apparent: Argentina will defy the rulings of this Court and all other American courts if it finds compliance burdensome or inconvenient.

Yet, today Argentina clamors for the attention of this Court to hear its appeal. This request is self-serving in the most fundamental sense because Argentina has already determined that it can be the only prevailing party, and deeply hypocritical insofar as Argentina professes concern for the welfare of international relations. Granting the petition would needlessly drain judicial resources. Argentina has asked the Court to decide the legal questions in this case but has said publicly that it will comply only if this Court rules in its favor. In so doing, Argentina has put itself in the position of a fugitive from justice who eludes law enforcement authorities while seeking to press an appeal. As described below, the Court has long held that it will not hear such appeals.

The Court should not grant certiorari. At its core, this is a simple case: Argentina waived objection and agreed to submit to the jurisdiction of United States Courts; it promised the holders of the bonds to repay them; and now it refuses to do both. The Court should not dignify this case with its time.

ARGUMENT

I. BY REFUSING TO COMPLY WITH COURT ORDERS, ARGENTINA HAS ACTED LIKE A FUGITIVE AND THEREFORE SHOULD BE DISALLOWED FROM USING ANY FURTHER RESOURCES OF THE UNITED STATES COURTS UNDER THE FUGITIVE DISENTITLEMENT DOCTRINE

Argentina does not, and cannot, contest the jurisdiction of United States courts to adjudicate this case; it agreed

explicitly to the jurisdiction of those courts. Nevertheless, it has demonstrated that it will make every effort to evade any adverse rulings issued by American courts, even as it attempts to use the very same court system to appeal those rulings. Argentina is behaving like a fugitive who appeals his conviction while simultaneously refusing to submit to the courts' authority. The Court has unequivocally stated—in over a century of precedent—that courts need not entertain appeals of fugitives from justice. If courts will refuse to hear even criminal direct appeals due to a defendant's refusal to submit to judicial authority, then *a fortiori*, discretionary Supreme Court review in a civil case—which is granted in only a tiny percentage of cases in which it is sought—should be withheld. This is especially true for a party like Argentina which has already submitted voluntarily to the jurisdiction of the federal courts but has nevertheless stated explicitly and publicly its intention to defy their rulings.

This Court's "fugitive disentitlement doctrine" states that the Court will not hear cases in which a party exhibits such fugitive behavior, and generally provides that "the fugitive from justice may not seek relief from the judicial system whose authority he or she evades." Martha B. Stolley, "Sword or Shield: Due Process and the Fugitive Disentitlement Doctrine," *Supreme Court Review* 752 (1997). The Court first articulated this principle in 1876, in an opinion in which Chief Justice Waite wrote for a unanimous Court that "[i]t is clearly within our discretion to refuse to hear a criminal case in error, unless the convicted party, suing out the writ, is where he can be made to respond to any judgment we may render." *Smith v. United States*, 94 U.S. 97, 97 (1876). Chief Justice Waite explained that

> If we affirm the judgment, [Smith] is not likely to appear to submit to his sentence. If we reverse it and order a new trial, he will appear or not, as he may consider most for his interest. Under such circumstances, we are not inclined to hear and decide what may prove to be only a moot case.

Id. The Court has gone on to reiterate its concern that a judgment adverse to the fugitive-appellant would not be enforceable against him. *See Bonahan v. Nebraska*, 125 U.S. 692, 8 S. Ct. 1390 (1887) (Waite, C.J.); *Eisler v. United States*, 338 U.S. 189, 69 S. Ct. 1453 (1949)). Similarly here, Argentina will comply with the Court's ruling only if the Court vacates the judgment below, so the Court should not waste time on "what may prove to be a moot case." *Id.*

More recently, the Court further clarified the fugitive disentitlement doctrine in *Molinaro v. New Jersey*, 396 U.S. 365, 366, 90 S. Ct. 498 (1970) (per curiam), where the Court stated, "No persuasive reason exists why this Court should proceed to adjudicate the merits of [this] case. . . . While . . . an escape does not strip the case of its character as an adjudicable case or controversy, we believe it disentitles the defendant to call upon the resources of the Court for determination of his claims."

In 2000, Congress, by statute, extended the fugitive disentitlement doctrine to civil cases of forfeiture related to criminal cases where the defendant is a fugitive who is aware that a warrant has issued. 28 U.S.C. § 2466. The doctrine, however, reflects the inherent authority of a court to protect the integrity of its jurisdiction, and is applied in criminal cases without Congressional authorization.

The rationale underlying the fugitive disentitlement doctrine certainly applies here: a party that comes to court unwilling to accept any but a favorable outcome should not be heard. Indeed, granting discretionary review to a party that has already vowed to disobey any adverse order might embolden future litigants to defy court orders. Alternatively, and at least as harmfully, it could encourage the view that contumacious behavior by a state actor will be suffered more tolerantly than the same behavior by an ordinary litigant. Further, unlike a direct criminal appeal with review as of right by statute or court rule,[3] Argentina is not entitled to review.

II. ARGENTINA HAS REPEATEDLY AND CONSISTENTLY DEMONSTRATED THAT IT HAS NO INTENTION OF COMPLYING WITH UNITED STATES COURTS' ORDERS

Argentina's proclamation in open court that it will defy court orders justified the Second Circuit's observation that Argentina is a "uniquely recalcitrant debtor." *NML Capital Ltd. v. Republic of Argentina*, 727 F.3d 230, 247 (2d Cir. 2013). Argentina has publicly and repeatedly stated that it would not comply with court orders in this case and others. Kurt Orzeck, "Argentina Asks High Court to Overturn $1.4B Debt Order," *Law360* (February 18, 2014). The law "closes the door of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief." *Motorola Credit Corp. v.*

3. "[T]oday virtually every state recognizes a right to appeal in 'significant criminal cases,' premised upon either a statute or a court rule." James E. Lobsenz, A Constitutional Right To An Appeal: Guarding Against Unacceptable Risks of Erroneous Conviction, 8 Univ. of Puget Sound L. Rev. 375, 376 (1985).

Uzan, 561 F.3d 123, 129 (2d Cir. 2009) (citation omitted). Because Argentina has shown bad faith in this matter by refusing to accept any but a favorable outcome, the Court should close its door and deny certiorari.

The district court, in its decision to vacate a previously issued stay pending appeal, recited a long litany of instances in which high-ranking Argentine officials declared that despite rulings issued by United States courts, they would never pay the holders of the original FAA bonds, including statements made by President Cristina Fernandez de Kirchner and Minister of Economy Hernan Lorenzino. *See* Opinion of U.S. District Judge Thomas P. Griesa, dated Nov. 21, 2012, at 2–4. Judge Griesa warned Argentina at a November 9, 2012 conference that violation of the court's orders would "represent the worst kind of irresponsibility in dealing with the judiciary." *Id.* Judge Griesa noted that "an extraordinary circumstance arises from continuous declarations by the President of Argentina and cabinet officers, that Argentina will not honor or carry out the current rulings of the District Court and Court of Appeals in the litigation to which Argentina is a party." *Id.* at 4. Despite Judge Griesa's cautions in November of 2012, Argentina continues to demonstrate its intent to defy American court orders.

On August 28, 2013, President Cristina Fernandez de Kirchner of Argentina noted in a speech on national television in that country that five days earlier, the United States Court of Appeals for the Second Circuit had upheld an injunction that compelled Argentina to make payments to holders of bonds issued before 2001 under Fiscal Agency Agreements ("FAA"), in equal proportion to any payments made to bond-holders who participated in

bond restructuring programs held in 2005 and 2010; those programs had made to the bondholders the proverbial offer they couldn't refuse: exchange their bonds for new bonds worth a fraction of the value of the originals, with the understanding that those who refused would not be paid at all.[4] She criticized the Second Circuit's ruling as "unfair" and said that

> [Argentina] cannot condone having the sword of Damocles hanging over our neck [to] say that at any moment someone will make a decision that the 2005 and 2010 exchanges will collapse, that our creditors will not pay and that our country will go back to 2001 levels. This is the only thing that we will not allow, at least as long as I am President.

She then announced that her administration would open exchanges so that only the bonds that had been exchanged could be paid in Argentina "to avoid potential embargoes that the funds could suffer," a clear statement of Argentina's intent to circumvent and defy the court-ordered injunction.[5]

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4. Approximately 93% of bondholders accepted the terms—including the drastic reduction in the value of the notes—of the 2005 and 2010 restructurings because the prospectuses of the restructuring stated in no uncertain terms that holdouts would not be paid. To date, Argentina has not made a single payment to any of the holdout bondholders.

5. Argentina also refused for several years to honor its obligations as to more than $700 million in arbitration awards rendered by the World Bank's International Centre for Settlement of Investment Disputes (ICSID) in favor of five companies, including CMS Energy, an American natural gas company. Argentina

Argentina has cast itself in the role of fugitive throughout the proceedings in the lower courts in this case, and continues to do so today. Even as Argentina's lawyers press the courts to consider arguments that it should not be held to the terms of the FAA, its attorney proclaims in open court that it will not abide by any adverse rulings and its president announces a scheme on national television to make an end-run around the injunctions of the lower courts—by paying restructured bondholders in Argentina so as to avoid the jurisdiction of U.S. courts. Granting such a party access to court demeans the court's processes and wastes its resources. As in *Molinaro*, "[n]o persuasive reason exists why this Court should proceed to adjudicate the merits of [this] case." 396 U.S. at 366.

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participated in the arbitration process in all of its cases in front of the ICSID and had won the large majority of them, but refused to pay when it lost. "Come and Get Me: Argentina Is Putting International Arbitration To The Test," *The Economist* (February 18, 2012). In October 2013, Argentina finally agreed to pay, but only after the companies agreed to a 25% or $17 million reduction in their awards, and only after the United States government blocked loans to Argentina from the World Bank and other multinational lenders. Ken Parks, "Argentina Reaches $677M Investment Dispute Settlement – Government," *The Wall Street Journal* (October 18, 2013).

CONCLUSION

For the foregoing reasons, and for those set forth in the Opposition to the Petition, the Court should deny the petition for a writ of certiorari.

Dated: New York, New York
May 7, 2014

Respectfully submitted,

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