No. 13-990, -991

In the Supreme Court of the United States

REPUBLIC OF ARGENTINA,
Petitioner,
v.
NML CAPITAL, LTD., ET AL.,
Respondents.

EXCHANGE BONDHOLDER GROUP,
Petitioner,
v.
NML CAPITAL, LTD., ET AL.,
Respondents.

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

BRIEF FOR JUBILEE USA NETWORK AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTERESTS OF THE AMICI CURIAE[1]

Jubilee USA Network ("Jubilee USA") coordinates numerous religious communities and development organizations in the United States that seek debt relief for poor and vulnerable populations living in developing sovereign countries. Jubilee USA and its partners have so far encouraged United States policymakers to provide $114 billion in debt relief to many of the world's poorest countries.[2] Jubilee USA and its partners have strong interests in *Republic of Argentina* v. *NML Capital, Ltd., et al.* because, if upheld, the unusual interpretation given to the *pari passu* clause and the remedy affirmed by the Court of Appeals in this case will undermine United States debt relief policy and harm many of the world's poorest people. See Appendix for partners joining in this amicus brief. It will also embolden and equip with new legal instruments predatory financial entities so contrary to the social welfare they are popularly known as "vulture funds." These firms buy the debt of distressed countries in order to profit from the increase in value once a majority of other creditors agrees to provide debt relief. Because using law to dispossess the poor for the pleasure of the powerful offends not

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[1] In accordance with Rule 37.6 the undersigned authored the brief with the assistance of others. No party authored this brief in whole or in part of made any monetary contribution to it. The ten-day notice was given to all parties and they consented to the filing of all amici.

[2] World Bank 2013. HIPC At a Glance. October. Available at http://siteresources.worldbank.org/INTDEBTDEPT/Resources/468980-1256580106544/HIPC_Fall2013_ENG_CRAweb.pdf

only the sense of justice embodied in United States policy, but the even more ancient principles of biblical justice revealed in the scriptures of our faiths, we respectfully submit this *amicus curiae* brief requesting that the Court accept certiorari.

BACKGROUND TO THE AMICI

Extreme poverty is the unrepentant enemy of human flourishing. Despite decades of extraordinary global economic growth, poverty in many countries has only deepened for the already desperately poor. There is broad international consensus that excessive sovereign debt has contributed to this phenomenon by siphoning countries' national wealth away from domestic economic development, education and health care to pay for past borrowing. While informal and ad hoc mechanisms for rescheduling and renegotiating sovereign debt have existed for a long time,[3] by the mid-1990s it was clear these mechanisms could not help debtor countries regain economic viability and reduce poverty.

An international movement coalesced around the religious ideal of debt forgiveness inspired by the Jubilee year in the Hebrew Scriptures:

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[3] Udaibir S. Das, Michael G. Papaioannou, and Christoph Trebesch 2012. Sovereign Debt Restructurings 1950–2010: Literature Survey, Data, and Stylized Facts. IMF Working Paper. WP/12/203; Christina Daseking and Robert Powell 1999. From Toronto Terms to the HIPC Initiative: A Brief History of Debt Relief for Low-Income Countries 1999. IMF Working Paper WP/99/142.

> If one of your fellow Israelites becomes poor and sells some of their property, their nearest relative is to come and redeem what they have sold. If . . . later on they prosper and acquire sufficient means to redeem it themselves, they are to determine the value for the years since they sold it and refund the balance to the one to whom they sold it. . . . But if they do not acquire the means to repay, what was sold will . . . be returned in the Jubilee, and they can then go back to their property.[4]

According to the Christian Scriptures, Jesus Christ began his ministry by reading the Book of Isaiah and declaring his mission to be the fulfillment of the Jubilee Year:

> "The Spirit of the Lord is on me, because he has anointed me to proclaim good news to the poor. He has sent me to proclaim freedom for the prisoners and recovery of sight for the blind, to set the oppressed free, to proclaim the year of the Lord's favor." Then he rolled up the scroll, gave it back to the attendant and sat down. The eyes of everyone in the synagogue were fastened on him. He began by saying to them, "Today this scripture is fulfilled in your hearing."[5]

Jewish and Christian leaders started to see the pitiable suffering of the global poor through these

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[4] Leviticus 25: 25-28.

[5] Luke 4:18-20.

scriptural lenses. The global relief agency American Jewish World Service described the way sovereign debt entrenched poverty:

> International debt paralyzes impoverished countries, inhibiting development as governments try in vain to keep up with interest payments on debts owed to wealthy nations like the United States and international financial institutions like the World Bank. In fact, many of these countries are paying more in debt service than they receive in aid.[6]

Pope John Paul II also warned that:

> [t]he heavy burden of external debt . . . compromises the economies of whole peoples and hinders their social and political progress. The debt question is part of a vaster problem: that of the persistence of poverty, sometimes even extreme, and the emergence of new inequalities which are accompanying the globalization process.[7]

Religiously inspired humanitarian organizations also began to find in their Scriptures the seeds of a possible solution: debt forgiveness. American Jewish World Service has described how debt forgiveness can

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[6] http://ajws.org/emergencies/debt_campaign.html.

[7] Pope John Paul II noted in his World Peace Day Message of 1998 WPD 1998, n.4. http://www.vatican.va/holy_father /john_paul_ii/ messages/peace/documents/hf_jp-ii_mes_08121997_xxxi-world-day-for-peace_en.html

reverse the fortunes of the poorest members of the poorest societies:

> Because debt payments often must take precedence over spending on education, health care and other basic necessities, debt cancellation can have a huge impact. Countries relieved of these crushing debt loads are finally free to invest their resources in their own citizens. To date, debt cancellation has resulted in more than doubling school enrollment in Uganda, vaccinating five hundred thousand children in Mozambique and adding three more years of schooling for Honduran children. Since the late 1990s, AJWS has mobilized the American Jewish community to join the international call for definitive debt cancellation for some of the world's most impoverished countries.[8]

Inspired by the new sense which Scripture was able to make of debt relief and global poverty, national religious bodies formed Jubilee 2000 and united around a common focus on debt cancellation for the poorest countries in the world. The founding organizations included the United States Conference of Catholic Bishops, American Jewish World Service, the Evangelical Lutheran Church of America, the Episcopal Church, the Presbyterian Church USA, the United Church of Christ, the United Methodist Church, Church World Service, the Center of Concern, and the Mennonite Central Committee. Jubilee 2000 became

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[8] http://ajws.org/emergencies/debt_campaign.html

Jubilee USA Network and now includes over 400 faith communities and 75 member organizations. Jubilee USA was the lead organization in a campaign to earn bipartisan support for debt relief in the United States Congress. Support for debt forgiveness among American and international policy makers advanced steadily over the next decade and a half, with new victories being won for the poor as well as for international financial stability.

The opinion below now threatens to unravel United States debt relief policy and undo much of the progress made on behalf of the poor. In this case, the Court of Appeals adopted a novel interpretation of the *pari passu* clause that is a standard part of national debt agreements. This new interpretation of an old clause would prevent the Republic of Argentina from paying holders of restructured bonds without also making "ratable payments" to holders of bonds that have not been restructured. The court also adopted NML Capital's proposed definition of "ratable payments," which requires the country to pay interest along with the full amount of prejudgment claims.

Until the Court of Appeals issued its opinion, parties and courts had understood the *pari passu* clause to bar a country from changing creditor rank, but not from changing the payments themselves. Thus, conduct which had not previously caused a breach of contract, making preferential payments to some creditors, will now violate the reinterpreted *pari passu* clause.

SUMMARY OF ARGUMENT

If upheld, the interpretation of *pari passu* in the Court of Appeal's decision will cause current debt restructuring efforts to degrade into creditor free-for-alls.

It will intensify and prolong the suffering of the poor in countries undergoing sovereign debt crises by increasing the incentives for vulture funds and other creditors not to restructure.

It will destabilize the international financial system, endangering both the poor and the global common good.

Lastly, it would harm core United States policies.

The Court should grant certiorari in this case.

ARGUMENT

I. UPHOLDING THE *PARI PASSU* INTERPRETATION WOULD EXACERBATE WEAKNESSES IN INTERNATIONAL DEBT RESTRUCTURING REGIMES AND ENCOURAGE CREDITOR FREE-FOR-ALLS

Most national legal systems provide a predictable, rules-based framework within which to address situations of insolvency. Bankruptcy proceedings enforce a temporary suspension of payments while a

tribunal adjudicates the claims of creditors.[9] Without such proceedings, creditors would respond to a debtor's financial distress by seizing any assets on which they could put their hands.[10] It is now accepted that it is more efficient and equitable to distribute debtor's assets among all the creditors than to give one creditor total satisfaction and make the rest go away empty-handed.[11] Bankruptcy thus serves the collective interests of creditors while at the same time preserving, to the extent possible, the viability of the debtor firm.[12]

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[9] Helleiner, Eric 2006, Assoc. Professor, Dep't of Political Sci., Univ. Waterloo, Address to Global Economic Governance Seminar: The Long and Winding Road: Towards a Sovereign Debt Restructuring Regime (May 2006).

[10] Adler, Barry E. 1993. Financial and Political Theories of American Corporate Bankruptcy. Stanford Law Review, Vol. 45, No. 2 (Jan., 1993), pp. 311-346 ("[B]ankruptcy protects an insolvent debtor's assets from its creditors who would otherwise dismantle the debtor in a frenzied attempt to collect on their loans. By providing for an orderly disposition of claims against a debtor firm, bankruptcy law preserves intact the firm's 'common pool' of assets available to creditors. In this classic account, creditors willingly bear the costs of bankruptcy because the alternative is worse: a contentious race among creditors and destruction of the firm.").

[11] "Alder" as per fn 10.

[12] Schwartz, Alan 2005. A Normative Theory of Business Bankruptcy. Virginia Law Review, Vol. 91, No. 5 (Sep., 2005), pp. 1199-1265 ("Social welfare is maximized when economically distressed firms are liquidated but financially distressed firms are continued. Creditors are less interested in saving firms than in whether assets exist to satisfy their claims.")

Most bankruptcy regimes are thus organized to serve three objectives. They first avoid both a creditor "rush to the courthouse" and an inefficient breakup of the firm by preserving the firm's "going concern" value.[13] Next, they enforce payment of creditors according to absolute priority.[14] Finally, they allow for the mandatory cancellation of all debts following the firm's liquidation, thereby giving the owners and managers of the failed firm the chance for a "fresh start."[15]

These same considerations largely apply to the case of sovereign debt restructuring. In an oft-cited statement, Adam Smith said that "When it becomes necessary for a state to declare itself bankrupt, in the same manner as when it becomes necessary for an individual to do so, a fair, open and avowed bankruptcy is always the measure which is both least dishonorable to the debtor, and least hurtful to the creditor"[16] Unlike at the domestic level, however, there is no bankruptcy or insolvency regime for sovereign debtors. The absence of an orderly, efficient, and predictable regime for sovereign debt restructuring remains one of the most

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[13] Bolton, Patrick 2003. Towards a Statutory Approach to Sovereign Debt Restructuring: Lessons from Corporate Bankruptcy Practice Around the World. IMF Working Paper WP/03/13, 18.

[14] Ib.

[15] Ib.

[16] Quoted in Kenneth Rogoff and Jeromin Zettelmeyer 2002. "Bankruptcy Procedures for Sovereigns: A History of Ideas, 1976-2001" *IMF Staff Papers* 49(3) (2002), p.471 fn 2.

significant gaps in the international financial system.[17] Without a comprehensive framework for negotiation binding on all creditors, each creditor has an incentive to hold out of participation in restructuring in hopes of obtaining the highest payout.[18] The presence of even a single holdout can deter otherwise cooperative creditors

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[17] Anne Krueger, First Deputy Managing Dir., Int'l Monetary Fund, Address at the National Economists' Club Annual Members' Dinner: International Financial Architecture for 2002: A New Approach to Sovereign Debt Restructuring (Nov 26, 2001), *transcript available at* http://www.imf.org/external/np/speeches/2001/112601.HTM. *See also*, Kunibert Raffer, *Applying Chapter 9 Insolvency to International Debts: An Economically Efficient Solution with a Human Face*, 18 WORLD DEV. 301, 310 (1990); Barry Herman & Shari Spiegel, Sovereign Bankruptcy: A Piece of the International Financial Architecture Is Still Missing (March 29, 2007) (Paper for UN/Commonwealth Workshop on Debt, Finance and Emerging Issues in Financial Integration), available at http://www.un.org/esa/ffd/events/2007debtworkshop/herman%20and%20spiegel.pdf; Eric Helleiner, supra; Christoph G. Paulus, *A Standing Arbitral Tribunal as a Procedural Solution for Sovereign Debt Restructurings*, *in* SOVEREIGN DEBT AND THE FINANCIAL CRISIS 317 (Carlos A. Primo Barga & Gallina A. Vincelette eds., 2010.

[18] Nouriel Roubini (2002), "Do We Need a New Bankruptcy Regime?" Brookings Papers on Economic Activity, No.1, pp. 321-33 ("If a holdout creditor can choose not to accept the offer and then, through later litigation, receive the full amount of its claim while those who accepted the offer receive less, a strong incentive arises for creditors to hold out. If this creditor coordination problem cannot be solved, a disorderly workout will result, even if a cooperative solution would be in the interest of all creditors."); IMF 2003. Reviewing the Process for Sovereign Debt Restructuring within the Existing Legal Framework. Prepared by Policy Development and Review, International Capital Markets, and Legal Departments In consultation with other Departments. (August 1, 2003), p. 4.

from agreeing to restructure a country's debt. Sovereign countries thus often face formidable obstacles which prevent them from reaching a restructuring agreement with their creditors. Meanwhile, the complexities of a restructuring process that may involve creditors in a great variety of asset classes and with a large variety of stipulations attached to their claims adds further obstacles to the debtor.

The new interpretation of the *pari passu* in the decision below would make holding out and suing for the full amount of the debt, rather than participating in sovereign debt restructuring, the most rational strategy for creditors. The presence of just one holdout creates irresistible incentive for other, more agreeable creditors to copy the first holdout's intransigence and seek full payment of the debt. As the IMF has warned, upholding the decision below would harm future sovereign debt restructuring attempts by making creditors less inclined to participate in restructuring while making those who do participate afraid that holdouts would interrupt payments under the restructuring agreement.[19]

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[19] IMF 2013. Sovereign Debt Restructuring—Recent Developments and Implications for the Fund's Legal and Policy Framework. (April 26, 2013) (stating that the Court of Appeals decision "if upheld, would likely give holdout creditors greater leverage and make the debt restructuring process more complicated.")

II. UPHOLDING THE DECISION BELOW WOULD INTENSIFY AND PROLONG THE SUFFERING OF THE POOR IN COUNTRIES UNDERGOING SOVEREIGN DEBT CRISES BY INCREASING THE INCENTIVES FOR VULTURE FUNDS AND OTHER CREDITORS NOT TO RESTRUCTURE

Allowing the decision below to stand would also equip financial companies that prey on the poorest nations and people of the world with a game-changing legal precedent to accelerate their predation. While sovereign debt crises have a variety of characteristics, they share the common element of making the poorest and most vulnerable members of the sovereign's subjects suffer most. In a country undergoing a sovereign debt crisis, people lose their jobs as well as safe, secure access to services such as health, education, or even water. Economic opportunity evaporates for those who do not already sit near or at the top of the wealth ladder. As the length and depth of crises extends, so do the negative impacts. Upholding the Second Circuit's decision would produce these effects several ways.

First, affirming the new interpretation of the *pari passu* clause will prolong future debt crisis situations by increasing the incentive for vulture funds not to participate in debt restructuring. Although restructuring sovereign debt should not be so easy that it gives debtors an incentive to restructure rather than satisfy their debts, the evidence is that the balance has tipped heavily in the opposite direction. Sovereign debt restructurings carry such significant costs and

challenges for sovereign debtors that the debtors tend to postpone the decision to do so. As a result, countries often make the decision to restructure their debt when it is no longer possible to avoid damage both to their national economy and their capacity to repay their creditors.[20] To make matters worse, the redefined clause will further impede and delay a country's debt restructuring efforts by providing creditors with incentive to hold out from the country's restructuring proposals. The effects will tend to make future debt crises last longer and cause more economic harm, especially to the poorest members of the debtor countries.[21] The only parties to benefit from this revision of established law will belong to that small minority of creditors, or vulture funds, who acquire

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[20] IMF 2003, supra (referring to sovereign debtor fears that a debt restructuring would impose economic and reputational cost on the country, litigation risks, and a sustained loss of access to international capital markets, leading debtors to a tendency to delay in the hope that with sufficient time they will succeed in resolving the current crisis without having to resort to a debt restructuring); Hubbard, Glenn 2002. Enhancing Sovereign Debt Restructuring. Remarks at Conference on the IMF's Sovereign Debt Proposal, American Enterprise Institute, Washington, D. C. (October 7, 2002) ("Costs of postponed . . . restructurings are real and substantial. Delays in restructuring can drain a country's resources and increase the ultimate costs of restoring financial sustainability.")

[21] Jack Boorman 2003. Alternative Approaches to Sovereign Debt Restructuring. *Cato Journal*, Vol. 23, No. 1 (Spring/Summer 2003) ("Limiting the kind of disruption and dislocation to the economy that has been seen in too many recent cases can help preserve substantial value both for the creditors and for the country and its citizens, including the poor who often suffer the most as a result of the economic fallout from financial crises.")

sovereign debt for the sole purpose of profiting from settlements reached with other debtors. The new definition of the *pari passu* clause will ensure that these funds are fully satisfied, whatever the cost to other parties or the disruption caused to sovereign debt restructuring.

The second effect of upholding the decision below would be to introduce a new moral hazard in the market for international debt, thereby increasing risk and the likelihood that new debt crises will occur in the future. By hindering sovereign debt restructurings and rewarding litigious creditors with full satisfaction despite settlements reached with a majority of other creditors, the Court of Appeals has created an incentive for creditors to behave recklessly and lend with little regard for risk. This moral hazard is akin to that created by the bailout of banks that are "too big to fail." Creditors who know they will be insulated from the consequences of taking on risky debt will behave even more recklessly because successful bets will bring huge payouts while the price of failed bets will be paid by someone else. More safeguards will need to be created to compensate for and prevent this reckless creditor behavior.[22]

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[22] Zettelmeyer, Jeromin, Beatrice Weder di Mauro, Ugo Panizza, Mitu Gulati, Anan Gelpern, Lee C. Buchheit 2013. Revisiting Sovereign Bankruptcy. Committee on International Economic Policy and Reform. (October 2013) ("Because countries tend to repay what they borrow from official lenders, there is limited empirical evidence for debtor moral hazard at the expense of global taxpayers. Creditors, however, may have incentives to behave recklessly and lend without adequate regard to risk because

The moral hazard is made even worse when private creditors to shift the losses resulting from their poor lending decisions onto the shoulders of public creditors, and thus, taxpayers. This shift occurs when sovereign debt restructurings are made more difficult and the ability of sovereign states to secure sufficient reductions in private debt is curtailed, thus causing a debt crisis to linger. For example, in Greece, the exposure of taxpayers in its total debt was just above 0% before its financial crisis, whereas it is now more than 80%, while private sector exposure for the national debt fell from nearly 100% to less than 20%.[23] A system that recognizes the voluntary nature of debt contracts and allocates burden-sharing among all parties, on the other hand, promotes responsible lending and borrowing and leads to greater market discipline. One of the purposes of sovereign debt restructuring is to involve creditors in the resolution of a debt crisis, so that they will care about the creditworthiness of sovereign debtors *ex ante*.[24]

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official bailout packages may allow for repayments that are "too high with respect to the social optimum.")

[23] Nouriel Roubini 2012. From Argentina to Greece: Crisis in the Global Architecture of Orderly Sovereign Debt Restructurings (November 2012); See also IMF 2013. EX POST EVALUATION OF EXCEPTIONAL ACCESS UNDER THE 2010 STAND-BY ARRANGEMENT (May 2013) (recognizing that in the early stages of its crisis, Greece chose to move ahead as if debt restructuring could be avoided but this only served to delay debt restructuring and allowed many private creditors to escape.)

[24] FRANÇOIS GIANVITI ET AL., A EUROPEAN MECHANISM FOR SOVEREIGN DEBT CRISIS RESOLUTION: A PROPOSAL 7 (2010), *available at* http://aei.pitt.edu/15123/1/101109_BP_Debt_resolution

Strengthening market discipline during the process of lending is a market-based strategy for preventing the creation of future unsustainable debts, thus reducing or even eliminating the need for future debt restructuring. By guaranteeing payouts to vulture funds that make the riskiest bets and permitting them to offload the liability for their bad bets onto public creditors, the interpretation of *pari passu* at issue will help prolong existing debt crises and create new ones, thus increasing the suffering endured by the poor during these crises.

Third, the incentive to hold out which the decision below provides vulture funds and other creditors will make it more difficult to engage creditors in providing debt relief for countries that need it. This may even be true even where a natural disaster makes debt relief necessary, as in the case of Haiti. In fact, one of the shortcomings of the most comprehensive[25] multilateral debt relief initiative known to date, the Heavily Indebted Poor Countries Initiative ("HIPC") and its successor, the Multilateral Debt Relief Initiative, has

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_BP_clean_01.pdf (further asserting that a sovereign debt restructuring aims at a fair distribution of the cost of restructuring between the borrower and the creditors.); see also Kunibert Raffer, *Applying Chapter 9 Insolvency to International Debts: An Economically Efficient Solution with a Human Face*, 18 WORLD DEV. 301, 310 (1990) [hereinafter Raffer, *Applying Chapter 9*] ("The lack of international insolvency procedures has important economic effects: as debtors can become illiquid, not insolvent, banks have felt invited to urge loans upon the South without obeying the most elementary rules of banking.").

[25] These were the widest initiatives based on number of countries covered.

been the lack of participation among commercial creditors. These creditors profited from the efforts of other creditors who participated in the HIPC by remaining outside of it:

> HIPCs owe $2 billion in [Present Value] terms to commercial creditors. A worrying recent trend has been of some non-Paris Club governments and commercial creditors refusing to participate and suing debtors (usually successfully) for full recovery of debt. Though the original debt is small, judgments in international courts have awarded 3 to 4 times this amount to creditors, due to accumulation of interest and legal fees, forcing some debtors to pay amounts as large as $50 million in a year, undermining poverty reduction spending plans.[26]

The case of Zambia and the Donegal vulture fund illustrates how outrageous the results can be in such circumstances. In 2007, Donegal bought Zambian debt with a face value of $30 million for less than $4 million, and then sued Zambia before a British court for around $55 million. The British court ended up giving Donegal permission to enforce its claim.[27] Many HIPC

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[26] Matthew Martin 2004. Assessing the HIPC Initiative: The Key HIPC Debates, in Jan Joost Teunissen and Age Akkerman (Ed.), HIPC Debt Relief - Myths and Reality The Hague: FONDAD, 2004.

[27] The Guardian 2007. Court Lets Vulture Fund Claw Back Zambian Millions. February 16.

beneficiary countries are still affected by litigation undertaken by these commercial creditors.[28]

III. UPHOLDING THE DECISION BELOW WOULD DESTABILIZE THE INTERNATIONAL FINANCIAL SYSTEM, ENDANGERING BOTH THE POOR AND THE GLOBAL COMMON GOOD

If allowed to stand, the decision in this case also has the potential to generate systemic risks in the international financial system. First, extending the length of debt crises would amplify the potential for volatility and contagion associated to them. Longer debt crises would make sovereign debt restructurings more difficult to obtain and less likely to succeed. In our interconnected global financial system, the sovereign debt crisis of one country has the potential to engulf a region or the global economy.[29] In particular, if the economy of a potentially liquid or insolvent sovereign is particularly large or interconnected, then its prolonged debt crisis may adversely affect the global

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[28] Among HIPC beneficiaries affected by litigation are Zambia, Democratic Republic of Congo, Liberia, Sudan, IMF and World Bank 2010. Heavily Indebted Poor Countries (HIPC) Initiative and Multilateral Debt Relief Initiative (MDRI)—Status of Implementation and Proposals for the Future of the HIPC Initiative. (September 2010)

[29] Barry Herman 2004. Dealing Deftly with Sovereign Debt Difficulties, Initiative for Policy Dialogue. ("Debt crises in "emerging economies" have been a focus of international policy attention not only because of the damage done to the countries themselves, but also because sometimes they have threatened the world financial system itself.")

economy. This possibility is not far-fetched given the high level of debt carried by many high income economies.[30] Greece's prolonged debt difficulties in recent years is a cautionary example of what a relatively small economy's debt difficulties can mean for a region, and even the rest of the world.

The Second Circuit's decision would also alter the balance of power between creditors and debtors. Requiring countries to pay holdout creditors the full judgment plus interest at the same time they pay creditors who have cooperated in the restructuring of the countries' debt would result in less effective debt reduction agreements and recurring new liquidity and solvency crises. It would thus frustrate the objective of returning the sovereign debtor to viability and growth.[31] Not only is this dynamic not in the interest of the debtor, it also does not ultimately benefit the creditors. The more creditor-friendly that the incentives are, the more likely it is that creditors will underestimate the level of debt forgiveness required by the sovereign debtor to achieve the objective of getting it back to a viable economic situation.[32] Finally, by

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[30] Bank of International Settlements 2013. Annual Report. Chapter IV.

[31] Anne Krueger 2002. A New Approach To Sovereign Debt Restructuring. International Monetary Fund. April ("A sovereign debt restructuring mechanism (SDRM) should aim to help preserve asset values and protect creditors' rights, while paving the way toward an agreement that helps the debtor return to viability and growth.")

[32] Patrick Bolton, Toward a Statutory Approach to Sovereign Debt Restructuring: Lessons from Corporate Bankruptcy Practice

fostering irresponsible lending and removing the creditors from the influence of market discipline, the decision encourages overlending. It is, therefore, prone to encourage, rather than prevent, the genesis of future unsustainable debts and thus trigger more instances of systemically excessive debt.

IV. UPHOLDING THE DECISION BELOW WOULD HARM CORE UNITED STATES POLICIES

For the reasons described above, upholding the decision below would harm or frustrate numerous established policies of the United States in several respects. The United States has been a leader in efforts to provide debt relief and cancellation for unsustainable debts of poor countries. Such efforts began during the George W. Bush Administration and have been continued by the Obama Administration.[33] The United States also has a longstanding policy of promoting orderly debt restructuring processes and

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Around the World 26 (Int'l Monetary Fund, Working Paper 03/13, 2003), available at http://www.imf.org/external/pubs/ft/wp/2003/wp0313.pdf ("[A] sovereign's renegotiated debt obligations under contractual and market restructuring procedures may still leave the country with an excessively high debt burden. . . . [A] debt restructuring procedure which is too creditor friendly may result in inefficiently low debt forgiveness.").

[33] The Washington Post 2004, Mr Bush's Debt Relief, October 1; Paul Blustein 2005, Debt Cut Is Set for Poorest Nations; Deal Would Cancel $40 Billion in Loans, in The Washington Post, June 12.

reduced uncertainty through voluntary approaches.[34] In addition, federal law requires the U.S. Treasury to advocate for the International Monetary Fund to "facilitate discussions between debtors and private creditors to help ensure that financial difficulties are resolved without inappropriate resort to public resources."[35] U.S. Treasury officials have also expressed support for responsible lending and borrowing,[36] and federal law requires the Treasury to "[v]igorously promote policies that aim at appropriate burden-sharing by the private sector so that investors and creditors bear more fully the consequences of their decisions."[37]

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[34] Speech by John B. Taylor, Under Secretary of Treasury for International Affairs. Sovereign Debt Restructuring: A US Perspective, at the conference "Sovereign Debt Workouts: Hopes and Hazards," Washington, DC, (April 2002); Statement by Secretary John W. Snow, United States Treasury, at the International Monetary and Financial Committee, Washington, D.C., (April 2003). More recently this policy was restated in these same proceedings, Brief for the United States of America as Amicus Curiae in Support of Reversal (2d Cir. Apr. 4, 2012);

[35] See Section 1503(a) of the International Financial Institutions Act, as amended (originally passed as Section 610(a) of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1999, and amended in 2004) [hereinafter International Financial Institutions Act 2004], at 5(G).

[36] Testimony of Treasury Secretary John W. Snow before the House Financial Services Committee on the International Financial System and the Global Economy, May 17 2006. See also International Financial Institutions Act.

[37] International Financial Institutions Act 2004, at 5.

These United States policies will be undermined if decision is allowed to stand.

CONCLUSION

As discussed above, it would undermine United States debt relief policy by giving vulture funds a powerful new tool for extracting their full claims plus interest from sovereign debtors at the expense of creditors who agree to provide debt relief. It would thus also undermine United States policy of supporting voluntary restructuring mechanisms for solving sovereign debt crises by providing additional incentive for creditors to hold out of such mechanisms. It would further enable the most irresponsible private creditors to be bailed out with public sector creditors' money, chiefly through the International Monetary Fund, in contravention of United States policy against the inappropriate use of public resources. Finally, it would increase moral hazard and thus incentivize irresponsible lending and borrowing by exempting creditors from having to shoulder their share of the consequences for their lending decisions, in opposition to United States treasury policy for burden sharing and against moral hazards.

Because the reinterpretation of the standard *pari passu* clause will harm the world's poor and undermine United States policy, Jubilee USA respectfully requests the Court to grant certiorari.

RESPECTFULLY SUBMITTED

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March 24, 2014

APPENDIX

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NATIONAL

Action Aid USA

American Jewish World Service

Bernadine Franciscan Sisters

Center of Concern

Church World Service

Franciscan Action Network

Holy Spirit Missionary Sisters

Jubilee USA Network

Latin America Working Group

Maryknoll Office of Global Concerns

Methodist Federation for Social Action

Missionary Oblates of Mary Immaculate

Missionary Oblates of Mary Immaculate – Justice, Peace, and Integrity of Creation

National Advocacy Center of the Sisters of the Good Shepherd

New Rules for Global Finance

App. 2

Office of Social Justice - Christian Reformed Church of North America

P. Francis Murphy Initiative for Justice and Peace Pax Christi USA

Provincial Council of the Clerics of St. Viator (Viatorians)

The Shalom Center

Sisters of Charity of Seton Hill

Sisters of the Holy Cross Congregation Justice Committee

Sisters of Mercy of the Americas - Institute Justice Team

Sisters of St. Joseph of Chambery - US Province

Society of the Holy Child Jesus - American Province

Society of the Sacred Heart - US/Canada Province

LOCAL

8th Day Center for Justice, IL

Ainsworth United Church of Christ, OR

Arlington Community Church, CA

Ascension Lutheran Church, CA

Benedictine Sisters of Erie, PA

Christ Evangelical Lutheran Church, CA

Christ the Servant Catholic Church, FL

Church of Reconciliation (PCUSA), NC

Collaborative Center for Justice, CT

College Avenue Presbyterian Church, CA

Congregation Netivot Shalom, CA

First Congregational Church of Alameda, CA

First Congregational Church of Chicago, IL

First Presbyterian Church, IA

Global Poverty Committee of the Sisters of Charity of New York, NY

Grace Lutheran Church, NE

Grace United Methodist Church, MD

Grace United Methodist Church, MO

Grey Nuns of the Sacred Heart, PA

Humansville United Methodist Church, MO

Jewish Farm School, PA

Jubilee Bay Area, CA

Jubilee Justice Taskforce of the United Church of Christ, MA

Jubilee Massachusetts, MA

Jubilee Northwest Coalition, WA

Jubilee Oregon, OR

Jubilee San Diego, CA

Jubilee Southern California, CA

Jubilee Vermont, VT

Living by Vow Zen Community, MN

Keystone United Church of Christ, WA

Mission Bay Community Church, CA

Niantic Community Church, CT

Peace and Justice Advocates, University Congregational United Church of Christ, WA

Reconstructionist Rabbinical College, PA

San Diego Missions Community, CA

Sandy Ridge Community Church, UT

School Sisters of Notre Dame, Justice, Peace, Integrity of Creation Staff, Central Pacific Province, MO

Shirat HaNefesh Congregation, MD

Sisters of the Divine Compassion, NY

Sisters Home Visitors of Mary, MI

Sisters of Notre Dame de Namur of California, CA
Sisters of St. Francis, MO

St. Alban's Episcopal Church, CA

St. Bede Abbey, IL

St. Francis of Assisi Catholic Parish, MI

St. John the Baptist Episcopal Church, OR

St. Paul's Methodist Church, CA

Trinity United Methodist Church, WA

UC Berkeley Jewish Student Union, CA

UC Berkeley Muslim Student Association Political Action Committee, CA

Ursulines for Peace and Justice, NY

Vancouver First Congregational United Church of Christ, WA