No. 12-1494

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 FOR THE AURELIUS RESPONDENTS IN OPPOSITION

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RULE 29.6 STATEMENT

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 FOR THE AURELIUS RESPONDENTS IN OPPOSITION

Respondents Aurelius Capital Master, Ltd., ACP Master, Ltd., Aurelius Opportunities Fund II, LLC, and Blue Angel Capital I LLC respectfully oppose the petition for a writ of certiorari, for the reasons stated below, as well as those stated in the brief in opposition filed by respondents NML Capital, Ltd., et al.

STATEMENT

Argentina's petition for a writ of certiorari fundamentally mischaracterizes this case. In Argentina's telling, the court of appeals has affirmed orders amounting to an attachment against sovereign property. Not so. The *in personam* orders compel specific performance of specific contractual language on specific facts not likely to recur. And they are injunctions—Argentina may comply without surrendering its property—not the sort of attachment, arrest, or execution from which sovereigns are immune under the Foreign Sovereign Immunities Act. What is more, just two days before this brief in opposition was filed, Argentina's president announced a plan to evade the district court's injunctions—in direct contravention of a separate district court order that is fully in effect. Argentina hardly deserves this Court's discretionary review when it has no intention of abiding by any decision it does not like.

1. Argentina issued respondents' bonds under a 1994 Fiscal Agency Agreement (FAA). In that Agreement, Argentina "irrevocably submitted to the jurisdiction" of U.S. courts and agreed that New York law would govern the contract. C.A. App. A-203. Argentina waived sovereign immunity in two places in the FAA. "The Republic hereby irrevocably waives and agrees not to plead any immunity from the jurisdiction of any such court . . . in any action arising out of or based on the [the FAA Bonds]." C.A. App. A-185. And, "[t]o the extent that the Republic or any of its revenues, assets or properties shall be entitled . . . to any immunity from . . . attachment prior to judgment, f[ro]m attachment in aid of execution of judgment, from execution of a judgment or from any other legal or judicial process or remedy . . . the Republic has irrevocably agreed not to claim and has irrevocably waived such immunity to the fullest extent permitted by the laws of such jurisdiction." C.A. App. A-204.

Argentina also included a "*pari passu*" clause in its Agreement. *Id.* at A-157. The second sentence of that clause—referred to below as the "Equal Treatment Provision" (Pet. App. 7)—requires Argentina to "rank" its "payment obligations" on the bonds "at least equally" with its other "present and future" "External Indebtedness." C.A. App. A-157. The Agreement elsewhere defines "External Indebtedness" to encompass other bonds and other securities paid in non-Argentine currency, with certain exceptions. *Id.* at A-171.

In 2001, Argentina defaulted on these bonds and declared a "temporary moratorium" on further payments. Pet. App. 7. It has renewed this moratorium every year since, and it has not made payments on respondents' bonds since 2001. Pet. App. 7-8.

In 2005, Argentina offered to exchange the defaulted bonds for new bonds. Pet. App. 8, 10. In those new bonds, Argentina would pay less than 30% of the face value of the original bonds. *Ibid.* In response to demands from potential exchange bondholders, C.A. App. A-850, Argentina enacted a "Lock Law" purporting to forbid it from ever making payments on the remaining defaulted, non-exchanged FAA bonds. Pet. App. 9-11. In 2010, Argentina temporarily suspended the Lock Law and reopened the exchange offer. Ultimately, about 91% of the defaulted bonds were exchanged for the new, less valuable bonds in the 2005 and 2010 exchanges. Pet. App. 11. Argentina has since reenacted the Lock Law. Three *amici* (the Euro Bondholders, the Exchange Bondholder Group, and Fintech) own some of those exchange bonds. Argentina has made all scheduled payments on the exchange bonds.

2. Respondents are holders of defaulted, non-exchanged FAA bonds. At the time of the decision below, Argentina owed them about $1.3 billion on the bonds at issue in the present case. Pet. App. 8. Respondents brought this suit seeking specific performance. See Pet. App. 12-13. In particular, respondents sought an injunction requiring Argentina to specifically perform its promise to "rank" its payment obligations "at least equally" to the exchange bonds.

The district court held that Argentina had violated its equal-ranking promise because it had enacted the Lock Law and because it persisted for several years in paying its exchange bondholders without paying respondents. Pet. App. 52-53. In February 2012, the district court entered the Injunctions at issue here. The Injunctions direct Argentina to make a "ratable payment" to respondents "concurrently [with] or in advance" of its payments on the exchange bonds. Pet. App. 15. Argentina may therefore comply by making an appropriate payment to respondents whenever it makes a payment on the exchange bonds. Or it may comply by paying neither respondents nor the exchange bondholders. See Pet. App. 33.

3. The court of appeals affirmed in part and remanded. It agreed with respondents that the Equal Treatment Provision "prohibits Argentina, as bond *payor*, from paying on other bonds without paying on the FAA Bonds." Pet. App. 25. It reasoned that Argentina's proffered "interpretation fails to give effect to the differences between the two sentences" of the *pari passu* clause. Pet. App. 24. The court of appeals further agreed that Argentina's breach of the Equal Treatment Provision warrants injunctive relief. The court considered the equities, the public interest, and the absence of an adequate remedy at law. Pet. App. 29-32, 34-36.

The court of appeals held that the Injunctions did not violate the Foreign Sovereign Immunities Act. As relevant here, that Act immunizes the property of foreign sovereigns from "attachment arrest and execution" (with specified exceptions). 28 U.S.C.

§ 1609. The court of appeals rejected Argentina's argument that the Injunctions run afoul of that immunity: "The Injunctions . . . . do not attach, arrest, or execute upon any property. They direct Argentina to comply with its contractual obligations not to alter the rank of its payment obligations." Pet. App. 32.

Finally, the court of appeals remanded two discrete issues (the precise meaning of "ratable payment" and the effect of the Injunctions on third parties) to the district court. Pet. App. 37.

4. The district court decided the remanded issues. Pet. App. 229-241. On August 23, 2013 (long after the certiorari petition was filed), the court of appeals affirmed. Addendum, *infra*, 1a-32a.

The court of appeals noted that in the FAA "Argentina promised that each bond would be transfer[]able and payable to the transferee, regardless of whether it was a university endowment, a so-called 'vulture fund,' or a widow or an orphan." Addendum, *infra*, 6a-7a. The court further noted Argentina's promise of equal treatment and its passage of the Lock Law. *Id*. at 7a. The court observed that "Argentina filed a petition for *certiorari* in this matter on June 24, 2013, notwithstanding that, as of that date, no final order had yet been issued in this case." *Id*. at 10a n.6.

The court reaffirmed that "the injunctions allow Argentina to pay its FAA debts with whatever resources it likes," and "remain[ed] convinced that the amended injunctions are consistent with the

FSIA." Addendum, *infra*, 15a. The court affirmed the district court's ratable-payment formula, noting that the "reason" for the formula was "obvious" and that "the district court's decision does no more than hold Argentina to its contractual obligation of equal treatment." *Id*. at 15a-16a. The court rejected the argument that the injunction was beyond an equity court's power, noting that "English chancery courts traditionally had power to issue injunctions and order specific performance when no effective remedy was available at law" and that, "[a]s we explained in our October 2012 opinion, the plaintiffs have no adequate remedy at law." *Id*. at 16a.

Rejecting exchange bondholders' complaints about the injunction's possible effects on Argentina's willingness to honor those obligations, the court was "unwilling to permit Argentina's threats to punish third parties to dictate the availability or terms of relief under [Federal Rule of Civil Procedure] 65(d)." "[B]efore accepting the exchange offers," the court explained, exchange bondholders "were expressly warned by Argentina in the accompanying prospectus that there could be 'no assurance' that litigation over the FAA Bonds would not 'interfere with payments' under the Exchange Bonds." Addendum, *infra*, 18a (quoting C.A. App. A-466).

The court addressed additional arguments pertaining to the functioning of "the international financial system through which Argentina pays Exchange Bondholders." Addendum, *infra*, 19a. "None of these arguments, numerous as they are, has merit." *Ibid.* Among the arguments rejected was that "the amended injunctions are improper or at a minimum violate comity when they extraterritorially enjoin payment systems that deliver funds to Exchange Bondholders." *Id.* at 21a. Among other defects in that argument, "a 'federal court sitting as a court of equity having personal jurisdiction over a party [here, Argentina] has power to enjoin him from committing acts elsewhere.'" *Ibid.* (quoting *Bano* v. *Union Carbide Corp.*, 361 F.3d 696, 716 (2d Cir. 2004)).

The court addressed alleged injuries to the public interest. "In our October opinion, we considered the dire predictions from Argentina that enforcing the commitments it made in the FAA would have cataclysmic repercussions in the capital markets and the global economy, and we explained why we disagreed." Addendum, *infra*, 26a. The court repeated that, other than "speculation," "'Argentina makes no real argument that, to avoid defaulting on its other debt, it cannot afford to service the defaulted debt, and it certainly fails to demonstrate that the district court's finding to the contrary was clearly erroneous.'" *Id.* at 27a (quoting Pet. App. 35). "Moreover, . . . Argentina failed to present the district court with any record evidence to support its assertions." *Ibid.*

Finally, the court explained why its holdings have little implication for other cases and why holding debtors to their promises is "essential to the integrity of the capital markets." Addendum, *infra*, 31a. "[T]his case is an exceptional one with little apparent bearing on transactions that can be expected in the future." *Id.* at 29a. "We simply affirm the district court's conclusion that Argentina's *extraordinary behavior* was a violation of the particular *pari passu* clause found in the FAA." *Ibid.* (emphasis added). "[C]ases like this one are unlikely to occur in the future because Argentina has been a uniquely recalcitrant debtor and because newer bonds almost universally include collective action clauses ('CACs') . . . ." *Id.* at 29a-30a (footnote omitted). "The particular language of the FAA's *pari passu* clause dictated a certain result in this case, but going forward, sovereigns and lenders are free to devise various mechanisms to avoid holdout litigation if that is what they wish to do." *Id.* at 30a-31a.

On Sunday, August 25, 2013, Argentine Economy Minister Hernán Lorenzino reiterated Argentina's intention to defy the rulings of the courts below. Taos Turner, *Argentine Minister Says Won't Change Plans to Pay Holdout Creditors*, Wall St. J., Aug. 25, 2013. The next day, Argentine President Cristina Fernández de Kirchner made good on that threat, announcing legislation that would attempt to circumvent the district court's injunction by swapping exchange bonds for Argentine-law bonds with a payment mechanism (purportedly) beyond the reach of U.S. courts. See Taos Turner, *Argentina Reopens Debt Swap*, Wall St. J., Aug. 27, 2013, at C4. This action was in direct defiance of the district court's March 5, 2012, order prohibiting Argentina from "tak[ing] any action to evade" the Injunctions or "render them ineffective in the event they are affirmed, or diminish the Court's ability to supervise compliance . . . including without limitation, altering or amending the processes or specific transfer mechanisms by which it makes payments on the Exchange Bonds." Pet. App. 220. That order was not stayed and remains in effect.

ARGUMENT

1. The first question presented, which concerns the application of the Foreign Sovereign Immunities Act of 1976 (FSIA), does not warrant certiorari. The court of appeals correctly held that the FSIA does not prohibit U.S. courts from enjoining sovereigns over which they have personal jurisdiction and that the *in personam* injunction here does not run afoul of the FSIA's limitations on certain *in rem* remedies. That holding is not in conflict with the decision of any other court of appeals and is manifestly correct.[1]

a. The decision below does not conflict with any decision of any other court of appeals.

The FSIA establishes two sets of immunity rules: one for jurisdiction and liability (28 U.S.C. §§ 1604-1607), and another for certain forms of enforcement (28 U.S.C. §§ 1609-1611). The petition and the cases it cites focus on 28 U.S.C. § 1609, which provides statutory immunity from three specified forms of enforcement: "[T]he property in the United States of a foreign state shall be immune from attachment arrest and execution." To the extent they are relevant at all, the cases cited in the petition involve what constitutes an attachment, arrest, or execution. See *Janvey* v. *Libyan Inv. Auth.*, 478 F. App'x 233 (5th Cir. 2012); *Phoenix Consulting Inc.* v. *Republic*

[1] Argentina's *amici* scarcely address this question. Notably, France, the sole sovereign *amicus*, raises no concerns about the court of appeals' interpretation of sovereign immunity.

of Angola, 172 F.3d 920 (D.C. Cir. 1998) (table); *Stephens* v. *Nat'l Distillers & Chem. Corp.*, 69 F.3d 1226 (2d Cir. 1995); *Atwood Turnkey Drilling, Inc.* v. *Petroleo Brasileiro, S.A.*, 875 F.2d 1174 (5th Cir. 1989); *S & S Mach. Co.* v. *Masinexportimport*, 706 F.2d 411 (2d Cir. 1983).

The Second Circuit has interpreted Section 1609 to bar an order—whether labeled an attachment, an injunction, or something else—that effects "precisely the same result that would obtain if the foreign sovereign's assets were formally attached," arrested, or executed upon. *Stephens*, 69 F.3d at 1229; see also *S & S Mach.*, 706 F.2d at 418. In the opinion below, the court of appeals correctly distinguished those cases because they involved orders that were attachments by another name.

In *Stephens*, the order forced sovereign entities "to place some of their assets in the hands of the United States courts," so that they "would have no access to those assets." 69 F.3d at 1229. That exercise of dominion over specific assets was "the equivalent of an attachment." *Id.* at 1234. Likewise, in *S & S Machinery*, an injunction "immobilize[d]" a letter of credit in favor of sovereign entities by enjoining "any and all negotiation of drafts or other negotiable paper pursuant" to the letters of credit. 706 F.2d at 412, 413 (internal quotation marks omitted). Because this order enjoined all "negotiation or use of property," the court held, it had the force of a "prejudgment attachment of assets." *Id.* at 418.

The cited cases from outside the Second Circuit took a consistent approach. The preliminary injunction in *Janvey* barred sovereign entities "from dissipating" certain funds "held in accounts at Citibank." 478 F. App'x at 235. That injunction "would effectively freeze the funds" and thus "would serve the same purpose as an attachment." *Id.* at 236. *Phoenix Consulting*, too, appears to have involved a preliminary injunction against use of certain funds at a certain bank, though the one-paragraph ruling is not detailed. See 172 F.3d 920, at *1.[2]

The orders at issue in all of the cited cases share one key feature: the court's seizure of a specific interest in the defendant's property. Each order would deprive the defendant of all use of the property and therefore would be the functional equivalent of an attachment.

The Injunctions in this case, as the court of appeals explained, lack any such characteristic and therefore are consistent with Section 1609 as interpreted in every case Argentina cites. Unlike an attachment, arrest, or execution, "[t]he Injunctions can be complied with without the court's ever exercising dominion over sovereign property." Pet. App. 33. Argentina may comply with them without surrendering any particular asset. Indeed, it may comply without using any assets at all.

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[2] In *Atwood*, the Fifth Circuit affirmed an injunction over an FSIA challenge, holding that the sovereign entity had waived its immunity from attachment. 875 F.2d at 1177. It did not matter whether the injunction was equivalent to an attachment.

Argentina contends that the Injunctions yield the same "result" in practice as an attachment. Pet. 26; see also Euro Br. 2-3.[3] As just explained, however, attachments and like orders deprive a defendant of all use of certain property, whereas the Injunctions are directed at no property and allow Argentina to comply without using its property at all. An attachment would offer no such choice. See *Kensington Int'l Ltd.* v. *Republic of Congo*, 461 F.3d 238, 243 (2d Cir. 2006) (holding that the FSIA did not bar an order requiring a sovereign either to post security or to state a reason for noncompliance).

The Injunctions here merely forbid Argentina from giving preferential treatment to one group of payment obligations over another set of obligations. This "incidental[]" effect on property, Pet. App. 33, falls far short of being a forbidden attachment, arrest, or execution. What makes an injunction unlike an attachment, arrest, or execution is that it is "issued against a party, not a piece of property," "requires that party to do more than simply deliver property to the court," and is "enforceable through contempt" rather than self-executing. See *Bogosian* v. *Woloohojian Realty Corp.*, 923 F.2d 898, 901 (1st Cir. 1991) (Breyer, C.J.). Here, the Injunctions are issued against Argentina, not a piece of property; require (and give Argentina the choice) *either* to pay

[3] "Euro Br." refers to the *amicus* brief of the Euro Bondholders. "Caja Br." refers to the *amicus* brief of Caja de Valores. "EBG Br." refers to the *amicus* brief of the Exchange Bondholder Group.

respondents or to pay no one; and are enforceable by contempt.

Even if the Injunctions were indistinguishable from the orders in *Stephens*, *S & S Machinery*, *Janvey*, and *Phoenix Consulting*, the courts of appeals still would not be divided. *Janvey* and *Phoenix Consulting* are unpublished and lack precedential effect. See 5th Cir. R. 47.5.4; D.C. Cir. R. 32.1(b)(1)(A). And *Atwood*, a precedential opinion, *upheld* the order at issue on grounds of waiver, without stating that a different kind of order such as the one at issue here would be forbidden.

Every other case Argentina cites comes from the Second Circuit. That court, not this Court, is best suited to resolve any such alleged conflict. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). And here there is no conflict: The Second Circuit correctly harmonized its own precedent. Unsurprisingly, Argentina's petition for rehearing en banc was denied without a call for a response and without recorded dissent. Pet. App. 42-44.

b. There is no error in the court of appeals' interpretation of the FSIA.

The FSIA authorizes courts to enter injunctions against sovereigns over which they have jurisdiction. Argentina does not dispute that the courts below have jurisdiction over it. Where such jurisdiction exists, "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606. And, in imposing liability, courts may enter equitable relief unless there is a clear statutory command to the contrary. *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398 (1946). The House Report on the FSIA put it plainly: "Consistent with [Section 1606], a court could, when circumstances were clearly appropriate, order an injunction or specific performance." H.R. Rep. No. 94-1487, at 22 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6621.

That a court might be unable to enforce its judgment in certain respects (*i.e.*, through arrest, attachment, or execution) does not undermine its power to enter the judgment; they are two different things. The structure of the FSIA makes this clear. A sovereign may be subject to jurisdiction and the entry of judgment (under Sections 1604 to 1607) without being subject to prohibited methods of enforcement (under Sections 1609 to 1611). The House Report explains the consequence in the injunction context: "For example, a foreign diplomat or official could not be imprisoned for contempt because of his government's violation of an injunction." *Ibid.*[4]

[4] In this respect, the United Nations Convention on Jurisdictional Immunities of States and Their Property mirrors the FSIA. Article 19, which Caja cites (Br. 5-6), applies only to "measures of constraint, such as attachment, arrest or execution, against property of a State." G.A. Res. 59/38, Art. 19, U.N. Doc. A/RES/59/38 (Dec. 2, 2004). Meanwhile, Article 24(1) expressly contemplates injunctions against sovereigns. *Id.* Art. 24(1) (addressing "refusal by a State to comply with an order of a court of another State enjoining it to perform or refrain from performing a specific act"). In any event, the United States has not ratified this Convention, making Caja's argument irrele-

The question presented is whether the district court may enter the Injunctions. And Congress left no doubt about the answer: It may.

Argentina nonetheless maintains that Section 1609—which governs enforcement, not entry, of judgments—bars the Injunctions. Pet. 27; accord EBG Br. 3. By its terms, however, Section 1609 limits the availability of three specific enforcement mechanisms: "attachment arrest and execution." The Injunctions are not an attachment, an arrest, or an execution. Each term has a well-defined meaning, and, as the court of appeals explained, none encompasses the Injunctions. Pet. App. 32 & n.13. Those meanings apply here, for, "absent other indication, Congress intends to incorporate the well-settled meaning of the common-law terms it uses." *Sekhar* v. *United States*, 133 S. Ct. 2720, 2724 (2013) (quotation marks omitted).

Despite this plain language, Argentina asserts that "there is no indication that Congress meant" to limit the constraints of Section 1609 to attachments, arrests, and executions. Pet. 22. But Congress chose to restrict only attachments, arrests, and executions. Congress intended other means of enforcement to be available so long as they did not run afoul of the specific prohibitions in Section 1609.

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vant; but, if the Convention has any bearing, it supports the holding below.

As the State Department's Acting Legal Adviser explained, "there are lots of methods" that a plaintiff might use when faced with "foreign governments [that do not] pay . . . a judgment against them" and there is "no attachable or executionable item in connection" with that judgment. Hearing on H.R. 3493 before the Subcommittee on Claims and Governmental Relations of the House Committee on the Judiciary, 93d Cong., 1st Sess., 26 (1973) (statement of Charles N. Brower). One such "method" is an injunction for specific performance.[5]

The policy concerns that prompted the FSIA confirm that Section 1609 is limited to attachments, arrests, and executions. Those *in rem* enforcement mechanisms are unique in their burden on sovereign defendants; they directly interfere with a sovereign's possession of property. The Injunctions, unlike an attachment, arrest, or execution, leave Argentina the choice whether to abide by them. Should it decline to do so, it would be subject to contempt—and courts could not enforce the contempt in a way that violates Section 1609 (unless the protections of Section 1609 have been validly waived, a question not yet posed). And, even if Argentina chooses to obey the Injunctions, it may do so by *not* surrendering any property

[5] To the extent the United States took a contrary view below in *amicus* briefing, its views merit no "deference" (EBG Br. 5 n.5). "The issue . . . concerns interpretation of the FSIA's reach—a pure question of statutory construction well within the province of the Judiciary. . . . [T]he United States' views on such an issue . . . merit no special deference." *Republic of Austria* v. *Altmann*, 541 U.S. 677, 701 (2004) (citation and internal quotation marks omitted).

at all—it may pay neither respondents nor the exchange bondholders.

c. The Injunctions are not impermissibly extraterritorial.

Unlike an attachment, which would operate *in rem* against specific property, the Injunctions operate *in personam*. Moreover, they operate against a juridical person (Argentina) that has consented to jurisdiction in New York. Where *in personam* jurisdiction is proper, courts "may command [a defendant] to take action even outside the United States." *Chafin* v. *Chafin*, 133 S. Ct. 1017, 1025 (2013). This is what the Injunctions do: They command Argentina not to do something (pay holders of exchange bonds) unless it also does something else (pay respondents ratably), all because Argentina itself promised to "rank" those obligations equally.

Argentina's attempt to derive a rule against extraterritorial injunction from 28 U.S.C. §§ 1609 and 1610 is therefore unavailing. See Pet. 20-21; see also Caja Br. 5-6; Euro Br. 3. As explained above, the Injunctions are not an "attachment arrest [or] execution." See 28 U.S.C. § 1609. Those provisions do not address the reach of U.S. court powers except with respect to those three remedies. It is immaterial that the contract, by which Argentina has been commanded to abide, implicates how it might use assets abroad. See Addendum, *infra*, 21a ("A 'federal court sitting as a court of equity having personal jurisdiction over a party [here, Argentina] has power to enjoin him from committing acts elsewhere.'") (quoting *Bano*, 361 F.3d at 716).

Likewise out of place is *amicus* Caja's reliance on the presumption against extraterritoriality. See Caja Br. 3-4. That presumption applies to *statutes* that "regulate conduct" abroad or "afford relief" based on events abroad. *Kiobel* v. *Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013). What regulates Argentina's conduct here is its own contract—in which it submitted to New York law and waived immunity—not the FSIA. The FSIA merely affords limited immunity in U.S. courts, without itself regulating conduct. See 11A Charles Alan Wright et al., *Federal Practice and Procedure* § 2945 (2d ed. 1995) ("[T]here is no doubt that if the court has personal jurisdiction over the parties, it has the power to order each of them to act in any fashion or in any place.").

2. In addition to its FSIA question, Argentina presents the question whether the Injunctions exceed certain bounds of "traditional equitable relief" as recounted in *Great-West Life & Annuity Insurance Co.* v. *Knudson*, 534 U.S. 204 (2002). Pet. i. This question is unfit for review for at least three reasons.

First, Argentina did not raise this issue in either court below. The main cases on which it now relies—*Great-West* and *Grupo Mexicano de Desarrollo S.A.* v. *Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999)—are cited nowhere in the briefing leading up to the opinion below. This Court does not ordinarily consider issues that are "not pressed or passed upon below." *Duignan* v. *United States*, 274 U.S. 195, 200 (1927). There is no reason why it should do so here.

Second, the decision below does not conflict with any holding of this Court. The nub of Argentina's complaint is that the court of appeals disregarded the principle, "repeatedly reaffirmed by this Court," that "federal courts may not grant equitable remedies where . . . there is an adequate remedy *at law*." Pet. 30; accord France Br. 6. But the court of appeals stated and applied that very principle. Pet. App. 29 ("Specific performance may be ordered where no adequate monetary remedy is available."); *id.* at 31 ("[M]onetary damages are an ineffective remedy for the harm plaintiffs have suffered as a result of Argentina's breach."); see also Addendum, *infra*, 16a.[6] At most, then, Argentina charges that the court of appeals "misappli[ed] a properly stated rule of law." See Sup. Ct. R. 10. That charge is false but would be no reason to grant certiorari even if true. *Ibid.*

Third, this question presented stands on a faulty premise. Contrary to Argentina's claims, the Injunctions are not "'injunction[s] against failure to pay a simple indebtedness.'" Pet. 31 (quoting *Great-West Life*, 534 U.S. at 216); see also EBG Br. 5-6. The Injunctions do not rest on Argentina's contractual obligation to pay amounts owed on the FAA bonds. Rather, they order specific performance to remedy Argentina's breach of its additional promise to "rank" its "payment obligations" "at least equally." Pet.

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[6] Similarly, France argues that courts must consider an injunction's effect on the public interest, Br. 4, but the court of appeals did just that, Pet. App. 34-36; see also Addendum, *infra*, 26a-31a.

App. 6; see *id.* at 32. Argentina may honor that promise either by paying everyone or by paying no one.[7] For this reason, the Injunctions are unlike the "personal liability" "for a contractual obligation to pay money" at issue in *Great-West Life*. 534 U.S. at 210.

3. Argentina and its *amici* resort to speculation that a single injunction tailored to the unique facts of Argentina's extraordinary repudiation of creditors will somehow cripple the international financial system. Pet. 4; Caja Br. 2; EBG Br. 1; Euro Br. 6; France Br. 4.

But recent experience directly contradicts those histrionic speculations. In the year and a half since the Injunctions were entered, four nations—Belize, Greece, Jamaica, and Saint Kitts and Nevis—have conducted successful sovereign debt restructurings. Moody's Investors Service, *The Role of Holdout Creditors and CACs in Sovereign Debt Restructurings* at 4 (Apr. 10, 2013) ("Moody's 2013 Report"). Holdout creditors have not materially disrupted those restructurings. And the Second Circuit's opinion will pose no greater threat to sovereign debt restructurings in the future.

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[7] To be sure, a failure to pay its other creditors would have consequences for Argentina. Those consequences, however, result from promises Argentina made when raising capital. If the combined effect of the Injunctions and Argentina's promises leads to Argentina paying respondents rather than paying no one, that is a result of Argentina's making.

As the Second Circuit recently explained, "this case is an exceptional one with little apparent bearing on transactions that can be expected in the future." Addendum, *infra*, 29a. The consequences of the Injunctions have been and will remain limited for at least three reasons. First, this case involves specific contractual language that most bonds do not include and need not include in the future. Second, it involves old bonds lacking anti-holdout provisions that since have become almost universal. Third, the Injunctions are a narrow, fact-specific remedy tailored to address Argentina's unprecedented disregard for legal judgments and well-established norms for negotiating in good faith with private creditors. We address each point in turn.

a. One reason why the issues presented here are unlikely to recur is that the bonds at issue here contain the Equal Treatment Provision in their *pari passu* clause. The court of appeals affirmed the Injunctions based on a specific, word-by-word reading of the Equal Treatment Provision. Because this language is far from universal now, and need not be included in future bond contracts, the result that it compelled here will not become standard. See Addendum, *infra*, 30a-31a.

The meaning of this *pari passu* clause is a question of contract interpretation, governed by state law. The certiorari petition does not ask this Court to resolve that question of state law, see Pet. i, nor would this Court do so. See *Fuller* v. *Oregon*, 417 U.S. 40, 48 n.9 (1974). As this case comes to the Court, the court of appeals' construction of the contract is binding.

Yet this issue is a major target of Argentina and its *amici*. See Pet. 10-13; Euro Br. 6-8; France Br. 8. They assert that the interpretation of the Equal Treatment Provision, coupled with the injunctive relief the certiorari petition does challenge, will cause such widespread negative consequences that the Court should grant review purely to forestall them. In reality, "[t]he particular language in the FAA's *pari passu* clause dictated a certain result in this case," Addendum, *infra*, 30a, making this case even more fact-specific and less likely to affect future restructurings.

The court of appeals correctly observed that "construction of *pari passu* clauses in the sovereign debt context is far from general, uniform and unvarying." Pet. App. 23 (quotation marks omitted). It is simply incorrect to suggest (France Br. 8) that the court of appeals' interpretation controls whenever any *pari passu* clause is governed by New York law. The correct interpretation varies with what each particular clause says. As the court of appeals recently explained: "We simply affirm the district court's conclusion that Argentina's extraordinary behavior was a violation of the particular *pari passu* clause found in the FAA." Addendum, *infra*, 29a.

This text-specific holding will not have broad effect because—contrary to the claims of Argentina and its *amici* (Pet. 10; Euro Br. 7; France Br. 7)—*pari passu* clauses are not "boilerplate." That label masks the important differences *among* various *pari passu* clauses and the particular significance of the Equal Treatment Provision at issue here. Building on an academic study, Moody's compared hundreds of *pari passu* clauses in sovereign debt contracts dating to 1823. Moody's Investors Service, *US Court Ruling on Argentina's Debt Could Have Limited Implications for Sovereign Debt Restructurings* (Dec. 6, 2012). It found that this case is unusual: "Not all sovereign bond contracts have the same formulation of the pari passu clause as Argentina's bonds." *Id.* at 1. Indeed, a "common formulation[] of the pari passu clause, found in the majority of the bonds issued over the past two decades and in almost all bonds issued earlier, poses a lower risk of holdout litigation" than the clause at issue here. *Ibid.* The predicate for the Injunctions will therefore be missing in most other cases.

Going forward, sovereigns may simply change the language of their bond contracts. Nothing requires sovereigns to insert this kind of Equal Treatment Provision. See Addendum, *infra*, at 30a-31a. Italy, for example, has recently deleted language in its bonds that referred to ratable payments. See International Monetary Fund, *Sovereign Debt Restructuring—Recent Developments and Implications for the Fund's Legal and Policy Framework* at 31 n.35 (Apr. 26, 2013), available at http://www.imf.org/external/np/pp/eng/2013/042613.pdf ("IMF Report"). And Argentina altered the key *pari passu* language in its 2005 and 2010 exchange bonds. C.A. App. A-1197, A-1235. There is no basis for this Court to review the remedies available for breach of an idiosyncratic contract provision when normal contract bargaining can respond far more nimbly by affecting what contract provisions sovereigns offer and lenders accept *ex ante*.

b. In addition, the issues presented here are unlikely to recur because the sovereign debt markets have developed means to avoid them. In the nearly two decades since the FAA was drafted, sovereigns have increasingly written their bond agreements in ways that discourage creditor litigation. These provisions have proven effective, and they have become nearly ubiquitous. Thus, the legal issues that Argentina's conduct has produced here are relics of the past.

Nearly all modern bonds include collective action clauses, or CACs. These clauses provide that, whenever a contractually prescribed percentage of bondholders agree to a change in the bond's terms, that change applies to all bonds in a given bond series, even if the remaining bondholders dissent. For example, if the contractually mandated threshold for restructuring a bond is set at 75%, and 75% agree to a change in payment terms, then the remaining 25% would be bound as well, leading to the absence of "holdouts." As the court of appeals recognized, these clauses "effectively eliminate the possibility of 'holdout' litigation." Pet. App. 35.

The governments of the United States and the European Union have endorsed collective action clauses as a means of facilitating sovereign debt restructurings. The U.S. Department of the Treasury, through its Under Secretary for International Affairs, said in 2002 that CACs were "the most practical and broadly acceptable reform," which would "prevent a small minority from delaying or otherwise disrupting a[restructuring] agreement."

John B. Taylor, *Sovereign Debt Restructuring: A U.S. Perspective* (Apr. 2, 2002), available at http://www.usembassy.it/file2002_04/alia/a2040205.htm. And Europe, having recently learned the lessons of a debt crisis, has gone one step further: It has *required* Euro-area sovereigns to use CACs in their bonds. Moody's 2013 Report at 2.

As a result, collective action clauses have become widespread. The court of appeals emphasized that "99% of the aggregate value of New York-law bonds issued since January 2005" contained CACs. Pet. App. 35. The Treasury Department's backing for these clauses has gotten "[m]uch of the credit for" this "shift" toward the use of CACs. Anna Gelpern & Mitu Gulati, *Public Symbol in Private Contract: A Case Study*, 84 Wash. U. L. Rev. 1627, 1713 (2006); see *id.* at 1660-73.

And collective action clauses are effective in practice. For example, in the most recent restructuring by Belize, 86% of bondholders approved a deal. By virtue of the collective action clause, the deal bound the remaining bondholders. Moody's 2013 Report at 12. Similarly, CACs in Greece's bonds enabled that country to exchange many series of its bonds without any holdouts at all; all told, Greece successfully exchanged 97% of its bonds. IMF Report at 27. Although the remaining 3% of bondholders did not accept Greece's offer, the IMF recognized that 97% is "a very high creditor participation," especially given the harsh terms of the Greek deal. *Ibid.* Greece, speaking through its Minister of Finance, was "extremely pleased with the results." Alkman Granitsas & Stelios Bouras, *Greece Completes Bond*

Exchange, Wall St. J., Apr. 25, 2012. "Holdouts did not impact the recent large Greek debt exchanges." Moody's 2013 Report at 1.

Equally important, collective action clauses are the product of the parties' agreement. Each side yields something in the initial bargain: Bondholders consent to be bound by a future exchange offer whose terms they might not vote for; sovereigns can successfully invoke this power only if the exchange offer is sufficient to entice the stipulated supermajority of bondholders to accept it. A higher percentage threshold favors bondholders, whose rights are afforded greater protections and who therefore will be willing to lend on terms more favorable to the borrower; a lower percentage threshold favors sovereigns, who must pay for that greater flexibility when raising the capital. Critically, the bargain is struck *ex ante* and reflected in the bonds' financial terms. That, in turn, reduces disputes *ex post*, both by creditors and by sovereigns attempting to dictate the terms of their restructurings unilaterally, as Argentina has done here. Collective action clauses are one way market forces can respond to the possibility of holdout litigation, and they offer a far better opportunity for an appropriately calibrated response than that suggested by Argentina here.

Some collective action clauses have operated series-by-series, rather than across all of a sovereign's bonds (see Euro Br. 6; France Br. 18-19), but CACs increasingly include "aggregation clauses" that allow a majority of series, not a majority within each series, to compel a restructuring. See Moody's 2013 Report at 11. And, even if bonds lack these clauses, restructuring can still proceed. In Greece, for example, a significant proportion of the holders of bonds whose CACs were not triggered nonetheless exchanged their bonds. And a sovereign may unilaterally declare a participation threshold, such that its offer to any creditor would be conditioned on some minimum percentage agreeing to the deal. See IMF Report at 31. With these devices, sovereigns may overcome holdouts across series in addition to holdouts within series.

In sum, official action and market forces have resulted in the widespread use of CACs to facilitate consensual sovereign debt restructurings in circumstances where the debtor (unlike Argentina) respects the rights of creditors. To the extent that CACs do not wholly resolve collective action issues, they "are evolving and becoming more 'aggressive,' and so may still offer the best opportunity to resolve[] sovereign defaults in the absence of a supranational resolution system." J.F. Hornbeck, Cong. Research Serv., R41029, *Argentina's Defaulted Sovereign Debt: Dealing with the "Holdouts"* 14 (Apr. 25, 2013) ("CRS Report").

Whether sovereigns use collective action clauses or some other contractual provision, the goal is to facilitate smooth restructurings. This requires balancing the needs of the sovereign with the needs of the bondholders. Sovereigns are able to borrow from private creditors, despite sovereign immunity, because creditors have some kind of recourse. Without such recourse, basic economics suggests that most sovereigns would be unable to borrow at all. See Jeremy Bulow & Kenneth Rogoff, *Sovereign*

Debt: Is to Forgive to Forget?, 79 Am. Econ. Rev. 43, 49 (1989). And, so long as there is recourse, some creditors might demand a different deal than a sovereign has offered. This has always been true, yet restructuring generally has worked. Moody's 2013 Report at 3 ("[S]overeign bond restructurings have generally been resolved quickly and without severe creditor coordination problems."). This case is different because the relevant contract and facts are different.

c. Finally, even if courts again confront a bond contract like this one—with a specifically tailored *pari passu* clause and without the now-common collective action provisions—this case does not suggest that relief like the Injunctions must necessarily follow, because Argentina has gone to greater lengths than other sovereigns to repudiate its obligations.

The court of appeals held that there was more to Argentina's breach than letting its "debts [go] unsatisfied for long enough." See Pet. 27. In addition, Argentina enacted the "Lock Law," which bars it from paying anything to respondents. Pet. App. 9. And it has repeatedly declared that it would not pay respondents. Pet. App. 7, 13. For example, "[i]n SEC filings, Argentina has stated that it has classified unexchanged FAA Bonds as a category separate from its regular debt and that, since 2005, it has 'not [been] in a legal . . . position to pay' that category." Pet. App. 13 (citing Republic of Arg., Annual Report (Form 18-K) at 2, 11 (Sept. 30, 2011)).

Thus, the court of appeals held, Argentina was in breach because of its nonpayment coupled with its "combination of . . . executive declarations and legislative enactments." Pet. App. 27. Indeed, the court of appeals held that Argentina's extreme and systematic effort to repudiate its obligations breached the *pari passu* clause even under the interpretation advocated by Argentina. Pet. App. 27. And the court of appeals has recently reaffirmed that it "ha[s] not held 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." Addendum, *infra*, 29a (citing Pet. App. 35 n.16).

The Republic of France contends that the decision below will "raise significant obstacles to good-faith negotiations and voluntary sovereign debt restructuring." France Br. 10. However, Argentina's actions, including its refusal to engage with creditors based on its Lock Law, have entirely undermined good-faith negotiations. A chorus of disinterested parties has recognized that Argentina failed to negotiate in good faith with private sector creditors. Argentina is without peer in its treatment of private sector creditors:

- The Congressional Research Service: "Despite the historical precedent for sovereign debt restructurings, the Argentine case involved methods, processes, and deep discounts that were notably unprecedented, if not illegal." CRS Report at 11. Argentina's "default was unprecedented for its" "lengthy resolution" and "low recovery rate." *Id.* at 5.

- The Institute of International Finance: "Argentina finds itself in the present messy situation because of its own behavior . . . . Fortunately, this has been a very rare case in the recent history of sovereign debt restructuring." Institute of International Finance, *Capital Markets Monitor* at 5 (Apr. 2013) (emphasis omitted).

- Moody's: "Among the 34 sovereign bond exchanges, . . . only one case—that of Argentina—resulted in persistent litigation. Moreover, the case of Argentina was and remains unique in its unilateral and coercive approach to the debt restructuring." Moody's 2013 Report at 2.

- The International Monetary Fund: "Under [IMF] policy, the [Argentine] authorities were expected to negotiate . . . . In the end, however, no constructive dialogue was observed and the authorities presented a non-negotiated offer." IMF Report at 36.

Other sovereigns have not followed Argentina's bad example. Argentina's "strategy seems a highly undesirable model for other countries contemplating a sovereign default," and others, including Greece, have "opted for variations on more conventional approaches." CRS Report at 14.

If anything, the consequences of Argentina's arguments would be to externalize the costs of its conduct. In this context, the International Monetary Fund has advised:

> [E]nforcement of credit obligations through the legal process is not objectionable. Effective creditor enforcement supports a credit culture and increases the availability of credit to sovereigns. Litigation may also cause a recalcitrant sovereign debtor to acknowledge the extent of its financial difficulties and bring it to the negotiating table. . . . The extent of litigation against sovereign debtors may largely depend on the actions of sovereign debtors themselves. A perceived pattern of prolonged payment default is likely to goad creditors into court action. Conversely, a timely posture of constructive engagement by the sovereign debtor may be an appreciable guard against creditor litigation.

International Monetary Fund, *Recent Developments in Sovereign Debt Litigation and Implications for Debt Restructuring and Debt Relief Processes* at 2 (Mar. 24, 2004) (emphasis omitted), available at http://adlib.imf.org/digital_assets/wwwopac.ashx?command=getcontent&server=webdocs&value=EB/2004/SM/214478.PDF. This is a salutary lesson.[8]

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[8] Any doubt regarding Argentina's outlier status was removed on August 26, 2013, when Argentine President Kirchner announced legislation that would attempt to place the exchange bond payments beyond the reach of U.S. courts. See Taos Turner, *Argentina Reopens Debt Swap*, Wall St. J., Aug. 27, 2013, at C4. Not only does such evasion violate the district court's March 5 order, see *supra* p. 8, it also illustrates why Argentina does not deserve this Court's discretionary review.

4. The other arguments advanced by *amici* are not persuasive.

a. The Republic of France contends that the holding below threatens lending by sovereigns to other sovereigns, particularly lending by developed nations to developing nations. France Br. 13-17.

The premise of France's argument is demonstrably false. The holding below has nothing to do with sovereign-to-sovereign lending. See Pet. App. 27-28. The legal instruments and practices associated with sovereign-to-sovereign lending are quite distinct from the private creditor bond market. Furthermore, France's argument proceeds on the erroneous assumption that the holding below "grant[s] hold-out creditors a powerful means of extracting full payment." *Id.* at 11. As explained above, however, the holding does no such thing. Instead, it enforces the Equal Treatment Provision by ordering Argentina to rank its payment obligations to respondents at least equally with holders of certain other Argentine debts.

Moreover, it cannot follow from the holding below that private creditors will escape the compromises of future restructurings, leaving sovereign creditors and their taxpayers to bear the brunt. See France Br. 14. If anything, contrary to France's argument, sovereign creditors have far more bargaining power than private creditors do. For example, the IMF does not resume lending to a defaulted sovereign unless that sovereign first pays its sovereign creditors. IMF Report at 35. But private creditors lack the "carrot" of resumed IMF funding. *Ibid.* Thus, defaulted sovereigns have good reason to pay their sovereign creditors before paying any private creditors.

The "comparability of treatment" clause in Paris Club debt, which France cites (at 13), is another tool in the bag of sovereign lenders. That clause forbids payment to private creditors that are not "comparable" to payments to the Paris Club. See Alon Seveg, *When Countries Go Bust: Proposals for Debtor and Creditor Resolution*, 3 Asper Rev. Int'l Bus. & Trade L. 25, 40-41 (2003). In practice, the clause limits only the ability of private creditors to negotiate a better deal than the Paris Club, not the other way around. See Arturo C. Porzecanski, *Debt Relief by Private and Official Creditors: The Record Speaks*, 10 Int'l Fin. 191, 201-04 (2007). "'[C]omparability of treatment' is a highly discretionary, one-way street." *Id.* at 204. Sovereign lenders, in short, have their own levels of protection, which are not threatened by the decision below.[9]

b. The Exchange Bondholder Group (EBG) contends that Argentina is unable to comply with the Injunctions by paying both respondents and the

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[9] Even while telling this Court that developed nations will not lend to developing nations if the decision below stands, France's central bank has recently extended a $3 billion line of credit to Argentina's central bank. Julián Guarino, *El BCRA consigue u$s 3.000 millones del Banco de Francia para las reservas*, La Cronista, July 22, 2013. France's motivation to help Argentina avoid paying other creditors is apparent, but its arguments do not withstand scrutiny.

exchange bondholders. EBG Br. 4, 6-8. But those factual claims are false.

The principal reason EBG offers for Argentina's purported inability to pay its contractual debt obligations is the Lock Law Argentina chose to impose on itself. *Ibid.* But Argentina can suspend the Lock Law. It did so in 2010 for its second exchange offer, see Pet. App. 10, and it offered to "take all steps necessary" to pay respondents an amount of its own choosing. Arg. Ltr. to Court 15, Mar. 29, 2013, 2d Cir. Dkt. No. 935. Whether or not *willing* to lift the Lock Law, Argentina is not *unable* to do so.

Alternatively, EBG appears to claim that Argentina lacks the financial wherewithal to comply with the Injunctions by choosing to pay all of its obligations. EBG Br. 7-8 n.6. But the district court found as fact, and the court of appeals affirmed, that Argentina has resources sufficient to honor its obligations both to the exchange bondholders and to respondents. Pet. App. 34-35; see also Addendum, *infra*, at 27a ("Argentina failed to present the district court with any record evidence to support its assertions."). Even had Argentina challenged those findings of fact (it has not), this Court would not review such findings. *E.g.*, *Exxon Co., U.S.A.* v. *Sofec, Inc.*, 517 U.S. 830, 841 (1996).

In any event, EBG is wrong to suggest that Argentina could not pay respondents along with its other creditors. Most of the numbers EBG cites—debt to the Paris Club, the World Bank, and the Inter-American Development Bank, as well as arbitral awards—have nothing to do with this case;

the Injunctions do not affect them. See Pet. App. 27-28, 125-127.[10] In addition, EBG has double-counted the judgment debts in its "untendered debt" figure, and some of those debts do not arise from the bonds under the FAA.

c. EBG and Fintech attack as inequitable the potential effect of the Injunctions on exchange bondholders. EBG Br. 4-5, 6, 11; Fintech Br. 6. They claim that their rights to payment are "unconditional" and independent of Argentina's obligations to respondents. EBG Br. 11. Thus, they claim, it is unfair to condition their rights on Argentina's payment to respondents.

But respondents' FAA bonds, which Fintech and some members of EBG have themselves owned in the past, expressly require Argentina to "rank" its obligations to respondents "at least equally" with its other "present and future" "External Indebtedness." C.A. App. A-157. And they define "External Indebtedness" to encompass the exchange bonds owned by EBG and Fintech. The exchange bonds, therefore, are not simply a "fulcrum" used to compel payment on respondents' bonds. See EBG Br. 11. Rather, they are the debts designated for equal treatment.

And the exchange bondholders had notice that their bonds are related in this way to respondents'

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[10] The "pending ICSID arbitrations," for which EBG claims a debt of $23.6 billion, Br. 7 n.6, impose no debt at all, as they have yet to be adjudicated—these numbers are merely *claimed* damages.

bonds. The 2005 exchange bond prospectus explicitly cautioned: "There can be no assurance that a creditor . . . will not be able to interfere with payments made" on the exchange bonds. C.A. App. A-466. Likewise, the 2010 exchange bond prospectus announced that "[p]resent or future litigation . . . could have material adverse effects on . . . our ability to service our debt" and referred to another document that parrots the warning in the 2005 prospectus. C.A. App. A-991. It is hardly inequitable that a risk long known to investors like EBG and Fintech has materialized. Accord Addendum, infra, 18a. Indeed, many current holders of the exchange bonds—including many within EBG—did not participate in either the 2005 or 2010 exchange. What is more, public filings suggest that many EBG members bought exchange bonds *after* the judicial decisions they now decry. According to their most proximate financial disclosures, some EBG members owned no exchange bonds when the district court issued the Injunctions, and some owned no exchange bonds when the Second Circuit first affirmed them. There is nothing wrong with that—the exchange bonds constantly trade on the secondary market—but these investors cannot be heard to cry foul over the "equities" of the Injunctions.

d. EBG and Fintech further claim that the Injunctions effect an unlawful taking. EBG Br. 9-11; Fintech Br. 7-15. But this issue exceeds the scope of the questions presented. See *Yee* v. *City of Escondido*, 503 U.S. 519, 535 (1992). Furthermore, the briefing below did not raise this issue, and the opinion Argentina currently challenges did not address it. See *Duignan*, 274 U.S. at 200.

Even were this takings issue properly presented—which it is not (indeed, the Second Circuit recently held that EBG and Fintech lacked appellate standing, see Addendum, *infra*, at 13a)—it would not warrant review. EBG and Fintech point to no split of authority on this issue. In addition, the Injunctions take nothing from *amici*. At most, they might affect the likelihood that Argentina will pay on the exchange bonds, which does not constitute a "taking." See *Omnia Commercial Co.* v. *United States*, 261 U.S. 502, 508-14 (1923).

e. Finally, Caja and Fintech complain that the Injunctions impermissibly bind third parties, such as financial clearing houses. Caja Br. 7-10; Fintech Br. 15-21. But, as with the takings issue, the questions presented do not encompass this issue. Furthermore, the decision below remanded this issue to the district court. Pet. App. 37. Only in August 2013 did the court of appeals decide this issue (and properly reject the argument). Addendum, *infra*, 20a-23a. It is not properly before the Court now.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 2013

ADDENDUM

12-105(L)
NML Capital, Ltd. v. Republic of Argentina

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2012

(Argued: February 27, 2013 Decided: August 23, 2013)

Docket Nos. 12-105(L), 12-109 (CON), 12-111 (CON), 12-157 (CON), 12-158 (CON), 12-163 (CON), 12-164 (CON), 12-170 (CON), 12-176 (CON), 12-185 (CON), 12-189 (CON), 12-214 (CON), 12-909 (CON), 12-914 (CON), 12-916 (CON), 12-919 (CON), 12-920 (CON), 12-923 (CON), 12-924 (CON), 12-926 (CON), 12-939 (CON), 12-943 (CON), 12-951 (CON), 12-968 (CON), 12-971 (CON), 12-4694 (CON), 12-4829 (CON), 12-4865 (CON)*

NML CAPITAL, LTD., AURELIUS CAPITAL MASTER, LTD., ACP MASTER, LTD., BLUE ANGEL CAPITAL I LLC, AURELIUS OPPORTUNITIES FUND II, LLC, PABLO

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* Appeals numbered 12-105, 12-109, 12-111, 12-157, 12-158, 12-163, 12-164, 12-170, 12-176, 12-185, 12-189, and 12-214 were dismissed as of October 26, 2012. Appeals numbered 12-909, 12-914, 12-916, 12-919, 12-920, 12-923, 12-924, 12-926, 12-939, 12-943, 12-951, 12-968, 12-971, 12-4829 are decided by this opinion. Appeals numbered 12-4694 and 12-4865 are dismissed by this opinion.

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Plaintiffs-Appellees,

v.

THE REPUBLIC OF ARGENTINA,

Defendant-Appellant,

THE BANK OF NEW YORK MELLON, as Indenture Trustee, EXCHANGE BONDHOLDER GROUP, FINTECH ADVISORY INC.,

Non-Party Appellants,

EURO BONDHOLDERS, ICE CANYON LLC,

Intervenors.

Before: POOLER, B.D. PARKER, and RAGGI, *Circuit Judges*.

Defendant-Appellant the Republic of Argentina, Non-Party Appellants, and Intervenors appeal from amended orders issued by the United States District Court for the Southern District of New York (Griesa, *J.*). The amendments explain certain aspects of those orders which were designed to remedy Argentina's breach of a promise to pay bondholders after a 2001 default on its sovereign debt. We hold that the district court did not abuse its discretion in issuing the orders.

AFFIRMED.

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BARRINGTON D. PARKER, *Circuit Judge*:

This is a contract case in which the Republic of Argentina refuses to pay certain holders of sovereign bonds issued under a 1994 Fiscal Agency Agreement (hereinafter, the "FAA" and the "FAA Bonds"). In order to enhance the marketability of the bonds, Argentina made a series of promises to the purchasers. Argentina promised periodic interest payments. Argentina promised that the bonds would be governed by New York law. Argentina promised that, in the event of default, unpaid interest and principal would become due in full. Argentina promised that any disputes concerning the bonds could be adjudicated in the courts of New York.

Argentina promised that each bond would be transferrable and payable to the transferee, regardless of whether it was a university endowment, a so-called "vulture fund," or a widow or an orphan. Finally, Argentina promised to treat the FAA Bonds at least equally with its other external indebtedness. As we have held, by defaulting on the Bonds, enacting legislation specifically forbidding future payment on them, and continuing to pay interest on subsequently issued debt, Argentina breached its promise of equal treatment. *See NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246 (2d Cir. 2012) (*NML I*).

Specifically, in October 2012, we affirmed injunctions issued by the district court intended to remedy Argentina's breach of the equal treatment obligation in the FAA. *See id.* Our opinion chronicled pertinent aspects of Argentina's fiscal history and the factual background of this case, *see id.* at 251-57, familiarity with which is assumed.[1] Those injunctions, fashioned by the Hon. Thomas P. Griesa, directed that whenever Argentina pays on the bonds or other obligations that it issued in 2005 or 2010 exchange offers (the "Exchange Bonds"), the Republic must also make a "ratable payment" to plaintiffs who hold defaulted FAA Bonds. We remanded, however, for the district court to clarify the injunctions' payment formula and effects on third parties and intermediary banks, and retained jurisdiction pursuant to *United States v. Jacobson*, 15 F.3d 19 (2d Cir. 1994).

[1] For a more comprehensive narrative of Argentina's long history of defaulting on its debts, see Judge José Cabranes's opinion in *EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 466 n.2 (2d Cir. 2007).

On November 21, 2012, the district court issued amended injunctions with the clarifications we requested,[2] as well as an opinion explaining them, which are challenged on this appeal by Argentina as well as by non-party appellants and intervenors. *See NML Capital, Ltd. v. Republic of Argentina*, No. 08 Civ. 6978 (TPG), 2012 WL 5895786 (S.D.N.Y. Nov. 21, 2012) (*NML II*). Recognizing the unusual nature of this litigation and the importance to Argentina of the issues presented, following oral argument, we invited Argentina to propose to the appellees an alternative payment formula and schedule for the outstanding bonds to which it was prepared to commit. Instead, the proposal submitted by Argentina ignored the outstanding bonds and proposed an entirely new set of substitute bonds.[3] In sum, no productive proposals have been forthcoming. To the contrary, notwithstanding its commitment to resolving disputes involving the FAA in New York courts under New York law, at the February 27, 2013 oral argument, counsel for Argentina told the panel that it "would not voluntarily obey" the district court's

[2] *See NML Capital, Ltd. v. Republic of Argentina*, No. 08 Civ. 6978 (TPG), 2012 WL 5895784 (S.D.N.Y. Nov. 21, 2012); *Aurelius Capital Master, Ltd. & ACP Master, Ltd. v. Republic of Argentina*, No. 09 Civ. 8757 (TPG), Dkt. No. 312 (S.D.N.Y. Nov. 26, 2012); *Olifant Fund, Ltd. v. Republic of Argentina*, No. 10 Civ. 9587, Dkt. No. 40 (S.D.N.Y. Nov. 26, 2012); *Varela v. Republic of Argentina*, No. 10 Civ. 5338, Dkt. No. 64 (S.D.N.Y. Nov. 26, 2012). We refer to these collectively as the "amended injunctions."

[3] *See* Dkt. No. 935 (Argentina's Proposal of March 29, 2013); *see also* Dkt. No. 950 (Appellees' April 22, 2013 Response to Argentina's Proposal).

injunctions, even if those injunctions were upheld by this Court. Moreover, Argentina's officials have publicly and repeatedly announced their intention to defy any rulings of this Court and the district court with which they disagree.[4] It is within this context that we review the amended injunctions for abuse of discretion and, finding none, we affirm.[5] However, in view of the nature of the issues presented, we will stay enforcement of the injunctions pending resolu-

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[4] Argentine President Cristina Fernández de Kirchner is quoted as announcing that Argentina will pay on the Exchange Bonds "but not one dollar to the 'vulture funds,'" referring to FAA Bondholders such as plaintiff NML Capital, Ltd. Argentina to Blast 'Vulture Funds' at the G20 Ministerial Meeting in Mexico, MercoPress, Nov. 4, 2012, Supp. App. 391. The Republic's Economy Minister Hernan Lorenzino is quoted as echoing that "Argentina isn't going to change its position of not paying vulture funds . . . . We will continue to follow that policy despite any ruling that could come out of any jurisdiction, in this case New York." Ken Parks & Charles Roth, Argentina Grapples with Credit-Rating Challenges, Wall St. J., Oct. 31, 2012, Supp. App. 395. In a speech apparently posted to a presidential website, President Kirchner criticized the "justice system" overseen by this Court, stating that it "evidently is unaware of its own legislation." Supp. App. 553.

[5] *See City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 142 (2d Cir. 2011). A district court abuses its discretion when it bases a ruling "on an erroneous view of the law or on a clearly erroneous assessment of the evidence, or render[s] a decision that cannot be located within the range of permissible decisions." *Sims v. Blot*, 534 F.3d 117, 132 (2d Cir. 2008) (internal quotation marks omitted).

tion of a timely petition to the Supreme Court for a writ of *certiorari*.[6]

In its opinion, the district court first explained that its “ratable payment” requirement meant that whenever Argentina pays a percentage of what is due on the Exchange Bonds, it must pay plaintiffs the same percentage of what is then due on the FAA Bonds. *Id.* at *2. Under the express terms of the FAA, as negotiated and agreed to by Argentina, the amount currently due on the FAA Bonds, as a consequence of its default, is the outstanding principal and accrued interest. *See id.*; *NML I* at 254 n.7; *see also* Appellant Argentina 2012 Br. at 26 (“[T]he contractually agreed upon remedy [for default] is acceleration of principal, an action already taken by these plaintiffs.”). Thus, as the district court explained, if Argentina pays Exchange Bondholders 100% of what has come due on their bonds at a given time, it must also pay plaintiffs 100% of the roughly $1.33 billion of principal and accrued interest that they are currently due. *See NML II* at *3.

Second, the district court explained how its injunctions would prevent third parties from assisting Argentina in evading the injunctions. Though the amended (and original) injunctions directly bind only Argentina, the district court correctly explained that, through the automatic operation of Federal Rule of Civil Procedure 65(d), they also bind Argentina’s

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[6] Apparently, Argentina filed a petition for *certiorari* in this matter on June 24, 2013, notwithstanding that, as of that date, no final order had yet issued in this case. *See* Supreme Court Dkt. 12-1494.

"agents" and "other persons who are in active concert or participation" with Argentina. *See id.* at *4; Fed. R. Civ. P. 65(d)(2). Those bound under the operation of Rule 65(d) would include certain entities involved in the system through which Argentina pays Exchange Bondholders. As the district court stated:

> Argentina transfers funds to the Bank of New York Mellon ("BNY"), which is the indenture trustee in a Trust Indenture of 2005. Presumably there is a similar indenture for the 2010 exchange offer. BNY then forwards the funds to the "registered owner" of the Exchange Bonds. There are two registered owners for the 2005 and 2010 Exchange Bonds. One is Cede & Co. and the other is the Bank of New York Depositary ("BNY Depositary"). Cede and BNY Depositary transfer the funds to a "clearing system" such as the Depository Trust Company ("DTC"). The funds are then deposited into financial institutions, apparently banks, which then transfer the funds to their customers who are the beneficial interest holders of the bonds.

NML II at *5. Of these, the amended injunctions cover Argentina, the indenture trustee(s), the registered owners, and the clearing systems. *See id.* The amended injunctions explicitly exempt intermediary banks, which enjoy protection under Article 4A of New York's Uniform Commercial Code (U.C.C.), and financial institutions receiving funds from the DTC. *See id.*

In accordance with our October 2012 opinion, the litigation then returned to our Court. Argentina has challenged certain aspects of the amended injunctions, and appeals have also followed from other entities: a group of Exchange Bondholders, styling themselves as the Exchange Bondholder Group ("EBG"); the Bank of New York Mellon ("BNY"), indenture trustee to Exchange Bondholders; and Fintech Advisory Inc., a holder of Exchange Bonds. We further received briefing (but no notices of appeal) from two intervenors: a group of bondholders calling themselves the Euro Bondholders, and ICE Canyon LLC, a holder of GDP-linked securities issued by Argentina.

APPELLATE STANDING

Neither BNY, EBG, Fintech, Euro Bondholders, nor ICE Canyon intervened below, but each seeks to participate here as a non-party. As a general rule, only parties may appeal, but we have recognized non-party appellate standing in two situations: where the non-party is bound by the judgment and where the non-party has an interest plausibly affected by the judgment. *See Official Comm. of Unsecured Creditors of WorldCom, Inc. v. S.E.C.*, 467 F.3d 73, 77-78 (2d Cir. 2006).

The amended injunctions provide that BNY, as a participant in the payment process of the Exchange Bonds, "shall be bound by the terms of this ORDER as provided by [Federal Rule of Civil Procedure] 65(d)(2)." 2012 WL 5895784, at *2. Accordingly, BNY has standing to appeal. *See NML Capital, Ltd. v. Banco Central de la República Argentina*, 652 F.3d 172, 175 n.1 (2d Cir. 2011) (holding that non-party Banco Central de la República Argentina had standing to challenge attachment and execution order). In contrast, EBG, Fintech, Euro Bondholders, and ICE Canyon are not bound by the amended injunctions. They are creditors, and, as such, their interests are 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. *Cf. Dish Network Corp. v. DBSD N. Am., Inc.*, 634 F.3d 79, 90 (2d Cir. 2010); *Evanston Ins. Co. v. Fred A. Tucker & Co., Inc.*, 872 F.2d 278, 280 (9th Cir. 1989). If Argentina defaults on its obligations to them, they retain their rights to sue. And, as discussed below, their interests are not cognizably affected in any other way. Consequently, EBG, Fintech, Euro Bondholders, and ICE Canyon have no appellate standing, and the appeals from EBG and Fintech are hereby dismissed. (Euro Bondholders and ICE Canyon did not file appeals of their own.)

At the same time, their arguments are not lost because they requested that, in the event they were not deemed appellants, the court consider their arguments as coming from *amici curiae*. Because Argentina contends in its own appeal that the amended injunctions should be vacated because, among other reasons, they are inequitable to Exchange Bondholders, we will consider the arguments of EBG, Fintech, Euro Bondholders, and ICE Canyon as arguments from *amici curiae* in support of Argentina. *See* Fed. R. App. P. 29(a).[7]

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[7] Judge Pooler disagrees with the majority decision to dismiss the appeals of EBG, Fintech, Euro Bondholders, and ICE Canyon. However, as the arguments of the dismissed appellants are treated as made by *amici*, and as the status of the non-appellants matters little to the outcome here, Judge Pooler

DISCUSSION

Argentina advances a litany of reasons as to why the amended injunctions unjustly injure itself, the Exchange Bondholders, participants in the Exchange Bond payment system, and the public. None of the alleged injuries leads us to find an abuse of the district court's discretion.

I. Alleged Injuries to Argentina

Argentina argues that the amended injunctions unjustly injure it in two ways. First, Argentina argues that the amended injunctions violate the Foreign Sovereign Immunities Act ("FSIA") by forcing Argentina to use resources that the statute protects. As discussed in our October opinion, the original injunctions—and now the amended injunctions—do not violate the FSIA because "[t]hey do not attach, arrest, or execute upon any property" as proscribed by the statute.[8] *NML I* at 262-63. Ra-

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has agreed to note her disagreement for the record in this footnote, rather than dissent.

[8] As we noted,

> [a]n "attachment" is the "seizing of a person's property to secure a judgment or to be sold in satisfaction of a judgment." Black's Law Dictionary 123 (9th ed.2009); *see also* 6 Am. Jur. 2d Attachment and Garnishment § 1. An arrest is "[a] seizure or forcible restraint." Black's Law Dictionary 124 (9th ed. 2009). "Execution" is "an act of dominion over specific property by an authorized officer of the court . . . which results in the creation of a legal right to subject the debtor's interest in the property to the satisfaction of the debt of his or her judgment creditor." 30 Am. Jur. 2d Executions

ther, the injunctions allow Argentina to pay its FAA debts with whatever resources it likes. Absent further guidance from the Supreme Court, we remain convinced that the amended injunctions are consistent with the FSIA.

Second, Argentina argues that the injunctions' ratable payment remedy is inequitable because it calls for plaintiffs to receive their full principal and all accrued interest when Exchange Bondholders receive even a single installment of interest on their bonds. However, the undisputed reason that plaintiffs are entitled immediately to 100% of the principal and interest on their debt is that the FAA guarantees acceleration of principal and interest in the event of default. *See NML I* at 254 n.7; *NML II* at *4. As the district court concluded, the amount currently owed to plaintiffs by Argentina as a result of its persistent defaults is the accelerated principal plus interest. We believe that it is equitable for one creditor to receive what it bargained for, and is therefore entitled to, even if other creditors, when receiving what they bargained for, do not receive the same thing. The reason is obvious: the first creditor is differently situated from other creditors in terms of what is currently due to it under its contract. *See Fin. One Pub. Co. v. Lehman Bros. Special Fin., Inc.*, 414 F.3d 325, 344 (2d Cir. 2005). Because the district court's decision does no more than hold

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§ 177; *see also* Black's Law Dictionary (9th ed. 2009) ("Judicial enforcement of a money judgment, usu. by seizing and selling the judgment debtor's property.").
NML I at 262 n.13.

Argentina to its contractual obligation of equal treatment, we see no abuse of discretion.

Argentina adds that the amended injunctions are invalid because a district court may not issue an injunctive "remedy [that] was historically unavailable from a court of equity." *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 333 (1999). However, English chancery courts traditionally had power to issue injunctions and order specific performance when no effective remedy was available at law. *See* 11A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2944 (2d ed. 1994). As we explained in our October 2012 opinion, the plaintiffs have no adequate remedy at law because the Republic has made clear its intention to defy any money judgment issued by this Court. *See NML I* at 261-62.

Moreover, Argentina has gone considerably farther by passing legislation, the Lock Law, specifically barring payments to FAA bondholders. And it is unremarkable that a court empowered to afford equitable relief may also direct the timing of that relief. Here, that timing requires that it occur before or when Argentina next pays the Exchange Bondholders.

II. Alleged Injuries to Exchange Bondholders

Invoking the proposition that equitable relief is inappropriate where it would cause unreasonable hardship or loss to third persons, *see Nemer Jeep-Eagle, Inc. v. Jeep-Eagle Sales Corp.*, 992 F.2d 430, 436 (2d Cir. 1993), Argentina, EBG, and Fintech argue that the amended injunctions are inequitable to Exchange Bondholders.[9] But this case presents no conflict with that proposition. EBG argues, notwithstanding our affirmance of the district court's finding that Argentina has the financial wherewithal to pay all of its obligations, *see NML I* at 256, 263, that the amended injunctions will harm Exchange Bondholders because Argentina "has declared publicly that it has no intention of ever paying holdout bondholders like NML" and, as a result, neither plaintiffs nor

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[9] Intervenor ICE Canyon urges that the amended injunctions should not apply to euro-denominated GDP-linked securities that Argentina issued in its 2005 and 2010 exchanges. The gist of ICE Canyon's argument is that the amended injunctions require payment to plaintiffs whenever Argentina pays on the Exchange *Bonds*, not when it pays on GDP-linked securities which yield revenue only if the Republic's GDP grows. By their terms, however, the amended (and original) injunctions require payment to plaintiffs whenever Argentina pays on "Exchange Bonds," defined as including both bonds *and "other obligations"* issued in the exchange offers. 2012 WL 5895784, at *2 (emphasis added). The inclusion of other obligations like GDP-linked securities is unsurprising, given that the FAA required that the FAA Bonds be treated at least equally with all "obligations (other than the [FAA Bonds]) for borrowed money or evidenced by securities, debentures, notes or other similar instruments denominated or payable, or which at the option of the holder thereof may be payable, in a currency other than the lawful currency of the Republic. . . ." J.A. 171. The euro-denominated GDP-linked securities fit this description because they are "obligations . . . evidenced by securities . . . denominated . . . in a currency other than the lawful currency of the Republic." Accordingly, we see no need to clarify the amended injunctions, and we consider the term Exchange Bonds to include the euro-denominated GDP-linked securities.

Exchange Bondholders will be paid if the amended injunctions stand. Appellant EBG Br. 2.

This type of harm—harm threatened to third parties by a party subject to an injunction who avows not to obey it—does not make an otherwise lawful injunction "inequitable." We are unwilling to permit Argentina's threats to punish third parties to dictate the availability or terms of relief under Rule 65. *See Reynolds v. Int'l Amateur Athletic Fed'n*, 505 U.S. 1301, 1302 (1992) (Stevens, *J.*, in chambers). Argentina's contention that the amended injunctions are unfair to Exchange Bondholders is all the less persuasive because, before accepting the exchange offers, they were expressly warned by Argentina in the accompanying prospectus that there could be "no assurance" that litigation over the FAA Bonds would not "interfere with payments" under the Exchange Bonds. J.A. 466. Under these circumstances, we conclude that the amended injunctions have no inequitable effect on Exchange Bondholders and find no abuse of discretion.[10]

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[10] The remaining arguments pertaining to Exchange Bondholder interests are similarly without merit. Exchange Bondholders have suffered no denial of procedural due process because there is no right to process for non-parties in their position. *See Nat'l Ass'n of Chain Drug Stores v. New Eng. Carpenters Health Benefits Fund*, 582 F.3d 30, 42 (1st Cir. 2009) ("Impact and legal rights are not the same thing. A decision in a contract dispute or antitrust case can have drastic effects on suppliers, stockholders, employees and customers of the company that loses the case; no one thinks the Constitution requires all of them to be parties."). EBG's substantive due process and Takings Clause arguments fail because the amended injunctions do not deprive Exchange Bondholders of

III. Alleged Injuries to Participants in the Exchange Bond Payment System

Argentina, BNY, Euro Bondholders, and ICE Canyon raise additional issues concerning the amended injunctions and their effects on the international financial system through which Argentina pays Exchange Bondholders. The arguments include that (1) the district court lacks personal jurisdiction over payment system participants and therefore cannot bind them with the amended injunctions, (2) the amended injunctions cannot apply extraterritorially, (3) payment system participants are improperly bound because they were denied due process, and (4) the amended injunctions' application to financial system participants would violate the U.C.C.'s protections for intermediary banks. None of these arguments, numerous as they are, has merit.[11]

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any property. And lastly, nonparties—even those whose enjoyment of contractual rights may be affected by a judicial decision—are not necessary parties for Rule 19 joinder if they can protect their rights in subsequent litigation. *See MasterCard Int'l Inc. v. Visa Int'l Serv. Ass'n, Inc.*, 471 F.3d 377, 386 (2d Cir. 2006). Here, Exchange Bondholders will be affected if, after we affirm the amended injunctions, Argentina decides to default on the Exchange Bonds, but Exchange Bondholders would then be able to sue over that default. Accordingly, we find no abuse of discretion in the amended injunctions with respect to the Exchange Bondholders' rights.

[11] We also note that some payment system participants, ostensibly concerned about being sued for obeying the injunctions, apparently enjoy the protection of exculpatory clauses in their contracts. *See e.g.*, Trust Indenture of June 2, 2005, §5.2(xvi), Supp. App. 662 ("[BNY] will not be liable to any

First, BNY and Euro Bondholders argue that the district court erred by purporting to enjoin payment system participants over which it lacks personal jurisdiction. But the district court has issued injunctions against no one except Argentina. Every injunction issued by a district court automatically forbids others—who are not directly enjoined but who act "in active concert or participation" with an enjoined party—from assisting in a violation of the injunction. *See* Fed. R. Civ. P. 65(d). In any event, the Supreme Court has expressed its expectation that, when questions arise as to who is bound by an injunction though operation of Rule 65, district courts will not "withhold a clarification in the light of a concrete situation." *Regal Knitwear Co. v. N.L.R.B.*, 324 U.S. 9, 15 (1945). The doors of the district court obviously remain open for such applications.

The amended injunctions simply provide notice to payment system participants that they could become liable through Rule 65 if they assist Argentina in violating the district court's orders. Since the amended injunctions do not directly enjoin payment system participants, it is irrelevant whether the district court has personal jurisdiction over them. And of course, "[t]here will be no adjudication of liability against a [non-party] without affording it a full opportunity at a hearing, after adequate notice, to present evidence." *Golden State Bottling Co., Inc.*

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person if prevented or delayed in performing any of its obligations . . . by reason of any present or future law applicable to it, by any governmental or regulatory authority or by any circumstance beyond its control . . . .").

v. N.L.R.B., 414 U.S. 168, 180 (1973). In such a hearing, before any finding of liability or sanction against a non-party, questions of personal jurisdiction may be properly raised. But, at this point, they are premature. Similarly, payment system participants have not been deprived of due process because, if and when they are summoned to answer for assisting in a violation of the district court's injunctions, they will be entitled to notice and the right to be heard. *See id.* at 181.

Euro Bondholders and ICE Canyon next argue that the amended injunctions are improper or at a minimum violate comity where they extraterritorially enjoin payment systems that deliver funds to Exchange Bondholders. But a "federal court sitting as a court of equity having personal jurisdiction over a party [here, Argentina] has power to enjoin him from committing acts elsewhere." *Bano v. Union Carbide*, 361 F.3d 696, 716 (2d Cir. 2004) (internal quotation marks omitted). And federal courts can enjoin conduct that "has or is intended to have a substantial effect within the United States." *United States v. Davis*, 767 F.2d 1025, 1036 (2d Cir. 1985).

The district court put forward sufficient reasons for binding Argentina's conduct, regardless of whether that conduct occurs here or abroad. *See NML II* at *4 (noting that if Argentina is able to pay Exchange Bondholders while avoiding its obligations to plaintiffs, "the Injunctions will be entirely for naught"); *see also* Oral Arg. Tr. Nov. 9, 2012, 16:16-18, Supp. App. 461 ("[T]he Republic has done everything possible to prevent those judgments that have been entered [against it] from being enforced."). And the district court has articulated good reasons that the amended injunctions must reach the process by which Argentina pays Exchange Bondholders. *See NML II* at *4 (noting that, to prevent Argentina from avoiding its obligations to plaintiffs, "it is necessary that the *process* for making payments on the Exchange Bonds be covered"); *id.* at *5 (explaining that "if Argentina attempts to make payments . . . contrary to law," then "third parties should properly be held responsible for making sure that their actions are not steps to carry out a law violation"). The amended injunctions do not directly enjoin any foreign entities other than Argentina. By naming certain foreign payment system participants (such as Clearstream Banking S.A., Euroclear Bank S.A./N.V., and Bank of New York (Luxembourg) S.A), the district court was, again, simply recognizing the automatic operation of Rule 65.

If ICE Canyon and the Euro Bondholders are correct in stating that the payment process for their securities takes place entirely outside the United States, then the district court misstated that, with the possible exception of Argentina's initial transfer of funds to BNY, the Exchange Bond payment "process, without question takes place in the United States." *NML II* at *5 n.2. But this possible misstatement is of no moment because, again, the amended injunctions enjoin no one but Argentina, a party that has voluntarily submitted to the jurisdiction of the district court. If others in active concert or participation with Argentina are outside the jurisdiction or reach of the district court, they may assert as much if and when they are summoned to that court for having assisted Argentina in violating United States law.

Argentina and Fintech further argue that the amended injunctions violate Article 4A of the U.C.C., which was enacted to provide a comprehensive framework that defines the rights and obligations arising from wire transfers. *See Exp.-Imp. Bank of the U.S. v. Asia Pulp & Paper Co.*, 609 F.3d 111, 118 (2d Cir. 2010). Two sections of that article are at issue: § 502, concerning creditor process, and § 503, requiring "proper cause" before a party to a fund transfer (but not an intermediary bank) may be enjoined.

Section 502(1) defines creditor process as a "levy, attachment, garnishment, notice of lien, sequestration, or similar process issued by or on behalf of a creditor or other claimant with respect to an account." Within the context of electronic funds transfers ("EFTs"), § 502 requires that creditor process must be served on the bank of the EFT beneficiary who owes a debt to the creditor. N.Y. U.C.C. § 4-A-502(4). The Republic argues that the district court impermissibly skirts § 502's bar to creditor process except against a beneficiary's bank because the amended injunctions purport to affect multiple banks and other financial institutions in active concert and participation with Argentina.

Section 502 is not controlling because the amended injunctions do not constitute, or give rise to, "creditor process," essentially defined in the statute as a levy or attachment. The cases cited by Argentina are inapposite because they deal with attachments, and as we have seen, none has occurred here.

See Shipping Corp. of India Ltd. v. Jaldhi Overseas Pte Ltd., 585 F.3d 58, 70 (2d Cir. 2009); *Aurelius Capital Partners, LP v. Republic of Argentina*, 584 F.3d 120, 124 (2d Cir. 2009).

Section 503, however, does apply. It provides that only "[f]or proper cause" may a court

> restrain (i) a person from issuing a payment order to initiate a funds transfer, (ii) an [EFT] originator's bank from executing the payment order of the originator, or (iii) the [EFT] beneficiary's bank from releasing funds to the beneficiary or the beneficiary from withdrawing the funds. A court may not otherwise restrain a person from issuing a payment order, paying or receiving payment of a payment order, or otherwise acting with respect to a funds transfer.

N.Y. U.C.C. § 4-A-503. This section "is designed to prevent interruption of a funds transfer after it has been set in motion," and "[i]n particular, intermediary banks are protected" from injunctions that would disrupt an EFT. *Id.* § 4-A-503 cmt.

Argentina argues that plaintiffs purport to have cause for an injunction only with respect to Argentina, and therefore any transfers not involving Argentina cannot be enjoined. But as discussed above, the district court explained why it had good cause to issue injunctions that cover Argentina as well as the Exchange Bond payment system. *See NML II* at *4-5. Moreover, taking into account § 503's ban on injunctions against intermediary banks, the district court expressly excluded intermediary banks from the scope of the amended injunctions. Nonetheless, Fintech argues that BNY, BNY's paying agents, and DTC all act as intermediary banks and are all bound by the amended injunctions. We need not determine now what entities may or may not act as intermediary banks in an EFT that violates the amended injunctions. Whether or not an institution has assisted Argentina in a payment transaction solely in the capacity of an intermediary bank will be a question for future proceedings.

We note, however, that the record does not support Fintech's assertions. BNY does not route funds transfers originated by Argentina to Exchange Bondholders. Rather, BNY accepts funds as a beneficiary of Argentina's EFT and then initiates new EFTs as directed by its indenture. *See* Supp. App. 529, 535, 537, 628-759; *see also* Appellant Argentina Br. 35 ("[BNY] initiates its *separate* funds transfer to distribute payment . . . .") (emphasis in original). It is noteworthy that neither Argentina nor BNY argue that BNY is an intermediary bank.

Similarly, the clearing systems such as DTC and Euroclear appear from the record and from their own representations to be other than intermediary banks. DTC does not route wire transfers but accepts funds that it then allocates "only to the [participant banks and brokerage houses] who have deposited the respective securities with DTC." Supp. App. 1289-90.

Euroclear receives "payments from paying agents" and then "credits such amounts to its account holders." *Amicus* Euroclear Br. 3. These are not the functions of an intermediary bank under

§ 503. *See In re Contichem LPG*, No. 99 Civ. 10493, 1999 WL 977364, at *2 n.2 (S.D.N.Y. Oct. 27, 1999) (McKenna, *J.*), *aff'd sub nom. ContiChem LPG v. Parsons Shipping Co., Ltd.*, 229 F.3d 426 (2d Cir. 2000) (explaining that a bank was "not an intermediary bank for purposes of U.C.C. § 4-A-503 because it did not transfer by wire, or attempt to transfer by wire, the funds in question, but simply, as a receiving bank, credited them to [its customer]").

IV. Alleged Injuries to the Public Interest

In our October opinion, we considered the dire predictions from Argentina that enforcing the commitments it made in the FAA would have cataclysmic repercussions in the capital markets and the global economy, and we explained why we disagreed. *See NML I* at 263. On this appeal, Argentina essentially recycles those arguments. We are mindful of the fact that courts of equity should pay particular regard to the public consequences of any injunction. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). However, what the consequences predicted by Argentina have in common is that they are speculative, hyperbolic, and almost entirely of the Republic's own making. None of the arguments demonstrates an abuse of the district court's discretion.

The district court found that Argentina now "has the financial wherewithal to meet its commitment of providing equal treatment to [plaintiffs] and [Exchange Bondholders]." 2012 WL 5895784, at *1. However, Argentina and the Euro Bondholders warn that Argentina may not be able to pay or that paying will cause problems in the Argentine economy, which could affect the global economy. But as we observed in our last opinion, other than this speculation, "Argentina makes no real argument that, to avoid defaulting on its other debt, it cannot afford to service the defaulted debt, and it certainly fails to demonstrate that the district court's finding to the contrary was clearly erroneous." *NML I* at 263. Moreover, and perhaps more critically, Argentina failed to present the district court with any record evidence to support its assertions.

Argentina and *amici* next assert that, by forcing financial institutions and clearing systems to scour all of their transactions for payments to Exchange Bondholders, the amended injunctions will delay many unrelated payments to third parties. But the financial institutions in question are already called on to navigate U.S. laws forbidding participation in various international transactions. *See, e.g.*, 31 C.F.R. § 560.206 (forbidding trade by U.S. persons, including financial institutions, with Iran); 31 C.F.R. § 560.208 (forbidding dealings between foreign persons engaged in trade with Iran and U.S. persons); *United States v. HSBC Bank USA, N.A.*, No. 12 Crim. 763, 2013 WL 3306161, at *8 (E.D.N.Y. July 1, 2013) (approving settlement of criminal charges against bank for violations of U.S. law that allowed money laundering by drug traffickers); U.S. Dep't of Treasury, Settlement Agreement, MUL-488066, *available at* http://www.treasury.gov/resource-center/sanctions/ofac-enforcement/documents/08182010.pdf (settling allegations that a foreign bank violated U.S. prohibitions on payments to Cuba, Iran, Burma, and Sudan).[12] Indeed, the record in this case appears to belie those concerns and suggests that payment system participants know when Exchange Bond payments are to arrive, because each is identified by a unique code assigned to a particular Exchange Bond. *See* Supp. App. 1290. In this context, we view Argentina's concerns as speculative. In any event, a district court always retains the power to adjust the terms of an injunction as unforeseen problems or complexities involving entities such as the clearing systems present themselves. *See United States v. Diapulse Corp. of Am.*, 514 F.2d 1097, 1098 (2d Cir. 1975).

Also unpersuasive is Argentina's warning that we should vacate the injunctions because future plaintiffs may "move against multilateral and official sector entities" like the IMF. Appellant Argentina Br. 47. As we have observed, this case presents no claim that payments to the IMF would violate the FAA. *NML I* at 260. A court addressing such a claim in the future will have to decide whether to entertain it or whether to agree with the appellees that subordination of "obligations to commercial unsecured creditors beneath obligations to multilateral institutions like the IMF would *not* violate the Equal Treatment Provision for the simple reason

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[12] We have never been presented with the question whether U.S. sanctions legally apply to non-U.S. persons or institutions, and we do not answer that question today. We merely note that both foreign and domestic financial institutions are already required to police their own transactions in order to avoid violations of potentially applicable United States laws and regulations.

that commercial creditors never were nor could be on equal footing with the multilateral organizations." *Id.* Speculation that a future plaintiff might attempt recovery affecting the IMF simply provides no reason to withhold relief here.

Next, Argentina and various *amici* assert that the amended injunctions will imperil future sovereign debt restructurings. They argue essentially that success by holdout creditors in this case will encourage other bondholders to refuse future exchange offers from other sovereigns. They warn that rather than submitting to restructuring, bondholders will hold out for the possibility of full recovery on their bonds at a later time, in turn causing second- and third-order effects detrimental to the global economy and especially to developing countries. *See generally Amicus* Anne Krueger Br. 11-16.

But this case is an exceptional one with little apparent bearing on transactions that can be expected in the future. Our decision here does not control the interpretation of all *pari passu* clauses or the obligations of other sovereign debtors under *pari passu* clauses in other debt instruments. As we explicitly stated in our last opinion, we have not held 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. *See NML I* at 264 n.16. We simply affirm the district court's conclusion that Argentina's extraordinary behavior was a violation of the particular *pari passu* clause found in the FAA. *Id.*

We further observed that cases like this one are unlikely to occur in the future because Argentina has been a uniquely recalcitrant debtor[13] and because newer bonds almost universally include collective action clauses ("CACs") which permit a super-majority of bondholders to impose a restructuring on potential holdouts. *See NML I* at 264. Argentina and *amici* respond that, even with CACs, enough bondholders may nonetheless be motivated to refuse restructurings and hold out for full payment—or that holdouts could buy up enough bonds of a single series to defeat restructuring of that series. But a restructuring failure on one series would still allow restructuring of the remainder of a sovereign's debt. And, as one *amicus* notes, "if transaction costs and other procedural inefficiencies are sufficient to block a super-majority of creditors from voting in favor of a proposed restructuring, the proposed restructuring is likely to fail under any circumstances." *Amicus* Kenneth W. Dam Br. 14 n.5.

Ultimately, though, our role is not to craft a resolution that will solve all the problems that might arise in hypothetical future litigation involving other bonds and other nations. The particular language of the FAA's *pari passu* clause dictated a certain result in this case, but going forward, sovereigns and lenders are free to devise various mechanisms to

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[13] *See also* Robin Wigglesworth & Jude Webber, An Unforgiven Debt, Fin. Times, Nov. 28, 2012 (characterizing Argentina as an "outlier in the history of sovereign restructurings"); Hung Q. Tran, The Role of Markets in Sovereign Debt Crisis Detection, Prevention and Resolution, Remarks at Bank of International Settlements Seminar, Sovereign Risk: A World Without Risk-Free Assets?, Jan. 8, 2013 ("Argentina . . . remain[s] a unique example of a sovereign debtor pursuing a unilateral and coercive approach to debt restructuring . . . .").

avoid holdout litigation if that is what they wish to do. They may also draft different *pari passu* clauses that support the goal of avoiding holdout creditors. If, in the future, parties intend to bar preferential payment, they may adopt language like that included in the FAA. If they mean only that subsequently issued securities may not explicitly declare subordination of the earlier bonds, they are free to say so. But none of this establishes why the plaintiffs should be barred from vindicating their rights under the FAA.

For the same reason, we do not believe the outcome of this case threatens to steer bond issuers away from the New York marketplace. On the contrary, our decision affirms a proposition essential to the integrity of the capital markets: borrowers and lenders may, under New York law, negotiate mutually agreeable terms for their transactions, but they will be held to those terms. We believe that the interest—one widely shared in the financial community—in maintaining New York's status as one of the foremost commercial centers is advanced by requiring debtors, including foreign debtors, to pay their debts. *See Weltover, Inc. v. Republic of Argentina*, 941 F.2d 145, 153 (2d Cir. 1991), *aff'd*, 504 U.S. 607 (1992).

CONCLUSION

For the foregoing reasons, we AFFIRM the district court's orders as amended.[14] The appeals from

[14] The orders affirmed here are listed in footnote 2 of this opinion.

Exchange Bondholder Group, No. 12-4694, and from Fintech Advisory Inc., No. 12-4865, are hereby dismissed. Enforcement of the amended injunctions shall be stayed pending the resolution by the Supreme Court of a timely petition for a writ of *certiorari*.