No. 12-842

IN THE

Supreme Court of the United States

REPUBLIC OF ARGENTINA,

Petitioner,

v.

NML CAPITAL, LTD.,

Respondent.

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

BRIEF FOR PROFESSORS LESTER BRICKMAN AND RICHARD ESENBERG AND THE CENTER FOR THE RULE OF LAW AS *AMICI CURIAE* IN SUPPORT OF THE RESPONDENT

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INTEREST OF AMICI

Amici are law professors and the Center for the Rule of Law, a non-profit foundation of international scholars focused on issues related to the rule of law.[1]

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Professor Richard Esenberg is an adjunct Professor of Law at Marquette University Law School and founder and General Counsel of the Wisconsin Institute for Law and Liberty. Prior to his tenure, he was a litigation partner at one of the largest firms in the United States and General Counsel at a privately held manufacturing firm with global operations. At Marquette, he has taught Civil Procedure and has spoken and written about discovery issues.

The Center for the Rule of Law and its affiliated scholars have long advocated for legal regimes that facilitate international trade and investment. Center

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[1] As required by Supreme Court rule 37.6, Amici state that no counsel for a party authored this brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than the Amici, members, or counsel for amici, made such a monetary contribution. Consent has been given by all parties for this brief.

scholars have served on governmental tribunals dealing with application of rules respecting international trade and investment, on arbitration panels deciding disputes respecting rights associated with international trade and investment, and on bodies considering legal rules to govern international trade and investment. They have been and continue to be involved in application of rules respecting trade and investment and in writing and teaching about core principles underlying law respecting international trade and investment.

Scholars affiliated with the Center also have substantial interest in issues relating to immunity, including sovereign immunity, and to questions of legal process. Their scholarly writings include attention to problems associated with immunity rules, the appropriate shape of such rules, and the consequences that flow from particular immunity rules. Center scholars further have written and taught about rules governing legal proceedings and problems of efficiency and fairness related to particular approaches to legal proceedings. All of the matters noted above are implicated in the question before the Court in the instant case.

SUMMARY OF ARGUMENT

The Foreign Sovereign Immunities Act substantially modifies the traditional law of sovereign immunity by adopting rules predicated on the restrictive theory of sovereign immunity. In contrast to a plenary theory of sovereign immunity, the restrictive theory permits jurisdiction over foreign sovereigns for liability arising from their commercial activity. By adopting that approach to immunity, FSIA facilitates commercial activity on the part of foreign nations and

creates an environment in which private parties may make and receive commitments from sovereigns with some confidence in their ability to rely upon and enforce those commitments. This understanding informs the nature of FSIA's limited grant of sovereign immunity and even more limited constraint on federal courts' authority to enforce judgments against foreign sovereigns.

To that end, FSIA specifies the conditions under which subject matter jurisdiction may be exercised over a foreign sovereign or its agencies and instrumentalities. It further provides that, when immunity is lifted and jurisdiction exists, a foreign sovereign may be held liable on the same basis as any other litigant. In keeping with the division between governmental and commercial activities, FSIA places restrictions on the ability of American courts to execute upon assets located in the United States, essentially exempting assets most likely to be used for governmental (non-commercial) functions.

FSIA does not, however, place any limitation on discovery directed to identifying other assets or restrict activity directed to assets located abroad. No such extraterritorial immunity or categorical ban on discovery is required by FSIA and none should be implied. The discoverability of assets is left to the otherwise applicable provisions of the Federal Rules of Civil Procedure and, as always, the amenability of such assets to execution is a matter for the law of the jurisdiction in which they may be found.

Discovery of the identity and location of assets that may not be attached by American courts does not, quite obviously, subject them to attachment. The availability of such discovery is the norm for judgment creditors, even for those seeking information on assets

abroad that may not themselves be attached by American courts. These background rules on discovery were left in place by FSIA except insofar as the statute creates express exceptions.

An implied ban on the discovery of such assets would transgress FSIA's basic predicate that, except as specified in the statute, sovereigns subject to American courts' jurisdiction are to be liable in the same manner and subject to the same rules as anyone else. Imposing categorical restrictions on discovery in suits against foreign sovereigns, beyond those contained in FSIA, would be inconsistent with this Court's consistent refusal to impose categorical limitations on discovery of information residing abroad; further, such new restrictions would place judgment creditors of foreign sovereigns in the untenable position of having to "guess" where attachable assets might be located.

To the extent that discovery of particular assets might compromise the unique interests of a sovereign judgment debtor, these interests can be dealt with by courts through the exercise of judicial discretion in the oversight of discovery in each individual case. Concern about possible overreaching in discovery requests should not be addressed by a categorical ban on jurisdiction or on the ability of parties to conduct discovery where jurisdiction exists.

Finally, even if this is not the proper approach to discovery directed to a foreign sovereign or its agencies and instrumentalities, it is certainly appropriate for discovery directed to third parties holding information regarding sovereign assets. Certainly any confidentiality concerns that might be legitimately asserted by a foreign sovereign can be addressed in the context of

particular discovery requests and not by a categorical rule.

ARGUMENT

I. FSIA Limits Jurisdictional Immunity for Sovereigns and Provides Expressly Constrained Limits on Enforcement Powers of American Courts.

The Foreign Sovereign Immunities Act, 28 U.S.C. § 1602, *et seq*., codifies an evolution in the concept of immunity from judicial process for foreign sovereigns by restricting the circumstances where immunity will be granted. It is a culmination of the move from the more formal and abstract doctrine of absolute immunity—by which a sovereign was regarded as beyond the reach of foreign courts by its very nature—to a more functional approach, typically referred to as "restrictive immunity." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983).

While sovereigns continue to enjoy immunity for actions that are governmental in nature (*jus imperii*), they are generally not immune when engaging in commercial activities or acting as a market participant (*jus gestionis*). Similarly, foreign sovereigns may be subject to the jurisdiction of our courts when, to induce others to enter into commercial transactions with them, they consent to jurisdiction of the courts.

This functional approach is not only a matter of fairness for those who do business with sovereign nations, but essential to the existence of international markets in which foreign sovereigns might participate. Private entities would reluctantly—if ever—contract with or extend credit to foreign nations if they could not enforce their legal rights in a court of law.

Reflecting on the rise of restrictive immunity, this Court has observed that "the enormous increase" in trade activities by foreign sovereigns "made essential 'a practice which will enable persons doing business with them to have their rights determined in the courts.'" *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 701 (1976). This more limited notion of immunity is not a regrettable insult to a sovereign's integrity, but an essential aspect of its ability to participate in markets and enjoy the benefits of commercial activities.

Of course, this modification of immunity will subject foreign sovereigns to obligations and liabilities that they may prefer to avoid. But FSIA represents a Congressional determination that these burdens are justified—even essential—for a well-functioning global economy in which states are commercial participants and partners. Thus, assertions of the need to defer to sovereigns' wishes or invocation of the "grace and comity" to which they would otherwise be entitled do very little work in assessing the scope of FSIA. The imposition of those burdens—and the suspension of that comity—is a feature of FSIA. The question is not whether FSIA ever imposes these burdens (it does), but when it imposes them.

Although FSIA immunity is not completely described as differing treatment of claims based on the commercial and governmental activities of states, *see* 28 U.S.C. §§ 1604-1607, this distinction between the commercial and non-commercial activities of foreign sovereigns informs much of its structure. Jurisdictional immunity, while it can also be waived, is lifted for certain commercial activity within the United States or having a direct effect here. *See* 28 U.S.C.

§ 1605(a)(2). Once jurisdiction is established, a sovereign for whom jurisdictional immunity has been waived stands in the position of any other litigant. 28 U.S.C. § 1606 ("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, as Petitioner notes and several courts have observed, to impose liability on a foreign sovereign for its commercial activities (or when it has consented) is a distinct matter from permitting execution against assets in the United States that may be used for its governmental functions. If acts and functions which are *jus imperii* are to be respected, an American judgment cannot permit the attachment of any and all assets to be found in the United States. Thus, FSIA enacts a separate and independent restriction on attachment and execution by limiting courts' authority to attach or seize certain types of sovereign assets. This approach conforms to the basic principle of restricted immunity. Having lifted *jurisdictional immunity* and permitted the imposition of liability upon sovereigns for certain types of activities, Congress limited the *enforcement power* of American courts to ensure that certain types of property in the United States required and useful for a sovereign's governmental activities would not be seized in the event of such liability. *See* 28 U.S. §§ 1609-10. Protection of these assets serves the same interests as the restricted immunity that shapes jurisdictional authority under FSIA.

As the Fifth Circuit has noted, "[o]ne of the chief motifs of the FSIA is to limit as much as possible

disrupting the 'public acts' or '*jure impereii*,' of sovereigns, while restricting their purely commercial activity. … Confiscating funds that are being put immediately to some sovereign use interrupts a sovereign's public acts …." *Connecticut Bank of Com. v. Republic of Congo*, 309 F.3d 240, 253 (5th Cir. 2002) (citations omitted). Thus, FSIA limits attachment and execution against sovereign property in the United States to, among other things, property that "is or was used for the commercial activity upon which the claim [resulting in judgment] was based …" 28 U.S.C. § 1610(a)(2) The assets of an agency or instrumentality of a sovereign in the United States receive similar, although less extensive, protection. 28 U.S.C. § 1610(b)

Thus is an important carve-out from the enforcement jurisdiction of federal courts, but a carefully cabined one that should not be read to confer a broader generic immunity. At the risk of belaboring the obvious, limiting attachment and execution against certain assets located in the United States does not immunize assets located outside this country. It says nothing about limiting discovery that would otherwise be available under Fed.R.Civ.P. 69. Such discovery is not generally limited to assets that may be attached and executed upon by American courts, i.e., an American judgment creditor can normally take discovery of persons subject to the jurisdiction of American courts to "hunt" for attachable assets abroad. *See* pp. 16-17, *infra.*

Thus, if assets other than those subject to attachment and execution under FSIA are potentially subject to attachment and execution abroad, discovery directed to obtaining information about such assets would normally be available to a judgment creditor. For Petitioner to categorically block such discovery,

they must find some restriction upon that discovery in FSIA or cognate law. It cannot.

II. Limitations on Execution Do Not Confer Immunity from Discovery Where Jurisdiction Over a Sovereign—or Any Other Party—Exists.

Petitioner's claim that a categorical restriction on discovery exists—even in cases where FSIA supports jurisdiction—turns on an unexamined (and logically flawed) syllogism. Petitioner begins by noting that courts have found FSIA's recognition of limited jurisdictional immunity implies immunity from general discovery until a party seeking to assert a claim against a foreign sovereign can establish jurisdiction (no jurisdiction means no discovery). In addition to limiting jurisdiction, FSIA limits execution. As a matter of logic, Petitioner says, even limited exceptions to ordinary rules on execution require an immunity parallel to FSIA's jurisdictional immunity (no U.S. execution authority means no discovery). Petitioner further implies that FSIA should be read to bar discovery of any assets held by a sovereign judgment debtor until it can be established that assets potentially found in discovery not only are subject to execution but are subject to execution within the United States (no execution within the United States means no discovery).

Even a cursory examination of the syllogism reveals its flaw. Jurisdictional immunity confers protection from the obligation to litigate. It would be empty protection if sovereigns entitled to its protection were forced to defend fully whatever claims might be asserted against them—including submitting to merits discovery—before a determination of whether

or not immunity from suit applies. Thus, courts have held that jurisdictional immunity implies that discovery must be limited to matters bearing on the applicability of immunity until the preliminary jurisdictional issue is resolved. The starting point for Petitioner's syllogism is valid, and indeed, with one exception, all of the lower court cases that Petitioner rely on arise in the context of jurisdictional immunity.

But limitations on enforcement of a judgment in American courts do not relieve a judgment debtor of the obligation to pay or insulate it from litigation attempting to attach or execute against assets located abroad. That is the well-established background rule. *See* pp. 16-17, *infra*; *Brief For The United States As Amicus Curiae In Support of Petitioner*, p. 26. FSIA by its terms confers no broader immunity from discovery, no blanket protection against execution and attachment, and no immunity on attachment or execution against assets located outside the United States. FSIA does not prevent an American judgment creditor from taking its judgment and seeking to have it recognized abroad as a prelude to seizing overseas assets of a sovereign judgment debtor. It places no limitation on the ability of such a judgment creditor to employ otherwise available discovery mechanisms to determine where those assets might be.

Execution immunity is entirely different from jurisdictional immunity. It does not confer protection from the obligation to litigate. Indeed, it can only come into question *after* that obligation has been established and the ensuing litigation has resulted in an adverse judgment. Execution immunity does not protect a sovereign from the need to litigate but only provides that certain of its assets cannot be attached by an American court. These can generally be described as

those that may be used for governmental functions and not those associated with commercial functions (and, at least, with respect to the sovereign itself, those commercial functions giving rise to the claim.) Immunity from the discovery of other assets—that may be subject to execution elsewhere—is not necessary to ensure that this limited protection of certain classes of assets is effective. Discovery alone leaves them untouched.

In short, one of these things is not like the other one. Execution immunity is a restriction on enforcement authority and not on jurisdiction. *First City, Texas-Houston, N.A. v. Rafidain Bank ("First City, Texas-Houston, N.A.")* 281 F.3d 48, 54 (2d Cir. 2002) ("No doubt, courts should proceed with care in pursuing the assets of foreign governments and their instrumentalities …" but this implicates the court's discretion, not its subject matter jurisdiction).

The question to be answered here is whether restrictions on discovery can be implied from restrictions on attachment and execution in the absence of any express limitation on discovery and in the face of FSIA's explicit recognition that, except as otherwise provided, a sovereign for whom jurisdictional immunity has been lifted is to be treated like any other litigant. Petitioner's syllogism is of no help in reaching that answer.

To be sure, immunity from execution incidentally relieves a foreign sovereign from the obligation to engage in certain types of litigation, i.e., resisting attempts to attach immune assets. But it is not, in and of itself, conferral of immunity from the obligation to litigate. If discovery is reasonably calculated to lead to the identification of assets that might be attached elsewhere, then it ought to be permitted, subject to

reasonable judicial oversight and the protection of any true privileges or confidences.

A. FSIA Confers No Immunity from Discovery Once Jurisdiction Lies.

A limitation on discovery goes hand in hand with a limitation on jurisdiction. No jurisdiction—no litigation, including discovery. But, "[o]nce a court is entitled to exercise subject matter jurisdiction over the suit, it has the full panoply of powers necessary to bring that suit to resolution and to enforce whatever judgments it has entered." *Autotech Techs, LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 744 (7th Cir. 2007).

There is no reason that this principle should not apply where FSIA has lifted the bar of sovereign immunity. *First City, Texas-Houston, N.A.*, *supra*, 281 F.3d at 54 ("We think that where subject matter jurisdiction under the FSIA exists to decide a case, jurisdiction continues long enough to allow proceedings in aid of any money judgment that is rendered in the case.") Once the bar of immunity is lifted, a sovereign subject to jurisdiction under FSIA is just like any other litigant, 28 U.S.C. § 1606, unless and until it can point to some other statutory exemption from otherwise applicable provisions of the Federal Rules of Civil Procedure and other applicable statutes.

For Petitioner, the exemption is to be found in the limitation on those assets that can be executed upon by an American court under FSIA. But that exemption by its terms confers only immunity from execution not discovery and, as we have seen, there is no logical reason to imply the latter from the latter.

As more than one court has noted, once a court is entitled to exercise subject matter jurisdiction, it has "the full panoply of powers necessary to bring that suit to resolution and to enforce whatever judgments it has entered. *Autotech*, 499 F.3d at 744.This is clear from the structure of FSIA:

> Jurisdiction (as well as immunity) is addressed in § 1604, which is captioned "Immunity of a foreign state from jurisdiction," and § 1605, captioned "General exceptions to the jurisdictional immunity of a foreign state." In contrast, later sections of the statute address various stages of a proceeding that has passed the jurisdictional hurdles. Sections 1609 and 1610 respectively outline the rules for "[i]mmunity from attachment and execution of the property of a foreign state" and "[e]xceptions" thereto. These sections delimit the scope of the district court's power to enter orders executing a judgment. They are, in the final analysis, nothing more than restrictions on the court's remedial and enforcement powers. Section 1609 says that, subject to certain exceptions, "the property in the United States of a foreign state shall be immune from attachment, arrest, and execution ..."; section 1610(a) lists those exceptions, in effect indicating when the property of a foreign state may be attached in aid of execution on a judgment.

Autotech, 499 F.3d at 744-45.

Of course, Congress can—and has—enacted specific limitations on the otherwise available "panoply" of judicial enforcement tools in the case of foreign sovereigns. But one set of limitations on enforcement,

i.e., protection of certain assets located in the United States, does not imply another set of limitations, i.e., protection from the need to disclose other assets that may be subject to execution. Indeed, we would not normally expect the fact that assets cannot be attached by an American court to block discovery of the identity and location of those assets so long as jurisdiction over the controversy has been established.

B. Immunity from Discovery Cannot Be Inferred from Limitations on Execution.

An American court will always be unable to directly seize assets abroad. This is true whether or not the owner is a foreign sovereign. A judgment against a non-sovereign foreign entity does not mean that its assets located abroad can simply be seized at the direction of American courts. Whether or not such assets can ultimately be executed upon will be determined in a foreign proceeding and depends upon a foreign courts' determination of whether its domestic law permits recognition of the American judgment and seizure of the assets in question.

Yet no one reasonably could suppose that this jurisdictional limitation on attachment and enforcement disables the holder of an American judgment from seeking discovery of the identity or nature of assets held by a judgment debtor abroad. Indeed, much of the brief filed by amicus the Clearing House consists of complaints that American courts routinely permit such discovery. Even when foreign law would not itself permit such discovery, American courts, employing the balancing test set forth in § 442(1)(c) of Restatement (Third) of Foreign Relations Law (1987) are not only free to permit it but generally do as an

adjunct to proceedings legitimately conducted in the United States. *See Société Nationale Industrielle Aérospatiale v. United States District Court*, 482 U.S. 522 (1987). As the Second Circuit has noted, "[d]iscovery of a judgment debtor's assets is conducted routinely under the Federal Rules of Civil Procedure." *First City, Texas-Houston, N.A.*, *supra*, 281 F.3d at 54, *citing* Fed.R.Civ.P. 69(a). If discovery is calculated to assist in the collection of a judgment, it is permitted. *Motorola Credit Corporation v. Uzan*, 203 F.R.D. 595 (S.D.N.Y. 2013).

Just as there is no requirement that a party seeking discovery demonstrate in advance that discovery will necessarily lead to dispositive (or even admissible) evidence, there is no requirement that a judgment creditor make some *a priori* showing that whatever assets are discovered will be subject to execution abroad. By definition, discovery is a search for the unknown and need only be reasonably calculated—not certain—to lead to admissible evidence or, as here, evidence of assets that may be subject to execution somewhere.

Indeed, in most cases, the forum court will be ill suited to address whether any particular discovered asset will be subject to execution where it is located. Determinations of foreign law are difficult and, in the absence of an order directing the disposition of an asset, should not be required at the discovery stage.

To require otherwise would turn considerations of judicial efficiency inside out. The Federal Rules of Civil Procedure favor a broad presumption in favor of discovery in recognition of the notion that the legal significance of discovered information, e.g., its admissibility or, as here, the ability to attach assets here or abroad is best considered once the information

has been obtained and the parties have moved to a forum best suited to the legal issues presented.

The idea, put bluntly, is that it is better to know what we are talking about before we assess its legal significance, to reserve difficult questions until they must be resolved, and to have them resolved by the tribunal best positioned to answer the questions definitively, which often will be in a foreign proceeding that actually seeks execution.

The alternative urged by Petitioner is for a judgment creditor to "guess" where assets might be located and initiate proceedings abroad in the hope that it has guessed correctly. Given that execution immunity is not compromised by discovery—it does not seize or freeze assets or otherwise impair a sovereign's enjoyment of the assets subject to discovery—it would be extraordinary to find such an implied exemption from the otherwise applicable rules where FSIA is silent on the matter. Once it knows what assets exist and where they are located, a judgment creditor such as NML can seek to domesticate its judgment in the appropriate forum and find out whether the assets are subject to attachment under applicable law.

To impose the burdensome alternative advocated by Petitioner would be poor public policy as well as bad law. It would place an almost insurmountable burden on judgment creditors in order to serve the vaguely stated convenience of foreign sovereigns who not only have been properly subjected to the jurisdiction of American courts, but also have been adjudicated to be liable for a debt that they now refuse to pay. This alternative construction would reach this result categorically, even though the interest of a foreign sovereign in avoiding the disclosure of assets that

might be attached abroad is not clearly established for the entire category affected.

More fundamentally, the policy championed by Petitioner is nowhere to be found in FSIA. To say that assets may not be attached in the United States is not to say that they may not be identified so that their immunity from attachment elsewhere may be tested. Creating such a restriction would be in derogation of the rules of civil procedure and in conflict with FSIA's assurances to international markets that, except as otherwise specified, foreign sovereigns subject to jurisdiction in respect of their commercial activities are to be treated like everyone else.

C. FSIA Does Not Confer Immunity on or Limit Discovery of Assets That May Not Be Attached by American Courts.

Perhaps recognizing that foreign sovereigns subject to US jurisdiction are generally subject to the same rules as other litigants, much of the discussion offered by Petitioner and supporting amici seeks to ground immunity from discovery in an assumption of actual or presumptive immunity from execution on the assets for which Respondent now seeks discovery. Indeed if these assets somehow are made immune from attachment or execution everywhere in the world based on a judgment rendered under FSIA, a categorical restriction on discovery might make sense. If FSIA were thought somehow to immunize assets abroad, then perhaps discovery of those assets would be thought part and parcel of that immunity by way of analogy to jurisdictional immunity's bar to merits discovery. On that view, it would serve no purpose to permit a judgment creditor discovery of assets that its judgment could never reach, and considerations of

grace and comity, as well as relevance and judicial economy, would counsel against permitting useless proceedings. In short, discovery would not be reasonably calculated to aid in collection of the judgment.

But FSIA does *not* confer worldwide immunity on assets outside the United States to satisfy a judgment rendered in American litigation for which FSIA has conferred jurisdiction. No one claims that NML or any other judgment creditor of a foreign sovereign cannot take their judgment abroad and see if the laws of a state in which sovereign assets might be located permit recognition of the judgment and execution upon those assets. Limitations on the ability of American courts to execute on assets located outside the United States, do not confer "a 'right' not to pay a valid judgment …." *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1477 (9th Cir. 1992). As the Ninth Circuit has noted, a judgment creditor of a sovereign "can seek to execute the judgment in whatever foreign courts have jurisdiction over [defendant's] assets," and "needs discovery to determine which courts those are." *Id.* Assets used for commercial activity in such states, while not subject to attachment and execution in the United States, may be subject to seizure where they are located. Creditors are entitled to discovery to learn whether such assets exist.

Given that FSIA does not purport to immunize foreign assets, discovery of those assets is not presumptively useless. It is very much in "aid of any money judgment that is rendered in the case." It is integral to the rights conferred by the judgment and will lead to no violation of sovereign rights protected by FSIA. The discovered assets will be disturbed only if applicable law permits it. Assets located abroad may

well be subject to execution abroad—even when those assets, if located in the United States, would be protected under FSIA. For example, French courts seem to recognize the same type of commercial activity exception recognized by FSIA while the United Kingdom appears less protective of sovereign assets than the United States. *See* Foster, *Collecting From Sovereigns: The Current Legal Framework for Enforcing Arbitral Awards and Court Judgments Against States and their Instrumentalities, and Some Proposals for Reform*, 25 Ariz. J. Int'l & Comp. L. 665, 684-687 (2008).

Grafting a limitation on asset discovery on to FSIA is not only unnecessary to serve the limitations on execution and attachment that are found in the law, it affords foreign sovereigns an entirely new immunity—one they do not enjoy under the law as written and as previously understood. The right to hide property that may be subject to execution and attachment elsewhere is not an immunity from attachment but freedom privilege from disclosure. In the absence of clear Congressional direction, this is not a privilege courts should create.

D. Immunity from Discovery Cannot Be Implied from Need to "Protect" Foreign Sovereigns.

Petitioner argues that such immunity should be found in FSIA because immunity—in some sense—is designed to protect foreign sovereigns from the need to litigate. Their argument essentially is this: because responding to—or resisting discovery—is "litigation" it presumptively should be forbidden; because discovery of assets that cannot be seized by American courts is not expressly authorized, the "grace and comity" due

foreign sovereigns require that an immunity from discovery be created.

There are at least two problems with this position. First and foremost, this position effectively amends existing law, and amendments to statutes are to be made by Congress and not the judiciary. Interpretations in derogation of otherwise applicable statutes and congressionally sanctioned rules—such as the Federal Rules of Civil Procedure—are disfavored.

And while FSIA may not expressly authorize discovery of assets located abroad, the Federal Rules of Civil Procedure do. Had Congress wished to deny judgment creditors their rights to conduct discovery that would otherwise be available to them, it would have been easy to do so. Had it intended to limit these creditors to whatever rights of discovery may or may not be available to them in whatever country a judgment debtor may or may not have assets, it could have said so. But, in the absence of law to the contrary, the normal rules apply. Congress ought not to be presumed to have conferred rights on judgment creditors that, as a practical matter, cannot be enforced anywhere in the world.

Second, saying that sovereigns' wishes should be deferred to or reciting platitudes about grace and comity and conjuring up vague threats of "retaliation" against American interests does no real analytical work. These were appropriate arguments to have made when FSIA was drafted; they can be advanced in support of proposed congressional amendments to the law; but they hardly suffice to alter the statutory scheme FSIA put in place. FSIA represents a judgment that, under certain circumstances, sovereigns ought to be made to answer in American courts. If, for example, the foreign sovereign has engaged in

commercial activity in the United States (seeking the advantages of our laws and the benefits of our markets) or, as in the present case, has voluntarily waived immunity in order to induce others to lend money, Congress has determined that the considerations pressed by Petitioner do not warrant immunity from suit and judgment.

As this Court has noted, "recognition by the courts of an immunity upon principles which the political department of government has not sanctioned may be equally embarrassing to it in securing the protection of our national interests and their recognition by other nations." *Alfred Dunhill*, *supra*, 436 U.S. at 700. In other words, there is no rule that more immunity is better. Where, as here, Congress has acted, its determination of where immunity ends must be respected.

Congress did not want the exceptions to immunity for commercial activity and in cases where immunity is waived to jeopardize certain assets in the United States deemed necessary to a foreign government's sovereign activities. In enacting the restrictive view of sovereign immunity, Congress sought to ensure that its waiver of jurisdictional immunity would not empower American courts to seize assets that predominately serve other sovereign purposes. Obviously, Congress could have no interest in and could not have intended to impose its views on execution immunity upon other states with respect to those states' treatment of the assets of other foreign states.

FSIA execution immunity serves only to ensure that whatever local law may provide with respect to execution against foreign assets be respected by requiring that attachment and seizure of those assets be accomplished through proceeding where they are

located. Simply permitting a judgment creditor to locate those assets through otherwise applicable discovery procedures does not disturb that immunity.

E. Arguments for Implying a Ban on Discovery Rely on Assumptions That Are Either Inapposite or at Odds with Established Law.

Amicus The Clearing House argues for an implied limitation on discovery in the provisions of 28 U.S.C. §§ 1781-83. Sections 1781 and 1783 permit letters rogatory and the compulsion of US persons abroad to give evidence as to assets located abroad. Neither has anything to do with whether persons within the United States and subject to the jurisdiction of its courts may be compelled to provide routine discovery as to assets abroad.

Perhaps in recognition of this, The Clearing House focuses on § 1782 which empowers US courts to order discovery within the United States in aid of actual or contemplated foreign proceedings. This, in its view, implies that no other discovery in aid of a foreign proceeding, such as execution against assets located abroad, may be had.

Section 1782 is designed to permit discovery of information located here when there is no American litigation of judgment. It has nothing to do with whether the Federal Rules of Civil Procedure permit discovery of information located abroad in aid of enforcing an American judgment. Where, as here, there has been litigation resulting in judgment, it is obviously inapposite. The Federal Rules of Civil Procedure govern such discovery and there is no reason to think that section 1782 would address it. Indeed, the Clearing House acknowledges that the

Federal Rules make discovery of information located abroad but held by persons subject to the jurisdiction of federal courts available to American litigants and judgment creditors. Yet much of the Clearing House's brief rails against the "burdens" and "outrage" of what it regards as federal courts' unfortunate willingness to allow discovery of information located abroad from persons subject to the jurisdiction of American courts.

The availability of that discovery does not constitute the kind of extraterritorial reach rejected in *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869 (2010). That case did not involve jurisdiction but instead assessed whether the Securities and Exchange Act applied to Australian securities. *Morrision* declined to apply U.S. law to claims by Australians, of misconduct by other Australians causing harm in Australia.

This case is different. Argentina marketed debt instruments in the United States to U.S. citizens and investors; Argentina consented to jurisdiction over disputes respecting that debt here and promised these U.S. creditors that it would not claim sovereign immunity in actions seeking to enforce that debt. The judgment against Argentina reflects harm inflicted on American investors arising out of Argentina's commercial activity in the United States. That is why the case against it was permitted to go forward under FSIA. The discovery sought here seeks information reasonably calculated to lead to the enforcement of the judgment reached in that litigation, even as it respects FSIA's limitations on attachment and execution. It seeks that discovery, moreover, from persons subject to the jurisdiction of American courts.

This Court's treatment of § 1782(b) is instructive as to the proper approach here. In *Intel Corporation v. Advanced Microdevices, Inc.*, 542 U.S. 241 (2004), this

Court was asked to infer a series of a priori and categorical limitations on the scope of discovery under that section. It was asked to require that a foreign proceeding actually be initiated prior to discovery and that parties seeking discovery show that the information sought would be discoverable abroad and that it be discoverable in an action initiated in the United States.

None of these limitations were to be found in the language of § 1782(b) itself, but each was urged as necessary to prevent discovery abuse and avoid offense to foreign governments. The Court, however, refused to imply extra-textual categorical limitations on discovery, stating instead that abuse in any particular case was best addressed by exercise of judicial discretion. *Id.* at 258-59, 260-63.

A similar approach was taken by this Court in *Société Nationale*. In that case, the Court was asked to hold that parties seeking discovery from a national of a signatory to the Hague Evidence Convention. As here, the limitation was urged on the basis of international comity and respect for foreign governments that may not permit—and even attempt to block—the more liberal discovery permitted in American courts. The Court rejected a categorical limitation, instead favoring a contextual consideration of the competing interests presented by particular requests for discovery. *Société Nationale*, *supra*, 425 U.S. at 543-544 ("Moreover, the concept of international comity requires in this context a more particularized analysis of the respective interests of the foreign nation and the requesting nation than the petitioners' proposed general rule would generate.")

While *Intel* and *Société Nationale* are not directly controlling, they demonstrate this Court's reluctance

to imply categorical limitations on discovery in the absence of clear textual warrant and based upon abstract notions of international comity. Discovery from, or even related to, foreign sovereigns may raise prudential concerns, but they are best addressed in context and through exercise of a district court's discretion and not a limitation on its jurisdiction.

III. Discovery Abuses Are Properly Addressed as Matters of Discretion and Oversight, Not Jurisdiction.

Much of the briefs filed by Petitioner and amici supporting the Petitioner complain of the breadth of the discovery order here and assert that it may reach certain assets that are unlikely to be subject to execution anywhere. Amici take no position on the scope of this or any other particular order. We do note that orderly treatment of the identity and location of assets would seem to be a distinct question from the amenability of those assets to execution and not ripe for determination at the discovery stage.

Nevertheless, it is possible that the distinct interests of foreign sovereigns may be impaired by certain forms of discovery directed to certain types of assets. The mere possibility that this asset discovery may present such difficulties, however, does not warrant a categorical rule prohibiting it. The Federal Rules provide courts with ample authority to address such concerns as they arise. Courts that have properly permitted such discovery as was ordered here have noted the need to proceed with circumspection regarding sovereign assets and recognized the ability of courts to craft orders balancing and accommodating any particular concerns.

But the need for such judicial superintendence does not, as it did not in *Société Nationale* and *Intel*, warrant categorical—and extra-textual—limitations on discovery.

IV. Any Discovery Immunity Applicable to Sovereigns Does Not Apply to Discovery from Third Parties

A word is in order about the claim that FSIA can render third parties immune from discovery related to a sovereign. As Respondent points out, nothing in FSIA comes close to saying so. Nor does FSIA's structure imply such emanating immunity.

Petitioner argues that execution immunity implies freedom from the obligation to litigate questions that the grant of immunity resolves in the sovereign's favor. To some extent, this is a truism. If, for example, Respondent attempted to attach clearly immune assets, Argentina would be entitled to a prompt dismissal without the need to litigate any other issues that might be raised by an attempt to execute against the assets.

For reasons set forth above, we do not believe that such implied immunity could ever apply to discovery of assets that might be attachable elsewhere or to information reasonably calculated to lead to the identity of such assets. But even were this not the case, any such implied immunity enjoyed by the sovereign itself cannot be categorically extended to discovery directed to third parties. While both Petitioner and supporting amici complain that the disclosure of such information might be undesirable for a sovereign, this is a far cry from recognizing a legally protected interest against such disclosure.

In short, Argentina need not litigate over discovery directed to a third party because disclosure of the requested information does not harm Argentina in a legally cognizable way. It does not seize or attach its assets. It subjects it to no legal command.

To be sure, it is possible that Argentina might make a claim of confidentiality or privilege with respect to some of the requested information. It would certainly be free to claim those protections as circumstances warrant. But the possibility that it might have a cognizable privacy interest with respect to some assets does not warrant a categorical ban on all discovery of assets that might be subject to attachment somewhere. That Argentina would "rather not" have any one know about information for which no claim of confidentiality or privilege can be successfully maintained is a thin reed upon which to rest an implied immunity extending to third parties.

CONCLUSION

For the foregoing reasons, Amici Professors Brickman and Esenberg and the Center for the Rule of Law request that the decision below be affirmed and this Court reject the claim of an implied immunity from discovery of assets that may be subject to execution abroad in the Foreign Sovereign Immunities Act.

Respectfully submitted,

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