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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 FOR RESPONDENT

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QUESTION PRESENTED

Whether the Foreign Sovereign Immunities Act of 1976 ("FSIA") limits a judgment creditor's entitlement to post-judgment discovery in aid of execution when: (1) the FSIA's text does not limit post-judgment discovery; (2) the discovery is served on third-party commercial banks that have not claimed immunity; and (3) the foreign-state judgment debtor has irrevocably waived any immunity that it might otherwise possess from post-judgment execution or legal process.

RULE 29.6 STATEMENT

The corporate disclosure statement included in the brief in opposition remains accurate.

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF ADDENDA

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

TABLE OF AUTHORITIES
(continued)

Page(s)

RULES

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page(s)

BRIEF FOR RESPONDENT

Respondent NML Capital, Ltd. respectfully submits that the judgment of the court of appeals should be affirmed.

CONSTITUTIONAL PROVISIONS, STATUTORY PROVISIONS, AND RULE

The relevant constitutional provisions, statutory provisions, and rule are reproduced in the addendum to this brief.

INTRODUCTION

Argentina and the government do not contest that the Federal Rules of Civil Procedure entitle judgment creditors to broad post-judgment discovery in aid of execution; that the FSIA does not address post-judgment discovery; that NML holds valid judgments against Argentina; that the subpoenas at issue were served on third parties that have not claimed sovereign immunity, not on Argentina itself; or that Argentina has broadly waived, in the bonds from which this case arises, any immunity from post-judgment execution or legal process. The question before this Court, therefore, is whether the Foreign Sovereign Immunities Act of 1976 ("FSIA") bars the post-judgment discovery sought here despite *each* of these points. The answer is no.

The FSIA's text provides no basis for limiting the post-judgment discovery routinely available to judgment creditors. The FSIA provides immunity from "attachment arrest and execution" for certain "property in the United States of a foreign state." 28 U.S.C. § 1609; *see id.* § 1610. But the statute says nothing about post-judgment discovery, and discovery is neither attachment nor execution. Indeed, Ar-

gentina and the government concede that "the FSIA does not expressly address [post-judgment] discovery." Pet. Br. 22; *see* U.S. Br. 15. That concession should end this case: The Court does not adopt a statutory construction with "no basis or referent in [the statute's] language." *Milner* v. *Dep't of the Navy*, 131 S. Ct. 1259, 1267 (2011). The statutory text alone thus compels the conclusion that the FSIA does not limit post-judgment discovery.

The structure of the FSIA confirms that textual conclusion. When Congress provided immunities in the FSIA—from suit and from post-judgment attachment and execution—it specified the precise scope of those immunities to make clear when they would (and would not) apply. If Congress had wanted to provide immunity from post-judgment discovery, it would likewise have specified the scope of (and limitations on) such immunity. Congress's decision not to do so makes clear that it did not intend to provide any such immunity. Similarly, when Congress wanted to override normal rules of procedure in FSIA proceedings, it did so in the FSIA's text. Yet nowhere does the FSIA displace the ordinary rules for post-judgment discovery under the Federal Rules of Civil Procedure.

The conclusion that the FSIA does not limit post-judgment discovery is further supported by two acknowledged purposes of the statute. *First*, Congress sought to achieve clarity in the FSIA regarding the scope of foreign sovereign immunity. Before the FSIA was enacted, immunity determinations were shrouded in uncertainty because the standards governing them were unclear and inconsistently applied. The FSIA was Congress's attempt "to remedy these problems" by establishing a "comprehensive" frame-

work for resolving all foreign sovereign immunity claims in U.S. courts. *Republic of Austria* v. *Altmann*, 541 U.S. 677, 691 (2004). But the FSIA provides such clarity only if courts make immunity determinations based on the standards actually set forth in its text. Imposing an atextual limitation on discovery would undermine the clarity and certainty that Congress sought to achieve.

Second, the FSIA reflects a delicate balance struck by Congress between the interests of foreign states and the interests of those with claims or judgments against those states. Congress was acutely aware of foreign-relations concerns, and thus provided robust immunity to foreign states in the FSIA, but it did not do so without limit. Instead, Congress understood that U.S. courts have a vital interest in providing a forum for resolving disputes against foreign states and for allowing judgment creditors to enforce any judgments that they secure, and it limited the scope of immunity accordingly. Reading immunities into the FSIA that Congress did not create would upset the balance that Congress drew.

Against all of this, Argentina and the government embrace the sovereign immunity regime that preceded the FSIA; rely on a newly minted clear statement rule that would presume the Federal Rules are inapplicable in FSIA proceedings unless Congress specifically provided otherwise; and invoke foreign-policy justifications for reading into the FSIA a discovery limitation not found in its text. The Court should reject these arguments.

The FSIA was enacted precisely because of the unreliability and inconsistency of the pre-FSIA common law—and because it so often departed from the restrictive approach to sovereign immunity that

Congress wanted U.S. courts to apply. Thus, "the [FSIA]—and not the pre-existing common law—indisputably governs the determination of whether a foreign state is entitled to sovereign immunity." *Samantar* v. *Yousuf*, 130 S. Ct. 2278, 2285 (2010).

Argentina's and the government's clear statement rule—that Congress was required to accept the background Federal Rules on discovery for those rules to apply—gets the law backwards. As this Court has held, federal law should not be read to displace the Federal Rules of Civil Procedure *unless* the federal law contains a "plain statement of a preemptive intent." *Société Nationale Industrielle Aérospatiale* v. *U.S. Dist. Ct. for the S. Dist. of Iowa*, 482 U.S. 522, 539-40 (1987). Neither Argentina nor the government claims that Congress made any such statement in the FSIA.

To the extent that Argentina and the government invoke foreign-policy concerns, they ignore that the text of the FSIA addresses the policy concerns that Congress chose to address. For this reason, the Court has already rejected the argument that the Federal Rules governing discovery do not fully apply in the face of strong foreign-relations interests. *See Société Nationale*, 482 U.S. at 539-40. And the Court has also refused to "articulate specific rules"—not set forth in the Federal Rules—to limit discovery in light of such interests. *Id.* at 546.

Yet even if this Court were to hold that the FSIA imposes some limitations on post-judgment discovery, it should nonetheless uphold the district court's discovery order on either of two grounds. *First*, even if the FSIA limits post-judgment discovery against *sovereigns*, it does not limit such discovery against *non-sovereigns*, including the third-party banks sub-

ject to the subpoenas at issue here. *Second*, even if the FSIA could be deemed to limit discovery against non-sovereigns in certain circumstances, NML would still be entitled to the requested discovery because Argentina waived any immunity from post-judgment discovery in aid of execution.

For each of these reasons, the court of appeals' judgment should be affirmed.

STATEMENT

1. "[F]oreign sovereigns have no right to immunity in our courts." *Republic of Austria* v. *Altmann*, 541 U.S. 677, 688 (2004). As this Court observed in *Schooner Exchange* v. *McFaddon*, "[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute" and "is susceptible of no limitation not imposed by itself." 11 U.S. (7 Cranch) 116, 136 (1812). *Schooner Exchange* also recognized that all sovereigns had "implicitly agreed," "as a matter of comity," not to assert jurisdiction "over other sovereigns in certain classes of cases." *Altmann*, 541 U.S. at 688. Thus, the United States had "relax[ed]" its "absolute and complete jurisdiction" over foreign sovereigns "in cases under certain peculiar circumstances." *Schooner Exchange*, 11 U.S. (7 Cranch) at 136.

Because foreign sovereign immunity rested, from the beginning, on political considerations rather than legal restrictions, the political branches long took primary responsibility for determining whether foreign states were immune from suit in U.S. courts. *See Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 486 (1983). During that time, a foreign state could ask the State Department to recognize its claim for immunity by filing a "suggestion of immunity" with the court. *Ex parte Republic of Peru*, 318 U.S. 578, 581 (1943). For more than a century and a

half after the Founding, the Executive Branch generally asked U.S. courts to extend immunity "in all actions against friendly foreign sovereigns." *Verlinden*, 461 U.S. at 486. Consistent with this Court's direction that "[i]t is . . . not for the courts to deny an immunity which our government has seen fit to allow," *Republic of Mexico* v. *Hoffman*, 324 U.S. 30, 35 (1945), U.S. courts were required to accept the State Department's suggestions as "conclusive" and "to proceed no further" with the case, *Ex parte Peru*, 318 U.S. at 588-89.

At the same time, this Court emphasized that "[i]t is . . . not for the courts . . . to allow an immunity on new grounds which the government has not seen fit to recognize." *Hoffman*, 324 U.S. at 35. Thus, if the State Department did not file a suggestion, or if the sovereign asserted its immunity without any intervention by the Department, courts would evaluate whether the claim satisfied the immunity principles typically applied by the State Department. *See id.* at 34-36; *see also Ex parte Peru*, 318 U.S. at 587-88. Applying these principles, courts would exercise jurisdiction over foreign states in a variety of circumstances, including when a foreign state consented to becoming a party, waived its immunity from suit, or failed to follow settled procedures for asserting immunity, and when the immunity claimed was not one recognized by the political branches. *See*, *e.g.*, *Porto Rico* v. *Ramos*, 232 U.S. 627 (1914) (consent); *Richardson* v. *Fajardo Sugar Co.*, 241 U.S. 44 (1916) (waiver); *In re Muir*, 254 U.S. 522, 533 (1921) (failure to follow "the correct practice" for asserting immunity); *Hoffman*, 324 U.S. at 38 (immunity not recognized by political branches). This history belies Argentina's suggestion that courts historically "had *no*

power to act with regard to foreign states." Pet. Br. 26 (emphasis added).

Over time, the international community became disenchanted with the "absolute" theory of sovereign immunity and increasingly embraced a "restrictive" theory. Under the restrictive theory, "immunity is confined to suits involving the foreign sovereign's public acts, and does not extend to cases arising out of a foreign state's strictly commercial acts." *Verlinden*, 461 U.S. at 487. The State Department announced in 1952 that it was adopting the restrictive theory. *See* Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State, to Philip B. Perlman, Acting U.S. Attorney General (May 19, 1952), *reprinted in* 26 Dep't State Bull. 984-85 (1952); *see also*, *e.g.*, *Samantar* v. *Yousuf*, 130 S. Ct. 2278, 2285 (2010).

"[A]pplication" of the State Department's change in policy, however, "proved troublesome." *Verlinden*, 461 U.S. at 487. The new policy, which "was not initially enacted into law," *ibid.*, "threw immunity determinations into some disarray," *Samantar*, 130 S. Ct. at 2285 (internal quotation marks omitted). Courts did not uniformly adhere to the restrictive theory, and some upheld immunity claims even when the restrictive theory would not have applied. *See Verlinden*, 461 U.S. at 487-88. More troublingly, even after the State Department changed its policy, the "standards" "governing" its immunity determinations were "neither clear nor uniformly applied." *Id.* at 488. As in the past, many immunity claims filtered through the State Department, *see id.* at 487, and courts continued to heed the Department's suggestions, *see Altmann*, 541 U.S. at 690. But the State Department did not faithfully apply the re-

strictive theory. *See Verlinden*, 461 U.S. at 487. Instead, it sometimes filed suggestions based on "political," *Altmann*, 541 U.S. at 690, "diplomatic," *Verlinden*, 461 U.S. at 488, or other "nonlegal" considerations, H.R. Rep. No. 94-1487, at 9 (1976).

2. "Congress responded to the inconsistent application of sovereign immunity by enacting the FSIA." *Samantar*, 130 S. Ct. at 2285. Embracing the restrictive theory, Congress sought in the FSIA "to clarify" the "standards" governing immunity decisions and "to 'assur[e] litigants that . . . [such] decisions are made on purely legal grounds and under procedures that insure due process.'" *Verlinden*, 461 U.S. at 488 (first alteration and ellipses in original). "To accomplish these objectives," the FSIA contains "a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities." *Ibid.*

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

ble in the same manner and to the same extent as a private individual under like circumstances," 28 U.S.C. § 1606.

Separate, non-jurisdictional provisions of the FSIA govern post-judgment attachment and execution. Section 1609 provides that "the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611." 28 U.S.C. § 1609. Section 1610, in turn, provides several exceptions to attachment immunity, including circumstances when property is used for commercial activity in the United States. *See id.* § 1610(a).

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

Although Sections 1609 and 1610 define in detail the contours of the attachment immunity provided by the FSIA, those provisions say nothing about discovery. The only provision of the FSIA addressing discovery permits stays in some cases involving terrorism where discovery would "significantly interfere with a criminal investigation or prosecution, or a national security operation." 28 U.S.C. § 1605(g)(1). Otherwise, Congress "kept in place a court's normal discovery apparatus in FSIA proceedings." *FG Hemisphere Assocs., LLC* v. *Democratic Republic of Congo*, 637 F.3d 373, 378 (D.C. Cir. 2011); *see also*, *e.g.*, H.R. Rep. No. 94-1487, at 23 (noting that the FSIA

"does not attempt to deal with questions of discovery").

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

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

In 2004, Argentina announced a debt restructuring plan. Rather than a "consensual" restructuring, Pet. Br. 10, Argentina imposed a take-it-or-leave-it plan that provided bondholders with a recovery of only 25 to 29 cents on the dollar. *See* Hal S. Scott, *Sovereign Debt Default: Cry for the United States,*

Not Argentina 3-4 (Wash. Legal Found., Working Paper No. 140, 2006), *available at* http://www.wlf.org/upload/Scott%20WP%20Final.pdf. Argentina imposed that 71-to-75-cent "haircut" even though it was able to pay substantially more. *See* Arturo C. Porzecanski, *From Rogue Creditors to Rogue Debtors: Implications of Argentina's Default*, 6 Chi. J. Int'l L. 311, 321 (2005). And to frustrate creditors that would pursue remedies in court, Argentina spirited assets out of the United States and began structuring its finances to avoid attachment under the FSIA or the laws of foreign jurisdictions. *See The Government Is Protecting Itself from Attachment*, La Nación, Feb. 5, 2004 (C.A. J.A. 988-92).

Argentina's economic fortunes have since improved. *See*, *e.g.*, *Argentina Says Can Rebuild Reserves Used to Pay Debt*, Reuters, Mar. 7, 2012. Despite that prosperity, however, Argentina "has not acted honestly and in good faith" to satisfy its debts. *EM Ltd.* v. *Republic of Argentina*, 720 F. Supp. 2d 273, 301 (S.D.N.Y. 2010), *vacated on other grounds*, *NML Capital, Ltd.* v. *Banco Central de la República Argentina*, 652 F.3d 172 (2d Cir. 2011). Although Argentina insists that it "did not repudiate [its] debt" and has "treat[ed] its private creditors equitably," Pet. Br. 10, it has instead engaged in a pattern of "willful defiance" of its legal obligations. *NML Capital, Ltd.*, 652 F.3d at 196 (internal quotation marks omitted).

4. NML Capital, Ltd. owns beneficial interests in bonds on which Argentina defaulted in 2001. To persuade investors to buy its bonds despite its checkered credit history, Argentina had comprehensively waived its sovereign immunity. It consented to application of New York law and to the jurisdiction of

the courts of that State. Pet. App. 4 & n.1. Concerning immunity from enforcement of judgments, Argentina further promised:

> To the extent that the Republic or any of its revenues, assets or properties shall be entitled . . . to any immunity . . . from attachment prior to judgment, f[ro]m attachment in aid of execution of judgment, from execution of a judgment or from any other legal or judicial process or remedy, . . . the Republic has irrevocably agreed not to claim and has irrevocably waived such immunity to the fullest extent permitted . . . (and consents generally for the purposes of the Foreign Sovereign Immunities Act to the giving of any relief or the issue of any process in connection with any Related Proceeding or Related Judgment) . . . .

J.A. 106.

Invoking Argentina's waiver of immunity and consent to jurisdiction, NML brought eleven actions in the United States District Court for the Southern District of New York based on those bonds. The district court entered five money judgments in NML's favor, totaling (with interest) more than $1.6 billion. *See* Pet. App. 4. The district court also granted summary judgment to NML as to principal in the six other actions, in which NML's claims total (again with interest) more than $900 million. *See ibid.* Although "Argentina does not dispute . . . that the judgments against it are valid and enforceable," *id.* at 18—and although it claims not to have "repudiate[d] [its] debt," Pet. Br. 10—it has not paid anything on those judgments, *see* Pet. App. 4.

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

NML's subpoena to Bank of America sought information about accounts maintained by or on behalf of Argentina, including account balances, closures, and transaction histories. Pet. App. 5-6. Because Argentina often holds assets in the name of entities affiliated with it, the subpoena defines "Argentina" to include Argentina's agencies, ministries, instrumentalities, political subdivisions, employees, and others acting on its behalf. *See id.* at 6.

The Bank of America subpoena also sought information about electronic fund transfers sent through the Society for Worldwide Interbank Financial Telecommunication ("SWIFT") system. Pet. App. 6 & n.3. International transfers involving U.S. dollars are often routed through intermediary banks in New York, including Bank of America. *See id.* at 6 n.3. The subpoena directed Bank of America to produce documents relating to transactions conducted through its SWIFT portal that identified Argentina as the beneficiary, originator, or any other related party to a transaction. *See id.* at 6; *see also* J.A. 55. Those documents would enable NML to follow Ar-

gentina's flow of funds to locate its assets. *See*, *e.g.*, Pet. App. 6 & n.3.

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

b. Argentina moved the district court to quash the Bank of America subpoena, and both banks objected to the subpoenas. Pet. App. 7. NML, in turn, moved to compel the banks to comply with the subpoenas. *Ibid.* Although it had "irrevocably agreed not to claim . . . such immunity," Argentina asserted that the subpoenas violated the very FSIA immunity from attachment and execution that it had "irrevocably waived." J.A. 106. Apart from its immunity arguments, Argentina did not contend that the subpoenaed information was privileged and did not argue that the subpoenas should be narrowed in any other respect. *See*, *e.g.*, Dkt. Entry 400, at 3.

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

At a hearing on August 30, 2011, the district court denied Argentina's motion to quash and granted NML's motions to compel compliance with both subpoenas, with the understanding that NML would negotiate further with the banks to narrow the sub-

poenas. Pet. App. 45, 49-51. In so ruling, the district court emphasized that NML had been forced to seek the discovery at issue by Argentina's bad-faith "behavior." *Id.* at 45. The court confirmed its August 30 ruling in a written order on September 2, 2011. *See id.* at 21-22.

In accordance with the district court's ruling, NML proposed further limitations on its subpoenas. Bank of America negotiated with NML and soon began producing documents. *See* Pet. App. 8. BNA refused to negotiate or to comply with its subpoena, but the district court in December 2011 ordered it to comply with the modified subpoena. *See ibid.*[1]

c. Argentina appealed the district court's September 2 discovery order; the banks did not. Argentina maintained that the FSIA bars discovery concerning sovereign property except to the extent that the proponent of discovery identified specific property that it could show would potentially be subject to execution in the United States; the FSIA bars any discovery concerning assets outside the United States, according to Argentina, because those assets

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[1] BNA later produced documents that it maintained in New York and Miami, but refused to produce documents maintained outside the United States because disclosing them would purportedly violate local law. The district court determined that, "with the exception of [one country], complying with this court's orders would not violate the various countries' laws," and in any event that "in all countries . . . requiring compliance with this court's orders is appropriate since the balance of applicable factors weighs in favor of disclosure." Dkt. Entry 535, at 2-3, 7. Far from "proceed[ing] as though only private interests were implicated," U.S. Br. 15, the district court reached this conclusion based on a thorough analysis of the comity factors articulated by this Court, *see* Dkt. Entry 535, at 19-24.

are "categorically immune from attachment." Pet. C.A. Br. 45. Argentina did not challenge the subpoenas on grounds unrelated to immunity, nor did it urge that the subpoenas should be narrowed. The Second Circuit affirmed the discovery order, rejecting Argentina's argument that FSIA attachment immunity barred NML from obtaining post-judgment discovery in aid of execution from the banks. Pet. App. 9, 12-20.

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

First, the court explained, the discovery order "does not implicate Argentina's immunity from attachment" because it "does not allow NML to attach Argentina's property, or indeed to have any legal effect on Argentina's property at all; it simply mandates [the banks'] compliance with subpoenas." Pet. App. 15. Although the district court lacked "the power to attach Argentinian property in foreign countries," *id.* at 15-16, the court of appeals emphasized that "the district court's power to order discovery to enforce its judgment does not derive from its ultimate ability to attach the property in question,"

id. at 16. Rather, the power to order such discovery derives "from [the district court's] power to conduct supplementary proceedings, involving persons indisputably within its jurisdiction, to enforce valid judgments." *Ibid.* In this case, "Argentina does not dispute that the district court had jurisdiction over it or that the judgments against it are valid and enforceable," *id.* at 18, and thus NML could obtain discovery about Argentina's assets, *see id.* at 16-17.

Second, the court of appeals held that the discovery order did not infringe Argentina's attachment immunity because "the subpoenas . . . were directed at [Bank of America] and BNA—commercial banks that have no claim to sovereign immunity, or to any other sort of immunity or privilege." Pet. App. 19. Moreover, because "[t]he FSIA says nothing about privilege," the court held that Congress "intended for courts to handle claims of privilege using the existing procedures under the Federal Rules." *Ibid.* (citing H.R. Rep. No. 94-1487, at 23). Yet Argentina had failed to invoke normal discovery rules to protect any privileged or confidential information. *See id.* at 20.

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

SUMMARY OF ARGUMENT

The FSIA does not limit the broad post-judgment discovery routinely available under the Federal Rules of Civil Procedure. Because the subpoenas here accord with the Federal Rules of Civil Proce-

dure and fall within the district court's broad latitude to manage discovery, the Second Circuit correctly upheld them.

I. The Second Circuit's conclusion is compelled by the Federal Rules of Civil Procedure, the text and structure of the FSIA, and the policy choices that the FSIA embodies.

A. Federal Rule of Civil Procedure 69 and New York state law (applicable through Rule 69) authorize broad discovery in aid of execution. *See* Fed. R. Civ. P. 69(a)(2); N.Y. C.P.L.R. § 5223. In keeping with that broad authority, the district court correctly allowed NML to obtain discovery regarding Argentina's assets to locate property that could potentially be used to satisfy its judgments. Tailored to uncover information about property that may be subject to attachment—and permitted against the backdrop of Argentina's bad-faith "behavior," Pet. App. 45—the order falls well within the district court's broad authority to control discovery.

B. Argentina does not dispute that the Federal Rules would authorize the discovery sought here, but claims that the FSIA supersedes a district court's ordinarily broad discretion over post-judgment discovery. That is incorrect.

1. The FSIA's text and structure demonstrate that it does not limit the broad post-judgment discovery routinely afforded to judgment creditors under the Federal Rules of Civil Procedure. This Court does not adopt a statutory construction with "no basis or referent in [the statute's] language," *Milner* v. *Dep't of the Navy*, 131 S. Ct. 1259, 1267 (2011), and the FSIA contains no language limiting post-judgment discovery. "[T]he entire statutory text" confirms that the construction of the FSIA proposed

by Argentina and the government "is not the meaning that Congress enacted." *Samantar* v. *Yousuf*, 130 S. Ct. 2278, 2286 (2010).

2. The acknowledged purposes of the FSIA confirm this conclusion. *First*, Congress sought in the FSIA to bring clarity and certainty to immunity determinations. Reading an atextual limitation on post-judgment discovery into the FSIA would undermine that effort. *Second*, the FSIA is Congress's attempt to balance the interests of judgment creditors with the interests of foreign states. If the Court imposed limitations in FSIA proceedings that have no basis in the FSIA's text, it would upset the balance that Congress struck.

3. Unable to muster any convincing arguments based on the FSIA's text, structure, or purpose, Argentina and the government advance policy-based arguments. They contend that the FSIA should be interpreted to limit discovery because pre-FSIA practice purportedly contained such a limitation. But the FSIA was expressly designed to displace the common-law approach to foreign sovereign immunity in favor of a more restrictive regime. Similarly, although Argentina and the government claim that permitting post-judgment discovery would undermine immunity's role as a protection against the burdens of litigation, they ignore that this protection applies only to immunity from suit; once a foreign state's immunity from suit has been overcome, as it has here because of Argentina's waiver of immunity, it is no longer entitled to avoid the burdens of litigation.

Argentina insists that the discovery at issue here would improperly give extraterritorial effect to the FSIA because it seeks information regarding proper-

ty both inside and outside the United States. But property outside the United States is not covered by the FSIA, which extends attachment immunity *only* to certain property in the United States. In any event, even if U.S. courts could not attach or execute against foreign property, the FSIA does not prohibit discovery of a judgment debtor's assets—wherever located—where (as here) the debtor is subject to the court's jurisdiction. The question whether particular property may be attached will be governed by the laws of the country where it is located, but the question whether NML may obtain discovery into the identity and location of Argentina's property is governed by the ordinary rules of discovery in federal court.

II. Even if this Court were to conclude that the FSIA imposes some limitations on post-judgment discovery, it should still uphold the district court's discovery order.

A. The FSIA does not limit post-judgment discovery against *non*-sovereigns, like that ordered here. Sovereign immunity is designed to protect foreign states. This immunity is not implicated where, as here, the discovery is directed to third parties, and thus the foreign state does not bear the responsibility of responding to the discovery at issue.

B. NML would be entitled to the discovery in any event because Argentina "irrevocably waived" and "agreed not to claim" "any immunity . . . f[ro]m attachment in aid of execution of judgment, from execution of a judgment or from any other legal or judicial process or remedy." J.A. 106. Indeed, Argentina "consent[ed]" "to . . . the issue of any process in connection with" a judgment. *Ibid.* That language un-

ambiguously encompasses the post-judgment discovery ordered here.

ARGUMENT

This Court should affirm the judgment below on any of three independent grounds: that the district court's order accords with the normal rules of post-judgment discovery and the FSIA does not abrogate those rules; that the FSIA does not limit post-judgment discovery against non-sovereigns, such as the discovery ordered here; and that Argentina waived any immunity that it might otherwise have possessed from the discovery at issue here.

I. THE DISCOVERY ORDER SHOULD BE AFFIRMED BECAUSE IT ACCORDS WITH THE NORMAL RULES GOVERNING POST-JUDGMENT DISCOVERY AND THE FSIA DOES NOT DISPLACE THOSE RULES.

The Federal Rules of Civil Procedure authorize broad post-judgment discovery in aid of execution. In accordance with federal law, the district court directed the banks to comply with subpoenas designed to identify assets on which NML may be able to execute its valid judgments against Argentina. In keeping with the district court's broad latitude over discovery, the court of appeals held that the district court did not abuse its discretion in compelling compliance with NML's subpoenas.

The FSIA provides no basis for upsetting the court of appeals' judgment. The text and structure of the FSIA demonstrate that the statute does not limit the broad post-judgment discovery routinely afforded to judgment creditors under the Federal Rules of Civil Procedure. In addition, upholding the discovery order serves the purposes of foreign sovereign im-

munity and respects the balance—between the interests of judgment creditors and of foreign states—that Congress struck in the FSIA. The judgment of the court of appeals should be affirmed.

A. THE DISCOVERY ORDER ACCORDS WITH THE NORMAL RULES OF POST-JUDGMENT DISCOVERY.

Federal law "allows judgment creditors to conduct full post-judgment discovery to aid in executing judgment." *Credit Lyonnais, S.A.* v. *SGC Int'l, Inc.*, 160 F.3d 428, 430 (8th Cir. 1998). Under Federal Rule of Civil Procedure 69(a)(2), "[a] judgment creditor . . . may obtain discovery from any person—including the judgment debtor"—"[i]n aid of . . . execution," under the same rules that govern pre-trial discovery, and under "the procedure of the state where the court is located." *See*, *e.g.*, *Natural Gas Pipeline Co.* v. *Energy Gathering, Inc.*, 2 F.3d 1397, 1405 (5th Cir. 1993). Under Rule 26(b)(1), in turn, "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense."

"A judgment creditor is [thus] entitled to discover the identity and location of any of the judgment debtor's assets, wherever located." *Nat'l Serv. Indus., Inc.* v. *Vafla Corp.*, 694 F.2d 246, 250 (11th Cir. 1982). New York law similarly entitles judgment creditors to discover "all matter relevant to the satisfaction of [a] judgment," including all information calculated to lead to assets that might be subject to execution. N.Y. C.P.L.R. § 5223.

Consistent with the broad post-judgment discovery authorized by the Federal Rules, the district court upheld the subpoenas here. *See* Pet. App. 21-22, 49-51. NML is entitled to "all matter relevant to

the satisfaction of [its] judgment[s]." N.Y. C.P.L.R. § 5223. And the district court's order correctly permits NML to "obtain discovery" concerning Argentina's assets, "wherever located." *Nat'l Serv. Indus.*, 694 F.2d at 250.

Given that "the presumption should be in favor of full discovery of any matters arguably related to [NML's] efforts to trace [Argentina's] assets and otherwise to enforce its judgment[s]," *Credit Lyonnais*, 160 F.3d at 431, the district court acted well within its discretion, *see Flatow* v. *Islamic Republic of Iran*, 308 F.3d 1065, 1074 (9th Cir. 2002) (noting a district court's "extensive control over the discovery process" (internal quotation marks omitted)). Indeed, mindful of the sensitive interests at stake, the district court acted "circumspectly" (*EM Ltd.* v. *Republic of Argentina*, 473 F.3d 463, 486 (2d Cir. 2007) (internal quotation marks omitted)) in upholding the subpoenas. The district court required NML to narrow their scope to focus on discovery reasonably calculated to identify attachable property, Pet. App. 45, 49-51; NML agreed to enter into a protective order to safeguard confidential information, C.A. J.A. 797; and the district court emphasized that Argentina's "behavior" had forced NML to resort to such discovery, Pet. App. 45. The court of appeals thus correctly affirmed the district court's discovery order. *See id.* at 12-19.

B. THE FSIA DOES NOT LIMIT POST-JUDGMENT DISCOVERY.

Argentina does not dispute that the district court's order complies with the Federal Rules concerning post-judgment discovery. Argentina's contention that the district court's order is unlawful rests entirely on its assertion that the FSIA categori-

cally prohibits post-judgment discovery unless that discovery is limited to "verify[ing] allegations of specific facts" that are "crucial" to determining whether specific property is immune from attachment and execution. Pet. Br. 22. But the FSIA does not displace Rule 69's regulation of post-judgment discovery. Indeed, far from curtailing such discovery, "Congress kept in place" the "normal discovery apparatus in FSIA proceedings." *FG Hemisphere Assocs., LLC* v. *Democratic Republic of Congo*, 637 F.3d 373, 378 (D.C. Cir. 2011). This conclusion follows from the statutory text and structure and is confirmed by the policy choices that Congress embodied in the statute.

1. THE STATUTORY TEXT AND STRUCTURE DEMONSTRATE THAT THE FSIA DOES NOT LIMIT POST-JUDGMENT DISCOVERY.

This Court does not adopt a statutory construction with "no basis or referent in [the statute's] language." *Milner* v. *Dep't of the Navy*, 131 S. Ct. 1259, 1267 (2011). Sections 1609 and 1610 of the FSIA provide immunity from "attachment arrest and execution" for certain "property in the United States of a foreign state." 28 U.S.C. § 1609; *see id.* § 1610. But neither section says anything about discovery—and nothing in the FSIA's text purports to limit post-judgment discovery in aid of execution. Indeed, Argentina and the government concede that "the FSIA does not expressly address [post-judgment] discovery." Pet. Br. 22; *see* U.S. Br. 15.

Sources of law other than the FSIA may limit post-judgment discovery against foreign states, including both settled doctrines of privilege and the discretionary determination by the district court whether the discovery is warranted, which may ap-

propriately consider comity interests and the burden that the discovery might cause to the foreign state. *See Société Nationale Industrielle Aérospatiale* v. *U.S. Dist. Ct. for the S. Dist. of Iowa*, 482 U.S. 522, 543-44 & n.28 (1987). Argentina has not asserted these grounds for limiting the subpoenas. Instead, Argentina argues only that the FSIA prohibits disclosure of the subpoenaed information, and indeed any post-judgment discovery seeking to identify a sovereign's assets.

Because the text of the FSIA provides "no basis" for limiting post-judgment discovery in FSIA proceedings, *Milner*, 131 S. Ct. at 1267, however, this Court must conclude that the FSIA "does not attempt to deal with questions of discovery," H.R. Rep. No. 94-1487, at 23 (1976), and that Congress instead "kept in place" the "normal discovery apparatus in FSIA proceedings," *FG Hemisphere*, 637 F.3d at 378. That is sufficient to affirm the judgment below: Under the "normal" rules of discovery, the district court's order must be upheld. *See supra* Part I.A.

a. "[T]he entire statutory text" confirms that construing the FSIA to limit post-judgment discovery "is not the meaning that Congress enacted." *Samantar* v. *Yousuf*, 130 S. Ct. 2278, 2286 (2010). Rather, "the FSIA as a whole" (*id.* at 2289) demonstrates that, if Congress had wanted to limit post-judgment discovery, it would have done so expressly in the FSIA's text.

First, when Congress wanted to grant a particular immunity in the FSIA, it "careful[ly] calibrat[ed]" the scope of that immunity. *Samantar*, 130 S. Ct. at 2288. When granting jurisdictional immunity from suit and post-judgment immunity from attachment and execution, *see* 28 U.S.C. §§ 1604, 1609, Congress

specified in detail when those immunities would not be available, *see id.* §§ 1605-1607, 1610-1611. Through these detailed exceptions to immunity—which "are central to the Act's functioning," *Republic of Austria* v. *Altmann*, 541 U.S. 677, 691 (2004)—Congress sought to "bring order to th[e] legal uncertainty" that shrouded immunity determinations before the FSIA was enacted, *id.* at 716 (Kennedy, J., dissenting).

Yet the FSIA provides no *hint* about the scope of, or limitations on, any immunity from post-judgment discovery. If Congress had wanted to provide such an immunity, it would have done so in the FSIA's text: A Congress that is intent on providing certainty in an area of disarray, that carefully defines the scope of particular immunities, and that just as carefully delineates the exceptions to those immunities, would not abruptly decline to provide *any* textual guidance about the scope of other immunities that it supposedly wished to grant.

To conclude otherwise would invite the very "legal uncertainty" that the FSIA sought to overcome. *Altmann*, 541 U.S. at 716 (Kennedy, J., dissenting). Indeed, it would "hardly furthe[r] Congress' purpose of 'clarifying the rules that judges should apply in resolving sovereign immunity claims'" to "lump . . . in" an immunity from post-judgment discovery "without so much as a word spelling out how and when" such an immunity would apply. *Samantar*, 130 S. Ct. at 2291 (quoting *Altmann*, 541 U.S. at 699). The structure of the FSIA thus demonstrates that Congress did not enact—and did not want to enact—any immunity from post-judgment discovery.

Second, the structure of the FSIA shows that Congress left in place the broad post-judgment dis-

covery available under the Federal Rules of Civil Procedure—just as it left in place most procedures set forth in the Federal Rules. When Congress wanted to override normal rules of procedure in FSIA proceedings, it did so expressly in the FSIA's text. Section 1608 of the FSIA, for example, contains detailed provisions on service that plainly displace the normal rules set forth in Federal Rule of Civil Procedure 4. *See* 28 U.S.C. § 1608; *see also* H.R. Rep. No. 94-1487, at 23. Similarly, Section 1605(g)—added to the statute in 1996—directs courts to "stay any request, demand, or order for discovery on the United States" in certain cases involving terrorism. 28 U.S.C. § 1605(g)(1)(A). And the statute expressly suspends the normal operation of Federal Rules of Civil Procedure 12 and 56 when such a stay has been entered. *See id.* § 1605(g)(4).

In the absence of language limiting the Federal Rules on post-judgment discovery, "drawing meaning from silence," as Argentina and the government invite this Court to do, is improper. *Kimbrough* v. *United States*, 552 U.S. 85, 103 (2007). Indeed, it is "particularly inappropriate" here because "Congress has shown that it knows how to [address discovery] in express terms." *Ibid.*; *see also*, *e.g.*, *Samantar*, 130 S. Ct. at 2288 (same); *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 476 (2003) (same). This conclusion accords with the settled rule that federal law should not be read to displace the Federal Rules of Civil Procedure unless the law contains a "plain statement of a pre-emptive intent," *Société Nationale*, 482 U.S. at 539, which neither Argentina nor the government claims is present here. *See Califano* v. *Yamasaki*, 442 U.S. 682, 700 (1979) (rejecting argument that federal statute precluded application of Rule 23 be-

cause the statute lacked "the necessary clear expression of congressional intent" to override Rule 23).

Third, the FSIA as a whole confirms that Congress was acutely aware of foreign-relations and comity concerns, but did not believe any special statutory rule was necessary to deal with those concerns in the context of post-judgment discovery. To the contrary, when Congress believed that such concerns required a statutory rule, it addressed that issue in the FSIA's text. The FSIA provides, for example, broad federal jurisdiction over cases involving foreign states "without regard to amount in controversy." 28 U.S.C. § 1330(a). Congress bestowed this broad jurisdiction on federal courts to promote "uniformity in decision," which it deemed "desirable" because "a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences." H.R. Rep. No. 94-1487, at 13; *see also Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 497 (1983) (similar). For similar reasons, Congress provided foreign states a correspondingly broad right to remove cases to federal courts. *See* 28 U.S.C. § 1441(d); *see also* H.R. Rep. No. 94-1487, at 32 (noting "the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area").

The FSIA is replete with provisions accommodating foreign-relations concerns. Congress precluded pre-suit attachments (*see* 28 U.S.C. § 1609) because such attachments "can . . . give rise to serious friction in [the] United States' foreign relations," and thus "[t]he elimination of attachment as a vehicle for commencing a lawsuit will ease the conduct of foreign relations by the United States." H.R. Rep. No. 94-1487, at 27. Moreover, although Congress provid-

ed exceptions to foreign states' attachment immunity, it immunized from attachment certain property used or intended to be used for military activity (28 U.S.C. § 1611(b)(2)) to help "avoid frustration of United States foreign policy in connection with purchases of military equipment and supplies in the United States by foreign governments," H.R. Rep. No. 94-1487, at 31.

These provisions confirm that Congress was attuned to the foreign-relations concerns raised by the restrictive theory of sovereign immunity. At each turn, it addressed *in the text of the FSIA* those concerns that it deemed to require a special statutory rule. But neither the text nor structure of the statute suggests Congress believed that post-judgment discovery presented sufficiently weighty foreign-relations concerns to justify an exception to existing law. *Cf.* H.R. Rep. No. 94-1487, at 23 (deeming "adequate" "[e]xisting law" governing "discovery").

By embracing the restrictive theory and allowing private litigants to overcome claims of immunity in a variety of circumstances, Congress *accepted* some friction in foreign relations and some affronts to comity. Although "the enforcement of judgments against foreign state property remain[ed] a somewhat controversial subject in international law" in 1976, Congress nonetheless "partially lower[ed] the barrier of immunity from execution" in Section 1610. H.R. Rep. No. 94-1487, at 27. And although it doubtless understood that some sovereigns could be "insult[ed]" if their "military property" did not enjoy blanket immunity, Pet. Br. 43; *see also* U.S. Br. 27, Congress did not provide absolute enforcement immunity even for military property. Although Argentina insists that Section 1611(b)(2) provides such

categorical immunity, *see* Pet. Br. 7, 25-26, 28, that provision immunizes only property that "is, or is intended to be, *used* in connection with a military activity, *and* (A) is of a military character, or (B) is under the control of a military authority or defense agency." 28 U.S.C. § 1611(b)(2) (emphases added).

The FSIA's structure demonstrates that Congress fully considered comity and foreign-relations risks, allaying some risks and accepting others. It would be unwarranted to impose atextual limits in FSIA proceedings—such as Argentina's proposed limitations on post-judgment discovery—in the name of concerns that Congress already addressed.

b. Because the statutory text and structure do not limit post-judgment discovery, the court of appeals correctly affirmed the district court's order allowing post-judgment discovery regarding Argentina's assets. Section 1609 of the FSIA does not provide a general "entitlement to immunity *in connection with* litigation to enforce a judgment." U.S. Br. 18, 30 (emphasis added). Immunity from litigation is accorded by Section 1604; once it is overcome, as here by Argentina's waiver, the FSIA provides only a limited immunity from "attachment arrest and execution" to "the property in the United States of a foreign state." 28 U.S.C. § 1609. Asset discovery is not attachment or execution; it is only discovery—and thus is permitted under the FSIA subject to recognized privileges and the district court's broad discretion to establish appropriate limitations based on the circumstances before it.

The court of appeals' decision below accords with the weight of judicial authority holding that "permit[ting] full discovery" against a sovereign judgment debtor "would not intrude upon [the foreign

state's] sovereign immunity." *First City, Texas-Houston, N.A.* v. *Rafidain Bank*, 150 F.3d 172, 177 (2d Cir. 1998) ("*Rafidain I*"). As the Second Circuit held more than a decade ago, "where subject matter jurisdiction under the FSIA exists to decide a case, jurisdiction continues long enough to allow proceedings in aid of any money judgment that is rendered in the case," including discovery designed to identify the judgment debtor's assets. *First City, Texas-Houston, N.A.* v. *Rafidain Bank*, 281 F.3d 48, 53-54 (2d Cir. 2002) ("*Rafidain II*"). Such "[d]iscovery of a judgment debtor's assets," the court emphasized, "is conducted routinely under the Federal Rules of Civil Procedure." *Ibid.*

Courts reaching this conclusion have acknowledged—as the court of appeals did in this case, *see* Pet. App. 15-16—that such discovery might uncover property on which a United States court lacks authority to execute. *See*, *e.g.*, *Richmark Corp.* v. *Timber Falling Consultants*, 959 F.2d 1468, 1477-78 (9th Cir. 1992). But they have recognized that a district court may order discovery into the identity and location of a foreign state's assets to allow the judgment creditor "to determine which courts" would have jurisdiction over those assets. *Id.* at 1478. Courts have therefore upheld post-judgment discovery in a variety of circumstances—requiring even "discovery [regarding a foreign state's] assets worldwide," so that the judgment creditor can "identif[y] . . . current assets in order to execute [its] judgment." *Id.* at 1471, 1475.

Argentina and the government maintain (Pet. Br. 22, 29; U.S. Br. 17) that the Fifth and Ninth Circuits have held that discovery concerning a foreign state's assets should be ordered "circumspectly and

only to verify allegations of specific facts crucial to an immunity determination." *Conn. Bank of Commerce* v. *Republic of Congo*, 309 F.3d 240, 260 n.10 (5th Cir. 2002) (internal quotation marks omitted); *see also Af-Cap Inc.* v. *Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1096 (9th Cir. 2007) (same). But that "circumspect[ion]"—repeatedly endorsed by the Second Circuit, *e.g.*, *EM Ltd.*, 473 F.3d at 486—is not "based on an interpretation of FSIA preemption." *Af-Cap Inc.*, 475 F.3d at 1096. Instead, it is a feature of the district court's "extensive control over the discovery process." *Flatow*, 308 F.3d at 1074 (internal quotation marks omitted); *see also* Pet. App. 13.

Thus, a district court can "weig[h] the benefits of additional discovery against the intrusiveness to [the foreign state] of permitting such discovery," *Rafidain I*, 150 F.3d at 175, and can deny "discovery requests [that] ha[ve] 'gone too far,'" *Af-Cap*, 475 F.3d at 1096. Consistent with this guidance, the district court narrowed the subpoenas; indeed, it did so even though Argentina did not argue that the subpoenas should be narrowed on privilege or discretionary grounds, and instead raised only wholesale assertions of immunity that it had waived and agreed never to claim.

The Seventh Circuit alone has interpreted the FSIA to impose a categorical limitation on post-judgment discovery from a foreign state. As Argentina and the government have argued here, *see* Pet. Br. 22, 29; U.S. Br. 9-10, the Seventh Circuit held in *Rubin* v. *Islamic Republic of Iran* that the FSIA permits discovery in aid of execution only with respect to "*specific property*" that the judgment creditor has *already* "identified" as potentially "subject" to attachment. 637 F.3d 783, 799 (7th Cir. 2011) (emphasis added). Beyond having no basis in the FSIA's

text or structure, that approach is completely unworkable. If the judgment creditor were aware of a potentially attachable asset held by the foreign state, it would not "nee[d] discovery" to identify the asset *in the first place*. *Richmark*, 959 F.2d at 1478. But where, as here, the judgment debtor has repeatedly attempted to "conceal its assets from the district court and therefore avoid execution of [the] judgment," *ibid.*, a judgment creditor needs discovery simply to learn what assets exist and where.

2. APPLYING NORMAL RULES OF POST-JUDGMENT DISCOVERY IN FSIA PROCEEDINGS ACCORDS WITH THE POLICY DECISIONS EMBODIED IN THE FSIA.

Applying the normal rules of post-judgment discovery in FSIA proceedings promotes the purposes of the FSIA and respects the balance struck by Congress. In contrast, engrafting onto the FSIA an atextual immunity from post-judgment discovery would disserve those purposes and undermine Congress's careful efforts to construct a balanced and tailored immunity doctrine.

a. Adopting an atextual immunity from post-judgment discovery would defeat one of the FSIA's "principal purposes": "clarifying the rules that judges should apply in resolving sovereign immunity claims." *Altmann*, 541 U.S. at 699. Before the FSIA was enacted, immunity determinations were in "some disarray" (*id.* at 690) because the standards governing such determinations "were neither clear nor uniformly applied," and did not consistently adhere to the restrictive theory of sovereign immunity. *Verlinden*, 461 U.S. at 488. The FSIA was Congress's attempt "to remedy these problems." *Alt-*

mann, 541 U.S. at 691. In the FSIA, Congress "established a *comprehensive* framework for resolving *any* claim of sovereign immunity"—precisely "to accomplish" its goal of "clarifying the rules" governing all immunity claims. *Id.* at 699 (emphases added).

Argentina and the government would have this Court treat the FSIA not as "a comprehensive set of legal standards," *Verlinden*, 461 U.S. at 488, but instead as a jumping-off point from which courts can create, in common-law fashion, atextual immunities based solely on the statute's "basic principles." Pet. Br. 39 n.18. Such an approach would defeat Congress's effort to "clarif[y] the rules" governing immunity claims. *Altmann*, 541 U.S. at 699. "Quite obviously, Congress' purposes in enacting such a comprehensive" statute "would be frustrated if . . . courts were to continue to follow" the sort of "ambiguous" "standards" that "the FSIA replaced." *Ibid.* (internal quotation marks omitted); *see also* H.R. Rep. No. 94-1487, at 9.[2]

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[2] In pressing what it believes to be the FSIA's purposes, Argentina invokes (*see* Pet. Br. 23, 39-40 & n.18) Section 1602 of the FSIA, which provides that "[c]laims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter." 28 U.S.C. § 1602. Argentina maintains that Section 1602 "instruct[s] courts to apply the basic principles of the FSIA to issues of both procedure and substance that the Act does not explicitly address." Pet. Br. 39 n.18. But Section 1602 states that courts should apply the principles "*set forth* in this chapter" (emphasis added)—not unenacted, atextual principles akin to those the statute was enacted to replace. Accordingly, in cases invoking Section 1602, this Court has carefully examined the text of the FSIA itself. *See Samantar*, 130 S. Ct. at 2285-89; *Altmann*, 541 U.S. at 691, 697-98.

Moreover, reading discovery limits into the FSIA would upset the careful balance that Congress struck in the statute. Congress embraced a *restrictive* theory of sovereign immunity that held sovereigns entering the United States to engage in commercial activity (such as selling bonds) to the same standards of liability as private parties. The United States has long been a "major source of private international credit," *Allied Bank Int'l* v. *Banco Credito Agricola de Cartago*, 757 F.2d 516, 522 (2d Cir. 1985), and thus "the United States has a strong interest in ensuring the enforceability of valid debts under the principles of contract law, and in particular, the continuing enforceability of foreign debts owed to United States lenders." *Pravin Banker Assocs., Ltd.* v. *Banco Popular Del Peru*, 109 F.3d 850, 855 (2d Cir. 1997).

The FSIA represents Congress's attempt to balance this interest with the interests of foreign states. Congress's decision to provide certain immunities to foreign sovereigns, but not to immunize them from discovery following entry of judgment against them, draws the balance in favor of creditors obtaining the information necessary to enforce their judgments, and thus (among other things) promotes viable primary and secondary markets in sovereign debt. Argentina would impermissibly redraw this balance, preventing creditors from obtaining the information they need to locate even non-immune assets, and thereby making enforcement against a recalcitrant sovereign nearly impossible. *See* Hal S. Scott, *Sovereign Debt Default: Cry for the United States, Not Argentina* 9 (Wash. Legal Found., Working Paper No.

140, 2006), *available at* http://www.wlf.org/upload/Scott%20WP%20Final.pdf.[3]

b. Against these policies embodied in the FSIA, Argentina and the government contend that the FSIA should be read to limit post-judgment discovery because failure to do so would supposedly undermine foreign relations, international comity, and reciprocity. *See* Pet. Br. 39-50; U.S. Br. 18-22, 32-33.

As explained above, however, the FSIA's text and structure demonstrate that Congress *already* balanced these interests with the interests of judgment creditors, and promoted foreign-relations interests—to the extent it wished—in the FSIA's text. This Court "need not determine whether declining to afford" a newly claimed immunity would "undermin[e]" "foreign relations" and "reciprocal protection" where, as here, "the [FSIA] does not address" the immunity. *Samantar*, 130 S. Ct. at 2290 n.14. Argentina maintains that "numerous treaties, conventions, and

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[3] Argentina attempts to undermine NML's judgments by denigrating NML as a "'vulture' hedge fun[d]," Pet. Br. 10—a term that Argentina apparently would apply to any secondary-market purchaser of its debt. But Argentina is a G-20 nation that, as the district court found, has ample resources to pay its debts. *See NML Capital, Ltd.* v. *Republic of Argentina*, 08 Civ. 6978, 2012 WL 5895784, at *1 (S.D.N.Y. Nov. 21, 2012). In any event, secondary purchasers of sovereign debt facilitate the primary market for that debt by allowing primary creditors to reduce their exposure to questionable debts. *See* Fernando Broner *et al.*, *Sovereign Risk and Secondary Markets*, 100 Am. Econ. Rev. 1523, 1523 (2010). For this reason, the "long term effect" of "rendering otherwise valid debts unenforceable" would be "significant harm" to "developing nations and their institutions seeking to borrow capital" in the United States. *Elliott Assocs., L.P.* v. *Banco de la Nacion*, 194 F.3d 363, 380 (2d Cir. 1999).

common law immunities" illustrate the "insult to comity" supposedly posed by post-judgment discovery against foreign sovereigns, Pet. Br. 43, but none of those authorities contains the "plain statement of a pre-emptive intent" that this Court has deemed necessary to displace the Federal Rules of Civil Procedure, *Société Nationale*, 482 U.S. at 539.

Even when recognizing the need to "demonstrate due respect for . . . any sovereign interest expressed by a foreign state," *Société Nationale*, 482 U.S. at 546, *quoted at* Pet. Br. 42; U.S. Br. 19, this Court has *rejected* the arguments made by Argentina and the government here: that the Federal Rules governing discovery do not apply fully when such an interest is present, *see* 482 U.S. at 539-40, and that the Court should "articulate specific rules"—found nowhere in the Federal Rules—to limit discovery in light of comity, *id.* at 546. Instead, the Court has held that district courts should address concerns of comity as part of their overall discretionary task of "supervis[ing] . . . discovery." *Ibid.* Though Argentina demeans such an approach as "impos[ing] no bounds at all," Pet. Br. 47-48, this Court's precedent forecloses its complaint.

Moreover, Argentina and the government *still* do not marshal even one concrete example of foreign-relations harm in the decade-plus since the Second Circuit cemented its position in *Rafidain II* that the FSIA does not limit post-judgment discovery in aid of execution. *See* NML Supp. Br. 11; *cf.*, *e.g.*, U.S. Br. 21-22 (speculating, without citation, that "[a]llowing sweeping discovery into foreign sovereigns' assets" "may result over the long term in reduced cooperation in a variety of areas"). It is not hard to see why: Such discovery is necessarily rare because it is au-

thorized only where, as here, a U.S. court has jurisdiction over a sovereign and enters a judgment against the sovereign that it refuses to pay.[4]

Argentina and the government observe (Pet. Br. 48-50; U.S. Br. 20-21, 32-33) that "some foreign states base their sovereign immunity decisions on reciprocity." *Persinger* v. *Islamic Republic of Iran*, 729 F.2d 835, 841 (D.C. Cir. 1984). Yet they are wrong to insist that discovery like that ordered here "could lead to reciprocal adverse treatment of the United States in foreign courts." U.S. Br. 20. To the extent that reciprocity matters at all here, *but see supra* at 36, the proper question is how the discovery ordered in this case might affect how the United States will be treated in foreign courts *in like circumstances*. In *Persinger*, for example, the D.C. Circuit considered whether the FSIA allows suit against foreign states for tortious injuries that occurred on the premises of a United States embassy. In considering reciprocity interests, the court noted that allowing such suits under the FSIA could "subject the United States to suits abroad *for torts committed on the premises of embassies located here*." 729 F.2d at 841 (emphasis added).

The proper reciprocity question in this case is not, as Argentina would have it, whether a "Chinese

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[4] Argentina maintains that the comity interests are even stronger here than in *Daimler AG* v. *Bauman*, 134 S. Ct. 746 (2014). *See* Pet. Br. 41-42; *see also* U.S. Br. 19. But this case involves nothing akin to the "exorbitant," "uninhibited approach to . . . jurisdiction" rejected in *Daimler*. 134 S. Ct. at 751, 761, 763. Argentina "irrevocably waived" its immunity from suit, J.A. 106, and it "does not dispute that the district court had jurisdiction over it or that the judgments against it are valid and enforceable," Pet. App. 18.

court" could (apparently out of nowhere) "orde[r] the U.S. embassy in China or Bank of America Asia Pacific to produce information on the United States Government's worldwide assets, including military property." Pet. Br. 49-50. Rather, the correct question is whether it would be inappropriate for a foreign court to allow post-judgment discovery against the United States where: (1) the United States broadly waived its sovereign immunity (as Argentina did here); (2) the United States then flagrantly breached an indisputably valid legal obligation as to which it had waived sovereign immunity (as Argentina did here); (3) indisputably valid judgments were entered against the United States (as against Argentina here); *and* (4) the United States refused, in bad faith and in repeated defiance of the foreign court and its creditor, to satisfy those judgments (as Argentina has done here). Neither Argentina nor the government explains why discovery from the United States would be inappropriate under such circumstances.

c. Even if the Court believed that allowing post-judgment discovery might undermine some goals animating the FSIA, it still should not recognize an atextual immunity from post-judgment discovery. "The question . . . is not what Congress 'would have wanted' but what Congress enacted in the FSIA." *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607, 618 (1992). Thus, this Court follows the result dictated by the statutory language *even when* doing so might defeat some of the FSIA's ostensible goals.

In *Powerex Corp.* v. *Reliant Energy Services, Inc.*, 551 U.S. 224 (2007), for example, this Court held that 28 U.S.C. § 1447(d) bars federal courts of appeals from reviewing district court decisions remand-

ing cases to state court that purported foreign sovereigns had removed under the FSIA. *Id.* at 238-39. Although the Court was "well aware" of the "undesirable consequences in the FSIA context" of "immuniz[ing]" erroneous remands from appellate review, the Court allowed those consequences because the statutory language left no other choice. *Id.* at 237. Arguments regarding such consequences, the Court emphasized, implicate "a policy debate that belongs in the halls of Congress, not in the hearing room of this Court." *Ibid.*

The same reasoning applies to the consequences that Argentina and the government hypothesize in this case. In the face of statutory text that provides no support for limiting post-judgment discovery, it is not for this Court to "rende[r] a quintessential policy judgment" divorced from that text, *Powerex*, 551 U.S. at 238 n.5; rather, "what the text of [the statute] indisputably does"—or, in this case, does not do—must "prevai[l]," *id.* at 238.

3. THE POLICY ARGUMENTS ADVANCED BY ARGENTINA AND THE GOVERNMENT DO NOT JUSTIFY THEIR PROPOSED LIMITATIONS ON POST-JUDGMENT DISCOVERY.

Because nothing in the FSIA's text, structure, or acknowledged purposes limits post-judgment discovery, Argentina and the United States are forced to rely on a variety of arguments unmoored from these interpretive sources. None has merit.

a. Relying on the broad attachment immunity that foreign states enjoyed before the FSIA was enacted, Argentina and the government maintain that, if Congress had wanted the Federal Rules on post-judgment discovery to apply in FSIA proceedings, it

was required to state that intention clearly in the FSIA. *See* Pet. Br. 32-36; U.S. Br. 22-24. But this Court has held that federal law must contain a "plain statement of a pre-emptive intent" to displace the Federal Rules. *Société Nationale*, 482 U.S. at 539; *see also Califano*, 442 U.S. at 700 (applying same rule to reject argument that federal statute precluded application of Federal Rules). Although Argentina and the government rely on *Société Nationale*, *see* Pet. Br. 42; U.S. Br. 19, 24 n.11, 26, 33, they never acknowledge that holding.

Argentina and the government maintain that reading the FSIA to permit normal post-judgment discovery would conflict with the presumption against abolishing common-law principles. Pet. Br. 33-36; U.S. Br. 22-24; *see also id.* at 12-14. But this argument ignores that the FSIA was adopted precisely *because of* the problems with pre-FSIA practice: it was inconsistent and unpredictable, and sometimes failed to follow the restrictive theory of sovereign immunity. "After the enactment of the FSIA," this Court has explained, "the Act—and not the pre-existing common law—indisputably governs the determination of whether a foreign state is entitled to sovereign immunity." *Samantar*, 130 S. Ct. at 2285.[5]

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[5] Argentina and the government also overstate the supposed uniformity of pre-FSIA cases regarding the post-judgment authority of U.S. courts. *Compare*, *e.g.*, Pet. Br. 33 (asserting that, before the FSIA, "there were n[o]" "post-judgment remedies to plaintiffs in aid of enforcing judgments against a foreign sovereign"), *and* U.S. Br. 13 (maintaining that "the established" pre-FSIA "sovereign immunity regime . . . gave a judgment debtor [*sic*] no ability *at all* to execute against a sovereign's property"), *with Flota Maritima Browning de Cuba, Sociadad*

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Observing that this Court has required Congress to "unequivocally expres[s]" its intent to abrogate federal sovereign immunity, Argentina also suggests that this Court should demand a similar plain statement in the FSIA. Pet. Br. 34 (internal quotation marks omitted). But federal sovereign immunity begins from a strong presumption that "[t]he United States, as sovereign, is immune from suit save as it consents to be sued." *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941). Foreign sovereign immunity begins from the *opposite* presumption: that foreign states are *not* immune from the jurisdiction of United States courts because "[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute." *Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812). Requiring a plain statement from Congress before denying immunity makes no sense for foreign sovereign immunity because the decisive question is whether and to what extent Congress has *granted* immunity to foreign sovereigns.[6]

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Anonima v. *Motor Vessel Ciudad de la Habana*, 335 F.2d 619, 626-27 (4th Cir. 1964) (holding that foreign state had waived immunity from execution).

6 Argentina contends that this Court has construed 42 U.S.C. § 1983 not to "covert[ly]" "eliminat[e]" well established immunities through its general language. Pet. Br. 35 (internal quotation marks omitted). But there is nothing "covert" about the FSIA, which provides "a comprehensive set of legal standards governing claims of immunity" (*Verlinden*, 461 U.S. at 488) and specifies, in its text, the precise scope of the immunities it protects. Moreover, Congress adopted the FSIA to dispense with the type of historical inquiry that underlies immunity determinations under Section 1983. *See Altmann*, 541 U.S. at 700 (faulting court of appeals for "engag[ing] in precisely the kind of

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b. Argentina and the government contend that allowing the discovery here would undermine a core function of immunity: to "protec[t] against the costs, in time and expense, and other disruptions attendant to litigation." U.S. Br. 15 (internal quotation marks omitted); *see id.* at 15-17, 32-33; Pet. Br. 29-32, 44-46. Relying on cases involving jurisdictional immunity from suit under the FSIA and the qualified immunity of some government officials, they observe that courts have "confine[d] the scope of discovery" in those contexts "to encompass only facts that are necessary to verify an alleged exception to immunity." U.S. Br. 16; *see also* Pet. Br. 29-30. According to Argentina and the government, the reasoning for limiting discovery in those contexts also applies to post-judgment discovery in aid of execution. *See* U.S. Br. 15-17; Pet. Br. 29-32.

Limiting discovery in the context of immunity *from suit* under the FSIA is based on the "nature of FSIA immunity, which is immunity not only from liability, but from the burdens of litigation as well." *Kelly* v. *Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 847 (5th Cir. 2000). The same theory animates discovery limitations in cases involving qualified immunity: Qualified immunity provides "a right, not merely to avoid standing trial, but also to avoid the burdens of such pretrial matters as discovery." *Behrens* v. *Pelletier*, 516 U.S. 299, 308 (1996) (emphasis and internal quotation marks omitted).

Argentina relinquished that right by broadly waiving its immunity *from suit*. Once the plaintiff

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detailed historical inquiry that the FSIA's clear guidelines were intended to obviate").

has overcome a foreign state's jurisdictional immunity from suit, the foreign state no longer has any statutory "protection from the inconvenience of suit." *Dole Food*, 538 U.S. at 479. To the contrary, the FSIA expressly provides that, in such cases, "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606.

In any event, apart from its waiver of immunity from suit, Argentina *also* waived any immunity from post-judgment legal process. *See* J.A. 106; Pet. App. 4 & n.1. Thus, even if Argentina were correct that attachment immunity otherwise would imply certain limitations on post-judgment discovery, those limitations would not be available to Argentina here.

c. Argentina contends that the court of appeals gave improper extraterritorial effect to the FSIA by upholding subpoenas that could uncover information about property located outside of the United States. *See* Pet Br. 36-39. But allowing discovery from entities subject to judgments in U.S. courts does not constitute an extraterritorial application of the FSIA (or Rule 69).

A federal court with personal jurisdiction over a defendant "may command her to take action even outside the United States." *Chafin* v. *Chafin*, 133 S. Ct. 1017, 1025 (2013). For that reason, under the Federal Rules, a court validly may compel disclosure of a judgment debtor's property outside the United States. *See*, *e.g.*, *Nat'l Serv. Indus.*, 694 F.2d at 250. And while NML's discovery "might *lead*" to attachment or execution elsewhere in the world, Pet. App. 31 (emphasis added)—although so far it has led only

to proceedings in the United States[7]—the district court did not conclude that *it* could order the attachment of property abroad. Instead, the district court recognized that, where property outside the United States is concerned, attachment and execution might be ordered not under the FSIA, but "on some other theory in a foreign country." *Id.* at 44. Thus, consistent with personal-jurisdiction principles and the presumption against extraterritoriality, the discovery order does no more than direct two banks operating in New York to produce documents bearing on the property of a judgment debtor in U.S. court.

d. Argentina and the government contend that the subpoenas conflict with the FSIA because, in addition to property in the United States, they also might uncover information about assets that are supposedly immune from attachment or execution: assets located outside of the United States; central bank and military property; diplomatic property; and property belonging to persons other than the judgment debtor. *See* Pet. Br. 43-44 & n.20; U.S. Br. 24-30. This argument is more properly directed to the discretion of the district court in assessing the scope of the subpoena. Argentina, however, chose not to urge that the subpoenas should be narrowed based on claims of privilege or the district court's discretion, but instead argued only that the subpoenas should be "quashed" in their entirety on immunity grounds. *E.g.*, Dkt. Entry 400, at 14. In any event, the argument is misguided.

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[7] *See* Complaint, *NML Capital, Ltd.* v. *Space Exploration Techs. Corp.*, No. CV14-02262-SVW(Ex) (C.D. Cal. filed Mar. 25, 2014) (suit under California law to execute on Argentina's contractual rights under commercial launch services contracts between Argentina and Space Exploration Technologies Corp.).

Argentina repeatedly asserts that the FSIA provides attachment immunity for property located outside of the United States. *See*, *e.g.*, Pet. Br. 6, 21, 25, 26, 28, 38, 45. That is, indeed, the central premise behind its claim that "*all* property of a foreign state is presumptively immune from the authority of the U.S. courts" unless (among other things) it is "located in . . . the United States." *Id.* at 1 (emphasis added). But this is false. Far from "clearly express[ing]" Congress's "affirmative intention" to extend attachment immunity to property abroad, *Morrison* v. *Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010) (internal quotation marks omitted), Section 1609 provides immunity from attachment and execution only for certain "property *in the United States*." 28 U.S.C. § 1609 (emphasis added). Thus, unlike property in the United States, foreign-held property is not protected by *any* grant of immunity under the FSIA.[8]

As for the other assets that are purportedly immune from attachment: The subpoenas do not seek information solely about immune central bank, military, or diplomatic property; they seek information about all assets that Argentina possesses, so that NML can identify where Argentina may be holding

[8] The government insists that Section 1609 "confirms the fundamental proposition that it would be unthinkable for a U.S. court . . . to presume to order the attachment of or execution against property of a foreign sovereign abroad." U.S. Br. 25. The issue is not whether a U.S. court can *attach* or *execute* against foreign property, but instead whether a foreign state can be required to provide *discovery* regarding that property following entry of a judgment against it in U.S. court. Nothing in the FSIA suggests, let alone "confirms," that the post-judgment discovery routinely available under the Federal Rules is not available in FSIA cases.

property that *is* subject to execution. Although that includes property held in the name of central bank, military, and diplomatic entities, nothing in the FSIA (or in the other authorities cited by Argentina and its *amici*) provides immunity for all assets that those entities might possess, let alone all information regarding such assets. As explained above, for example, the FSIA immunizes from attachment only *certain* military property. *See supra* at 29-30. Although the subpoenas might produce information about assets that are not subject to attachment, Argentina asserted no privilege from disclosure specific to that property. In the absence of a demonstration of privilege, NML is entitled to the information necessary to identify attachable assets, unconstrained by *ex ante* limitations on the scope of discovery based on nothing more than Argentina's self-serving assertions about which of its assets are attachable. That is particularly true because Argentina has waived its immunity and yet has consistently structured its finances to hinder NML's attempts to enforce the judgments.

Similar reasons support NML's requests for information about the assets held by persons and entities other than Argentina. As an initial matter, Argentina failed to suggest below any principle for narrowing the subpoenas on this basis; having rested instead on its blanket immunity argument for quashing the subpoenas in full, it should not be permitted to complain now. Moreover, as the government acknowledges, NML may be able to execute against property held by other entities if it establishes that "separate juridicial entities should [not] 'be treated as such.'" U.S. Br. 29 (quoting *First Nat'l City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 627 (1983)). NML needs to understand Ar-

gentina's financial activity in order to know whether that presumption has been overcome—particularly because Argentina has evaded judgment enforcement by holding assets in the name of entities affiliated with it. The discovery is appropriately calculated to help NML learn that information.

e. Argentina also contends that the FSIA's legislative history supports reading the statute to limit post-judgment discovery. *See* Pet. Br. 50-53. Downplaying the statement that "[t]he bill does not attempt to deal with questions of discovery," H.R. Rep. No. 94-1487, at 23; *see* Pet. Br. 50-51, Argentina focuses (*see* Pet. Br. 52-53) on the House Report's statement that "[t]he term 'attachment in aid of execution'" in Section 1610(a) "is intended to include attachments, garnishments, and *supplemental proceedings* available under applicable Federal or State law to obtain satisfaction of a judgment," H.R. Rep. No. 94-1487, at 28 (emphasis added). Argentina maintains that "[o]ne such supplementary proceeding is discovery '[i]n aid of the judgment or execution'" under Rule 69, and thus that the attachment immunity provided in Section 1610 limits the discovery available under Rule 69. Pet. Br. 52; *see id.* at 52-53.

Argentina is wrong that the term "supplemental proceedings" in the House Report includes discovery under Rule 69. When the FSIA was enacted, Rule 69(a) read:

> Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and

> procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable. In aid of the judgment or execution, the judgment creditor or his successor in interest when that interest appears of record, may obtain discovery from any person, including the judgment debtor, in the manner provided in these rules or in the manner provided by the practice of the state in which the district court is held.

Fed. R. Civ. P. 69(a) (1970). Rule 69(a) therefore provided, *first*, that—unless a federal statute said otherwise—the relevant *state* law would govern "supplementary" proceedings. *Second*, and by contrast, it provided that post-judgment discovery would be governed by the *federal* rules of civil procedure or the relevant state law. Reading "supplemental proceedings" to include post-judgment discovery (as Argentina advocates) would cause Rule 69 to give conflicting directives: When conducting post-judgment discovery, courts would be told both (1) to follow the applicable state law (unless a federal statute said otherwise), and (2) to follow the Federal Rules of Civil Procedure *or* the applicable state law.

Instead, the reference to "supplementary" (or "supplemental") proceedings—in both Rule 69 and the House Report—is best read to denote the traditional proceedings associated with "the protection and enforcement of federal judgments," that is, "attachment, mandamus, garnishment, and the prejudgment avoidance of fraudulent conveyances." *Peacock* v. *Thomas*, 516 U.S. 349, 356 (1996). Because Rule 69 mandates that state law governs these

remedies unless Congress says otherwise, the House Report made clear that the FSIA was changing the default rules. By contrast, "[e]xisting law" governing "discovery"—*i.e.*, the Federal Rules—was deemed to be "adequate." H.R. Rep. No. 94-1487, at 23; *see also Samantar*, 130 S. Ct. at 2294 (Scalia, J., concurring in the judgment) (noting "the bill's failure to deal with discovery" as "ma[de] . . . clear" in the House Report).

f. Argentina and the government suggest that Rule 69 itself provides that the FSIA limits post-judgment discovery because Rule 69(a)(1) "specifically states that 'a federal statute,' here the FSIA, 'governs' where applicable." Pet. Br. 39 (quoting Fed. R. Civ. P. 69(a)(1)); U.S. Br. 31 (same). Argentina and the government ignore that Rule 69(a)(1) does not address discovery; only Rule 69(a)(2) does so, and that provision does not contain the language on which they rely. In any event, their argument is mistaken.

Rule 69(a)(1) provides that "[t]he procedure on execution—and in proceedings supplementary to and in aid of judgment or execution—must accord with the procedure of the state where the court is located, but a federal statute governs to the extent it applies." By Rule 69(a)(1)'s terms, a federal statute would "gover[n]" only when that federal statute provides a "procedure" on execution or in enforcing a judgment. But "[t]he FSIA does not provide methods for the enforcement of judgments against foreign states, only that those judgments may not be enforced by resort to immune property." *Peterson* v. *Islamic Republic of Iran*, 627 F.3d 1117, 1130 (9th Cir. 2010).

II. EVEN IF THE FSIA LIMITED POST-JUDGMENT DISCOVERY, THE DISCOVERY ORDER SHOULD STILL BE UPHELD.

Even if this Court were to conclude that the FSIA limits post-judgment discovery, it should still uphold the district court's discovery order on either of two independent grounds. *First*, even if the FSIA limits post-judgment discovery from sovereigns, it does not block such discovery from *non*-sovereigns, such as the two banks subject to the subpoenas at issue here. *Second*, even if the FSIA could be read to block discovery from non-sovereigns, NML would still be entitled to discovery here because Argentina has waived *any* immunity from post-judgment discovery in aid of execution.

A. THE FSIA DOES NOT BLOCK DISCOVERY FROM NON-SOVEREIGNS.

The district court compelled discovery from two third-party, non-sovereign commercial banks. *See* Pet. App. 9. Because it did not order discovery from a foreign state, there is no basis for concluding that the FSIA limits that discovery.[9]

Whatever grounds may support protecting foreign states from discovery in aid of execution, those grounds—like the FSIA itself—do not apply to non-sovereigns. Sovereign immunity is "designed to give *foreign states and their instrumentalities* some pro-

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[9] In a footnote, Argentina asserts that BNA is a foreign state. Pet. Br. 14 n.12. But BNA itself has never made such an assertion, and it did not appeal the district court's order. In any event, Argentina waived any argument that BNA is entitled to immunity by failing to raise that issue at the petition stage and by failing to develop any argument on the merits that BNA is entitled to immunity.

tection from the inconvenience of suit." *Republic of Philippines* v. *Pimentel*, 553 U.S. 851, 865 (2008) (emphasis added; internal quotation marks omitted); *see also* Pet. App. 19. In the discovery context, this means that sovereign immunity applies (if at all) "to protect *foreign sovereigns* from the burdens of litigation, including the cost and aggravation of discovery." *Rubin*, 637 F.3d at 795 (emphasis added); *see also* 28 U.S.C. § 1609 (applying only to "the property in the United States of a foreign state").

Foreign states do not face the "burdens of litigation" when they do not bear the responsibility of responding to the discovery at issue. *Rubin*, 637 F.3d at 795. Where, as here, a U.S. court has not forced a foreign state to shoulder the burden of assembling and producing information about its assets, no sovereign has been subjected to "the inconvenience of suit." *Pimentel*, 553 U.S. at 865 (internal quotation marks omitted). NML's subpoenas seek only business records from third-party banks that those banks already possess.

Argentina contends that it has shouldered burdens from the third-party discovery because it must protect the financial privacy of its officials and various entities associated with it. *See* Pet. Br. 46-47. Similarly, it protests that the discovery could "directly threaten national security" interests. *Id.* at 50. As the Second Circuit correctly recognized, however, these arguments "asser[t] a claim of privilege and not a claim of immunity." Pet. App. 19. If Argentina is "concern[ed] that the subpoenas will review sensitive information," *ibid.*, including confidential financial details or state secrets, it could have invoked "concepts of governmental privilege" to resist particular aspects of the discovery, H.R. Rep. No. 94-1487,

at 23. But those arguments do not implicate the FSIA, which "says nothing about privilege." Pet. App. 19.

The United States suggests in a footnote that confidentiality orders or privilege rulings will be inadequate because they raise risks of comity and reciprocity. *See* U.S. Br. 33 n.16. But district courts can amply address such concerns through their authority to "supervis[e] . . . discovery." *Société Nationale*, 482 U.S. at 546. Moreover, discovery about persons and entities *other than* the judgment debtor generally becomes necessary only where, as here, the debtor itself has acted in bad faith and structured its finances across other entities to avoid attachment. The FSIA does not grant sovereigns that defy judgments—or their non-sovereign confederates—any "*right*" to "conceal [their] assets from the district court and therefore avoid execution of . . . judgment[s]." *Richmark*, 959 F.2d at 1478.

Finally, Argentina complains of "additional 'inconvenience[s]'" that will purportedly result from third-party discovery, Pet. Br. 47 (alteration in original), but none withstands scrutiny. Argentina suggests that such discovery could "forc[e]" the foreign state "to defend itself in subsequent litigation." *Ibid.* But that would be true only if the district court had jurisdiction over the foreign sovereign in that litigation—in which case, the state is not entitled to avoid that inconvenience. Argentina also argues that the discovery could "yiel[d] information that cannot justify an attachment proceeding but which a judgment creditor can use as a basis to seek still more intrusive discovery." *Ibid.* But that discovery is not improper when the sovereign's immunity from suit has been overcome, and the district court can cabin dis-

covery that becomes overly intrusive. And Argentina contends that third-party discovery could "forc[e] third parties to deem their burdens of discovery as a cost of doing business with a sovereign state, and to either pass those costs on to the state or refuse to do business with that state." *Ibid.* But even if this were so, there is no basis for concluding that the FSIA contains an implicit limitation on discovery based on these remote, attenuated, and speculative costs.

B. ARGENTINA'S BROAD AND IRREVOCABLE WAIVER OF IMMUNITY INDEPENDENTLY JUSTIFIES THE DISCOVERY ORDER.

In the bonds that Argentina has now repudiated, Argentina "irrevocably waived" and "agreed not to claim" "any immunity . . . f[ro]m attachment in aid of execution of judgment, from execution of a judgment or from any other legal or judicial process or remedy." J.A. 106. Moreover, Argentina affirmatively "consent[ed]" "to the giving of any relief or the issue of any process in connection with any Related Proceeding or Related Judgment." *Ibid.*

Argentina's waiver expressly authorizes the post-judgment discovery ordered here, and this Court can affirm the judgment below based solely on this waiver.[10] Indeed, this Court has found an explicit waiver

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[10] Argentina contends that NML forfeited this contractual-waiver argument by not raising it below. *See* Pet. Br. 19 n.15. But NML argued in the district court that Argentina's contractual waiver "is broad enough to sustain the court's jurisdiction through proceedings to aid collection of a money judgment." Dkt. Entry 412, at 4 n.2 (internal quotation marks omitted); *see also* Dkt. Entry 384, at 15 n.6 (arguing that Argentina had waived "immunity from execution and other judgment enforce-

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of sovereign immunity in much less stark contractual language. In *C & L Enterprises, Inc.* v. *Citizen Band Potawatomi Indian Tribe of Oklahoma*, this Court held that, by agreeing to arbitration and choice-of-law clauses in a standard-form construction contract, an Indian tribe had clearly and unambiguously waived its immunity from a state-court lawsuit to enforce an arbitration award—even though the contract did not specifically address the tribe's immunity. 532 U.S. 411, 415, 418, 423 (2001). The Court was satisfied that the tribe had effected a waiver because, under the arbitration rules and governing law to which the contract referred, the parties necessarily consented to judgments by the State's courts based on arbitration awards. *See id.* at 418-22. The Court held that the waiver was explicit even though it did not use the words "sovereign immunity." *Id.* at 420.

Both tribal immunity and foreign sovereign immunity are matters of congressional prerogative. *See Kiowa Tribe of Okla.* v. *Mfg. Techs., Inc.*, 523 U.S. 751, 759 (1998). Under the principles applied in *C & L Enterprises*, Argentina waived any immunity that it might otherwise possess from post-judgment discovery. Argentina expressly surrendered its immunity not only from lawsuits, attachment, and execution, but also from "*any other legal or judicial process or remedy*," and with respect to "the issue of any process in connection with" a judgment. J.A. 106 (emphasis added). Even without an explicit reference to "discovery in aid of execution," this language plainly encompasses post-judgment discovery. To hold otherwise would be to impose a "ritualistic formula" re-

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ment process"). NML pressed the same argument before the Second Circuit. *See* NML C.A. Br. 32-33.

quirement on FSIA waivers—something this Court has long refused to do in assessing whether a sovereign has waived its immunity. *Franchise Tax Bd. of Cal.* v. *U.S. Postal Serv.*, 467 U.S. 512, 521 (1984) (internal quotation marks omitted).

Argentina insists that any contractual waiver is irrelevant because, "even with a waiver of immunity, a court's power is still limited to what the FSIA permits." Pet. Br. 19 n.15; *cf.* U.S. Br. 30 n.14. But the FSIA does not bar a foreign state from waiving any protections it may have against post-judgment discovery, and the authority to grant such discovery comes from the Federal Rules, not from the FSIA. Argentina's waiver forecloses it from invoking any limitations that the FSIA would otherwise impose on post-judgment discovery.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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ADDENDUM

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U.S. Const. art. I, sec. 8, provides in relevant part:

Section 8. The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

. . .

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

. . .

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

U.S. Const. art. III, sec. 1, provides:

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

U.S. Const. art. III, sec. 2, cl. 1, provides:

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

28 U.S.C. § 1330 provides:

§ 1330. Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising

out of any transaction or occurrence enumerated in sections 1605-1607 of this title.

28 U.S.C. § 1332 provides in relevant part:

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—

* * *

(2) citizens of a State and citizens or subjects of a foreign state, except that the district courts shall not have original jurisdiction under this subsection of an action between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same State;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

28 U.S.C. § 1391 provides in relevant part:

§ 1391. Venue generally

* * *

(f) Civil actions against a foreign state—A civil action against a foreign state as defined in section 1603(a) of this title may be brought—

(1) in any judicial district in which a substantial part of the events or omissions giving

rise to the claim occurred, or a substantial part of property that is the subject of the action is situated;

(2) in any judicial district in which the vessel or cargo of a foreign state is situated, if the claim is asserted under section 1605(b) of this title;

(3) in any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state as defined in section 1603(b) of this title; or

(4) in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.

* * *

28 U.S.C. § 1441 provides in relevant part:

§ 1441. Removal of civil actions

* * *

(d) Actions against foreign States.—Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

* * *

28 U.S.C. § 1602 provides:

§ 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

28 U.S.C. § 1603 provides:

§ 1603. Definitions

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

28 U.S.C. § 1604 provides:

§ 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. § 1605 provides:

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United

States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

(7) Repealed. Pub. L. 110-181, Div. A, § 1083(b)(1)(A)(iii), Jan. 28, 2008, 122 Stat. 341.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: *Provided*, That—

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in section 31301 of title 46. Such action shall be brought, heard, and determined in accordance with the provisions of chapter 313 of title 46 and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

(e), (f) Repealed. Pub. L. 110-181, Div. A, Title X, § 1083(b)(1)(B), Jan. 28, 2008, 122 Stat. 341.

(g) Limitation on discovery.—

(1) In general.—**(A)** Subject to paragraph (2), if an action is filed that would otherwise be

barred by section 1604, but for section 1605A, the court, upon request of the Attorney General, shall stay any request, demand, or order for discovery on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action, until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere.

(B) A stay under this paragraph shall be in effect during the 12-month period beginning on the date on which the court issues the order to stay discovery. The court shall renew the order to stay discovery for additional 12-month periods upon motion by the United States if the Attorney General certifies that discovery would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action.

(2) Sunset.—**(A)** Subject to subparagraph (B), no stay shall be granted or continued in effect under paragraph (1) after the date that is 10 years after the date on which the incident that gave rise to the cause of action occurred.

(B) After the period referred to in subparagraph (A), the court, upon request of the Attorney General, may stay any request, demand, or order for discovery on the United States that the court finds a substantial likelihood would—

(i) create a serious threat of death or serious bodily injury to any person;

(ii) adversely affect the ability of the United States to work in cooperation with foreign and international law enforcement agencies in investigating violations of United States law; or

(iii) obstruct the criminal case related to the incident that gave rise to the cause of action or undermine the potential for a conviction in such case.

(3) Evaluation of evidence.—The court's evaluation of any request for a stay under this subsection filed by the Attorney General shall be conducted ex parte and in camera.

(4) Bar on motions to dismiss.—A stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

(5) Construction.—Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States.

28 U.S.C. § 1605A provides:

§ 1605A. Terrorism exception to the jurisdictional immunity of a foreign state

(a) In general.—

(1) No immunity.—A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabo-

tage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

(2) Claim heard.—The court shall hear a claim under this section if—

(A)(i)(I) the foreign state was designated as a state sponsor of terrorism at the time the act described in paragraph (1) occurred, or was so designated as a result of such act, and, subject to subclause (II), either remains so designated when the claim is filed under this section or was so designated within the 6-month period before the claim is filed under this section; or

(II) in the case of an action that is refiled under this section by reason of section 1083(c)(2)(A) of the National Defense Authorization Act for Fiscal Year 2008 or is filed under this section by reason of section 1083(c)(3) of that Act, the foreign state was designated as a state sponsor of terrorism when the original action or the related action under section 1605(a)(7) (as in effect before the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) was filed;

(ii) the claimant or the victim was, at the time the act described in paragraph (1) occurred—

(I) a national of the United States;

(II) a member of the armed forces; or

(III) otherwise an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment; and

(iii) in a case in which the act occurred in the foreign state against which the claim has been brought, the claimant has afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration; or

(B) the act described in paragraph (1) is related to Case Number 1:00CV03110 (EGS) in the United States District Court for the District of Columbia.

(b) Limitations.—An action may be brought or maintained under this section if the action is commenced, or a related action was commenced under section 1605(a)(7) (before the date of the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) not later than the latter of—

(1) 10 years after April 24, 1996; or

(2) 10 years after the date on which the cause of action arose.

(c) Private right of action.—A foreign state that is or was a state sponsor of terrorism as described in subsection (a)(2)(A)(i), and any official, employee, or agent of that foreign state while acting within the

scope of his or her office, employment, or agency, shall be liable to—

(1) a national of the United States,

(2) a member of the armed forces,

(3) an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment, or

(4) the legal representative of a person described in paragraph (1), (2), or (3),

for personal injury or death caused by acts described in subsection (a) (1) of that foreign state, or of an official, employee, or agent of that foreign state, for which the courts of the United States may maintain jurisdiction under this section for money damages. In any such action, damages may include economic damages, solatium, pain and suffering, and punitive damages. In any such action, a foreign state shall be vicariously liable for the acts of its officials, employees, or agents.

(d) Additional damages.—After an action has been brought under subsection (c), actions may also be brought for reasonably foreseeable property loss, whether insured or uninsured, third party liability, and loss claims under life and property insurance policies, by reason of the same acts on which the action under subsection (c) is based.

(e) Special masters.—

(1) In general.—The courts of the United States may appoint special masters to hear damage claims brought under this section.

(2) Transfer of funds.—The Attorney General shall transfer, from funds available for the pro-

gram under section 1404C of the Victims of Crime Act of 1984 (42 U.S.C. 10603c), to the Administrator of the United States district court in which any case is pending which has been brought or maintained under this section such funds as may be required to cover the costs of special masters appointed under paragraph (1). Any amount paid in compensation to any such special master shall constitute an item of court costs.

(f) Appeal.—In an action brought under this section, appeals from orders not conclusively ending the litigation may only be taken pursuant to section 1292(b) of this title.

(g) Property disposition.—

(1) In general.—In every action filed in a United States district court in which jurisdiction is alleged under this section, the filing of a notice of pending action pursuant to this section, to which is attached a copy of the complaint filed in the action, shall have the effect of establishing a lien of lis pendens upon any real property or tangible personal property that is—

(A) subject to attachment in aid of execution, or execution, under section 1610;

(B) located within that judicial district; and

(C) titled in the name of any defendant, or titled in the name of any entity controlled by any defendant if such notice contains a statement listing such controlled entity.

(2) Notice.—A notice of pending action pursuant to this section shall be filed by the clerk of the district court in the same manner as any

pending action and shall be indexed by listing as defendants all named defendants and all entities listed as controlled by any defendant.

(3) Enforceability.—Liens established by reason of this subsection shall be enforceable as provided in chapter 111 of this title.

(h) Definitions.—For purposes of this section--

(1) the term "aircraft sabotage" has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation;

(2) the term "hostage taking" has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages;

(3) the term "material support or resources" has the meaning given that term in section 2339A of title 18;

(4) the term "armed forces" has the meaning given that term in section 101 of title 10;

(5) the term "national of the United States" has the meaning given that term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22));

(6) the term "state sponsor of terrorism" means a country the government of which the Secretary of State has determined, for purposes of section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)), section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371), section 40 of the Arms Export Control Act (22 U.S.C. 2780), or any other provision of law, is a government that has repeatedly provided support for acts of international terrorism; and

(7) the terms "torture" and "extrajudicial killing" have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991 (28 U.S.C. 1350 note).

28 U.S.C. § 1606 provides:

§ 1606. Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

28 U.S.C. § 1607 provides:

§ 1607. Counterclaims

In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim—

(a) for which a foreign state would not be entitled to immunity under section 1605 or 1605A of this chapter had such claim been brought in a separate action against the foreign state; or

(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

28 U.S.C. § 1608 provides:

§ 1608. Service; time to answer; default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail

requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state—

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made—

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

28 U.S.C. § 1609 provides:

§ 1609. Immunity from attachment and execution of property of a foreign state

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

28 U.S.C. § 1610 provides:

§ 1610. Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property—

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: *Provided*, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment, or

(6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement, or

(7) the judgment relates to a claim for which the foreign state is not immune under section 1605A, regardless of whether the property is or was involved with the act upon which the claim is based.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a) (2), (3), or (5), 1605(b), or 1605A of this chapter, regardless of whether the property is or was involved in the act upon which the claim is based, or

(3) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605A of this chapter or section 1605(a)(7) of this chapter (as such section was in effect on January 27, 2008), regardless of whether the property is or was involved in the act upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if—

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

(e) The vessels of a foreign state shall not be immune from arrest in rem, interlocutory sale, and execution in actions brought to foreclose a preferred mortgage as provided in section 1605(d).

(f)(1)(A) Notwithstanding any other provision of law, including but not limited to section 208(f) of the Foreign Missions Act (22 U.S.C. 4308(f)), and except as provided in subparagraph (B), any property with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the Trading with the Enemy Act (50 U.S.C. App. 5(b)), section 620(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2370(a)), sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701-1702), or any other proclamation, order, regulation, or license issued pursuant thereto, shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state (including any agency or instrumentality or such state) claiming such property is not immune under section 1605(a)(7) (as in effect before the enactment of section 1605A) or section 1605A.

(B) Subparagraph (A) shall not apply if, at the time the property is expropriated or seized by the foreign state, the property has been held in title by a

natural person or, if held in trust, has been held for the benefit of a natural person or persons.

(2)(A) At the request of any party in whose favor a judgment has been issued with respect to a claim for which the foreign state is not immune under section 1605(a)(7) (as in effect before the enactment of section 1605A) or section 1605A, the Secretary of the Treasury and the Secretary of State should make every effort to fully, promptly, and effectively assist any judgment creditor or any court that has issued any such judgment in identifying, locating, and executing against the property of that foreign state or any agency or instrumentality of such state.

(B) In providing such assistance, the Secretaries—

(i) may provide such information to the court under seal; and

(ii) should make every effort to provide the information in a manner sufficient to allow the court to direct the United States Marshall's office to promptly and effectively execute against that property.

(3) Waiver.—The President may waive any provision of paragraph (1) in the interest of national security.

(g) Property in certain actions.—

(1) In general.—Subject to paragraph (3), the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution,

upon that judgment as provided in this section, regardless of—

(A) the level of economic control over the property by the government of the foreign state;

(B) whether the profits of the property go to that government;

(C) the degree to which officials of that government manage the property or otherwise control its daily affairs;

(D) whether that government is the sole beneficiary in interest of the property; or

(E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

(2) United States sovereign immunity inapplicable.—Any property of a foreign state, or agency or instrumentality of a foreign state, to which paragraph (1) applies shall not be immune from attachment in aid of execution, or execution, upon a judgment entered under section 1605A because the property is regulated by the United States Government by reason of action taken against that foreign state under the Trading With the Enemy Act or the International Emergency Economic Powers Act.

(3) Third-party joint property holders.—Nothing in this subsection shall be construed to supersede the authority of a court to prevent appropriately the impairment of an interest held by a person who is not liable in the action giving rise to a judgment in property subject to attach-

ment in aid of execution, or execution, upon such judgment.

28 U.S.C. § 1611 provides:

§ 1611. Certain types of property immune from execution

(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if—

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver; or

(2) the property is, or is intended to be, used in connection with a military activity and

(A) is of a military character, or

(B) is under the control of a military authority or defense agency.

(c) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution in an action brought under section 302 of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 to the extent that the property is a facility or installation used by an accredited diplomatic mission for official purposes.

Federal Rule of Civil Procedure 69 provides:

Rule 69. Execution

(a) In General.

(1) ***Money Judgment; Applicable Procedure.*** A money judgment is enforced by a writ of execution, unless the court directs otherwise. The procedure on execution—and in proceedings supplementary to and in aid of judgment or execution—must accord with the procedure of the state where the court is located, but a federal statute governs to the extent it applies.

(2) ***Obtaining Discovery.*** In aid of the judgment or execution, the judgment creditor or a successor in interest whose interest appears of record may obtain discovery from any person--including the judgment debtor—as provided in these rules or by the procedure of the state where the court is located.

(b) Against Certain Public Officers. When a judgment has been entered against a revenue officer in the circumstances stated in 28 U.S.C. § 2006, or against an officer of Congress in the circumstances stated in 2 U.S.C. § 118, the judgment must be satisfied as those statutes provide.

N.Y. C.P.L.R. § 5223 provides:

§ 5223. Disclosure

At any time before a judgment is satisfied or vacated, the judgment creditor may compel disclosure of all matter relevant to the satisfaction of the judgment, by serving upon any person a subpoena, which shall specify all of the parties to the action, the date of the judgment, the court in which it was entered, the amount of the judgment and the amount then due thereon, and shall state that false swearing or failure to comply with the subpoena is punishable as a contempt of court.

United States District Court
for the Southern District of New York

NML Capital, Ltd. v. *Republic of Argentina*,
Case No. 1:08-cv-06978-TPG

Dkt. Entry 284, Declaration of
Eric C. Kirsch (January 20, 2011)

EXHIBIT B [excerpt]

Fiscal Agency Agreement
(October 19, 1994)

* * *

To the extent that the Republic or any of its revenues, assets or properties shall be entitled, in any jurisdiction in which any Specified Court is located, in which any Related Proceeding may at any time be brought against it or any of its revenues, assets or properties, or in any jurisdiction in which any Specified Court or Other Court is located in which any suit, action or proceeding may at any time be brought solely for the purpose of enforcing or executing any Related Judgment, to any immunity from suit, from the jurisdiction of any such court, from set-off, from attachment prior to judgment, form attachment in aid of execution of judgment, from execution of a judgment or from any other legal or judicial process or remedy, and to the extent that in any such jurisdiction there shall be attributed such an immunity, the Republic has irrevocably agreed not to claim and has irrevocably waived such immunity to the fullest extent permitted by the laws of such jurisdiction (and consents generally for the purposes of the Foreign Sovereign Immunities Act to the giving of any relief or the issue of any process in connection with any Related Proceeding or Related Judgment), provided that such waiver shall not be effective (i) with respect to the assets which constitute freely

available reserves pursuant to Article 6 of the Convertibility Law (the "Convertibility Law"), the amount, composition and investment of which will be reflected on the balance sheet and accounting statement of Banco Central consistently prepared pursuant to Article 5 of the Convertibility Law and (ii) with respect to property of the public domain located in the territory of The Republic of Argentina or property owned by the Republic and located in its territory which is dedicated to the purpose of an essential public service, and provided further that such agreement and waiver, insofar as it relates to any jurisdiction other than a jurisdiction in which a Specified Court is located, is given solely for the purpose of enabling the Fiscal Agent or a holder of Securities of this Series to enforce or execute a Related Judgment. The waiver of immunities referred to herein constitutes only a limited and specific waiver for the purpose of the Securities of this Series and the Fiscal Agency Agreement and under no circumstances shall it be interpreted as a general waiver of the Republic or a waiver with respect to proceedings unrelated to the Securities of this Series or the Fiscal Agency Agreement.

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