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16-0639(CON), 16-0640(CON), 16-0641(CON), 16-0642(CON), 16-0643(CON), 16-0644(CON), 16-0649(CON), 16-0650(CON), 16-0651(CON), 16-0653(CON), 16-0657(CON), 16-0658(CON), 16-0659(CON), 16-0660(CON), 16-0661(CON), 16-0662(CON), 16-0664(CON), 16-0665(CON), 16-0666(CON), 16-0667(CON), 16-0668(CON), 16-0669(CON), 16-0670(CON), 16-0671(CON), 16-0672(CON), 16-0673(CON), 16-0674(CON), 16-0675(CON), 16-0677(CON), 16-0678(CON), 16-0681(CON), 16-0682(CON), 16-0683(CON), 16-0684(CON), 16-0685(CON), 16-0686(CON), 16-0697(CON), 16-0688(CON), 16-0689(CON), 16-0690(CON), 16-0691(CON), 16-0694(CON), 16-0695(CON), 16-0696(CON), 16-0697(CON), 16-0698(CON)

In the United States Court of Appeals for the Second Circuit

AURELIUS CAPITAL MASTER, LTD., *et al.*,

Plaintiffs-Appellants,

– v. –

REPUBLIC OF ARGENTINA,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF SETTLING PLAINTIFFS EM LTD., MONTREUX PARTNERS, L.P., LOS ANGELES CAPITAL, CORDOBA CAPITAL, AND WILTON CAPITAL, LTD. IN SUPPORT OF APPELLEE AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

EM Ltd. is a limited liability corporation organized under the laws of the Cayman Islands. EM Ltd. has no publicly held corporate parents, subsidiaries, or affiliates, and no publicly held corporation owns more than 10% of its stock or membership interests.

Montreux Partners, L.P. is a limited partnership organized under the laws of Delaware. Montreux Partners, L.P. has no publicly held corporate parents, subsidiaries, or affiliates, and no publicly held corporation owns more than 10% of its stock or membership interests.

Los Angeles Capital is an exempted company with limited liability organized under the laws of the Cayman Islands. Los Angeles Capital has no publicly held corporate parents, subsidiaries, or affiliates, and no publicly held corporation owns more than 10% of its stock or membership interests.

Cordoba Capital is an exempted company with limited liability organized under the laws of the Cayman Islands. Cordoba Capital has no publicly held corporate parents, subsidiaries, or affiliates, and no publicly held corporation owns more than 10% of its stock or membership interests.

Wilton Capital, Ltd. is an exempted company with limited liability organized under the laws of the Cayman Islands. Wilton Capital, Ltd. has no

publicly held corporate parents, subsidiaries, or affiliates, and no publicly held corporation owns more than 10% of its stock or membership interests.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES (Continued)

Page(s)

Other Authorities

STATEMENT OF INTEREST[1]

Settling plaintiffs EM Ltd. and Montreux[2] respectfully submit this brief in support of affirmance. These consolidated appeals arise from a final order of the district court conditionally lifting the *pari passu* injunction—an injunction that required the Republic of Argentina to make ratable payments to holders of certain defaulted debt if it made payment to other bondholders. The injunction had been entered against Argentina in various actions filed by bondholders, including one brought by EM and four brought by Montreux.

In early February 2016, EM and Montreux became the first plaintiffs with bonds covered by the *pari passu* injunction to execute settlement agreements with Argentina. Under those agreements, Argentina is obligated to pay settlement amounts totaling more than $1.1 billion in the aggregate if, but only if, the *pari passu* injunction is lifted in all cases. EM and Montreux therefore supported Argentina's motion to lift the injunction in the district court, and do so here.

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1 No counsel for a party or party to this proceeding authored this brief in whole or in part, and no counsel for a party or party to this proceeding made a monetary contribution intended to fund either the preparation or the submission of this brief. No person other than EM Ltd. and Montreux or their counsel made a monetary contribution to the preparation or submission of this brief.

2 Montreux Partners, L.P., Los Angeles Capital, Cordoba Capital, and Wilton Capital, Ltd.

EM and Montreux are functionally in the position of appellees and, but for the fact that the cases on appeal were coordinated in the district court rather than consolidated, they would be parties here. The district court indeed treated all the injunctions in the coordinated cases as if they were a single injunction.[3] The reason the district court did so is that it appropriately found that maintaining an injunction in place in any one case would have all the inequitable consequences that the court sought to avoid by lifting the injunction in other cases. Among other things, the court found that "it would unfairly deny [EM and Montreux] the opportunity to resolve their disputes amicably with the Republic."[4]

Beyond that, EM and Montreux respectfully submit that they have a valuable perspective on the contrast between the obstructionist policies of the prior Argentine administration and the constructive approach of President Macri's newly elected administration. EM and Montreux actively litigated their claims against Argentina for many years before successfully negotiating settlements. In addition, EM and Montreux can speak to the harm they and other settling plaintiffs would suffer if the Court were to reverse the district court's order lifting the injunction.

EM and Montreux notified the parties that they intended to move for leave to file this brief as intervenors or *amici*. No party indicated that it would object.

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3 *E.g.*, Special Appendix ("SPA")-65 ("[I]f the court lifts the injunctions, it will do so in all cases.").

4 SPA-63.

INTRODUCTION

After more than a decade of closely supervising the hard-fought and sprawling litigation that followed Argentina's 2001 default on its debt, the district court entered an order and well-reasoned opinion that set Argentina and its creditors on a clear path to peace. Argentina has now executed voluntary settlements with holders of over 85% of outstanding claims, including EM and Montreux, and Argentina stands ready to negotiate and settle with the remainder. In response to the district court's order, the lower house of the Argentine legislature passed a bill that would repeal the Lock Law (the very statute that had caused the district court to enter the *pari passu* injunction in the first place), effective when the district court's order is affirmed. If that bill becomes law and the injunction is lifted, the Republic of Argentina will again have access to much-needed funding from the international markets. Appellants would have this Court undo all that progress, scuttle settlements for more than 85% of outstanding claims, and return everyone to active litigation—even with a once-unimaginable resolution now within reach.

Despite the significance of this appeal for plaintiffs, Argentina, and its people, the question presented is simple and narrow: whether the district court engaged in "a clear abuse of judicial power"[5] in finding that "circumstances ha[d]

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5 *Parker v. Broad. Music, Inc.*, 289 F.2d 313, 314 (2d Cir. 1961).

changed [so] dramatically"[6] as to justify lifting the *pari passu* injunction. The appellants agree that the district court's judgment is subject to review for abuse of discretion—a standard that is and should be dispositive given "the proximity of [the] district court to the facts of [the] case"[7] for more than a decade. Yet, they urge this Court to re-weigh the equities and take a fresh look at the facts found by the district court. The self-proclaimed "Lead Plaintiffs," who are appellants here despite having *already* agreed to settle their claims, go so far as to urge this Court to blue-pencil the district court's order to give them a bargaining chip in case Argentina does not pay them by April 14, 2016 and they elect to terminate their settlement (a form of "insurance,"[8] they say). None of that is proper. The district court's order should be affirmed.

To begin with, the district court's finding of dramatically changed circumstances is supported by the record and "within the range of permissible decisions"[9]—not clearly erroneous. The district court originally entered the *pari passu* injunction based on "Argentina's extraordinary behavior" as "a uniquely

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6 SPA-64.

7 *In re Lawrence*, 293 F.3d 615, 623 (2d Cir. 2002).

8 Brief for Plaintiffs-Appellants Aurelius Capital Master, Ltd., *et al.* (Dkt. No. 366) ("Aurelius Br.") 40.

9 *In re Terrorist Attacks on Sept. 11, 2001*, 741 F.3d 353, 357 (2d Cir. 2013).

recalcitrant debtor."[10] In seeking relief under Rule 54 and Rule 60, however, Argentina presented ample evidence to support the district court's finding that "President Macri's election changed everything,"[11] starting with Argentina's watershed settlements with EM and Montreux. EM and Montreux directly experienced Argentina's change from intransigence to conciliation, and there is no ground for this Court to find a clear error in this respect.

Next, there is also no basis to revisit the district court's finding that, in view of the change in circumstance, the injunction is now inequitable and disserves the public interest. The district court considered all relevant interests: (1) the interests of settling plaintiffs, including not just EM and Montreux, but also the settling bondholders who are appellants here as well as the "foreign-law bondholders" who seek to intervene; (2) the sovereign interests of the Republic of Argentina and its roughly 40 million inhabitants, who are barely mentioned in appellants' many briefs, but who for years have been denied the benefits of access to the international capital markets; (3) the interests of the exchange bondholders, who represent more than 90% of the debt on which Argentina originally defaulted, and who haven't been paid on their bonds in two years; and (4) the interests of non-

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10 *NML Capital, Ltd. v. Republic of Argentina* ("*NML II*"), 727 F.3d 230, 247 (2d Cir. 2013).

11 SPA-59.

settling plaintiffs, who represent approximately 1% of the originally defaulted debt, and whose number continues to decline as they negotiate settlements.

Weighing the competing interests in light of changed circumstances, the district court quite permissibly—indeed correctly—found that the injunction was now inequitable and against the public interest, and should be lifted. The district court *found* that maintaining the injunction in place "would unfairly deny those plaintiffs [that had reached settlement agreements] the opportunity to resolve their disputes amicably with the Republic."[12] It *found* that maintaining the injunction would continue to cause immeasurable harm to "'the economic health of [the Argentine] nation.'"[13] And it *found* that there was no warrant to continue to deny payment to the exchange bondholders.[14] Which is to say, it *found* that the injunction, entered initially in aid of resolving these cases, was actually impeding their resolution and causing great mischief. Not one of the appellants articulates a basis to conclude that the district court committed any clear error.

Instead, appellants assert a hodge-podge of arguments that reduce to an improper request to have this Court re-weigh the equities. This is clearly seen in

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12 SPA-63. That finding was valid even based on the facts existing at the time of the indicative ruling. Since then, multiple billions of dollars of additional settlements have occurred, only reinforcing its correctness.

13 SPA-66 (quoting *EM Ltd. v. Republic of Argentina*, 131 F. App'x 745, 747 (2d Cir. 2005)).

14 SPA-64–65.

the briefs of NML and Aurelius, who have agreed to settle their claims for $4.6 billion. The apparent purpose of their appeal is to convince this Court that the interests of the people of Argentina, other settling plaintiffs, and the exchange bondholders should all give way to the settling appellants' wish to keep the injunction in place—preventing all other settlements from going forward—if they decide that they do "not want to be kept waiting" any longer for their money[15] and opt instead to terminate their settlement agreement. Similarly, non-settling bondholders argue that the many benefits of lifting the injunction should be delayed—and possibly lost forever—while they negotiate with the Argentine delegation, never mind the district court's finding that "vacating the injunctions in no way impedes . . . settlement negotiations."[16]

The district court considered all these arguments. It concluded, however, that appellants' interests should yield, and it held, in the sound exercise of its discretion, that maintaining the injunction in place would be gravely inequitable. That was no error, let alone clear error. This Court should promptly affirm.

ARGUMENT

"The proposition that a court has the authority to alter the prospective effect of an injunction in light of changes in . . . the circumstances is, of course, well

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15 Aurelius Br. 21.

16 SPA-82.

established."[17] Given the considerable discretion that the law confers to the district court in that context, appellants can obtain a reversal only if they can show that the district court's order either (1) "rest[ed] on an error of law or clearly erroneous factual finding" or (2) "cannot be found within the range of permissible decisions."[18] There must, in other words, be "a clear abuse of judicial power."[19] There is nothing of the sort here.

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT CIRCUMSTANCES HAD CHANGED

At its core, the district court's order was predicated on its factual finding, following extensive briefing, evidentiary submissions, and oral argument—and based on its decade-long superintendence of these cases—that there had been a dramatic change in circumstances. During the protracted litigation, Argentina publicly and repeatedly "made clear its intention to defy any money judgment issued by th[e] [district] court" and it refused to "entertain meaningful settlement discussions."[20] The district court and the special master it appointed experienced this intransigence first hand, as did EM and Montreux.

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17 *Benjamin v. Jacobson*, 172 F.3d 144, 161 (2d Cir. 1999) (citing *Sys. Fed'n No. 91, Ry. Emps. Dep't, AFL-CIO v. Wright*, 364 U.S. 642, 646–47 (1961); *United States v. Swift & Co.*, 286 U.S. 106, 114–15 (1932)).

18 *In re Terrorist Attacks*, 741 F.3d at 357.

19 *Parker*, 289 F.2d at 314.

20 *NML Capital, Ltd. v. Republic of Argentina*, __ F. Supp. 3d __, 2015 WL 6656573, at *5 (S.D.N.Y. Oct. 30, 2015).

But "President Macri's election changed everything,"[21] and again, EM and Montreux experienced the change first hand. Argentina initiated good-faith negotiations with its principal creditors and, in a matter of weeks, reached settlement agreements with EM and Montreux. Tellingly, appellants nowhere allege (nor could they) that these agreements were reached on anything other than an arm's length basis between independent and experienced commercial parties.

Since then, Argentina signed settlements with additional creditors and, by the time the final order was entered, it had agreed to resolve "over 85% of claims held by plaintiffs with injunctions"[22] and had voluntarily dismissed with prejudice two appeals challenging the district court's equitable authority.[23] The district court took particular note of Argentina's willingness to condition lifting the injunction on two significant prerequisites: (1) repeal of the Lock Law—"the legislation that led the court to fashion these injunctions in the first place"[24]—and (2) full payment under all settlement agreements signed by February 29, 2016, the day before Argentina's Congress went into session.

It is in view of this dramatic change of circumstances that the district court evaluated the equities and found the injunction to be "inequitable and detrimental

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21 SPA-59.

22 SPA-83.

23 *Id.*

24 SPA-61.

to the public interest."[25] There can be no serious challenge to the district court's finding, based on a substantial record and its proximity to the case for over ten years, that circumstances had dramatically changed.

A.

In an effort to trivialize the change in circumstances, certain of the appellants argue that, by the time the district court entered its indicative ruling, "only" Montreux had "settled," because EM stands to receive 100% of its claim.[26] That point could not show clear error in the district court's findings given the deferential standard of review coupled with all the other evidence of change that Argentina presented to the district court—both before the indicative ruling was entered and before the district court converted it to a final order.

Beyond that, the terms of EM's settlement actually *support* the district court's finding of changed circumstances. EM negotiated at arm's length, and then accepted, the so-called "Standard Offer" that Argentina later made available to *all* bondholders. Argentina agreed to pay all creditors who accepted that offer 100% of the principal of their debt—every single penny of it. On top of that, it agreed to pay accrued interest up to 50% of that principal. That offer remains available to everyone.

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25 SPA-84.

26 *E.g.*, Aurelius Br. 37.

The fact that EM's claim was settled for full value (but without the other sweeteners the settling appellants negotiated, including continuing interest and legal fees) is simply a consequence of EM having secured a judgment in 2003, soon after Argentina's default. Since then, EM's judgment has been earning interest at the statutory rate of 1.3% per year. If EM had strategically delayed obtaining a judgment in order to earn pre-judgment interest at many times that rate—as the appellants who disparage EM's settlement apparently chose to do—then EM would have received hundreds of millions of dollars *more* for its claim, even after taking the haircut that Argentina offered to other holders of bonds covered by the *pari passu* injunction.

Finally, although appellants seek to trivialize Montreux's $300 million settlement of over $400 million in claims, it was negotiated at arm's length and requires Argentina to pay a material amount of cash. Along with the EM settlement, it represents the first time that Argentina agreed to resolve claims held by a party with a *pari passu* injunction. In and of itself, Montreux's settlement represents a mammoth reversal of Argentina's decade-long refusal to pay anyone anything.

B.

Next, seizing upon a passing remark made by Judge Walker during a hearing on Argentina's motion to remand, certain of the appellants assert that Argentina's

public proposal is a "cram down" no different from the take-it-or-leave-it offer accepted by exchange bondholders years ago.

The district court appropriately rejected the notion that there was anything like a cram down. No bondholder is being forced to accept Argentina's terms. Instead, as cannot be disputed here given the district court's factual findings, "[p]laintiffs who have not settled may continue to negotiate with the Republic"[27] even after the injunction will be lifted and every bondholder remains free to "accept[] . . . the Republic's Proposal for settlement, which remains open"[28]—including the offer that EM accepted. Proposing to pay all creditors all the principal they are due on their debt, plus a handsome amount of interest to boot, is hardly the hallmark of a cram down.

The district court appropriately found that, in the circumstances, allowing the non-settling plaintiffs to use the injunction "as a tool for leverage in negotiations"[29] was unnecessary to bring Argentina to the table, in addition to being inequitable and contrary to the public interest. (More on that below.) In short, there was no clear error to permit this Court to revisit the district court's factual finding of dramatically changed circumstances.

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27 SPA-82.

28 *Id.*

29 SPA-83.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT THE INJUNCTION IS NOW INEQUITABLE

The district court also acted well within its discretion in balancing the equities and finding that the *pari passu* injunction now disserves the public interest. As the district court found, maintaining the injunction in place will cause great harm to settling plaintiffs (including EM and Montreux), the roughly 40 million inhabitants of Argentina, and exchange bondholders. There is nothing on the other side of the balance that could justify setting aside the court's careful evaluation of competing interests on an abuse-of-discretion standard.

A. Maintaining The Injunction Would Injure EM, Montreux, And Other Settling Plaintiffs

To begin with, the district court appropriately found that the injunction now jeopardizes rather than promotes the resolution of these longstanding and hard-fought disputes. EM, Montreux, and the other settling plaintiffs (including some of the appellants here) have spent many years attempting to satisfy their claims. When Argentina finally presented the opportunity to negotiate a reasonable settlement, EM and Montreux were the first to agree. But the settlements they reached are conditional, and cannot be consummated until the injunction is lifted in all cases.

In the circumstances, the district court appropriately found that maintaining the injunction in place "would unfairly deny [EM and Montreux] the opportunity

to resolve their disputes."[30] The court added: "If another plaintiff, armed with an injunction in a different action, could scupper that deal, EM—as a third party to that action—would suffer. The court never intended this result."[31]

Some appellants assert that the condition in the settlements should not count because it is "self-imposed."[32] But this is just another way of saying that the condition reflects the deal Argentina struck with its creditors. The reason Argentina wanted this term, as the district court's opinion makes clear, is that Argentina will be unable to "raise the capital required to pay all plaintiffs with whom it has reached agreement,"[33] or to settle these cases, unless the injunction is lifted across the board.

In granting relief in every case, the district court also appropriately considered the challenges facing Argentina's President in winning legislative support for the settlements. "The Argentine Congress must know where it stands."[34] A prompt order of affirmance here would give the Argentine legislature the clarity it needs to repeal the Lock Law and to approve the settlements. Indeed, although not part of the record in the district court, it is significant that the

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30 SPA-63.

31 SPA-65.

32 *E.g.*, Brief for Plaintiffs-Appellants Ricardo Pons, *et al.* "Individual Bondholders," Dkt. No. 256 ("Individual Bondholders Br.") 31.

33 SPA-83; *see also* Joint Appendix ("A-") 669; A-1172–73.

34 SPA-82.

Argentine lower house has now passed a bill repealing the Lock Law with effect upon this Court's affirmance of the district court's order of vacatur.[35]

An order of affirmance would set all the parties on a clear path to settlement—something unimaginable just a few months ago. An order of reversal, by contrast, would upend President Macri's administration, undo the acts of the Argentine Congress, and throw everyone back into the prior proceedings involving injunctions, contempt of court, and the like. It would slam shut the first window to resolving these disputes that has opened in more than ten years of bitter and complex litigation in the district court, this Court, and the Supreme Court, thus plainly frustrating the "strong judicial policy in favor of settlements."[36] None of this would be equitable.

B. Maintaining The Injunction Would Injure The Welfare Of The Argentine People And The Sovereign Interests Of Argentina

The district court also appropriately considered "'the economic health of [the Argentine] nation.'"[37] Back in 2012, the district court had correctly entered the *pari passu* injunction to remedy "Argentina's extraordinary behavior."[38] Although entirely warranted given the circumstances at the time, the injunction

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35 *Lower House passes holdouts bill*, Buenos Aires Herald.com (Mar. 16, 2016), http://www.buenosairesherald.com/article/210806/lower-house-passes-holdouts-bill; *see also* A-1813:17–14:15.

36 *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005).

37 *EM Ltd.*, 131 F. App'x at 747.

38 *NML II*, 727 F.3d at 247.

was strong medicine, implicating as it did a sovereign's deployment of its public fisc. The injunction's effects were dramatic—the injunction choked Argentina's access "to the global financial markets," barring Argentina from "rais[ing] much-needed capital" unless it paid what we and the other plaintiffs were owed.[39]

The injunction continues to have that effect, but now it does so without the "exceptional"[40] context that once justified the extraordinary remedy and caused us to move for entry of the injunction. The Argentine people exercised its right to elect a new leader, one who has promised to resolve these disputes and rejoin the international financial community. In the absence of the extraordinary behavior justifying the injunction, the Republic should be permitted to chart the course set by its people, particularly when that course so closely aligns with the Court's interest in promoting settlement.

As the district court recognized, lifting the injunction would "[a]llow[] the Republic to reenter the capital markets [and] will undoubtedly stimulate [Argentina's] economy and thus benefit its people."[41] Commentators lauding President Macri's efforts thus far recognize that twelve years of isolation have left Argentina's economy in a precarious position, and that among the "key uncertainties" facing the new government is "access to 'bridge' finance, which

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39 SPA-54.

40 *NML II*, 727 F.3d at 247.

41 SPA-20.

depends on a settlement with the holdout creditors."[42] They warn that, with "inflation of about 30 per cent" and "a fiscal deficit of almost 8 per cent," ending the "decade-long legal dispute with 'holdout' creditors in the US that are blocking Argentina's access to international capital markets" is a "serious challenge[]" for the new government.[43] The repeal of the Lock Law, now making its way through the Argentine legislature, is a key test in "the quest for a sustainable road to development."[44]

C. Maintaining The Injunction Would Injure Exchange Bondholders

The district court also stressed that the injunction had caused great harm to the substantial majority of creditors that had held defaulted FAA bonds. More than 90% of them accepted Argentina's tender offer for exchange bonds. When plaintiffs sought the *pari passu* injunction, they had correctly stated that there was "'no evidence' that the injunctions would 'stop or interfere or impair in any way

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42 Martin Guzman and Joseph Stiglitz, *Argentina's Uncertain Prospects*, Project Syndicate (Jan. 29, 2016), https://www.project-syndicate.org/print/macri-argentina-economic-uncertainty-by-joseph-e--stiglitz-and-martin-guzman-2016-01.

43 Benedict Mander and Daniel Politi, *Macri Raises Hopes for Argentina's Economic Renewal*, Financial Times (Jan. 20, 2016), http://www.ft.com/intl/cms/s/0/e4476904-beb6-11e5-9fdb-87b8d15baec2.html#axzz42czDTTah.

44 Eduardo Levy-Yeyati, *In Argentina's Economy, It Takes Three to Tango*, BloombergView (Feb. 26, 2016), http://www.bloombergview.com/articles/2016-02-26/in-argentina-s-economy-it-takes-three-to-tango.

those exchange offers.'"[45] But as the district court found in lifting the injunction, and as the district court never intended, "that is precisely what has happened."[46] The exchange bondholders are now owed over $3 billion.[47] An order affirming the district court's ruling will mean that "the Republic may once again pay the exchange bondholders—something that has not happened for nearly two years."[48]

D. Appellants Offer No Countervailing Interest To Support Maintaining The Injunction

In the district court, appellants were at a loss to identify a single interest or fact that weighed in favor of maintaining the *pari passu* injunction in place, and they fare no better here. Appellants fall into two camps. Each offers an argument that, they say, should have affected the district court's calculus, but neither argument tilts the balance of the equities in appellants' direction, still less does it demonstrate an abuse of discretion by the district court.

1. *NML, Aurelius, and the other settling bondholders*. Astoundingly, plaintiffs NML, Aurelius, and others appeal despite having reached a $4.6 billion settlement with Argentina, and despite expressing the "sincere[] hope that Argentina will pay in full under [their] settlement agreement."[49] Their argument

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45 SPA-64.

46 SPA-65.

47 A-2269:13–15.

48 SPA-65; *see also* A-2248–49; A-2269:11–12; 2302:12–14.

49 Aurelius Br. 3.

here is that *if* Argentina does not pay them by April 14, 2016, then they will have the right to terminate their agreement; and *if* they choose to exercise that right, then they should continue to have an injunction in their case.

In the first instance, it is doubtful that these hypotheticals are properly before the Court.[50] But it is also a curious argument, because if these plaintiffs do not terminate their settlement, they will continue to benefit from the injunction until they are paid. That's what both their settlement agreement and the district court's order provide.[51] They will also continue to accumulate interest on their settlement payment after April 14, at a higher rate that they purposefully negotiated.[52] So they face no harm at all, let alone the sort of "irreparable injury" that has "repeatedly [been] held" to be "the basis for injunctive relief" and without which no injunction could issue in the first place.[53]

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50 *See Lillbask ex rel. Mauclaire v. Conn. Dep't of Educ.*, 397 F.3d 77, 84 (2d Cir. 2005) ("[A]t all times, the dispute before the court must be real and live, not feigned, academic, or conjectural." (internal quotation marks omitted)).

51 A-2367–68.

52 Under their agreement, appellants receive interest at an annual rate of 2% until April 14 and, thereafter, "interest will resume running . . . at the [applicable] legal and statutory interest rate . . . ." A-2366.

53 *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982); *see also Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156, 162 (2010) (district court abuses its discretion by entering injunction where plaintiff does not face irreparable harm).

The appeal also fails at the threshold because it is based on a misreading of the settlement agreement. NML and Aurelius dispute Argentina's assertion that, "by exercising their termination right, Lead Plaintiffs would render the[ir] [agreement] void *ab initio*,"[54] but that is precisely what the contract provides. It says, in boldface no less, that if any of the plaintiffs terminates, then "**the terminating Plaintiffs and the Republic of Argentina (with respect to the terminating Plaintiffs only) shall thereupon be restored to their respective prior positions as if there had been no Agreement in Principle.**"[55] There is no ambiguity. If the contract is terminated, it becomes void *ab initio*, and the terminating plaintiffs will assume the position of bondholders who did not enter into agreements in principle by February 29. So the text of the agreement quite clearly defeats their appeal.

Finally, even if the Court takes the settling appellants' view of their contract at face value, the appeal still fails in light of the standard of review. That is because the record before the district court plainly supported the conclusion that it would be inequitable to keep the injunction in place—and thus to potentially "scupper th[e] deal" of EM, Montreux, and other settling plaintiffs;[56] to continue to bar Argentina's access to the international capital markets; and to delay payment to

54 Aurelius Br. 43.

55 A-2371 (emphasis in original).

56 SPA-65.

exchange bondholders—simply because certain plaintiffs might choose to terminate their settlements in order to hold out for better terms.

Beyond that, the district court found in its indicative ruling that changed circumstances warranted relief *even before* NML and Aurelius had entered into settlement agreements. The agreements in principle signed with NML and Aurelius between the indicative ruling and the final order provided further support for the district court's ruling, but were not the basis on which the district court granted relief. Based on the finding that lifting the injunction was warranted even before NML and Aurelius had settled, the district court rightly refused to underwrite appellants' "insurance"[57] policy by giving them the power to resurrect the injunction after April 14. In that respect, the court's decision could hardly be called an abuse of discretion.

2. *Non-settling bondholders*. The second group of appellants is here because it has refused Argentina's public offer and continues to hold claims. These appellants' chief argument is that the injunction should remain in place while they press Argentina for more favorable terms.

Again, that is no basis to reverse the district court's holding. "As the record makes clear, claims made by certain plaintiffs that they have had 'no opportunity'

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57 Aurelius Br. 40.

to negotiate are exaggerated."[58] And even if negotiations had not progressed to these appellants' liking, "vacating the injunctions in no way impedes . . . settlement negotiations" and does not "prevent acceptance of the Republic's Proposal for settlement, which remains open."[59] (Indeed, although not part of the record in the district court, it is publicly reported that Argentina has continued to negotiate and has reached settlements with more than 120 additional bondholders since entry of the final order, resolving additional claims of $345 million.[60])

What many of these appellant seek to do—but what equity does not now permit—is to use the district court's injunction "as a tool for leverage in negotiations."[61] The argument of certain appellants to the effect that the injunction should be kept in place in order to pressure Argentina to pay them on account of

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58 SPA-82. Contrary to the position of certain appellants, that finding was indeed supported by evidence in the record; it withstands review for clear error under any scenario. *See, e.g.*, A-1939–40 ¶¶ 15–18.

59 SPA-82.

60 *Statement of Daniel A. Pollack, Court-Appointed Special Master, March 9, 2016*, http://www.prnewswire.com/news-releases/statement-of-daniel-a-pollack-court-appointed-special-master-march-9-2016-300233604.html; *Argentina Settles With 115 Individual Bondholders, Holding $155 Million In Defaulted Bonds* (March 18, 2016), http://www.prnewswire.com/news-releases/argentina-settles-with-115-individual-bondholders-holding-155-million-in-defaulted-bonds-300238220.html.

61 SPA-83.

time-barred claims[62] well illustrates the problem. Nor is it equitable to hold up Argentina's access to the international capital markets and other settlements simply because, for instance, Andrarex Ltd. desires to negotiate a $5 million claim while armed with the bludgeon of an injunction that can scupper multi-billion dollar settlements, when Andrarex will remain free to negotiate without it.[63]

In short, the district court appropriately determined that the interests of the non-settling bondholders should not continue to hold up the existing settlements and bar Argentina from accessing the capital markets. That judgment is entitled to considerable weight, which is here dispositive.

III. THE DISTRICT COURT'S ORDER WAS LEGALLY SOUND

Having found that the circumstances had changed so dramatically as to render the *pari passu* injunction inequitable and contrary to the public interest, the district court appropriately entered an order conditionally lifting it. Certain of the appellants nonetheless urge that the court was legally constrained to deny relief—never mind the inequity—because plaintiffs had obtained an unmovably permanent injunction.

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62 *See, e.g.*, Opening Brief of Interested Non-Party Appellant Foreign-Law Bondholders, Dkt. No. 263-1 ("Arag-A Ltd. Br.") 22-24. These plaintiffs' argument that the public offer didn't expressly exclude defunct claims is absurd. An offer to pay unenforceable debts would have to state expressly that they were *in*cluded. Failing that, they fall outside the definition of bonds and become memorabilia.

63 *See* Brief for Plaintiff-Appellant Andrarex, Ltd., Dkt. No. 264.

Gone are the days when "no injunction or statute which the king establisheth may be changed."[64] This injunction, moreover, was "more in the nature of a preliminary injunction," such that in considering whether to lift it, the district court enjoyed "the same discretion it exercised in granting . . . injunctive relief in the first place."[65] Neither the court nor the parties "intended [the *pari passu* injunction] to operate in perpetuity."[66] The district court entered that decree to place judicial force behind the contractual *pari passu* clause so long as, but only so long as, Argentina remained uniquely recalcitrant. The district court was always cognizant of the decree's provisional nature, having retained full authority to "modify and amend it as justice requires to achieve its equitable purposes and to account for changing circumstances."[67] And the court retained ample authority to vacate the injunction under Rule 54(b), given that it had "adjudicate[d] fewer than all the claims or the rights and liabilities of" the parties.

Moreover, appellants' argument fails even if the Court evaluates the *pari passu* injunction as a permanent decree, because Rule 60(b) is not so wooden as appellants assert. Their argument boils down to the claim that a federal court is

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64 Daniel 6:15.

65 *Sierra Club v. United States Army Corps of Eng'rs*, 732 F.2d 253, 256–57 (2d Cir. 1984).

66 *Bd. of Educ. of Okla. City Pub. Sch. v. Dowell*, 498 U.S. 237, 248 (1991).

67 SPA-59.

powerless to revisit an inequitable decree with prospective effect unless the judgment has been satisfied.[68] The Supreme Court rejected precisely this argument in *Horne v. Flores*, explaining that "[s]atisfaction of an earlier judgment is *one* of the enumerated bases for Rule 60(b)(5) relief—but it is not the only basis for such relief"; instead, a petitioner "may obtain relief if prospective enforcement of that order 'is no longer equitable.'"[69] The Supreme Court has also rejected appellants' assertion that Rule 60(b)(5) always requires a showing of "'grievous wrong evoked by new and unforeseen conditions'"; Rule 60(b)(5) contemplates "a less stringent, more flexible standard."[70] This Court, meanwhile, has made clear that "cases may arise in which modification or termination of a[n] [equitable] decree is appropriate even though the purpose of the decree has not been achieved."[71] Finally, the

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68 *See* Aurelius Br. 31 ("The purpose of the Injunctions is plain from the Injunctions themselves and from this Court's opinions affirming them—to 'order[] Argentina to specifically perform its obligations under' the Pari Passu Clause . . . . Argentina has not done that.").

69 *Horne v. Flores*, 557 U.S. 433, 454 (2009) (emphasis in original) ("Use of the disjunctive 'or' [in Rule 60(b)(5)] makes it clear that each of the provision's three grounds for relief is independently sufficient and therefore that relief may be warranted even if petitioners have not 'satisfied' the original order.").

70 Aurelius Br. 30; *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 380 (1992) ("Our decisions since [*United States v. Swift & Co.*, 286 U.S. 106 (1932)] reinforce the conclusion that the 'grievous wrong' language of *Swift* was not intended to take on a talismanic quality, warding off virtually all efforts to modify consent decrees.").

71 *United States v. Eastman Kodak Co.*, 63 F.3d 95, 102 (2d Cir. 1995).

standard for obtaining relief is and should be even more flexible where, as here, issues of sovereignty are at stake.[72] In short, as the district court aptly observed, the law is quite "nuanced."[73]

In this "exceptional"[74] case, it was more than sufficient for the district court to find, as it did, that circumstances had dramatically changed with the election of President Macri and that the injunction had become grossly inequitable in unforeseen ways. The district court, which had originally fashioned the injunction and was best positioned to ascertain its purpose, observed that the main purpose of the injunction had been to "promote settlement," and found that the injunction now stands as an obstacle to settlement.[75] The injunction "create[s] an incentive for the remaining holdout plaintiffs to shun settlement, knowing that they derive leverage from the ability to prevent the Republic and the other plaintiffs from consummating agreements."[76] And in this way the injunction has been "'turned through changing circumstances into an instrument of wrong,'" which is something

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72 *Cf. Horne*, 557 U.S. at 450 ("[A] 'flexible approach' to Rule 60(b)(5) motions" applies in institutional reform context "to ensure that 'responsibility for discharging the State's obligations is returned promptly to the State and its officials' when the circumstances warrant." (citations omitted)).

73 SPA-56–59 (summarizing decisions on Rule 60(b)).

74 *NML II*, 727 F.3d at 247.

75 SPA-62–63.

76 SPA-63.

the district court never intended.[77] The district court was quite right to correct the mischief and had the discretion to do so.

As for appellants' argument that lifting the injunction would improperly permit Argentina to breach the *pari passu* clause, this is yet another attempt to have the Court usurp the district court's role of determining whether Rule 60 relief is warranted.[78] When this Court affirmed the entry of the injunction, it took great care to explain that neither the district court's order nor this Court's affirmance of it should be viewed to hold that "a sovereign debtor breaches its *pari passu* clause every time it pays one creditor and not another, or even every time it enacts a law disparately affecting a creditor's rights."[79] Instead, reviewing the district court's order for abuse of discretion, this Court "simply affirm[ed]" the district court's judgment in light of "Argentina's extraordinary behavior," and nothing more.[80]

In view of the limited basis on which the district court entered the *pari passu* injunction and the exceptional course of this litigation, and in view of the deferential standard of review that governs this appeal, there is no basis to disturb the district court's ruling. To demand strict adherence to the *pari passu* clause in the contract as the price for relief from the injunction is unwarranted in law, and it

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77 *Id.* (quoting *United States v. Swift & Co.*, 286 U.S. 106, 115 (1932)).

78 *See, e.g.*, Individual Bondholders Br. 23–25.

79 *NML II*, 727 F.3d at 247.

80 *Id.*

would deprive the district court of its inherent discretion in fashioning equitable remedies. Argentina's breach did not give appellants a legal right to maintain the injunction forever.[81] For the same reason, full performance of the contract cannot be a requirement for relief from the injunction.

IV. THE DISTRICT COURT'S ORDER WAS PROCEDURALLY SOUND

Finally, appellants mount two procedural attacks on the district court's order, neither of which has merit. *First*, many appellants advance the throw-away claim that they were inadequately "heard" in the district court, although no appellant seems to seek reversal on that basis.[82] Nor could they. The briefing schedules on Argentina's motions for an indicative ruling and for a final order undoubtedly were "by the book."[83] The procedures fully complied with all applicable rules, including Federal Rule of Civil Procedure 6(c)(1)(C), Local Rule 6.1(d), as well as this Court's mandate returning the cases to the district court. And appellants were heard. Represented by several of the largest and most highly regarded law firms in the world, appellants interposed their objections to

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81 *NML Capital, Ltd. v. Republic of Argentina ("NML I")*, 699 F.3d 246, 261 (2d Cir. 2012) ("The performance required by a decree need not . . . be identical with that promised in the contract.").

82 *E.g.*, Aurelius Br. 18–20, 23–25; Opening Brief of Appellants NML Capital, Ltd., *et al.* ("NML Br.") 13–14, 16–17, 20–22; Arag-A Ltd. Br. 21–22, 25–26.

83 Aurelius Br. 18.

Argentina's motions in hundreds of pages of briefing and exhibits, and at oral argument.

Second, NML objects to the district court's order because it will take effect, and the injunction will be lifted, on the occurrence of two conditions, and without a further hearing. NML did not make this argument in the district court, so it is not properly before the Court. Regardless, NML cites no authority for its made-up rule that "springing" vacaturs are only appropriate "where they vacate upon a date certain, or readily observable conditions."[84] That rule comes from nowhere. There is also no authority for NML's assertion that the district court must hold yet another hearing before the injunction finally may be lifted.

Instead, the law is clear that the district court was free to impose the easily ascertainable conditions that it wrote into its final order, because "district courts whose equity powers have been properly invoked indeed have discretion in fashioning injunctive relief (in the absence of a statutory restriction)."[85] District courts also have the discretion to decide whether the circumstances of a particular

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84 NML Br. 27 (citing two out-of-Circuit district court decisions issuing springing vacaturs but referencing no restrictions for doing so).

85 *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 496 (2001); *NML I*, 699 F.3d at 261 (the district court "ha[s] considerable latitude in fashioning [injunctive] relief"); *see also MacFadden-Bartell Corp. v. Local 1033*, No. 72 Civ. 1837, 1972 WL 3225, at *1 (S.D.N.Y. May 10, 1972) (restraining order dissolved on condition that union leader "carry out the assurances given to the court" that he would better control striking union members).

case call for a hearing.[86] Having already found that the injunction was inequitable, the district court had a very good reason to enter a conditional order that would be effective immediately on satisfaction of the two conditions the court had imposed, and without a further hearing: "The Argentine Congress must know where it stands," and it must know promptly.[87]

86 *Zappia Middle East Const. v. Emirate of Abu Dhabi*, 215 F.3d 247, 253 (2d Cir. 2000) ("The district court's denial of an evidentiary hearing is subject to an abuse of discretion standard of review.").

87 SPA-82.

CONCLUSION

For the reasons stated, the decision of the district court should be promptly affirmed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The foregoing brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B) because it contains 6,765 words, excluding those parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

The foregoing brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface, 14-point Times New Roman font, using Microsoft Word 2013.

Dated: March 21, 2016

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