

No. 13-991

IN THE
Supreme Court of the United States

EXCHANGE BONDHOLDER GROUP,

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 IN OPPOSITION

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QUESTIONS PRESENTED

The court of appeals affirmed an injunction requiring the Republic of Argentina—the defendant in the underlying suit—to perform its contractual obligation to “rank” its contractual “payment obligations” to respondents “at least equally” with its “payment obligations” under later-issued bonds. The court of appeals held that petitioner Exchange Bondholder Group (“EBG”) lacks standing to challenge the injunction on appeal because it is not a party to the case and is not bound by the injunction.

The questions presented are:

1. Whether the court of appeals correctly determined that nonparty EBG lacks appellate standing to challenge an injunction requiring specific performance by Argentina of its contractual commitments to others, such that EBG cannot seek review of any other issue in this Court.

2. If EBG were to establish that it has appellate standing:

a. Whether the injunction imposed below requiring specific performance of a contract is within the district court’s historical equitable powers and wide remedial discretion.

b. Whether the injunction requiring specific performance by Argentina of its contractual obligations to respondents violated nonparty EBG’s purported substantive-due-process rights or constituted a judicial taking of EBG members’ contractual rights to repayment, when the courts below found that Argentina is fully capable of satisfying its payment obligations to both EBG members and respondents, and all EBG members were on notice that a court might

reach the very result now alleged to constitute a judicial taking.

RULE 29.6 STATEMENT

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

NML Capital, Ltd. is not publicly traded and has no corporate parent, and no publicly held corporation owns 10% or more of its stock.

Olifant Fund, Ltd. is not publicly traded; its parent corporation is ABIL, Ltd., and no publicly held corporation owns 10% or more of its stock.

Pablo Alberto Varela, Lila Ines Burgueno, Mirta Susana Dieguez, Maria Evangelina Carballo, Leandro Daniel Pomilio, Susana Aquerreta, Maria Elena Corral, Teresa Munoz de Corral, Norma Elsa Lavorato, Carmen Irma Lavorato, Cesar Ruben Vazquez, Norma Haydee Gines, and Marta Azucena Vazquez are not corporations.

Aurelius Capital Master, Ltd. ("ACM"), is an exempted company with limited liability incorporated in the Cayman Islands. Aurelius Capital International, Ltd., is the parent of ACM. No publicly held corporation owns 10% or more, directly or indirectly, of ACM.

Aurelius Opportunities Fund II, LLC, is a limited liability company organized and existing under the laws of the State of Delaware. It is not a corporation.

ACP Master, Ltd., is an exempted company with limited liability incorporated in the Cayman Islands. Aurelius Capital Partners, LP, is the parent of ACP Master, Ltd. Aurelius Capital GP, LLC, is the sole general partner of Aurelius Capital Partners, LP, and is the indirect parent of ACP Master, Ltd. No publicly held corporation owns 10% or more, directly or indirectly, of ACP Master, Ltd.

Blue Angel Capital I LLC is a limited liability company organized and existing under the laws of the State of Delaware. It is not a corporation.

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BRIEF IN OPPOSITION

Respondents NML Capital, Ltd., Aurelius Capital Master, Ltd., ACP Master, Ltd., Aurelius Opportunities Fund II, LLC, Blue Angel Capital I LLC, Olifant Fund, Ltd., Pablo Alberto Varela, Lila Ines Burgueno, Mirta Susana Dieguez, Maria Evangelina Carballo, Leandro Daniel Pomilio, Susana Aquerreta, Maria Elena Corral, Teresa Munoz De Corral, Norma Elsa Lavorato, Carmen Irma Lavorato, Cesar Ruben Vazquez, Norma Haydee Gines, and Marta Azucena Vazquez (collectively, “respondents”) respectfully submit that the petition for a writ of certiorari should be denied.

OPINIONS BELOW

The court of appeals’ August 23, 2013, opinion is reported at 727 F.3d 230. *See* App. to Pet. for Cert. of Republic of Argentina 1, No. 13-990 (“Arg. App.”). The court of appeals’ October 26, 2012, opinion is reported at 699 F.3d 246 (Arg. App. 29). The district court’s orders (Arg. App. 70-165) are unreported, but the lead order is available at 2012 WL 5895784 (Arg. App. 117), and the accompanying opinion is available at 2012 WL 5895786 (Arg. App. 125).

JURISDICTION

The court of appeals entered its judgment on August 23, 2013. C.A. Dkt. #1006.¹ The court of appeals denied the petition for rehearing en banc of petitioner Exchange Bondholder Group (“EBG”) on November 19, 2013. App. to Pet. for Cert. of Exchange Bondholder Group 1, No. 13-991 (“EBG App.”). Alt-

¹ All citations of the court of appeals’ docket (“C.A. Dkt. #__”) refer to docket No. 12-105 (2d Cir.) unless otherwise indicated.

though EBG invokes this Court’s jurisdiction under 28 U.S.C. § 1254(1), it lacks appellate standing to challenge the injunction imposed by the district court and is not properly a “party to” the case in the court of appeals, *ibid.* This Court has jurisdiction only to consider EBG’s appellate standing. *See infra* Part I.

STATEMENT

EBG asks the Court to consider an array of broad legal issues concerning an injunction (the “Injunction”) that the district court imposed against someone else—the Republic of Argentina. But the *only* question that EBG can actually present in this Court—which it buries at the end of its petition—is whether EBG has appellate standing to challenge the Injunction at all. It does not.

The court of appeals correctly determined that EBG lacks appellate standing to attack the Injunction in any respect because it is not a party to the underlying case and not bound by the injunction. Consequently, unless and until this Court reviews and reverses that highly factbound ruling, EBG cannot seek review of any *other* issue. But the Second Circuit’s standing decision does not remotely merit this Court’s review. The purported circuit conflicts EBG alleges are illusory, and the court of appeals’ application of settled principles to these facts was entirely correct.

The Court thus cannot even entertain the principal questions that EBG presents—ranging from substantive due process and judicial takings to the scope of equitable remedies. But even if the Court could consider them, none meets any of the Court’s certiorari criteria. EBG does not assert that any of those issues implicates a certworthy conflict, and this case

would be a poor vehicle to address them. Each of EBG's arguments, moreover, is meritless. None has any footing in this Court's case law. Indeed, most call for overturning decades of settled precedent.

The petition should be denied.

1. EBG's petition arises in the broader context of respondents' litigation against Argentina to enforce Argentina's contractual commitments concerning certain bonds. The background of that litigation is described in detail in respondents' briefs in opposition to Argentina's own petition for a writ of certiorari (No. 13-990) seeking review of the same judgment. *See, e.g.*, Br. in Opp. of NML Capital, Ltd., and Olifant Fund, Ltd., 2-12, No. 13-990 (May 7, 2014). Respondents will not burden the Court with a full recitation of that background here, but will instead set forth only the facts essential to address EBG's petition.

2. In 1994, Argentina began issuing bonds under a Fiscal Agency Agreement (the "Agreement Bonds"). In addition to the standard promise to repay principal and interest, Argentina separately promised that "[t]he payment obligations of the Republic under the Securities shall at all times rank at least equally with all its other present and future unsecured and unsubordinated External Indebtedness." Arg. App. 32 (emphasis omitted). This additional promise is known as the Equal-Treatment Provision. *Id.* at 33.

Argentina defaulted on the Agreement Bonds in 2001. In 2005, it offered to exchange Agreement Bonds for new "Exchange Bonds," worth only a fraction of the Agreement Bonds' face value. Argentina warned participants in the 2005 exchange that "there could be 'no assurance' that litigation over the

[Agreement] Bonds would not ‘interfere with payments’ under the Exchange Bonds.” Arg. App. 14 (quoting C.A. Joint App. (“J.A.”) A-466). Holders of nearly one-quarter of the outstanding value of Agreement Bonds rejected the offer. Among the creditors who declined was Gramercy, a member of EBG, which criticized the 2005 exchange offer as “unilateral in nature,” “not a result of good faith negotiations,” and “not consistent with Argentina’s capacity to pay.” C.A. Supp. App. SA-1352.

Argentina launched a second exchange in 2010 under similar terms. “Gramercy played a pivotal role” in “masterminding and anchoring” the second exchange through direct discussions with Argentina, while at the same time purchasing billions of dollars of Agreement Bonds for tender into that exchange. See Jude Webber, *Argentina’s Capital Market Challenges*, Fin. Times, June 22, 2010. Other EBG members who then owned Agreement Bonds also accepted the 2010 exchange offer. Others purchased Exchange Bonds later on the secondary market—some after the injunctions in this case had been entered.²

Since the exchanges, Argentina has reliably paid holders of Exchange Bonds (“exchange bondholders”),

² EBG’s suggestion that its members were unaware of the risks associated with the Exchange Bonds therefore is false. In fact, both before and after the Injunctions were entered, EBG members actively trade Exchange Bonds, as is their right. Indeed, some have traded out of their positions entirely despite initially claiming membership in EBG, as evidenced by the fact that—in response to letters from respondents’ counsel noting that public disclosures of exchange bond holdings did not match claims of ownership in the EBG petition and prior filings—numerous funds have withdrawn from the EBG (some as recently as April 30).

but refused to make any payment on the Agreement Bonds. Arg. App. 33, 37. The exchange bondholders actively sought this outcome, encouraging Argentina to pass Law 26,017—the “Lock Law”—which prohibited Argentina from approving any settlement with holders of Agreement Bonds who declined the 2005 and 2010 exchanges. J.A. A-850.

3. Respondents are beneficial owners of Agreement Bonds who declined the 2005 and 2010 exchange offers. Because Argentina refused to honor its obligations, respondents filed suits against Argentina in the Southern District of New York, each asserting two separate sets of claims: (1) claims for money damages to remedy Argentina’s failure to pay principal and interest, and (2) claims for specific performance to remedy Argentina’s breach of the Equal-Treatment Provision. *See, e.g.*, J.A. A-1601-22.

The district court granted summary judgment to respondents on the second set of claims, concluding that Argentina breached the Equal-Treatment Provision by failing to “rank” the Agreement Bonds “at least equally” with the Exchange Bonds. *See, e.g.*, Arg. App. 73-74. After further briefing regarding the appropriate remedy, the district court entered the Injunction, which permanently enjoined Argentina from paying obligations due under the Exchange Bonds unless it also makes a “[r]atable [p]ayment” on respondents’ Agreement Bonds. *See, e.g., id.* at 91. None of the exchange bondholders, including EBG, participated in these district-court proceedings.

4. Argentina appealed. Eight *amici curiae* submitted briefs addressing the Injunction. Neither EBG nor any other exchange bondholder did so.

In October 2012, the Second Circuit affirmed the Injunction in most respects. Arg. App. 63. The court held that the Equal-Treatment Provision “prohibits Argentina, as bond payor, from paying on other bonds without paying on the Agreement Bonds,” and that Argentina breached that provision through its six-year “course of conduct,” including passage of the Lock Law. *Id.* at 50, 52. Specific performance was an appropriate remedy, the Second Circuit held, because respondents had no adequate remedy at law, and the district court had not abused its discretion in applying the traditional equitable factors—particularly given its finding that Argentina “ha[s] sufficient funds” to pay both its obligations to respondents *and* to the Exchange Bondholders. *Id.* at 56-57, 60-62. The Second Circuit remanded, however, for the district court to clarify two narrow aspects of the Injunction: how the payment formula operates, and whether the Injunction applies to “third parties including intermediary banks.” *Id.* at 63.

5. On remand, the district court addressed the court of appeals’ concerns by spelling out the payment formula and clarifying that the Injunction prohibits “participants in the payment process of the Exchange Bonds” who know about the Injunction from assisting any violation by Argentina. Arg. App. 121, 130. The district court identified entities that would likely be bound by the Injunction by virtue of Rule 65(d)(2)³ if they helped Argentina to violate the Injunction. *Id.* at 121-22. The district court did not

³ Rule 65(d)(2) provides that injunctions bind only the named parties, their agents, and “other persons who are in active concert or participation with” those already bound by the injunction.

identify any exchange bondholder as likely to fall within Rule 65(d)(2).

EBG surfaced for the first time during these remand proceedings, in November 2012. It moved “to appear as Interested Non-Parties in this action” and to vacate the Injunction under Federal Rule of Civil Procedure 60(b). D.C. Dkt. #401, 402.⁴ The district court denied EBG’s motions. D.C. Dkt. #427, 428.

6. Argentina appealed the district court’s order clarifying the Injunction. EBG filed its own notice of appeal. D.C. Dkt. #430; *see* No. 12-4694 (2d Cir.). EBG also filed, in Argentina’s appeal, an “Emergency Motion for Leave to Appear as Interested Non-Parties.” C.A. Dkt. #467. A single judge of the Second Circuit granted EBG’s motion, C.A. Dkt. #482, and consolidated EBG’s appeal with Argentina’s, C.A. Dkt. #575, #580.

In August 2013, the Second Circuit issued the decision from which EBG now petitions. The court dismissed EBG’s appeal for lack of appellate standing. Arg. App. 8-10. EBG, the court explained, is not a party to the case, and neither of the exceptions allowing nonparties to appeal a judgment applied: EBG was “not bound by the amended injunctions”; it was not identified by the district court as an entity that would likely be bound by the Injunction by virtue of Rule 65(d)(2); and its interests as a creditor “[we]re not plausibly affected by the injunctions because a creditor’s interest in getting paid is not cognizably affected by an order for a debtor to pay a different creditor.” *Id.* at 7-9. EBG thus “ha[s] no appellate standing,” and its appeal was “dismissed.”

⁴ All citations of the district court’s docket (“D.C. Dkt. #__”) refer to docket No. 08-cv-6978 (S.D.N.Y.).

Id. at 9. To the extent EBG’s arguments related to issues that Argentina had raised, the court explained that it would “consider [them] as coming from *amici curiae*.” *Ibid.* One member of the panel noted her disagreement with the dismissal of EBG. *Id.* at 10 n.7.

The Second Circuit then unanimously affirmed the Injunction as clarified by the district court. Arg. App. 10-28. As relevant here, the court of appeals rejected the argument that the Injunction was “inequitable” to Exchange Bondholders. The court reaffirmed its prior ruling that “Argentina has the financial wherewithal to pay all of its obligations,” so any harm to the Exchange Bondholders, including EBG, would result from Argentina’s voluntary refusal to honor its obligations to Exchange Bondholders, not from the Injunction: “Argentina’s threats to punish third parties,” the court explained, could not “dictate the availability or terms of relief under Rule 65.” *Id.* at 13-14; *see id.* at 23. Argentina, moreover, had “expressly warned” Exchange Bondholders “that there could be ‘no assurance’ that litigation over the [Agreement] Bonds would not ‘interfere with payments’ under the Exchange Bonds.” *Id.* at 14.

The Second Circuit noted but rejected EBG’s remaining arguments in a single footnote. Arg. App. 15 n.10. As relevant here, it explained that “EBG’s substantive due process and Takings Clause arguments fail because the [Injunction] do[es] not deprive Exchange Bondholders of any property.” *Ibid.*

The Second Circuit denied EBG’s petition for rehearing en banc, without a call for a response and without recorded dissent. *See* EBG App. 1.

REASONS FOR DENYING THE PETITION

EBG cannot seek review of any issue besides its own appellate standing to challenge the Injunction. That factbound issue does not merit review, and the ruling below is correct. The other questions EBG presents are thus academic; EBG cannot raise them, and the Court cannot consider them. In any event, none of the other issues EBG raises warrants review, and all of its arguments regarding them lack merit.

I. THE ONLY QUESTION EBG CAN PRESENT IS ITS STANDING TO APPEAL THE INJUNCTION, WHICH DOES NOT MERIT REVIEW.

A. The court of appeals' holding that EBG lacks appellate standing to challenge the Injunction—and thus is not a proper party to the appeal, but merely an *amicus*—precludes EBG from seeking review of any *other* issue in this Court.

1. It is well-settled that only a party with appellate standing may seek review of a lower court's judgment. “The standing Article III requires must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance.” *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997). As this Court has explained, “[t]he decision to seek review is not to be placed in the hands of concerned bystanders,” and “[a]n intervenor cannot step into the shoes of the original party unless the intervenor independently fulfills the requirements of Article III.” *Id.* at 64-65 (internal quotation marks omitted). If the party invoking federal appellate jurisdiction lacks appellate standing, a court cannot consider the *merits* of the challenged ruling. *See, e.g., Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661-67 (2013).

Moreover, the statute establishing this Court’s certiorari jurisdiction to review “[c]ases in the courts of appeals” expressly restricts the right to file a petition to a “party to” the “case” below. 28 U.S.C. § 1254(1). One who never becomes a “party” below thus cannot seek certiorari in *this* Court of the underlying merits of the case. Such a litigant may challenge *only* the court of appeals’ ruling that the litigant is not a proper party. See *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 34 (1993) (per curiam) (dismissing writ where petitioner “was not a party to the appeal below, and the Court of Appeals denied [the petitioner’s] motion to intervene there,” and this Court “decline[d] to review” the “denial of intervention”).

2. These well-established principles doom EBG’s request for review of the merits of the decision below upholding the Injunction against Argentina. The court of appeals explicitly held that EBG—not a party in the lawsuit and not bound by the Injunction—lacks “appellate standing” to challenge the Injunction. Arg. App. 9. Thus, although a single judge of the Second Circuit had previously granted EBG’s request (filed on an “emergency” basis) to intervene as an “Interested Non-Party Appellant,” C.A. Dkt. #575, at 4; see C.A. Dkt. #580, the court ultimately concluded that EBG was *not* a proper party and “dismissed” its appeal. Arg. App. 9. Instead, that court “consider[ed]” EBG’s arguments (and those of other

putative nonparty appellants) “as arguments from *amici curiae*,” not those of a party. *Id.* at 10.⁵

B. EBG cannot seek review in this Court of the merits of the decision below upholding the Injunction unless and until the Court concludes *both* that the Second Circuit’s appellate-standing decision merits review *and* that that decision was incorrect. The court of appeals’ highly factbound ruling on that issue, however, plainly does not merit review. And even if it did, the Second Circuit’s ruling is entirely sound.

1. In its cursory discussion of the court of appeals’ appellate-standing decision (at 29-32), EBG fails to demonstrate any reason why review of that ruling is appropriate. Indeed, lower courts’ decisions that a party lacks “standing” to “intervene” on appeal are “always to some extent bound up in the facts of the particular case,” making it “unlikely that any new principle of law would be enunciated.” *Izumi*, 510 U.S. at 33. The Court is loath to “devot[e] [its] efforts *solely* to addressing a relatively factbound issue which does not meet the standards that guide the exercise of its certiorari jurisdiction,” and has “consciously resisted” suggestions to review and reverse rulings regarding such factbound threshold issues—even when, unlike here, doing so might facilitate review of *other* issues that meet the Court’s certiorari criteria. *Id.* at 34.

⁵ EBG does not and cannot argue that it should be allowed to intervene in *this* Court to seek certiorari. The named party has sought review, *cf. Banks v. Chi. Grain Trimmers Ass’n*, 389 U.S. 813 (1967), and no one suggests Argentina’s case will become moot, *cf. Rogers v. Paul*, 382 U.S. 198, 199 (1965) (per curiam).

The standing issue in this case is just as “unlikely” to shed light on “any new principle of law.” *Id.* at 33. Indeed, both of the supposed lower-court conflicts that EBG alleges are illusory, and its submission only underscores the highly fact-specific character of the standing issue.

a. EBG first contends that the Second Circuit’s appellate-standing ruling here conflicts with cases from other circuits purportedly holding “that a nonparty’s interests as a creditor ... are alone sufficient to confer standing where th[ose] interests are directly affected by a judgment.” Pet. 30. EBG’s claim of a conflict rests on a distortion of other circuits’ cases.

Of the three cases EBG cites, two involve orders freezing or disposing of specific property, in which the nonparty appellants had a direct financial interest that was frustrated by the challenged district-court order. *See United States v. Yielding*, 657 F.3d 722, 726 n.2, 728-29 (8th Cir. 2011) (nonparty had standing because the order prohibited disbursement of specific funds over which the nonparty creditors claimed an interest); *United States v. Holy Land Found. for Relief & Dev.*, 445 F.3d 771, 780 (2006) (nonparty creditor had standing to appeal a freeze order directed at specific assets on which the nonparty had sought to levy to satisfy its own money judgment), *vacated and reinstated on other grounds*, 493 F.3d 469, 472, 479 (5th Cir. 2007) (en banc). Here, in contrast, the Injunction does *not* identify, much less restrict EBG’s access to, any specific asset belonging to EBG. The Injunction simply requires Argentina to honor its contractual obligations to respondents. It does not preclude Argentina from also honoring its separate obligations to EBG.

EBG's third case, *In re Piper Funds, Inc., Institutional Government Income Portfolio Litigation*, 71 F.3d 298 (8th Cir. 1995), involved an order enjoining an absent class member from arbitrating its claim for securities fraud while the separate class-action settlement proceeded. *See id.* at 300-01. The Injunction here has no similar effect on EBG. It does not name EBG and places no limitations on EBG's right to sue if Argentina fails to pay on EBG's bonds.

b. EBG's second alleged split is even less substantial. EBG asserts that the decision below conflicts with decisions holding that "non-parties" had standing where they "will be bound by a court's order." Pet. 31. But the Second Circuit here *applied* that principle: It held that EBG lacked standing precisely because it is "not bound by" the Injunction. Arg. App. 9. Review of the fact-bound issue whether EBG is, in fact, bound by the Injunction, thus would concern only whether the Second Circuit applied that principle correctly here in finding that the Injunction does not bind EBG.

EBG, moreover, fails to establish the relevance of the purported split to its own case, because EBG does not even contend that it is in fact bound by the Injunction. It asserts only (without citation) that *respondents believe* that the Injunction binds EBG in particular ways. That is a non sequitur. The parties' beliefs are irrelevant to whether this Court should grant certiorari; what matters for purposes of certworthiness is that the Second Circuit held that EBG is "not bound by the amended [I]njunction[]." Arg. App. 9.

2. Even if the appellate-standing issue warranted review, the court of appeals' conclusion is correct. As the Second Circuit explained, EBG is merely one

of Argentina’s “creditors,” and its “interests are not plausibly affected by the [Injunction],” which merely requires Argentina to honor its commitments to someone *else*. Arg. App. 9.

EBG claims that the appellate-standing decision below contravenes this Court’s precedent, but the only decisions of this Court it invokes allowed appeal by a nonparty who was directly bound by the challenged order. *Devlin v. Scardelletti*, 536 U.S. 1 (2002), permitted a class member to appeal a class settlement that would have bound him because he could not opt out. *Id.* at 6. And *U.S. Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72 (1988), allowed nonparties subject to subpoenas to challenge the issuing court’s jurisdiction. *Id.* at 77. EBG’s fallback claim (at 31) that its “significant participation at the district and circuit court levels” confers standing is bootstrapping that is squarely foreclosed by this Court’s case law. *See, e.g., Hollingsworth*, 133 S. Ct. at 2660-63 (proponents of ballot initiative who defended statute in district court lacked appellate standing).⁶

II. THE REMAINING QUESTIONS EBG PRESENTS ARE NOT PROPERLY BEFORE THE COURT AND DO NOT MERIT REVIEW.

EBG’s petition also asks this Court to decide several additional questions relating to the merits of the Injunction: whether the Injunction exceeded the district court’s wide equitable authority and discretion, and whether the Injunction deprived EBG of purported substantive-due-process rights, or constituted a judicial taking, in violation of the Fifth Amend-

⁶ If Argentina’s petition (No. 13-990) is granted, EBG will have ample opportunity to present its views as an *amicus*.

ment. As explained above, this Court cannot consider any of these additional issues unless and until it reviews *and* reverses the court of appeals' ruling that EBG lacks standing to challenge the Injunction on appeal. And there is no reason to review that fact-bound ruling, and no basis to set aside the Second Circuit's judgment on that antecedent issue. *See* Part I, *supra*. But even if EBG's other questions were properly presented, they still would not merit review.

A. Although styled as a single question, the question EBG raises concerning the district court's exercise of its equitable authority actually comprises two distinct issues: (a) whether "enjoining payments to innocent third-party creditors to coerce contractual payments to other creditors" lay beyond the district court's *authority* because it was "unknown to the English chancery courts" in 1789, Pet. 17-18; and (b) whether the lower courts abused their *discretion* by "disregard[ing] hardship to a non-party caused by an injunction based on who causes that hardship or how it is caused," Pet. 21. EBG does not allege that either of these subsidiary issues implicates any conflict (at least among courts of *this* country, *see* Pet. 24-25). Both subsidiary claims, moreover, are meritless.

EBG, in fact, cannot pursue its first subsidiary claim—that the district court lacked authority to enjoin payments to third parties to coerce payments to respondents—in this Court because it forfeited that claim by failing to raise it below. *See United States*

v. *Jones*, 132 S. Ct. 945, 954 (2012).⁷ The Second Circuit accordingly did not have occasion to address the question at all, much less to issue the sort of precedential decision that could warrant review in this Court. In any event, EBG’s claim is incorrect. Courts regularly enforce contractual provisions governing priority among creditors. *See, e.g., Safeco Ins. Co. of Am. v. Schwab*, 739 F.2d 431, 433 (9th Cir. 1984); 25 *Williston on Contracts* § 67:88 (4th ed. 2009-2010); Arg. App. 12. That is all the Injunction does here.

EBG’s second subsidiary claim—that the courts below failed to account for the purported hardship the Injunction causes to third parties—fares no better. Any alleged hardship EBG may face would not be caused by the Injunction; it would result instead from Argentina’s independent, punitive decision to scorch the earth and default on its obligations to other creditors—instead of using its ample resources to honor its obligations to both EBG and respondents. *See* Arg. App. 14. That outcome is unlikely, as Argentina repeatedly has confirmed its intention to pay on the Exchange Bonds. *Id.* at 5 n.4. More importantly, courts of equity, as the Second Circuit recognized, should not permit a defendant’s “threats to punish third parties to dictate the availability or terms of relief under Rule 65.” *Id.* at 14 (citing *Reynolds v. Int’l Amateur Athletic Fed’n*, 505 U.S. 1301, 1302 (1992) (Stevens, J., in chambers)). EBG’s

⁷ The Second Circuit did consider Argentina’s vaguely similar contention that courts historically did not use equitable jurisdiction to compel payment of past-due debts. Arg. App. 12. But Argentina’s contention, unlike EBG’s, had nothing to do with the purported lack of historical precedent for coercing payment by a debtor by enjoining payments to third-party creditors.

quibbling (at 23-24) over the scope of the in-chambers opinion in *Reynolds* would not merit certiorari even if correct. And it is wrong. As in *Reynolds*, EBG's challenge to imposition (here, affirmation) of the Injunction hinges on the defendant's threats to resort to self-help. See 505 U.S. at 1302.

EBG's related claim that it is "the district court," not Argentina, "that is taking non-parties hostage" is spurious. If EBG is imprisoned, Argentina holds the keys. EBG, moreover, entered its purported predicament with eyes wide open: Argentina warned that "that there could be 'no assurance' that litigation over the [Agreement] Bonds would not 'interfere with payments' under the Exchange Bonds," Arg. App. 14. And it was exchange bondholders who urged Argentina to breach the Equal-Treatment Provision by enacting the Lock Law. J.A. A-850.

B. EBG's second question asserts various Fifth Amendment claims: The Injunction, it argues, effects a "judicial taking," and violates EBG's substantive-due-process rights by "plac[ing] [a] significant imposition on the private property of one person for the private benefit of another." Pet. 25-27. This frivolous argument does not remotely satisfy the standards for certiorari.

EBG again does not allege any lower-court conflict. And while EBG did at least argue this issue below (unlike the preceding one), the Second Circuit deemed it "without merit" and addressed its merits only in a cursory footnote. Such a decision would be unlikely to require this Court's attention even if it really did resolve the merits of a significant and recurring issue. Cf., e.g., *Ark. Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 521-22 (2012) (this Court is one "of final review, not one of first view,"

and ordinarily declines to address issues not “explored” or “examined” below). The Second Circuit’s disposition is all the less certworthy given that the footnote discussion of Fifth Amendment claims was an alternative to the court’s primary ruling that EBG lacked standing to raise these issues at all.

In this case, the Second Circuit correctly perceived that EBG’s Fifth Amendment claims are makeweights. The Injunction places no “imposition” on EBG’s contractual right to be paid by Argentina. The District Court expressly found that Argentina “ha[s] sufficient funds” to satisfy its obligations to respondents *and* to Exchange Bondholders. *See* Arg. App. 56-57, 60-62; Br. for Aurelius Resps. in Opp. 25-26, No. 13-990 (May 7, 2014).⁸ If despite these resources Argentina chooses to comply with the Injunction by paying neither EBG nor respondents, EBG retains its right to payment and to pursue appropriate judicial relief. Nor does the Injunction work a “taking” or “deprivation” of EBG’s property. The entry of the injunction did not affect the value of many EBG bonds because EBG members bought them *after* the injunction issued. Even crediting EBG’s allegations, the Injunction at most threatens to impair Argentina’s performance of its contractual obligations—which this Court has never held to constitute a tak-

⁸ EBG asserts as a “fact” that this is not true (Pet. 14), but never grapples with the factual finding affirmed by the court of appeals; it certainly does not make “a very obvious and exceptional showing of error,” the standard of review for findings of fact on which two courts below agree. *E.g., Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 841 (1996). At a minimum, contrary to EBG’s suggestion (at 14 n.14), Argentina’s ability to pay is not synonymous with its foreign-currency reserves. *See* Br. for Aurelius Resps. in Opp. 25, No. 13-990 (May 7, 2014).

ing. See *Omnia Commercial Co. v. United States*, 261 U.S. 502, 508-14 (1923); see also *Huntleigh USA Corp. v. United States*, 75 Fed. Cl. 642 (2007), *aff'd*, 525 F.3d 1370 (Fed. Cir. 2008).

Indeed, accepting EBG's novel arguments would require this Court to overturn decades of precedent, and to answer thorny jurisdictional questions never briefed below. For example, EBG's substantive-due-process claim asks this Court to re-constitutionalize a right of contract. *But see, e.g., West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391-99 (1937). Moreover, to sustain EBG's claim here, the Court also would have to hold that one entity's constitutional freedom of contract is impaired by judicial *enforcement* of another party's separate contractual rights. EBG's judicial-takings claim calls for even more innovation. It would require the Court to decide whether a claim based on a federal-court ruling may be raised under Rule 60(b)(4) or must proceed under the Tucker Act, 28 U.S.C. § 1491(a)(1), in the Court of Federal Claims. And it would apparently require this Court not only to endorse a theory of unconstitutional judicial takings, but also to hold that the concept encompasses a judicial decision that was so foreseeable under existing law that *Argentina warned purchasers of Exchange Bonds about it*. Cf. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 560 U.S. 702, 730 (2010) (burden is on judicial-takings plaintiff to establish, at a minimum, that the judicial decision changed the law to take away an existing property right). There is no reason to grant a non-party's certiorari petition to consider such far-reaching issues.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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