Written Testimony of

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Subcommittee on Capital Markets and Government Sponsored Enterprises

"Investor Protection: The Need to Protect Investors from the Government"

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Thank you, Chairman Garrett, Representative Waters, for holding this hearing on an issue of great importance to American investors. My name is Theodore B. Olson, and I am a partner with the law firm of Gibson, Dunn & Crutcher in Washington, D.C. My firm and I represent NML Capital Ltd., which is one of many investors that has won substantial judgments from U.S. courts against the Republic of Argentina. NML is part of a family of funds that manages capital for dozens of U.S.-based organizations, including colleges, universities, hospitals, and pension funds. My firm and I have also recently represented victims of Hamas-orchestrated and Iranian-supported terror against the government of Iran.

In these representations, I have been troubled by our government's eagerness to side with lawless nations against the interests of Americans. For example, just last month, our government filed a brief in the United States Supreme Court supporting the position of the government of Iran that it can refuse to disclose to American victims of Iranian-sponsored terror the location of Iranian assets needed to satisfy the victims' judgments.[1]

I have been particularly troubled by positions our government has taken against investors in U.S. markets. For example, the government recently intervened in an appeal in favor of Argentina, in a case where the trial court had

[1] Br. for the United States as *Amicus Curiae*, *Rubin v. Islamic Republic of Iran*, No. 11-431 (U.S. May 25, 2012).

ruled that Argentina must abide by a contractual obligation to treat one set of bondholders no less favorably than others.[2]

Although courts often request the government's views regarding federal law, that was not the case here. The government intervened without any invitation from the court, and the issues primarily concerned the enforceability of a contractual provision in the bonds under New York law. Not only did the government gratuitously intervene, but it also did so after showing no interest for a year-and-a-half as the trial court considered the investors' claims. Instead of advising the trial court of its views, the government suddenly emerged for the first time before the court of appeals. There, it largely repeated Argentina's arguments, adding only unsubstantiated and vague assertions that the trial court's order would hurt U.S. foreign policy interests.[3] The brief was signed by the U.S. Attorney for the Southern District of New York, an Acting Assistant Attorney General, the General Counsel for the Treasury Department, and the Legal Adviser to the State Department. Just one year ago, the United States Court of Appeals for the District of Columbia Circuit admonished the government that the gratuitous, last minute

[2] Br. for the United States of America as *Amicus Curiae* in Support of Reversal, *NML Capital Ltd. v. Republic of Argentina*, No. 12-105 (2d Cir. Apr. 4, 2012).

[3] *See id.* at 28-30.

filing of such a brief in an appellate court was "patently unfair" to the litigants and "disrespectful to the district judge."[4]

The broader context of the Argentina case raises grave questions about why our government would choose to side with Argentina against investors who put their faith and capital in U.S. securities markets and in the U.S. courts. The case arises from Argentina's worldwide default on more than $80 billion of its debt in 2001. That was the largest sovereign default in history.[5] It led to a series of lawsuits and billions of dollars of judgments in favor of investors against Argentina.

Argentina unquestionably has the ability to pay the investors it is betraying: It currently sits on $47 billion in foreign currency reserves in a Swiss bank account.[6] Yet it refuses to pay and has used every means imaginable to avoid its responsibilities. Indeed, Argentina has spirited its assets out of the United States[7]

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[4] *FG Hemispheres Assoc., LLC v. Democratic Republic of Congo*, 637 F.3d 373, 379 (D.C. Cir. 2011).

[5] For a brief overview of Argentina's history of defaulting on its sovereign obligations, see *EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 466 n.2 (2d Cir. 2007).

[6] Argentina's Central Bank has, as of May 24, 2012, $47.154 billion in foreign currency reserves. Banco Central de la Republica Argentina, Main Variables, http://www.bcra.gov.ar/index_i.htm (last accessed June 5, 2012). The Argentine government recently amended the Central Bank's charter to permit the government greater access to the Bank's reserves to service Argentine debt. "Piggy Bank: Rootling Around For Cash," *The Economist* (Mar. 31, 2012).

[7] "The Government Is Protecting Itself From Attachment," *La Nación* (Feb. 5, 2004).

and has now filed more than thirty appeals from rulings in favor of investors.[8] Argentina has declared that it would never pay a penny on these debts or in response to these judgments. Indeed, it took the unprecedented step of enacting a law that makes it unlawful to pay these obligations.[9] According to the federal judge who has overseen most of this litigation: "What is going on between the Republic of Argentina and the federal court system is an exercise of sheer ***willful defiance*** . . . of the Republic to honor the judgments of a federal court."[10] Our government's decision to invest taxpayer resources in supporting such defiance—when the courts have not asked for its views—is disappointing to say the least.

It is all the more appalling in light of Argentina's recent actions. Just since the start of 2011, Argentina nationalized an oil company owned by the Spanish firm Repsol,[11] defied international arbitral awards of the World Trade

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[8] *See, e.g.*, *NML Capital Ltd. v. Republic of Argentina*, No. 12-105 (2d Cir.) (oral argument pending); *NML Capital Ltd. v. Republic of Argentina*, No. 11-4065 (2d Cir.) (decision pending); *NML Capital Ltd. v. Republic of Argentina*, ___ F.3d ____, 2012 WL 1059073 (2d Cir. Mar. 30, 2012); *NML Capital Ltd. v. Banco Central de la Republica Argentina*, 652 F.3d 172 (2d Cir. 2011); *NML Capital Ltd. v. Republic of Argentina*, 621 F.3d 230 (2d Cir. 2010); *EM Ltd. v. Republic of Argentina*, 389 F. App'x 38 (2d Cir. 2010); *Aurelius Capital Partners, LP v. Republic of Argentina*, 379 F. App'x 74 (2d Cir. 2010); *Seijas v. Republic of Argentina*, 606 F.3d 53 (2d Cir. 2010); *Seijas v. Republic of Argentina*, 352 F. App'x 519 (2d. Cir. 2009); *Aurelius Capital Partners, LP v. Republic of Argentina*, 584 F.3d 120 (2d Cir. 2009); *Fontana v. Republic of Argentina*, 415 F.3d 238 (2d Cir. 2005); *EM Ltd. v. Republic of Argentina*, 382 F.3d 291 (2d Cir. 2004).

[9] *See* Republic of Argentina, Prospectus Supplement, at S-53 (Apr. 28, 2010) (describing the Lock Law, which prohibits Argentina from paying "any claims or judgments based on" securities that were not exchanged in 2005 debt restructurings).

[10] *EM Ltd. v. Republic of Argentina*, 720 F. Supp. 2d. 273, 304 (S.D.N.Y. 2010) (emphasis added).

[11] Editorial, "The Argentine Model," *The Wall Street Journal* (Apr. 17, 2012).

Organization,[12] incited tensions with Britain over the sovereignty of the Falklands,[13] and confiscated cargo from a U.S. Air Force transport plane that was sent to Argentina to train local police to rescue hostages.[14] These actions have drawn the rightful condemnation of the international community, leading to trade sanctions,[15] suits in the WTO,[16] and repeated public denouncements from high-level governmental officials throughout the world.[17]

But our government's legal action in support of Argentina sent the exact opposite signal to Argentine Finance Secretary Adrian Cosentino. He celebrated the filing of our government's brief, declaring that it "validat[es] the arguments used and the general strategy of the Argentine government against" American

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[12] *See* Proclamation 8788 of March 26, 2012, 77 Fed. Reg. 18,889 (Mar. 28, 2012).

[13] Eliana Raszewski, "Argentina To Raise U.K. 'Militarization' Of Falklands At UN," Bloomberg (Feb. 8, 2012).

[14] CNN Wire Staff, "Cargo Sparks Dispute Between Argentina, U.S.," CNN (Feb. 16, 2011).

[15] Proclamation 8788, *supra* note 12 (removing Argentina from the Generalized System of Preferences).

[16] Sebastian Moffett & Tom Miles, "EU Files WTO Suit Over Argentina's Export Restrictions," Reuters (May 25, 2012).

[17] *See, e.g.*, Testimony of Marisa Lago, Assistant Treasury Secretary, International Markets and Development before the House Financial Services Subcommittee on International Monetary Policy and Trade Holds (Sept. 21, 2011) ("[W]e also share concerns about [Argentina's] unwillingness to engage with its creditors, its unwillingness to engage with international institutions. We find Argentina's approach particularly troubling because if you look at Argentina's per capita income, it falls squarely within the ranks of middle income countries."); Jennifer M. Freedman & Jonathan Stearns, "EU Planning WTO Complaint Against Argentine Import Curbs," Bloomberg (Apr. 23, 2012) (statement by European Union Trade Commissioner Karel De Gucht: "I wish to express the EU's serious concerns about the overall business and investment climate in Argentina and, in particular, certain recent decisions by the Argentine government. . . . The situation is now at a point where it risks jeopardizing our overall trade and investment relations.").

investors.[18] The last thing American investors needed was their own government to encourage Argentina's lawless intransience.

This incident is not the only time that our government has sided recently with corrupt nations against investors. The government also backed the Democratic Republic of Congo against U.S. investors in 2010, arguing that a court could not hold a foreign government in contempt for disregarding its orders for two years.[19] And recently, it supported another Argentine scheme to evade its responsibilities, this time by arguing that investors cannot recover money Argentina owes them from Argentina's central bank[20]—even though the Argentine government itself draws from that bank at will to pay its other debts when it wants to,[21] and even though a federal trial court has ruled that Argentina and its bank have no separate identities in the eyes of the law.[22]

The time has come for our government to concern itself with the rights of American investors, the rule of law, thoughtfully drawn Congressional limits on sovereign immunity, the enforceability of contracts under U.S. laws voluntarily entered into by foreign sovereigns to induce our citizens to invest in their

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[18] "U.S. Treasury, In Favor Of Argentina," *Ambito Financiero* (Apr. 9, 2012).

[19] Br. of the United States as *Amicus Curiae* in Support of Appellant at 6, *FG Hemispheres Assoc., LLC v. Democratic Republic of Congo*, 637 F.3d 373 (D.C. Cir. Oct. 7, 2010) (No. 10-7046).

[20] Br. for the United States as *Amicus Curiae* at 8, *EM Ltd. v. Republic of Argentina*, No. 11-604 (U.S. May 25, 2012).

[21] Camila Russo, "Argentina Issued Note Of Up To $5.7 Billion To Central Bank," Bloomberg (Apr. 26, 2012).

[22] *EM Ltd. v. Republic of Argentina*, 720 F. Supp. 2d. 273, 301-02 (S.D.N.Y. 2010).

indebtedness, and the judgments of U.S. courts. These considerations should not be overridden by vague, inarticulate, and expedient concepts of foreign policy and the interests of foreign tyrants, lawless governments and terrorists. The lawful contractual and statutory rights of our citizens should be paramount over the unlawful defiance of our laws by governments that have no respect for the rule of law or the laws of nations.

That concludes my prepared remarks and I welcome your questions.