No. 12-842

In the Supreme Court of the United States

REPUBLIC OF ARGENTINA, PETITIONER,

v.

NML CAPITAL, LTD.

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

BRIEF FOR THE CLEARING HOUSE AS AMICUS CURIAE SUPPORTING PETITIONER

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BRIEF FOR THE CLEARING HOUSE AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF AMICUS CURIAE

Established in 1853, The Clearing House is the United States' oldest banking association and payments company.[1] It is owned by the world's largest commercial banks, which collectively employ 1.4 million people in the United States and hold more than half of all U.S. deposits. The Clearing House is a nonpartisan advocacy organization that represents, through regulatory comment letters, amicus briefs, and white papers, the interests of its member banks on a variety of important banking issues. Its affiliate, The Clearing House Payments Company L.L.C., provides payment, clearing, and settlement services to its member banks and other financial institutions, clearing almost $2 trillion daily and representing nearly half of the automated clearinghouse, funds-transfer, and check-image payments made in the United States.

The Clearing House does not condone Argentina's failure to pay the judgments that respondent has obtained against it, but that is not the issue in this case. The question here is the extent to which third parties may be enlisted in efforts to enforce those judgments. The decision below imposes severe burdens on financial institutions as part of post-judgment proceedings. Specifically, the decision below orders nonparty fi-

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[1] Pursuant to Rule 37.6, amici affirm that no counsel for a party authored this brief in whole or in part, and that no person other than amici or their counsel contributed any money to fund its preparation or submission. The parties have consented to the filing of this brief.

nancial institutions to conduct extremely burdensome searches in various jurisdictions all over the world—even if those searches violate foreign law, and despite the fact that the information can be used (if at all) only in future and foreign proceedings. That type of extraterritorial discovery places an unprecedented strain on nonparties generally, and even more so with respect to financial institutions, which are routinely the target of post-judgment enforcement efforts and therefore are disproportionately affected by the burdens of worldwide discovery. Accordingly, The Clearing House and its members have a substantial interest in this Court's resolution of this case.

SUMMARY OF ARGUMENT

I. A. The decision below fails to consider the extensive burdens and jeopardy it imposes on nonparty financial institutions. Under that decision, nonparties may be ordered to perform difficult and costly searches in numerous foreign jurisdictions. Moreover, even when disclosure of clients' financial information would violate the laws of those foreign jurisdictions, lower courts often order it anyway, putting financial institutions and their employees at the real risk of criminal and civil penalties. Further, subpoenas seeking worldwide discovery are extremely difficult to challenge either in the trial court or on appeal. As a result, nonparties often have little choice but to comply, meaning that they incur not only significant costs but also repercussions from foreign regulators and law enforcement authorities (whose laws have been flouted) and from foreign clients (whose confidential information has been disclosed).

B. As a matter of both logic and experience, the burdens of overbroad discovery inescapably flow

through to foreign states. As to the sovereign debtor, it does not matter whether a subpoena is directed to the sovereign itself or its chosen financial institution: either way, disclosure of the sovereign's confidential records inflicts the same injury. It impugns the foreign sovereign's dignity by subjecting it to intrusive inquiries about its assets located overseas. The injury to sovereign interests is even greater when the discovery would be barred or limited under the laws of the relevant foreign jurisdiction. Foreign states are understandably offended when litigants avoid foreign procedures and limits by turning to U.S. courts accustomed to different notions of privacy and disclosure. Ordering discovery in those circumstances undermines principles of comity and reciprocity and impairs the United States' relationship with foreign nations.

II. A. Although the decision below ignores the severe burdens on nonparties and foreign sovereigns, Congress has taken a different, more balanced approach. It has authorized only limited forms of extraterritorial discovery in aid of U.S. proceedings. Under the FSIA, post-judgment discovery must be relevant to determining some type of relief authorized by the Act. Other federal statutes authorize U.S. courts to obtain discovery located in foreign countries in aid of domestic proceedings (letters rogatory under 28 U.S.C. 1781); to order discovery in the United States in aid of foreign proceedings (discovery orders under 28 U.S.C. 1782); and to obtain the presence of U.S. persons overseas (subpoenas under 28 U.S.C. 1783). What Congress has *never* done is take the giant step of allowing U.S. courts to order foreign discovery in aid of foreign proceedings. Congress has simply left that matter to foreign states and their own judicial systems. Neither the FSIA nor any other

source of federal law should be read to grant an authority that Congress has never seen fit to bestow.

B. The Federal Rules of Civil Procedure likewise do not authorize U.S. courts to order nonparties to produce foreign discovery for use solely in foreign litigation. The courts below erred by failing to interpret the Rules with due respect for the legitimate interests of foreign sovereigns and litigants. Neither Rule 45 nor Rule 69 supports the discovery ordered in this case. Rule 45 limits discovery directed toward nonparties—limits that the court of appeals did not even acknowledge and that respondent cannot satisfy. Rule 69 does not create a freestanding right to discovery, but rather allows discovery in post-judgment proceedings only in accordance with the normal rules governing discovery. Rule 69 therefore does not set aside the express limitations in Rule 45. Nor should it be read to create precisely the right to extraterritorial discovery in foreign litigation that Congress has never conferred directly.

C. This Court has expressed appropriate concern about projecting the reach of U.S. law beyond our shores in the absence of express congressional authorization. At a minimum, each of the federal laws potentially applicable to this case gives no "clear indication of an extraterritorial application." *Morrison* v. *Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2878 (2010). Under that standard, none of those federal laws authorizes discovery of materials located abroad solely for use in potential foreign litigation. If anything, the usual presumption against extraterritoriality is even more warranted in this context than in the securities-law context at issue in *Morrison*, because extending the reach of federal law here would interfere with the sovereignty of foreign nations. In this case, two non-

party financial institutions have been ordered to conduct worldwide discovery related to a foreign sovereign's overseas assets—assets that the parties acknowledge are not subject to attachment or execution in the United States. That is a remarkable result, and one that should require a clear, affirmative indication from Congress.

ARGUMENT

The decision below holds that, notwithstanding the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1330, 1602 *et seq.*, a judgment creditor may obtain broad, worldwide discovery of a foreign state's financial records from nonparty financial institutions, even if relevant only to foreign litigation and even if compliance would expose the financial institutions to civil and even criminal proceedings under foreign law. The court of appeals rested its decision on two bases: *first*, that discovery requests directed to nonparty financial institutions burden only those institutions, not foreign sovereigns themselves, and the burdens on those third parties can be largely ignored; and, *second*, that in any event such discovery does not implicate the sovereign immunity interests protected by the FSIA. See Pet. App. 3 (concluding that "Argentina's sovereign immunity is not affected" because "discovery is directed at third-party banks" and "the district court ordered only discovery, not the attachment of sovereign property").

Neither of those bases is correct. As a matter of both experience and common sense, worldwide discovery into the financial records of sovereign states imposes severe burdens on financial institutions and sovereigns alike. Gathering information from bank branches across the globe, potentially in violation of

foreign law, has proven exceedingly difficult when it has been possible at all, and the injury to a sovereign from the disclosure of its sensitive financial information is obvious. The lower courts' analysis essentially disregards those burdens, although they are and should continue to be highly relevant in interpreting the FSIA and other federal laws. The magnitude of the burdens at issue only underscores that U.S. courts lack authority to order extraterritorial discovery of a foreign sovereign's financial records for use in future foreign litigation.

I. WORLDWIDE DISCOVERY INTO THE FINANCIAL RECORDS OF FOREIGN SOVEREIGNS PLACES SEVERE BURDENS ON BOTH FINANCIAL INSTITUTIONS AND THE SOVEREIGNS THEMSELVES

Plaintiffs are increasingly attempting to use American courts in their efforts to reach assets held by foreign sovereigns abroad that are not subject to attachment or execution in the United States under the FSIA.[2] The decision below only encourages those ef-

[2] In this case and others, distressed-debt funds—or so-called "vulture" funds—have requested broad post judgment discovery against financial institutions in order to track the assets of foreign states overseas. See, *e.g., Aurelius Capital Partners* v. *Republic of Arg.*, No. 07-cv-2715, 2013 WL 857730 (S.D.N.Y. Mar. 7, 2013) (permitting general asset discovery of Argentina and eighteen non-party banks). Such funds also have requested that federal courts declare foreign instrumentalities—for example, foreign central banks—to be alter egos of their parent governments, even though there are no attachable assets available in the United States. Vulture funds hope to use those alter-ego declarations to reach assets held by the foreign instrumentalities anywhere in the world. See, *e.g.*, *EM Ltd.* v. *Banco Central de la República Arg.*, No. 06-cv-7792,

forts. There is no need to speculate about the way in which such efforts impact both financial institutions and foreign sovereigns. In only the eighteen months since the decision below, lower courts have ordered extremely intrusive discovery into the financial records of various foreign states, including through orders directed at nonparty financial institutions.[3] Those orders—and the many that are sure to follow—inflict serious injury on financial institutions and foreign states. In deciding the scope of permissible post-judgment discovery under the FSIA, this Court should take into account the extraordinary burdens and jeopardy imposed by the kind of discovery ordered in this case.

Doc. No. 186 (S.D.N.Y. Sept. 26, 2013), *appeal docketed*, No. 13-3819 (2d Cir. Oct. 3, 2013).

[3] See, *e.g.*, 08-cv-2541, Doc. No. 371 (S.D.N.Y. Sept. 25, 2013) (granting motions to compel discovery against several nonparty banks pertaining to Argentina's assets); *Aurelius Capital Partners*, 2013 WL 857730, at *1 (denying protective order as to subpoenas served on Argentina and a motion to quash the eighteen subpoenas served on nonparty banks for general asset discovery of Argentina); see also *Thai Lao Lignite (Thailand) Co.* v. *Gov't of Lao People's Democratic Republic*, 924 F. Supp. 2d 508, 519 (S.D.N.Y. 2013) (denying sovereign immunity objections to discovery orders and holding that "discovery [could] proceed as broadly as it would in a typical post-judgment context without regard to immunity issues"); *Servaas Inc.* v. *Republic of Iraq*, No. 09-cv-1862, 2013 WL 3146787, at *5 (S.D.N.Y. June 19, 2013) (holding that the FSIA did not preclude ordering broad post-judgment discovery related to Iraq's assets), *aff'd in part, rev'd in part*, 2013 WL 5913363 (S.D.N.Y. Nov. 4, 2013).

A. The Decision Below Subjects Nonparty Financial Institutions To Massive And Often Contradictory Discovery Obligations

1. The type of broad, extraterritorial discovery at issue is incredibly difficult to perform under even the best of conditions, because it requires financial institutions to undertake potentially hundreds of searches all over the world. This case is an example: the subpoenas served here on two nonparties, Banco de la Nación Argentina (BNA) and Bank of America, N.A., demanded the production of documents relating to the account information for hundreds of separate international accounts—including transfers to and from those accounts—over the course of several years.[4] As banks have explained in this and other cases, they do not have centralized databases that would permit employees in offices here in the United States to conduct global searches for such information. Rather, employees in each foreign branch or affiliate must conduct their own searches, generally in their own native languages.[5]

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[4] See J.A. 39-76 (subpoena issued to Bank of America, N.A.); J.A. 77-105 (subpoena issued to BNA).

[5] See, *e.g.*, 08-cv-2541, Doc. No. 280, at 2-3 (S.D.N.Y. Feb. 10, 2011) (declaration of general manager at BNA's New York branch; New York employees are not able to obtain information regarding accounts at other BNA branches); *Blue Angel Capital I LLC* v. *Republic of Arg.*, No. 10-cv-4782, Doc. No. 171, at 4 (S.D.N.Y. Nov. 7, 2012) (declaration of Citigroup director and associate general counsel; "[T]he New York office of Citibank [could not] undertake a search for customer information held by its branch or affiliate offices offshore without engaging the active assistance of personnel located in the jurisdictions where the search is to take place, and those personnel are the only individuals with direct access to the information.").

That is not simply a matter of bookkeeping or computer software. One of the reasons that many foreign branches operate without centralized databases is that *foreign law often requires it*. The laws of the United States generally provide for more sweeping discovery than the laws of foreign nations. See *Société Nationale Industrielle Aérospatiale* v. *U.S. Dist. Ct.*, 482 U.S. 522, 542 (1987) (*Aérospatiale*) ("It is well known that the scope of American discovery is often significantly broader than is permitted in other jurisdictions."). By contrast, the bank-secrecy, data-protection, and privacy laws and regulations of many foreign countries more strictly prohibit financial institutions from disclosing the records of their customers in response to civil actions. See, *e.g.*, Swiss Penal Code, Art. 273; French Monetary and Financial Code, Art. L 511-33; Uruguay Decree-Law 15332, § 25. Subpoenas directed at nonparty financial institutions here in the United States often seek extraterritorial discovery that is barred by foreign law.

As a result, the New York bank branches that are subject to these subpoenas must do more than attempt to coordinate scores of foreign searches in numerous foreign languages—although that in itself is a Herculean task. They must also navigate dozens of foreign legal regimes in the process and attempt to avoid civil and even criminal sanctions. See, *e.g.*, *Blue Angel Capital I LLC* v. *Republic of Arg.*, No. 10-cv-4782, Doc. No. 169, at 1, 7 (S.D.N.Y. Nov. 7, 2012) (explaining that Citibank would have to conduct searches at over 100 offices around the world and consult with local counsel in each of those jurisdictions). That effort consumes enormous resources, and yet courts tend to systematically underestimate the costs because they are imposed on nonparties and are often

felt far beyond the courts' jurisdiction. Indeed, the lower courts' analysis in this case appears to take no account at all of the burdens imposed on nonparties by broad, extraterritorial discovery.

2. Even when ordering bank branches overseas to disclose their customers' financial information would likely violate foreign law, lower courts often do it anyway. See, *e.g.*, *Gucci Am., Inc.* v. *Weixing Li*, No. 10-cv-4974, 2011 WL 6156936, at *10-11 (S.D.N.Y. Aug. 23, 2011) (ordering discovery of information acknowledged to be protected by Chinese bank secrecy laws); *Gucci Am., Inc.* v. *Curveal Fashion*, No. 09-cv-8458, 2010 WL 808639, at *4-5, 8 (S.D.N.Y. Mar. 8, 2010) (ordering discovery in potential violation of Malaysian law); *Strauss* v. *Credit Lyonnais, S.A.*, 249 F.R.D. 429, 447-448, 456 (E.D.N.Y. 2008) (ordering discovery in potential violation of French banking law). That is because, even having shown that foreign law likely bars the discovery, courts generally require a financial institution to further establish that a multifactor balancing test for international comity likewise bars the discovery. See Restatement (Third) of Foreign Relations Law § 442(1)(c) (1987) (Restatement). Depending on how a district court weighs those factors, a financial institution can be put to the Hobson's choice of violating either a U.S. court's discovery order or foreign law.

This case illustrates how imbalanced the test has become, with nonparty financial institutions almost always the loser. BNA contended that complying with the district court's discovery order would violate the laws of nine foreign jurisdictions. In a lengthy opinion, the court agreed that "ordering discovery would likely violate Uruguay's bank secrecy laws." *NML Capital, Ltd.* v. *Republic of Arg.*, No. 08-cv-2541,

2013 WL 491522, at *9 (S.D.N.Y. Feb. 8, 2013). The court noted that "[t]he punishment for violation can involve criminal sanctions on bank employees including three months to three years in prison" and "[a] violator could also receive fines of up to 50% of the minimum net worth and total or partial suspension of activities and revocation of its license." *Ibid.* The court nevertheless ordered production because, in its view, "the balance of applicable factors [under the Restatement] weighs in favor of disclosure." *Id.* at *1. The court therefore concluded "that compliance with the subpoena is warranted in this case even if it is in violation of foreign countries' laws." *Id.* at *12.[6]

This Court is currently awaiting the views of the Solicitor General in a similar case. See *Linde* v. *Arab Bank, PLC*, 706 F.3d 92, 114 (2d Cir. 2013) (refusing to vacate sanctions against the U.S. branch of a bank for failing to produce foreign documents in violation of foreign laws), *calling for the views of the Solicitor General*, 134 S. Ct. 500 (2013); see also *Linde* v. *Arab Bank, PLC*, 463 F. Supp. 2d 310, 313 (E.D.N.Y. 2006) (ordering production of foreign documents in violation of "bank secrecy laws * * * [that] are broadly phrased and prohibit not only the bank, but also bank employees, from disclosing information"), *aff'd*, 2007 WL 812918 (E.D.N.Y. Mar. 14, 2007). As these cases

[6] Notably, although the district court found that discovery was permissible in Argentina, Bolivia, and Chile, it did not find that discovery was permitted by Spain, Brazil, Panama, Paraguay, and the Cayman Islands. It instead concluded, in the face of competing evidence, that the laws of those nations are not clear with respect to whether they prohibit disclosing a customer's confidential information in response to a U.S. court's discovery order. It is therefore possible that the banks at issue here stand to face criminal or civil sanctions in countries besides Uruguay.

demonstrate, the danger to financial institutions from being ordered to violate foreign law is not abstract or academic; it is a real and ever-present concern that carries the risk of criminal and civil penalties for banks and their employees.

3. Although subpoenas seeking worldwide discovery inflict serious harm on nonparties, they are extremely difficult to challenge either in the trial court or on appeal. Federal Rule of Civil Procedure 45(d)(1) provides that the "party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena." Rule 45(d)(1) further provides that "[t]he court for the district where compliance is required must enforce this duty." But despite that clear language, lower courts often saddle the target of a subpoena with the obligation to prove that it should not be required to comply. That is precisely what the district court did here. See *NML Capital*, 2013 WL 491522, at *1 (finding that "[i]n all countries except Uruguay, BNA has failed to satisfy *its* burden of proof in demonstrating" that discovery was barred by foreign law) (emphasis added). Requiring nonparties to show that compliance will impose "undue burden or expense" effectively stands Rule 45 on its head by shifting the necessary showing from parties to nonparties.

There can be no disputing that the showing is very costly for nonparties to make. First, the nonparty financial institution must demonstrate that foreign law prohibits the requested discovery, which usually requires retaining an expert on foreign law for each foreign jurisdiction implicated by the subpoena. See, *e.g.*, *NML Capital*, 2013 WL 491522, at *4-9 (referring to declarations submitted by BNA regarding the laws

of nine foreign countries). Second, the nonparty financial institution must also demonstrate that the balance of factors under the Restatement tips in its favor, which typically requires submitting yet more evidence. For example, the nonparty has to address whether there are alternative means of securing the requested information. See *id.* at *11 (finding that BNA had not provided "details on what such [alternative] means would be" in this case). The nonparty also has to address the hardships that it faces from compliance. See *ibid.* ("Courts have required that the party resisting discovery provide information on the likelihood that the party would be prosecuted for producing the requested documents."). Needless to say, it is difficult for financial institutions to show a likelihood of prosecution, because they are not in the habit of flouting the laws of their host countries.

In the event that the district court interprets foreign law differently or strikes a different balance in the international comity factors, there is rarely any opportunity for meaningful appellate review. As a general matter, "[a] party that seeks to present an objection to a discovery order immediately to a court of appeals must refuse compliance, be held in contempt, and then appeal the contempt order." *Church of Scientology* v. *United States*, 506 U.S. 9, 18 n.11 (1992). Thus, to obtain appellate review and avoid violating foreign law, the financial institution must disregard the U.S. court's order and be held in contempt.[7] And even if the institution is willing to risk

[7] Here, the district court's discovery order was appealable by Argentina, which was able to raise "the central legal issue of whether obtaining discovery from a third party of a foreign sovereign's assets outside the United States infringes on sovereign immunity." Pet. App. 10 n.5. But that only highlights the inability of nonparties

that serious sanction, it faces the additional obstacle in cases like this one of proving that the lower court abused its discretion in balancing the Restatement factors. See, *e.g.*, *First City, Texas-Houston, N.A.* v. *Rafidain Bank*, 150 F.3d 172, 175-176 (2d Cir. 1998). In light of that deferential standard, nonparties are commonly left with no practical option other than to comply with extraterritorial discovery orders, no matter how broad, burdensome, or violative of foreign law.

4. When financial institutions comply with U.S. orders that have effects in foreign jurisdictions, that can cause foreign regulators to respond. In a recent case in the Second Circuit, Motorola Credit Corporation sought to collect a multi-billion dollar judgment against a group of defendants known as the Uzans. See *Tire Eng'g & Distrib. L.L.C.* v. *Bank of China Ltd.*, 740 F.3d 108, 112-113 (2d Cir. 2014). During post-judgment proceedings, the district court entered a restraining order prohibiting the transfer of any property belonging to the Uzans or their "agents." *Id.* at 113. That order was served on the New York branch of Standard Chartered Bank. The United Arab Emirates (UAE) branch of Standard Chartered subsequently identified significant interbank deposits in the UAE relating to a Jordanian bank that was allegedly an Uzan "agent." Although it sought relief from the restraining order, Standard Chartered's UAE branch nevertheless froze the deposits in the interim. See *ibid.*

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to obtain appellate review on their own initiative. In cases involving sovereigns, the decision to seek further review will rest with the sovereign; and in cases involving other types of parties, there may be no opportunity for further review at all.

That gave rise to action by Jordanian and UAE regulators. The Central Bank of Jordan confiscated documents from Standard Chartered's branch in Jordan. The UAE Central Bank debited sums equivalent to the interbank deposits from Standard Chartered's own account with the UAE Central Bank, and remitted those funds to the Jordanian bank. See 740 F.3d at 113. Although this issue concerned a U.S. court's restraining order rather than discovery order, the point here is simply that orders aimed at foreign conduct can cause substantial concern for foreign regulators. See, *e.g.*, *In re Advocat Christopher X*, Cour de cassation [Cass.] [supreme court for judicial matters] crim., Dec. 12, 2007, Bull. crim., No. 07-83.228 (Fr.) (convicting an attorney for violating a French blocking statute); *Strauss*, 249 F.R.D. at 450-451 (ordering a bank to produce discovery in violation of the French blocking statute notwithstanding *Christopher X*).

5. When foreign bank branches disclose confidential client information, that inevitably affects the willingness of foreign clients to transact business with financial institutions that have any presence here in the United States. Financial institutions owe strict duties of confidentiality to their clients, and generally are not permitted to share with others any of the information they hold on behalf of their clients. See, *e.g.*, Matteo Zambelli & Chiara Zambelli, *Obtaining Information From English Banks for Use in Foreign Civil Proceedings: The Banker's Duty of Confidentiality*, 18 N.Y. Int'l L. Rev. 169, 169 (2005) ("The duty of confidentiality that a bank owes to its customer is said to be a cornerstone in the success of a banking system, as it lies at the heart of the banker-customer relationship."). If foreign clients are aware that, by conducting business with institutions that have U.S.

offices, their financial records will be potentially subject to discovery in U.S. courts as a result, they will be less willing to transact with or through those institutions in the first place.

B. The Decision Below Likewise Harms Important Interests Of Foreign States And Thus Implicates Significant Sovereign Immunity Concerns

The Republic of Argentina and the United States are correct that merely because the subpoenas at issue were served on nonparty financial institutions, Argentina's interests as a sovereign nation are no less affected. Changing the name on a subpoena does not change reality. Discovery of its confidential financial records imposes the same harms on a foreign sovereign, regardless of whether it is directed to the sovereign itself or to its chosen banker. More broadly, to the extent discovery seeks disclosure of confidential information in third countries, it often offends the regulatory interests of those countries' governments. Even if the goal in a particular case is to search out the assets of a foreign sovereign that has not honored a U.S. judgment, ordering such discovery has far-reaching harmful effects that go to the core of why foreign sovereign immunity exists in the first place. The kind of discovery ordered here inevitably risks irritating foreign states, impugning their dignity, impairing the United States' relationship with them, and ultimately undermining the international system of comity and reciprocity.

1. As explained above, financial institutions owe a duty to their clients to maintain their records in confidence. When that client is a foreign sovereign, revealing its records produces the same injury as for

any other client. Just as a foreign state regards the judicial seizure of its property as an affront, see *Republic of Phil.* v. *Pimentel*, 553 U.S. 851, 866 (2008), its dignity is no less offended when the United States permits discovery into its financial records in aid of seizure and execution in some other country. See, *e.g.*, *Rubin* v. *Islamic Republic of Iran*, 637 F.3d 783, 795 (7th Cir. 2011) ("As a general matter, it is widely recognized that the FSIA's immunity provisions aim to protect foreign sovereigns from the burdens of litigation, including the cost and aggravation of discovery."); *id.* at 796 ("Discovery orders that are broad in scope and thin in foundation unjustifiably subject foreign states to unwarranted litigation costs and intrusive inquiries about their American-based assets.").

2. Ordering discovery of a foreign state's confidential financial records undermines the principles of comity and reciprocity that underlie the doctrine of foreign sovereign immunity. See *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 479 (2003) (noting that foreign sovereign immunity is meant "to give foreign states and their instrumentalities some protection from the inconvenience of suit as a gesture of comity between the United States and other sovereigns"). That is doubly true, of course, when disclosure violates foreign law. See *F. Hoffmann-LaRoche Ltd.* v. *Empagran S.A.*, 542 U.S. 155, 165, 169 (2004) (any application of U.S. law that creates "a serious risk of interference" with a foreign nation's regulation of its own affairs would amount to "an act of legal imperialism"); *Doe* v. *United States*, 487 U.S. 201, 218 n.16 (1988) (observing that "international comity questions" are implicated by "attempts to overcome protections afforded by the laws of another nation"). When disclosure violates the law of the foreign juris-

diction in which the discovery is sought, there is an injury to yet another foreign sovereign.

At a minimum, such disclosure "may be regarded by foreign states as demonstrating a lack of respect and may cause friction in the United States' foreign relations." U.S. Cert. Br. 15. Indeed, it has long been true that "[n]o aspect of the extension of the American legal system beyond the territorial frontier of the United States has given rise to so much friction as the requests for documents in investigation and litigation in the United States." Restatement § 442, Reporters' Notes; *Aérospatiale*, 482 U.S. at 548 (Blackmun, J., concurring in part and dissenting in part). The extent of that friction results from the fact that, as this Court has recognized, "[p]rivate plaintiffs often are unwilling to exercise the degree of self-restraint and consideration of foreign governmental sensibilities generally exercised by the U.S. Government." *Empagran S.A.*, 542 U.S. at 171 (internal quotation marks omitted).

The friction is made worse because foreign countries have their own procedures for obtaining discovery in their own courts. In this case, for instance, BNA introduced evidence that each of the relevant foreign jurisdictions provides alternative means for obtaining the discovery that respondent has requested. See 08-cv-2541, Doc. No. 338, at 17 (S.D.N.Y. Sept. 13, 2012). Foreign states can reasonably regard it as unjustified when litigants do not seek information abroad pursuant to the procedures and limits that govern in those respective jurisdictions.[8] And by

[8] In addition to showing respect for foreign sovereignty, requiring or encouraging litigants to seek discovery under foreign law when possible would have the additional benefit in many cases of

the same token, foreign states can reasonably regard it as offensive when litigants end-run foreign procedures and limits by turning to U.S. courts accustomed to different notions of privacy and disclosure. See, *e.g.*, Petition for Writ of Certiorari at 15, *Arab Bank* v. *Linde*, No. 12-1485 (June 24, 2013) (summarizing letters in the record from Jordanian and Palestinian officials regarding the importance of due respect in American courts for their financial privacy laws).

In recognition of the fact that "[c]ross-border discovery has become a major source of international legal conflict," the American Bar Association's House of Delegates recently resolved that U.S. courts should "consider and respect" the "data protection and privacy laws of any applicable foreign sovereign, and the interests of any person who is subject to" those laws, "with regard to data sought in discovery in civil litigation." Michael E. Burke, *Report to the House of Delegates*, 2012 A.B.A. Sec. Int'l L. Res. 103, at 1. It explained that "the laws of foreign countries, many with notions of privacy and disclosure that differ from or are much stricter than those in the United States[,] * * * are, quite frequently, given less than due consideration by courts in the United States." *Id.* at 2. The House of Delegates correctly concluded that "international comity" requires U.S. courts "to accommodate foreign interests even where the foreign system strikes a different balance," and that permitting discovery "in disregard or even defiance of foreign protective legislation" would "impede global commerce" and "harm the interests of U.S. parties in for-

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avoiding "undue burden and expense" on nonparties in U.S. proceedings under Rule 45.

eign courts." *Id.* at 2, 15 (internal quotation marks omitted).

II. U.S. COURTS LACK THE AUTHORITY TO ORDER THIS KIND OF EXTRATERRITORIAL DISCOVERY

Discovery is generally not a freestanding cause of action or form of relief in the federal courts. In this context, respondent must point to some source of law authorizing that discovery. See Fed. R. Civ. P. 26(b)(1) ("Parties may obtain discovery relating to any party's claim or defense."); 27 C.J.S. *Discovery* § 2 (2013) ("The purpose of discovery is to enable one who is asserting a right or claim to determine the exact nature of such right or claim and the extent thereof."). Here, there is no dispute that respondent seeks extraterritorial discovery concerning foreign assets that could be reached, if at all, only through litigation in foreign courts. But every available source of law—whether the FSIA, other federal statutes, the federal civil rules, or even state law as incorporated into federal law—accounts for the burdens that foreign discovery imposes on nonparties and sovereigns in ways that the lower courts here simply ignored. In short, no source of federal law supports unrestricted foreign discovery regarding foreign assets for use solely in potential foreign litigation.

A. Neither The FSIA Nor Other Federal Statutes Authorize U.S. Courts To Order Nonparties To Produce Extraterritorial Discovery Of A Foreign State's Financial Records For Use Only In Foreign Litigation

Respondent does not argue that any particular federal statute authorizes the discovery at issue in

this case. Rather, respondent contends only that the FSIA does not preclude such discovery. See Br. in Opp. 19. That contention is incorrect, but in any event it misses the broader point: namely, that no Act of Congress authorizes U.S. courts to order extraterritorial discovery of a foreign state's financial records for use solely in foreign litigation. Respondent needs to point to some authority for its discovery requests, not the absence of any denial of authority.

1. *The FSIA*. For the reasons given by petitioner and the United States, the FSIA does not permit the extraterritorial discovery ordered in this case. As the United States explains, the FSIA was enacted against the backdrop of a longstanding theory of absolute immunity. See U.S. Cert. Br. 1, 8. Although the FSIA creates an exception to that immunity for attachment of or execution on certain assets located in the United States, it makes no such exception for property located outside the United States. See *Autotech Techs. LP* v. *Integral Research & Dev. Corp.*, 499 F.3d 737, 750 (7th Cir. 2007) ("The FSIA did not purport to authorize execution against a foreign sovereign's property, or that of its instrumentality, wherever that property is located around the world."). Here, there is no dispute that respondent's requested discovery relates to assets of the Republic of Argentina that are located abroad. See Pet. App. 11. As a result, respondent's requested discovery is not relevant to determining any form of relief authorized by or available under the FSIA. Respondent therefore must point to some source of authority other than the FSIA to justify its discovery request.

2. *28 U.S.C. 1781-1783*. Respondent has not sought discovery pursuant to Sections 1781, 1782, and 1783 of Title 28, and with good reason. Those statutes

set forth the circumstances in which U.S. courts can order either foreign discovery or domestic discovery in aid of foreign proceedings, and none of them allows the discovery at issue in this case. Quite to the contrary, those statutes show the careful balancing of interests in which Congress engages in this area. The lower courts' orders here ignore the balance of interests that Congress has struck.

a. Under Section 1781, U.S. courts have the authority to issue requests for international judicial assistance—or what are called letters rogatory—to obtain discovery located in foreign countries. Letters rogatory are consistent with the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters art. 1, Mar. 18, 1970, 28 U.S.C. 1781 (Hague Convention on Evidence), and are generally honored by signatory nations.[9] They are less disruptive to international relations than orders entered in U.S. courts because foreign countries or tribunals may decline to honor the requests—for instance, on the ground that doing so would violate foreign law. See, *e.g.*, *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 563 F.2d 992, 995 (10th Cir. 1977) (observing that the Ontario Supreme Court had declined to enforce letters rogatory because enforcement would have caused "a violation of [Canada's] Uranium Information Security Regulations"). Accordingly, letters rogatory reduce the likelihood that

[9] See *Aérospatiale*, 482 U.S. at 562-63 (Blackmun, J., concurring in part and dissenting in part); *Conclusions and Recommendations of the Special Commission on the Practical Operation of the Hague Apostille, Service, Taking of Evidence and Access to Justice Conventions* 8 (2009) (noting "that the Evidence Convention is operating relatively smoothly and effectively").

nonparties will be subject to conflicting legal obligations under U.S. and foreign law.

b. Under Section 1782, U.S. courts have the authority to order discovery in aid of foreign tribunals. Specifically, "[t]he district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal." 28 U.S.C. 1782(a). That order may be issued in response to a "request made[] by a foreign or international tribunal or upon the application of any interested person." *Ibid.* The procedure established by Section 1782(a) governs the discovery of information that is intended "for use in a proceeding in a foreign or international tribunal." Here, respondent hopes to identify assets of the Republic that, although not subject to attachment or execution in U.S. proceedings under the FSIA, may be reached in future foreign proceedings.

Respondent, however, did not apply for an order directed to Bank of America and BNA pursuant to Section 1782(a). That may be because courts have held that Section 1782 only authorizes the compelled production of documents located here in the United States. See, *e.g.*, *In re Kreke Immobilien KG*, No. 13 Misc. 110, 2013 WL 5966916, at *4 (S.D.N.Y. Nov. 8, 2013) (collecting cases); *In re Godfrey*, 526 F. Supp. 2d 417, 423 (S.D.N.Y. 2007) ("[F]or purposes of [Section] 1782(a), a witness cannot be compelled to produce documents located outside of the United States."). Even assuming Section 1782 permitted extraterritorial discovery, it still would need to be in aid of foreign litigation "in reasonable contemplation." *Intel Corp.* v. *Advanced Micro Devices, Inc.*, 542 U.S. 241, 247 (2004). Here, respondent has not

shown that any proceeding to recover Argentina's assets in foreign jurisdictions "can or will be instituted within a reasonable period." *In re Intel Corp. Microprocessor Antitrust Litig.*, No. 05-1717-JJF, 2008 WL 4861544, at *11-15 (D. Del. Nov. 7, 2008).

In enacting Section 1782, Congress considered what authority U.S. courts should possess to order discovery in aid of foreign proceedings. It extended that authority to ordering production of documents located in the United States—but not documents located abroad—when necessary for pending or reasonably contemplated future foreign proceedings. This Court should not read the FSIA or any other source of federal law to confer a power on U.S. courts that Congress declined to grant in Section 1782, especially when to do so would require extending the reach of U.S. law into foreign nations. See, *e.g.*, *Will* v. *United States*, 389 U.S. 90, 97 n.5 (1967) ("This Court cannot and will not grant the Government a right of review which Congress has chosen to withhold."); *Mitchell* v. *Fed. Bureau of Prisons*, 587 F.3d 415, 421 (D.C. Cir. 2009) ("[W]e refuse to conclude that with one hand Congress intended to enact a statutory rule * * * but, with the other hand, it engrafted an open-ended exception that would eviscerate the rule.") (quoting *Abdul–Akbar* v. *McKelvie*, 239 F.3d 307, 315 (3d Cir. 2001) (en banc)).

c. Under Section 1783, U.S. courts may issue subpoenas to U.S. persons located abroad. Specifically, any federal court may order the issuance of a subpoena requiring "a national or resident of the United States who is in a foreign country" to appear as a witness or to produce documents, if it is "necessary in the interest of justice" and in civil cases if it is "not possible to obtain" the testimony or documents "in

any other manner." 28 U.S.C 1783(a). Respondent did not rely on Section 1783 as the basis for its subpoenas or comply with the procedures that the statute requires, see 28 U.S.C. 1783(b), nor could it have done so. The statute would not apply here because the subpoenas at issue were served on bank branches in the United States—not bank branches "in a foreign country" as Section 1783(a) requires. See, *e.g.*, *Estate of Ungar* v. *Palestinian Auth.*, 412 F. Supp. 2d 328, 335 (S.D.N.Y. 2006); S. Rep. No. 1580, 88th Cong., 2d Sess. 3782 (1964) (noting that amendments to Section 1783 and other provisions related to "subpoenaing witnesses in foreign countries *in connection with proceedings in the United States*") (emphasis added).

* * *

Congress has provided different ways for U.S. courts to obtain discovery located in foreign countries in aid of domestic proceedings (letters rogatory under Section 1781), to order discovery here in the United States in aid of foreign proceedings (discovery orders under Section 1782), and to obtain the presence of U.S. persons overseas (subpoenas under Section 1783). What Congress has *never* done, however, is take the additional step of allowing U.S. courts to order foreign discovery in aid of foreign proceedings. Congress has appropriately left that matter to foreign states and their own judicial systems. Neither the FSIA nor any other source of federal law should be read to grant an authority that Congress has never seen fit to bestow.

B. The Federal Rules Of Civil Procedure Do Not Authorize U.S. Courts To Order Nonparties To Produce Foreign Discovery For Use Only In Foreign Litigation

The Federal Rules of Civil Procedure likewise should not be expansively interpreted to authorize U.S. courts to order nonparties to produce foreign discovery for use solely in foreign litigation. Nothing in the Rules contemplates that litigants will use federal district courts as "clearinghouse[s] for information" to gather documents for use in foreign proceedings. Pet. App. 7.

1. As an initial matter, the decision below is inconsistent with this Court's instructions regarding cross-border discovery in *Aérospatiale*. In that case, this Court held that the Hague Convention on Evidence is not the exclusive method of obtaining civil discovery from foreign entities that are party-defendants in U.S. litigation. See 482 U.S. at 529. Although *Aérospatiale* did not address whether U.S. courts may order nonparties to produce foreign discovery, it recognized that even as to parties, "American courts * * * should exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position." *Id.* at 546. Indeed, as especially relevant here, this Court emphasized that U.S. courts should "take care to demonstrate due respect for *any special problem confronted by the foreign litigant on account of its nationality or the location of its operations*, and for *any sovereign interest expressed by a foreign state*." *Ibid.* (emphasis added).

The decisions below throw that cautionary warning to the wind. They fail even to consider the difficulties

and conflicting legal obligations imposed on the non-party financial institutions—such as the fact later found by the district court that discovery here puts BNA at risk of imprisonment, fines, and revocation of its banking license in at least one foreign jurisdiction (and potentially as many as six such jurisdictions, see *supra*, p. 11 n.6). Moreover, the discovery at issue in *Aérospatiale* was at least relevant to the claims being litigated in that case. By contrast here, respondent seeks discovery from nonparties that is not relevant to any claims capable of resolution in U.S. courts. Thus, if anything, the Court's direction in *Aérospatiale* to protect against the burdens of foreign discovery should apply with even greater force in this context.

2. In any event, the Federal Rules themselves do not authorize the discovery ordered in this case. Respondent served that discovery on Bank of America and BNA pursuant to Rules 34 and 45. See *supra*, p. 8 n.4; see also Fed. R. Civ. P. 34(c) (providing that discovery from a nonparty may be obtained "[a]s provided in Rule 45"). The court of appeals, however, did not address those rules. The court held instead that Rule 69 and New York state law authorize the discovery at issue. See Pet. App. 13-14. But whatever the purported source for respondent's subpoenas, none allows this type of extraterritorial discovery.

a. *Rule 45.* Far from providing support for respondent's position, Rule 45 is clear on its face that nonparties are entitled to greater protection from burdensome discovery than party-litigants. Rule 45 requires courts to "protect a person who is neither a party nor a party's officer from significant expense resulting from compliance" with a subpoena. Fed. R. Civ. P. 45(d)(2)(B)(ii). Rule 45 accomplishes

that in relevant part by providing that a nonparty may be required to produce documents only "at a place within 100 miles of where the [nonparty] resides, is employed, or regularly transacts business in person." Fed. R. Civ. P. 45(c)(2)(A) (2013).[10] As the Second Circuit acknowledged with regard to a similar provision of Rule 45, "[t]he purpose of the 100 mile exception is to protect such witnesses from being subjected to excessive discovery burdens in litigation in which they have little or no interest." *In re Edelman*, 295 F.3d 171, 178 (2002).

A fortiori, if nonparties should not be forced to incur the expense and difficulty of producing documents more than 100 miles from their workplaces or residences, they should not be compelled to shoulder the exponentially greater burdens associated with producing documents in numerous foreign jurisdictions. See, *e.g.*, *Miller* v. *Holzmann*, 471 F. Supp. 2d 119, 121 (D.D.C. 2007) (denying a motion to compel production of documents more than 100 miles from defendants' expert witnesses). Indeed, the existence of the 100-mile limitation itself demonstrates that Rule

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[10] This subsection of Rule 45 did not come into effect until December 13, 2013, but Rule 45 has always sought to protect nonparties from overly burdensome discovery. See Fed. R. Civ. P. 45 advisory committee's notes (noting that one of the purposes of the revisions was to "clarify and enlarge the protections afforded persons who are required to assist the court by giving information or evidence"); see also *Century Sur. Co.* v. *Master Design Drywall, Inc.*, No. 09-cv-0280, 2010 WL 2231890, at *1 (S.D. Cal. June 2, 2010) ("Underlying the protections of Rule 45 is the recognition that 'the word non-party serves as a constant reminder of the reasons for the limitations that characterize third-party discovery.'") (quoting *Dart Indus. Co.* v. *Westwood Chem. Co.,* 649 F.2d 646, 649 (9th Cir. 1980)).

45 does not remotely contemplate foreign discovery directed to a nonparty. It is inconceivable that the drafters of the Rules would have wanted to prevent nonparties from having to travel more than 100 miles, but would have accepted that nonparties could be forced to search for and produce documents in foreign countries all over the world.

b. *Rule 69*. The court of appeals did not address Rule 45, but held instead that the discovery at issue here is authorized by Rule 69 and New York state law. See Pet. App. 15. The court erred, however, in concluding that Rule 69 permits any and all post-judgment discovery so long as it is "calculated to assist in collecting on a judgment." *Id.* at 13. Rule 69 authorizes discovery in post-judgment proceedings only insofar as otherwise "provided in these rules or by the procedure of the state where the court is located." Fed. R. Civ. P. 69(a)(2). Respondent pursued discovery only under Rule 45, and as explained above, that rule does not permit federal courts to order nonparties to conduct extraterritorial discovery. And respondent did not invoke New York state law, so this case does not present the question of whether New York provides any procedure that would authorize the discovery at issue here.[11]

Nor should Rule 69 be interpreted to set aside the express limitations on nonparty discovery in Rule 45. Not only does Rule 69 incorporate the limitations

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[11] New York courts have denied similar discovery pursuant to the "well-established separate entity rule" under which "each branch of a bank is treated as a separate entity, in no way concerned with accounts maintained by depositors in other branches or at a home office." *Ayyash* v. *Koleilat*, 957 N.Y.S.2d 574, 580 (N.Y. Sup. Ct. 2012).

"provided in these rules," but the Federal Rules of Civil Procedure must be read as a coherent whole. See, *e.g.*, *Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 353-354 (1981). Rule 69 thus should not be interpreted to permit what Rule 45 prohibits. See *id.* at 354 (declining to attribute "a schizophrenic intent to the drafters" of the Federal Rules by interpreting one rule to limit discretion that another rule conferred). Moreover, Rule 69 should not be interpreted to create a right that Congress has thus far declined to confer on litigants, *i.e.*, the right to extraterritorial discovery for foreign litigation. See *supra*, pp. 21-25. In effect, respondent is attempting to use U.S. discovery rules as an end-run around the foreign discovery rules that would otherwise apply to its future actions before foreign tribunals. But when the Federal Rules contemplate action being taken in foreign countries, they are careful not to unilaterally displace whatever foreign rules govern that action. See, *e.g.*, Fed. R. Civ. P. 4(f) (service of summons abroad), 28(b) (depositions abroad). And as explained below, in case there were any remaining doubt, at the least Rule 69 does not clearly indicate that it should be given extraterritorial effect as this Court's precedents require.

C. The Presumption Against Extraterritoriality Requires Interpreting Federal Law Not To Authorize Foreign Discovery From Nonparties For Use Only In Foreign Litigation

The various federal laws that are potentially applicable to this case—the FSIA, 28 U.S.C. 1781 to 1783, and Rules 45 and 69—do not permit U.S. courts to order nonparties to conduct extensive discovery in foreign countries. But to the extent that any of those laws is ambiguous, at a minimum none gives any

"clear indication of an extraterritorial application." *Morrison*, 130 S. Ct. at 2878; see *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) ("[L]egislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.") (quoting *Foley Bros, Inc. v. Filardo*, 336 U.S. 281, 285 (1949)). Those federal statutes and rules must therefore be presumed "to apply only within the territorial jurisdiction of the United States." *Morrison*, 130 S. Ct. at 2877 (quoting *Arabian Am. Oil Co.*, 499 U.S. at 248); see *Kiobel* v. *Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1665 (2013) ("[N]othing in the text of the statute suggests that Congress intended causes of action recognized under it to have extraterritorial reach."). Indeed, applying the usual presumption against extraterritoriality is even more warranted in this context than in *Morrison*, because extending the reach of federal law here would interfere with the sovereignty of foreign nations. See *Kiobel*, 133 S. Ct. at 1667.

This case illustrates the reason for the presumption. Here, two nonparty financial institutions have been ordered to conduct extensive discovery in foreign countries. That discovery relates to a foreign sovereign's foreign assets—assets that the parties acknowledge are not subject to attachment or execution in the United States. That is a remarkable result: in the absence of any express authority to do so, U.S. courts have ordered bank branches in New York to gather documents overseas that can be of use, if at all, only in foreign litigation against a foreign sovereign. Moreover, compliance with these orders exposes the banks to potential civil and even criminal liability under foreign law. Imposing those types of extraterritorial burdens on nonparties does and should re-

quire a clear, affirmative indication from Congress. See *Morrison*, 130 S. Ct. at 2877 ("[U]nless there is the affirmative intention of the Congress clearly expressed to give a statute extraterritorial effect, we must presume it is primarily concerned with domestic conditions.") (internal quotation marks omitted). Congress has given no such indication here.

CONCLUSION

For the reasons set forth above, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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