NO. ______

In the
Supreme Court of the United States

REPUBLIC OF ARGENTINA,

Petitioner,

v.

NML CAPITAL LTD., et al.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Following a severe economic and social crisis in 2001, Argentina defaulted on approximately $80 billion in external debt. Because there is no sovereign bankruptcy regime, Argentina followed established international practice by voluntarily restructuring its debt. Ultimately, Argentina restructured 92% of its debt by trading defaulted bonds for new "exchange" bonds with different terms. Respondents are primarily "vulture funds" that exploit the absence of a sovereign bankruptcy regime and seek windfall profits by buying distressed debt at steep discounts, holding out from restructuring, and then suing to enforce the debt's original terms.

Under the Foreign Sovereign Immunities Act ("FSIA"), foreign state property is immune from "attachment arrest and execution" unless, among other things, it is located in the United States and used for commercial activity. 28 U.S.C. §§ 1609–1611. Accordingly, if Respondents obtained a money judgment based on their defaulted Argentine debt, the FSIA would prevent enforcement against Argentina's immune assets, including its reserves. The Second Circuit below nonetheless affirmed injunctions that coerce Argentina into paying Respondents with immune assets. Based on an outlier and deeply flawed interpretation of a *pari passu* clause that appears in virtually all sovereign bonds, the injunctions mandate that Argentina must pay Respondents in full, including principal and interest—and as a practical matter payment must come from Argentina's reserves—or else it must go into default on $24 billion of restructured debt, imposing grave losses on third-party bondholders, credit markets, and Argentine citizens.

The questions presented are:

1. Whether this Court should certify to the New York Court of Appeals this question: Whether a foreign sovereign is in breach of a *pari passu* clause when it makes periodic interest payments on performing debt without also paying on its defaulted debt.

2. Whether a district court can enter an injunction coercing a foreign sovereign into paying money damages, without regard to whether payment would be made with assets that the FSIA makes immune from "attachment arrest and execution," 28 U.S.C. §§ 1609–1611.

PARTIES TO THE PROCEEDING

The Republic of Argentina is Petitioner and was defendant-appellant below. NML Capital, Ltd., Aurelius Capital Master, Ltd., ACP Master, Ltd., Blue Angel Capital I LLC, Aurelius Opportunities Fund II, LLC, Pablo Alberto Varela, Lila Ines Burgueno, Mirta Susana Dieguez, Maria Evangelina Carballo, Leandro Daniel Pomilio, Susana Aquerreta, Maria Elena Corral, Teresa Munoz De Corral, Norma Elsa Lavorato, Carmen Irma Lavorato, Cesar Ruben Vazquez, Norma Haydee Gines, Marta Azucena Vazquez, and Olifant Fund, Ltd. were plaintiffs-appellees below. The Bank of New York Mellon, as Indenture Trustee, Exchange Bondholder Group, and Fintech Advisory Inc., were styled as Non–Party Appellants below. Euro Bondholders and Ice Canyon LLC were Intervenors. Unless otherwise noted, "Respondents" herein refers only to plaintiffs-appellees.

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The decisions below warrant this Court's intervention as they are deeply offensive to Argentina's sovereignty, flout the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602–1611, and have upended expectations in the sovereign debt markets. The Second Circuit affirmed injunctions that effectively reach into Argentina's borders, coercing it into violating its sovereign debt policies and commandeering billions of dollars of core sovereign assets—Argentina's reserves—to pay the vulture fund NML Capital Ltd. ("NML") and other holdout creditors. Unless Argentina pays all principal plus accrued interest to NML, Argentina must stop fully servicing its ongoing obligations to bondholders who accepted new "exchange" bonds as part of Argentina's restructuring. That is, Argentina must reward NML with a massive litigation windfall or face a court-ordered default, which could trigger a renewed economic catastrophe with severe consequences for millions of ordinary Argentine citizens.

These unprecedented injunctions stem from two important legal errors. First, the lower courts interpreted a boilerplate *pari passu* clause—which appears in virtually all foreign sovereign debt instruments—as a promise not to restructure. Under this incorrect interpretation, Argentina must pay all of its external debt at the same time or default on its restructured debt. And although exchange bondholders are entitled only to a periodic interest payment that was reduced in restructuring, because of an acceleration clause (another standard feature of sovereign debt), holdouts are due all principal and accrued interest without any haircut. The lower courts' counterintuitive interpretation of boilerplate language allows any holdout to veto a restructuring unless it is paid in full, upsets settled market expectations, impedes sovereign restructurings, and threatens New York's status as a law and forum of choice for international sovereign debt issuances.

Second, the lower courts enforced this newly-created obligation with effectively extraterritorial injunctions that trample Argentina's sovereignty and conflict with the FSIA's comprehensive immunity scheme. Under the FSIA, a foreign state's property is only subject to "attachment arrest and execution" if, among other things, that property is located and used for commercial activity in the United States. 28 U.S.C. §§ 1609–1611. The injunctions circumvent this express limitation on judicial authority by coercing Argentina into paying Respondents with immune assets located outside the United States: Argentina's reserves. The injunctions also conflict with traditional principles of equity. Indeed, the lower courts found that Argentina's FSIA immunities meant that there was no adequate remedy at law, thereby supporting injunctions that coerce payment with the very assets the FSIA declares immune. The injunctions thus achieve through indirection a result the FSIA directly prohibits. They upend Congress' carefully-crafted regime, contravene basic principles of equity, and cause the precise international tensions Congress intended for the FSIA to prevent.

The errors below are enormously consequential. The offense to Argentina's sovereignty is manifest, and the consequences go well beyond Argentina. First, the rulings upset the settled expectations of the financial community, threaten the stability of the international credit markets, and impede the restructuring of sovereign debt—a necessary aspect of the global financial system. Second, the rulings overstep the FSIA's limitations and, predictably, spark international tension. Indeed, the United States filed briefs as *amicus curiae* below emphasizing that these are issues of "vital public policy and legal importance to the United States." App. 113. Courts may have an impulse to ensure a remedy for every right, but the FSIA expressly limits their authority to remedy judgments against foreign sovereigns, placing certain assets—especially those located overseas—beyond the reach of judicial enforcement. The FSIA represents the political branches' considered balancing of the interests of litigants and foreign sovereigns, and it plainly contemplates that some money debts will remain unsatisfied. It is not an invitation to creative judicial maneuvering to achieve by indirection what the statute forbids directly.

The decisions below are final, and the need for this Court's intervention is imperative. The Court should certify the *pari passu* question to New York's highest court, resolve the FSIA question, or both.

OPINIONS BELOW

The court of appeals issued two opinions below. The first (App. 29) ("*NML I*") is reported at 699 F.3d 246. The second (App. 1) ("*NML II*") is reported at 727 F.3d 230. The district court's orders (App. 70–165) are unreported.

JURISDICTION

The Court has jurisdiction under 28 U.S.C. § 1254(1). The judgment of the court of appeals was entered on August 23, 2013. Argentina timely filed a petition for rehearing and rehearing en banc, which was denied on November 19, 2013.

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the FSIA, 28 U.S.C. §§ 1602–1611 are reprinted at App. 208–20.

STATEMENT OF THE CASE

A. The Foreign Sovereign Immunities Act.

The FSIA provides the exclusive and comprehensive scheme for obtaining and enforcing a judgment against a foreign sovereign. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989); *Af-Cap, Inc. v. Republic of Congo*, 462 F.3d 417, 428 (5th Cir. 2006); 28 U.S.C. § 1602. The scheme is two-fold. First, a foreign state is immune from jurisdiction unless an express statutory exception applies, such as when the sovereign has consented to jurisdiction. 28 U.S.C. §§ 1604–1605(a).

Second, even when a foreign sovereign is subject to jurisdiction, the FSIA strictly constrains courts' remedial authority. A foreign state's property in the United States "shall be immune from attachment arrest and execution except as provided" in 28 U.S.C. §§ 1610 and 1611. 28 U.S.C. § 1609. Section 1610 provides that a foreign state's property may be attached or executed upon if it is located in and used for a commercial activity in the United States *and* the sovereign has waived its enforcement immunity or another exception applies. § 1610(a)(1). Section

1611 further protects uniquely sovereign assets: military and central bank property. § 1611(b). Foreign state property in the United States that is not used for commercial activity is thus immune, as is foreign state property abroad: "The FSIA did not purport to authorize execution against a foreign state's property … wherever that property is located around the world." *Autotech Techs. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 750 (7th Cir. 2007).

The FSIA's robust enforcement immunity reflects a "deliberate policy choice on the part of Congress." App. 189 (U.S. Br.); *see also* Br. of United States as *Amicus Curiae* 8–9, *Republic of Argentina v. NML Capital*, *Ltd.*, No. 12-842 (Dec. 4, 2013) ("U.S. Discovery Br."). When it enacted the FSIA, Congress codified the "restrictive theory" of immunity from *jurisdiction* that had largely supplanted the traditional rule of absolute immunity. *See Republic of Austria v. Altmann*, 541 U.S. 677, 678–91 (2004). But "enforcement [of] *judgments* against foreign state property remain[ed] a somewhat controversial subject in international law." H.R. Rep. No. 94-1487, 27 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6626 ("House Report") (emphasis added); *accord* Restatement (Third) of the Foreign Relations Law of the United States § 460 note 1 (1987). "Enforcement against State property constitutes a greater interference with a State's freedom to manage its own affairs and to pursue its public purposes" than entry of a judgment. Hazel Fox & Philippa Webb, *Law of State Immunity* 481 (3d ed. 2013) ("State Immunity"). Judicial seizure of a foreign state's property may "be regarded as 'an affront to [the sovereign's] dignity and may … affect our relations with it.'" *Republic of Philippines v. Pimentel*, 553 U.S. 851, 866 (2008) (quoting *Republic of Mexico v. Hoffman*, 324 U.S. 30, 35–36 (1945)). Coercive measures against a foreign state's reserves, in particular, "could cause significant foreign relations problems." House Report 31.

The political branches thus struck a delicate balance between the rights of creditors and the dignity of foreign sovereigns. Congress proceeded cautiously, "remedy[ing], *in part*, the … predicament of a plaintiff who has obtained a judgment against a foreign state." House Report 8 (emphasis added); *see also id*. 27 ("*partially* lowering" the preexisting rule of absolute immunity) (emphasis added). But Congress left foreign states' absolute enforcement immunity otherwise intact. *De Letelier v. Republic of Chile*, 748 F.2d 790, 798 (2d Cir. 1984).

B. The Argentine Crisis.

In 2001, Argentina suffered the worst economic and social crisis in its modern history, causing poverty and unemployment to reach unprecedented levels. Unable to pay its debt and provide basic government services, Argentina declared a payment moratorium on more than $80 billion of its public external debt. App. 33. The default included bonds governed by a 1994 Fiscal Agency Agreement, known as "FAA Bonds." *Id*.

In the wake of default, millions of Argentines suffered grave harms. The cumulative fall in economic output was almost twice that experienced by the United States during the Great Depression. "The living standards of over one-half of the

Argentine people fell below the poverty line, and over a third could not afford basic food.... Adults were rioting and breaking into supermarkets, regularly, in search of food." Ross P. Buckley, *The Bankruptcy of Nations: An Idea Whose Time Has Come*, 43 Int'l Lawyer 1189, 1196 (2009).

There is no bankruptcy regime for sovereign nations. Instead, a sovereign in crisis must engage in a voluntary restructuring of its debt. *See* App. 172–74 (U.S. Br.); Br. of France as *Amicus Curiae* 13-15, *Republic of Argentina v. NML Capital, Ltd.*, No. 12-1494 (July 26, 2013) ("France Br."). Voluntary restructuring enables a distressed sovereign to devise solutions that are broadly acceptable to the markets, prioritize payments to international financial institutions ("IFIs") like the International Monetary Fund ("IMF") and the World Bank, and "move expeditiously past a balance of payment crisis." App. 173 (U.S. Br.). This, in turn, minimizes "ripple effects" across the global economy. *Id.*

Consistent with this approach, Argentina made voluntary exchange offers in 2005 and 2010. App. 33–37. Ultimately, 92% of the non-performing bonds were traded for new "exchange" bonds with modified terms, such as reduced principal, lower interest rates, and/or longer maturities. App. 37. In both offers, Argentina treated all FAA Bonds equally by offering all holders identical terms. In connection with the 2005 Exchange Offer, Argentina enacted a so-called Lock Law, ensuring that bondholders who held out would not be treated better than bondholders who accepted the exchange. App. 34–35.

Argentina has consistently made timely payments on its exchange bonds.

C. NML and Its Suit for Specific Performance of the *Pari Passu* Clause.

NML is a Cayman Islands-based vulture fund. Vulture funds "exploi[t] the voluntary nature of international debt relief schemes by acquiring defaulted sovereign debt at deeply discounted prices and then seeking repayment of the full value of the debt through litigation, seizure of assets or political pressure." Press Release, Office of the High Comm'r for Human Rights, *'Vulture Funds'—UN Expert on Foreign Debt Welcomes Landmark Law to Address Profiteering* (Apr. 20, 2010), http://bit.ly/1ca5ZsW. Vulture funds' defection "deter[s] participation" in restructurings, and their "subsequent litigation threatens to derail any restructuring ultimately agreed upon." Christopher C. Wheeler & Amir Attaran, *Declawing the Vulture Funds*, 39 Stan. J. Int'l L. 253, 254 (2003). Vulture funds' profits often "com[e] at the expense of already impoverished nations and, in some cases, 'highly indebted poor countries.'" *Id.* 262–63; *see also* Gordon Brown, Speech at the United Nations General Assembly Special Session on Children (May 10, 2002), http://bit.ly/1hqEboQ (describing such litigation as "morally outrageous").

In the FAA Bonds, Argentina selected New York law and consented to jurisdiction in the Southern District of New York. App. 3. The bonds include an acceleration clause that, upon invocation, made all principal plus accrued interest due immediately to Respondents. App. 40–41 n.7; *see also* Mitu Gulati &

Robert E. Scott, *The 3½ Minute Transaction: Boilerplate and the Limits of Contract Design* 26–27 (2013) (acceleration clauses are standard in sovereign bonds). Respondents claim more than $1.33 billion, a subset of the over $15 billion in principal and accrued interest on outstanding non-performing bonds. *See* Republic of Argentina Annual Report (Form 18-K) (Sept. 30, 2011) (JA 2602) ($11.2 billion outstanding as of December 2010, which totals over $15 billion today with additional interest).

As a holder of FAA Bonds, NML was entitled to seek a money judgment against Argentina. But in a transparent effort to evade the FSIA's strict limitations on courts' judgment enforcement powers, NML sued and demanded specific performance. Am. Compl. ¶¶ 1–2 *NML Capital, Ltd. v. Republic* of Argentina, No. 08-6978, (S.D.N.Y. Oct. 17, 2011) (Doc. 344) ("Am. Compl."). Of course, an order for specific performance of a sovereign debt contract is more attractive than a money judgment *only* if it forces the sovereign to pay with property the FSIA renders immune. NML has candidly described such relief as an "enhanced judgment enforcement mechanism." (Letter from K. Reed, counsel of NML Capital, Ltd., to Hon. Thomas P. Greisa 3 (Jan. 14, 2004) (JA 210).)

NML demanded that Argentina perform the FAA's *pari passu* clause. It states:

> [The FAA Bonds] will constitute … direct, unconditional, unsecured and unsubordinated obligations of the Republic and shall at all times rank *pari passu* and without any preference among themselves.

> The payment obligations of the Republic under the Securities shall at all times rank at least equally with all its other present and future unsecured and unsubordinated External Indebtedness." App. 198.[1]

This is "a boilerplate provision." App. 170 (U.S. Br). *Pari passu* clauses appear in virtually all modern sovereign bonds, often with language that is materially identical to that here. Mark Weidemaier, et al. *Origin Myths, Contracts, and the Hunt for* Pari Passu, 38 Law & Soc. Inquiry 72, 84, 101–02 (2013) ("*Origin Myths*").

The first sentence of the clause prohibits Argentina from discriminating "among" the FAA Bonds "themselves" and "is not at issue." NML Resp. Br. 8 in *NML I* (Doc. 307) ("*NML I* Resp. Br."). Financial markets have most commonly understood the second sentence "to protect a lender against the risk of legal subordination in favor of another creditor," such as by creating unsecured debt ranking senior in legal right of payment. App. 177 (U.S. Br.). And markets have overwhelmingly agreed on what it does *not* mean: "a borrower does not violate the *pari passu* clause by electing as a matter of practice to pay certain indebtedness in preference to the obligations outstanding under the agreement in which this clause appears." App. 177–78 (U.S. Br.).

NML nonetheless argued that the second sentence promised that "Argentina may not make a

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[1] In this context, "External Indebtedness" means debt in currency other than Argentine pesos. App. 32.

payment to a holder of External Indebtedness without a ratable payment being made at the same time to [NML]." Am. Compl. ¶ 48. Although Argentina pays the exchange bondholders periodic interest payments that were reduced in restructuring, NML argued that, because of acceleration, Argentina must pay holdouts the entire balance of principal plus accrued interest. App. 120. Otherwise, Argentina must stop fully servicing its exchange bond debt and go into a court-ordered default.

NML dismissed the prospects of a default, asserting that Argentina could afford to pay all its bondholders by spending its reserves. *E.g.*, *NML I* Resp. Br. 1. But Argentina's reserves are immune under the FSIA. *NML Capital, Ltd. v. Banco Central de la República Argentina*, 652 F.3d 172, 196 (2d Cir. 2011); 28 U.S.C. § 1611(b)(1). Moreover, the claims of all holdouts exceeds $15 billion; the exchange bondholders' principal amount totals $24 billion; and Argentina's reserves, which must also be used for purposes other than debt service, are approximately $28 billion. Taos Turner, *Argentina's Currency Reserves Rise by $24 Million*, Wall St. J., Feb. 13, 2014.

D. The Decisions Below.

1. The district court granted partial summary judgment to NML. App. 70. It thereafter entered permanent injunctions requiring Argentina to make a "Ratable Payment." App. 88. The court held that Argentina breached the *pari passu* clause by "ma[king] payments currently due under the Exchange Bonds, while persisting in its refusal to

satisfy its payment obligations currently due under NML's Bonds." App. 88–89. The orders define "Ratable Payment" to mean that Argentina must pay NML the same percentage of "the total amount currently due" to it (*i.e.*, 100% of the entire amount of principal plus accrued interest) that Argentina pays of the total amount currently due to the exchange bondholders (*i.e.*, 100% of the periodic interest payment). App. 91.

The district court found "no adequate remedy at law" because Argentina would not pay a money judgment—in other words, because Argentina asserted its immunities under the FSIA. App. 89. The court held that the equities favored a "Ratable Payment" injunction because Argentina "has the financial wherewithal" to pay both NML and the exchange bondholders—notwithstanding that Argentina has that "wherewithal," if at all, only by using immune assets. App. 90.

The orders also threaten third-party financial institutions with contempt. App. 92–93. Consistent with ordinary practice, Argentina does not pay exchange bondholders directly. Isasa Decl. ¶ 4 (JA 2288). Argentina makes a lump sum payment in Argentina from its treasury to an Argentine office of the exchange bondholders' trustee. App. 7. Their trustee routes payments internationally through other institutions (the "registered owners" and the "clearing system"), before the funds are transferred to the bondholders or their nominees. *Id.* These third-party institutions face contempt for fulfilling their duties to the exchange bondholders if Argentina does not also make a "Ratable Payment" to NML. App. 92–93.

Following NML's lead, other holdout creditors obtained materially identical injunctions. *See* App. 94–116. With NML, they are Respondents here.

2. Argentina appealed. The United States joined as *amicus curiae*, arguing that the case "raise[d] two issues of vital public policy and legal importance to the United States that extend beyond the particular facts of this case." App. 169–70. First, the district court's interpretation of the "boilerplate" *pari passu* clause "deviate[d] from decades of settled market expectations" and was "contrary to United States economic policy." App. 170. The district court's ruling could "undermine the decades of effort the United States has expended to encourage a system of cooperative resolution of sovereign debt crises." *Id.* The United States also warned that private creditors could block sovereigns from making debt payments to IFIs, notwithstanding the "established custom" that IFIs ordinarily get paid back first. App. 186. Second, the injunctions' "breathtaking assertion of extraterritorial jurisdiction" was inconsistent with the FSIA and "could have adverse effects on … foreign relations." App. 188.

On October 26, 2012, the Second Circuit substantially affirmed. First, it held that Argentina breached the *pari passu* clause. It found the clause's meaning "neither well settled nor uniformly acted upon," and stated that the "real dispute is over what constitutes subordination" under the clause. App. 49. The panel held that the clause "protect[s] bondholders from more than just formal subordination"; it "prohibits Argentina, as bond *payor*, from paying on other bonds without paying on the FAA Bonds." App. 49–50. The panel found "that Argentina effectively has ranked its payment obligations to the plaintiffs below those of the exchange bondholders" because Argentina was paying the exchange bonds but not the FAA Bonds, Argentina's SEC filings stated that it had "no intention of resuming payment," and the Lock Law "preclud[ed] its officials from paying defaulted bondholders and barr[ed] its courts from recognizing plaintiffs' judgments." App. 51–52. The panel also held in the alternative that, even if the clause only prohibited formal subordination, the Lock Law breached that promise. App. 52.

Second, the panel held that the injunctions did not conflict with the FSIA. The panel recognized that courts are "barred from granting, 'by injunction, relief which they may not provide by attachment.'" App. 58 (quoting *S&S Mach. Co. v. Masinexportimport*, 706 F.2d 411, 418 (2d Cir. 1983)). But it held that the injunctions "are not barred by § 1609" because they "do not attach, arrest, or execute upon any property." *Id.* "Each of these three terms refers to a court's seizure and control over specific property." App. 57. According to the panel, the injunctions "affect Argentina's property only incidentally" and "can be complied with without the court's ever exercising dominion over sovereign property." App. 58.

The panel remanded for the district court to clarify the "ratable payment" formula and the impact on third-party financial institutions. App. 31, 63.

Argentina filed a petition for rehearing, which was denied. App. 66. Argentina also filed an interlocutory petition for certiorari, which was denied. 134 S. Ct. 201 (2013).

3. On remand, the district court issued final permanent injunctions, clarifying the payment formula dictating to Argentina that, when it makes the next interest payment on the exchange bonds, it "will be required to pay plaintiffs approximately $1.33 billion." App. 129; *see also* App. 138–65. The court exempted "intermediary banks," *see* N.Y. U.C.C. Art. 4-A-503, but confirmed that the exchange bondholders' trustee and other institutions in the international clearing and payment system could face contempt if Argentina does not comply. App. 122.

Argentina appealed again, arguing, among other things, that the panel should certify a *pari passu* question to the New York Court of Appeals.

4. On August 23, 2013, the Second Circuit affirmed the final injunctions without certifying the *pari passu* question. App. 1.[2] The panel reaffirmed its earlier holdings that Argentina breached the *pari passu* clause and that the injunctions "do not attach, arrest, or execute upon any property" in violation of the FSIA, as they "allow Argentina to pay its FAA debts with whatever resources it likes." App. 10–11.

Argentina and its *amici* "warn[ed] that rather than submitting to restructuring," bondholders in

[2] On January 10, 2013, the Second Circuit summarily denied a motion by the Exchange Bondholder Group to certify a *pari passu* question. Order 1 (Doc. 777).

future sovereign crises "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." App. 25. The panel downplayed all that, describing this as "an exceptional [case] with little apparent bearing on transactions that can be expected in the future." *Id.* "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." App. 25–26; *see also* App. 12 ("Argentina has gone considerably farther by passing legislation, the Lock Law, specifically barring payments to FAA bondholders."). The panel noted that "newer bonds almost universally include collective action clauses ('CACs') which permit a super-majority of bondholders to impose a restructuring on potential holdouts." App. 26. And the panel "d[id] not believe the outcome of this case threatens to steer bond issuers away from the New York marketplace." App. 27. "[I]n view of the nature of the issues presented," however, the panel stayed the injunctions pending resolution of this petition for certiorari. App. 6.

5. On September 11, 2013, Argentina suspended the Lock Law indefinitely, App. 204, once again allowing the holdouts to accept an exchange offer under the same terms that holders of 92% of the non-performing bonds accepted.

Argentina's petition for rehearing and rehearing en banc was denied on November 19, 2013. App. 68.

REASONS FOR GRANTING CERTIORARI

The now-final injunctions here are enormously consequential for Argentina and the global financial system and warrant this Court's intervention.

1. This Court should grant certiorari and certify the *pari passu* question to the New York Court of Appeals. The "ratable payments" injunctions below rest on an outlier interpretation of the ubiquitous *pari passu* clause, which appears in hundreds of billions of dollars of sovereign bonds. That interpretation is deeply flawed, disrupts settled market expectations, and threatens New York's role as a world center of sovereign finance. Certification would allow New York's highest court to undo the damage caused below and could lead to vacatur of the harmful injunctions here without the need for this Court to address the FSIA question.

2. The Court should also grant certiorari to review—and reverse—the Second Circuit's misguided holding that the FSIA can be evaded by injunction, even if it is not inclined to certify the *pari passu* question. Congress carefully crafted a two-part immunity scheme, ensuring that certain foreign sovereign property—including central bank property and property located abroad—would be immune from judicial enforcement even when the sovereign consents to jurisdiction in U.S. courts. *See* 28 U.S.C. §§ 1609, 1610(a)(1), 1611(b)1. The injunctions below trample this scheme and traditional principles of equity by coercing payment of a money debt with assets the FSIA declares immune—and coercing Argentina into violating its policies—thereby causing

the very offense to sovereign dignity that Congress sought to prevent.

3. This case is extraordinarily important to Argentina, other sovereigns, the capital markets, and U.S. foreign relations. *See* App. 169–70 (U.S. Br.) (rulings below raise issues of "vital public policy and legal importance … beyond the particular facts of this case"). The injunctions coerce Argentina into paying holdout creditors using core sovereign assets—Argentina's reserves—located outside the United States. Amplifying the offense, the injunctions derive their coercive power from the threat that, if Argentina does not pay Respondents, it will be pushed into default, exposing exchange bondholders and millions of Argentine citizens to grave harm.

More broadly, the United States, the IMF, France, and others have warned that the "ratable payments" injunctions threaten the international financial system. Orderly and voluntary restructuring of sovereign debt crises is critical to maintaining stability in a financially-interconnected world without a sovereign bankruptcy regime. The possibility of obtaining "ratable payments" injunctions creates a powerful incentive for creditors to hold out and seek windfall profits by threatening to block payments on restructured debt. This makes voluntary restructuring "substantially more difficult, if not impossible," and threatens to delay a process where swift action is essential to prevent crises from spreading. App. 182 (U.S. Br.).

I. This Court Should Certify The *Pari Passu* Question To The New York Court Of Appeals, Which Could Obviate The FSIA Question.

This Court should grant certiorari and certify the *pari passu* question to the New York Court of Appeals. Certification is appropriate when "determinative questions of New York law are involved in a case … for which no controlling precedent of the Court of Appeals exists." NY Comp. Codes R. & Regs. tit. 22 § 500.27(a). Certification fosters "cooperative judicial federalism" by enabling a state's highest court to answer questions that impact the state's important interests. *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974).

Certification here has the twin virtues of potentially obviating the FSIA issue and providing New York's highest court an opportunity to correct an important misinterpretation of New York law. First, the state's certification statute is satisfied because no New York court has ever interpreted a *pari passu* clause in a sovereign debt contract, *see* Philip R. Wood, Pari Passu *Clauses—What Do They Mean?*, Butterworths J. Int'l Banking & Fin. L. 371, 374 (2003), and the question is determinative. If the court holds that the *pari passu* clause only prohibits legal subordination, then injunctions requiring Argentina to make "ratable payments" would be unfounded and inequitable, particularly in light of the Lock Law repeal. Certification could therefore obviate the need for this Court to reach the FSIA question. As *Cline v. Oklahoma Coalition for Reproductive Justice*, 133 S. Ct. 2887 (2013), recently demonstrated, certification is particularly valuable where, as here, resolution of an antecedent state-law question could permit the Court to avoid an important federal question that would otherwise demand review.

Second, the *pari passu* question is extraordinarily important to New York. New York courts strive to "maintai[n] and foste[r]" the state's "undisputed status as the preeminent commercial and financial nerve center of the Nation and the world." *Ehrlich-Bober & Co. v. Univ. of Hous.*, 49 N.Y.2d 574, 581 (1980). "New York has a strong interest in maintaining its preeminent financial position and in protecting the justifiable expectation of the parties who choose New York law." *Banco Nacional De Mexico, SA. v. Societe Generale*, 34 A.D.3d 124, 130 (N.Y. App. Div. 2006); *see also* Judith S. Kaye & Kenneth I. Weissman, *Interactive Judicial Federalism: Certified Questions in New York*, 69 Fordham L. Rev. 373, 401 (2000) ("Contract law has been [a] fertile area for certification in New York.").

The decisions below "disrup[t] settled expectations concerning the scope and effect of boilerplate language contained in many sovereign debt instruments." App. 182 (U.S. Br.). *Pari passu* clauses appear in hundreds of billions of dollars of debt subject to New York law, often with language that is materially identical to that found here. *See Origin Myths* 84, 101–02; France Br. 8. The lower courts read this boilerplate language to include a promise against restructuring: Argentina cannot "pa[y] on other bonds without paying on the FAA Bonds." App. 50. Whatever disagreement there may be about the precise meaning of a *pari passu* clause, markets have overwhelmingly agreed that this is wrong. App. 177–78 (U.S. Br.). "[A] borrower does not violate the *pari passu* clause by electing as a matter of practice to pay certain indebtedness in preference to the obligations outstanding under the agreement in which this clause appears." App. 177–78 (U.S. Br.); *see* U.N. Centre on Transnational Corporations, Advisory Studies, No. 4, Series B, *International Debt Restructuring: Substantive Issues and Techniques* 29 (1989) (*Pari passu* clauses "do not, of course, obligate the borrower to repay all of its debt at the same time."); *see also* Br. of Clearing House as *Amicus Curiae* 4–5 (Doc. 237) (describing the contrary reading as a "dramatic and disruptive departure" from market understanding).[3]

Markets have most commonly understood the clause "to protect a lender against the risk of legal subordination in favor of another creditor." App. 177 (U.S. Br.). The panel rejected this interpretation because it would leave the differences between the sentences in the clause "substantially without force

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[3] *Pari passu* clauses have been common for decades, but "ratable payments" relief was never entered before NML's affiliate, Elliott Associates, persuaded a Belgian court to adopt such relief on an *ex parte* basis. App. 179–80 (U.S. Br.). "Most commentators concluded that the Belgian court had misconstrued the *pari passu* clause in a way that would cause problems in the sovereign debt markets," and Belgium's Parliament effectively overruled the decision. App. 180 (U.S. Br.). United Kingdom courts have refused to issue "ratable payments" injunctions. *See Kensington Int'l Ltd. v. Republic of the Congo*, 2002 No. 1088, [2003] EWHC 2331 (Comm) (Commercial Ct. Apr. 16, 2003) (U.K.).

or effect." App. 49. Not so. The first sentence prohibits discrimination "among" the FAA Bonds "themselves." *Accord NML I* Resp. Br. 8. The second is different, because it promises that Argentina will not legally subordinate FAA Bonds to *other* debt (its "unsecured and unsubordinated External Indebtedness").

The panel held in the alternative that Argentina breached the "legal subordination" interpretation by "enact[ing] the Lock Law," which barred Argentine "officials from paying defaulted bondholders and barr[ed] its courts from recognizing plaintiffs' judgments," when no Argentine law would bar enforcement of the exchange bonds after a default. App. 52. Even if this were correct, breaching a "legal subordination" promise would provide no basis for injunctions requiring "ratable payments." In any event, Argentina has suspended the Lock Law, so even if it once somehow supported the injunctions, it clearly no longer does. App. 204.

The New York Court of Appeals should have the final word on whether the *pari passu* clause prohibits a sovereign from continuing to service performing debt without servicing defaulted debt. If New York courts want New York law to upset settled expectations, impede restructurings, and endanger New York's status as the law of choice for sovereign debt, that is their prerogative. But they should not have those consequences thrust upon them.

II. This Court Should Grant Certiorari To Review The FSIA Question.

This Court should also grant certiorari to review—and reverse—the extraordinary remedy affirmed below, which flouts the FSIA and causes exactly the international friction the FSIA is designed to prevent. In the FSIA, Congress cautiously balanced comity and international relations concerns against the interests of litigants, making it easier to obtain jurisdiction over a foreign sovereign but preserving much of foreign sovereigns' traditional immunity from enforcement measures. The panel below upset that basic balance and affirmed injunctions that indirectly achieve what the FSIA directly forbids: They coerce a foreign sovereign into satisfying a money debt with immune assets.

1. Under the FSIA, even when a foreign sovereign consents to jurisdiction it is not treated like an ordinary litigant for enforcement purposes. A foreign state's property is immune from "attachment arrest and execution" unless, among other things, it is located and used for commercial activity in the United States. 28 U.S.C. §§ 1609–1611. All other foreign sovereign property—particularly property abroad—is immune. *See id.*; *Autotech*, 499 F.3d at 750; *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1131–32 (9th Cir. 2010).

This scheme is the product of a careful compromise by the political branches. Congress chose to remedy "in part"—not in full—"the … predicament of a plaintiff who has obtained a judgment against a foreign state," giving *some* measure of relief against *some* foreign sovereign property located in the United States. House Report 8. As the Fifth, Seventh, Ninth, and D.C. Circuits have recognized, some judgments against a foreign sovereign will be unenforceable, a result Congress "fully intended" when it "create[d] rights without remedies, aware that plaintiffs would often have to rely on foreign states to voluntarily comply with U.S. court judgments." *Peterson*, 627 F.3d at 1128; *see also FG Hemisphere Assocs., LLC v. Democratic Republic of Congo*, 637 F.3d 373, 377 (D.C. Cir. 2011); *Autotech*, 499 F.3d at 750; *Conn. Bank of Comm. v. Republic of Congo*, 309 F.3d 240, 252 (5th Cir. 2002).

The Second Circuit upended this careful balance by affirming injunctions that are designed to circumvent Congress' remedial scheme and to provide relief where Congress fully intended U.S. courts would provide none. Indeed, an order for specific performance of a debt contract is an "enhanced judgment enforcement mechanism" only to the extent it coerces the sovereign into satisfying the debt with assets that the FSIA declares immune from enforcement of a money judgment.

Remarkably, Respondents and the courts below eliminated any pretense by identifying the immune assets that the injunctions target: Argentina's "'foreign currency reserves.'" Br. in Opp. 9, *Republic of Argentina v. NML Capital, Ltd.*, No. 12-1494 (Aug. 28, 2013) ("Br. in Opp."); *see NML I* Resp. Br. 1 (Argentina's reserves include "ample resources to pay"); *NML II* Joint Resp. Br. 4 (Doc. 821) (Argentina holds "more than $40 billion in accessible reserves"). Those reserves are doubly immune under the FSIA, as they are central bank property—core sovereign assets—and they are located abroad. *Banco Central*, 652 F.3d at 172. Orders coercing a sovereign into paying a debt with assets the FSIA declares immune plainly violate Congress' judgment that those assets should be immune in the first place. *E.g.,* House Report 31 (enforcement against reserves "could cause significant foreign relations problems").

2. The lower courts' analysis of the injunction factors similarly contravenes the judgment of the political branches and violates bedrock principles of equity. Injunctions are traditionally unavailable "to compel the payment of money past due under a contract, or specific performance of a past due monetary obligation," because a money judgment is an adequate remedy at law. *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210–11 (2002); *see also Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318–19 (1999). But the panel held that Respondents "have no adequate remedy at law because the Republic has made clear its intention to defy any money judgment issued by this Court." App. 12; *see also* App. 56 ("Argentina will simply refuse to pay any judgments"). The panel thus used Argentina's invocation of its FSIA immunities as the avowed basis for entering an injunction designed to circumvent those immunities.

This reasoning is wholly incompatible with the FSIA. Immunity conferred by Congress upon property cannot render monetary relief "inadequate" and thereby justify an injunction that compels payment with immune property. The *whole point* of the FSIA's two-part immunity scheme is that a foreign sovereign may "refuse to pay" immune assets to satisfy a money judgment, even when the sovereign is subject to a court's jurisdiction. *See* 28

U.S.C. §§ 1610(a)(1), 1611(b). That is the basic structure of the FSIA, not a defect that justifies an injunctive remedy.

Even worse, the injunctions give rise to extraterritoriality concerns. *See Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013). This Court has cautioned against injunctions with extraterritorial effects that may "interfer[e] with the sovereignty of another nation." *Steele v. Bulova Watch Co.*, 344 U.S. 280, 289 (1952); *see Republic of Philippines v. Westinghouse Elec. Corp.*, 43 F.3d 65, 78 (3d Cir. 1994) (reversing injunctions because they "thrust the district court into the internal affairs of the Republic"). These injunctions bind Argentina itself, extending extraterritorially to constrain Argentina's use of core sovereign assets located outside the United States. Argentina must either use its reserves to pay Respondents, or it must not use its reserves or other immune assets to make an unrelated payment to the exchange bondholders' trustee.

3. Numerous circuits, including the Second Circuit, have recognized that a court cannot circumvent the FSIA by merely labeling an order an "injunction" when the effect is "attachment, arrest, or execution" of immune property. *See* App. 58 ("[C]ourts are … barred from granting 'by injunction, relief which they may not provide by attachment.'" (quoting *S&S Mach.*, 706 F.2d at 418); *see also Janvey v. Libyan Inv. Auth.*, 478 F. App'x 233, 236 (5th Cir. 2012) (per curiam) (prohibiting an injunction that is "functionally equivalent to an attachment"); *Phoenix Consulting Inc. v. Republic of*

Angola, 172 F.3d 920 (D.C. Cir. 1998) (table) (prohibiting an injunction that is "in effect a pre-judgment attachment").

The panel rendered this principle toothless, however, by holding that the injunctions do not even implicate the FSIA because they do not "exercis[e] dominion over sovereign property"; Argentina supposedly could "pay its FAA debts with whatever resources it likes." App. 58; App. 11. This cramped reading of the FSIA must not stand.

First, the panel's rule that § 1609 only prevents a court from taking "dominion" over immune property makes no sense in light of the FSIA's structure and purpose. From a foreign sovereign's perspective, it is immaterial whether a U.S. court coerces it into transferring immune assets to the court so that the court can transfer them to plaintiffs, or if the court skips a step and coerces the sovereign into handing the same assets directly to plaintiffs. Both orders are equally offensive as they equally constrain the sovereign's use of its property. *Cf.* State Immunity 31 ("The application by one State of forcible measures of constraint against the conduct or property of another State is an unfriendly act generally prohibited by international law ….").

Second, an order coercing a foreign sovereign to satisfy a money debt "with whatever resources it likes"—without regard to whether the assets used to satisfy the debt are immune under the FSIA—itself conflicts with the FSIA's immunity scheme, which is property-specific. "The only way the court can decide whether it is proper" to issue a remedial order "is if it knows which property is targeted." *Autotech*, 499

F.3d at 750. A court "cannot give a party a blank check when a foreign sovereign is involved." *Id.*; *see also Rubin v. Islamic Republic of Iran*, 637 F.3d 783, 799 (7th Cir. 2011) (the FSIA "cloaks the foreign sovereign's property with a presumption of immunity" which "inheres in the property itself").[4] To the extent Respondents and the lower courts identified any property for Argentina to use to pay Respondents, they pointed only to immune reserves. The fact that the injunctions constrain Argentina's use of such core sovereign assets located abroad is a sure signal that the injunctions violate Argentina's sovereign immunity.

This Court has long rejected similar efforts to evade state sovereign immunity. For example, after the Civil War, Louisiana issued bonds that included covenants promising that it would pay creditors with a particular earmarked account funded by particular taxes. *Louisiana v. Jumel*, 107 U.S. 711, 713–15 (1883). Louisiana later defaulted, stopped collecting the tax and filling the account, and offered investors a bond exchange. *Id.* at 715–16. Some refused and sued in federal court. To evade Louisiana's sovereign immunity, the holdouts "purposely avoided" seeking

[4] This Court recently granted certiorari in *Republic of Argentina v. NML Capital, Ltd.*, No. 12-842, in which the same lower courts committed a similar error: They entered (and affirmed) an order permitting extraterritorial discovery into Argentine assets without regard to whether those assets were immune under the FSIA. *See* U.S. Discovery Br. 6–7, 9 (courts may not "exercise … judicial power over Argentina as any other party"; discovery orders must be tailored to "respec[t] the general rule of immunity Congress established in Section 1609").

a money judgment and instead demanded that state officials specifically perform the covenants, which would effectively satisfy the debt. *Id.* at 721–22. This Court squarely rejected the effort. *Id.* A state is thus immune from a suit that "will operate so as to compel [it] specifically to perform its contracts." *In re State of New York*, 256 U.S. 490, 500–01 (1921). This anti-circumvention rule should apply *a fortiori* here, where an effectively extraterritorial injunction runs against a foreign sovereign—not merely a state's residual sovereignty—to evade enforcement immunity codified in statute.

4. Even the Second Circuit recognized that it could not directly command Argentina to pay Respondents. But it held that it could achieve the same result indirectly by giving Argentina a choice: pay Respondents or suffer a calamity. *See* App. 58. The "choice" between satisfying a monetary obligation to Respondents and defaulting on $24 billion of exchange bond debt—threatening draconian consequences for the Argentine people—is no choice at all, let alone something a district court can impose on a foreign sovereign. It is a "weapo[n] of coercion." *Nat'l Federation of Indep. Business v. Sebelius*, 132 S. Ct. 2566, 2603 (2012) (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 586 (1937)).

This weapon significantly exacerbates the FSIA problem because it puts Argentina in the unsustainable position of either paying Respondents or having countless third parties suffer grave harm. The exchange bondholders would suffer immense losses, and a new default would threaten a renewed financial crisis in Argentina. Moreover, because a district court ordinarily cannot punish foreign officials for their official acts, *see* State Immunity 564–65, to coerce Argentina, the court thrust yet more third parties into harm's way. The injunctions expressly threaten with contempt the exchange bondholders' trustee and other financial institutions that receive interest payments and route them to exchange bondholders. The threat to third parties is a "deliberate design choice, made in light of the fact that the injunction[s] cannot reach [their] primary target, to induce third parties to pressure Argentina to comply." W. Mark C. Weidemaier & Anna Gelpern, *Injunctions in Sovereign Debt Litigation* 7, Yale J. on Reg., UNC Legal Studies Research, Working Paper No. 2330914, http://bit.ly/1h01Isc (forthcoming 2014). Because of this panoply of threats, the injunctions "have the practical effect" of forcing Argentina to use immune assets to satisfy a money debt to Respondents—in direct contravention of Congress' choice to make those assets immune. *See* App. 191 (U.S. Br.).

The injunctions thus engender precisely the friction the FSIA is designed to prevent. No sovereign nation would stand idly by while a foreign court takes its citizens and other third parties hostage in order to commandeer the public fisc. The fact that the panel below viewed this "option" as avoiding the FSIA problem simply underscores how badly it misinterpreted the FSIA.

III. This Case Is Extraordinarily Important to Argentina, Foreign Relations, Other Sovereigns, and the Capital Markets.

A. The Decisions Below Ignore Argentina's Sovereign Interests and Threaten Foreign Relations.

As Congress recognized in enacting the FSIA, the judiciary threatens international comity and foreign relations when it coerces a foreign sovereign into paying money damages with assets located abroad. First, the FSIA's enforcement immunities are robust precisely because the mere act of seizing foreign sovereign property "may be regarded as an affront," *Pimentel*, 553 U.S. at 866 (quotation marks omitted). "Questions of foreign-sovereign immunity are sensitive, and lower-court mistakes about the availability of immunity can have foreign-policy implications." *Rubin*, 637 F.3d at 791; *see* App. 194–95 (U.S. Br.); *see also Peterson*, 627 F.3d at 1128 ("courts should proceed carefully in enforcement actions against foreign states…."). Second, a court order reaching into a foreign sovereign's own borders to govern the sovereign's own conduct requires a "breathtaking assertion of extraterritorial jurisdiction" that "could have adverse effects on [U.S.] foreign relations and pose reciprocal concerns with respect to U.S. government assets." App. 188 (U.S. Br.). Third, it "could cause significant foreign relations problems" for a court to enter coercive measures reaching a country's reserves. House Report 31. A country's discretion over the use of its reserves "is seen as an element in the exercise of sovereign authority," and court orders limiting that discretion may have "political consequences to the friendly relations of the forum State." State Immunity 481.

The injunctions here cause all three problems and are "particularly likely to raise foreign relations tensions." App. 195 (U.S. Br.); App. 188 (U.S. Br.) (the orders' "extraordinary intrusiveness … could have adverse effects on [U.S.] foreign relations"). They are designed to coerce Argentina into turning over billions of dollars of assets located abroad, in violation of Argentina's own sovereign policies. "[T]he allocation of scarce resources among competing needs and interests lies at the heart of the political process. While the judgment creditor of a State may have a legitimate claim for compensation, other important needs and worthwhile ends compete for access to the public fisc." *Alden v. Maine*, 527 U.S. 706, 750 (1999). Here, full payment of the holdouts would cut Argentina's reserves approximately in half, an unimaginable result for any nation. *Cf. Banco Central*, 652 F.3d at 192 (describing critical functions of Argentina's central bank). Compliance through payment is thus offensive and destabilizing.

B. The Decisions Below Threaten Countless Third Parties With Harm and Will Impede Future Restructurings.

1. Compliance through non-payment would be even worse, as countless third parties would be harmed if Argentina defaulted on $24 billion of exchange bond debt. The exchange bondholders, who made the best of a difficult situation, would face massive losses. A default also could trigger a

renewed financial crisis, directly compromising the health and welfare of millions of ordinary Argentine citizens. No U.S. court has entered injunctions of this kind before.

2. The decisions below are more broadly important because they undermine the voluntary "system of cooperative resolution of sovereign debt crises." App. 170 (U.S. Br.). This is critical because there is no bankruptcy procedure for sovereign nations. App. 174–75 (U.S. Br.). Voluntary restructuring "will become substantially more difficult" under the regime endorsed below. App. 182 (U.S. Br.). Creditors are less likely to accept the haircut that is part and parcel of a restructuring if they are "guaranteed to receive the full amount of their outstanding loan obligation" after the restructuring succeeds and payments resume. App. 183 (U.S. Br.). *See also* G. Mitu Gulati & Kenneth N. Klee, *Sovereign Piracy*, 56 Bus. Law. 635, 638 (2001) (this "is a nightmarish situation").

The IMF has similarly warned that the decisions below "risk undermining the sovereign debt restructuring process." IMF, Sovereign Debt Restructuring — Recent Developments and Implications for the Fund's Legal and Policy Framework 31 (Apr. 26, 2013) ("IMF Report"). France, currently the secretary of the Paris Club, has echoed that the decisions "will have a chilling effect on … voluntary and negotiated debt restructurings." France Br. 14; *see also* Joe Leahy, *Brazil warns on Argentina debt ruling*, Fin. Times, Nov. 29, 2012 ("Brazil's central bank governo[r] has warned that [this case] sets a negative precedent that could hurt sovereign debt negotiations elsewhere.”).

The rulings below also could “impede the repayment of loans extended … to sovereigns experiencing unserviceable debt burdens” by IFIs and sovereign lenders, including the Paris Club. App. 185 (U.S. Br.); *see* France Br. 15–17. A typical *pari passu* clause applies to “*all* its other present and future unsecured and unsubordinated External Indebtedness” without regard to whether that other creditor is a private party, another country, or an IFI. FAA ¶ 1(c) (App. 197) (emphasis added); *see also* App. 185–86 (U.S. Br.). The Second Circuit stated that it did not decide “whether policies favoring preferential payments to [IFIs] like the IMF would breach *pari passu* clauses” because Respondents had not raised such an argument. App. 53. But Respondents' reticence does not change the implications of their legal position. There is no material distinction for *pari passu* or FSIA purposes between payment to exchange bondholders and payment to an IFI. *See* App. 185–87 (U.S. Br.).

3. The Second Circuit was wrong to downplay these systemic concerns. *Pari passu* clauses are found in virtually all sovereign bonds, often with materially identical language to that found here. App. 183 (U.S. Br.); *Origin Myths* 101–02. And it has been “common practice” for sovereigns to restructure some but not all public debt. App. 178 (U.S. Br.). The decisions below thus have sweeping ramifications.

The advent of collective action clauses in recent bonds also does not “effectively eliminate the possibility of 'holdout' litigation." App. 61. CACs allow a supermajority of creditors to bind holdouts, but they were very rare before 2005. Tens of billions of dollars of older New York-law bonds without CACs remain outstanding. Choi Decl. ¶ 26 (Nov. 16, 2012) (SPE-1133). Moreover, "whereas CACs can be helpful, they do not—at least in the variety that is most common in sovereign debt contracts today—eliminate holdouts in sovereign debt restructuring so as to make the *pari passu* remedy unimportant." Brookings Inst., Comm. on Int'l Econ. Policy & Reform, *Revisiting Sovereign Bankruptcy* 18 (Oct. 2013) ("Brookings Report"); *accord* App. 170 (U.S. Br.); *see also* IMF Report 31. By creating massive incentives to hold out, the decisions below make it harder to obtain the needed supermajority in the first place, delaying restructuring and potentially altering the terms. *See* Br. of Prof. Krueger as *Amicus Curiae* 11–16 (Doc. 700). Furthermore, "creditors can and do target small series trading at a deep discount, where they can buy a blocking position with relative ease, hold out, and threaten to sue." Brookings Report 18. For example, notwithstanding the use of CACs, "more than half of all foreign-law bonds in the Greek debt restructuring failed to get the needed votes to amend the terms." *Id.*; *see also* IMF Report 28; France Br. 19.

The systemic harm is not quelled by the panel's emphasis on Argentina's allegedly "extraordinary behavior." App. 26. The panel's interpretation of the *pari passu* clause and its holding that reserves can be reached by injunction will embolden vultures worldwide and create powerful incentives for others to hold out. The Second Circuit affirmed "ratable payments" injunctions and explained that the *pari passu* clause "prohibits Argentina, as bond *payor*, from paying on other bonds without paying on the [old] bonds." App. 50. The panel further described the "ratable payments" injunctions as "d[oing] no more than hold[ing] Argentina to its contractual obligation of equal treatment." App. 12; *see also* App. 55 (they "requir[e] that [Argentina] specifically perform its obligations under the FAA"). The panel emphasized the existence of the Lock Law as an example of Argentina's supposedly "extraordinary behavior," App. 26, but even the panel did not posit the "ratable payment" injunctions as a remedy for the existence of the Lock Law; in the court's view, they remedied a breach of the "payor" interpretation adopted by the district court. In any event, the Lock Law is now gone. Crucially, the panel also held that the FSIA did not protect sovereigns from injunctions that coerce it into using reserves located outside the United States to satisfy a money debt. The one-two punch of the holdings below creates serious comity and international relations problems, threatens a court-ordered default, and impedes future restructurings.

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The need for this Court's review is imperative, and the time for review is now. Respondents primarily opposed Argentina's earlier petition for certiorari on the grounds it was interlocutory. Br. in Opp. 1; *id*. at 17. The injunctions are now final.

Respondents also argued that Argentina's refusal to voluntarily pay any judgments on holdout debt would render a grant a "gross misallocation of this Court's scarce resources." *Id.* at 30. This rhetoric again ignores that the FSIA expressly permits a foreign sovereign to consent to the jurisdiction of U.S. courts while still protecting much of its property—particularly its reserves—from enforcement measures.

In reacting to the district court's injunctions, Argentina thus has not behaved like a contumacious litigant—it acted like a sovereign, displaying exactly the affront that Congress intended for the FSIA to prevent. Any sovereign would protest if a foreign court issued an extraterritorial order threatening its creditors and citizens and coercing it into turning over billions of dollars from its immune reserves. Overstepping its proper role, an Article III court has thrust upon the political branches a foreign relations problem that the FSIA should have forestalled. The fact that injunctions designed to circumvent the FSIA are causing the very harms that Congress intended to prevent is no surprise. It is also a sure signal that the orders below are wrong and warrant this Court's review.

CONCLUSION

For the reasons set forth above, this Court should grant the petition, certify the *pari passu* question to the New York Court of Appeals, and review as needed the FSIA question after return from the Court of Appeals; or it should simply grant the FSIA question.

Respectfully submitted,

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