No. 12-842

IN THE

Supreme Court of the United States

REPUBLIC OF ARGENTINA,

Petitioner,

v.

NML CAPITAL, LTD.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION

ROBERT A. COHEN
DECHERT LLP
1095 Avenue of the Americas
New York, N.Y. 10036
(212) 698-3500

THEODORE B. OLSON
Counsel of Record
MATTHEW D. MCGILL
SCOTT P. MARTIN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
tolson@gibsondunn.com

Counsel for Respondent

RULE 29.6 STATEMENT

Respondent NML Capital, Ltd. has no parent corporation, and no publicly held company owns 10% or more of its stock.

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BRIEF IN OPPOSITION

Respondent NML Capital, Ltd. respectfully submits that the petition for a writ of certiorari should be denied.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-20) is reported at 695 F.3d 201. The order of the district court compelling discovery (Pet. App. 21-22) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on August 20, 2012. A petition for rehearing en banc was denied on October 10, 2012. *See* Pet. App. 87-88. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

The Foreign Sovereign Immunities Act of 1976 ("FSIA") provides foreign states with two primary forms of immunity: jurisdictional immunity from suit, 28 U.S.C. § 1604, and non-jurisdictional immunity from post-judgment attachment and execution, *id.* § 1609. The Republic of Argentina asserts that, in cases where a foreign state's immunity from suit has been overcome, the courts of appeals disagree on whether (or to what extent) post-judgment discovery from the foreign state is limited by attachment immunity under the FSIA. This case, however, does not present that question.

The Second Circuit affirmed an order directing two third-party commercial banks to comply with subpoenas seeking information about Argentina's assets. Those banks are not foreign states, and there-

fore they have no claim to immunity—from discovery or otherwise—under the FSIA. The only question presented by this case is whether the FSIA's attachment immunity limits the scope of discovery in aid of execution that a judgment creditor may obtain from a non-sovereign third party. There is no circuit split on that question.

1. Congress enacted the FSIA to provide a "comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities." *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 488 (1983). The statute embraced a "restrictive theory of sovereign immunity" that displaced the practice of "generally grant[ing] foreign sovereigns complete immunity from suit in the courts of this country." *Id.* at 486, 488.

Under Section 1604 of the FSIA, "a foreign state shall be immune from the jurisdiction of the courts of the United States . . . except as provided in sections 1605 to 1607." 28 U.S.C. § 1604; *see also id.* § 1603(a) (defining "foreign state" to include "an agency or instrumentality of a foreign state"). Among other exceptions, the FSIA includes a waiver provision: "A foreign state shall not be immune from the jurisdiction of courts of the United States" where "the foreign state has waived its immunity either explicitly or by implication." *Id.* § 1605(a)(1). If that provision—or any other exception to immunity from suit—applies, then "a federal district court may exercise subject-matter jurisdiction," *Verlinden*, 461 U.S. at 489, and (except for punitive damages) "the 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.

Separate provisions of the FSIA govern post-judgment attachment and execution. Section 1609 provides that "the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter." 28 U.S.C. § 1609. Section 1610, in turn, provides several exceptions to attachment immunity, including exceptions for property used for a commercial activity in the United States when the foreign state has waived attachment immunity or the property was used for the commercial activity on which the claim is based. *See id.* § 1610(a)(1)-(2).

By their terms, neither Section 1609 nor Section 1610 extends attachment immunity to property outside the United States. Instead, the immunity from attachment (if any) of such assets is a question of foreign law, to be decided by foreign tribunals. *See*, *e.g.*, *NML Capital Ltd.* v. *Bank for Int'l Settlements*, Bundesgericht [BGer] [Federal Supreme Court] July 12, 2010, No. 5A_360/2010 (Switz.) (C.A. J.A. 862-93) (applying Swiss law).

Although Sections 1609 and 1610 define in detail the contours of the attachment immunity conferred by the FSIA, those provisions say nothing about discovery. The only provision of the FSIA addressing discovery simply permits stays in some cases involving terrorism where discovery would "significantly interfere with a criminal investigation or prosecution, or a national security operation." 28 U.S.C. § 1605(g). Otherwise, Congress "kept in place a court's normal discovery apparatus in FSIA proceedings." *FG Hemisphere Assocs., LLC* v. *Democratic Republic of Congo*, 637 F.3d 373, 378 (D.C. Cir. 2011); *see also*, *e.g.*, H.R. Rep. No. 94-1487, at 23

(1976) (noting that the FSIA "does not attempt to deal with questions of discovery"), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6621.

The federal courts' "normal discovery apparatus" (*FG Hemisphere*, 637 F.3d at 378) provides for "broad post-judgment discovery" to aid parties seeking to execute on judgments in their favor. Pet. App. 13. Federal Rule of Civil Procedure 69(a)(2) provides that, "[i]n aid of . . . judgment or execution, [a] judgment creditor . . . may obtain discovery from *any* person—including the judgment debtor—as provided in these rules or by the procedure of the state where the court is located." Fed. R. Civ. P. 69(a)(2) (emphasis added). And New York law (applicable here) similarly provides that a "judgment creditor may compel disclosure of *all* matter relevant to the satisfaction of the judgment." N.Y. C.P.L.R. § 5223 (emphasis added).

2. Argentina "has made many contributions to the law of foreign insolvency through its numerous defaults on its sovereign obligations, as well as through what . . . might [be] term[ed] a diplomacy of default." *EM Ltd.* v. *Republic of Argentina*, 473 F.3d 463, 466 n.2 (2d Cir. 2007). Its latest contribution began in December 2001, when it violated its agreements with creditors by declaring a moratorium on payments on its external debt. Pet. App. 3. That default was then the largest sovereign debt default in history. *See*, *e.g.*, Sophie Arie & Andrew Cave, *Argentina Makes Biggest Debt Default in History*, Telegraph, Dec. 24, 2001.

In 2004, Argentina announced a debt restructuring plan, on a take-it-or-leave-it basis, that provided bondholders with a recovery of only 25 to 29 cents on the dollar. *See* Hal S. Scott, *Sovereign Debt Default:*

Cry for the United States, Not Argentina 3-4 (Wash. Legal Found., Working Paper No. 140, 2006), *available at* http://www.wlf.org/upload/Scott%20WP%20Final.pdf; *see also* Larry Rohter, *Argentina Announces Deal on Its Debt Default*, N.Y. Times, Mar. 4, 2005, at C3. Argentina imposed that 71 to 75 cent "haircut" even though it was able to pay more. *See* Arturo C. Porzecanski, *From Rogue Creditors to Rogue Debtors: Implications of Argentina's Default*, 6 Chi. J. Int'l L. 311, 321 (2005).

Since Argentina's 2001 default, its economic fortunes have improved greatly. *See*, *e.g.*, *Argentina Says Can Rebuild Reserves Used to Pay Debt*, Reuters, Mar. 7, 2012. It has enjoyed consistent and substantial fiscal and balance-of-payments surpluses as a result of high prices for its agricultural exports, and now sits on more than $40 billion in monetary reserves.

Despite its financial success, however, Argentina "has not acted honestly and in good faith" to make good on its debts, *EM Ltd.* v. *Republic of Argentina*, 720 F. Supp. 2d 273, 301 (S.D.N.Y. 2010), and has instead engaged in a pattern of "willful defiance" of its legal obligations, *NML Capital, Ltd.* v. *Banco Central de la República Argentina*, 652 F.3d 172, 196 (2d Cir. 2011) (internal quotation marks omitted). While it "irrevocably agreed not to claim" sovereign immunity against its creditors and consented "to the giving of any relief or the issue of any process in connection with any Related Proceeding or Related Judgment," Pet. App. 4 n.1, it has continued to assert sovereign immunity as a defense. And to evade its creditors, Argentina has spirited assets outside the United States and structured its finances to avoid attachment under the FSIA or the laws of foreign ju-

risdictions. *See The Government Is Protecting Itself from Attachment*, La Nación, Feb. 5, 2004 (C.A. J.A. 988-92).

3. NML Capital, Ltd. owns beneficial interests in bonds on which Argentina defaulted in 2001. NML brought eleven actions in the United States District Court for the Southern District of New York based on those bonds. The district court possessed jurisdiction because Argentina broadly waived its jurisdictional immunity from suit in the bond agreements. *See* Pet. App. 4 & n.1. The court entered five money judgments in NML's favor, totaling (with interest) more than $1.6 billion. *Id.* at 4. The district court also granted summary judgment to NML as to principal in six other actions in which NML's claims total (again with interest) more than $900 million. *See ibid.* Although "Argentina does not dispute . . . that the judgments against it are valid and enforceable," *id.* at 18, it has not paid these amounts, *see id.* at 4.

a. Since 2003, in an effort to execute on its judgments, NML has pursued discovery regarding Argentina's assets. Pet. App. 4-5. As part of that discovery, NML served subpoenas in 2010 on two non-sovereign commercial banks conducting business in New York: Bank of America and Banco de la Nación Argentina ("BNA"). *Id.* at 5. Through those subpoenas, NML sought to "learn how Argentina moves its assets through New York and around the world" and to "identify the places and times when those assets might be subject to attachment and execution." *Ibid.* (internal quotation marks omitted).

NML's subpoena to Bank of America sought information about accounts maintained by or on behalf of Argentina, including account balances, closures, and transaction histories. Pet. App. 5-6. Because

Argentina has evaded judgment enforcement efforts by holding assets in the name of entities affiliated with it, the subpoena defines "Argentina" to include Argentina's agencies, ministries, instrumentalities, political subdivisions, employees, and others acting on its behalf. *See id.* at 6.

The Bank of America subpoena also sought information about electronic fund transfers sent through the Society for Worldwide Interbank Financial Telecommunication ("SWIFT") system. Pet. App. 6 & n.3. Banks use the SWIFT system to send and receive international electronic fund transfers. *See id.* at 6 n.3. Transfers involving U.S. dollars are often routed through intermediary banks in New York, including Bank of America. *See ibid.* The subpoena directed Bank of America to produce documents relating to transactions conducted through its SWIFT portal identifying Argentina as the beneficiary, originator, or any other related party to a transaction. *See id.* at 6; *see also* C.A. J.A. 672-73. Those documents will enable NML to track the flow of funds to locate Argentina's assets. *See*, *e.g.*, Pet. App. 6 & n.3.

NML's subpoena to BNA sought information about Argentina's accounts at BNA, other property obtained by BNA on Argentina's behalf, debts owed by BNA to Argentina, and flows of funds into and out of Argentina's accounts. Pet. App. 6. Like the Bank of America subpoena, the BNA subpoena defined "Argentina" to include entities controlled by, or acting on behalf of, Argentina. *See ibid.*

b. Argentina moved the district court to quash the Bank of America subpoena, and both banks objected to the subpoenas. Pet. App. 7. NML, in turn, moved to compel compliance. *Ibid.* Argentina joined the banks in opposing NML's motions, contending

that the subpoenas violated its immunity from attachment and execution under Sections 1609 and 1610 of the FSIA.

Even before the district court ruled on those objections, NML agreed to narrow its subpoenas by excluding the names of some Argentine officials from the initial SWIFT message search and by entering into a protective order affording confidential treatment to documents designated as confidential by the banks. C.A. J.A. 796-97, 930-31.

At a hearing on August 30, 2011, the district court denied Argentina's motion to quash and granted NML's motions to compel compliance with both subpoenas, with the understanding that the parties would negotiate further to narrow the subpoenas to discovery that was reasonably calculated to lead to attachable property. Pet. App. 45, 49-51. In so ruling, the district court emphasized that NML had been forced to seek the discovery at issue only because of Argentina's "behavior" and its refusal to "comply with its legal obligations." *Id.* at 45, 47-48. The court confirmed its August 30 ruling in a written order on September 2, 2011. *See id.* at 21-22.

In accordance with the district court's ruling, NML proposed further limitations on its subpoenas. Bank of America negotiated with NML and soon began producing documents. Pet. App. 8. BNA refused to negotiate or to comply with its subpoena, but the district court in December 2011 ordered it to comply with the modified subpoena. *Ibid.*[*]

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[*] BNA subsequently produced documents that it maintained in New York and Miami, but refused to produce documents maintained outside the United States on the ground that their disclosure would violate local law. The district court, however,

[Footnote continued on next page]

c. Argentina appealed the district court's September 2 discovery order; the banks did not. The Second Circuit affirmed the order, rejecting Argentina's argument that FSIA attachment immunity barred NML from obtaining post-judgment discovery in aid of execution from the banks. Pet. App. 9, 12-20.

The court of appeals began by recognizing that "[a] district court has broad latitude to determine the scope of discovery and to manage the discovery process," "that broad post-judgment discovery in aid of execution is the norm in federal and New York state courts," and that "[i]t is not uncommon to seek asset discovery from third parties, including banks, that possess information pertaining to the judgment debtor's assets." Pet. App. 13-14 (citing Fed. R. Civ. P. 69(a)(2) and N.Y. C.P.L.R. § 5223). Consistent with these principles, the court of appeals held for two independent reasons that the district court did not abuse its discretion in ordering the banks to comply with NML's subpoenas.

First, the court explained, the discovery order "does not implicate Argentina's immunity from attachment" because it "does not allow NML to attach Argentina's property, or indeed to have any legal effect on Argentina's property at all; it simply mandates [the banks'] compliance with subpoenas." Pet. App. 15. Although the district court lacked "the power to attach Argentinian property in foreign

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determined that, "with the exception of [one country], complying with this court's orders would not violate the various countries' laws," and in any event that "in all countries . . . requiring compliance with this court's orders is appropriate since the balance of applicable factors weighs in favor of disclosure." D.E. 535, at 2-3, 7.

countries," *id.* at 15-16, the court of appeals emphasized that "the district court's power to order discovery to enforce its judgment does not derive from its ultimate ability to attach the property in question," *id.* at 16. Rather, as the court of appeals had held in *First City, Texas-Houston, N.A.* v. *Rafidain Bank*, 281 F.3d 48 (2d Cir. 2002) ("*Rafidain II*"), the power to order such discovery derives "from [the district court's] power to conduct supplementary proceedings, involving persons indisputably within its jurisdiction, to enforce valid judgments." Pet. App. 16 (citing *Rafidain II*). Here, "Argentina does not dispute that the district court had jurisdiction over it or that the judgments against it are valid and enforceable," *id.* at 18, and thus NML could obtain discovery about Argentina's assets, *id.* at 16-17.

The court of appeals acknowledged that the Seventh Circuit had reached a conclusion different from *Rafidain II* in *Rubin* v. *Islamic Republic of Iran*, 637 F.3d 783 (7th Cir. 2011), *cert. denied*, 133 S. Ct. 23 (2012). Pet. App. 17. In *Rubin*, the Seventh Circuit held that the FSIA requires a judgment creditor to identify specific, potentially attachable assets as a prerequisite for obtaining discovery from a foreign state in aid of execution. 637 F.3d at 796. The Second Circuit noted that *Rubin* conflicts with *Rafidain II* "to the extent [the Seventh Circuit] concluded that the district court's subject matter jurisdiction over a foreign sovereign was insufficient to confer the power to order discovery from a person subject to the court's jurisdiction that is relevant to enforcing a judgment against the sovereign." Pet. App. 17.

Second, the court of appeals held that the discovery order did not infringe Argentina's attachment immunity because "the subpoenas . . . were directed

at [Bank of America] and BNA—commercial banks that have no claim to sovereign immunity, or to any other sort of immunity or privilege." Pet. App. 19. "Thus, the banks' compliance with [the] subpoenas will cause Argentina no burden and no expense." *Ibid.* And while Argentina might claim privilege over some information, "[t]he FSIA says nothing about privilege," and "it appears that Congress intended for courts to handle claims of privilege using the existing procedures under the Federal Rules." *Ibid.* (citing H.R. Rep. No. 94-1487, at 23 (1976)). Normal discovery rules, the court explained, can protect any privileged or confidential information. *See id.* at 20.

The court of appeals recognized that, "if and when NML moves past the discovery stage and attempts to execute against Argentina's property, Argentina will be protected by principles of sovereign immunity in this country or in others, to the extent that immunity has not been waived." Pet. App. 20. Discovery from the banks, however, "does nothing to endanger Argentina's sovereign immunity." *Ibid.*

REASONS FOR DENYING THE PETITION

The Second Circuit correctly allowed post-judgment discovery in aid of execution from non-sovereign third-party banks. That decision implicates no circuit split, is correct under the FSIA and this Court's precedent, promotes important federal interests, and accords with the weight of authority allowing post-judgment discovery in aid of execution under the FSIA.

Although there is a shallow circuit split on a separate question under the FSIA—involving the circumstances under which a judgment creditor may pursue post-judgment asset discovery from a foreign

state itself—this case does not squarely present that issue. And even if it did, this Court declined in June 2012 to resolve this very conflict. Nothing has changed in the intervening months that would counsel a different result here. Indeed, the only pertinent change is that the Second Circuit has expressly acknowledged the conflict, but that acknowledgment militates in favor of waiting so that the Seventh Circuit can have an opportunity to recede en banc from its outlier position. The petition for a writ of certiorari should be denied.

I. THIS CASE IS A POOR VEHICLE FOR RESOLVING ANY QUESTION ON WHICH THE COURTS OF APPEALS HAVE DIVIDED.

The Second Circuit affirmed an order compelling discovery from two third-party, non-sovereign commercial banks—not discovery from a foreign state. *See* Pet. App. 9. In each decision invoked by Argentina as part of the lower-court split, by contrast, discovery was sought from a foreign sovereign itself or from one of its agencies or instrumentalities. *See*, *e.g.*, *Rubin* v. *Islamic Republic of Iran*, 637 F.3d 783, 785 (7th Cir. 2011) (Islamic Republic of Iran), *cert. denied*, 133 S. Ct. 23 (2012); *First City, Texas-Houston, N.A.* v. *Rafidain Bank*, 150 F.3d 172, 174, 176 (2d Cir. 1998) ("*Rafidain I*") (agencies or instrumentalities of Iraq). This distinction makes all the difference.

Whatever grounds may support protecting foreign states from discovery in aid of execution, those grounds—like the FSIA itself—do not apply to non-sovereigns. Sovereign immunity is "designed to give *foreign states and their instrumentalities* some protection from the inconvenience of suit." *Republic of Philippines* v. *Pimental*, 553 U.S. 851, 865 (2008)

(emphasis added; internal quotation marks omitted); *see also* Pet. App. 19 ("[S]overeign immunity protects a sovereign from the expense, intrusiveness, and hassle of litigation."). In the discovery context, this means that sovereign immunity applies (if at all) "to protect *foreign sovereigns* from the burdens of litigation, including the cost and aggravation of discovery." *Rubin*, 637 F.3d at 795 (emphasis added); *see also* 28 U.S.C. § 1609 (applying only to "the property in the United States of a foreign state").

Foreign states do not face "the cost and aggravation of discovery"—or the manifold "burdens of litigation" more generally—when they do not bear the responsibility of responding to the discovery at issue. *Rubin*, 637 F.3d at 795. The government has maintained that "[c]ompelling *a foreign state* to produce extensive material in discovery concerning its assets" could, in some circumstances, "impose significant burdens and impugn the state's dignity." U.S. Br. 11, *Rubin*, No. 11-431 (emphasis added); *see id.* at 13, 14-15 (same). But where, as here, a United States court has not "force[d] *a foreign state* to shoulder the burden of assembling . . . and producing" information about its assets, *id.* at 15 (emphasis added), no sovereign has been subjected to "the inconvenience of suit," *Pimental*, 553 U.S. at 865 (internal quotation marks omitted). NML's subpoenas impose no burden of litigation or judicial process at all on Argentina: The subpoenas seek only business records from third-party banks that those banks already possess. They do not require Argentina to take any action or to produce any information.

Argentina contends that discovery from non-sovereign third parties "will . . . inevitably spill over into equally intrusive discovery of the party itself."

Pet. 19. But Argentina cannot explain why, if discovery reveals property that is subject to attachment or execution, a judgment creditor would then "inevitably" seek still *further* discovery instead of moving to seize the property. And if the judgment creditor did seek such discovery, the courts only then would confront the immunity issue that Argentina seeks to inject prematurely into this case. Tellingly, Argentina cites nothing at all for its speculation about the "spill over" effects of the decision below.

Argentina similarly cannot muster any support for its claim that, "when third parties are forced to submit to costly discovery devices because they have done business with, and therefore have information regarding, a state, those costs will be passed on to the state in one form or another." Pet. 19-20. Yet even if this were so, there is no basis for concluding that the FSIA contains an implicit limitation on discovery from non-sovereigns based on these remote, speculative costs. At a minimum, this question is far removed from the circuit split that Argentina claims warrants this Court's review.

The discovery order at issue here does not compel any foreign state to shoulder the burdens of discovery; it imposes discovery obligations exclusively on non-sovereign third parties. Because the case could be resolved on this straightforward ground without addressing the scope of a foreign state's immunity from discovery in aid of execution, this case presents a decidedly poor vehicle for addressing any question on which the courts of appeals have divided.

II. THE SHALLOW CIRCUIT SPLIT REGARDING POST-JUDGMENT ASSET DISCOVERY FROM FOREIGN STATES DOES NOT WARRANT THIS COURT'S REVIEW.

There is a circuit conflict on the question whether FSIA attachment immunity limits discovery in aid of execution from a foreign state, as the result of an outlier decision by the Seventh Circuit. The weight of authority supports the view long endorsed by the Second Circuit, and this Court denied review of the Seventh Circuit's contrary decision just months ago. *See Rubin* v. *Islamic Republic of Iran*, 133 S. Ct. 23 (2012). Nothing has changed to warrant review now.

A. In *Rafidain I*, the Second Circuit held that "permit[ting] full discovery" against a sovereign judgment debtor—there, an agency of Iraq—"would not intrude upon [the foreign state's] sovereign immunity." 150 F.3d at 177. Later in the same case, the Second Circuit affirmed a contempt order against the Iraqi agency for failing to comply with discovery requests, elaborating that, "where subject matter jurisdiction under the FSIA exists to decide a case, jurisdiction continues long enough to allow proceedings in aid of any money judgment that is rendered in the case," including discovery designed to identify the judgment debtor's assets. *Rafidain II*, 281 F.3d at 53-54. Such "[d]iscovery of a judgment debtor's assets," the court emphasized, "is conducted routinely under the Federal Rules of Civil Procedure." *Ibid.*

The Seventh Circuit created a circuit split with *Rafidain I* and *II* in 2011, when it held in *Rubin* that the FSIA permits discovery in aid of execution only with respect to "*specific property*" that the judgment creditor has *already* "identified" as "potentially subject" to attachment. 637 F.3d at 799 (emphasis add-

ed). "[T]o the extent [*Rubin*] concluded that the district court's subject matter jurisdiction over a foreign sovereign was insufficient to confer the power to order discovery from a person subject to the court's jurisdiction that is relevant to enforcing a judgment against the sovereign," the Second Circuit explained below, it "conflict[s] with [the] holding in *Rafidain II*." Pet. App. 17.

The Seventh Circuit's decision in *Rubin* is the minority view. The Second Circuit has reached the contrary result in several cases, and its position accords with the Ninth Circuit's decision in *Richmark Corp.* v. *Timber Falling Consultants*, 959 F.2d 1468 (9th Cir. 1992), which Argentina curiously declines to mention. *Cf.* Pet. App. 16 (citing *Richmark*). *Richmark* upheld an order requiring "an arm of the [Chinese] government" to provide "discovery [regarding its] assets worldwide," which was designed to "identif[y] . . . current assets in order to execute the judgment." 959 F.2d at 1471-72, 1475. The Ninth Circuit explained that, although the FSIA "does not empower United States courts to levy on assets located outside the United States," *id.* at 1477, a district court may order discovery into the identity and location of a foreign state's assets to allow the judgment creditor "to determine which courts" would have jurisdiction over those assets. *Id.* at 1478.

This Court was presented in *Rubin* with the conflict between the Second and Ninth Circuits, on the one hand, and the Seventh Circuit, on the other. After requesting the views of the United States, which recommended denying certiorari, this Court declined review. *See* 133 S. Ct. at 23. Nothing has changed since then to alter this conclusion. The Second Circuit has now acknowledged that *Rubin* conflicts with

Rafidain II, *see* Pet. App. 17, but this counsels in favor of denying the petition here, to afford the Seventh Circuit a chance to resolve the conflict itself: Now that the Second Circuit has recognized the conflict, the Seventh Circuit may consider the question presented en banc—a path that was effectively foreclosed in *Rubin* because half of the Seventh Circuit's active judges were recused. *See Rubin*, 637 F.3d at 783 n.*.

B. Argentina is mistaken that the decision below conflicts with decisions of the Fifth and Ninth Circuits. *See* Pet. 15-17. Argentina imagines a conflict based on these circuits' suggestion that "[d]iscovery . . . should be ordered circumspectly and only to verify allegations of specific facts crucial to an immunity determination." *Conn. Bank of Commerce* v. *Republic of Congo*, 309 F.3d 240, 260 n.10 (5th Cir. 2002) (internal quotation marks omitted); *see also Af-Cap Inc.* v. *Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1096 (9th Cir. 2007) (same). The Second Circuit, however, has repeatedly endorsed this same approach to discovery against a foreign state. *See*, *e.g.*, *EM Ltd.* v. *Republic of Argentina*, 473 F.3d 463, 486 (2d Cir. 2007); *see also* Pet. 17 (quoting other Second Circuit decisions).

Argentina does not claim that the Fifth and Ninth Circuits have applied this "circumspect[ion]" to announce a categorical limitation on general asset discovery from a foreign state, as the Seventh Circuit did in *Rubin*. It could hardly do so in light of the Ninth Circuit's decision in *Richmark*. And the fact that a district court can exercise its discretion to ensure that discovery against a foreign sovereign proceeds cautiously does not mean, as Argentina appears to assume, that the FSIA broadly prohibits

post-judgment discovery into a foreign state's assets. As the Second Circuit noted in *Rafidain I*, a district court can appropriately "weig[h] the benefits of additional discovery against the intrusiveness to [the foreign state] of permitting such discovery." 150 F.3d at 175. In *Af-Cap*, for instance, the Ninth Circuit affirmed a district court's decision to deny "discovery requests [that] had 'gone too far.'" 475 F.3d at 1096.

Yet this discretionary inquiry is not "based on an interpretation of FSIA preemption." *Af-Cap Inc.*, 475 F.3d at 1096. Instead, it is a feature of the district court's "extensive control over the discovery process." *Flatow* v. *Islamic Republic of Iran*, 308 F.3d 1065, 1074 (9th Cir. 2002) (internal quotation marks omitted); *see also* Pet. App. 13 ("A district court has broad latitude to determine the scope of discovery and to manage the discovery process."). There is therefore nothing surprising or conflicting in the fact that the Second Circuit (in the *Rafidain* cases) and the Ninth Circuit (in *Richmark*) have permitted asset discovery in aid of execution to proceed against a foreign state while at the same time recognizing the need to act circumspectly in this area.

III. THE DECISION BELOW IS CORRECT AND RESPECTS THE BALANCE STRUCK IN THE FOREIGN SOVEREIGN IMMUNITIES ACT.

This Court's review is not warranted for the further reasons that the Second Circuit's decision is correct, accords with this Court's caselaw, and promotes important policies embodied in federal law.

A. Federal law authorizes broad discovery in aid of execution. Under Federal Rule of Civil Procedure 69(a)(2), "[a] judgment creditor . . . may obtain discovery from any person—including the judgment debtor"—under the same rules that govern pre-trial

discovery. *See*, *e.g.*, *Natural Gas Pipeline Co.* v. *Energy Gathering Inc.*, 2 F.3d 1397, 1405 (5th Cir. 1993). Under Rule 26(b)(1), in turn, "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense."

"Congress kept in place" this "normal discovery apparatus in FSIA proceedings." *FG Hemisphere Assocs., LLC* v. *Democratic Republic of Congo*, 637 F.3d 373, 378 (D.C. Cir. 2011). Sections 1609 and 1610 of the FSIA provide immunity from "attachment arrest and execution" for certain "property in the United States of a foreign state." 28 U.S.C. § 1609; *see id.* § 1610 (limiting Section 1609's grant of immunity). But neither section says anything about discovery. There is therefore nothing "sweeping" or "remarkable" (Pet. 17) in concluding that the FSIA itself does not limit post-judgment discovery in aid of execution. To the contrary, it would be sweeping and remarkable to read the FSIA's silence regarding the scope of post-judgment discovery as implicitly creating an atextual immunity from such discovery. *See Milner* v. *Dep't of the Navy*, 131 S. Ct. 1259, 1267 (2011) (courts may not adopt a statutory construction with "no basis or referent in [the statute's] language").

In accordance with the normal rules of discovery and the FSIA, the Second Circuit correctly affirmed the district court's order allowing post-judgment discovery regarding Argentina's assets. Even if that discovery had been directed to Argentina itself, *but see supra* Part I, asset discovery is not an act of attachment or execution; it is only discovery—and thus is permitted under the FSIA subject to the district court's broad discretion to establish appropriate limitations based on the circumstances before it.

Argentina suggests that the subpoenas conflict with the FSIA because they will uncover information about assets that, because they are outside the United States, are supposedly immune from attachment and execution. *See*, *e.g.*, Pet. 2, 10-11, 27. Whether the assets are located in the United States or abroad, the discovery orders at issue here do not themselves effect an attachment or execution. And in any event, the FSIA does not render foreign-held assets *immune* from attachment and execution; instead, Section 1609 provides attachment immunity only for certain "property *in the United States* of a foreign state" (emphasis added).

Courts are authorized to allow, and routinely order, discovery in aid of execution of their judgments in other states or countries. *See*, *e.g.*, *Nat'l Serv. Indus., Inc.* v. *Vafla Corp.*, 694 F.2d 246, 250 (11th Cir. 1982) (under Federal Rule 69(a)(2), a judgment creditor is entitled to obtain discovery relating to the judgment debtor's assets "wherever located"). Neither the FSIA nor any other limitation on the district court's discretion prohibits such commonplace discovery in the sovereign context.

B. The decision below also accords with important federal policies. "[T]he courts of the United States undoubtedly have a vital interest in providing a forum for the final resolution of disputes and for enforcing these judgments." *Reinsurance Co. of Am., Inc.* v. *Administratia Asigurarilor de Stat*, 902 F.2d 1275, 1280 (7th Cir. 1990). The FSIA represents Congress's attempt to balance this weighty interest with the comity interests of foreign states. By ensuring that American judgment creditors may obtain the information necessary to enforce their judgments

against foreign states, the Second Circuit has respected that balance.

The United States has long been a "major source of private international credit," *Allied Bank Int'l* v. *Banco Credito Agricola de Cartago*, 757 F.2d 516, 522 (2d Cir. 1985), and American lenders hold many billions of dollars in foreign sovereign debt, *see* David Reilly, *Euro Pain Could Blow Back on Big U.S. Banks*, Wall St. J., May 14, 2010, at B14. As a result, "the United States has a strong interest in ensuring the enforceability of valid debts under the principles of contract law, and in particular, the continuing enforceability of foreign debts owed to United States lenders." *Pravin Banker Assocs., Ltd.* v. *Banco Popular Del Peru*, 109 F.3d 850, 855 (2d Cir. 1997).

A well-functioning market for sovereign debt depends on investors' confidence that they will be able to enforce loan agreements with foreign countries—and to collect on any judgments obtained. "Experience shows that debt markets work best when the rights of creditors are protected most effectively." Andrei Shleifer, *Will the Sovereign Debt Market Survive?*, 93 Am. Econ. Rev. 85, 85 (2003).

The "heart of the problem" for investors in sovereign debt is that "it has become exceedingly difficult for creditors to actually collect on their debts." Scott, *supra*, at 9. To be sure, much of this problem is the result of the FSIA's limitations on attachment and execution, and similar provisions in other countries' laws. But if creditors cannot obtain the information needed to locate even non-immune assets to satisfy a judgment in their favor—despite having won the case on the merits—then enforcement against a recalcitrant sovereign such as Argentina becomes near-

ly impossible. If judgments or debts are to be paid only at the sovereign's option, lending to foreign countries is a risky proposition indeed, and creditors will take that information into account in deciding whether to lend (and, if so, at what rate). *Cf.* Alexander Hamilton, *First Report on the Public Credit* (Jan. 14, 1790), *in* 2 *The Works of Alexander Hamilton* 227, 228 (Henry Cabot Lodge ed. 1904) ("[W]hen the credit of a country is in any degree questionable . . . it never fails to give an extravagant premium, in one shape or another, upon all the loans it has occasion to make.").

Further, there is a large secondary market in sovereign debt that could be jeopardized if that debt becomes more difficult to enforce because it is impossible to obtain information about the debtor's assets. The secondary market enables the primary market to function by allowing primary creditors to reduce their exposure to questionable debts. *See* Fernando Broner *et al.*, *Sovereign Risk and Secondary Markets*, 100 Am. Econ. Rev. 1523, 1523 (2010). For this reason, the "long term effect" of "rendering otherwise valid debts unenforceable" would be "significant harm" to "developing nations and their institutions seeking to borrow capital" in the United States. *Elliott Assocs., L.P.* v. *Banco de la Nacion*, 194 F.3d 363, 380 (2d Cir. 1999). If the "holders of debt instruments" know that they will "have substantial difficulty selling those instruments [in the secondary market] if payment were not voluntarily forthcoming," that would "add significantly to the risk of making loans to developing nations with poor credit ratings"—and "[t]he additional risk would naturally be reflected in higher borrowing costs to such nations." *Ibid.*

C. In urging this Court's review, Argentina relies heavily on "the important interests the United States has raised" in *amicus* briefs—particularly its invitation brief filed with this Court in *Rubin*. Pet. 27; *see id.* at 26 n.16, 27-28. But the government recommended that this Court *deny* certiorari in *Rubin*. *See* U.S. Br. 1, 8, 23, *Rubin*, No. 11-431. And its brief in *Rubin* underscores why this Court should also deny certiorari here.

The government emphasized in *Rubin* that "the precise content and import" of the Seventh Circuit's holding "remain to be determined in future cases." U.S. Br. 8, *Rubin*, No. 11-431; *see id.* at 16-17. In the months since this Court denied certiorari in *Rubin*, the Seventh Circuit has not determined "the precise content and import" of *Rubin*'s holding. And the decision below simply accorded with existing circuit precedent: the Second Circuit had already, in *Rafidain I* and *II*, cemented a position from which the Seventh Circuit departed in *Rubin*. *See* Pet. App. 17 (recognizing existing conflict between Second Circuit precedent and *Rubin*).

If the Second Circuit's holding here could actually "cause grave harm to the foreign relations of the United States and the treatment of the United States in litigation abroad," Pet. 26, that would also have been true when the government filed its brief in *Rubin*. Yet the government asked this Court to deny certiorari as premature. On the government's own view of the question presented in *Rubin*—embraced by Argentina here, *see id.* at 26-28—certiorari should likewise be denied in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT A. COHEN
DECHERT LLP
1095 Avenue of the Americas
New York, N.Y. 10036
(212) 698-3500

THEODORE B. OLSON
Counsel of Record
MATTHEW D. MCGILL
SCOTT P. MARTIN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
tolson@gibsondunn.com

Counsel for Respondent

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