No. 12-842

In the Supreme Court of the United States

THE 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 PETITIONER

JONATHAN I. BLACKMAN
Counsel of Record
CARMINE D. BOCCUZZI, JR.
DANIEL J. NORTHROP
MICHAEL M. BRENNAN
CLEARY GOTTLIEB STEEN & HAMILTON LLP
One Liberty Plaza
New York, New York 10006
(212) 225-2000
jblackman@cgsh.com

Attorneys for Petitioner
The Republic of Argentina

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Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Sections 1609 and 1610(a) of the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. § 1602 *et seq*., limit execution on property of a foreign state to "property . . . in the United States . . . used for a commercial activity in the United States."

Whether post-judgment discovery in aid of enforcing a judgment against a foreign state can be ordered with respect to all assets of a foreign state regardless of their location or use, as held by the Second Circuit, or is limited to assets located in the United States that are potentially subject to execution under the FSIA, as held by the Seventh, Fifth, and Ninth Circuits.

LIST OF PARTIES

The petitioner in this case is the Republic of Argentina, defendant-appellant below. The respondent, and plaintiff-appellee below, is NML Capital, Ltd.

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The opinion of the court of appeals is reported at 695 F.3d 201. Pet. App. A.[1] The relevant order of the district court is not published. Pet. App. B.

JURISDICTION

The court of appeals entered its opinion on August 20, 2012, and denied a timely petition for rehearing *en banc* on October 10, 2012. The petition for a writ of certiorari was filed on January 7, 2013, and granted on January 10, 2014. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions, 28 U.S.C. §§ 1602, 1603, 1604, 1605(a), 1606, 1609, 1610(a), and 1611, are set forth in the Statutory Appendix at 1a–20a.

STATEMENT

The FSIA provides the sole basis for enforcing a judgment against a foreign state. The statute provides that all property of a foreign state is presumptively immune from the authority of U.S. courts, unless it is both located in and used for a commercial activity in

[1] The appendix that the Republic of Argentina (the "Republic" or "Argentina") filed with its petition for writ of certiorari is referred to as "Pet. App." Accompanying this brief is a joint appendix, referred to as "JA," and a statutory appendix, referred to as "Stat. App."

the United States. *See* 28 U.S.C. §§ 1609–1611 (Stat. App. 13a–20a). Nevertheless, the court of appeals held below that a district court may order, in supplementary judgment enforcement proceedings under the FSIA, discovery of foreign-state assets that are not located in the United States or used for a commercial activity, because once a court has personal and subject matter jurisdiction over a foreign state, "it [can] exercise its judicial power over [the sovereign] as over any other party." Pet. App. 18. According to the court of appeals, NML is entitled to discovery concerning all of Argentina's property located around the world and regardless of its use, including military and diplomatic property, because that information might lead to successful enforcement proceedings in foreign jurisdictions under a foreign country's immunity laws.

But as a foreign state, Argentina is not just "any other party." The court of appeals' unprecedented ruling, which permits U.S. courts to conduct a "forensic examination" of foreign-state assets and serve as a "clearinghouse for information . . . that might lead to attachments or executions anywhere in the world," Pet. App. 31, 41, defies the language, structure, and history of the FSIA, as well as the principles of comity and reciprocity that underlie it. The Court should reject the Second Circuit's boundless and extraterritorial conception of asset discovery against foreign states and adopt the standard applied by every other court of appeals that has addressed the issue, which have all held that such discovery must be ordered circumspectly and only to verify allegations of specific facts crucial to an immunity determination.

A. The Foreign Sovereign Immunities Act

1. Although today the FSIA governs the immunities afforded to foreign states and their property, "[t]he doctrine of foreign sovereign immunity developed as a matter of common law long before the FSIA was enacted in 1976." *Samantar v. Yousuf*, 560 U.S. 305, 311 (2010). The "source of [this Court's] foreign sovereign immunity jurisprudence," *Republic of Austria v. Altmann*, 541 U.S. 677, 688 (2004), is Chief Justice Marshall's opinion for the Court in *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812), which concluded that federal courts lacked jurisdiction over an armed ship of the emperor of France because "the United States had impliedly waived jurisdiction over certain activities of foreign sovereigns," *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983). That decision and its progeny broadly extended virtually absolute immunity to foreign sovereigns as "a matter of grace and comity," *id.*, founded on the United States' understanding that both international practice, and its own self-interest, necessitate such comity.

Following *Schooner Exchange*, "a two-step procedure developed for resolving a foreign state's claim of sovereign immunity, typically asserted on behalf of seized vessels." *Samantar*, 560 U.S. at 311 (citing *Republic of Mexico v. Hoffman*, 324 U.S. 30, 34–36 (1945)); *Ex parte Republic of Peru*, 318 U.S. 578, 587–89 (1943). First, the State Department could file a formal suggestion of immunity with the court on behalf of the foreign state, which, if granted, as it invariably was, resulted in the dismissal of the case for lack of jurisdiction. *See Samantar*, 560 U.S. at 311. Second, if the State Department said nothing, a district

court "had authority to decide for itself whether all the requisites for such immunity existed." *Id.* (internal quotation marks omitted). As a practical matter, absolute immunity from jurisdiction and judgment execution remained the rule, because "[p]rior to 1952, the State Department followed a general practice of requesting immunity in all actions against friendly sovereigns." *Id.* at 312.

To better align the law of the United States with the immunity regimes of other sovereigns, the State Department in 1952 adopted the "restrictive" theory of foreign sovereign immunity, according to which 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; *see also* Letter from Jack B. Tate, Acting Legal Advisor, Department of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), *reprinted in* 26 Dep't of State Bull. 984–85 (1952). Importantly, however, this change did not alter the practice of affording sovereign property absolute immunity from attachment and execution. *See, e.g.*, *Weilamann v. Chase Bank*, 21 Misc.2d 1086, 1087–89 (N.Y. Sup. Ct. Westchester Cnty. 1959); *New York and Cuba Mail S.S. Co. v. Republic of Korea*, 132 F. Supp. 684, 685–87 (S.D.N.Y. 1955). Thus, for the first time, jurisdiction to adjudicate liability diverged from the power to execute and enforce a judgment, a distinction that Congress would eventually carry over into the FSIA.

2. The State Department's recommendations of immunity from suit were frequently influenced by political considerations, which in turn resulted in the

inconsistent application of jurisdictional sovereign immunity in U.S. Courts. Congress responded in 1976 by enacting the FSIA "in order to free the Government from the case-by-case diplomatic pressures, to clarify the governing standards, and to 'assur[e] litigants that . . . decisions are made on purely legal grounds and under procedures that insure due process.'" *Verlinden*, 461 U.S. at 487–88 (quoting H.R. Rep. 94-1487 at 7 (1976), *reprinted in* 1976 U.S.C.A.A.N. 6604, 6606 ("House Report")); *see also Altmann*, 541 U.S. at 716. Section 1602 of the FSIA describes the Act's two primary purposes: (1) to endorse and codify the restrictive theory of sovereign immunity and (2) to transfer primary responsibility for deciding "claims of foreign states to immunity" from the State Department to the courts. Stat. App. 1a. Section 1602 further provides that all "[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." *Id.*

To accomplish these goals, "the Act contains a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state." *Verlinden*, 461 U.S. at 488; *see also Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989) ("FSIA provides the sole basis for obtaining jurisdiction over a foreign state"). The scheme is two-fold. First, foreign states are immune from jurisdiction unless an express exception applies, such as when a sovereign has consented to jurisdiction. *See* 28 U.S.C. §§ 1604–1605 (Stat. App. 2a–8a).

Second, even when a foreign sovereign is subject to jurisdiction, courts' post-judgment remedial powers are

strictly constrained. A foreign state's property is "immune from attachment arrest and execution except as provided in sections 1610 and 1611." *See* 28 U.S.C. § 1609 (Stat. App. 13a). Section 1610 provides that a foreign state's property "shall not be immune from attachment in aid of execution, or from execution, upon a judgment" *if* it is "used for a commercial activity in the United States" *and* the sovereign has waived its immunity or another express exception applies. 28 U.S.C. § 1610(a) (Stat. App. 13a–14a). As the House Judiciary Committee Report states, "[t]he term 'attachment in aid of execution' is intended to include attachments, garnishments, and supplemental proceedings available under applicable Federal or State law to obtain satisfaction of a judgment. *See* Fed. R. Civ. P. 69." House Report at 28. Foreign-state property in the United States that is not used for commercial activity here is therefore immune from post-judgment proceedings in aid of execution, as is foreign-state property outside the United States. *Autotech Techs. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 750 (7th Cir. 2007), *cert. denied,* 552 U.S. 1231 (2008). Section 1611 provides additional protections for uniquely sovereign assets, including military property. 28 U.S.C. § 1611(b) (Stat. App. 19a–20a).

The FSIA's broad enforcement immunity reflects a deliberate policy choice on the part of Congress. *See* Brief for the United States as *Amicus Curiae* at *8–9, *Republic of Argentina v. NML Capital, Ltd.*, No. 12-842 (Dec. 4, 2013) ("U.S. *Amicus* Br."). While Congress codified the "restrictive theory" of immunity from suit, *see Altmann*, 541 U.S. at 689–91 (2004), the "enforcement [of] judgments against foreign state

property remain[ed] a somewhat controversial subject in international law," House Report at 27; *accord* Restatement (Third) of Foreign Relations Law of the United States § 460 n. 1 (1987). "Enforcement against State property constitutes a greater interference with a State's freedom to manage its own affairs and to pursue its public purposes" than entry of a judgment. Hazel Fox & Philippa Webb, *The Law of State Immunity* 481 (3d ed. 2013). Judicial seizure of a foreign state's property thus may "be regarded as 'an affront to [the sovereign's] dignity and may . . . affect our relations with it.'" *Republic of Philippines v. Pimentel*, 553 U.S. 851, 866 (2008) (quoting *Hoffman*, 324 U.S. at 35–36). The political branches therefore struck a delicate balance between the rights of creditors and the foreign relations imperative of respecting foreign sovereigns. Congress proceeded cautiously, "remedy[ing], *in part*, the predicament of a plaintiff who has obtained a judgment against a foreign state." House Report at 8 (emphasis added); *see also id*. at 27 ("*partially* lowering" the preexisting rule of absolute immunity (emphasis added)). Congress thereby left intact foreign states' absolute enforcement immunity for military property, 28 U.S.C. § 1611(b) (Stat. App. 19a–20a), and deliberately restricted execution and execution-related remedies on other foreign-state property to property located in the United States and used for a commercial activity in the United States, 28 U.S.C. § 1610(a) (Stat. App. 13a–14a).[2]

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[2] This limitation also necessarily excludes enforcement and enforcement remedies against property used for a diplomatic activity, which of course is not "commercial" activity. *Saudi Arabia v. Nelson*, 507 U.S. 349, 369 (1993) (White, J., concurring) (citing House Report for proposition that "employment of diplomatic . . .

B. The Argentine Crisis and NML's Execution Efforts

1. After a prolonged economic recession that reached its nadir in 2002, the Republic experienced the worst economic, social, and political crisis of its modern history, marked by an enduring recession, widespread poverty and unemployment, and lack of access to the international capital markets. *See* Decl. of Noemi C. LaGreca ¶¶ 4–13, *EM Ltd. v. Republic of Argentina*, No. 03 Civ. 2507 (TPG) (S.D.N.Y. June 11, 2003); Decl. of Federico Carlos Molina ¶ 3, *NML Capital, Ltd. v. Republic of Argentina*, No. 03 Civ. 8845 (TPG) (S.D.N.Y. Mar. 24, 2005). With its economy in ruins, the country suffered social and political turmoil: riots in the streets of Buenos Aires left dozens dead and four presidents resigned within a two-week period.[3] Larry Rohter, *Bank Holiday and Creditors Add to Crisis in Argentina*, N.Y. Times, April 22, 2002.

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personnel" is a "distinctly sovereign activit[y]" and is therefore "public or governmental and not commercial in nature").

[3] The Argentine crisis has been described as the "worst-case scenario" in eight centuries of modern financial crises. *See* Carmen M. Reinhart & Kenneth S. Rogoff, *This Time is Different: A Panoramic View of Eight Centuries of Financial Crises*, at 51 (2008), *available at* http://www.nber.org/papers/w13882.pdf; *see also* Ross P. Buckley, *The Bankruptcy of Nations: An Idea Whose Time Has Come*, 43 INT'L LAW. 1189, 1196 (2009) (describing Argentina's economic crisis: "The living standards of over one-half of the Argentine people fell below the poverty line, and over a third could not afford basic food. Children were fainting in class from hunger, regularly. Adults were rioting and breaking into supermarkets, regularly, in search of food.").

By the end of 2001, this crisis made it impossible for the Republic to service its overwhelming debt burden—some $80 billion in public external debt alone—while maintaining basic governmental services necessary for the health, welfare, and safety of the Argentine population. "[U]nable to service its debts," the Republic had no choice but to defer interest and principal payments to its bondholders. *See* Panel of Independent Advisers, *Economic and Financial Issues Facing Argentina*, Report to the Government of Argentina and the International Monetary Fund, ¶ 1 (July 29, 2002), *available at* http://www.imf.org/external/np/sec/nb/2002/nb0280.htm. Like many nations that have faced economic crisis and unsustainable indebtedness, including the United States in the early days of the Constitution, *see generally* Forrest McDonald, *Alexander Hamilton: A Biography* 163–88 (1979), the Republic was forced to seek restructuring of both its external and internal public debt.[4]

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[4] The United States, the international financial community, and the federal courts have all recognized the importance of voluntary sovereign debt restructuring. *See, e.g.*, Brief for the United States as *Amicus Curiae* in Support of Reversal at *6–10, *NML Capital, Ltd. v. Republic of Argentina*, No. 12-105-cv(L), 2012 WL 1150791 (2d Cir. Apr. 4, 2012); Statement of Interest of the United States at *2–6, *Macrotecnic Int'l Corp. v. Republic of Argentina*, No. 02 Civ. 5932 (TPG), 2004 WL 5475206 (S.D.N.Y. Jan. 12, 2004); *H.W. Urban GmbH v. Republic of Argentina*, No. 02 Civ. 5699 (TPG), 2003 WL 21058254, at *2 (S.D.N.Y. May 12, 2003) ("[A]n important channel for attempting to resolve the Argentine debt problem will undoubtedly be the effort to negotiate a debt restructuring plan."); *cf. Pravin Banker Assocs., Ltd. v. Banco Popular del Peru*, 109 F.3d 850, 855 (2d Cir. 1997) ("[T]he United States encourages participation in, and advocates the success of, IMF foreign debt resolution procedures . . .").

Because there is no bankruptcy regime for insolvent states, the Republic followed international practice favoring the orderly and consensual restructuring of sovereign debt and successfully restructured its unsustainable external debt through two voluntary global exchange offers in 2005 and 2010. Participating holders exchanged old, nonperforming bond interests for new, performing bond interests with lower interest rates, reduced principal, and/or longer maturities. The Republic has consistently made timely payments on its restructured debt.

The exchange offers were extended on the same terms to all beneficial owners of eligible bonds—including respondent NML Capital, Ltd. ("NML")—and reflected the Republic's commitment to treat its private creditors equitably. The Republic did not repudiate that debt. Owners tendered approximately 92% of the aggregate eligible debt in the exchange offers, making the Republic's sovereign debt restructuring the largest in history at that time. *See* Republic of Argentina, Annual Report (Form 18-K), at 17 (Sept. 30, 2011), *available at* http://www.sec.gov/Archives/edgar/data/914021/000090342311000486/roa-18k_0928.htm. NML declined to participate in the restructuring.

2. NML, a Cayman Islands hedge fund established exclusively to buy distressed Republic debt, acquired beneficial interests in Republic bonds at a deep discount both immediately before, and well after, the Republic suspended payments on its unsustainable external debt in December 2001. NML and similar "vulture" hedge funds seek to take advantage of the absence of bankruptcy protection in the sovereign

context by bringing lawsuits for the face value of defaulted sovereign debt, obtaining judgments on which interest continues to run indefinitely, and then using aggressive means to try to collect on them, notwithstanding the broad immunity afforded foreign-state property under the FSIA.[5]

NML has sought to enforce its judgments against the Republic through a series of execution attempts against immune property of the Republic and other entities[6] that the federal courts have in most cases

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[5] *See, e.g.*, Press Release, Office of the High Commissioner for Human Rights, *'Vulture Funds' – UN expert on foreign debt welcomes landmark law to address profiteering* (Apr. 20, 2010), *available at* http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=9976&LangID=E (last visited Feb. 24, 2014) ("[T]he profiteering of 'vulture funds' [has been] at the expense of both the citizens of distressed debtor countries and the taxpayers of countries that have supported international debt relief efforts . . . . 'Vulture funds' have exploited the voluntary nature of international debt relief schemes by acquiring defaulted sovereign debt at deeply discounted prices and then seeking repayment of the full value of the debt through litigation, seizure of assets or political pressure." (internal quotation marks omitted)); Jonathan C. Lippert, Note, *Vulture Funds: The Reason Why Congolese Debt May Force a Revision of the Foreign Sovereign Immunities Act*, 21 N.Y. INT'L L. REV. 1, 2, 27 (2008) (vulture funds seek "extraordinary profits at the expense of U.S. companies, the U.S. economy and U.S. foreign relations . . . potentially affecting debt restructuring in all emerging markets").

[6] These entities are presumptively separate from the Republic and therefore also presumptively immune from execution on Republic debt. *See First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 626–27 (1983) ("Due respect for the actions taken by foreign sovereigns and for principles of comity between nations . . . leads us to conclude . . . that government

rejected as violating the FSIA.[7] NML has also sought, unsuccessfully, to execute against property abroad, including by trying to attach taxes owed to the Republic in France,[8] to attach diplomatic bank accounts in France[9] and Belgium,[10] and to seize an Argentine

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instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." (citation omitted)).

[7] *See, e.g.*, *NML Capital, Ltd. v. Banco Central de la República Argentina*, 652 F.3d 172, 196–97 (2d Cir. 2011) (rejecting NML's attempt to attach property of the central bank of Argentina), *cert. denied*, 133 S. Ct. 23 (2012); *Aurelius Capital Partners, LP v. Republic of Argentina*, 584 F.3d 120, 124, 130–31 (2d Cir. 2009) (rejecting attempt by NML and others to execute upon Argentine social security funds because the Republic had not "used [the funds] for a commercial activity in the United States"), *cert. denied*, 130 S. Ct. 1691 (2010); *EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 465–66 (2d Cir. 2007) (rejecting NML's other attempt to attach property of the central bank of Argentina), *cert. denied*, 522 U.S. 818 (2007); *NML Capital, Ltd. v. Spaceport Sys. Int'l., L.P.*, 788 F. Supp. 2d 1111, 1127 (C.D. Cal. 2011) (rejecting NML's attempt to execute on satellite jointly launched by Argentine space agency, NASA, and other nations' space agencies); *NML Capital, Ltd. v. Republic of Argentina*, No. 04-00197 (CKK), 2005 U.S. Dist. LEXIS 47027, at *56-57 (D.D.C. Aug. 3, 2005) (vacating NML's *ex parte* attachments of diplomatic and military property in Washington, D.C.).

[8] *See NML Capital, Ltd. v. Republic of Argentina*, Cour d'appel [CA] [regional court of appeal] Paris, 4e pôle 8e ch., Dec. 9, 2010, No. 10/00390 (Fr.) (appeal pending to the Cour de Cassation [French Supreme Court]).

[9] *See NML Capital, Ltd. v Republic of Argentina*, Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Sept. 28, 2011, Bull. civ. I, No. 867 (Fr.), *available at* http://www.courdecassation.

naval vessel in Ghana,[11] in each case without any claim by NML that it needed discovery from a United States court to pursue these legally improper execution efforts.

Most recently, NML has obtained injunctions prohibiting the Republic from making periodic payments on its restructured debt unless it also pays 100% of NML's defaulted debt. *See NML Capital, Ltd. v. Republic of Argentina*, 727 F.3d 230, 240–41 (2d Cir. 2013); *NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246, 265 (2d Cir. 2012). The court of appeals' decisions affirming those orders are currently the subject of petitions for certiorari filed with this Court. *See* Petition for Writ of Certiorari, *Republic of Argentina v. NML Capital, Ltd.*, No. 13-990 (Feb. 18, 2014); *see also* Petition for Writ of Certiorari, *Exchange Bondholder Group v. NML Capital, Ltd.*, No. 13-991 (Feb. 18, 2014).

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fr/jurisprudence_2/premiere_chambre_civile_568/867_28_21103.html.

[10] *See Republic of Argentina v. NML Capital, Ltd.*, Cour de Cassation [Cass.] [Court of Cassation], Nov. 22, 2012, No. C.11.0688.F/1 (Belg.).

[11] Order, *The "ARA Libertad Case" (Argentina v. Ghana)*, International Tribunal for the Law of the Seas (ITLOS) (Dec. 15, 2012), *available at* http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/C20_Order_15_12_2012.pdf; *Republic of Argentina v. High Court (Comm. Div.) Accra Ex Parte, Attorney General*, No.J5/10/2013 (Ghana S.C., June 20, 2013).

C. The Decisions Below

1. Having failed to satisfy its judgments with property subject to execution under the FSIA—*i.e.*, property of the Republic used for a commercial activity *in* the United States—NML in 2010 expanded its enforcement efforts beyond the scope contemplated by the FSIA by demanding from Bank of America and Banco de la Nación Argentina ("BNA")[12] discovery of information concerning all purported property—regardless of its use or location—of the Republic and a multitude of other individuals and entities. In NML's words, it sought to conduct a "forensic examination" of the Republic's worldwide "financial circulatory system." *See* Pet. App. 5, 41, 60–61; *see also id.* at 65 (NML's counsel: "[W]e should have this information, Judge, so that we can find out what [the Republic] is doing around the world.").

The subpoena served on Bank of America defined the Republic as including 136 public officials, 43 independent entities,[13] and 148 purported "Ministries" and "Secretariats" of the Republic, as well as countless unspecified alleged "agencies, ministries, instrumentalities, political subdivisions, employees, attorneys, representatives, affiliates, subsidiaries,

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[12] BNA, Argentina's largest commercial bank, is wholly-owned by the Republic and thus is a "foreign state" under the FSIA that is entitled to its own sovereign immunity. 28 U.S.C. § 1603.

[13] Pet. App. 69 (NML's counsel: "We are not required to establish at this time that any particular agency is or is not an alter ego. What we have shown, which is sufficient, is that these agencies and these individuals might have information subject to discovery.").

predecessors, successors, alter-egos, and assigns." JA 49, JA 57–76. For each of these entities and individuals, the subpoena demands information concerning, *inter alia*, "[e]ach asset or property of any kind whatsoever which [they] owned directly or indirectly, in whole or in part, as sole owner or jointly with others, either of record or beneficially." JA 56. The subpoena served on BNA was equally expansive, defining the Republic to include 225 entities, including all "agencies, instrumentalities, ministries, political subdivisions, representatives, [and] State Controlled Entities," and demanding documents concerning "any property, assets or accounts maintained at BNA *anywhere* in the name of Argentina or for Argentina's benefit." JA 91–105.

Each subpoena contains unprecedented demands for information concerning *military* and *diplomatic* property, as well as property held by the Secretariat of Intelligence (Argentina's intelligence agency) wherever located around the world. *E.g.*, JA 57, JA 58, JA 61, JA 63 (defining "Argentina" to include the "Ministry of Foreign Affairs," which oversees Argentina's diplomatic activities, and the Republic's "Military Headquarters" and "Ministry of Defense"). The subpoenas do not provide any basis—let alone a plausible basis—to support the claim that any of the purported property at which they are directed is subject to attachment and execution under the FSIA (or for that matter the laws of any nation). Rather, as NML later explained, it sought to obtain information concerning *all* such property, regardless of whether it was immune under the FSIA or the laws of another jurisdiction, so that it could "determine [for itself] whether or not it is suggestive of a commercial transaction to buy goods,

[or] to invest money someplace," Pet. App. 33, and then decide whether to pursue enforcement proceedings abroad, *see also* Pet. App. 74 (NML's counsel stating that the information may allow NML to attach, for example, "food for hospitals").

The Republic moved to quash the Bank of America subpoena and Bank of America joined. Among other things, the Republic argued that because execution on property of a foreign state under the FSIA is limited to "property in the United States of a foreign state . . . used for a commercial activity in the United States," 28 U.S.C. § 1610(a) (Stat. App. 13a–14a), discovery of property *outside* the United States, and therefore by definition not subject to execution under the statute, is neither permissible under the FSIA, which shields sovereigns from the burdens of litigation in both the pre- and post-judgment context, nor relevant as a matter of law to execution under the FSIA. NML then moved to compel BNA and Bank of America to comply with the subpoenas, arguing that the FSIA's enforcement immunity was irrelevant to discovery in aid of execution because the statute does not expressly state that the property immunities apply to discovery. *See* Pet. App. 35 (NML's counsel: "There is nothing in the Foreign Sovereignty [sic] Immunities Act that even talks about discovery.").

Recognizing the unprecedented nature of NML's demands for worldwide discovery of sovereign assets wholly divorced from any immunity determination, the district court at a hearing in December 2010 initially expressed concern about ordering compliance with them. *See* Pet. App. 66 ("[D]iscovery is taking a shape that it has not taken before . . . . you are seeking

information about assets located in foreign countries so that you might take advantage of the law of foreign countries which might be different from United States law, the Foreign Sovereign Immunities Act."); *id.* at 70–71 ("I have no picture at all of what a country such as the Republic of Argentina might be sending or receiving messages about of a financial nature. . . . [I]t is a functioning government of a sizeable and important country. . . . I really don't know what they would be communicating about in the way of finance. . . . It is not the Argentine Steel Corporation. This is the Republic of Argentina."); *id.* at 74 ("I would be surprised if France or Germany or England or anybody else over there would allow the attachment of strictly government property. . . . I wouldn't want to just start and say, well, maybe it could be done and, therefore, there should be all of this discovery."). The court reserved decision and instructed the parties to "narrow the subject matter," stating: "[I]f I enforced the subpoena against Bank of America as to what it demands on its face, I believe that enforcement would dredge up a great deal of material of no use to the plaintiffs." *Id.* at 84; *see also id.* ("The Republic of Argentina is a government, and I have to assume that most of its activities, including communications about finances, relate to governmental matters.").

Notwithstanding its initial well-founded hesitation, the district court later reversed course at a second hearing and, citing no authority, ordered Bank of America and BNA to comply nearly in full with the subpoenas.[14] The court rejected the Republic's FSIA

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[14] NML's only narrowing of its original demands was to "limit" the individuals listed in the subpoenas to the current and most recent

arguments and concluded that it would serve as "a clearinghouse for information . . . that might lead to attachments or executions *anywhere in the world*." Pet. App. 31 (emphasis added). Although it had previously found insufficient NML's bare assertions that such discovery might somehow lead to attachable property abroad, the district court held that, notwithstanding the FSIA's strict limitation on the enforcement of judgments to commercial property in the United States, plaintiffs could seek discovery of *all* sovereign property *worldwide* because under some "theory" it "might" lead to attachable assets "in a foreign country." Pet. App. 44.

The district court orally granted NML's motions to compel and denied the Republic's, BNA's, and Bank of America's objections to the subpoenas as well as the Republic's motion to quash, which it confirmed by a brief written Order on September 2, 2011 (the "Discovery Order"). Pet. App. 21–22.

2. The Second Circuit affirmed, holding that "because the Discovery Order involves discovery, not attachment of sovereign property, and because it is directed at third-party banks, not at Argentina itself, Argentina's sovereign immunity is not infringed." Pet. App. 9; *see also id.* at 16 ("Whether a particular sovereign asset is immune from attachment must be determined separately under the FSIA, but this

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former President, and to exclude documents related to assets or transfers exclusively within Argentina. Pet. App. 8. Under the reasoning of the court of appeals below, however, there would be no principled basis for denying this discovery either.

determination does not affect discovery.").[15] The Second Circuit stated that the Discovery Order "does not implicate Argentina's immunity from attachment

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[15] Although NML never raised the argument in the district court, and therefore forfeited it, NML argued to the Second Circuit that the Republic had purportedly waived its immunity from post-judgment discovery in the Fiscal Agency Agreement governing the bonds. The Second Circuit properly did not discuss this point. *See Allianz Ins. Co. v. Lerner*, 416 F.3d 109, 114 (2d Cir. 2005) ("[I]t is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal." (internal quotation marks omitted)). In any event, like every other court to consider the issue, the Second Circuit had previously held that even with a waiver of immunity, a court's power is still limited to what the FSIA permits. *See EM Ltd.*, 473 F.3d at 481 n.19 (Republic's waiver extends "only to the 'extent permitted under the laws of the jurisdiction.' . . . Under the laws of this jurisdiction, courts may grant the remedies of attachment, arrest and execution against a foreign state's property only if the property is eligible for attachment under a specific provision of the FSIA.") (citing *Conn. Bank of Commerce v. Republic of Congo*, 309 F.2d 240, 247 (5th Cir. 2002) ("[I]f a foreign sovereign waives its immunity from execution, U.S. courts may execute against property in the United States . . . used for a commercial activity in the United States . . . . Even when a foreign state completely waives its immunity from execution, courts in the U.S. may execute only against property that meets these two statutory criteria." (internal quotation marks omitted)); *Aurelius Capital Partners, LP*, 584 F.3d at 129–30 (same). This uniform reading is compelled by the plain text of FSIA Section 1610(a), which provides that "[t]he property in the United States of a foreign state . . . used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution . . . *if*—(1) the foreign state has waived its immunity from attachment in aid of execution or from execution." Stat. App. 13a–14a (emphasis added). A waiver of immunity accordingly opens the door to the limited universe of property defined in the preceding text of Section 1610(a); it does not expand that universe.

under the FSIA" because it does not literally "allow NML to attach Argentina's property" or "have any legal effect on Argentina's property at all." Pet. App. 15. Accordingly, the court of appeals concluded that "[o]nce the district court had subject matter and personal jurisdiction over Argentina, it could exercise its judicial power over Argentina as over any other party" and order discovery to the fullest extent of Federal Rule of Civil Procedure 69's purportedly "broad" scope. *Id.* at 13, 18.

The court acknowledged that "sovereign immunity protects a sovereign from the expense, intrusiveness, and hassle of litigation," and thus that "a court must be 'circumspect' in allowing discovery before the plaintiff has established that the court has jurisdiction over a foreign sovereign defendant under the FSIA." *Id.* at 19; *see also id.* at 18 ("Where a plaintiff seeks to initially establish that the court has subject matter jurisdiction over a sovereign, discovery and immunity are almost invariably intertwined."). However, the Second Circuit found that these "concerns" are not present in the post-judgment context where a district court "indisputably ha[s] jurisdiction." *Id.* at 19; *see also id.* at 16 ("[T]he district court's power to order discovery to enforce its judgment does not derive from its ultimate ability to attach the property in question but from its power to conduct supplementary proceedings, involving persons indisputably within its jurisdiction, to enforce valid judgments.").

The court also reasoned that NML's service of the subpoenas on commercial banks, rather than Argentina itself, meant that the Discovery Order could not infringe Argentina's sovereign immunity because "the

banks' compliance with the subpoenas will cause Argentina no burden and no expense." *Id.* at 18. The Second Circuit stated that "[t]o the extent Argentina expresses concern that the subpoenas will reveal sensitive information, it is asserting a claim of privilege and not a claim of immunity," which the FSIA "says nothing about." *Id.* at 19. The court concluded 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." *Id*. at 20.[16]

The Second Circuit thereafter denied the Republic's petition for rehearing en banc.

SUMMARY OF ARGUMENT

The FSIA is the sole, comprehensive scheme for obtaining and enforcing a judgment against a foreign state. Under the Act, even where a sovereign is subject to the jurisdiction of U.S. courts, its property remains presumptively immune from judgment enforcement unless it is both located in the United States and used for a commercial activity here. The Second Circuit erred in ruling that judgment creditors are nonetheless entitled to discovery in purported aid of execution that

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[16] Empowered by the court of appeals' decision, NML and other holdout creditors of the Republic subsequently sought, and were granted by the district court, discovery directed to the Republic itself concerning the same type of immune property as that upheld by the decision under review. *See* Order, *NML Capital, Ltd. v. Republic of Argentina*, No. 03 Civ. 8845 (S.D.N.Y. Sept. 25, 2013); Opinion, *Aurelius Capital Partners v. Republic of Argentina*, No. 07 Civ. 2715 (S.D.N.Y. Mar. 7, 2013); *see also* Supplemental Brief of Petitioner at *1–4, No. 12-842 (Nov. 22, 2013).

is directed to property that falls far outside this narrow exception to immunity. The text, structure, and history of the FSIA make clear that such discovery is improper.

A. Prior to the enactment of the FSIA in 1976, foreign-state property was entitled to essentially absolute immunity from judgment enforcement, and creditors had to rely on foreign states to voluntarily satisfy judgments against them. The power of U.S. courts in actions against foreign states thus necessarily ended upon the entry of judgment, and supplemental proceedings in aid of executing such judgments, including conducting discovery in aid of execution, did not exist. The FSIA modified this framework by creating a presumption that, even where a foreign state has waived its immunity, all foreign-state property is immune from attachment and execution, unless, *inter alia*, it is used for a commercial activity in the United States. By partially lowering the barrier to judgment enforcement in this manner, Congress authorized enforcement proceedings *only* to the extent they are directed to that narrow category of sovereign property. For this reason, until the decision of the Second Circuit in this case, the courts of appeals had consistently held that any discovery in aid of executing on sovereign property must be ordered circumspectly and only to verify allegations of specific facts crucial to an immunity determination. That is the correct rule to apply here.

The Second Circuit was wrong to interpret the fact that the FSIA does not expressly address discovery as granting civil plaintiffs sweeping discovery concerning foreign-state property—including military and diplomatic property, and property located outside the

United States, all of which is plainly beyond the enforcement power of U.S. courts—as if foreign states were the same as private parties. The FSIA's purported statutory silence with regard to discovery must be read as authorizing discovery consistent with the narrow exceptions to FSIA immunity, not as an invitation to disregard these limits and leave discovery concerning foreign-state property solely within the discretion of district courts. This conclusion is reinforced by both the presumption against abolishing protections afforded at common law, as well as the presumption against the extraterritorial application of statutes.

B. Limiting discovery in aid of execution against foreign states to property potentially subject to execution under the FSIA is consistent with the principles of foreign sovereign immunity, which the FSIA expressly directs courts to follow in all cases involving claims against foreign states. *See* 28 U.S.C. § 1602 (Stat. App. 1a) ("claims of foreign states to immunity" should be decided "in conformity with the principles set forth in this chapter").

First, the foundation of this Court's sovereign immunity jurisprudence is that foreign states are entitled to "grace and comity" in U.S. courts, which is premised on respect for the power, dignity and absolute independence of foreign sovereigns. Restricting post-judgment discovery to plausibly non-immune property properly balances these interests. In contrast, the Second Circuit's new rule authorizing plaintiffs to conduct worldwide "forensic examinations" of foreign-state property beyond the enforcement power of U.S. courts clearly disregards them.

Second, as numerous courts of appeals have recognized, FSIA immunity is not just immunity from suit and execution, but also from the attendant burdens, including discovery, of both pre- and post-judgment proceedings where no exception to immunity applies. The court of appeals' endorsement of blanket discovery of *all* sovereign assets, wherever located and regardless of their use, improperly subjects foreign states to the very burdens that the FSIA was enacted to prevent. These burdens exist whether the discovery is served on third parties or on the foreign state itself, as the inquiries are equally intrusive and will result in equally burdensome litigation costs regardless of the subpoena's recipient.

Third, the sovereign immunity that the United States affords foreign states is intended to protect the reciprocal interests of the United States abroad. As the United States itself has stated in no fewer than seven briefs in the past seven years, discovery orders such as the one entered below threaten U.S. interests by inviting foreign courts to similarly compel disclosure of all of the United States' property worldwide. The forced disclosure of information concerning property of the United States Government, including its military and diplomatic property, is a significant threat to the sovereign interests of the United States, just as the Discovery Order is to the sovereign interests of Argentina.

C. To the extent that resort to the legislative history is appropriate here, the Report of the House Judiciary Committee confirms that asset discovery in aid of judgment enforcement against a foreign sovereign must be limited to the narrow enforcement

exceptions created by the Act. That Report expressly states that the term "attachment in aid of execution" in Section 1610(a) of the FSIA broadly refers to *all supplemental proceedings* in aid of execution under Federal Rule 69, which necessarily includes discovery in purported furtherance of enforcing a judgment. The FSIA's limitations on the enforcement of judgments against foreign states accordingly apply to discovery in aid of such enforcement as well.

ARGUMENT

THE FSIA DOES NOT PERMIT U.S. COURTS TO ORDER DISCOVERY CONCERNING SOVEREIGN ASSETS THAT ARE INDISPUTABLY IMMUNE FROM EXECUTION AND ATTACHMENT IN AID OF EXECUTION

The FSIA provides "a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488 (1983); *see also* 28 U.S.C. § 1602 (Stat. App. 1a). This includes providing "the sole basis for obtaining jurisdiction over a foreign state in federal court," *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989), as well as "the sole, comprehensive scheme for enforcing judgments against foreign sovereigns." *Af-Cap Inc. v. Republic of Congo*, 462 F.3d 417, 428 (5th Cir. 2006). Sections 1609 through 1611 of the FSIA address the enforcement of judgments against foreign states, and provide that the only property over which a U.S. court may exercise its authority is property used for a commercial activity in the United States. *See* 28 U.S.C. § 1610(a) (Stat. App. 13a–14a). Military property is

further provided absolute immunity as set forth in Section 1611(b). Stat App. 19a–20a. Those provisions dictate the permissible scope of discovery in aid of judgment enforcement against a foreign sovereign under established principles of statutory construction, as well as the principles of comity, reciprocity, and immunity that the FSIA codified.

A. The FSIA Does Not Empower Courts to Order Discovery Concerning Immune Assets

1. The FSIA Confers No Authority to Compel the Discovery Demanded by the Subpoenas

Throughout the history of the United States, foreign sovereigns have been afforded immunity in U.S. courts. *See Republic of Philippines v. Pimentel*, 553 U.S. 851, 865 (2008). This immunity was long regarded as virtually absolute, and courts therefore had no power to act with regard to foreign states. *Verlinden*, 461 U.S. at 480, 486. Beginning in 1952, the Department of State adopted the "restrictive" theory of foreign sovereign immunity, pursuant to which sovereigns were immune from suit for their governmental, but not commercial, acts. *Id.* at 487. Nonetheless, in the few cases where execution was even attempted, the Department of State and U.S. courts continued to recognize the absolute immunity of foreign-state property. *See, e.g.*, *Weilamann v. Chase Bank*, 21 Misc.2d 1086, 1087–89 (N.Y. Sup. Ct. Westchester Cnty. 1959); *see also New York and Cuba Mail S.S. Co. v. Republic of Korea*, 132 F. Supp. 684, 685–87 (S.D.N.Y. 1955); House Report at 17. Plaintiffs holding judgments against a foreign sovereign thus had no

choice but "to rely on the foreign state to pay the judgment voluntarily." *See Conn. Bank of Commerce v. Republic of Congo* ("*CBC*"), 309 F.3d 240, 252 (5th Cir. 2002); *accord De Letelier v. Republic of Chile*, 748 F.2d 790, 799 (2d Cir. 1984). Discovery in aid of enforcing a judgment against a foreign state was therefore necessarily nonexistent. *Cf. Dexter & Carpenter, Inc. v. Kunglig Jarnvagsstyrelsen*, 43 F.2d 705, 709 (2d Cir. 1930) (in suits against foreign sovereigns, "when judgment has been rendered and the liability judicially ascertained, the power of the courts ends and the sovereign is at liberty to determine for itself whether or not to pay the judgment."), *cert. denied*, 282 U.S. 896 (1931).

Against this backdrop, Congress enacted the FSIA. Consistent with immunity at common law, Congress codified the presumption that foreign sovereigns are immune from the jurisdiction of U.S. courts. 28 U.S.C. § 1604 (Stat. App. 2a). Congress then provided jurisdiction to adjudicate a foreign state's liability if a statutory exception to immunity from suit applies. *See* 28 U.S.C. §§ 1605, 1607 (Stat. App. 3a–10a). For cases in which a court properly exercised jurisdiction under one of these exceptions, Congress provided that the foreign state generally shall be "liable" to the same extent as a private party. 28 U.S.C. § 1606 (Stat. App. 9a).

Critically, Congress did *not* provide that foreign states, even where jurisdiction to adjudicate liability exists, shall be subject to judgment enforcement remedies to the same extent as private defendants. Instead, Congress preserved the separate and independent immunity afforded state property at

common law, thereby maintaining the distinction between a court's authority to: 1) enter a judgment against a foreign state; and 2) provide post-judgment relief in aid of enforcing such judgment. *See CBC*, 309 F.3d at 255–56 (FSIA enacted when "the international community viewed execution against a foreign state's property as a greater affront to its sovereignty than merely permitting jurisdiction over the merits of an action"); *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1127–28 (9th Cir. 2010) ("Congress was aware that, although the restrictive theory of sovereign immunity from suit had become an accepted principle of international law by the time of the FSIA's enactment, the enforcement of judgments against foreign state property remain[ed] a somewhat controversial subject." (internal quotation marks omitted)). Congress enacted a presumption that sovereign property is immune, and provided courts with the limited authority to permit "execution" and "attachment in aid of execution" only on property that is both located in the United States and used for a commercial activity in the United States, and only if one of certain further narrow statutory exceptions to immunity applies. *See* 28 U.S.C. §§ 1609–10 (Stat. App. 13a–19a). These exceptions do not apply to military property, which remains absolutely immune as set forth in Section 1611(b)(2). Stat. App. 20a.

Congress thus limited the post-judgment powers a district court could exercise to "execution" and "attachment in aid of execution" on a narrowly circumscribed category of sovereign property. Congress did *not* place within the purview of U.S. courts sovereign property located anywhere in the world and used for any and all activities, including military and

diplomatic property. In providing for a presumption of immunity for foreign-state property separate and distinct from the immunity from suit—and with even narrower exceptions—Congress, when it partially lowered the previously unconditional barrier to post-judgment relief, gave no indication that it was authorizing courts to inquire into state property beyond the court's limited enforcement authority. As held by the Seventh, Fifth, and Ninth Circuits, discovery in aid of judgment enforcement should accordingly be limited to discovering facts necessary to answering the sole inquiry that the FSIA gives U.S. courts the authority to adjudicate—whether the property at issue is potentially property of the foreign state, used for a commercial activity in the United States. *Rubin v. Islamic Republic of Iran*, 637 F.3d 783, 799 (7th Cir. 2011) (discovery limited to property that plausibly falls within an exception to execution immunity), *cert. denied*, 133 S. Ct. 23 (2012); *Af-Cap, Inc. v. Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1095-96 (9th Cir. 2007) (discovery should be ordered "circumspectly and only to verify allegations of specific facts crucial to the immunity determination" (internal quotation marks omitted)); *CBC*, 309 F.3d at 260 n.10 (same); *accord* U.S. *Amicus* Br. at *12 ("[T]he court should require the judgment creditor to demonstrate that the proposed discovery is directed toward assets for which there exists a reasonable basis to believe that an exception to immunity applies and that the court would have authority to order execution on the assets.").

In light of the presumption of immunity codified in the FSIA, every circuit to address discovery with regard to a sovereign's claim to immunity from suit, including the Second Circuit itself, has adopted a

similarly focused framework. *See Butler v. Sukhoi*, 579 F.3d 1307, 1314 (11th Cir. 2009) (FSIA requires discovery concerning immunity from suit to be "ordered circumspectly and only to verify allegations of specific facts crucial to an immunity determination" (internal quotation marks omitted)); *First City, Texas–Houston N.A. v. Rafidain Bank*, 150 F.3d 172, 176 (2d Cir. 1998) (same); *Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 534 (5th Cir. 1992) (same); *see also In re Republic of the Philippines*, 309 F.3d 1143, 1152 (9th Cir. 2002) (discovery must "support [plaintiffs'] claim that the [FSIA] exceptions they assert apply in this case"); *In re Papandreou*, 139 F.3d 247, 253 (D.C. Cir. 1998) ("Relevance . . . is not enough. Because sovereign immunity is an immunity from suit . . . . a district court authorizing discovery to determine whether immunity bars jurisdiction must proceed with circumspection."); *Fed. Ins. Co. v. Richard I. Rubin & Co., Inc.*, 12 F.3d 1270, 1284 n.11 (3d Cir. 1993) (discovery "should be limited to the essentials necessary to determining the preliminary question" of immunity); *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 451 (6th Cir. 1988) (same), *abrogated on other grounds by Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992). As the Fifth Circuit explained in *Arriba*, this discovery limitation is necessary to properly balance the inherent "tension between permitting discovery to substantiate exceptions to statutory foreign sovereign immunity and protecting a sovereign's or sovereign agency's legitimate claim to immunity from discovery." 962 F.2d at 534; *First City, Texas–Houston N.A.*, 150 F.3d at 176 (same).

There is no coherent basis for holding that discovery concerning whether sovereign property is potentially

subject to execution should be any broader than the standard applied to determine whether a sovereign is potentially amenable to suit. The scope of immunity from attachment or execution is drastically narrower than the scope of immunity from suit. *Compare* 28 U.S.C. § 1605(a) (Stat. App. 3a–8a) *with id.* § 1610(a) (Stat. App. 13a–14a). Accordingly, at least the same circumspection that applies to the jurisdictional immunity determination should apply to the enforcement immunity inquiry, because in each case the question is whether there is a plausible basis that an exception to immunity exists under the applicable standard. Otherwise, for purposes of discovery, the two distinct inquiries—whether there is a plausible basis for overcoming immunity from suit under the standards of Section 1605, and whether a particular piece of property is subject to execution under the narrower immunity exceptions set forth in Section 1610—would be collapsed into one.

This Court followed the same approach of tying the scope of discovery to that of substantive immunity in suits against United States Government officials in *Harlow v. Fitzerald*, 457 U.S. 800, 817–18 (1982), which the Fifth Circuit cited in *Arriba.* 962 F.2d at 534 ("conflict" between a foreign state's entitlement to immunity and a plaintiff's need for limited discovery to determine whether an exception applies "is not unlike that attendant to claims that challenge domestic government officials' qualified immunity from suit"). In *Harlow*, the Court held that, prior to an immunity determination, "bare allegations . . . should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery." 457 U.S. at 817. The Court reasoned that narrowly

limiting discovery to immunity determinations furthers the purposes underlying governmental immunity because "broad-ranging discovery" from government officials "can be peculiarly disruptive of effective government." *Id.* As the Court has explained, this immunity-based limitation on discovery constrains the normally broad discretion that district courts have over the discovery process. *Crawford-El v. Britton*, 523 U.S. 574, 597 (1998) ("[T]he trial court *must* exercise its discretion in a way that protects the substance of the qualified immunity defense." (emphasis added)); *see also Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987) (instructing trial court on remand to dismiss action on immunity grounds without discovery if plaintiff failed to allege facts that would defeat immunity defense, and stating that if it did not dismiss at that point, "then discovery may be necessary" to resolve the immunity issue, but "[o]f course, any such discovery should be tailored specifically to the question of [defendant's] qualified immunity.").

2. The Second Circuit Erred in Designating the District Court a Worldwide Discovery Clearinghouse

At the heart of the court of appeals' decision is the flawed reasoning that because Sections 1609 through 1611 do not "expressly address" discovery, the FSIA has no bearing on the permissible scope of discovery against a foreign state, and the district court therefore could appropriately designate itself "a clearinghouse for information . . . that might lead to attachments or executions *anywhere in the world*." Aug. 30, 2011 Hr'g Tr. (Pet. App. 31) (emphasis added); Pet. App. 7, 15–16. That conclusion is wrong for at least three reasons.

First, the court of appeals ignored that the FSIA is an affirmative grant of jurisdiction that nowhere authorizes courts to permit inquiry into property located outside the United States and that, in no circumstance, could be executed upon to satisfy a judgment. *Amerada Hess Shipping Corp.*, 488 U.S. at 434; *Af-Cap Inc.*, 462 F.3d at 428. Indeed, it was only with the enactment of the FSIA that, for the first time in the history of the United States, U.S. courts were authorized to provide any post-judgment remedies to plaintiffs in aid of enforcing judgments against a foreign sovereign; before that, there were none. *See supra* at 3–7, 25–28. The question is therefore not, as NML and the court of appeals would have it, whether the FSIA expressly bars certain types of discovery in aid of execution, but to what extent the FSIA authorizes such discovery. The answer is plain from the structure of Section 1610 itself: Discovery in aid of judgment enforcement is limited to the property over which U.S. courts are authorized to act; *i.e.*, property located in the United States and used for a commercial activity here.

Second, reading such an expansive grant of authority into the FSIA's purported "silence" is directly contrary to the canon of construction that statutes are presumed not to abolish common law principles "unless the language of a statute be clear and explicit for this purpose." *Norfolk Redev. & Housing Auth. v. C. & P. Tel. Co.*, 464 U.S. 30, 35–36 (1983) (internal quotation marks omitted); *see also United States v. Texas*, 507 U.S. 529, 534 (1993) ("[S]tatutes which invade the common law . . . are to be read with a presumption favoring retention of long-established and familiar principles, except when a statutory purpose to the

contrary is evident." (internal quotation marks omitted)); *Haven v. Polska*, 215 F.3d 727, 731 (7th Cir. 2000) ("Because [FSIA's immunity] exceptions are in derogation of the common law, we must not read them broadly. Statutes in derogation of the common law are narrowly construed."), *cert. denied*, 531 U.S. 1014; *In re Liberatore*, 574 F.2d 78, 85 (2d Cir. 1978) (applying presumption to preclude expansion of judicial power in light of "general historical limitations").

This canon applies with particular force when the claimed departure from the common law restricts sovereign immunity. The Court has recognized on numerous occasions, in the analogous context of suits against the United States, that a statute will only be read to limit sovereign immunity if and to the extent Congress has "unequivocally expressed" its intent to do so. *FAA v. Cooper*, 132 S. Ct. 1441, 1448 (2012) (addressing the Privacy Act of 1974); *accord Dep't of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 260–61 (1999) (addressing Section 10(a) of the Administrative Procedure Act); *Lane v. Pena*, 518 U.S. 187, 192 (1996) (addressing Section 504(a) of the Rehabilitation Act of 1973). Thus, the Court has routinely refused to grant various remedies to plaintiffs suing the United States that would ordinarily be available in suits against private defendants, in each case requiring a plain statement from Congress that immunity should be deemed not to apply, and strictly construing the applicable statute in concluding that the required express abrogation of immunity was not present. *See Cooper*, 132 S. Ct. at 1452–53 (refusing to permit award of damages for mental or emotional distress because it was "plausible" to read Congress's use of term "actual damages" as only authorizing relief for

pecuniary loss); *Blue Fox*, 525 U.S. at 262–64 (denying plaintiff right to obtain equitable lien on funds held by United States Government because "its goal is to seize or attach money in the hands of the Government as compensation," which does not fall within authorized remedy of specific performance); *Pena*, 518 U.S. at 192–93 (refusing to allow suit for money damages against executive agency because "[w]hatever might be said about the somewhat curious structure of the [statute's] liability and remedy provisions," it did not expressly abrogate immunity beyond the "narrow category" of violations identified). As discussed *supra*, Congress has indisputably *not* plainly stated its intent to derogate from sovereign immunity at common law by opening up foreign states to discovery that bears no relation to property over which U.S. courts could potentially exercise their enforcement powers, and the FSIA should therefore not be interpreted as doing so.

The Court's jurisprudence with regard to 42 U.S.C. Section 1983 is similarly instructive. Notwithstanding the observation that Section 1983 "creates a species of tort liability that on its face admits of no immunities," *Imbler v. Pachtman,* 424 U.S. 409, 417 (1976), the Court has long recognized that the statute's "broad terms" should not be interpreted "to effect a radical departure" from sovereign immunities at common law, *Rehberg v. Paulk*, 132 S. Ct. 1497, 1502 (2012). Because certain public officials had traditionally enjoyed absolute immunity for their official actions, *Burns v. Reed*, 500 U.S. 478, 485–86 (1991), the Court has refused to interpret Section 1983 as somehow eliminating these immunities "by covert inclusion in the general language" of the statute, *Paulk*, 132 S. Ct. at 1502 (citing *Tenney v. Brandhove*, 341 U.S. 367, 376

(1951)). Instead, the Court has held that Section 1983 must be read as preserving immunities "well grounded in history and reason." *Paulk*, 132 S. Ct. at 1502; *see also Tower v. Glover*, 467 U.S. 914, 920 (1984) ("Section 1983 immunities are 'predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it.'" (quoting *Imbler*, 424 U.S. at 421)); *Briscoe v. LaHue,* 460 U.S. 325, 330 (1983) ("It is by now well settled that the tort liability created by § 1983 cannot be understood in a historical vacuum." (internal quotation marks omitted)). This logic applies equally here: Throughout the history of the United States, discovery in aid of judgment enforcement against a foreign sovereign was unheard of, and, as set forth in detail below, longstanding principles of sovereign immunity strongly support permitting such discovery only to the extent of a U.S. court's enforcement powers under the FSIA. *See infra* Point B.

Third, the FSIA is plainly *not* silent on its territorial reach. Section 1609 of the FSIA states 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," and Section 1610 states that "property *in the United States* of a foreign state . . . 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" if one or more of the listed exceptions in Section 1610(a)(1)–(7) are satisfied. *See* 28 U.S.C. §§ 1609–1610(a) (Stat. App. 13a–14a) (emphasis added); *compare* 28 U.S.C. § 1605(a)(2) (Stat. App. 3a) (authorizing *suit*, but not enforcement remedies, based

upon a commercial activity outside the United States with a direct effect in the United States). Congress expressed its intent that the FSIA apply domestically when it made these specific references to "the United States," and to nowhere else. *See Autotech Techs. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 750 (7th Cir. 2007) ("The FSIA did not purport to authorize execution against a foreign sovereign's property, or that of its instrumentality, wherever that property is located around the world. We would need some hint from Congress before we felt justified in adopting such a breathtaking assertion of extraterritorial jurisdiction."), *cert. denied,* 552 U.S. 1231 (2008); *Walters v. Indus. & Commercial Bank of China, Ltd.*, 651 F.3d 280, 297 (2d Cir. 2011) ("only sovereign property that is in fact 'used for a commercial activity in the United States' may be subject to execution"); *Peterson*, 627 F.3d at 1131–32 (Iranian property located in France "immune from execution" because it is not "property in the United States").

The Court has rejected even the extraterritorial application of statutes that undeniably do not have the FSIA's explicit domestic enforcement focus based on the "longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010) (internal quotation marks omitted); *see also Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013) (presumption against extraterritoriality "similarly constrain courts" in interpreting jurisdictional statutes because "the danger of unwarranted judicial interference in the conduct of foreign policy is

magnified . . . because the question is not what Congress has done but what courts may do"). This presumption precludes a district court from exercising its authority under the FSIA to serve as a "clearinghouse" for discovery concerning assets of a foreign sovereign, located exclusively in foreign countries, for the claimed purpose of enforcing judgments in foreign countries. *See Kiobel*, 133 S. Ct. at 1665–69 (looking to historical background in concluding that Congress did not intend ATS to apply extraterritorially).

The court of appeals was therefore wrong to conclude, citing, *inter alia*, this Court's decision in *Riggs v. Johnson County*, 73 U.S. 166, 187 (1867), that supplemental proceedings directed to immune sovereign property are "essential" to federal jurisdiction because courts' "judicial power would [otherwise] be incomplete and entirely inadequate." Pet. App. 16.[17] The judicial power of courts to enforce their judgments against sovereigns is "incomplete" because Congress decided to afford sovereign property broad immunity from execution, subject only to narrow exceptions. In the post-judgment context, where Rule 69 provides the basis for all "proceedings supplementary to and in aid of a judgment or execution," including discovery in aid of execution, the

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[17] The court of appeals also relied on its own decision in *First City, Texas-Houston, N.A. v. Rafidain Bank*, 281 F.3d 48 (2d Cir. 2002), but that decision recognized that subject matter jurisdiction over a foreign sovereign continues through post-judgment enforcement proceedings only "to the extent those procedures and responsibilities are related to [the sovereign's] commercial activities in the United States," *id.* at 53.

Rule specifically states that "a federal statute," here the FSIA, "governs" where applicable. Fed. R. Civ. P. 69(a)(1) (Stat. App. 20a–21a). Thus, extending post-judgment supplemental jurisdiction to permit enforcement efforts that are inconsistent with the immunity framework set forth in the FSIA, as the court of appeals did, is clearly not "essential" to maintain the adequacy of judicial power within the meaning of *Riggs*, but would extend it beyond the limited power Congress has authorized.

B. Court-Ordered Discovery of Foreign-State Property Infringes Sovereign Immunity and the Principles Behind It

The discovery compelled by the district court and endorsed by the court of appeals is not only contrary to the structure and logic of the FSIA, but also to the principles of sovereign immunity that it codified, which the Act specifically commands U.S. courts to follow. *See* 28 U.S.C. § 1602 (Stat. App. 1a). As the Court has explained, Section 1602 of the FSIA describes the Act's purposes. *Samantar v. Yousuf*, 560 U.S. 305, 313 (2010). Congress further instructed in Section 1602 that all "[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*." Stat. App. 1a (emphasis added);[18] *see also Schooner Exchange v. McFaddon*, 11

[18] The Court has on several occasions looked to Section 1602 for guidance in interpreting the scope and meaning of the FSIA. *See Samantar*, 506 U.S. at 313, and n.7, 319-20 (citing Section 1602 as evidence of the Act's primary purposes); *id.* at 329 (Scalia, J., concurring) (disagreeing with majority's reference to legislative history because "the *enacted* statutory text itself includes findings

U.S. (7 Cranch) 116, 135–36 (1812) (the resolution of claims to sovereign immunity should "conform to those principles of national and municipal law by which it ought to be regulated").

The courts below disregarded these "principles." Despite Section 1602's mandate that the immunity principles laid down in the statute should inform all "[c]laims of foreign states to immunity" in United States courts, the district court and the Second Circuit treated them as irrelevant, and compelled Bank of America and BNA to produce information concerning all assets of the Republic, wherever located in the world and regardless of their use. Indeed, the district court authorized a "forensic examination" of the Republic's international "financial circulatory system," designating itself as "a clearinghouse for information . . . that might lead to attachments or executions *anywhere in the world*." Pet. App. 31, 41, 60 (emphasis added). Among other things, the information demanded concerned: 1) military entities, such as the Republic's Ministry of Defense, Military Headquarters, and Secretary of Intelligence; 2) diplomatic entities, such as the Republic's Ministry of Foreign Affairs; 3) the Republic's deceased former President, as well as its current President; and 4) dozens of legally separate

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and a declaration of purpose" (emphasis in original)); *Republic of Austria v. Altmann*, 541 U.S. 677, 697 (2004) (relying on use of "henceforth" in Section 1602 in concluding that the Act applies retroactively); *id.* at 717 (Kennedy, J., dissenting) (agreeing that Section 1602 codifies the FSIA's purpose). The clear function of Section 1602 is to instruct courts to apply the basic principles of the FSIA to issues of both procedure and substance that the Act does not explicitly address, but that implicate the same immunity concerns reflected in the Act.

agencies or instrumentalities of the Republic. *See* NML Notice of Subpoena served on Bank of America, N.A., dated Mar. 10, 2010 (JA 47, 57–76); NML Notice of Subpoena served on Banco de la Nación Argentina, dated June 14, 2010 (JA 84); Persons or Entities Falling Under the Definition of "Argentina" (JA 92–105). The Discovery Order upholding these extraordinary demands is an unprecedented affront to sovereign immunity that should not be endorsed by this Court.

First, the Discovery Order is irreconcilable with a central tenet of foreign sovereign immunity that foreign states are entitled to "grace and comity" in U.S. courts. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983). Sovereign immunity derives from "respect for the 'power and dignity' of the foreign sovereign," *Nat'l City Bank of N.Y. v. Republic of China*, 348 U.S. 356, 367, and n.7 (1955), and is "premised upon 'the perfect equality and absolute independence of sovereigns, and th[e] common interest impelling them to mutual intercourse.'" *Republic of Philippines v. Pimentel*, 553 U.S. 851, 865 (2008) (quoting *Schooner Exchange*, 11 U.S. (7 Cranch) at 137)). Comity thus requires that U.S. courts tread cautiously when exercising judicial power over foreign sovereigns, and avoid affronts to the sovereignty of a foreign state wherever possible. *Id.* at 866 ("Giving full effect to sovereign immunity promotes the comity interests that have contributed to the development of the immunity doctrine.").

As the Court recently explained in *Daimler AG v. Bauman*, 134 S. Ct. 746, 763 (2014), broad interpretations of the jurisdiction of U.S. courts raise

serious risks to international comity. In *Daimler*, comity was harmed because lower courts' expansive views of general personal jurisdiction had resulted in "objections" from foreign governments and "impeded negotiations of international agreements." *Id.* The present case is *a fortiori*: The exercise of judicial power with regard to the worldwide property of a foreign state is an even more significant affront to international comity. *Cf. Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, 546 (1987) (noting that the Court has "long recognized the demands of comity in suits involving foreign states, either as parties or as sovereigns with coordinate interest in the litigation," and instructing courts to "demonstrate due respect" in discovery proceedings "for any sovereign interest expressed by a foreign state"); Restatement (Third) of Foreign Relations Law of the United States § 442, Reporters' Notes 1, at 354 (1986) ("No aspect of the extension of the American legal system beyond the territorial frontier of the United States has given rise to so much friction as the requests for documents in investigation and litigation in the United States.").

It is precisely for this reason that the United States Government has filed at least seven briefs as *amicus curiae* since 2007—including most recently in this proceeding in support of the Republic's petition for a writ of certiorari—in which it has presented its view that the FSIA restricts discovery concerning the assets of a foreign sovereign to property falling within the limitations set forth in Section 1610, and that failing to recognize this restriction could cause grave harm to the

foreign relations of the United States.[19] *See also Butler v. Sukhoi*, 579 F.3d 1307, 1314 (11th Cir. 2009) (relying on "principles of comity underlying the FSIA" in requiring district courts to "balance the need for discovery to substantiate exceptions" to immunity against need to protect sovereign's "legitimate claim to immunity from discovery").

The Discovery Order is a plain derogation of comity. The insult to comity of a court ordering a worldwide "forensic examination" of all assets of a foreign state —including the property of a nation's military, its diplomatic core, and its highest officials—cannot be overstated. This is confirmed by the numerous treaties, conventions, and common law immunities on the topic.[20] Only slightly less insulting is a worldwide

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[19] *See, e.g.*, U.S. *Amicus* Brief at *12, *22; Brief for the United States as *Amicus Curiae* at *11-12, *Rubin v. Islamic Republic of Iran*, No. 11-431, 2012 WL 1891593 (May 25, 2012); Brief for the United States of America as *Amicus Curiae* in Support of Reversal at *9-10, *NML Capital, Ltd. v. Banco Central de la República Argentina*, No. 10-1487-cv(L), 2010 WL 4597226 (2d Cir. Nov. 3, 2010); Brief of the United States as *Amicus Curiae* in Support of Appellant at *28–29, *FG Hemisphere Assocs., LLC v. Democratic Republic of Congo*, No. 10-7046, 2010 WL 4569107 (D.C. Cir. Oct. 7, 2010); Brief for the United States as *Amicus Curiae* at *13-15, *Rubin v. Islamic Republic of Iran*, No. 08-2805, 2009 WL 8132813 (7th Cir. June 26, 2009); Brief of the United States of America as *Amicus Curiae* in Support of Affirmance at 24 n.5, *Peterson v. Islamic Republic of Iran*, No. 08-17756 (9th Cir. June 25, 2009); Third Statement of Interest of the United States, *Rubin v. Islamic Republic of Iran*, No. 03-cv-9370 (N.D. Ill. Nov. 16, 2007).

[20] *See* Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 9; Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261; United

"forensic examination," at the behest of a private party, of the property of dozens of legally distinct agencies or instrumentalities that are presumed separate from the Republic and entitled to their own sovereign immunity. *See* 28 U.S.C. § 1603 (Stat. App. 1a–2a); *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 626–27 (1983). One would be hard-pressed to imagine a more intrusive encroachment into the internal affairs and sovereignty of a foreign state than the unprecedented subpoenas below, nor one more calculated to create the foreign relations irritations that the principle of comity underlying the FSIA is directed at preventing.

Second, endorsing such discovery would eviscerate the principle that immunity is intended to shield foreign states from the burdens of litigation. *Republic of Philippines v. Pimentel*, 553 U.S. 851, 865 (2008) (FSIA is "designed to 'give foreign states and their instrumentalities some protection from the inconvenience of suit'") (quoting *Dole Food Co. v. Patrickson*, 538 U.S. 468, 479 (2003), *superseded on other grounds by* 28 U.S.C. § 1610(g)(1)). As the courts of appeals have consistently recognized, the FSIA's framework of presumptive immunity makes clear that Congress intended not merely to protect foreign states from the ultimate relief sought by U.S. plaintiffs—*i.e.*,

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Nations Convention on Jurisdictional Immunities of States and Their Property, Dec. 2, 2004; United Nations Convention on the Law of the Sea Art. 29, 32, Dec. 10, 1982, 1833 U.N.T.S. 3; International Law Association, Report of the Sixty-Sixth Conference held at Buenos Aires at 493, Aug. 14–20, 1994; *Samantar*, 560 U.S. at 321 (discussing common law sovereign immunity for high government officials).

a judgment or execution thereon—but from the costs and burdens of the legal proceedings themselves. *See, e.g.*, *Peterson*, 627 F.3d at 1132 ("The statutory text, structure, legislative history, and case law suggest that *sua sponte* consideration" of the FSIA's attachment and execution immunity "serves the . . . goal[] of the FSIA . . . [of] sparing [foreign states] the inconvenience of litigation."); *Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 849 (5th Cir. 2000) ("FSIA immunity is immunity not only from liability, but also from the costs, in time and expense, and other disruptions attendant to litigation"); *Segni v. Commercial Office of Spain*, 816 F.2d 344, 347 (7th Cir. 1987) ("The position of the State Department, taken in hearings on the bill which became the [FSIA] and repeated in a memorandum that the Department has filed with this court in the present case, is that 'the purpose of sovereign immunity in modern international law . . . is to promote the functioning of all governments by protecting a state from the burdens of defending law suits abroad which are based upon its public acts.'" (citation omitted)); *Hansen v. PT Bank Negara Indonesia (Persero), TBK*, 601 F.3d 1059, 1063 (10th Cir. 2010) ("The immunity provided under the FSIA protects foreign sovereigns from all the burdens of litigation, including the general burden of responding to discovery requests."); *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 443 (D.C. Cir. 1990).

Discovery in aid of execution untethered to any immunity determination or, as here, directed to *categorically* immune property, improperly subjects a foreign state to the costs and inconveniences of litigation in the same way as does discovery concerning

a foreign state's liability before an exception to jurisdictional immunity has been established. As the Seventh Circuit correctly explained in *Rubin*, "[d]iscovery orders that are broad in scope and thin in foundation unjustifiably subject foreign states to unwarranted litigation costs and intrusive inquiries about their American-based assets," and "[o]ne of the purposes of the [execution] immunity codified in § 1609 is to shield foreign states from these burdens." 637 F.3d at 796–97. It is even more important to limit discovery in the post-judgment context, because the FSIA's intention to "spare foreign states . . . from the cost and inconvenience of trial" "appl[ies] *more strongly* in the context of immunity from execution," based on foreign relations concerns and principles of international law that prompted Congress to draft the exceptions to immunity from execution "more narrow[ly] than the exceptions from immunity from suit." *Peterson*, 627 F.3d at 1127–28 (emphasis added); *id.* at 1128 ("In light of the special sensitivities implicated by executing against foreign state property, courts should proceed carefully in enforcement actions against foreign states . . . .").

The court of appeals held that the subpoenas were proper because they would cause the Republic "no burden and no expense," since they were served on third-party banks rather than the Republic itself. Pet. App. 19. This reasoning cannot be justified. Whether the discovery is served on third parties or the Republic, NML's "forensic examination" of the Republic's international "financial circulatory system," Pet. App. 41, 60, including detailed financial information concerning the Republic's current and deceased former Presidents, military and diplomatic entities, and

hundreds of entities that are presumed separate, indisputably qualifies as a litigation burden. It is the Republic that must attempt to protect the financial privacy of these persons—it cannot simply stand with arms folded while its high officials and core sovereign functions are being subjected to this kind of assault, any more than the United States would stand by silently if someone in another country tried to subpoena the bank accounts of the President, Congressional leaders, or members of the Judicial Branch.

Moreover, discovery served on third parties but concerning assets of a foreign state can and will result in a myriad of additional "inconvenience[s]" to the foreign state, *Pimentel*, 553 U.S. at 865, including by: a) forcing the sovereign to defend itself in subsequent litigation (the Republic has already borne the cost of litigating in Swiss courts NML's improper *ex parte* attachments of diplomatic bank accounts as a result of the Discovery Order); b) yielding information that cannot justify an attachment proceeding but which a judgment creditor can use as a basis to seek still more intrusive discovery; and c) forcing 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. *Accord* U.S. *Amicus* Br. at *17. Such costs are the logical result of permitting judgment creditors the unfettered right to use the ordinarily "broad post-judgment discovery" procedures under Rule 69 to obtain discovery concerning assets of a foreign state as if it were a private person and as if such discovery is bound only by the discretion of the district court, Pet. App. 13, which in the present case imposed no bounds

at all, *see id.* at 9 (because "Argentina's sovereign immunity is not infringed," "[t]he district court therefore did not abuse its discretion").

Finally, the very history of this case demonstrates the artificiality of trying to limit the Second Circuit's decision to discovery directed to third parties. No sooner did the Second Circuit enter its decision than NML and other holdout creditors returned to the district court to obtain discovery from the Republic itself of essentially the same scope as that upheld by the decision under review. *See* Order, *NML Capital, Ltd. v. Republic of Argentina*, No. 03 Civ. 8845 (TPG) (S.D.N.Y. Sept. 25, 2013); Opinion, *Aurelius Capital Partners v. Republic of Argentina*, No. 07 Civ. 2715 (TPG) (S.D.N.Y. Mar. 7, 2013); *see also* Supplemental Brief of Petitioner at 4, *Republic of Argentina v. NML Capital, Ltd.*, No. 12-842 (Nov. 22, 2013). As NML's counsel noted in those subsequent proceedings, the court of appeals broadly held that the FSIA "does not have anything to do with post judgment discovery" regardless of whether that discovery is sought from a foreign state or a third party. Hr'g Tr. at 3:13–17, *NML Capital, Ltd. v. Republic of Argentina*, No. 03 Civ. 8845 (TPG) (S.D.N.Y. Sept. 3, 2013).

Third, the court of appeals failed to take into account that the FSIA is intended to protect the reciprocal interests of the United States. *See Peterson*, 627 F.3d at 1127–28 (citing *Nat'l City Bank of N.Y.*, 348 U.S. at 362 (foreign sovereign immunity based in part on "reciprocal self-interest")); Joseph W. Glannon & Jeffery Atik, *Politics and Personal Jurisdiction Suing State Sponsors of Terrorism Under the 1996 Amendments to the Foreign Sovereign Immunities Act*,

87 Geo LJ 675, 691 (1999) ("As a practical matter, considerations of reciprocity compelled foreign sovereign immunity; nations expected to receive foreign sovereign immunity as well as to accord it."). Because "some foreign states base their sovereign immunity decisions on reciprocity," *i.e.*, the treatment that U.S. courts provide to foreign sovereigns, *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 841 (D.C. Cir. 1984), the Court's interpretation of the FSIA can be expected to have a tangible impact on the treatment of the United States Government abroad, *see In re Islamic Republic of Iran Terrorism Litig.*, 659 F. Supp. 2d 31, 125 n.52 (D.D.C. 2009) ("Another troubling aspect of litigation under the FSIA terrorism exception is that it appears to have spurred on reciprocal lawsuits in the courts of Iran against the United States for actions allegedly committed against Iran and its citizens by United States agencies and officials."). *Accord* U.S. *Amicus* Br. at *11–12 ("The United States maintains extensive overseas holdings as part of its worldwide diplomatic missions and security operations," and "a United States court's allowance of unduly broad discovery concerning a foreign state's assets may cause the United States to be subjected to similar treatment abroad."); *cf.* House Report at 9 ("Beginning in the early 1970's, it became the consistent practice of the Department of Justice not to plead sovereign immunity abroad in instances where, under the Tate letter standards, the Department would not recognize a foreign state's immunity in this country.").

Interpreting the FSIA to permit discovery into the worldwide property of a foreign state would be equivalent to a Chinese court ordering 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. *Cf. All Am. Trading Corp. v. Cuartel Gen. Fuerza Aerea Guardia Nacional de Nicaragua*, 818 F. Supp. 1552, 1556 (S.D. Fla. 1993) (FSIA protection for military property intended to avoid "the possibility that a foreign state might permit execution on military property of the United States abroad under a reciprocal application of the act"). Such an interpretation of the FSIA would thus directly threaten national security, privacy interests, and the sovereignty of the United States itself, just as it has for Argentina. *Cf. Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1665–69 (considering reciprocal risk to U.S. citizens of extraterritorial application of Alien Tort Statute as "serious foreign policy consequence[]" that cautioned against such application). Congress cannot have intended to permit this result, and the reciprocal invasion of core sovereign assets, through any purported silence in the FSIA.

C. The FSIA's Legislative History Supports Restricting Discovery in Aid of Judgment Enforcement to the Limits of Sections 1610 and 1611

NML pressed below and in opposition to *certiorari* review that the legislative history of the FSIA indicates that the statute places no limitation on discovery in aid of judgment enforcement, because an isolated remark from the House Judiciary Committee Report states that "[t]he bill does not attempt to deal with questions of discovery." As an initial matter, it is axiomatic that "Congress's 'authoritative statement is the statutory text, not the legislative history.'" *Chamber of Commerce*

of U.S. v. Whiting, 131 S. Ct. 1968, 1980 (2011) (quoting *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005)). Nowhere is that principle more salient than where, as here, a private party seeks to invade a sovereign interest. In those circumstances, the courts must be guided by what Congress has said, and not by what a particular legislator has said in a congressional report. *See supra* at 33–35; *see also, e.g.*, *Samantar*, 560 U.S. at 328 (Scalia, J., concurring) (disagreeing with reliance on the FSIA's "House Committee Report that we have no reason to believe was read (much less approved) by the Senate—or, indeed, by the Members of the House who were not on the Committee—or even, for that matter, by the members of the Committee, who never voted on the Report."). For the reasons set forth above, the clear language, structure, and history of the FSIA establish that the Act does indeed restrict the permissible scope of post-judgment discovery.

However, to the extent that consideration of the statute's legislative history is appropriate, this snippet does not bear the weight NML has placed on it. The comment appears in a discussion of Section 1606, which, as noted above, addresses a foreign state's *liability*. It does not address a sovereign's immunity from post-judgment proceedings in aid of attachment or execution. *See Rubin*, 637 F.3d at 797 (emphasizing "critical error" of reading Section 1606 to address discovery in aid of judgment execution). Thus, at most the language quoted by NML could be interpreted as suggesting that *liability* discovery should follow the procedures set forth in the Federal Rules. *See* Fed. R. Civ. P. 26, 37, 45.

When the House Judiciary Committee addressed post-judgment immunity, on the other hand, the Committee explained 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." House Report at 28 (citing Fed. R. Civ. P. 69) (emphasis added). This is consistent with the Executive Branch's section-by-section analysis of the draft bill that it submitted to Congress in 1975. *See* Section-by-Section Analysis, 15 *Int'l Leg. Mat.* 102, 114 (1976) (similarly defining "attachment in aid of execution" as including "supplemental proceedings"). The Committee and the Executive Branch cited Rule 69, which principally concerns "Execution," as its title indicates, but also addresses "proceedings supplementary to and in aid of judgment or execution." One such supplementary proceeding is discovery "[i]n aid of the judgment or execution." Fed. R. Civ. P 69(a)(2) (Stat App. 21a); *see also* Black's Law Dictionary 1608 (4th ed. 1951) (defining supplementary proceedings as "[p]roceedings supplementary to an execution, directed to the discovery of the debtor's property and its application to the debt for which the execution is issued."); Ballentine's Law Dictionary 1242 (3d ed. 1969) (defining supplemental and supplementary proceedings as "[a] proceeding . . . whereunder the plaintiff is entitled to examine the judgment debtor and third persons for the purpose of obtaining information concerning property owned by the debtor which may be applied in payment of the judgment."). Even the court of appeals rested its decision on its view that the Discovery Order fell within the district court's authority to conduct "supplementary proceedings."

Pet. App. 16 (authority to grant post-judgment discovery derives from authority to conduct supplementary proceedings).

The House Judiciary Committee Report thus strongly supports the conclusion that Congress did intend for Section 1610(a) to limit post-judgment discovery, along with all other supplemental proceedings in aid of judgment enforcement. The principal constraint under that section is, of course, that post-judgment remedies such as asset discovery are permitted only with regard to property used for a commercial activity in the United States. *Accord* Brief of the United States as *Amicus Curiae* in Support of Appellant at *27–28, *FG Hemisphere Assocs., LLC v. Democratic Republic of Congo*, No. 10-7046, 2010 WL 4569107 (D.C. Cir. Oct. 7, 2010) (Congress's authorization of supplemental proceedings means that "post-judgment discovery is permitted under § 1610(a)," but "that discovery is subject to the same limitations that apply to other coercive measures under the statute"). Indeed, that is the only property that Congress deemed to be within the purview of U.S. courts when providing a partial lowering of the longstanding bar on all post-judgment relief. 28 U.S.C. § 1610(a) (Stat. App. 13a–14a).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

JONATHAN I. BLACKMAN
Counsel of Record
CARMINE D. BOCCUZZI, JR.
DANIEL J. NORTHROP
MICHAEL M. BRENNAN
CLEARY GOTTLIEB STEEN & HAMILTON LLP
One Liberty Plaza
New York, New York 10006
(212) 225-2000
jblackman@cgsh.com

Attorneys for Petitioner
The Republic of Argentina

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APPENDIX

STATUTORY APPENDIX

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28 U.S.C. § 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. 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. 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. 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. § 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. 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. 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. 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. 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 or section 1605(a)(7) (as such section was in effect on January 27, 2008), 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) or 1605(b) 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 attachment in aid of execution, or execution, upon such judgment.

28 U.S.C. § 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.

Fed. R. Civ. P. 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. 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.