12-105-cv(L)

12-109 -cv (CON), 12-111-cv (CON), 12-157-cv (CON), 12-158-cv (CON), 12-163-cv (CON), 12-164-cv (CON), 12-170-cv (CON), 12-176-cv (CON), 12-185-cv (CON), 12-189-cv (CON), 12-214-cv (CON), 12-909-cv (CON), 12-914-cv (CON), 12-916-cv (CON), 12-919-cv (CON), 12-920-cv (CON), 12-923-cv (CON), 12-924-cv (CON), 12-926-cv (CON), 12-939-cv (CON), 12-943-cv (CON), 12-951-cv (CON), 12-968-cv (CON), 12-971-cv (CON)

United States Court of Appeals for the Second Circuit

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, CESAR RUBEN VAZQUEZ, NORMA HAYDEE GINES, MARTA AZUCENA VAZQUEZ, OLIFANT FUND, LTD.,

Plaintiffs/Appellees,

v.

REPUBLIC OF ARGENTINA,

Defendant/Appellant.

On Appeal from the United States District Court for the Southern District of New York

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BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS/APPELLEES, URGING AFFIRMANCE

Richard A. Samp
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed.R.App.P. 26.1, the Washington Legal Foundation (WLF) states that it is a nonprofit corporation organized under § 501(c)(3) of the Internal Revenue Code. WLF has no parent corporation and does not issue stock, and no publicly held company enjoys a 10% or greater ownership interest.

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BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS/APPELLEES, URGING AFFIRMANCE

INTERESTS OF *AMICUS CURIAE*

The interests of the Washington Legal Foundation (WLF) are set out more fully in the accompanying motion for leave to file this brief.[1] In brief, WLF is a public interest law and policy center with supporters in all 50 states. WLF regularly appears before federal and state courts to promote economic liberty, free enterprise, and a limited and accountable government. In particular, WLF has litigated in support of legal standards that ensure equal treatment of all creditors and prevent debtors from favoring some creditors at the expense of others. *See, e.g., Indiana State Police Pension Trust v. Chrysler LLC,* 576 F.3d 108 (2d Cir.), *vacated and remanded as moot,* 130 S. Ct. 1015 (2009); *Capital Ventures Int'l v. Republic of Argentina,* 652 F.3d 266 (2d Cir. 2011). WLF has also published monographs regarding legal issues raised when foreign governments default on their debt. *See, e.g.*, Hal S. Scott, *Sovereign Debt Default: Cry for the United States, Not Argentina,* WLF WORKING PAPER SERIES NO. 140 (Washington Legal Foundation, 2006).

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[1] Pursuant to Local Rule 29.1, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, contributed monetarily to the preparation and submission of this brief.

WLF is concerned that the legal position espoused here by Appellant Argentina and the United States would eliminate important constraints on Argentina's ability to flout the payment requests of its creditors. This Court has repeatedly commented on Argentina's "appalling record of keeping its promises to its creditors." *NML Capital, Ltd. v. Banco Central de la Republica Argentina*, 652 F.3d 172, 196 (2d Cir. 2011). The United States concedes that Argentina's "continued failure to abide by its obligations" to Appellees and others "remains a concern" and it has maintained a "strong insistence" that Argentina honor those obligations. U.S. Br. 4. The United States nonetheless espouses an overly broad interpretation of the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1602 *et seq.*, that would eliminate virtually all possibility that Argentina will ever pay its debts – despite uncontested evidence that it has more than sufficient foreign reserves to do so. In adopting the FSIA, Congress determined the proper balance between the rights of litigants to press their just claims and the sovereignty rights of foreign nations. WLF opposes efforts by the Executive Branch to alter that balance.

STATEMENT OF THE CASE

In 1994, Argentina issued sovereign bonds pursuant to the Fiscal Agency Agreement ("FAA Bonds"). It defaulted on the FAA Bonds (and all its foreign

debt) in 2001 and has not thereafter made any payments on the FAA Bonds. Appellees are the owners of substantial number of FAA Bonds whose unpaid principal and interest amount to about $1.3 billion. Argentina does not contest the legitimacy of Appellee's claims for payment.

In 2005, Argentina tendered a take-it-or-leave-it exchange offer to all FAA Bond holders. It offered to give them newly-issued bonds (the "Exchange Bonds") in exchange for the FAA Bonds, with the former worth but a small fraction of the latter. To induce acceptance, Argentina vowed that it would never repay its obligations under any FAA Bonds that were not tendered. Its vow was evidenced by Law 26,017 (commonly known as the "Lock Law"), adopted by the Argentina legislature in 2005. The Lock Law prohibits "any type" of settlement with respect to non-tendered FAA Bonds. Argentina did not offer to negotiate the terms of the exchange, and only 76% of all FAA Bonds had been tendered when the exchange offer closed in June 2005. Argentina tendered a second exchange offer on similar terms in 2010, and temporarily suspended the Lock Law during the period of the second exchange. Appellees did not tender their bonds.

Since 2005, Argentina has made timely payments on all Exchange Bonds. In compliance with the Lock Law, it has made no payments on the FAA Bonds. During that period, Argentina's economy has boomed. The district court found

that Argentina now has sufficient resources to honor all foreign debt obligations, including its obligations under the FAA Bonds.

Appellees filed suit against Argentina on their defaulted FAA Bonds at various times from 2009 to 2011. Appellees alleged that Argentina breached a provision of the FAA Bonds referred to by Appellees as the Equal Treatment Provision, by discriminating against the holders of FAA Bonds.[2] Between December 2011 and February 2012, the district court granted motions for partial summary judgment filed by Appellees, concluding that Argentina had breached the Equal Treatment Provision and granting Appellees their claims for specific performance of the provision. The district court order does not require Argentina to make any payments or to impose a restraint on any funds belonging to Argentina; rather, the court held that *if* Argentina continues to make any payments

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[2] Paragraph 1(c) of the FAA provides:

> The Secutities 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.*

SPA-10-11 (emphasis added). The first quoted sentence is not at issue in this case; all FAA bonds are being held on an equal (*i.e.*, non-paying) footing. The second, italicized sentence (the "Equal Treatment Provision") is the one on which Appellees rely.

on the Exchange Bonds, it must comply with the Equal Treatment Provision by fulfilling its payment obligation to Appellees on their FAA Bonds. At no time did Argentina assert in the district court that it lacked the resources necessary to make both sets of payments. Nor did it contest the district court's determination regarding what would constitute an equitable, equivalent payment; rather, its position was that it had not breached the Equal Treatment Provision and thus that no payment was required.

Argentina has appealed from the grant of partial summary judgment.

SUMMARY OF ARGUMENT

By making regular payments on the Exchange Bonds for the past seven years while simultaneously refusing to use readily available funds to make payments on the FAA Bonds and even going so far as to adopt legislation prohibiting all such payments, Argentina has breached the plain terms of the Equal Treatment Provision. That provision does not simply require that the FAA Bonds not be subordinated to other "external" indebtedness of Argentina; it also requires that Argentina's "payment obligations" under the FAA Bonds *shall* rank at least as high as that of all other external indebtedness. One cannot plausibly argue that Argentina complies with that ranking of "payment obligations" when it adopts legislation that absolutely prohibits all payments on FAA Bonds at the same time

that it makes all payments on the Exchange Bonds. Isolated payments to other creditors in preference to FAA Bond holders most likely do not constitute a breach of the Equal Treatment Provision; Argentina's massively inequitable ranking of payment obligations unquestionably does.

Tellingly, the counter-arguments of Argentina and its supporting *amici* never once attempt to explain the "payment obligations" language. Rather, they simply assert that the Equal Treatment Provision is a "boilerplate" *pari passu* provision that has never been understood by those involved in sovereign debt financing to impose equal payment obligations. That assertion is demonstrably incorrect – the provision cannot be dismissed as "boilerplate" when (as Appellees have demonstrated) it is not included in a substantial percentage of sovereign debt instruments. Moreover, the assertion regarding the "common understanding" of the provision flies in the face of the numerous decisions over the past decade that have interpreted the provision as imposing an equitable payment obligation.

Argentina's status as a sovereign nation does not alter Appellee's right to specific performance of its contract. The FSIA states that, except in those circumstances in which the FSIA provides explicitly for immunity from a requested "claim for relief," a foreign state "shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C.

§ 1606. Appellees have demonstrated that, under New York law, they would have been entitled to specific performance of the contract had it been filed against a private party. Accordingly, § 1606 entitles them to specific performance in this case as well.

In adopting the FSIA, Congress set out detailed rules that prescribe the circumstances under which sovereign nations are subject to the jurisdiction and judgments of U.S. courts. It is uncontested that the district court properly exercised jurisdiction over Argentina; in signing the FAA, Argentina explicitly waived immunity from suit and agreed to personal jurisdiction in New York. Foreign policy concerns should not be invoked as a basis for overruling Congress's mandate. When Congress has established clear lines regarding the extent of foreign state liability, it is not the role of the Executive Branch or the courts to draw a different line and provide additional protections for foreign states.

Nor should the doctrine of laches be invoked to bar Appellees' efforts to enforce the Equal Treatment Provision. It is uncontested that Appellees filed suit within the six-year statute of limitations. Moreover, Argentina cannot begin to state a laches claim in the absence of any evidence that it has been prejudiced by Appellees' failure to seek specific enforcement at an earlier date. Argentina's allegation that *holders of Exchange Bonds* are injured by the relief granted by the

district court is irrelevant to *Argentina's* laches claim. Moreover, given the uncontested evidence that Argentina has ample funds to pay the bondholders *and* Appellees, injury to those bondholders (if any) will be caused solely by a voluntary decision by Argentina to default on its Exchange Bond obligations, not by the district court's order.

Argentina appears to have raised its laches claim primarily as a vehicle for bad-mouthing Appellees by repeatedly pointing out that many of the Appellees are hedge funds that purchased their FAA Bonds on the secondary market after Argentina defaulted on those bonds in 2001 and after adoption of the Lock Law in 2005. Such name calling is inappropriate as well as legally irrelevant. One who purchases a security steps into the shoes of the seller and acquires all the legal rights possessed by the seller. Were the law otherwise, demand for defaulted bonds would have dried up, and bondholders (in the absence of buyers) would have suffered even greater losses as a result of Argentina's refusal to honor its obligations.

ARGUMENT

I. ARGENTINA BREACHED THE EQUAL TREATMENT PROVISION AND APPELLEES ARE ENTITLED TO SPECIFIC PERFORMANCE

The Equal Treatment Provision states, "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." SPA-10-11. Under any plausible interpretation of that language, Argentina did not "rank" its "payment obligations" under the FAA at a level equal to its payment obligations under the Exchange Bonds when it adopted legislation prohibiting all payments on the FAA Bonds – and Argentina's supporting *amici* do not argue otherwise.

Appellees have explained at length why Argentina's contrary interpretation is without merit. Rather than repeating that entire explanation here, WLF wishes to highlight several points.

First, it simply is not correct (as asserted by Argentina) that all *pari passu* clauses are no more than interchangeable "boilerplate" and thus that the meaning of the Equal Treatment Provision can be gleaned by consulting experts with experience in the sovereign debt field. For example, less than 60% of sovereign bonds include the key phrase here – the one requiring equality among "payment obligations." Appellees Br. 42 (citing research by Harvard Law School Professor Hal S. Scott). All parties involved in negotiating the FAA were experienced bond counsel; had they not intended to require equality in the ranking of "payment obligations," they would not have drafted the Equal Treatment Provision as

written.

Second, Argentina has failed to provide a plausible explanation of the purpose served by the Equal Treatment Provision if it is not designed to require Argentina to make equitable payments to FAA bondholders. Argentina asserts, "The limited purpose of the pari passu clause in the sovereign context, as it has been universally understood for over 50 years, is to provide protection from legal subordination or other discriminatory legal ranking by preventing the creation of legal priorities by the sovereign in favor of creditors holding particular classes of debt." Argentina Br. 34. But what good does it do a creditor of Argentina to be protected from "legal subordination" if Argentina remains free at its whim to categorically refuse all payments to the creditor while paying other, similarly situated creditors? In the absence of a sovereign bankruptcy regime, the creditor has no means of enforcing its anti-subordination rights. Thus, if interpreted as suggested by Argentina, the Equal Treatment Provision is a dead letter.

Indeed, as Appellees have pointed out, holders of FAA Bonds are not even permitted to enforce their contractual rights in the courts of Argentina. NML Br. 30-31. In light of Argentina's continued refusal to honor its obligations, Argentina's interpretation of the Equal Treatment Provision leaves holders of FAA Bond unduly limited means of collecting what is owed to them – other than

searching for non-immune Argentinian assets located in the United States. It is far more plausible to conclude that lenders demanded inclusion of the Equal Treatment Provision in the FAA so that they would have a means of preventing Argentina from adopting a highly discriminatory payment scheme of the sort at issue here.

Third, as the United States recognizes, "Restructuring negotiations must take place within a framework where creditors can seek recourse to the courts to enforce contractual obligations." U.S. Br. 9. WLF recognizes that governments must be permitted some leeway to arrive at solutions to sovereign debt crises. Countries experiencing such a crisis must be permitted to make the short-term expenditures necessary to continue operating without fear that such expenditures will trigger court orders demanding immediate repayment of all other debts. But Argentina's debt crisis occurred in 2001, more than a decade ago; it now has more than $46 billion in foreign reserves. Moreover, instead of entering into good-faith negotiations with creditors designed to ease short-term difficulties, Argentina presented holders of FAA Bonds with a take-it-or-leave-it offer that would have required Appellees to relinquish the great majority of their claims. Unless Appellees are permitted to seek recourse in the courts and specifically enforce the Equal Treatment Provision, Argentina will have absolutely no incentive to enter

into the good-faith negotiations favored by the United States. Reversing the district court judgment will send precisely the wrong signal to sovereign debtors: that an "appalling record" of failing to keep promises to creditors will have no consequences in terms of continued access to credit markets. *See* Scott, *supra*, at 39 ("Appeasement does not work and has not worked in the case of Argentina. At the very least, the United States should stop intervening at all and let the courts decide the issues.")

Fourth, Argentina and its supporting *amici* rely largely on a "slippery slope" argument: if Appellees are granted specific enforcement of the Equal Treatment Provision, then other creditors might take similar enforcement steps – and the world financial system would be thrown into crisis. The argument is not well taken. We note initially that this case is truly *sui generis*: Argentina's record of flouting its financial obligations is unparalleled in both scope and duration. Argentina has not simply made short-term payments to select creditors whose cooperation is vital to continued operations of its government; it has also adopted legislation that prohibits repayments *ever* being made to Appellees. The district court's interpretation of the Equal Treatment Provision does not call into question the preferred-creditor status of multilateral organizations, and Appellees have disclaimed any such priority claims for their contractual rights. NML Br. 40 ("[A]

sovereign's *de jure* or *de facto* policy that subordinated obligations to commercial unsecured creditors beneath obligations to multinational institutions like the IMF would *not* violate the Equal Treatment Provision for the simple reason that the commercial creditors never were nor could be on equal footing with the multilateral organizations."). Furthermore, nations concerned that a small number of hold-out creditors could block renegotiation of sovereign debt can alleviate that concern by including "collective action" clauses that permit renegotiation to proceed when supported by the great majority of creditors. Indeed, most New York bonds issued since 2005 have included such a provision.[3]

Finally, Argentina raises an issue on appeal that it failed to raise in the district court. It asserts that the district court ordered excessive payments to Appellees, that lesser payments would have satisfied the requirement that "payment obligations of the Republic under the Securities shall at all times rank at least equally" with payments to holders of Exchange Bonds. Argentina has waived its right to object to the size of the payment obligation by failing to raise the issue below. Instead, its consistent position in the district court was that the Equal

[3] Such a clause might not have been of benefit to Argentina, however. The financial terms of its 2005 offer to FAA Bond holders were so onerous that only 76% of holders accepted – despite being told that it was a take-it-or-leave-it offer that would leave those who declined with nothing of value.

Treatment Provision imposed no enforceable payment obligations whatsoever, not that a lesser payment would be sufficient to ensure that Appellees were being treated equally.

II. SPECIFIC PERFORMANCE OF THE EQUAL TREATMENT PROVISION IS CONSISTENT WITH THE FOREIGN SOVEREIGN IMMUNITIES ACT

Argentina's status as a sovereign nation does not alter Appellee's right to specific performance of its contract. The district court's judgment is fully consistent with the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1602 *et seq.*

The FSIA states that, except in those circumstances in which the FSIA provides explicitly for immunity from a requested "claim for relief," a foreign state "shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606. Appellees have demonstrated that, under New York law, they would have been entitled to specific performance of the contract had it been filed against a private party. *See, e.g., Nemer Jeep-Eagle, Inc. v. Jeep-Eagle Sales Corp.*, 992 F.2d 430, 433 (2d Cir. 1993). Accordingly, § 1606 entitles them to specific enforcement in this case as well.

The United States argues that the FSIA, and § 1606 in particular, do not authorize entry of injunctive relief against sovereign nations. It asserts, "[S]ection

1606 concerns the scope of liability, not the scope of execution. Although a state may be found liable in the same manner as any other private defendant, the options for executing a judgment remain limited." U.S. Br. 27 (citations omitted). That interpretation of § 1606 is mistaken. The United States has conflated the permissible scope of a district court judgment (the "manner" in which the defendant may be found liable and the permissible "extent" of that liability) and the plaintiff's efforts to execute on a judgment by attaching property belonging to the foreign sovereign. The latter is governed exclusively by 28 U.S.C. §§ 1609-1611. Section 1606 governs the jurisdiction of federal courts to enter judgments against foreign sovereigns.

Our interpretation of § 1606 is confirmed by that statute's discussion of specific judgments that are or are not permissible. It provides:

> [A] foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the act or the omission occurrred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

28 U.S.C. § 1606. The statute's discussion regarding the limited availability of judgments for non-compensatory damages against a foreign state evidences Congress's understanding that § 1606 encompasses not only the *circumstances*

under which a foreign state may be found liable but also the *manner* and *extent* of that liability (*i.e.*, what types of judgments are permissible against a foreign state). *See also* H.R. Rep. No. 94-1487, at 22 (a court may "order an injunction or specific performance" against a sovereign where "clearly appropriate").

As noted above, §§ 1609-1611 impose limitations on the authority of a plaintiff to execute on a judgment by attaching property belonging to the foreign sovereign. *See EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 472 (2d Cir. 2007). Argentina argues that the district court's injunction is "an end-run around the FSIA," an unauthorized effort to attach Argentinian property in a manner not authorized by § 1609-1611. Argentina Br. 52. That argument is unavailing because the district court's judgment does not target any specific property of Argentina. Rather, the district court has ordered a party over whom it possessed *in personam* jurisdiction to perform one of its contractual commitments – a type of order that district courts routinely issue. The court ordered Argentina to make payments to Appellees to the extent necessary to ensure that they are being equitably treated, but it did not specify the specific source of Argentinian property from which those payments are to come. Indeed, the district court's judgment does not require Argentina to make *any* payments. Its obligation to Appellees is to make payments that "rank at least equally" with payments made to holders of

Exchange Bonds; if Argentina voluntarily chooses to breach its payment obligations to those bondholders, its specific-performance payment obligations to Appellees would cease.

Argentina's reliance on *S&S Machinery Co. v. Masinexportimport*, 706 F.3d 411 (2d Cir. 1983), is misplaced. *S&S Machinery* held that the FSIA protects not only against attachments of sovereign property but also "injunctions against the negotiation or use of property." *Id*. at 418. The Court held that the district court properly denied a plaintiff's request for an injunction that would have prevented Romania from negotiating a letter of credit that the plaintiff had given to Romania as payment for the purchase of allegedly defective goods. Although *S&S Machinery* recognizes that the FSIA imposes limitations on injunctions directed at specific property owned by a foreign nation, it does not stand for the broader proposition asserted by Argentina: that the federal courts may not issue an injunction ordering a sovereign nation to comply with its contractual commitment to afford equal treatment to Appellees.

Finally, the United States argues that the district court's orders "could cause heightened tension in our foreign relations." U.S. Br. 28. WLF agrees with the United States that the Court should be sensitive to the foreign relations concerns that arise whenever a foreign government is a party to litigation. Indeed, it was

Congress's recognition of such concerns that led to its adoption of the FSIA, which provides foreign states with broad immunity from attachment, arrest, and execution. In setting out detailed rules that prescribe the circumstances under which sovereign nations are subject to the jurisdiction and judgments of U.S. courts, Congress sought to establish the proper balance between the comity owed to foreign governments and providing opposing litigants an opportunity to enforce their contractual and property rights. Where, as here, the district court litigation proceeded in full accord with the congressionally sanctioned balance,[4] this Court should not upset that balance by granting additional comity to Argentina in the interests of improved foreign relations.

Indeed, the FSIA was adopted in 1976 to replace the former system under which federal courts looked to the Executive Branch on a case-by-case basis for guidance regarding the propriety of extending sovereign immunity to a foreign nation that was a federal court defendant. That case-by-case approach was deemed by Congress to be too cumbersome, and it adopted the FSIA to "transfe[r] primary responsibility for immunity determinations from the Executive Branch to the Judicial Branch." *Republic of Austria v. Altmann*, 541 U.S. 677, 691 (2004);

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[4] It is uncontested, for example, that the district court properly exercised jurisdiction over Argentina: in signing the FAA, Argentina explicitly waived immunity from suit and agreed to personal jurisdiction in New York.

id. at 699 (one of two "principal purposes" of the FSIA was "eliminating political participation in the resolution of [sovereign immunity] claims."). *See also* 28 U.S.C. § 1602 ("The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. . . . Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter."). Deciding Argentina's immunity claims based not on the principles set forth in the FSIA but rather on amorphous concerns about the potential for "heightened tensions" would constitute a unwarranted rejection of the balance created by the FSIA. The views expressed by the United States in its *amicus curiae* brief are entitled to respect, but they should not be allowed to alter the framework adopted by Congress for addressing sovereign immunity questions.

III. THE DOCTRINE OF LACHES DOES NOT BAR APPELLEES' EFFORTS TO ENFORCE THE EQUAL TREATMENT PROVISION

Argentina also asserts that Appellees' claims are barred by laches "because plaintiffs inexcusably delayed in bringing their pari passu motions, to the prejudice of the Republic and its bondholders." Argentina Br. 65. That assertion

is without merit. Appellees have explained at length Argentina's failure to establish any of the elements of a laches claim. NML Br. 66-69. WLF focuses on just one of the elements: Argentina's failure to establish that it was prejudiced by the alleged delay.[5]

New York case law cited by Argentina in support of its "prejudice" claim all involved challenges to the legality of a bond issuance. For example, *In re Schulz*, 81 N.Y.2d 336 (1993), was a constitutional challenge to the issuance of bonds by a public corporation for the purpose of purchasing property from the State of New York. By the time the lawsuit was belatedly filed, nearly $400 million in bonds had been sold, the proceeds were used to purchase the property, and various other funds had been expended – all in reliance on the constitutionality of the bond sale. The court held that the defendants demonstrated that they were prejudiced by the delay in filing suit until after bonds were sold; unwinding the bond sales would have been enormously expensive. *Id.* at 347. Argentina cannot demonstrate any

[5] As Appellees note, the earliest that any Appellee could have claimed a breach of the Equal Treatment Provision was in 2005, when Argentina first began paying interest on the Exchange Bonds and adopted the Lock Law, which prohibited any payments on the FAA Bonds. Each of the Appellees filed an Equal Treatment Provision claim within six years of that date. There is a strong presumption that claims for equitable relief are not barred by laches when the claims are asserted within the applicable limitations period (in this case, six years). *Conopco, Inc. v. Campbell Soup Co.*, 95 F.3d 187, 191 (2d Cir. 1996).

remotely similar prejudice. In particular, Appellees have not challenged the legality of Argentina's decision to issue the Exchange Bonds. Rather, they assert that Argentina is breaching the Equal Treatment Provision by refusing to pay interest on the FAA Bonds at the same time that it is paying interest on the Exchange Bonds. Argentina cannot demonstrate prejudice in the absence of any evidence suggesting that it might have acted differently had Appellees filed suit at an earlier occasion. Argentina's suggestion that, because of Appellees' alleged delay, it "developed legitimate expectations that the restructuring process was settled" is absurd. Argentina was well aware that Appellees and a significant number of other FAA Bond holders had rejected its take-it-or-leave-it exchange offer and were demanding the payments to which they were contractually entitled.

Argentina's allegation that *holders of Exchange Bonds* are injured by the relief granted by the district court is irrelevant to *Argentina's* laches claim. Moreover, given the uncontested evidence that Argentina has ample funds to pay the bondholders *and* Appellees, injury to those bondholders (if any) will be caused solely by a voluntary decision by Argentina to default on its Exchange Bond obligations, not by the district court's order.

Argentina appears to have raised its laches claim primarily as a vehicle for bad-mouthing Appellees by repeatedly pointing out that many of the Appellees are

hedge funds that purchased their FAA Bonds on the secondary market after Argentina defaulted on those bonds in 2001 and (in some cases) after adoption of the Lock Law in 2005.[6] Such name calling is inappropriate as well as legally irrelevant.

One who purchases a security steps into the shoes of the seller and acquires all the contractual rights possessed by the seller. Were the law otherwise, demand for defaulted bonds would have dried up, and bondholders (in the absence of buyers) would have suffered even greater losses as a result of Argentina's refusal to honor its obligations. Moreover, as this Court has recognized, foreign governments would have much more difficulty issuing sovereign debt in the first instance in the absence of investors willing to purchase that debt on the secondary market. *Elliott Assocs. L.P. v. Banco de la Nacion*, 194 F.3d 363, 380 (2d Cir. 1999) (stating that the existence of "[a] well-developed market of secondary purchasers of defaulted sovereign debt" provided "incentives for primary lenders to continue to lend to high risk countries" and that "the long-term effect" of court decisions that discriminate against secondary purchasers "would be to cause

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[6] Argentina suggests that "hedge funds" whose "business models" entailed "purchas[ing] their bond interest well after the Republic's default" are less deserving of the Court's equity – presumably because their losses are not as great as those who purchased Argentina's debt at face value. *See, e.g.*, Argentina Br. 59 n.22, 65-66.

significant harm to Peru and other developing nations and their institutions seeking to borrow capital in New York").

Faced with a similar situation arising in a Fifth Amendment context, the U.S. Supreme Court declined a request by state and local governments to provide reduced constitutional protections to secondary purchasers. In *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), the Petitioner purchased shoreline property well after Rhode Island had adopted wetlands regulations that prevented virtually all development of the property. Rhode Island asserted that an individual who purchases real estate after a government imposes land-use regulations that prohibit all development of the property (and thus has notice of the regulations) is barred from claiming that the regulations violate the Fifth Amendment's Takings Clause by effecting an uncompensated taking of the property.

The Court rejected the assertion that post-regulation purchasers are barred from raising Takings Clause claims, stating that "unreasonable" zoning ordinances "do not become less so through passage of time or title." *Id.* at 627. It observed,

> [U]nder the proposed rule the right to compensation may not be asserted by an heir or successor, and so may not be challenged at all [if the original owner does not maintain ownership throughout legal proceedings]. The State's rule would work a critical alteration to the nature of property, as the newly regulated landowner is stripped of the ability to transfer the interest that was possessed prior to the regulation. The State may not by this means secure a windfall to itself.

Id.

Similarly, any rule that denies those who purchased FAA Bonds on the secondary market the same contractual rights as those enjoyed by individuals who purchased bonds when initially issued would constitute a radical departure from traditional contract law. Some of the Appellees purchased their bonds when initially issued; others purchased them on the secondary market. Both groups come into court with identical equitable claims with respect to enforcement of the Equal Treatment Provision. The secondary-market-purchaser status of some Appellees is irrelevant to Argentina's laches defense, as well as to the propriety of the injunctive relief issued by the district court.

CONCLUSION

The Washington Legal Foundation respectfully requests that the Court affirm the judgment of the district court.

Respectfully submitted,

/s/ Richard A. Samp
Richard A. Samp

Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Dated: April 20, 2012

Counsel for *amicus curiae*

CERTIFICATE OF COMPLIANCE

Pursuant to Fed.R.App.P. 32(a)(7)(C), I hereby certify that the foregoing brief of WLF is in 14-point proportionately spaced CG Times type. According to the word processing system used to prepare this brief (WordPerfect 12.0), the word count of the brief is 5,376 words, not including the corporate disclosure statement, table of contents, table of authorities, certificate of service, and this certificate of compliance.

/s/ Richard A. Samp
Richard A. Samp

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of April, 2012, I electronically filed the brief of *amicus curiae* Washington Legal Foundation with the Clerk of the Court for the U.S. Court of Appeals for the Second Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Richard A. Samp
Richard A. Samp