No. 12-1494

In the
Supreme Court of the United States

THE REPUBLIC OF ARGENTINA,

Petitioner,

v.

NML CAPITAL, LTD., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF *AMICUS CURIAE* FINTECH ADVISORY INC. IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Does an injunction which restrains a trustee from distributing funds held in trust for a bondholder constitute a judicial taking within the meaning of *Stop the Beach Renourishment v. Florida Department of Environmental Protection*, 560 U.S. 2592 (2010) when the injunction contravenes the bondholder's established property rights to funds held by the trustee?

2. Does an injunction which broadly covers non-parties including the trustee, various clearinghouses and other financial participants violate the rule in *Zenith Radio v. Hazeltine Research*, 395 U.S. 100 (1969) when the enjoined non-parties were afforded no right to meaningfully participate in the proceedings leading to the injunction and when the injunction covers purported aiders and abettors who engaged in nothing more than routine financial transactions pursuant to pre-existing contracts?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Rules:

Other Authorities:

STATEMENT OF INTEREST[1]

As a holder of Exchange Bonds[2], the interests of Fintech Advisory Inc. ("Fintech") are adversely affected by the orders of the district court and the Second Circuit, which are the subject of the Republic's petition for a *writ of certiorari*. These orders enjoin distributions of money belonging to Fintech and the Exchange Bondholders unless the Republic first pays large amounts of accelerated payments of principal and interest to a small group of holders of other bonds – Respondents herein. Fintech's separate and constitutionally protected property has been dragged into a long-term dispute between the Republic and Respondents by the Courts below in an effort to coerce the Republic to pay the Respondents. These orders do not pass constitutional muster or long-held principles of equity, and therefore cannot stand.

In recognition of the interest that third parties such as Fintech hold in this matter, on October 26, 2012 the Second Circuit required the district court on remand to consider the Injunction's application to

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[1] Pursuant to Supreme Court Rule 37.2(a), all parties have consented to the filing of this brief. Written confirmation of such consent has been filed with the Clerk of the Court. Counsel of record for all parties received notice at least 10 days prior to the due date of *amicus curiae's* intention to file in support of Petitioner's *writ of certiorari*. In addition, pursuant to Rule 37.6, *amicus curiae* affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

[2] All terms not defined herein are set forth below.

third parties. The district court accordingly accepted submissions from third parties, including Fintech. Thereafter, when the matter returned to it, the Second Circuit granted Fintech non-party appellant status on an appeal still pending in the Second Circuit from the district court's orders on the initial remand. Accordingly, as the Courts below here have recognized, Fintech has property interests affected by the orders of the district court and the Second Circuit as they currently stand.

STATEMENT OF THE CASE

When the Republic of Argentina (the "Republic") issued bonds in or around 1994 (the "Original Bonds") pursuant to a Fiscal Agency Agreement, dated October 19, 1994 (the "FAA"), Fintech was among the purchasers (the "Original Bondholders"). Fintech eventually held $834 million face value of the Original Bonds. After the Republic defaulted on the Original Bonds on December 24, 2001, the Republic in 2005 and 2010 (the "2005 Exchange" or the "2010 Exchange") offered the opportunity for all Original Bondholders to exchange their defaulted bonds for new, unsecured, subordinated bonds at a substantially reduced value on which the Republic would begin making payments (the "Exchange Bonds," the holders of which are referred to as "Exchange Bondholders"). Fintech was one of the largest participants of the 2005 Exchange and ultimately surrendered the balance of its Original Bonds in the 2010 Exchange. While Fintech's Original Bonds had a face value of $834 million, after the 2005 and 2010 Exchanges, it held approximately $247 million face value of the Exchange Bonds.

As a holder of the Exchange Bonds, Fintech has received regular interest payments from the Republic since 2005, the monies for which Fintech understands originate in Argentina, are subsequently transferred to the Bank of New York, as Indenture Trustee (the "Trustee"), and are ultimately distributed to the Exchange Bondholders.

On October 26, 2012, the United States Court of Appeals for the Second Circuit issued an order which affirmed in part and remanded in part an order issued by the United States District Court for the Southern District of New York in *NML Capital, Ltd., et al. v. The Republic of Argentina*, 699 F.3d 246 (2d Cir. 2012) (the "October 26 Decision"). The October 26 Decision affirmed that the Republic had breached the so-called pari passu clause of the FAA, which provides that the payment obligations of the Republic "rank at least equally with all its other present and future unsecured and unsubordinated External Indebtedness." *Id.* at 259. It also affirmed the entry of permanent injunctive relief in favor of Respondents, which are among the 9% of Original Bondholders that refused to participate in the 2005 and 2010 Exchanges.

The injunction issued by the district court on February 23, 2012, which the Second Circuit affirmed in the October 26 Decision, provided that "whenever the Republic pays any amount due under the terms of the [exchange] bonds," it must "concurrently or in advance" pay plaintiffs the same fraction of the amount due to them (the "Injunction"). *Id.* at 254. The Injunction enjoined "all parties involved, directly or indirectly, in advising upon, preparing, processing, or facilitating any payment on the Exchange Bonds" unless payments were first

made to the Original Bondholders. *Id*. at 255. The Injunction described such parties as "Agents" and "Participants" and "prohibited [them] from aiding and abetting any violation of this ORDER, including any further violation by the Republic of its obligations under Paragraph 1 (c) of the FAA, such as any effort to make payments under the terms of the Exchange Bonds without also concurrently or in advance making a Ratable Payment to [Respondents]." *Id*.

In its October 26 Decision, the Second Circuit expressed "concerns about the Injunctions' application to banks acting as pure intermediaries in the process of sending money from Argentina to the holders of the Exchange Bonds," as well as concerns about "how the challenged order will apply to third parties generally," and subsequently remanded to the district court for further analysis as to the application of the Injunction to third parties.[3] *Id*. at 264. However, by affirming the district court, the Second Circuit left in place the core of its decision

[3] On November 21, 2012, the district court on remand issued an order enjoining any "Participant" from "aiding and abetting" violations of its order including any "effort to make payments under the terms of the Exchange Bonds without also concurrently or in advance making a Ratable Payment to NML" (the "November 21 Order"). *See NML Capital, Ltd. v. Republic of Argentina*, No. 08-cv-6978 (TPG), 2012 WL 5895784, at *2 (S.D.N.Y. Nov. 21, 2012). "Participants" were expressly defined to include "those persons and entities who act in active concert or participation with the Republic, to assist the Republic in fulfilling its payment obligations under the Exchange Bonds." *Id*. The November 21 Order prohibits the Trustee and such "participants" from disbursing funds rightfully owed to the Exchange Bondholders without simultaneously issuing payments to Respondents.

that it is appropriate to coerce the Republic to pay one set of creditors by interfering with the payment rights of other creditors.

Fintech's property and constitutional rights are significantly impacted by the October 26 Decision, specifically the Injunction affirmed therein which seeks to coerce the Republic to pay Respondents by holding the property of third parties, including Fintech, "hostage." Accordingly, Fintech submits its *amicus curie* brief in support of the Republic's petition for *writ of certiorari* seeking review of the remedy affirmed by the October 26 Decision.

SUMMARY OF ARGUMENT

The Second Circuit's effort to craft a remedy to coerce the Republic to pay Respondents herein has swept broadly and ensnared the property of innocent parties such as Fintech. Fintech is one of many Exchange Bondholders which face the loss of their property as a result of the district court's unprecedented ruling which restrains the Republic and the Trustee from paying monies due to Fintech unless the Republic makes payments to other, unrelated parties on different obligations. Specifically, the October 26 Decision prevents the Republic from paying Exchange Bondholders such as Fintech unless the Republic also pays Respondents herein on other debt. The payments owed to Fintech by the Republic, however, become Fintech's property the moment the money is in the hands of the Trustee. Thus, by restricting the Trustee from paying Fintech and the other Exchange Bondholders despite the fact that they have done nothing themselves to cause such restriction, the Injunction violates the Fifth Amendment of the U.S.

Constitution as a taking of Fintech's property without due process.

Fintech's constitutionally protected property which is being taken without due process includes its contractual rights, investment expectations and the monies owed to it once in the hands of the Trustee. Moreover, the taking is impermissible as a taking of private property (belonging to the Exchange Bondholders) for the benefit of other private parties (Respondents), not the public at large. The Injunction also runs contrary to long-held precedent of this Court that prohibits an injunction from reaching parties who have not had their day in Court.

Finally, as a fundamental issue, this effort at equitable relief is entirely inequitable as to Fintech and other Exchange Bondholders. Fintech surrendered a substantial amount of money owed to it in exchange for the promise of certainty of payment on the reduced obligation of the Republic. Indeed, the Courts below specifically upheld the 2005 and 2010 Exchanges and permitted them to proceed over Respondents' efforts to enjoin same. It is difficult to fathom that the same Courts are now using the property the Exchange Bondholders received in those same Exchanges to benefit parties who refused to participate in the Exchanges. This twist in approach by the Courts below completely undermined and ignored the reasonable investment expectations of the parties who decided to participate in the Exchanges, influenced at least in part by the Courts' upholding of the Exchanges. Had this result been known to be in any way possible, Fintech would not have participated in the Exchanges; indeed, it is hard to believe that any other Original Bondholder

would have participated. Should the October 26 Decision stand, Fintech would entertain serious doubts about participating in future sovereign debt restructurings where U.S. Courts have the ability to enjoin monies belonging to the participant creditors for the benefit of holdouts. The Respondents are free to seek their remedy to obtain a judgment from the Republic; they are not, however, entitled to obtain that result by utilizing Fintech's property.

ARGUMENT

I. By Limiting The Exchange Bondholders' Right to Payment From The Trustee and Other Participants, The Injunction Effected A Judicial Taking

This Court should grant the writ because this case presents an opportunity to clarify the contours of the judicial taking doctrine enunciated in *Stop the Beach Renourishment, Inc. v. Florida Dep't of Envt'l Prot.*, 130 S. Ct. 2592, 2614-18, 177 L. Ed. 2d 184 (2010), a decision which has left the law of judicial taking unsettled and thus is ripe for clarification.[4]

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[4] *See* Josh Patashnik, *Bringing A Judicial Takings Claim*, 64 Stan. L. Rev. 255, 259 (2012) ("as Justice Kennedy recognized in his concurring opinion, it remains 'unclear' both 'how a party should properly raise a judicial takings claim' and 'what remedy a reviewing court could enter after finding a judicial taking'") (citing *Stop the Beach*, 130 S. Ct. 2616-17); D. Benjamin Barros, *The Complexities of Judicial Takings*, 45 U. Rich. L. Rev. 903, 960 (2011) ("*Stop the Beach* dramatically raised the profile of judicial takings, but left all of the important issues open."); Michael B. Kent, Jr., *More Questions Than Answers: Situating Judicial Takings Within Existing Regulatory Takings Doctrine*, 29 Va. Envt'l L.J. 143, 146 (2011) ("the theory of judicial takings endorsed by the *Stop the Beach* plurality raises more questions than it helps to answer and, in the process, has

The Injunction effectuates a judicial taking of the Exchange Bondholders' property rights by prohibiting the Trustee from distributing funds belonging to the Exchange Bondholders unless the Republic simultaneously pays Respondents. Under firmly established New York law and the documents controlling the Exchange Bonds (as addressed below), the Exchange Bondholders have a property interest in these funds which are held in trust for, and must be distributed to, the Exchange Bondholders. The district court's failure to afford the non-party Exchange Bondholders due process prior to issuing the Injunction and then circumscribing their property interests constitutes a classic "judicial taking."

The Injunction has profound implications for trustees throughout the country, as well as investors who utilize and rely on the services of trustees. If, due to no conduct of its own, a beneficiary's money held in trust can be seized for purely private purposes without due process, current and future beneficiaries of such trusts correctly will perceive a threat to the safety of their funds. Such a perception could undermine the trust industry in the United States – an industry that holds trillions of dollars

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backtracked on the promises of clarity made in *Lingle*."); Mitch L. Walter, *From Background Principles to Bright Lines: Justice Scalia and the Conservative Bloc of the U.S. Supreme Court Attempt to Change the Law of Property As We Know It (Stop the Beach Renourishment, Inc. v. Florida Department)*, 50 Washburn L.J. 799, 831 (2011) ("Unfortunately, *Stop the Beach* left much unsettled."); John D. Echeverria, *Stop the Beach Renourishment: Why the Judiciary Is Different*, 35 Vt. L. Rev. 475, 475 (2010) (describing *Stop the Beach* as a an "inconclusive outcome" resulting from "undoubtedly contentious internal debate").

in trust for beneficiaries worldwide. Moreover, if current trust arrangements are unraveled and future trust arrangements are chilled, the resulting instability could jeopardize the fixed income market worldwide.

A. The Injunction Violates the Fifth Amendment

The Exchange Bondholders, including Fintech, have had an unfettered property and contractual right to receive payments under the Exchange Bonds, a right which they have enjoyed for the past seven years, and which is entirely separate from the Republic's obligations to Respondents under the Original Bonds. By issuing an Injunction that acts to prevent the Exchange Bondholders from receiving the payments they are owed, the district court authorized a judicial taking and "declare[d] that what was once an established right of private property no longer exists." *Stop the Beach*, 130 S. Ct. at 2602. *See also Shelley v. Kraemer*, 334 U.S. 1, 18 (1948) ("the action of the States to which the [Fourteenth] Amendment has reference includes action of state courts and state judicial officials. . . [I]t has never been suggested that state court action is immunized . . . simply because the act is that of the judicial branch of the state government.").[5]

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[5] Judicial orders can (and often do) constitute "state action" for purposes of Constitutional provisions limiting governmental power. *See*, *e.g.*, *Stop the Beach*, 130 S. Ct. at 2601-02 ("It would be absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat. Our precedents provide no support for the proposition that takings effected by the judicial branch are entitled to special treatment, and in fact suggest the contrary.") (citation omitted); *Virginia v. Rives*, 100 U.S. 313, 318 (1879) ("It is doubtless true that a

The Injunction impermissibly limits and diminishes the Exchange Bondholders' property and contract rights. A compensable taking occurs when regulation effectively destroys "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Hodel v. Irving*, 481 U.S. 704, 716 (1987) (citation omitted) (holding that property owners were entitled to compensation where regulation destroyed their right to pass property to heirs). *See also Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979) (property owner entitled to compensation where regulation destroyed their right to exclude others).

Here, restraining Fintech's right to receive payment under the Exchange Bonds from the Trustee unless Respondents receive their own claimed payments from the Republic has deprived Fintech of the most important "stick" in its bundle of rights. The practical outcome of the Injunction inevitably will be, at a minimum, a "significant restriction . . . placed upon [the Exchange Bondholders'] use of [their] property," *Me. Educ. Ass'n Benefits Trust v. Cioppa*, 695 F.3d 145, 152 (1st Cir. 2012) (internal citation and quotation omitted), which is clearly a "taking." *See United States Fidelity & Guaranty v. McKeithen*, 226 F.3d 412, 416-20 (5th Cir. 2000) (holding that additional restrictions on insurance company contracts and rates were a taking even though the entirety of the insurance company's business was not affected and only

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State may act through different agencies, – either by its legislative, its executive, or its judicial authorities; and the prohibitions of the [Fourteenth] amendment extend to all action of the State denying equal protection of the laws, whether it be action by one of these agencies or by another.").

$5 million was at stake during first year) (citing, *inter alia*, *Eastern Enterprises v. Apfel*, 524 U.S. 498, 528-29 (1998)).[6]

The writ should also be granted to establish standards as to whether judicial takings can occur without any arguable public use. Here, the Injunction deprives Fintech of its property rights without any arguable public use. To the contrary, the October 26 Order affirmed the issuance of an injunction for the sole purpose of benefiting Respondents, which consist of only 9% of the Original Bondholders. The Injunction allows Respondents to leapfrog all other bondholders and receive preferential accelerated principal and interest payments. Such a taking for a private purpose is impermissible. *See Kelo v. City of New*

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[6] A taking may be impermissible even if it does not deprive the plaintiff of the entirety of its property rights. Here, the limitation imposed upon the Exchange Bondholders' rights rises to the level of a taking. *See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 322 (2002) (taking occurs "regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof"); *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001) ("[T]here will be instances when government actions . . . affect and limit [property] use to such an extent that a taking occurs.") (citation omitted); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831 (1987) (appropriation of an easement constitutes compensable taking); *First English Evangelical Church of Glendale v. County of Los Angeles, California*, 482 U.S. 304, 318 (1987) (temporary takings no different from permanent takings); *Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1353 (Fed. Cir. 2003) (appropriation of temporary flowage easement results in compensable taking). "[A] landowner's reclaiming his land does not disentitle him to be compensated for the original taking by the government." *Ridge Line*, 346 F.3d at 1354 (citing *United States v. Dickinson*, 331 U.S. 745, 751 (1947)).

London, 545 U.S. 469, 477 (2005) ("[I]t has long been accepted that the sovereign may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation."); *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 245 (1984) ("A purely private taking could not withstand . . . scrutiny . . . it would serve no legitimate purpose of government and would thus be void"). Indeed, Supreme Court authority holds that State action which places any significant imposition on the private property of one for the private use of another is a core violation of fundamental due process rights.[7]

B. The Injunction Contravenes Clearly Established Property Rights

The Injunction constitutes a judicial taking because it "declare[d] that what was once an established right of property no longer exists." *Stop the Beach*, 130 S. Ct. at 2614-15. Fintech's contractual rights and investment expectations through its holdings of the Exchange Bonds are "property" protected by the Fifth Amendment. *See Ascom Hasler Mailing Sys., Inc. v. U.S. Postal Serv.*,

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[7] *See Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55, 76-80 (1937) (striking down state administrative order requiring majority of private gas producers to curtail desired production and purchase shortfall from minority of private gas producers with no available market); *Chicago, St. Paul, Minn. & Omaha Railway Co. v. Holmberg*, 282 U.S. 162, 166-67 (1930) (order requiring railroad to build underground pass for private benefit of private landowners violated due process); *Missouri Pac. Ry. Co. v. Nebraska Bd. of Trans.*, 164 U.S. 403, 417 (1896) (order requiring private railroad to allow private party to construct elevator on its property for private use violated due process).

815 F. Supp. 2d 148, 173-76 (D.D.C. 2011) (citing *Cienega Gardens v. United States*, 331 F.3d 1319, 1330 (Fed. Cir. 2003) (quoting *Lynch v. United States*, 292 U.S. 571, 579 (1934) ("The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a state or the United States"))). By taking Fintech's property as a mechanism in which to coerce the Republic to distribute payments to Respondents, the October 26 Decision contravenes Fintech's "established property rights."

The October 26 Decision affirms the issuance of an injunction solely for the benefit of Respondents, and places restraint on the parties who make payment to Fintech unless Respondents are paid. Under the governing Indenture for the Exchange Bonds, however, the Trustee, who receives funds from the Republic, holds all monies paid to it under the Indenture "in trust" for itself and the Exchange Bondholders. The beneficial owners of the Exchange Bonds, such as Fintech, hold equitable title to the Trust assets and are the "real owners" of the Trust property. *See*, *e.g.*, *United States v. Coluccio*, 51 F.3d 337, 341-42 (2d Cir. 1995) ("If she were the beneficiary of such a trust, then she would be "the equitable owner" of those funds") (citing William F. Fratcher, *Scott on Trust*, § 12.1 (4th ed. 1987)).

Thus, the funds held by the Trustee are no longer the property of the Republic, but rather belong to the Exchange Bondholders and are held by the Trustee for their benefit. As the Indenture makes clear, the Republic has "no interest whatsoever" in the monies it transfers to the Trustee for the benefit of the

Exchange Bondholders, and such property in the Trustee's possession belongs to the Exchange Bondholders. *See* Indenture § 3.5(a) ("such amounts shall be held in trust by the Trustee for the exclusive benefit of the Trustee and the Holders entitled thereto in accordance with their respective interests and the Republic shall have no interest whatsoever in such amounts")). Since June 2005, the Republic has effectuated regular interest payments to the Exchange Bondholders by transferring the required funds to the Trustee. Once the Trustee possesses those funds, it holds those amounts for the benefit of the Exchange Bondholders, including Fintech. Accordingly, any payments made by the Republic to the Trustee belong to the beneficial owners, the Exchange Bondholders such as Fintech, and cannot be restrained from being distributed to them in an effort to "assist" Respondents. *See Willis Mgmt. (Vt.), Ltd. v. United States*, 652 F.3d 236, 245 (2d Cir. 2011) (" . . . if a constructive trust properly should be imposed on particular property that was in the possession of the defendant, it was never truly the defendant's property and is not subject to forfeiture . . . "); *Brown v. J.P. Morgan & Co., Inc.*, 265 A.D. 631, 635, 40 N.Y.S. 2d 229, 233 (1st Dep't 1943) (bondholder cannot attach money in the hands of trustee for other bondholders because the money "belongs to the [other] bondholders"), *aff'd*, 295 N.Y. 867, 67 N.E.2d 263 (1946).

Accordingly, the imposition of limitations on the distribution of the Exchange Bondholders' own money in the hands of the Trustee and its agents constitutes a judicial taking because it interferes with the Exchange Bondholders' unfettered right and justified expectation to be paid irrespective of what the Republic does as to the Original Bondholders.

See Stop the Beach, 130 S. Ct. at 2602 (taking occurs when a court declares that "what was once an established right of private property no longer exists.").

II. The Injunction Impermissibly Affects The Rights of Innocent Non-Parties

The writ should also be granted so that this Court can address the issue of the extent to which court orders and injunctions can affect the rights of absent non-parties. Here, the Injunction applies to a number of non-parties, including those responsible for transferring the Exchange Bondholders' property to them. By enjoining these entities, the proper recipients of the payments, namely, the Exchange Bondholders such as Fintech, are deprived of their property rights. None of these non-parties, including Fintech, was a party in the proceedings before the district court or the Second Circuit, and none of them engaged in any discovery or had any meaningful participation in the proceedings before the district court or the Second Circuit prior to the October 26 Decision and the Injunction.

If the writ is not granted and the Second Circuit's decision is allowed to stand, routine financial transactions, undertaken pursuant to longstanding contracts, may be declared to "aid and abet" violations of law, even if the alleged aiders and abettors were not parties to the underlying litigation. Such a result effectuates, with almost no analysis, a dramatic change in existing law that would make New York a less effective place in which to engage in financial transactions.

A. The Injunction Cannot Be Enforced Against Non-Parties, As They Have Not Had Their Day in Court

"'It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.'" *Taylor v. Sturgell*, 553 U.S. 880, 884 (2008) (quoting *Hansberry v. Lee*, 311 U.S. 32, 40 (1940)); *see also Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 110 (1969). This principle is based on the "'deep-rooted historic tradition that everyone should have his own day in court.'" *Taylor*, 553 U.S. at 892-93 (quoting *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996)). It limits the extent to which an injunction may be enforced against nonparties. *See, e.g.*, *Zenith Radio*, 395 U.S. at 112 (holding that it is "error to enter [an] injunction against" a non-party "without having made this determination in a proceeding to which the [non-party] was a party"). For example, in *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229 (1917), this Court reversed an injunction against named defendants who had not been "served with process . . . ." 245 U.S. at 234. The Court explained that because "the injunction operates only in personam, it was erroneous to include" these un-served parties "as defendants" subject to the injunction. *Id. See also Scott v.*

Donald, 165 U.S. 107, 117 (1897) ("The decree is also objectionable because it enjoins persons not parties to the suit.").[8]

Indeed, the principle that non-parties to a litigation should not be bound by an injunction is so powerful that in *Zenith Radio*, this Court struck down an injunction that attempted to cover a non-party parent of an antitrust defendant because there were no findings that the parent was an alter ego or controlled the litigation in question. So too, should the Injunction be struck down here as against the non-parties in this case. Critically, the Court made clear in *Zenith Radio* that, to be effective, any such findings would have to have been made in a proceeding in which the parent itself was a party. *See Zenith Radio*, 395 U.S. at 110 (to be bound by an injunction the non-party's rights must be "adjudged according to law").

As this Court held in *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 13 (1945), the injunctive power is not "so broad as to make punishable the conduct of persons who act independently and whose rights have not

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[8] A non-party may be bound by an injunction individually only where "it can be fairly said that he has had his day in court in relation to the validity of the injunction." *G&C Merriam Co. v. Webster Dictionary Co., Inc.*, 639 F.2d 29, 37 (1st Cir. 1980). "[W]hether a particular person . . . is among the . . . persons in active concert or participation with [the defendant] is a decision that may be made only after the person is given notice and an opportunity to be heard." *Lake Shore Asset Mgmt. v. CFTC*, 511 F.3d 762, 767 (7th Cir. 2007); *see also Herrlein v. Kanakis*, 526 F.2d 252, 255 (7th Cir. 1975) (it is a "primary axiom of our jurisprudence that no man shall be subject to judicial sanction without the opportunity for a hearing on the merits of the claim against him").

been adjudged according to law." In *Chase National Bank v. City of Norwalk*, 291 U.S. 431, 436 (1934), the Court found clearly erroneous an injunction that was directed at "all persons to whom notice of the order of injunction should come." Writing for a unanimous Court, Justice Brandeis explained that it was improper for the district court there to make punishable as contempt the conduct of persons who act independently and whose rights have not been adjudged according to the law. *See Chase*, 291 U.S. at 437. "Unless duly summoned to appear in a legal proceeding," he added, "a person not a privy [of a party] may rest assured that a judgment recovered therein will not affect his legal rights." *Chase*, 291 U.S. at 441. As Judge Learned Hand eloquently stated:

> [No] court can make a decree which will bind any one but a party; a Court of equity is as much so limited as a Court of law; it cannot lawfully enjoin the world at large, no matter how broadly it words it decree. If it assumes to do so, the decree is pro tanto brutum fulmen, and the persons enjoined are free to ignore it. It is not vested with sovereign powers to declare conduct unlawful; its jurisdiction is limited to those over whom it gets personal service, and who therefore can have their day in court.

Alemite Mfg. Corp. v. Staff, 42 F.2d 832, 832 (2d Cir. 1930).

B. There Is No Basis To Enjoin The Players In The Payment Process

The writ should also be granted because the Injunction appears to sweep in a host of non-parties including the Trustee, various clearinghouses, and other financial institutions, and prohibit them from "aiding and abetting" the Injunction. *See* pp. 3-4, *supra*. This expansive prohibition of "aiding and abetting," untethered to any language in Federal Rule of Civil Procedure 65, cannot be reconciled with the limitations placed on aiding and abetting liability in such cases as *Central Bank of Denver v. First Interstate Bank*, 511 U.S. 164, 176 (1994) (language covering all parties who directly or indirectly engage in securities fraud does not encompass aiding and abetting liability).

Such a sweeping Injunction, entered without any process afforded to the alleged aiders and abettors, also cannot be reconciled with *Regal Knitwear* and *Zenith Radio*. As set out above, the rights of non-parties can only be affected if a finding is made with respect to those nonparties in proceedings in which they were allowed to participate. Moreover, even with the proper proceedings, the label of "aiding and abetting" simply does not fit here.

First, there is the legion of cases holding that a financial institution does not aid and abet a customer when it does nothing more than provide its usual banking services. *See*, *e.g.*, *Seattle-First National Bank v. Carlstedt*, 800 F.2d 1008, 1011 n.2 (10th Cir. 1986) ("to the extent the counterclaim and amended counterclaim seek to impose aiding and abetting liability under the securities laws on SeaFirst based on routine participation in the loans to the

defendants, such claims would not satisfy Rule 9(b)") (citations omitted); *Rosner v. Bank of China*, 528 F. Supp. 2d 419, 427 (S.D.N.Y. 2007) (bank could not be held liable for aiding and abetting violation when there was "no evidence that [the bank] was doing anything more than providing its usual banking services to a customer"). "Financial transactions that are not considered 'atypical' or 'non-routine' do not constitute substantial assistance, as would be necessary to establish aiding and abetting liability." *In re Sharp Int'l Corp.*, 403 F.3d 43, 50 (2d Cir. 2005) (internal citations omitted).[9]

Second, it cannot be meaningfully disputed that the non-parties involved in making payments to the Exchange Bondholders, such as the Trustee and the Depository Trust & Clearing Corporation are independent, arms-length actors that do not act on behalf of the Republic. Each of these non-parties seeks to meet its own contractual obligations which are entirely separate from any obligations they may have with the Republic. Indeed, the transfer of monies that rightfully belong to the Exchange Bondholders as beneficial owners of the Exchange Bonds is a process in which Respondents have no legal interest. *See*, *e.g.*, *EM Ltd. v. Republic of Argentina*, 865 F. Supp. 2d 415, 423 (S.D.N.Y. 2012).

The Trustee acts solely for the benefit of the Exchange Bondholders, and any payment to them is distributed pursuant to the legal obligations it has to the beneficial owners of the Exchange Bonds. In the

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[9] *See also Travelhost, Inc. v. Blandford*, 68 F.3d 958, 965 (5th Cir. 1995) (ruling that "an arms-length transaction and a legitimate transfer of assets" was not a conspiracy); *Herrlein*, 526 F.2d at 254-55.

event of a default by the Republic, the Trustee's interests would become adverse to that of the Republic. Moreover, the non-party banks function as "paying agents" of the Trustee, as opposed to "agents" of the Republic. *See* Indenture ("[A]ny trustee paying agents appointed pursuant to this Indenture shall be agents solely of the Trustee, and the Republic shall have no authority over or any direct relationship with any such trustee paying agent or agents"). Finally, neither the Trustee nor the paying agents have any role in deciding whether the Republic makes a concurrent payment to Respondents. Accordingly, the Trustee and its agents cannot be said to be in "active concert" with the Republic, and its obligations upon receipt of money from the Republic run only to the Exchange Bondholders pursuant to the Indenture. *See Parker v. Ryan*, 960 F.2d 543, 546 (5th Cir. 1992) ("if a nonparty asserts an independent interest in the subject property and is not merely acting on behalf of the defendant, then Rule 65(d) does not authorize jurisdiction over the party") (citing, *inter alia, Heyman v. Kline*, 444 F.2d 65 (2d Cir. 1971)).[10]

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[10] *See E.A. Renfroe & Co. Inc. v. Moran*, 338 Fed. App'x 836, 840 (11th Cir. 2000) ("The law is clear that a court may not enforce an injunction against a nonparty who acts independently of the enjoined party") (internal quotations and citation omitted) (holding non-party attorney's actions in delivering documents to attorney general did not constitute aiding and abetting employees who were enjoined to return documents, which would subject the attorney to contempt jurisdiction of district court for failing to comply with injunction, since attorney acted on his own and independently of enjoined employees); *Microsystems Software Inc. v. Scandinavia Online AB*, 226 F.3d 35, 43 (1st Cir. 2000) ("A nonparty who has acted independently of the enjoined defendant will not be bound by the injunction").

CONCLUSION

For the foregoing reasons, this Court should grant the Republic of Argentina's petition for *writ of certiorari*.

Respectfully submitted,

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