American Bar Association
www.supremecourtpreview.org

No. 12-842

In the Supreme Court of the United States

REPUBLIC OF ARGENTINA,
Petitioner,
v.

NML CAPITAL, LTD.,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF OF *AMICI CURIAE* AURELIUS ENTITIES IN SUPPORT OF RESPONDENT

ROY T. ENGLERT, JR.
Counsel of Record
MARK T. STANCIL
JOSHUA S. BOLIAN
Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP
1801 K Street, N.W., Ste. 411
Washington, DC 20006
(202) 775-4500
renglert@robbinsrussell.com

Counsel for Amici *Aurelius Entities*

April 2, 2014

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. THE IMMUNITY FROM "ATTACHMENT ARREST AND EXECUTION" DOES NOT CONSTRAIN DISCOVERY 5

A. The Text Of The FSIA Does Not Support The Rule That The United States Proposes 6

B. The Discovery Order Is Consistent With The Purpose And "Nature" Of The FSIA..... 13

C. The Backdrop Against Which Congress Legislated Undermines The United States' Proffered Approach 20

D. The United States' Concerns About Foreign Policy Consequences Are Not Justified 24

II. THE DISCOVERY ORDER RESPECTS THE FSIA'S IMMUNITY FROM "ATTACHMENT ARREST AND EXECUTION" 30

CONCLUSION 33

TABLE OF AUTHORITIES

Page(s)

Cases

Af-Cap, Inc. v. *Chevron Overseas (Congo) Ltd.*,
475 F.3d 1080 (9th Cir. 2007)................................14

Alfred Dunhill of London, Inc. v. *Republic of Cuba*,
425 U.S. 682 (1976)..19

Butler v. *Sukhoi Co.*,
579 F.3d 1307 (11th Cir. 2009)..............................14

Chadbourne & Parke LLP v. *Troice*,
134 S. Ct. 1058 (2014)...10

Connecticut Bank of Commerce v. *Republic of Congo*,
309 F.3d 240 (5th Cir. 2002) 14

Connecticut Nat'l Bank v. *Germain*,
503 U.S. 249 (1992)...2

Cotton v. *PrivateBank & Trust Co.*,
235 F. Supp. 2d 809 (N.D. Ill. 2002) 33

De Letelier v. *Republic of Chile*,
748 F.2d 790 (2d Cir. 1984) 7

de Sanchez v. *Banco Cent. de Nicaragua*,
770 F.2d 1385 (5th Cir. 1985)................................27

Dole Food Co. v. *Patrickson*
538 U.S. 468 (2003)...12, 33

TABLE OF AUTHORITIES—Continued

Page(s)

E.I. DuPont de Nemours & Co. v. *Kolon Indus., Inc.*,
286 F.R.D. 288 (E.D. Va. 2012) 31

EM Ltd. v. *Republic of Argentina*,
473 F.3d 463 (2d Cir. 2007) 14

EM Ltd. v. *Republic of Argentina*,
720 F. Supp. 2d 273 (S.D.N.Y. 2010) 31

F. Hoffmann-La Roche Ltd. v. *Empagran S.A.*,
542 U.S. 155 (2004)...28

FG Hemisphere Assocs., LLC v. *Democratic Republic of Congo*,
637 F.3d 373 (D.C. Cir. 2011)...............7, 15, 25, 26

First Nat'l City Bank v. *Banco Para El Comercio Exterior de Cuba*,
462 U.S. 611 (1983)...30

Hansen v. *PT Bank Negara Indonesia (Persero), TBK*,
601 F.3d 1059 (10th Cir. 2010).............................14

Harlow v. *Fitzgerald*,
457 U.S. 800 (1982)...15

Hilton v. *Guyot*,
159 U.S. 113 (1895)...28

In re Papandreou,
139 F.3d 247 (D.C. Cir. 1998)................................14

TABLE OF AUTHORITIES—Continued

Page(s)

INS v. *Cardoza-Fonseca*,
480 U.S. 421 (1987)...25

Johnson v. *Jones*,
515 U.S. 304 (1995)...15

Kline v. *Burke Constr. Co.*,
260 U.S. 226 (1922).. 9-10

LeClair v. *Hart*,
800 F.2d 692 (7th Cir. 1986) 15

Libaire v. *Kaplan*,
760 F. Supp. 2d 288 (E.D.N.Y. 2011) 31

Marx v. *Gen. Revenue Corp.*,
133 S. Ct. 1166 (2013)...11

McKesson Corp. v. *Islamic Republic of Iran*,
52 F.3d 346 (D.C. Cir. 1995).................................27

Murray v. *Schooner Charming Betsy*,
6 U.S. (2 Cranch) 64 (1804) 28

New Orleans Pub. Serv., Inc. v. *Council of City of New Orleans*,
491 U.S. 350 (1989)...10

Nken v. *Holder*,
556 U.S. 418 (2009)...22

NML Capital, Ltd. v. *Republic of Argentina*,
727 F.3d 230 (2d Cir. 2013) 31

TABLE OF AUTHORITIES—Continued

Page(s)

Owen Equip. & Erection Co. v. *Kroger*,
437 U.S. 365 (1978)..8

Permanent Mission of India to the United Nations v. *City of New York*,
551 U.S. 193 (2007)....................................6, 19, 28

Peterson v. *Islamic Republic of Iran*,
627 F.3d 1117 (9th Cir. 2010)...............................23

Republic of Argentina v. *Weltover, Inc.*,
504 U.S. 607 (1992)..19, 25

Republic of Austria v. *Altmann*,
541 U.S. 677 (2004)............................21, 22, 25, 26

Republic of Iraq v. *Beaty*,
556 U.S. 848 (2009)..10

Republic of Mexico v. *Hoffman*,
324 U.S. 30 (1945)..17

Republic of Philippines v. *Pimentel*,
553 U.S. 851 (2008)...................................13, 14, 17

Richmark Corp. v. *Timber Falling Consultants*,
959 F.2d 1468 (9th Cir. 1992)...........................9, 24

Rubin v. *Islamic Republic of Iran*,
637 F.3d 783 (7th Cir. 2011) 14

TABLE OF AUTHORITIES—Continued

Page(s)

Samantar v. *Yousuf*,
130 S. Ct. 2278 (2010)................................18, 22, 25

Société Nationale Industrielle Aérospatiale v.
U.S. Dist. Court for the S. Dist. of Iowa,
482 U.S. 522 (1987)..14

The Schooner Exchange v. *McFaddon*,
11 U.S. (7 Cranch) 116 (1812) 20

Verlinden B.V. v. *Cent. Bank of Nigeria*,
461 U.S. 480 (1983)...................................19, 20, 21

W.S. Kirkpatrick & Co. v. *Envtl. Tectonics*
Corp., Int'l,
493 U.S. 400 (1990)..25

Walters v. *Indus. & Commercial Bank of*
China, Ltd.,
651 F.3d 280 (2d Cir. 2011) 6

Whitfield v. *United States*,
543 U.S. 209 (2005)...11

Statutes and Rules

28 U.S.C. § 1602 ....18, 21, 25

28 U.S.C. § 1603(b)(2) 12

28 U.S.C. § 1604 6

28 U.S.C. § 1605 7

TABLE OF AUTHORITIES—Continued

Page(s)

28 U.S.C. § 1605(a) 8, 10

28 U.S.C. § 1605(a)(2) 19

28 U.S.C. § 1605(b)(1) 11

28 U.S.C. § 1606 7

28 U.S.C. § 1607 7

28 U.S.C. § 1609 .... 3, 6, 10, 30

28 U.S.C. § 1610 .... 7, 23

28 U.S.C. § 1610(a)(2) 19

28 U.S.C. § 1610(a)(4)(B) 30

28 U.S.C. § 1610(e) 11

28 U.S.C. § 1611 .... 7, 23

28 U.S.C. § 1611(b)(1) 30

28 U.S.C. § 1611(b)(2) 30

Fed. R. Civ. P. 26(b)(1) 31

Fed. R. Civ. P. 69(a)(2) 9, 30

Fed. R. Civ. P. 82 8

Other Authorities

Aristotle, Physics, Book 2 18

TABLE OF AUTHORITIES—Continued

Page(s)

Black's Law Dictionary (4th ed. 1951)......................11

Foreign States Immunities Act 1985 s. 42(1) (Austl.)..26

H.R. Rep. No. 94-1487 (1976)............................*passim*

Arturo C. Porzecanski, *From Rogue Creditors to Rogue Debtors: Implications of Argentina's Default*, 6 Chi. J. Int'l L. 311 (2005)...................................26

Presidential Proclamation No. 8788, 77 Fed. Reg. 18,899 (Mar. 26, 2012)..................................27

Rep. of the Int'l Law Comm'n, 43d Sess., Apr. 29-July 19, 1991, U.N. Doc. A/46/10; GAOR, 46th Sess., Supp. No. 10 (1991).............................29

Restatement (Third) of Foreign Relations Law of the United States, § 442(1)(a) (1987)..................9

State Immunity Act, 1978, c. 33, § 15 (U.K.) 27

State Immunity Act, 1985, s. 17 (Sing.) 27

State Immunity Act, R.S.C. 1985, c. S-18, s. 15 (Can.)... 26-27

TABLE OF AUTHORITIES—Continued

Page(s)

Testimony of State Department Acting Legal Adviser Charles Brower, Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the H. Comm. on the Judiciary, 93d Cong., 1st Sess. (1973) 23

United Nations Convention on Jurisdictional Immunities of States and Their Property, G.A. Res. 59/38, U.N. Doc. A/RES/59/38 (Dec. 2, 2004) 29

Wright, Miller & Cooper, Federal Practice and Procedure (1992) 16

Xiaodong Yang, State Immunity in International Law (2012) 26

INTEREST OF *AMICI CURIAE*

Amici, referred to below as the "Aurelius Entities," comprise Aurelius Capital Master, Ltd., Aurelius Opportunities Fund II, LLC, ACP Master, Ltd., Aurelius Capital Partners, LP, and Blue Angel Capital I LLC.[1] Like respondent NML, *amici* are holders of defaulted Argentine bonds and—based on Argentina's express waiver of sovereign immunity and submission to the jurisdiction of U.S. courts and to U.S. law—sued Argentina in the Southern District of New York for breaching its contractual obligations. And, like respondent NML, *amici* have sought discovery from Argentina regarding its assets. See *NML Capital, Ltd.* v. *Republic of Argentina*, No. 13-4054(L) (2d Cir. appeal docketed Oct. 25, 2013). *Amici* therefore have a direct and substantial interest in U.S. courts' authority to order discovery and other appropriate relief against sovereigns that, to attract investment in their public debt, have expressly submitted to the jurisdiction of U.S. courts.

This brief responds to the *amicus* brief filed by the United States in support of petitioner. The United States has opposed respondent and *amici* in Argentina-related litigation, urging the courts to depart from the text of the Foreign Sovereign Im-

---

[1] This brief was not written in whole or in part by counsel for any party, and no person or entity other than *amici* and their counsel has made a monetary contribution intended to fund the preparation or submission of this brief. Petitioner has consented to the filing of this brief by letter, which was filed herewith. Respondent's blanket letter of consent to the filing of *amicus* briefs has been filed with the Court.

munities Act (FSIA). The United States has suggested that courts should base their decisions on supposed intentions behind the FSIA rather than the text Congress enacted, and has backed its arguments with vague suggestions that the foreign policy of the United States will suffer if the courts do not follow the United States' recommendations. The *amicus* brief filed by the Solicitor General in this case is of that ilk.

This Court should take this opportunity to confirm that, when enacting the FSIA, Congress meant what it said and said what it meant. That holding would respect the clear rules and careful balance among the Branches that the FSIA brought to sovereign immunity law. Contrary to the largely unexplained assertions made by the United States, affirming the court of appeals would not imperil the Nation's foreign relations. Indeed, reaffirming that courts enforce our laws according to their plain meaning—even in cases where one Branch of the government may prefer a different result—is a hallmark of the American legal system and the foundation of our Nation's stature in the international community.

INTRODUCTION AND SUMMARY OF ARGUMENT

This is a statutory interpretation case. As this Court has "stated time and again," "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-54 (1992). The FSIA makes no mention of prohibiting postjudgment discovery against sovereigns

who have submitted to the jurisdiction of U.S. courts. Nor does the statute purport to imbue sovereign property with categorical "immunity" or to prohibit any judicial action related to it, other than certain actions specifically prohibited by statute. Rather than speak in the categorical terms the United States attributes to it, the statute simply declares, in relevant part, that "the property in the United States of a foreign state shall be immune from attachment arrest and execution" by U.S. courts. 28 U.S.C. § 1609.

The United States seeks to transform that specific statutory restriction into blanket immunity from any judicial action that *concerns* sovereign property that is not itself subject to attachment, arrest, or execution. To that end, the United States points to "costs and burdens" and "foreign-relations concerns" it says will result from complying with the district court's discovery orders. U.S. Br. 9, 11. But, even if those were real worries here (they are not)—and even if the United States' concerns about such matters warranted deference (they do not)—they could not overcome the established tools of statutory interpretation. The FSIA's text, purpose, and history all demonstrate that "attachment arrest and execution" means "attachment, arrest, and execution," not "discovery."

The FSIA recognizes two immunities, which operate independently of one another: an immunity from jurisdiction, and an immunity from "attachment arrest and execution" of sovereign property. The former is not at issue here, since Argentina explicitly waived it and therefore voluntarily subjected itself to the full powers of the U.S. courts. If

either immunity applies in this case, therefore, it would be the immunity from "attachment arrest and execution." But, by its terms, that immunity does not encompass discovery of any stripe. Indeed, discovery is a power that accompanies a court's jurisdiction over a party, not its authority to attach or execute against property. The absence of "postjudgment discovery" from the list of immunities was no accident: Congress thought about discovery but did not include it in the FSIA's list of prohibitions.

The FSIA's purposes confirm what its text says. One purpose of the immunity from *jurisdiction* is to spare sovereigns the burdens of litigation. But that concern has no application when a sovereign is already subject to jurisdiction. That concern is especially inapplicable when the basis of jurisdiction is the sovereign's consent, and the consent was given to reassure investors that they could count on the sovereign to keep its promises and would have remedies if the sovereign did not keep its promises.

The FSIA's other purposes—among them, codifying the "restrictive theory" of immunity and replacing executive determinations with legislative rules—are in harmony with postjudgment discovery orders. Congress sought to replace the murky common-law system with clear legislative rules. And it replaced the common-law prohibition on enforcement against sovereigns with a mechanism for *satisfying* judgments, except in the specific ways—*e.g.*, "attachment arrest and execution" with respect to certain property—prohibited by the text. Erecting a barrier to asset discovery, which Congress did not prohibit,

would frustrate, not advance, those statutory objectives.

The United States' asserted foreign-relations concerns do not compel a different result in this case. Such concerns are entitled to no special deference in a statutory-interpretation case, even when the statute at issue is the FSIA. That aside, any such considerations here are minimal. Reciprocal treatment is uncommon in modern immunity law, and it is unlikely to arise given the exceptional facts of this case. Nor is comity implicated, as the discovery order here is fully consistent with international law. More important, such concerns cannot change the plain meaning of the FSIA's text. To be sure, there are special rules for sovereigns. But they are the ones set forth by Congress *in the FSIA*—there are no special rules *of statutory interpretation* entitling sovereign litigants to claim statutory immunities that the FSIA does not actually confer.

ARGUMENT

I. THE IMMUNITY FROM "ATTACHMENT ARREST AND EXECUTION" DOES NOT CONSTRAIN DISCOVERY

The United States contends that the FSIA limits postjudgment discovery from sovereigns. That is so, it maintains, even when courts have consent-based jurisdiction over the sovereign, which empowers courts to order such discovery.

For four reasons, the United States is incorrect. First, the text of the FSIA suggests no such limitation. Second, the purpose (or "nature") of the FSIA

supports limiting only the forms of enforcement enumerated in the statute—not discovery—against a sovereign that has been sued in its commercial capacity and has consented to jurisdiction. Third, the context in which the FSIA was enacted confirms that Congress meant to move away from uncertain common law and toward clear legislative rules set forth in the statute's text. Fourth, the discovery order presents no material reciprocity or comity concerns.

A. The Text Of The FSIA Does Not Support The Rule That The United States Proposes

When construing the FSIA, this Court "begin[s], as always, with the text of the statute." *Permanent Mission of India to the United Nations* v. *City of New York*, 551 U.S. 193, 197 (2007). The text of the statute does not bear the meaning that the United States ascribes to it.

1. At its core, the FSIA consists of two distinct immunities. First, it provides that foreign sovereigns "shall be immune from the jurisdiction of the courts of the United States" with certain exceptions. 28 U.S.C. § 1604. Second, it provides that "the property in the United States of a foreign state shall be immune from attachment arrest and execution" with certain different exceptions. *Id.* § 1609. These two immunities and their exceptions operate independently of one another. *E.g.*, *Walters* v. *Indus. & Commercial Bank of China, Ltd.*, 651 F.3d 280, 288 (2d Cir. 2011).

One result of the FSIA's distinct immunities is that courts might be able to issue judgments against sovereigns but not "attach[] arrest [or] execut[e]" on their property. See *De Letelier* v. *Republic of Chile*, 748 F.2d 790, 798 (2d Cir. 1984). That is because the exceptions to jurisdictional immunity, 28 U.S.C. §§ 1605-1607, are different from the exceptions to "attachment arrest and execution" immunity, *id.* §§ 1610-1611. For this reason, it is "not anomalous" to separate "a court's power to impose" orders on a sovereign—which follows from its jurisdiction—from "the question of a court's ability to enforce" those orders through attachment, arrest, or execution. *FG Hemisphere Assocs., LLC* v. *Democratic Republic of Congo*, 637 F.3d 373, 377 (D.C. Cir. 2011). The immunities are distinct; courts may issue orders that they lack the power to enforce through certain prohibited mechanisms. Accord U.S. Br. 12-13. On this much, the parties here are in agreement.

The question presented here, however, is whether the FSIA's immunity from "attachment arrest and execution" against property in the United States bars the discovery order. Argentina contends that, because this immunity shields some of its property in the United States from execution, the district court's authority to order discovery must be sharply limited. Arg. Br. 2. The court of appeals disagreed. It reasoned that the district court had jurisdiction because Argentina had expressly waived the FSIA's jurisdictional immunity. Pet. App. 18. And the jurisdiction of the federal courts empowers them to enter postjudgment discovery orders. Pet. App. 16, 18. The second immunity, from "attachment arrest and execution," did not constrain the order, which "or-

dered only discovery, not the attachment of sovereign property." Pet. App. 3.

2. It is undisputed that Argentina waived its immunity from suit as an inducement to investors who purchased its debt and therefore is "not . . . immune from the jurisdiction of courts of the United States." 28 U.S.C. § 1605(a); see Pet. App. 4. Argentina is thus subject to the full scope of the federal courts' authority, unless another provision of the FSIA specifically precludes its exercise. The federal courts' jurisdiction includes the power to issue post-judgment discovery orders like the order at issue here. The United States contends that the FSIA's prohibition on "attachment arrest and execution" against property in the United States also prohibits federal courts from ordering discovery regarding any sovereign property that does not fall within one of the limited exceptions to the "attachment arrest and execution" immunity. The United States is wrong.

The "jurisdiction of courts of the United States" comprises a broad array of powers. Encompassed within these powers are the powers enumerated in the Federal Rules of Civil Procedure. See *Owen Equip. & Erection Co.* v. *Kroger*, 437 U.S. 365, 370 (1978) ("[I]t is axiomatic that the Federal Rules of Civil Procedure do not create or withdraw federal jurisdiction.") (citing Fed. R. Civ. P. 82). Hence, a district court's exercise of a power enumerated in the Federal Rules derives from its jurisdiction over the case before it. Exercise of such a power does not require some separate source of authority, such as the authority to order execution against property.

The power to order postjudgment discovery from a litigant over which a court has jurisdiction is one of these powers. See Fed. R. Civ. P. 69(a)(2) ("[T]he judgment creditor . . . may obtain discovery . . . as provided in these rules or by the procedure of the state where the court is located."); Pet. App. 16. And it is beside the point that such discovery might lead abroad: "A court or agency in the United States, when authorized by statute or rule of court, may order a person *subject to its jurisdiction* to produce documents . . . relevant to an action or investigation, *even if* the information or the person in possession of the information is outside the United States." Restatement (Third) of Foreign Relations Law of the United States, § 442(1)(a) (1987) (emphases added); see also *Richmark Corp.* v. *Timber Falling Consultants*, 959 F.2d 1468, 1478 (9th Cir. 1992) (affirming a postjudgment discovery order against an instrumentality of a foreign sovereign).

The United States asserts that, although the district court had "jurisdiction to conduct" these proceedings, it was not "empowered to afford" the relief it did. Br. 30. But observing that the FSIA limits the "scope of relief" that a court may grant simply begs the question whether the FSIA prohibits a particular form of relief—*i.e.*, postjudgment discovery. The courts below have "afford[ed]" no "relief" that the FSIA prohibits.

Relatedly, the United States asserts that, because jurisdiction under the FSIA is a matter of legislative grace, it should be narrowly construed. U.S. Br. 18. In that respect, however, the lower courts' jurisdiction under the FSIA is no different than any other sort of jurisdiction. *Kline* v. *Burke Constr. Co.*, 260

U.S. 226, 234 (1922) ("Every [lower] court . . . derives its jurisdiction wholly from the authority of Congress."). And the federal courts have a "virtually unflagging" obligation to exercise the jurisdiction granted them. *New Orleans Pub. Serv., Inc.* v. *Council of City of New Orleans*, 491 U.S. 350, 359 (1989) (quotation marks omitted). Moreover, Congress did not suggest that it was conferring half-a-loaf jurisdiction. To the contrary, it provided that, where (as here) an exception applies, foreign sovereigns lack immunity from "the jurisdiction of courts of the United States"—period. 28 U.S.C. § 1605(a); see *Republic of Iraq* v. *Beaty*, 556 U.S. 848, 851 (2009) ("[I]f any of these [FSIA exceptions] is applicable, the state is subject to suit, and federal district courts have jurisdiction to adjudicate the claim.").

Both of these assertions rest on the United States' conclusory claim that "Congress provided foreign states with an independent entitlement to immunity in connection with litigation to enforce a judgment." U.S. Br. 18, 30. But one will search the FSIA's text in vain for such a categorical prohibition. To the contrary, that "independent entitlement" is an immunity only from "attachment arrest and execution." 28 U.S.C. § 1609. Had Congress intended that immunity to apply to any proceedings "in connection with" these remedies, it would have said so. See, *e.g.*, *Chadbourne & Parke LLP* v. *Troice*, 134 S. Ct. 1058 (2014) (construing statutory phrase "in connection with"). It did not.

3. The discovery order does not amount to "attachment arrest [or] execution." As the FSIA does not define "attachment," "arrest," or "execution," the Court should "adopt the common law definition of

[those] statutory terms." *Whitfield* v. *United States*, 543 U.S. 209, 213 (2005) (quotation marks omitted). None of these meanings covers the discovery order here. For example, the edition of Black's Law Dictionary that was current when the FSIA was enacted defines "attachment" as "[t]he act or process of taking, apprehending, or seizing persons or property . . . for the purpose of bringing a person before the court, [or] of acquiring jurisdiction over the property seized." Black's Law Dictionary 161 (4th ed. 1951). Likewise, it defines "execution of judgment or decree" as "putting into effect of final judgment of court." *Id.* at 678.[2] The common thread running through these definitions is the seizure of a property interest. The discovery order in this case effects no seizure.

Conspicuously absent from Section 1609 is a ban on "discovery in aid of enforcement" or anything like it. That absence is particularly telling because the legislative history shows that Congress thought about discovery but elected not to include it in the list of prohibited actions. See *Marx* v. *Gen. Revenue Corp.*, 133 S. Ct. 1166, 1175 (2013) ("[T]he *expressio unius* canon does not apply unless it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it." (quotation marks omitted)). The House Report states, "The bill does not attempt to deal with questions of discovery." H.R. Rep. No. 94-1487 at 23 (1976) ("House Report"). Rather, the Report indicates that "[e]xisting law appears to be adequate in this area. For example, if

---

[2] Elsewhere in the FSIA, Congress used "arrest" in the context of maritime law. See 28 U.S.C. §§ 1605(b)(1), 1610(e).

a private plaintiff sought the production of sensitive governmental documents of a foreign state, concepts of governmental privilege would apply." *Ibid.* Notably, these comments appear in the discussion of jurisdictional immunity, confirming that discovery follows jurisdiction, not the power to enforce.

The United States' sole response to this legislative history is to insist that Congress could not have meant to embrace the full gamut of existing discovery law. U.S. Br. 23. But the House Report suggests that Congress did just that, even after considering the ways in which discovery could present foreign-relations issues.

Reading "attachment arrest and execution" to mean "discovery" is a bridge too far, and this Court has refused to take much shorter leaps when interpreting the FSIA. *Dole Food Co.* v. *Patrickson*, for instance, concerned the meaning of "'shares or other ownership interest . . . owned by a foreign state.'" 538 U.S. 468, 473 (2003) (quoting 28 U.S.C. § 1603(b)(2)). An indirect subsidiary of the government of Israel argued that Israel effectively "owned" the subsidiary for FSIA purposes. *Ibid.* This Court disagreed, holding that "ownership" means direct ownership: "Where Congress intends to refer to ownership in other than the formal sense, it knows how to do so." *Id.* at 476. That distinction, arguably, was one "purely of form, not of substance." *Id.* at 485 (Breyer, J., concurring in part and dissenting in part). The distinction between enforcement and discovery, on the other hand, is fundamental—enforcement seeks satisfaction of the judgment and operates directly against property; discovery operates against persons and seeks information. Discov-

ery may seek information *about* property, but any steps taken against the property will come only after discovery. Unlike attachment, arrest, or execution, discovery does not operate on the property itself. Congress made a clear distinction between enforcement and discovery, and this Court should give that distinction effect.

B. The Discovery Order Is Consistent With The Purpose And "Nature" Of The FSIA

The principal focus of the United States' argument is not the FSIA's text but the "nature of immunity" it posits the statute (implicitly) confers. Br. 15; see Br. 15-20. The "nature" the United States sees in immunity, however, is peculiar to jurisdictional immunity, which Argentina does not have here. It has nothing to do with the separate "attachment arrest and execution" immunity at issue. And it ignores the broader purposes of the FSIA that undergird both of those immunities (which Argentina waived).

1. The United States claims that the "nature of immunity" requires "'foreign states and their instrumentalities'" to have "'some protection from the inconvenience of suit.'" Br. 15 (quoting *Republic of Philippines* v. *Pimentel*, 553 U.S. 851, 865 (2008)). It continues that discovery orders like the one in this case "could impose significant burdens on the foreign state." Br. 19. Thus, the United States contends, the FSIA does not tolerate such discovery orders.

That argument is misplaced for two reasons. First, the order in this case is directed at third-party

banks, not at Argentina. Pet. App. 5. It therefore would spare Argentina the heavy lifting of discovery.

Second, and more fundamentally, it is *jurisdictional* immunity that serves to protect sovereigns from the inconvenience of suit. The cases on which the United States relies generally concern whether a sovereign is amenable to suit to begin with. *E.g.*, *Pimentel*, 553 U.S. at 865; *Hansen* v. *PT Bank Negara Indonesia (Persero), TBK*, 601 F.3d 1059, 1063-64 (10th Cir. 2010); *Butler* v. *Sukhoi Co.*, 579 F.3d 1307, 1314 (11th Cir. 2009); *In re Papandreou*, 139 F.3d 247, 253 (D.C. Cir. 1998).[3] Where jurisdictional immunity might apply, it is unclear whether the courts may ask sovereigns to lift a finger. By compelling discovery, courts would demand the kind of action that jurisdictional immunity might otherwise prevent.

---

[3] Some courts, including the Second Circuit, have limited discovery after assuming jurisdiction. *E.g.*, *Rubin* v. *Islamic Republic of Iran*, 637 F.3d 783, 796 (7th Cir. 2011); *Af-Cap, Inc.* v. *Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1095-96 (9th Cir. 2007); *EM Ltd.* v. *Republic of Argentina*, 473 F.3d 463, 486 (2d Cir. 2007); *Connecticut Bank of Commerce* v. *Republic of Congo*, 309 F.3d 240, 260 n.10 (5th Cir. 2002). Except for the Seventh Circuit, however, those courts have not grounded those holdings on the FSIA. See Resp. Br. 31-32. Rather, district courts account for any foreign-relations concerns when they exercise their discretion over discovery. See *Société Nationale Industrielle Aérospatiale* v. *U.S. Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, 544 n.28 (1987). And the district court has done that here. Opinion, *NML Capital, Ltd.* v. *Republic of Argentina*, Dkt. No. 535 (S.D.N.Y. Feb. 8, 2013). The district court thus is not "proceed[ing] as though only private interests [a]re implicated." But see U.S. Br. 15.

The same is not true, however, of immunity from "attachment arrest and execution." Once a court has jurisdiction over a sovereign, it may order it to appear in court, respond to pleadings, and provide discovery—all of which may impose significant "inconvenience" on sovereigns. And a court may impose contempt sanctions should the sovereign fail to comply. *FG Hemisphere*, 637 F.3d at 379. Attachment, arrest, and execution might be unavailable, but that does not affect the court's power to issue orders to a sovereign over which it has jurisdiction.

The United States' analogy to qualified immunity, Br. 15, 16-17, confirms this point. Qualified immunity, like jurisdictional immunity under the FSIA, is an "immunity from suit." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 809 (1982). Once a court determines that this immunity does not apply, however, it may subject the defendant to the full rigors of jurisdiction. *E.g.*, *LeClair* v. *Hart*, 800 F.2d 692, 697 (7th Cir. 1986). That an immunity might have applied at the outset does not cast a shadow over the rest of the proceedings.[4]

---

[4] Even when the interest in avoiding the burdens of litigation is relevant—as it is in a qualified-immunity case, and in an FSIA case in which jurisdiction is doubtful, but not here, where jurisdiction is established—this Court will not allow it to trump other important considerations. For example, in *Johnson* v. *Jones*, 515 U.S. 304 (1995), the United States as *amicus curiae* argued that the "'the need to protect officials against the burdens of further pretrial proceedings and trial' justifies a relaxation of the" requirement that issues be separable from the merits to justify an interlocutory appeal. *Id.* at 315 (quoting

When one considers why U.S. courts have jurisdiction over Argentina, it becomes even clearer why it would make no sense to hold that some residuum of immunity from the inconveniences and burdens of litigation remains. Argentina waived sovereign immunity, "irrevocably" and "to the fullest extent permitted by the law[]." Pet. App. 4 n.1. It did so for the purpose of making its bonds as attractive as possible to potential investors. The concept that a residuum of the FSIA's immunity *from suit* restricts the litigation rights of those investors is directly contrary to the instrument that induced them to do business with Argentina, is unsupported in the text of the FSIA, and constitutes the worst kind of bait-and-switch by the sovereign debtor. Argentina promised the broadest permissible waiver of immunity when doing so served its interest to attract investment, but now seeks to use the fully waived immunity as support for a broad construction of the separate statutory provisions governing enforcement of judgments. The Court should reject that effort. Argentina's claim of immunity from discovery must stand or fall entirely based on the FSIA's immunity from "attachment arrest and execution."

2. The FSIA's "attachment arrest and execution" immunity, the only one that could apply here, protects interests different from those protected by the (waived) immunity from suit. None is affected here.

Wright, Miller & Cooper, Federal Practice and Procedure § 3914.10, at 656 (1992)). This Court unanimously disagreed.

First, the "attachment arrest and execution" immunity guards sovereigns from the indignity of seizure by a U.S. court of their property within the United States. A "judicial seizure," this Court has explained, "may be regarded as an affront to [a sovereign's] dignity and may . . . affect our relations with it." *Pimentel*, 553 U.S. at 866 (second alteration in original) (quotation marks omitted); see U.S. Br. 14 (collecting citations). And that indignity is quite specific. Not only was it limited to the seizure of property; it was limited to the seizure of property in the possession of the foreign state. *Republic of Mexico* v. *Hoffman*, 324 U.S. 30, 37-38 (1945). If a sovereign held title to property, but did not possess it, that property was fair game. *Ibid.* A court order that merely concerns, but does not take, sovereign property is another step removed from the indignity that Section 1609 guards against. In particular, a discovery order operates *in personam* (and, in this case, only against banks). It is not the same as an *in rem* remedy like a judicial seizure of property.

Second, the FSIA restricts attachments and arrests to prevent courts from securing *quasi in rem* jurisdiction over foreign sovereigns that could not otherwise be sued here. Congress was concerned that "the fortuitous presence of property in the jurisdiction" was "involving U.S. courts in litigation not involving any significant U.S. interest or jurisdictional contacts." House Report 26. Attachments of property that created jurisdiction were "giv[ing] rise to serious friction in United States[] foreign relations." *Id.* at 27.

The discovery order at issue implicates neither of those protections for sovereigns.[5] It does not seize any Argentine property. Nor does it create jurisdiction that otherwise would be lacking; Argentina sold its bonds and consented to suit in the United States.

3. The United States' "nature" argument is, fundamentally, an argument about the FSIA's purpose. Cf. Aristotle, Physics, Book 2, Part 8 ("[N]ature is a cause, a cause that operates for a purpose."). By focusing narrowly on one purpose of one (inapplicable) FSIA immunity, however, the United States overlooks the purposes that animate the statute as a whole.

Congress expressly declared the purposes of the FSIA. 28 U.S.C. § 1602. Those purposes, as this Court has summarized them, are "(1) to endorse and codify the restrictive theory of sovereign immunity, and (2) to transfer primary responsibility for deciding 'claims of foreign states to immunity' from the State Department to the courts." *Samantar* v. *Yousuf*, 130 S. Ct. 2278, 2285 (2010) (quoting 28 U.S.C. § 1602). Those purposes are fully consistent with the discovery order in this case.

---

[5] The United States asserts that "a primary purpose *of execution immunity* is to protect against the burdens of litigation." U.S. Br. 11 (emphasis added). Yet its brief offers no substantial support for that proposition. The United States cites cases that state, correctly, that a primary purpose of *jurisdictional* immunity is such protection, and elides the major distinction between jurisdictional and execution immunity, even after touting that distinction elsewhere in its brief.

First, the discovery order comports with the "restrictive theory" of sovereign immunity. The "restrictive theory" was in 1976, and is today, followed by "the majority of other countries." *Permanent Mission of India*, 551 U.S. at 199. Under that theory, "'the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*).'" *Ibid.* (quoting *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 711 (1976)). The restrictive theory, in other words, "confine[s]" immunity "to suits involving the foreign sovereign's public acts." *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 487 (1983). Suits involving the sovereign's "strictly commercial acts" generally are not covered. *Ibid.*; see 28 U.S.C. §§ 1605(a)(2), 1610(a)(2) (establishing exceptions for commercial activities).

Consistent with the restrictive theory, the discovery order is related to Argentina's commercial acts, not its sovereign acts. It is rooted in NML's efforts to collect on bonds that Argentina promised to pay in U.S. dollars in New York City. Argentina, therefore, is wearing a decidedly commercial hat, not a sovereign one. See *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607 (1992) (holding that Argentina's issuance of such bonds is a commercial act). And, though the discovery order is directed at what Argentina calls sovereign property, it is calculated to lead to discovery of attachable property. See part II, *infra*.

Second, the discovery order infringes no immunity recognized by the courts. The Executive Branch opposes the discovery order issued here, but a "principal purpose" of the FSIA was "to transfer the determination of sovereign immunity from the

executive branch to the judicial branch." House Report 7. That transfer aimed to "assur[e] litigants" that immunity determinations "are made on purely legal grounds." *Ibid.* Applying established canons of statutory interpretation to the FSIA reveals no infirmity in the discovery order. See section I.A, *supra*.

C. The Backdrop Against Which Congress Legislated Undermines The United States' Proffered Approach

The United States reminds us that "[i]t is important to keep in mind the backdrop against which Congress legislated." Br. 22. We could not agree more. Congress enacted the FSIA against a backdrop of uncertainty and disarray, and it sought to institute clear legislative rules in their stead. Adopting the atextual gloss that the United States encourages here would be a large step *away* from that objective. Likewise, restricting discovery in aid of enforcement would frustrate Congress's goal of moving away from the common law.

1. For most of the Nation's history, there was no need for Congress to draw a clear line on foreign sovereign immunity, because there was generally little question about whether immunity did or did not apply. Shortly after the Founding, this Court held that sovereigns were "in no respect amenable to [one] another." *The Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch) 116, 137 (1812). The Executive Branch consistently determined that friendly sovereigns were absolutely immune, and the courts deferred to those determinations. See *Verlinden*, 461 U.S. at 486-87.

That changed in 1952, when the Executive Branch adopted the "restrictive theory"—and thereby "thr[e]w immunity determinations into some disarray." *Republic of Austria* v. *Altmann*, 541 U.S. 677, 690 (2004). In the years that followed, "sovereign immunity determinations were made in two different branches, subject to a variety of factors, sometimes including diplomatic considerations." *Verlinden*, 461 U.S. at 488. As a result, "the governing standards were neither clear nor uniformly applied." *Ibid.* The resulting mess pleased no one. It put the Executive Branch "in the awkward position of a political institution trying to apply a legal standard." House Report 8. And it left litigants facing "considerable uncertainty." *Id.* at 9.

"In 1976 Congress sought to remedy these problems by enacting the FSIA, a comprehensive statute containing a set of legal standards." *Altmann*, 541 U.S. at 691 (quotation marks omitted). The FSIA operates like any other civil procedure statute. It "grants federal courts jurisdiction" in certain cases, *ibid.*, "contains venue and removal provisions," *ibid.*, and "prescribes the procedures for obtaining personal jurisdiction," *ibid.* And, as with any other civil procedure statute, Congress expected the "courts of the United States" to "decide[]" questions arising under the statute, 28 U.S.C. § 1602, on "purely legal grounds," House Report 7.

The United States would have this Court retreat from the plain words of the statute to "principles" supposedly emanating from textual penumbras. *E.g.*, U.S. Br. 10, 12, 24. It "hardly furthers Congress' purpose of clarifying the rules," however, to "lump" discovery "in with" attachment, arrest, and

execution "without so much as a word spelling out" the contours of this new rule. *Samantar*, 130 S. Ct. at 2291 (quotation marks omitted). In enacting the FSIA, Congress sought to avoid "ambiguous and politically charged 'standards.'" *Altmann*, 541 U.S. at 699 (citation omitted). This Court, mindful of the context of the FSIA's enactment, should stay that course.

2. The backdrop that the United States deems relevant is a common-law rule of "absolute immunity from execution," which "necessarily did not contemplate discovery into a foreign state's assets." U.S. Br. 22. That background is irrelevant at best; if anything, it contradicts the position of the United States.

The "canon of construction that statutes should be interpreted consistently with the common law . . . does not help us to decide the antecedent question whether . . . Congress intended the statute to govern a particular field." *Samantar*, 130 S. Ct. 2289-90. As discussed above, the FSIA did not "attempt to deal with questions of discovery." House Report 23. Any common-law rules limiting discovery from sovereigns, therefore, shed little light on the FSIA.

To the extent that pre-FSIA common law is relevant, it shows that Congress meant to allow discovery in this context. This Court construes statutes to displace the common law "when a statutory purpose . . . contrary" to the common law "is evident." *Nken* v. *Holder*, 556 U.S. 418, 433 (2009) (quotation marks omitted). The FSIA evinces such a purpose. Whereas the common law provided comprehensive immunity from execution, the FSIA established significant exceptions to that immunity,

displacing the common-law rule. See 28 U.S.C. §§ 1610-1611; House Report 8 ("[T]he bill would remedy, in part, the present predicament of a plaintiff who has obtained a judgment against a foreign state."); Testimony of State Department Acting Legal Adviser Charles Brower, Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the H. Comm. on the Judiciary, 93d Cong., 1st Sess. 15 (1973) ("[I]f you are able to gain jurisdiction and obtain a judgment you would have a reasonable chance of obtaining satisfaction of judgment.").[6]

Permitting postjudgment discovery is consonant with Congress's goal of affording plaintiffs some relief. As the United States recognizes, "[a] judgment creditor bears the burden of identifying the

---

[6] Acting Legal Adviser Brower's statement to a congressional committee considering the legislation that became the FSIA is more probative of Congress's intent than the statement in some case law that "Congress fully intended to create rights without remedies, aware that plaintiffs would often have to rely on foreign states to voluntarily comply with U.S. court judgments." *Peterson* v. *Islamic Republic of Iran*, 627 F.3d 1117, 1128 (9th Cir. 2010), quoted in U.S. Br. 13. In any event, the creation of rights without remedies is an unfortunate byproduct of the FSIA's provisions in certain circumstances rather than an animating purpose of the statute, and there is no reason to construe the FSIA to create rights without remedies except when its text, purpose, and history so dictate. The creation of rights without remedies is particularly to be avoided when a foreign sovereign waived its immunity to the fullest extent permitted by law, for the very purpose of inducing investment in its debt instruments by promising that there *would* be remedies unless prohibited by law.

particular property to be executed against and proving that it falls within a statutory exception to immunity from execution." Br. 14. In this context as in any other, discovery is the main way creditors may seek to meet that burden. And discovery is just as significant, if not more so, for assets located abroad. See Resp. Br. 44-46; *Richmark*, 959 F.2d at 1478 ("TFC can seek to execute the judgment in whatever foreign courts have jurisdiction over Beijing's assets, but TFC needs discovery in order to determine which courts those are." (citation omitted)).

Any common-law limitations on discovery were a mere byproduct of the virtually absolute immunity it provided. See U.S. Br. 22. Having eliminated that immunity, Congress did not silently retain its byproduct.

D. The United States' Concerns About Foreign Policy Consequences Are Not Justified

Although the FSIA's text, purpose, and history warrant affirming the court of appeals, the United States warns that doing so "could disrupt foreign policy." Br. 10. Its views on potential consequences, however, warrant no special deference. Apart from that, its views are unfounded. The discovery order here exposes the United States to no material reciprocal harm, and, since it is consistent with international law, it presents no comity concerns.

1. The views of the United States are no more persuasive here than they are in other statutory interpretation cases. The question presented "con-

cerns interpretation of the FSIA's reach—a 'pure question of statutory construction . . . well within the province of the Judiciary.'" *Altmann*, 541 U.S. at 701 (quoting *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 446, 448 (1987)). Hence, although "the United States' views on such an issue are of considerable interest," they "merit no special deference." *Ibid.* In particular, the Court has found unpersuasive claims that "foreign relations and the reciprocal protection of United States officials abroad would be undermined if we do not adopt [the petitioner's] reading of the [FSIA]." *Samantar*, 130 S. Ct. at 2290 n.14; see also *W.S. Kirkpatrick & Co.* v. *Envtl. Tectonics Corp., Int'l*, 493 U.S. 400, 408-09 (1990) (rejecting United States' argument that "international comity, respect for the sovereignty of foreign nations on their own territory, and the avoidance of embarrassment to the Executive Branch in its conduct of foreign relations" required expanding act-of-state doctrine "into new and uncharted fields"). Such "broad, generic argument[s]" are "appropriately presented to Congress—not [the courts]." *FG Hemisphere*, 637 F.3d at 380.

The United States cannot change those holdings by imputing its reasoning to Congress. See U.S. Br. 23. As in every case, the question "is not what Congress 'would have wanted' but what Congress enacted in the FSIA." *Weltover*, 504 U.S. at 618. That is especially true where, as here, Congress directed that the "courts of the United States," not the Executive Branch, shall "decide[]" "[c]laims of foreign states to immunity." 28 U.S.C. § 1602.

2. The United States expresses concern that "broad discovery could lead to reciprocal adverse treatment of the United States in foreign courts."

Br. 20. But that is misdirection. It is an abstract, generalized concern, not an opinion about the effects of imposing orders on "*particular* petitioners," which might warrant some consideration. See *Altmann*, 541 U.S. at 702. Indeed, the particular petitioner here is a "rogue debtor" whose acts the United States itself "strongly" condemns—hardly a basis for reciprocity concerns. See U.S. Br. 6 n.2; Arturo C. Porzecanski, *From Rogue Creditors to Rogue Debtors: Implications of Argentina's Default*, 6 Chi. J. Int'l L. 311 (2005). And, in expressing this concern, the United States "does not explain how [it] would be harmed if it were found in contempt under reciprocal circumstances." See *FG Hemisphere*, 637 F.3d at 380 (rejecting similar argument).

Compelling discovery in this particular case would do little to harm the United States as a litigant abroad. "[I]n practice," one commentator has observed, "very few courts have expressly referred to [reciprocity] as the basis for immunity." Xiaodong Yang, State Immunity in International Law 57 (2012). Indeed, "there are even statements dismissing it as having any bearing on the question of immunity." *Ibid.* Accordingly, holding that Argentina lacks immunity here is unlikely to subject the United States to the same treatment in foreign courts.

Moreover, any threat posed in this case is unlikely to extend beyond this Nation's relationship with Argentina, which Argentina has already damaged. The foreign statutes that recognize reciprocity, see U.S. Br. 21 n.9, provide that it applies only if the executives of those nations say so. *E.g.*, Foreign States Immunities Act 1985 s. 42(1) (Austl.); State

Immunity Act, R.S.C. 1985, c. S-18, s. 15 (Can.); State Immunity Act, 1985, s. 17 (Sing.); State Immunity Act, 1978, c. 33, § 15 (U.K.). Thus, foreign executives must choose to subject the United States to reciprocal treatment. And reciprocity applies, if at all, only on a nation-by-nation basis. See *ibid.* Thus, the United Kingdom (for example) would not retaliate unless a U.S. court entered a broad discovery order against it—which is unlikely, as other friendly sovereigns are unlikely to echo Argentina's behavior. There is no reason to believe that reciprocity in this case would extend beyond Argentina, whose actions have already strained this Nation's relationship with it. See Presidential Proclamation No. 8788, 77 Fed. Reg. 18,899, 18,899 (Mar. 26, 2012) (withholding benefits from Argentina because it "has not acted in good faith in enforcing arbitral awards in favor of United States citizens").

Finally, the United States' reciprocity argument proves too much. If it applies to postjudgment discovery, as the United States contends, it has every reason to apply also to prejudgment discovery, which is no narrower in scope. Yet courts routinely order prejudgment discovery from sovereigns over which they have jurisdiction. *E.g.*, *McKesson Corp.* v. *Islamic Republic of Iran*, 52 F.3d 346, 349 (D.C. Cir. 1995); *de Sanchez* v. *Banco Cent. de Nicaragua*, 770 F.2d 1385, 1389 (5th Cir. 1985). And the United States does not contend that this established practice flouts the FSIA. Consequently, striking down the discovery order here on reciprocity grounds would upend the law elsewhere.

3. The United States also claims that the discovery order at issue "threaten[s] harm to the United

States' foreign relations more generally." Br. 21; see also Br. 9, 10, 13, 19 (citing "comity" concerns). That perceived harm is even more remote than the potential harm of reciprocity. See U.S. Br. 21 ("likely to breed resentment"); *ibid.* ("a perception of unequal treatment could arise"); Br. 22 ("may result over the long term in reduced cooperation"). At any rate, there is no ground for concern, as the discovery order here is consistent with international law.

The United States' concerns would, at most, call for the Court to harmonize the FSIA with international law. The "comity of nations" fixes no concrete rule of decision. See *Hilton* v. *Guyot*, 159 U.S. 113, 165 (1895) ("'[Comity] is clearly [an] imperfect obligation . . . . Every nation must be the final judge for itself, not only of the nature and extent of the duty, but of the occasions on which its exercise may be justly demanded.'" (quoting Joseph Story, Commentaries on the Conflict of Laws § 33)). The only tenet of comity that has any bearing here is the maxim that courts should "construe[] ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations." *F. Hoffmann-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155, 164 (2004). Such "interference" exists, however, only if the challenged construction of the FSIA "violate[s] the law of nations." See *Murray* v. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

In enacting the FSIA, Congress sought to "codif[y] international law at the time of the FSIA's enactment." *Permanent Mission of India*, 551 U.S. at 199. It succeeded. Although immunity statutes vary, "many" provisions of the United Nations Convention on Jurisdictional Immunities of States and Their

Property "reflect accepted international principles and practices" in this area. U.S. Br. 28 n.12.[7] This U.N. Convention mirrors the FSIA in relevant part. It establishes separate immunities from "jurisdiction" and from "measures of constraint, such as attachment, arrest, or execution." G.A. Res. 59/38, arts. 5, 19, U.N. Doc. A/RES/59/38 (Dec. 2, 2004) ("U.N. Convention"). And, like the FSIA, it does not indicate that the latter immunity affects discovery.

Indeed, international law supports the discovery order here. The U.N. Convention contemplates that sovereign defendants might "fail[] . . . to produce any document or disclose any other information for the purposes of a proceeding." Art. 24(1). In other words, it expressly contemplates discovery. And it sets no boundaries on that discovery, whether before or after judgment. As with the FSIA, the drafters expected other law, such as government-secrets privileges, to provide any necessary boundaries. Rep. of the Int'l Law Comm'n, 43d Sess., Apr. 29-July 19, 1991, U.N. Doc. A/46/10, at 150-51; GAOR, 46th Sess., Supp. No. 10 (1991) ("States, for reasons of

---

[7] The Solicitor General acknowledges that the United States is not a party to the Convention and that it has not yet entered force. U.S. Br. 28 n.12. To the extent any provision of the Convention might be inconsistent with the FSIA, therefore, it is the FSIA that must govern. But in key part the Convention's provisions *reaffirm* the consistency of the FSIA with international law, including the propriety of sharply distinguishing, as the FSIA does, between jurisdictional immunity and enforcement immunity. By eliding that distinction at various places in its brief, and by ignoring the Convention's provisions contemplating discovery, the United States takes a position supported by neither the FSIA nor the Convention.

security or their own domestic law, may sometimes be prevented from submitting certain documents or disclosing certain information to a court of another State.").

In sum, the discovery order is consonant with international law and so would cause no "perceived affronts." But see U.S. Br. 21. Foreign sovereigns cannot question the United States' claim to a power that they themselves possess.

II. THE DISCOVERY ORDER RESPECTS THE FSIA'S IMMUNITY FROM "ATTACHMENT ARREST AND EXECUTION"

The breadth of the discovery order does not offend the FSIA and related laws. That order does not "attach[]," "arrest," or "execut[e]" upon any property. See 28 U.S.C. § 1609. Specifically, it does not seize property abroad, central bank property (*id.* § 1611(b)(1)), military property (*id.* § 1611(b)(2)), diplomatic or consular property (*id.* § 1610(a)(4)(B)), or the property of a separate entity (*First Nat'l City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983)). It orders only discovery.

The discovery order relates to some assets that might be immune from enforcement in the United States, but that does not render it invalid. Plaintiffs who have obtained judgments "may obtain discovery from any person—including the judgment debtor—as provided" by the Federal Rules of Civil Procedure or applicable state law. Fed. R. Civ. P. 69(a)(2). Those rules limit discovery to "all information 'reasonably calculated to lead to the discovery of admissible evidence' relevant to enforcement of the judgment."

E.I. DuPont de Nemours & Co. v. *Kolon Indus., Inc.*, 286 F.R.D. 288, 292 (E.D. Va. 2012) (quoting Fed. R. Civ. P. 26(b)(1)); accord, *e.g.*, *Libaire* v. *Kaplan*, 760 F. Supp. 2d 288, 293 (E.D.N.Y. 2011).

Applying these rules, the discovery order here is permissible because it is reasonably calculated to lead to discovery of Argentine assets that are not immune. Orders like the one in this case might seem unnecessary to discover the nonimmune assets of an ordinary litigant. But Argentina is no ordinary litigant. It has announced in open court that it will "not voluntarily obey" court orders. *NML Capital, Ltd.* v. *Republic of Argentina*, 727 F.3d 230, 238 (2d Cir. 2013). In fashioning the discovery order, the district court accounted for the lengths to which Argentina has gone to hide its assets. See, *e.g.*, *EM Ltd.* v. *Republic of Argentina*, 720 F. Supp. 2d 273, 280 (S.D.N.Y. 2010) ("When the Republic wishes to use the funds of a particular entity, there is no real separation . . . . But when plaintiffs in these cases are seeking to recover on their just judgment debts, the situation shifts and a wall of separation suddenly appears."), vacated on other grounds, 652 F.3d 172 (2d Cir. 2011). In these circumstances, an "understanding of Argentina's financial circulatory system," Pet App. 5 (quotation marks omitted), is necessary to locate Argentina's nonimmune assets. Even so, the district court limited its order by, for example, excluding information that would lead only to assets located in Argentina, as those assets presumably are beyond any court's reach. Pet. App. 7-8.

The United States' qualms stem from its premise that the FSIA does more than limit attachment, arrest, and execution.[8] As explained above, see part I, *supra*, that premise is mistaken. Thus, the fact that the FSIA prohibits execution against certain types of property in the United States, such as consular property, does not bar discovery regarding that property. But see U.S. Br. 24-30. Similarly, the fact that Federal Rule of Civil Procedure 69 permits other statutes to override it, U.S. Br. 31, is of no consequence; the FSIA does not conflict with Rule 69. (Besides, only Rule 69(a)(1) provides that "a federal statute governs to the extent it applies"; this case involves the distinct provisions of Rule 69(a)(2).) The FSIA does not restrict the courts' jurisdiction to conduct supplemental proceedings because it provides no penumbral "immunity in connection with" enforcement. See U.S. Br. 30; section I.A.2, *supra*. And the United States' arguments about the FSIA's purpose and the consequences of the discovery order are misplaced. See sections I.B and I.D, *supra*.

Sovereign immunity is particularly inapplicable here, as the discovery order is directed not to the sovereign itself but to third parties. Blocking third-party discovery would not advance the purpose of "giv[ing] *foreign states and their instrumentalities*

---

[8] The United States suggests that its rule should be applied "[e]ven were the question here one of discretion rather than authority." Br. 24 n.11. But Argentina did not ask this Court to determine whether the district court abused its discretion. Arg. Br. i. Indeed, it appears to disavow discretion as a basis for reversal. Arg. Br. 47-48. In any event, as explained in the text, the district court did not abuse its discretion.

some protection from the inconvenience of suit." See *Dole Food Co.*, 538 U.S. at 479 (emphasis added). Sovereigns need not involve themselves in third-party discovery. And "comity and reciprocity concerns," U.S. Br. 33, are weak where the sovereign has voluntarily given information to banks, which are the routine targets of American discovery. See, *e.g.*, *Cotton* v. *PrivateBank & Trust Co.*, 235 F. Supp. 2d 809, 815 (N.D. Ill. 2002) ("[Transaction records] are to be produced in the ordinary course of discovery because they are business records made in the ordinary course of business.").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

ROY T. ENGLERT, JR.
Counsel of Record
MARK T. STANCIL
JOSHUA S. BOLIAN
Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP
1801 K Street, N.W., Ste. 411
Washington, DC 20006
(202) 775-4500
renglert@robbinsrussell.com

April 2, 2014