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

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BRIEF OF COMPETITIVE ENTERPRISE INSTITUTE & FORMER STATE DEPARTMENT OFFICIALS AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

The Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. §§ 1330, 1602 *et seq.,* contains no provision granting immunity against discovery of foreign state property. What limits, if any, based on comity and reciprocity in foreign relations, should apply to discovery in enforcement of a valid FSIA judgment?

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INTEREST OF AMICI[1]

The Competitive Enterprise Institute (CEI) is a nonprofit organization dedicated to advancing the principles of individual liberty and free enterprise. CEI's interest in this case is to ensure that foreign states are fully accountable for their commercial contracts and that the restrictive theory of immunity embodied in the FSIA will not be rendered impotent by overly limited post-judgment discovery.

All of the individual *amici* on this brief served in the Department of State either as the Legal Adviser, the Counselor on International Law, or in other capacities. The individual *amici* are listed in Appendix A. Of particular relevance to the FSIA, John Norton Moore, the Counsel of Record on this brief, served as Counselor on International Law to the Department of State during the drafting of the FSIA in the early 1970s, and at that time participated both in the drafting of the law as submitted by the Executive to the Congress and in clearing the draft FSIA law through the interagency process within the United States government. Robert F. Turner served as national security adviser to Senator Robert P. Griffin (R. Mich.) when FSIA

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief.

was enacted in 1976 and was Acting Assistant Secretary of State for Legislative and Intergovernmental Affairs in 1984-1985. Davis R. Robinson and Judge Abraham D. Sofaer served as the Legal Adviser to the Department of State, respectively from 1981-85 and 1985-90.[2]

The *amicus* brief for the United States calls the Court's attention to the distinction in sovereign immunity law under the FSIA between jurisdiction for suit and jurisdiction for attachment and execution. We believe that this brief is deficient, however, in not also calling attention to the fundamental distinction in the FSIA between categories of property *per se* exempt from attachment and execution under international law (as principally set out in Section 1611 of the FSIA), and those not so limited but merely not available for execution or attachment in the United States (as principally identified by omission in Section 1610 of the FSIA). The United States should be encouraging all nations to live up to their commercial obligations. And, it should be encouraging full and effective application of the rule of law to breaches of those obligations. This includes, where the necessary commercial assets are not available in the United States for attachment and execution on a valid

[2] Many of the *amici* have strong records of supporting Executive authority in foreign relations. Disputes concerning commercial activities of foreign states, however, have been entrusted to the courts under the FSIA and, in our opinion, there is no foreign policy interest of the United States served by preventing discovery in aid of judgment with respect to commercial property of foreign states, wherever located.

judgment, facilitating through discovery the identification of commercial assets held abroad to permit recognition and enforcement of the American judgment abroad.[3]

The *amicus* brief for the United States also fails to clearly separate the issue here, that of *scope of discovery under the FSIA,* from that of *scope of attachment and execution* under the FSIA. The thrust of the argument in the United States *amicus* brief concerns limitations on attachment and execution[4] and we take no issue with this discussion. But importantly, the reasons concerning limitations on attachment and execution with respect to commercial property under the FSIA are not the same as the reasons for permitting broader discovery with respect to commercial assets wherever they may be located. Discovery is part of the normal judicial process in the United States court system and the expectation of states under the restrictive theory of immunity is that once jurisdiction has been established they will be subject to the normal judicial process of the United States.

There is also an important national interest in support of discovery with respect to commercial assets wherever those assets may be located. The United States has a strong interest in enhancing effectiveness of its judgments through recognition

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[3] This brief solely addresses issues of comity and reciprocity for United States foreign relations in settings of post-judgment discovery under the FSIA. As such, it is a response to the *amicus* brief submitted by the United States.

[4] *See amicus* brief for the United States at 13-14.

and enforcement of American judgments in other nations wherever the commercial property of the responsible state may be located.

The evidence is overwhelming that states which follow the rule of law in their dealings perform better for their citizens than those which fail to do so.[5] For Argentina or other nations to default on the bonds which they have internationally marketed not only directly harms American and other investors but it raises the capital cost of Argentinian debt and directly harms the Argentinian people. Adhering to the integrity of an agreement is as essential for governments in their commercial dealings as it is for corporations and individuals. Equally important, when governments fail to live up to their commercial obligations, they should be subject to suit to enforce the rule of law in the interest of all parties—investors and the citizens of the state itself, both of whom have an important stake in the rule of law.

There is also an important rule of law interest in supporting effectiveness in enforcement of valid judgments against foreign states. Indeed, supporting

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[5] *See generally* WORLD SURVEY OF ECONOMIC FREEDOM, 1995-96 (Richard E. Messick ed., 1996) [Freedom House]; JAMES D. GWARTNEY & ROBERT A. LAWSON, ECONOMIC FREEDOM OF THE WORLD (1997); BRYAN T. JOHNSON & THOMAS P. SHEEHY, THE INDEX OF ECONOMIC FREEDOM (1995) [and subsequent annual reports]; GERALD SCULLY, CONSTITUTIONAL ENVIRONMENTS AND ECONOMIC GROWTH (1992); DOUGLAS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC PERFORMANCE (1990). For a discussion of the broad range of indicia showing that nations adhering to democracy and the rule of law perform better for their citizens *see* JOHN NORTON MOORE, SOLVING THE WAR PUZZLE 1-8 (2004).

respect for United States judgments is an important interest of the judiciary and the Nation.

States, of course, are not individuals or corporations and there are important reasons why certain classes of state property cannot and should not be subject to attachment or execution. These limited categories, as generally internationally accepted, include *first*, diplomatic and consular premises and property,[6] *second*, property of foreign states held in international organizations which are entitled to enjoy the privileges and immunities provided by the International Organizations Immunities Act (organizations such as the International Monetary Fund or the World Bank), *third*, property of a military character or under the control of a military or defense authority and intended to be used in connection with a military activity, and *fourth*, except as *explicitly waived,* property of a foreign central bank or monetary authority *held for its own account*.[7]

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[6] *See* Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T., T.I.A.S. No. 7502, Articles 21-24, 27 & 30; and Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820, Articles 27, 30-33 & 35. Absolute immunity also extends to the residence of a Chief of Mission.

[7] *See* 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES 436 (ALI 1987) Comment C, § 460 ("Two types of property are absolutely immune from attachment, and the immunity is not subject to waiver: (i) assets of foreign states held in certain international organizations such as the International Monetary Fund or the World Bank (FSIA Section 1611(a)), and (ii) property of a military character that is used or intended to be used in connection with a military activity or is under the control of a military authority or defense agency (FSIA Section 1611(b)(2). Property of a foreign central bank or monetary authority *held for its own account* is also absolutely

To permit attachment or execution against diplomatic or consular premises or property interferes with an important international interest in effective communication between nations. Similarly, to permit such enforcement actions against accounts held in international organizations can undermine the functions assigned to such organizations, an effect going beyond the defaulting state and potentially harming the international interest in such organizations. Obviously to seek to attach or execute against military assets has grave potential for international conflict. Finally, to seek to attach or execute against central bank or monetary authority property *held by the bank or authority for its own account without explicit waiver* has potentially grave implications for economic stability and the functioning of such authorities.

The individual *amici* submitting this brief *urge that discovery not be permitted against the above categories of foreign state property exempt from attachment and execution under international law as specified in §§ 1611 and 1610(a)(5) (the proviso for diplomatic properties).* Since these categories of property are categorically exempt, except under the narrow exceptions set out in § 1611, there can be no attachment or execution against them in any

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immune from attachment unless *explicitly waived* (FSIA Section 1611(b)(1) (emphasis added))."

jurisdiction.[8] Thus, there could be no supplemental action in any other country based on recognition and enforcement of the American judgment that could either attach or execute against these assets. As such, discovery with respect to these categories of foreign state property would be futile. Moreover, the sensitivity of many of these categories of assets suggests high potential for interference in foreign policy and costs to comity and reciprocity. For example, it would be extremely costly for foreign policy and comity, with accompanying reciprocity risk to the United States, to permit attachment or execution against military assets of another state. Thus, for the classes of property as specified in Sections 1611 and 1610(a)(4)(B) of the FSIA which are categorically exempt from attachment and execution under international law we agree with the brief of the United States.[9]

In contrast to the above special categories that should remain exempt, however, there is no general international interest in exempting assets held for commercial activities or which are otherwise non-exempt. Indeed, that is the clear implication of the international reform removing commercial activities from immunity. There is simply no comity or

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[8] We believe that these provisions, setting out the United States view of exempt categories under international law, generally reflect contemporary international law.

[9] Importantly, however, property to be *per se* exempt under § 1611 or § 1610(a)(4)(B) must meet *all* the requirements for immunity in at least one of the exempt categories. Moreover, discovery should be flexible enough to defeat efforts to hide commercial assets though disguising them as exempt property.

reciprocity interest with respect to commercial property. The principal foreign relations interest at stake here is to encourage all nations to adhere to their commercial agreements; adherence that serves both the international investing community as well as the citizens of the lending state.

Amici seek to support the rule of law in the interest of all nations; a rule of law which includes holding governments to their commercial agreements. Doing so requires that we maintain a vigorous ability to subject the commercial activities of states to suit and enforcement while supporting a limited but essential state immunity from attachment and execution as set out in the above classes of categorically exempt property.

STATEMENT

The Foreign Sovereign Immunities Act was drafted in the Legal Adviser's Office of the Department of State in the early 1970s. It had two principal objectives. First, it was intended to codify the restrictive theory of state immunity in which states would henceforth be subject to legal process for their commercial activities. Second, it was responding to criticism both about fairness to litigants and costs to United States foreign policy when the Office of the Legal Adviser in the Department of State was making immunity decisions on a case-by-case basis. Henceforth, immunity decisions would be turned over to the courts. The old thinking of "absolute immunity" which the Act decisively rejected was fundamentally inconsistent with the rule of law. The Act reflected strong United States leadership in limiting this older rule of "absolute immunity," most importantly in codifying a commercial activities exception—which has clearly become the principally accepted international approach to immunity decisions. It is worth noting that it was the Department of State itself which drafted the original legislation, though the legislation subsequently has been broadened by the Congress, particularly with respect to waiving state immunity concerning certain terror attacks against Americans now codified in Section 1605(a)(7) of the FSIA. The Act also largely eliminated pre-judgment attachment, which had been the predominant pre-FSIA modality of obtaining jurisdiction, and it simultaneously set up a

system for post-judgment attachment, execution and satisfaction.

The two principal purposes of the Act are both reflected in Section 1602: "Findings and declaration of purpose." Thus, making a clear statement that under international law states are not immune with respect to their commercial activities and that their commercial assets may be levied upon for satisfaction of judgments against them, the FSIA provides:

> 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.[10]

And, with respect to the purpose that henceforth immunity decisions should be made by the courts rather than the Legal Adviser's Office of the Department of State, this Section states:

> 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

[10] 28 U.S.C. §1602.

> justice and would protect the rights of both foreign states and litigants in United States courts. . . . . 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.[11]

It is important to note that the Act, as drafted by the Department of State, is not simply codifying an American view of the commercial activity exception, it clearly affirms that "*under international law, states are not immune . . . . [concerning] their commercial activities . . . [and] their commercial property . . . .*"[12]

Consistent with the purpose of the Act to henceforth have immunity claims determined by the courts, the Act assumes that, except for special procedural provisions spelled out in the Act such as Section 1608 on service of process, the courts will apply normal court rules and procedures. Thus, Section 1606 provides as the general rule that: "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances . . . ."[13] This includes discovery, which has no special limitations in the Act. According to the *Restatement (Third) of the Foreign Relations Law of the United States:*

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[11] 28 U.S.C. §1602.
[12] *Ibid.* §1606.
[13] *Ibid.*

> *Discovery*. Neither the Foreign Sovereign Immunities Act of the United States nor corresponding legislation in other states addresses the issue of discovery against foreign states. When a state is party to an action in a court of another state—whether as plaintiff or as defendant—all the normal procedures associated with adjudication in that court, including discovery and requirements for posting security, are applicable, except as expressly excluded. A state subject to suit under the restrictive theory, then, is subject to discovery in connection with such suit.[14]

Confirming this point that discovery, under the usual supervision of the court, is available pursuant to existing law, the House Report on the FSIA explains: "*The bill does not attempt to deal with questions of discovery. Existing law appears to be adequate* in this area. . . .[15] The House Report goes even further and notes that "[A]ppropriate remedies would be available under Rule 37, F.R. Civ. P., for an unjustifiable failure to make discovery."[16] The *Restatement* strongly suggests from this House Report reference to Rule 37 that even a default

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[14] 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §451 Comment *c* (1987).
[15] H.R. Rep. No. 1487 (94th Cong., 2d Sess.) at 23 (1976).
[16] *Ibid*. (emphasis added).

judgment would be available for failure to comply with a discovery order.[17]

The *amicus* brief for the United States asserts that "[i]f Congress had wanted to authorize courts to issue discovery orders . . . . Congress would have said so expressly. But it gave no indication of any such intent."[18] With respect, the United States brief has it backward on the FSIA "comprehensive scheme." Congress in the FSIA made it clear in Section 1606 of the FSIA that, once "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 . . . ."[19] The sections of the FSIA specifically cited by the Act here as the conditions precedent for normal judicial "manner and extent" in exercise of jurisdiction (that is, Sections 1605 & 1607) are those relating to jurisdiction over suit, not jurisdiction with respect to attachment or execution as set out in Sections 1609-1611. So Congress specifically left out as conditions precedent for normal exercise of jurisdiction any reference to the provisions concerning attachment and execution immunities. Moreover, in this same provision the Congress did address a limitation—that concerning punitive damages; so the Congress certainly understood that once jurisdiction over suit was met

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[17] I RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 459 Comment *d* (1987).

[18] Brief for the United States as *Amicus Curiae* in Support of Petitioner, at 10.

[19] 28 U.S. Code § 1606. *See also* Res. Br. 4, 41.

the foreign state would be treated in the courts as any other litigant, with the exception of the punitive damage provisions spelled out in this same section.[20] Further, the intent of Congress gets even clearer when it is noted that the Congress not only specifically addressed discovery in the FSIA, but it specifically addressed "limitations on discovery," and the only limitation on discovery specified by Congress was on discovery against the United States, not discovery against foreign states.[21]

With respect to the new provisions on attachment and execution in aid of judgment the Act sets out two categories of restraints. The most important restraints, as set out in Section 1611 of the FSIA, are categorically exempt from attachment and execution except pursuant to the narrow exceptions spelled out in this Section.[22] They include:

- Property of a foreign central bank or monetary authority *held for its own account*, unless immunity is explicitly waived;
- Property of organizations entitled to the immunities provided by the International Organizations Immunities Act (including

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[20] *Ibid*.

[21] *See* 28 U.S.C. § 1605 (g) "Limitation on Discovery," applying such limitations in FSIA actions solely to discovery against the United States.

[22] These exceptions include the "explicit waiver" and "held for its own account" provisions concerning foreign central bank or monetary authority property.

accounts of national governments in these organizations);

- Property of a military character or under the control of a military authority or defense agency and used or intended to be used in connection with a military activity.

Under Section 1609, the introductory provision on immunity from attachment and execution, the Act also exempts any category of property "[s]ubject to existing international agreements to which the United States is a party at the time of enactment of this Act . . . ."[23] This latter category includes diplomatic and consular premises or property as categorically exempted by the Vienna Convention on Diplomatic Relations[24] and the Vienna Convention on Consular Relations.[25] Moreover, diplomatic and consular properties are also specifically exempt from attachment as set out in Section 1610(a)(4)(B) of the FSIA—which provides an exemption for "property used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission . . . ."[26]

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[23] 28 U.S.C. § 1609.

[24] *See* Vienna Convention on Diplomatic Relations. Articles 21-24, 27 & 30.

[25] *See* Vienna Convention on Consular Relations. Articles 27, 30-33 & 35.

[26] 28 U.S.C. § 1610(a)(4)(B). Presumably this restriction appears in § 1610 rather than the categorically exempt property in § 1611 of the Act simply because it relates to immovable property situated in the United States which would otherwise be subject to attachment or execution in relation to a judgment establishing rights in property.

The second set of exceptions to immunity and attachment are principally dealt with in Section 1610 of the FSIA which includes property used by the foreign state or its agency or instrumentality for commercial activities in the United States. The careful construction of this section reflects that the categories of property that fall outside of Section 1610—such as commercial property used abroad—are not categorically exempt from attachment and execution under international law, but rather are categories excluded from attachment and execution in the United States based on perceived limitations on United States jurisdiction in attempting to attach or execute on commercial property located abroad. This jurisdictional nexus for the Section 1610 limitations on attachment and execution against commercial assets was well understood by the draftsmen of the FSIA and is reflected in the House Report which provides:

> [T]he bill would remedy, in part, the present predicament of a plaintiff who has obtained a judgment against a foreign state. Under existing law, a foreign state in our courts enjoys absolutely immunity from execution, even in ordinary commercial litigation where commercial assets are available for the satisfaction of a judgment. H.R. 11315 seeks to restrict this broad immunity from execution. *It would conform the execution immunity rules*

> *more closely to the jurisdiction immunity rules.*[27]

These commercial properties, however, are presumably still available to satisfy judgments either under actions brought in the foreign states where such commercial property is located, or under United States judgments recognized and enforced in such foreign states. *But under the restrictive theory there is no basis for concluding that these properties used in commercial activities are under international law categorically exempt from attachment and execution.*[28] In this connection, consistent with the restrictive theory, Section 1602 of the FSIA states: "Under international law, states . . . commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities."[29]

Importantly, if the FSIA purpose in holding states accountable for their commercial activities is to be effectuated, not only must the FSIA permit discovery with respect to their commercial property wherever located, but courts must also be permitted to retain adequate discretion in discovery to ensure that foreign states are not concealing their property

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[27] H.R.Rep. No. 1487 (94th Cong., 2d sess.) at 8 (1976) (emphasis added).

[28] Similarly, the FSIA itself makes it clear in numerous provisions of the § 1610 "exceptions to immunity from attachment or execution" that the question of "whether the property is or was involved in the act upon which the claim is based" is not part of any categorical immunity under international law.

[29] 28 U.S.C. § 1602.

through blanket assertions either of non-existence or that the property in question is within a class categorically exempt from attachment or execution. As such, it would seem appropriate to require a foreign state to support any assertion that discovery with respect to challenged property should be blocked because the property in question is in a class of property categorically exempt. This conclusion is also supported by the important reality that it is the foreign state that controls information as to the nature of the property in question. Perhaps an appropriate balance might be achieved by limiting discovery to non-exempt property but requiring the foreign state to provide an appropriate showing that any challenged property is non-exempt.[30]

The FSIA defines "commercial activity"[31] and there is a substantial jurisprudence[32] available under the FSIA as to what is "commercial activity." Indeed, the courts apply this test routinely in determining jurisdiction under the commercial activity exception to the FSIA, as set out in Section 1605(a)(2) of the FSIA.[33] As such, the test for determining whether property was or is being used for "commercial activity," and is thus subject to

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[30] According to Respondent's brief Argentina never sought to limit discovery to non-exempt categories such as military property. Res. Br. 45.

[31] 28 U.S.C. § 1603(d).

[32] *See, e.g., Argentina v. Weltover*, 504 U.S. 607, 612 (1992); *Verlinden v. Central Bank of Nigeria*, 461 U.S. 480, 486-89 (1983); 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 453 & Comment at 401-07 (1987).

[33] 28 U.S.C. § 1605(a)(2).

discovery in aid of enforcement, is well within usual judicial practice.

Finally, it should be noted that there is an additional route by which the commercial property of a foreign state might be subject to attachment and execution in the United States. That is—the recognition and enforcement in the United States of a foreign judgment against the foreign state. Comment *c* to Section 482 of the *Restatement of the Foreign Relations Law of the United States, Third* provides: "A foreign judgment is generally entitled to recognition by courts in the United States to the same extent as a judgment of a court of one State in the courts of another state."[34] And Comment *h* provides with respect to an action to enforce foreign judgments:

> [A]n action to enforce a judgment may usually be brought wherever property of the defendant is found, without any necessary connection between the underlying action and the property, or between the defendant and the forum. The rationale behind wider jurisdiction in enforcement of judgments is that once a judgment has been rendered in a forum having jurisdiction, the prevailing party is entitled to have it

[34] 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 482, Comment *c* (1987).

> satisfied out of the judgment debtor's assets wherever they may be located.[35]

Assuming that the provisions of the FSIA apply to such recognition and enforcement of foreign judgments,[36] Section 1610 of the FSIA may embody different limitations than in the case of attachment and execution on a United States judgment. Thus, Section 1611 continues to provide a categorical bar against attachment and execution with respect to the included class of exempted property as set out above. But, in contrast, Section 1610 repeatedly uses the limiting language "upon a judgment entered by a court of the United States or of a State"—quite possibly leaving the category of commercial property unlimited by that section in relation to the enforcement of foreign judgments in the United States. Further, were the provisions of Article 19 of the United Nations Convention on Jurisdictional Immunities of States and Their Property[37] to be applied by a United States court in recognition and enforcement of a foreign judgment, the limitations on attachment and execution would be different than those set out in Section 1610 of the FSIA.

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[35] *Ibid.*, Comment *h*.

[36] This is arguably not clear under the FSIA. Possibly recognition and enforcement of foreign judgments against foreign states may be principally dealt with by application of state law, as is the usual case in recognition and enforcement of foreign judgments generally.

[37] *See* G.A. Res. 59/38, art. 21(a), (b), and (c), U.N. Doc. A/RES/59/38 (Dec. 2, 2004). This convention, which is not yet in force, is discussed *infra* at 26.

SUMMARY OF ARGUMENT

The plain language and core purpose of the FSIA permit discovery against the commercial property of foreign states in aid of enforcement of a valid United States judgment, wherever such commercial property is located.

The statutory language of Section 1606 of the FSIA is clear in establishing that once jurisdiction is present for suit that "the foreign state shall be liable *in the same manner and to the same extent as a private individual under like circumstances* . . . ."[38] This includes, as reflected in the legislative history, normal discovery under the supervision of the courts. Further, the FSIA legislative framework did not overlook the issue of discovery, for it specifically contains a limit on discovery—a limit that applies only to discovery against the United States.[39]

A core purpose of the FSIA is to hold states accountable through the judicial system, including effective enforcement, for their commercial activities. It also deliberately turned such accountability over to the courts to follow normal judicial procedures in subjecting the commercial activities of states to the rule of law. In this connection, the FSIA states clearly as a declaration of purpose: "[S]tates are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon

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[38] 28 U.S.C. § 1606 (1976) (emphasis added).
[39] *Ibid.* § 1605(g) (1976).

for the satisfaction of judgments rendered against them in connection with their commercial activities."[40]

Comity and reciprocity are not harmed by discovery concerning the commercial property of foreign states, wherever located. There is no prohibition in international law on recovery against commercial property, as opposed to categories of property *per se* exempt from attachment or execution.[41] As such, states do not have justified expectations that their commercial property will be exempt from attachment or execution in enforcing judgments against them resulting from their commercial activities.[42] Moreover, under the

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[40] 28 U.S.C. § 1602 (1976). Moreover, the core immunity from attachment and execution provision of the FSIA, § 1609, provides immunity by its terms only to "the property in the United States of a foreign state." 28 U.S.C. § 1609. *See* Res. Br. 9. *Only the categorically exempt properties set out in § 1611 of the FSIA are not limited by the "property in the United States" language.* At the least this language suggests that the Congress had no intent to limit execution and attachment against commercial assets abroad pursuant to recognition and enforcement of American judgments abroad.

[41] Even prior to the FSIA the RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 69 Reporters' Note 2, "*Immunity from execution,"* at 215-16, at 216 (1965), pointed out that cases in foreign states were permitting levy on property of a state connected with its "private acts;" acts today identified as "commercial activities."

[42] This is particularly true for Argentina, which certainly understands its exposure in United States courts with respect to commercial activities. *See, e.g., Argentina v. Amerada Hess Shipping Corp*., 488 U.S. 428 (1989); *Argentina v. Weltover*, 504 U.S. 607 (1992). Moreover, the commercial activity in question is one in which Argentina specifically agreed, without

restrictive theory of immunity there is no justifiable expectation that a state will not be subject to full judicial process once it is established that a claim has no immunity. As such, there is no comity issue in subjecting the commercial property of foreign states to discovery in aid of enforcement of a valid United States judgment, wherever such property may be located.

Rather than harming comity and reciprocity interests of the United States, permitting discovery in aid of judgment with respect to commercial property of foreign states, wherever such property may be located, serves comity and reciprocity in numerous ways. These include encouraging states to adhere to their word in commercial activities; enhancing global commerce; furthering the restrictive theory of immunity championed by the United States; protecting the integrity of judgments issued by United States courts;[43] and, most broadly, supporting the rule of law in international affairs.

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limitation, to be subject to "the courts of New York." *NML Capital v. Argentina,* 727 Fed. 3d. 230, 237 (2d Cir. 2013).

[43] The Second Circuit apparently believes that the behavior of Argentina in this case poses a direct challenge to the authority of the Court. It stated that the creditors of Argentina "have no adequate remedy at law because the Republic has made clear its intention to defy any money judgment issued by this Court. . . ." *NML Capital v. Argentina*, 727 Fed. 3d. 230, 241 (2d. Cir., 2013). Since granting comity here would be a voluntary setting aside of jurisdiction in the interest of fairness and good relations, it would certainly be a relevant factor for this Court to consider that the Second Circuit believes that Argentina has sought to "defy" the judgment of the Court," behavior hardly demonstrating "comity" on the part of Argentina.

ARGUMENT

A. Discovery Under the FSIA in Enforcing an American Judgment Against Commercial Assets, Not Otherwise Exempt, Should Not Be Limited by the FSIA Restrictions on Attachment and Execution Related to Use of the Property for Commercial Activities in the United States as Set Out in Section 1610 of the FSIA; Restrictions Which Simply Reflect Voluntary Jurisdictional Restraints.

There is a fundamental distinction between property that is categorically exempt from attachment and execution under international law, and commercial property excluded under the FSIA from attachment and execution for jurisdictional considerations.[44] There is no prohibition in international law to attachment or execution against commercial properties of a state to enforce a judgment rooted either in waiver in relation to a commercial activity or simply a commercial activity exception to immunity. Thus, there should be no negative effect on United States foreign policy or comity or reciprocity interests of the United States in permitting discovery concerning such commercial properties whether located in the United States or elsewhere. The United States has fully accepted the restrictive theory limiting immunity with respect to

[44] It is unclear whether the Section 1610 limitations would even apply when United States courts are recognizing and enforcing a foreign judgment.

commercial activities, and including recovery against commercial properties.

The principal restrictions established (by omission) in Section 1610 of the FSIA are voluntary in nature, intended to limit attachment and execution in the United States to property over which the United States has clear jurisdiction. They do not reflect categorical prohibitions under international law against attachment or execution of foreign assets such as those set out in Sections 1611 and 1610(a)(4)(B) (diplomatic or consular properties). *But when the issue is discovery in enforcement of a valid judgment where jurisdiction for suit against the foreign state has already been established, then no issue of jurisdiction under international law arises.* This is a fundamental distinction between the issue of discovery and the issue of attachment and execution. Clearly when non-immunity against suit is established, national courts have jurisdiction to order discovery and apply other normal judicial procedures and practices against the foreign state. As the FSIA clearly states in Section 1606 "Extent of Liability"—when the foreign state is not entitled to immunity under the Act "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances . . . ."[45] It would make no sense, then, to limit *discovery in a United States court, where jurisdiction over discovery is present,* to categories of assets excluded from attachment and execution for jurisdictional reasons.

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[45] 28 U.S.C. § 1606.

The *amicus* brief of the United States is also telling in pointing out that the United Nations Convention on Jurisdictional Immunities of States and Their Property[46] recognizes as immune from execution "[c]entral bank, military, and diplomatic property."[47] Sadly, however, the United States brief fails to note that Article 10 of the Convention provides that there is no sovereign immunity for commercial transactions.[48] Moreover, Article 19 of the Convention, which regulates post-judgment attachment and execution in the courts of a third country, specifically permits attachment against commercial property located in the third country.[49] This Convention is compelling evidence that there is no international comity or reciprocity problem with respect to post-judgment discovery concerning commercial property located abroad, *precisely the point of this amicus brief!*

Discovery in aid of enforcement of a United States judgment concerning commercial properties abroad could be of considerable importance to a judgment holder through foreign recognition and

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[46] *See* G.A. Res. 59/38, art. 21(a), (b), and (c), U.N. Doc. A/RES/59/38 (Dec. 2, 2004). This Convention is not in force and remains controversial in part.

[47] *Amicus* brief of the United States, at 28. The United States brief goes on to note that "the Convention's protections . . . [which specifically exclude any absolute bar against post-judgment execution on commercial property in third countries] reflect accepted international principles and practices regarding foreign-state immunity." *Ibid*.

[48] G.A. Res 59/38, *supra* note 46, art. 10.

[49] *Ibid*. art. 19.

enforcement of the American judgment. An American judgment holder has a strong interest, not only in enforcing the judgment in the United States, but also in recognition and enforcement of the American judgment in any jurisdiction abroad where the foreign state's commercial assets may be located.

Absent discovery in the American action it may not be evident to the judgment holder where it would be useful to seek recognition and enforcement of their judgment. Given the expense in filing such actions it simply is not practical to conduct a fishing expedition through filing actions in multiple jurisdictions abroad in search of the foreign state's commercial assets. As such, broad discovery in the United States with respect to the commercial assets of the responsible state, wherever such assets might be located, is an important element in the effectiveness of the American judgment. Such discovery is even more important where a sophisticated scheme to sequester assets abroad is suspected.[50]

The *amicus* brief of the United States points out the seriousness of the problem for the United States

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[50] Nothing in the FSIA text or legislative history suggests that the Congress of the United States sought to limit the import of American judgments under the FSIA with respect to recognition and enforcement abroad, an important element of effectiveness. Nor is post-judgment discovery, addressed to a foreign state which is already fully subject to the jurisdiction of an American court, an "extraterritorial," application of the FSIA, whether or not discovery is limited to property in the United States. *See* Res. Br. 44-45.

judgment holder absent permitted discovery in the United States concerning assets abroad. The brief states: "Notably, because other jurisdictions generally allow much more limited discovery than is available in the United States . . . respondent likely could not obtain the discovery it seeks in the courts of many foreign states."[51] This difficulty would be added to the even greater difficulty of not even knowing in which of more than 190 other judicial systems to begin an enforcement action, absent knowledge as to the country location of available commercial property.

B. The Department of State Has Overstated Comity and Reciprocity Concerns with Respect to Discovery, if Such Discovery is Limited to Property Related to Commercial Activities.

Quite simply, when a foreign state enters the commercial arena to do business it does so without the immunity it might otherwise possess; and this is so both under the FSIA and under international law.[52] Accordingly, there is no harm to United States foreign policy in holding states accountable for their commercial activities, including recovery against their commercial assets. Comity, a principle

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[51] *Amicus* brief of the United States at 26.

[52] One of the Department of State's leading international experts in this area has written: "[G]overnments are subject to essentially the same jurisdictional rules as private entities in respect to their commercial transactions. . . . Today, the propriety of providing for the juridical settlement of such claims has gained worldwide acceptance." David P. Stewart, *The UN Convention on Jurisdictional Immunities of States and their Property,* 99 AM. J. INT'L L. 194, 194-95 (2005).

of international law respecting the interests of other states in the exercise of jurisdiction, is simply not implicated where a United States court is facilitating implementation of the restrictive theory of immunity. As such, robust discovery of commercial assets in aid of enforcement of a United States judgment rooted both in commercial activities and in waiver poses no comity concern *whether those assets are located in the United States or abroad.*

Further, it is well understood that once a national court has jurisdiction pursuant to an exception to immunity, such as waiver or commercial activity, then the foreign state is subject to the normal judicial process of that court. In the United States that normal judicial process includes discovery. The FSIA makes this clear in Section 1606 "Extent of liability" when it provides in settings where the foreign state is not entitled to immunity that: ". . . the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances . . . ."[53] Accordingly, at least with respect to commercial assets implicated under the restrictive theory of immunity, there is no expectation under international law that a foreign state would not be subject to robust discovery in support of enforcement.

One of the core purposes of the FSIA, to take immunity decisions out of the Department of State and transfer them to the courts, was rooted in

[53] 28 U.S.C. §1606.

American foreign policy experience. It was found that United States foreign policy would be implicated less by foreign states understanding that henceforth they would be subject to the rule of law in United States courts rather than a process of case-by-case pleading by the foreign state with the Department of State and then the foreign state taking offense whenever immunity was rejected.

Similarly, discovery of commercial assets, whether such assets are located in the United States or abroad, in support of enforcement of a valid judgment against a foreign state for defaulting on bonds the foreign state marketed in the United States, a commercial activity,[54] and with immunity waived in aid of such marketing, does not pose a problem of reciprocity in foreign relations for the United States. The United States has never defaulted on its bonds and there is virtually no chance that the United States, with the world's reserve currency, and as the world's financial safe haven of choice, will default on its bonds. Moreover, the United States routinely adheres to court judgments concerning monetary damages and it would be an exceptional case were it not to do so. It is also likely, were the circumstances reversed and the United States had borrowed money in Argentina under the stipulation that immunity was waived and disputes would be resolved under Argentinian law,

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[54] "Borrowing Money" was listed in the House Report on the FSIA as an example of a "commercial activity." H.R. Rep. No. 1487, 94th Cong., 2nd Sess. at 16.

that Argentinian courts would not assist the United States in defrauding Argentinian investors. Accordingly, the facts of this case simply do not implicate reciprocity concerns for the United States.[55] The facts of this case, however, do implicate the United States' interest in encouraging all states to adhere to their commercial obligations, particularly in something as important as the sale of bonds.

Even prior to the FSIA it was common for treaties of friendship, commerce and navigation to waive immunity for commercial or business activities, including both immunity from suit and execution of judgment. For example, the Treaty of Friendship, Commerce and Navigation with the Netherlands provided in Article XVIII(2):

> No enterprise of either Party, including corporations, associations, and government agencies and instrumentalities, which is publicly owned or controlled shall, to the extent that it engages in commercial, industrial, shipping or other business activities, within the territories of the other Party claim or enjoy, either for itself or for its property, immunity therein from taxation, *suit, execution of judgment or other liability* to which privately owned and

[55] Respondent's brief summarizes the range of factors present in this case which hugely limit reciprocity concerns for the United States. Res. Br. 39.

> controlled enterprises are subject therein.[56]

Moreover, while these FCN treaties waived immunity for commercial activities, including both suit and execution of judgment, they contained no specific limitations on execution against commercial assets held abroad as is created by Section 1610 of the FSIA. This FCN practice does not suggest a comity or reciprocity concern with respect to discovery against commercial assets in aid of enforcement of an American judgment, whether these assets are located in the United States or abroad.

Of course, as previously discussed, discovery with respect to property categories which are *per se* exempt under international law from either attachment or execution, as set out in Section 1611 of the FSIA, or pursuant to treaty obligations of the United States (for example, military equipment or diplomatic premises), *would* present comity and reciprocity concerns for the United States. Since the scope of discovery under the Federal Rules of Civil Procedure is under the control of the court such overly broad discovery can easily be controlled by the court.

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[56] Treaty of Friendship, Commerce and Navigation with the Netherlands, 8 U.S.T. 2043, T.I.A.S. No. 3942, 285 U.N.T.S. 231 (1958) (emphasis added). *See also* I RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 456 "Waiver of Immunity," Comment *c* "*Waiver by International Agreement.*" According to the *Restatement:* "Immunity clauses in pre-1976 FCN treaties accomplished what the Foreign Sovereign Immunities Act achieved by statute." *Ibid*.

C. Principles of Comity and Reciprocity Will Be Served, Rather Than Harmed, By the Courts Retaining an Ability to Fashion Discovery Under the FSIA in Support of Enforcement Against Commercial Property.

Excluding property categorically exempt under international law from attachment or execution, the United States has strong comity and reciprocity interests in ensuring that states adhere to their international agreements, including their agreements with non-state parties. Thus, the United States has an interest—including a foreign policy interest—in ensuring that states comply with their agreements. Indeed, this is *the* core principle of international law; *pacta sunt servanda.* The United States has an interest, including a foreign policy interest, in enhancing effectiveness of the restrictive theory of immunity; a theory that strongly supports global commerce. The United States has an interest, including a foreign policy interest, in broadly ensuring enforcement of valid judgments as an essential element of the rule of law. Indeed, the United States also has an interest, including a foreign policy interest, in encouraging foreign states to respect judgments of United States courts. And the United States has an interest, including a foreign policy interest, in *justice*[57]; an interest that

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[57] Section 1602 of the FSIA begins by reciting that "[t]he 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* . . . . [emphasis added.]" 28 U.S.C. § 1602. It is a fundamental principal of justice, reflected in the writings of Blackstone, that

surely includes responsibility of a state to pay its debts.

The *amicus* brief for the United States specifies in footnote 2 "The United States does not condone a foreign state's failure to satisfy the final judgment of a U.S. court imposing liability on the state. The United States consistently has maintained, and continues strongly to maintain, that Argentina should normalize relations with its creditors, both public and private."[58] The United States would be more effective in realizing these objectives were it to argue more narrowly to the Court with respect to the permitted scope of discovery for purposes of attachment and execution under the FSIA and support discovery concerning the commercial property of defaulting foreign states whether that property is located in the United States or abroad.

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every legal right must have a legal remedy. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 23 (1768). Chief Justice John Marshall made the same point thirty-five years later in *Marbury v. Madison,* 5 U.S. 137, 163 (1803). The Chief Justice wrote that the "very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury," and he warned that a government cannot be called a "government of laws, and not of men . . . . if the laws furnish no remedy for the violation of a vested legal right." *Ibid.*

[58] Brief for the United States as *Amicus Curiae*, note 2, at 6.

D. The FSIA, a United States Initiative Supporting the Rule of Law, Should Not Be Limited by the Courts to Undermine Its Principal Legislative Purposes in Holding States Accountable for Their Commercial Activities and In Transferring Immunity Decisions to the Courts.

The interest of the United States in promoting the rule of law globally, as well as the core purposes of the FSIA, support an interpretation to limit immunity concerning commercial activities. As has been seen, there is no comity or reciprocity interest implicated by permitting discovery in aid of a judgment with respect to the commercial assets of a foreign state, wherever those assets may be located. For the restrictive theory of immunity is widely accepted internationally and states have no justifiable expectation that their property used in commercial activities will not be subject to the rule of law.

Moreover, there are strong United States foreign policy interests supporting robust enforcement of judgments issued by United States courts against the commercial assets of foreign states. A pattern of empty judgments, frustrated through systematic non-compliance by a foreign state, undermines the rule of law. Permitting a robust discovery in aid of judgment also supports the principal purposes of the FSIA; which are to codify the restrictive theory of immunity and to turn immunity decisions over to the courts.

FSIA contains no legislative restriction concerning discovery against a foreign state once jurisdiction is initially established. As such, at least the plain meaning of the FSIA as a legislative act is that foreign states are not immune from discovery. Any judicial fashioning of parameters for discovery implementing this plain legislative framework should be narrowly crafted to support the clear purposes of the Act as textually set out in Section 1602 of the Act, to support judgments issued by American courts under the FSIA, and to promote the rule of law internationally; a major United States foreign policy objective.

The commercial assets of foreign states should not be immune from discovery, wherever such assets may be located. To hold otherwise would be to undermine an important mechanism for enforcement of judgments; that is the ability of the judgment holder to seek foreign recognition and enforcement of their United States judgment. Effectiveness in such foreign recognition and enforcement turns inevitably on knowledge as to where the foreign state's commercial assets are located. That, in turn, supports the centrality of adequate discovery for effective enforcement of judgments entered by United States courts under the FSIA.

Courts must also be permitted to retain adequate discretion in post-judgment discovery under the FSIA to ensure that foreign states are not concealing their property through blanket assertions either of non-existence or that the property in question is

within a class categorically exempt from attachment or execution. Indeed, in seeking to fashion discovery orders in support of final judgments, District Courts are likely to encounter a diversity of levels of compliance. Some governments may be entirely cooperative while others may secretly seek to deceive the court or openly flaunt its authority. Sometimes substantial information will be available about the location of commercial assets, while other settings may reflect sophisticated efforts to evade court orders through a veil of secrecy. This Court should leave adequate flexibility in the scope of permitted discovery for District Courts to deal with an expected range of cooperation. Under the FSIA, commercial activities of foreign states are subject to suit in United States courts. The United States should not unilaterally disarm a normal and important power of the courts in ensuring compliance with FSIA final judgments.

Ultimately the FSIA is about ensuring that states are subject to the rule of law in their commercial dealings. For this Court to hold that foreign states are subject to post-judgment discovery with respect to their commercial property, wherever located, both serves that purpose and, as well, carries out the plain meaning of the Act.

CONCLUSION

The judgment of the Court of Appeals supporting an order of discovery should be affirmed as it applies to the commercial property of Argentina, wherever such property may be located.

Respectfully submitted,

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APPENDIX A

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