No. 12-842

In the Supreme Court of the United States

REPUBLIC OF ARGENTINA,

Petitioner,

v.

NML CAPITAL, LTD.,

Respondent.

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

BRIEF OF MONTREUX PARTNERS, L.P., CORDOBA CAPITAL, LOS ANGELES CAPITAL, AND WILTON CAPITAL AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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April 2, 2014

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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INTEREST OF *AMICI CURIAE*[1]

Amici Montreux Partners, L.P., Cordoba Capital, Los Angeles Capital, and Wilton Capital are investors in sovereign debt. Each of these *amici* has obtained one or more final judgments entered by the United States District Court for the Southern District of New York against Petitioner the Republic of Argentina ("Argentina" or the "Republic") based on Argentina's non-payment of its dollar-denominated external sovereign debt.[2] Those judgments remain entirely unpaid. Each of these *amici* has sought post-judgment discovery under the Federal Rules of Civil Procedure concerning assets of the Republic that are located or may be located outside the United States. More generally, each of these *amici*, as an investor in sovereign debt that is governed by New York law and that may be enforced through litigation in the Southern District of New York, has an interest in a system of discovery that confers on federal district courts the power and discretion to assist creditors of a defaulting sovereign debtor in identifying assets of the debtor that may be located outside the United States.

SUMMARY OF ARGUMENT

In support of their argument that the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§ 1602–1611, curtails post-judgment discovery

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici curiae* or their counsel contributed money to the preparation or submission of this brief. The parties have consented to the filing of this brief.

[2] *See Montreux Partners, L.P. v. Republic of Arg.*, No. 05 Civ. 4239 (TPG), 2009 WL 1528535, at *1–2 (S.D.N.Y. May 29, 2009) (opinion directing entry of judgments), *aff'd*, 435 F. App'x 41 (2d Cir. Aug. 17, 2011).

against private entities concerning the property of a foreign sovereign judgment debtor, petitioner Argentina and *amicus* the United States speculate that the discovery orders in this case might thwart comity, might harm U.S. foreign relations, and might result in reciprocal adverse treatment for the United States. *See* Pet. Br. 39–50; U.S. Br. 18–22, 32–33. These hypothetical concerns are irrelevant to the proper interpretation of the FSIA, which sought to ensure that courts make immunity determinations on the basis of written law. *See* Resp. Br. 33–39. But even if the concerns were relevant to the interpretation of the FSIA or otherwise of interest to this Court, they are, as *amici* will show, legally and factually unsupported and highly unlikely to materialize.

First, the discovery orders are consistent with international norms concerning State immunity, and thus raise no comity concerns or danger of legitimate retaliatory action related to immunity. Argentina and the United States agree that the best measure of accepted international norms in this context is the United Nations Convention on Jurisdictional Immunities. *See* United Nations Convention on Jurisdictional Immunities of States and Their Property, G.A. Res. 59/38, U.N. Doc. A/RES/59/38 (Dec. 2, 2004) ("Convention on Jurisdictional Immunities" or "Convention"). The Convention confers immunity only on "post-judgment measures of *constraint*, such as attachment or arrest, against property of a [foreign] State." *Id.*, Art. 19 (emphasis added). Since discovery orders for information about sovereign property in no way constrain the use of that property, they do not implicate State immunity from execution. Article 24(1) of the Convention confirms this conclusion. It expressly permits a national court to order a foreign State party "to produce any

document or disclose any other information for the purposes of a proceeding." The discovery orders are also consistent with international norms of State immunity for the independent reason that Argentina broadly waived its immunity from post-judgment execution.

Second, the United States' speculative concerns about disadvantageous reciprocal treatment have little basis in international or foreign law, and are highly unlikely to materialize. The United States can hardly complain about a reciprocal practice that is consistent with pertinent international norms. But in any event, the likelihood of adverse reciprocal treatment in foreign courts is improbable for the simple reason that foreign discovery practices are significantly more restrained than discovery practices in U.S. courts. Adverse reciprocal treatment is all the more unlikely because foreign courts rarely limit State immunity on this basis. Even the nations with statutes that make reciprocity a potential criterion will deny sovereign immunity based on lack of reciprocity only if the executive branch of the forum nation so requests, and only if the United States does not accord sovereign immunity to that nation in particular. These conditions are very rarely satisfied. And the absence of any pressing threat of adverse reciprocal treatment is confirmed by the failure of even a single foreign sovereign to file an *amicus* brief in support of Argentina.

ARGUMENT

Argentina and the United States maintain that post-judgment discovery against private entities concerning the property of a foreign sovereign judgment debtor will cause significant foreign relations controversy and invite disadvantageous reciprocal treatment for the United States. These claims are speculative and abstract. They also lack factual or legal foundation, and deserve no credit.

I. The Discovery Orders Are Consistent with International Norms of State Immunity and Thus Do Not Implicate Any Legitimate Comity Concerns

Comity in the discovery context "refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states." *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court*, 482 U.S. 522, 544 n.27 (1987). The avowed concerns about comity in this case, and the related concerns about potential foreign relations harm, presuppose that the discovery orders do not account for sovereign interests. But this presupposition is false because the discovery orders conform to international norms of State immunity.

A. The Discovery Orders Are Consistent with International Norms of State Immunity Because They Are Not "Measures of Constraint" on the Use of State Property

Nations take different approaches to the details of State immunity against execution, and no globally binding treaty governs their actions in this context. *See* Xiaodong Yang, *State Immunity in International*

Law ch. 9 (2012) (canvassing state practice). The best guide to accepted international norms within the variety of State practice is the Convention on Jurisdictional Immunities. The Convention has not been ratified by the United States and thus can have no impact on the proper interpretation of the FSIA. But importantly, both the United States and Argentina acknowledge that it is the proper measure of accepted international norms in this context. *See* U.S. Br. 28 n.12; Pet. Br. 43 & n.20.

Article 19 of the Convention governs State immunity from post-judgment execution. Like Section 1609 of the FSIA, Article 19 describes this immunity in precise and limited terms. Article 19 provides, subject to identified exceptions, that "[n]o post-judgment measures of constraint, such as attachment, arrest or execution, against property of a State may be taken in connection with a proceeding before a court of another State . . . ." Convention on Jurisdictional Immunities, Art. 19; *see also Report of the International Law Commission on the Work of its Forty-Third Session* at 55, U.N. Doc. A/46/10 (Supp.) (Sept. 1, 1991) (explaining in official Commentary on Draft Articles on Jurisdictional Immunities of States and Their Property that Part IV of Convention, which contains Article 19, "is concerned with State immunity from measures of constraint upon the use of property"). If a judicial measure does not "constrain" the use of State property, it does not implicate Article 19 and is thus consistent with international norms of State immunity from execution.

The discovery orders in this case in no way constrain the use of Argentina's property. As the Second Circuit properly noted, the orders "do[ ] not allow NML to at-

tach Argentina's property, or indeed have any legal effect on Argentina's property at all." *EM Ltd. v. Republic of Arg.*, 695 F.3d 201, 208 (2d Cir. 2012). Rather, they simply require two banks to provide information within their control about Argentina's assets. The orders are thus consistent with international norms of State immunity from execution.

Article 24(1) of the Convention confirms this conclusion. It contemplates that a national court can order a foreign State "to produce *any* document or disclose any other information for the purposes of a proceeding" without territorial qualification. Convention on Jurisdictional Immunities, Art. 24(1) (emphasis added). Article 24 limits this discovery power by disallowing certain consequences for State non-compliance, notably fines and penalties. *Id.*[3] But the critical point about Article 24(1) is that it "leaves unaffected the competence of courts to issue, in accordance with domestic law, orders enjoining foreign States" to produce any documents or information. *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* 363 (Roger O'Keefe & Christian Tams eds., 2013) ("*Convention Commentary*").

Article 24(1) has particular significance in this case because, as the government has stated, "it is the position of the United States that a number of the convention's provisions, including Article 24(1), reflect current international norms and practices regarding

[3] Article 24 has not prevented some U.S. courts from interpreting the FSIA to permit monetary sanctions for non-compliance with court orders. *See FG Hemisphere Assocs., LLC* v. *Dem. Rep. Congo*, 637 F.3d 373, 380 (D.C. Cir. 2011); *Autotech Techs. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 744–45 (7th Cir. 2007).

foreign state immunity." Brief of the United States as *Amicus Curiae* in Support of Appellant at 22, *FG Hemisphere Assocs., LLC v. Dem. Rep. Congo*, 637 F.3d 373 (D.C. Cir. 2011) (No. 10-7046). The government's current claim that the discovery orders will harm comity or spark foreign relations controversy thus rings hollow.

B. The Discovery Orders Are Also Consistent with International Norms of State Immunity Because Argentina Broadly Waived All Immunities from Execution

The discovery orders below do not violate international norms of State immunity for the independent reason that Argentina broadly waived all immunities from post-judgment execution. Waiver is an acknowledged exception to State immunity from execution under international law. *See* Convention on Jurisdictional Immunities, Art. 19(a) (prohibiting measures of constraint against State property "unless and except to the extent that . . . the State has expressly consented to the taking of such measures as indicated . . . in a written contract"). A waiver of immunity from post-judgment execution can extend to extraterritorial orders. *See, e.g.*, *Sabah Shipyard (Pak.) Ltd v. Pak.*, [2002] EWCA Civ 1643, [2003] 2 Lloyd's Rep. 571 (U.K.) (reading waiver of immunity to permit extraterritorial anti-suit injunction against state-owned Pakistan corporation).

The Argentine Fiscal Agency Agreement ("FAA") governing the bonds in this case provides:

> To the extent that the Republic or any of its revenues, assets or properties shall be entitled . . . to any immunity from . . . attachment prior to judgment, form [*sic*] attachment in

> aid of execution of judgment, from execution of a judgment or from any other legal or judicial process or remedy . . . the Republic has irrevocably agreed not to claim and has irrevocably waived such immunity to the fullest extent permitted by the laws of such jurisdiction (and consents generally for the purposes of the Foreign Sovereign Immunities Act to the giving of any relief or the issue of any process in connection with any Related Proceeding or Related Judgment) . . . .

J.A. 106. This is an all-encompassing waiver of immunity from execution that distinguishes pre- and post-judgment judicial orders; waives immunity as to both under the laws of all potentially relevant jurisdictions; and expressly consents for purposes of the FSIA to "the giving of any relief or the issue of any process." The leading commentary on the Convention on Jurisdictional Immunities describes this very waiver as a "classic contractual provision in accordance with which a State patently consented to the taking of, *inter alia*, post-judgment measures of constraint against its property." *Convention Commentary*, at 320. *See also NML Capital Ltd v. Republic of Arg.*, [2011] UKSC 31 ¶¶ 128–29, [2011] 2 A.C. 495 (U.K.) (judgment of Lord Collins, joined by Lord Walker) (describing FAA waiver as it relates to enforcement of judgments as "clearest possible waiver of immunity").

The discovery orders in this case are on their face a "legal or judicial process" in aid of post-judgment execution for which Argentina waived immunity in the FAA. Even if the orders were somehow deemed measures of constraint against Argentina's use of its property, they would still fall within an acknowledged

exception to State immunity from post-judgment execution. The FAA waiver thus provides a second and independent reason why the discovery orders in this case respect comity and can give rise to no legally justifiable complaints abroad.[4]

II. The Discovery Orders Implicate No Realistic Reciprocity Concerns

The United States maintains that the discovery orders in this case "could lead to reciprocal adverse treatment of the United States in foreign courts." U.S. Br. 20. This worry, like the concerns about comity and foreign relations harm, is conspicuously abstract and speculative. It also has little foundation in international or foreign law, and is unlikely to be realized.

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[4] The FAA waiver has been litigated in other countries. *See, e.g.*, *NML Capital Ltd v. Republic of Arg.*, [2011] UKSC 31 ¶¶ 59–64, 83, 98, 127–30, 138, [2011] 2 A.C. 495 (U.K.) (ruling that FAA waiver permits enforcement of New York judgment in English courts); *Republic of Arg. v. High Court (Comm. Div.) Accra Ex Parte, Attorney General*, No. J5/10/2013 (Ghana S.C., June 20, 2013) (ruling that waiver was effective under international law to remove immunity from execution against Argentine warship but declining to respect the waiver as a matter of local law); *NML Capital, Ltd. v. Republic of Arg.*, Cour de Cassation [Cass.] 1e civ., Sept. 28, 2011, Bull. civ. I, No. 867 (Fr.) (ruling that waiver lacked adequate specificity to extend to attachment of diplomatic bank accounts); *Republic of Arg. v. NML Capital, Ltd.*, Cour de Cassation [Cass.] Nov. 22, 2012, No. C.11.0688.F/1 (Belg.) (similar). All of these decisions concerned the FAA waiver's relevance to attempted execution of judgments against Argentine property. By contrast, the case now before this Court concerns the relevance of the waiver to discovery against nonparties; it involves no attempted measure of constraint against Argentine property.

As noted above, the discovery orders in this case are consistent with Article 24(1) of the Convention on Jurisdictional Immunities that the United States itself says reflects accepted international norms. It is thus theoretically possible that a foreign court in a proper case could seek discovery from banks concerning U.S. property outside of the forum. But the United States can have no legitimate complaint about a discovery order in a foreign court that conforms to what the United States itself views as controlling international norms.

In any event, it is highly unlikely that the United States or a bank where it has accounts will ever in fact be subject to discovery orders like the ones issued below. One reason is that the United States is unlikely to find itself in a foreign court, having broadly waived immunity from jurisdiction and execution, in violation of valid legal obligations, defiantly resisting judicial efforts to enforce judgments based on those obligations. Another reason is that discovery in foreign courts is relatively constrained compared to discovery in U.S. courts. As the United States acknowledges, "because the scope of American discovery is often significantly broader than is permitted in other jurisdictions, respondent likely could not obtain such sweeping discovery in the courts of many other Nations." U.S. Pet'n Br. 15 (citation and internal quotation marks omitted); *see also* Rudolf Schlesinger, *Comparative Law* 762 (Ugo Mattei et al. eds., 7th ed. 2009) ("In most civil-law countries, discovery is almost nonexistent. Even in those countries in which it exists—a relatively new phenomenon—discovery is considerably more limited than in the U.S."). The nature and limits of foreign discovery law and practice make it implausible that the United States will be exposed to the type of discovery orders in this case.

Yet another reason why the United States is unlikely to suffer reciprocal disadvantage is that reciprocity is increasingly irrelevant to determinations about immunity from execution in foreign courts. *See* Yang, *supra* p. 5, at 57 (2012) (noting that "in practice, very few courts have expressly referred to [reciprocity] as the basis of immunity," and that "there are even statements dismissing it as having any bearing on the question of immunity"). Professors Fox and Webb conclude from an analysis of state practice and other sources that "[a]rguably, in the future the grant of immunity on terms of reciprocity or as a matter of discretion will constitute a breach of the forum State's obligation to afford immunity." Hazel Fox & Philippa Webb, *The Law of State Immunity* 14–15 (3d ed. 2013) (relying in part on *Jurisdictional Immunities of the State (Ger. v. It.)*, Judgment (Feb. 3, 2012), available at http://www.icjcij.org/-docket/files/143/16897.pdf). *Cf.* James Crawford, *Execution of Judgments and Foreign Sovereign Immunity*, 75 Am. J. Int'l L. 820, 855 (1981) (noting that approaches to State immunity from jurisdiction "based on reciprocity . . . lead to unsatisfactory subjectivity, and have attracted virtually no support").

It is true that some foreign statutes treat reciprocity as potentially relevant to execution immunity. *See, e.g.*, Foreign State Immunities Act 1985, § 42(1) (Austl.) ("Australia Act"); State Immunity Act, R.S.C. 1985, c. S-18, § 15 (Can.) ("Canada Act"); State Immunity Act, 1985, § 17 (Sing.) ("Singapore Act"); State Immunity Act, 1978, c. 33, § 15 (Gr. Brit.) ("United Kingdom Act"). But the discovery orders in this case pose no realistic reciprocal danger to the United States under these statutes. The statutes provide that reciprocity is relevant only when and to the extent that

the executive branch says so. *See* Australia Act § 42(1); Canada Act, § 15; Singapore Act § 17; United Kingdom Act § 15. And they limit the executive's discretion to modify immunity on a reciprocal basis to situations in which the reciprocal State (*e.g.*, the United States) has not accorded protection in relation to the foreign State on a reciprocal basis. *See* Australia Act § 42(1); Canada Act § 15; Singapore Act § 17; United Kingdom Act § 15. It is highly unlikely that discovery orders necessitated by Argentina's aggressive defiance of judicial process would be needed in the relatively rare lawsuits against these friendly nations and would result in such nations approving reciprocal action against the United States.

One imperfect but revealing measure of the likely reciprocal consequences of the discovery orders in this case is the number of foreign governments that have filed *amicus* briefs. Foreign governments closely monitor this Court's docket. In many cases with extraterritorial implications that pose concerns to foreign sovereign interests, several foreign governments filed *amicus* briefs to express their views. In *Société Nationale*, 482 U.S. 522, for example, four foreign governments filed *amicus* briefs to protest an extraterritorial discovery order on sovereignty grounds and to support petitioners' argument for the application of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *opened for signature*, Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638.[5] Similarly, in *Kiobel v. Royal Dutch*

[5] Brief for the Federal Republic of Germany as *Amicus Curiae* at 13, 32–33, 40–41, *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court*, 482 U.S. 522 (1987) (No. 85-1695); Brief of *Amicus Curiae* the Republic of France in Support of Petitioners at 7–8, 14–15, *Société Nationale Industrielle Aérospatiale v. U.S.*

Petroleum Co., 133 S. Ct. 1659 (2013), four foreign governments and the European Union filed *amicus* briefs concerning the application of the Alien Tort Statute, 18 U.S.C. § 1350, to conduct abroad.[6] And in *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), two foreign governments and a foreign state-owned corporation filed *amicus* briefs concerning the retroactive application of the FSIA.[7] By contrast, not a single foreign government has filed an *amicus* brief in support of Argentina in this case.

Dist. Court, 482 U.S. 522 (1987) (No. 85-1695); Brief of Government of Switzerland as *Amicus Curiae* in Support of Petitioners at 8, *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court*, 482 U.S. 522 (1987) (No. 85-1695); Brief of the Government of the United Kingdom of Great Britain and Northern Ireland as *Amicus Curiae* in Support of Petitioners at 7–8, *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court*, 482 U.S. 522 (1987) (No. 85-1695).

[6] Brief for the Government of the Argentine Republic as *Amicus Curiae* in Support of Petitioners, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491); Brief of the Governments of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands as *Amici Curiae* in Support of the Respondents, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491); Brief of the Governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland as *Amici Curiae* in Support of Neither Party, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491); Brief of the Federal Republic of Germany as *Amicus Curiae* in Support of Respondents, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491); Brief of the European Commission on Behalf of the European Union as *Amicus Curiae* in Support of Neither Party, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491).

[7] *Amicus Curiae* Brief in Support of Petitioner for the Government of the United Mexican States, *Republic of Austria v. Altmann*, 541 U.S. 677 (2004) (No. 03-13); Brief for *Amicus Curiae* Japan in Support of Petitioners, *Republic of Austria v. Altmann*,

Because foreign discovery is so limited, because reciprocity is rarely a basis for State immunity determinations, and because no foreign government other than Argentina has raised concerns about the discovery orders in this case, the United States faces no realistic threat of harmful reciprocal consequences. In any event, this Court's task is to interpret the FSIA, not to predict the foreign relations consequences of that interpretation. If concrete concerns about reciprocity ever materialize in this context, those concerns should be, as the United States Court of Appeals for the District of Columbia Circuit said in a similar context, "appropriately presented to Congress—not [the courts]." *FG Hemisphere Assocs., LLC v. Dem. Rep. Congo*, 637 F.3d 373, 380 (D.C. Cir. 2011).

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541 U.S. 677 (2004) (No. 03-13); Brief for *Amicus Curiae*, Société Nationale des Chemins de fer Français in Support of Neither Party, *Republic of Austria v. Altmann*, 541 U.S. 677 (2004) (No. 03-13).

CONCLUSION

The ruling below is unlikely to cause foreign relations harm or invite retaliatory action against the United States because it is consistent with pertinent international norms of State immunity and because foreign courts possess relatively modest discovery powers and rarely invoke reciprocity as a criterion for State immunity. The Court can safely focus its attention on the text and structure of the FSIA without worrying about these foreign relations concerns.

Respectfully submitted,

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April 2, 2014