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 *AMICI CURIAE* OF THE JUDICIAL EDUCATION PROJECT AND PROFESSORS OF LAW IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Federal Rule of Civil Procedure 69(a)(2) authorizes a judgment creditor to obtain discovery from any person, including the judgment debtor, in aid of the judgment or execution. The question presented is whether, in cases where the judgment debtor is a foreign state, the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1601 *et seq.*, restricts Rule 69(a)(2) only to discovery about specified assets subject to execution in the United States.

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INTEREST OF *AMICI CURIAE* [1]

Amici curiae have a strong interest in the proper construction of the Foreign Sovereign Immunities Act and the Federal Rules of Civil Procedure. *Amici* law professors, who are listed in Appendix A, have taught and written extensively on foreign sovereign immunity, international civil litigation and international law. *Amicus* Judicial Education Project ("JEP") is a non-profit educational organization in Washington, D.C. JEP is dedicated to defending the Constitution as envisioned by the Framers – a federal government of enumerated powers, dedicated to the rule of law and supported by a fair and impartial judiciary. JEP educates citizens about these constitutional principles and focuses on issues such as the judiciary's role in our democracy, how judges construe statutes and the impact of court rulings on the nation. JEP undertakes these efforts by various means, including filing briefs in this Court on matters of national importance.

SUMMARY OF ARGUMENT

In the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1601 *et al.*, Congress designed a comprehensive scheme regulating the limits of a foreign state's immunity from civil suit. Nowhere does this comprehensive statutory scheme immunize foreign states from the post-judgment discovery

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[1] No counsel for any party authored this brief in whole or in part. No person or entity, other than *amici*, their members or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. *Amici* law professors received no compensation for offering the views reflected herein. All parties have consented to the filing of this brief. Respondent has filed a blanket consent letter with the Clerk's Office. Petitioner's specific consent letter is being filed with this brief.

ordinarily available to judgment creditors under Federal Rule of Civil Procedure 69. Despite the complete absence of any statutory basis, Petitioner invokes sovereign immunity in an effort to block discovery about assets that might be used to satisfy valid judgments against it.

In its merits brief, Respondent offers various case-specific reasons, also identified by the Second Circuit, why Petitioner's argument is incorrect. These include the waiver contained in Petitioner's bond documents and the fact that the discovery is directed against third parties rather than Petitioner itself. *Amici* endorse these arguments.

In this brief, *amici* explain why the result would be the same even absent these case-specific factors. The FSIA does not erect independent limits to post-judgment discovery in cases where a court has validly exercised jurisdiction over a foreign state. This rule follows from faithful application of statutory interpretation techniques that have guided this Court in cases under the FSIA and other federal statutes. As an initial matter, nothing in the plain text of the FSIA limits post-judgment discovery under Rule 69(a)(2).

What the FSIA's text suggests, its structure confirms. Provisions of both the FSIA and other statutes demonstrate that Congress knows how to embed limits on discovery into federal law. More generally, when Congress wished to alter the otherwise applicable rules of civil procedure in cases against foreign states, it did so, as the provisions governing personal jurisdiction and service of process exemplify. While Petitioner and its *amici* lay great weight on the FSIA's limits on property subject to execution, that argument erroneously ties the scope of a court's power to order post-judgment discovery to its power to issue a writ of

execution, a linkage supported neither by the FSIA nor by Rule 69(a)(2).

The FSIA's legislative history resolves any lingering doubt about the availability of discovery from foreign states. In that history, committee reports from both houses make clear that Congress deliberately chose not to regulate discovery in the original enactment. This statutory lacuna was not due to some legislative oversight or lack of political consensus. Instead, according to reports from the House and Senate Judiciary Committees, Congress deliberately chose not to address discovery in the FSIA because "[e]xisting law appears to be adequate in this area." H.R. Rep. No. 94-1487, at 23 (1976) [hereinafter *House Judiciary Committee Report*]; S. Rep. No. 94-1310, at 9 (1976) [hereinafter *Senate Judiciary Committee Report*]. That "existing law" included Rule 69, which had been amended only a few years earlier to ensure that "all discovery procedures provided in the rules are available." Fed. R. Civ. P. 69 advisory committee's note (1970). In light of the close proximity between the revisions to Rule 69 and Congress's consideration of the FSIA, it defies reason to think that Congress somehow intended to exempt foreign states from the ordinary obligations of judgment debtors to provide post-judgment discovery without addressing the matter anywhere in the legislation.

Finally, the purposes behind the FSIA's enactment support this conclusion. A core purpose of the FSIA was to provide meaningful relief to private litigants, including foreign litigants, in cases against foreign states where an exception to the immunity applies. These cases specifically include claims by holders of sovereign debt. Congress considered, but rejected, a version of the bill that would have preserved the

immunity for foreign states in certain cases involving public debt. In such instances, like this one, post-judgment discovery becomes an essential tool to ensure that noteholders do not lack a remedy. Imposing undue limits on such discovery thwarts this purpose.

Petitioner's appeal to "principles" animating the FSIA does not justify a different interpretation of the statute. Resort to such "principles" is fraught with peril, for it risks according the statute a meaning beyond the words actually adopted by Congress. "The question . . . is not what Congress 'would have wanted' but what Congress enacted in the FSIA." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992). Even if such appeals were appropriate in this context, the relevant principles are not those handpicked by Petitioner but, instead, the ones affirmatively "set forth in" the FSIA. 28 U.S.C. § 1602. To the extent Petitioner's "principles" are relevant, courts can rely on well-established doctrines, already used in the post-judgment discovery context, to address them. The FSIA, however, does not supply a trump card replacing this carefully crafted framework with one privileging foreign states that have refused voluntarily to comply with valid judgments of United States courts. If foreign states wish to obtain such special status, they should direct their arguments to Congress.

ARGUMENT

Stripped of its rhetoric, this case presents a simple and straightforward matter of statutory interpretation. The interpretive question is whether the FSIA independently limits post-judgment discovery in cases involving a foreign-state debtor over which a court has validly exercised jurisdiction. The answer is no.

This rule follows from faithful application of statutory interpretation techniques consistently applied by this Court in prior cases under the FSIA and other federal statutes: text, structure, legislative history and purpose. While Petitioner and its *amici* appeal to so-called principles that supposedly animate interpretation of the FSIA, that appeal should be rejected and, in any event, does not require this Court to twist the FSIA's meaning.

A. The FSIA's text does not limit post-judgment discovery against foreign state judgment debtors.

Like all questions of statutory interpretation, the proper construction of the FSIA begins with the text itself. *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 197 (2007); *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). The FSIA "contains a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state . . . ." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488 (1983). *See also Amerada Hess*, 488 U.S. at 435 n.3. Tellingly, though, nothing in this "comprehensive set of legal standards" exempts foreign states from post-judgment discovery. Petitioner infers from this statutory silence a lack of express authorization to issue such discovery unless it pertains to specific assets that are subject to execution under the FSIA. (Br. at 33). Yet Congress had no need to authorize such discovery affirmatively in the FSIA. Courts already had the necessary authority from Rule 69(a)(2), which in 1976 and still today authorizes discovery "from any person – including the judgment debtor." Fed. R. Civ. P. 69(a)(2). Consequently, the better interpretation suggested by the statutory text

is that the ordinary rules governing post-judgment discovery apply even in cases where the judgment debtor is a foreign state.

B. The structure of the FSIA and other federal statutes confirms that Congress knows how to embed limits on discovery in positive law.

Lacking any support for its argument in the FSIA's text, Petitioner claims to unearth limits on post-judgment discovery in other features of the statute. (Br. at 27). *Amici* agree that the FSIA's structure bears on its interpretation. *See, e.g.*, *Saudi Arabia v. Nelson*, 507 U.S. 349, 357-58 (1993); *Amerada Hess*, 488 U.S. at 434. But a close examination of that structure does not support Petitioner's argument. Rather, it confirms that the FSIA does not independently limit post-judgment discovery ordinarily available under Rule 69(a)(2).

"Drawing meaning from silence is particularly inappropriate . . . [where] Congress has shown that it knows how to [address an issue] in express terms." *Kimbrough v. United States*, 552 U.S. 85, 103 (2007). *See also Dole Food Co. v. Patrickson*, 538 U.S. 468, 476 (2003) ("Where Congress intends to refer to ownership in other than the formal sense, it knows how to do so."). Other provisions of the statute illustrate that Congress "knows how to" address discovery limits "in express terms." Specifically, Section 1605(g), entitled "Limitation on Discovery," contains no mention of post-judgment discovery.[2] *See Almendarez-Torres v.*

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[2] Both the Seventh Circuit in *Rubin v. Islamic Republic of Iran*, 637 F.3d 783, 795 n.10 (7th Cir. 2011), and the United States in its brief to this Court, Br. of the United States at 15 n.7,

United States, 523 U.S. 224, 234 (1998) (including "the heading of a section" among the "'tools available for the resolution of a doubt' about the meaning of a statute" (quoting *Bhd. of R.R. Trainmen v. Baltimore & Ohio R.R. Co.*, 331 U.S. 519, 528–29 (1947))). Instead, this limitation applies only where: (a) the case arises exclusively under the FSIA's antiterrorism exception, 28 U.S.C. § 1605A; (b) the discovery is directed at the United States; and (c) the Attorney General certifies that the discovery "would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action." 28 U.S.C. 1605(g)(1)(A).

This limitation reveals Congress's intent in several respects. First, and most obviously, the need to enact a specific limitation on discovery presupposes that normal discovery is otherwise available. Second, when Congress does intend to limit discovery, it ties the limitation to a specific exception to immunity. Third, in such statutes, Congress also specifies the party (including the sovereign) that may invoke the limitation. Section 1605(g) allows no exception in cases where the court's jurisdiction is based on something other than the antiterrorism exception and grants no exception to parties other than the United States. In short, Congress knows how to embed discovery limits in federal statutes and, had it intended to create special rules limiting post-judgment discovery in cases involving foreign-state debtors, it would have done so.[3]

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acknowledge the existence of this provision but fail to discuss its implications.

[3] The United States Code is replete with examples, like Section 1605(g), where Congress has embedded specific limits on discovery in federal law. *See, e.g.*, 10 U.S.C. § 949p-4(a)(1) (limiting

Other features of the FSIA demonstrate that Congress "knows how to" carve out exceptions to ordinary practice under the Federal Rules of Civil Procedure in cases involving foreign states. As this Court recently and repeatedly has recognized, the FSIA contains special provisions governing personal jurisdiction and service of process that differ from those applying to ordinary defendants. *See Samantar v. Yousuf*, 560 U.S. 305, 324 n.20 (2010); *Verlinden*, 461 U.S. at 485 n.5.

- The personal jurisdiction provisions automatically authorize the exercise of personal jurisdiction over the foreign state if an exception to immunity applies. *See* 28 U.S.C. § 1330. Otherwise, in a garden-variety breach of contract claim against a non-sovereign defendant, the federal court would have to borrow the long-arm statute of the state in which it sits in order to test whether personal jurisdiction is authorized. *See* Fed. R. Civ. P. 4(k)(1)(a).
- The service of process provisions similarly set forth detailed requirements governing service of process against foreign states and their

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access by accused to classified information in proceedings before military commissions); 15 U.S.C. § 37(b) (providing partial immunity from federal and state antitrust laws for charitable gift annuities and charitable remainder trusts and, including among the immunities, "the right not to bear the cost, burden, and risk of discovery"); 15 U.S.C. § 2055(e)(2) (providing that certain reports supplied by manufacturers to the Consumer Product Safety Commission shall be "immune from legal process and shall not be subject to subpoena or other discovery in any civil action in a State or Federal court or in any administrative proceeding" except in certain enumerated cases); 18 U.S.C. § 2336(b) (limiting access to Justice Department files in civil claims for acts of terrorism).

> agencies or instrumentalities. *See* 28 U.S.C. § 1608; Fed. R. Civ. P. 4(j)(1) ("A foreign state or its political subdivision, agency, or instrumentality must be served in accordance with 28 U.S.C. § 1608."). Otherwise, in a garden-variety case, a foreign defendant is served by the means set forth in Federal Rule of Civil Procedure 4(f) and 4(h)(2).

In light of the express alterations to ordinary civil practice contained elsewhere in the FSIA, the better inference from the FSIA's structure is that Congress did not intend to alter the application of Rule 69(a)(2) in cases where the judgment debtor happens to be a foreign state.

Relying heavily on the Seventh Circuit's decision in *Rubin v. Islamic Republic of Iran*, 637 F.3d 783 (7th Cir. 2011), Petitioner argues (Br. at 36-39) that the FSIA's provisions immunizing certain foreign-state property from execution, 28 U.S.C. §§ 1609-11, correspondingly limit discovery to specific requests about property subject to execution in the United States. Just like Petitioner's flawed textual argument, *see supra* at 5-6, this argument improperly conflates a court's power to order post-judgment discovery with its power to issue a writ of execution.

While the FSIA limits the property of a foreign state in the United States subject to a writ of execution, that limitation does not "vest in [the foreign state] a 'right' not to pay a valid judgment against it." *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1477-78 (9th Cir. 1992). Questions of post-judgment discovery arise only if the judgment debtor does not voluntarily comply with the court's judgment. *See Senate Judiciary Committee Report*, at 9. In those cases, courts must exercise their "inherent power to

enforce [their] judgments." *Peacock v. Thomas*, 516 U.S. 349, 356 (1996); *Riggs v. Johnson Cnty.*, 73 U.S. (6 Wall.) 166, 187 (1868). This "inherent power" includes the power to issue process until the judgment is satisfied. Such process "is as essential to jurisdiction as process antecedent to judgment, else the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution." *Riggs*, 73 U.S. at 187. *See also Cent. Nat'l Bank v. Stevens*, 169 U.S. 432, 464 (1898) ("[J]urisdiction of a court is not exhausted by the rendition of the judgment, but continues until the judgment shall be satisfied.").

The broad post-judgment discovery authorized by Rule 69 merely represents a particular species of this "inherent power." It enables courts to identify property of the judgment debtor that may be subject to execution, whether in the United States or abroad. *See* Pet. App. 26. Indeed, precisely because of the limits contained in the FSIA, judgment creditors may need to seek execution against property located in countries with more generous execution provisions than the United States, *see* Pet. App. 27-28, and post-judgment discovery enables them "to determine which courts those are." *Richmark*, 959 F.2d at 1478; *see also FG Hemisphere Assocs., LLC v. Democratic Republic of Congo*, 637 F.3d 373, 376, 380 (D.C. Cir. 2011) (Silberman, J.) (affirming court's power to issue contempt sanction against foreign state for failure to provide discovery about assets located in other countries where judgment creditor might seek to execute on judgment of United States court); *cf. Republic of Austria v. Altmann*, 541 U.S. 677, 703 (2004) (Scalia, J., concurring) ("Federal sovereign-immunity law limits the jurisdiction of federal and state courts to entertain those claims . . . but not

respondent's right to seek redress elsewhere."). Post-judgment discovery also allows courts to determine the "situs" of assets, particularly intangible ones, so that parties can determine where to pursue execution. *See* Pet. App. 31. Finally, post-judgment discovery can help courts determine whether *alter egos* of the judgment debtor have property in the United States that can be used to satisfy the judgment. *See, e.g.*, *First City, Texas-Houston N.A. v. Rafidain Bank*, 150 F.3d 172, 177 (2d Cir. 1998); *cf. First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 630-33 (1983) (recognizing the *alter ego* principle in cases involving state-owned entities).

In sum, the better reading of the FSIA's structure is that Congress did not intend to confine Rule 69 to discovery about specific assets of the foreign state subject to execution in the United States.

C. The FSIA's legislative history demonstrates that Congress did not wish to alter ordinary discovery principles in cases involving foreign states.

Amici recognize the members of this Court do not all accord the same weight to the legislative history of a statute. *Compare Samantar*, 560 U.S. at 316 n.9, *with id.* at 326 (Alito, J. concurring); *id.* at 326 (Thomas, J., concurring in part and concurring in the judgment), *and id.* at 326-28 (Scalia, J., concurring in the judgment). For those Justices who do consult legislative history, that history points in the same direction as the plain text and the statutory structure: the FSIA does not impose independent limits on post-judgment discovery under Rule 69(a)(2).

Both the House and Senate committee reports on the FSIA "demonstrate[] that Congress kept in place

a court's normal discovery apparatus in FSIA proceedings." *FG Hemisphere Assocs.*, 637 F.3d at 378 (Silberman, J.). Both reports contain identical language stating that "[t]he bill does not attempt to deal with questions of discovery. Existing law appears to be adequate in this area." *House Judiciary Committee Report*, at 23; *Senate Judiciary Committee Report*, at 22.

Congress's express satisfaction with the "existing law" of discovery is significant. In 1970, a mere six years prior to the FSIA's enactment (and a mere three years before Congress first held hearings on the proposed legislation), Rule 69(a)(2) was amended to ensure that judgment creditors could utilize the full array of discovery tools when seeking to obtain information from a judgment debtor. *See* Fed. R. Civ. P. 69 advisory committee's note (1970); *Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the H. Comm. on the Judiciary*, 93d Cong. (1973) [hereinafter *1973 House Hearing*]. In light of those recent amendments, had Congress intended to create special rules for post-judgment discovery against foreign states, it would have so provided in the bill.[4]

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[4] Practice prior to the FSIA's enactment confirms that discovery was available against foreign states in cases where jurisdiction was proper. Even prior to 1952, foreign states were not entirely immune from suit. Most obviously, the State Department might decline to file a suggestion of immunity. *See Republic of Mexico v. Hoffman*, 324 U.S. 30, 38 (1945). But far earlier, only a few years after its decision in *Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812), this Court recognized that foreign states surrendered their immunity when they voluntarily appeared in prize cases laying claim to the disputed cargo. *See The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283, 353-54 (1822); *see also Amerada Hess*, 488 U.S. at 437 (citing *Santissima*

Other aspects of the legislative history likewise suggest that Congress did not intend to create different discovery rules for cases involving foreign-state defendants. Both the House and Senate committee reports state that "appropriate remedies would be available under Rule 37, F. R. Civ. P., for an unjustifiable failure to make discovery." *House Judiciary Committee Report*, at 23; *Senate Judiciary Committee Report*, at 22. Nothing in either report indicates that courts should alter their application of Rule 37

Trinidad for the proposition that "foreign states were not immune from the jurisdiction of United States courts in prize proceedings"). Likewise, immunity was denied if the state merely claimed title, but not possession, of the property in dispute. *See The Navemar*, 303 U.S. 68 (1938). In other cases, foreign states might proceed as plaintiffs and be amenable to counterclaims or setoffs. *See Nat'l City Bank of New York v. Republic of China*, 348 U.S. 356, 359-65 (1955).

In cases like these, where the foreign state was not immune, it was obligated to provide discovery. *See Guaranty Trust Co. of New York v. United States*, 304 U.S. 126, 134 n.2 (1938) ("The foreign sovereign suing as a plaintiff must give discovery."); *The Gloria*, 286 F. 188, 194 (S.D.N.Y. 1923) ("[W]here a foreign sovereign files a bill, or prosecutes an action in this country, he may be made a defendant to a cross-bill or bill of discovery in the nature of a defense to the proceeding, which the foreign sovereign has himself adopted.") (quoting *Duke of Brunswick v. King of Hanover*, [1844] 6 Beavan 1, 37, 38); *see generally* Charles H. Weston, *Actions Against the Property of Sovereigns*, 32 Harv. L. Rev. 266, 275 (1919) ("When a sovereign comes into court as plaintiff . . . he is bound by the usual rules governing litigants. He may be required to give security for costs and he may be met by defenses, set-offs or cross-bills . . . ."); *International Law—Sovereign State as Plaintiff—Waiver of Immunity from Interpleader of Third Person by Defendant*, 27 Yale L. J. 278, 279 (1917) ("[I]f a sovereign power commences proceedings, it must conform to the practice and regulations of the court, such as giving discovery, etc.").

standards in light of the fact that the sovereign might be the party subject to a discovery sanction. Again, had Congress believed it was necessary to treat foreign states with kid gloves, it would have so provided in the FSIA and not left the matter subject to the ordinary practice under the Federal Rules of Civil Procedure.[5]

Petitioner argues that the above-cited passages from the House and Senate reports are better understood to refer only to discovery during the liability phase of a case and not to post-judgment discovery pursuant to Rule 69(a)(2). (Br. at 51). This interpretation is incorrect. Nothing in the reports suggests that Congress intended to leave merits discovery alone while restricting post-judgment discovery. Both reports refer to "discovery" generally when describing the committees' parallel views about the adequacy of "existing law." Petitioner attempts to draw support for its interpretation from the fact that the passage on discovery appears in a portion of the reports entitled "extent of liability." (Br. at 51). But post-judgment discovery uses the exact same tools as those used in the liability phase of a case. *See* Fed. R. Civ. P. 69 advisory committee's note (1970). Since Congress found "existing law" regarding those devices to be adequate, "it would be surprising, indeed, if Congress had" limited those devices "*sub silentio*" for post-judgment discovery while leaving them unchanged for merits discovery. *Dir. of Revenue of Missouri v. CoBank ACB*, 531 U.S. 316, 323 (2001). *Cf. Dames &*

[5] Likewise, both committee reports are replete with indications that Congress expected suits against foreign states under the FSIA to operate in harmony with the Federal Rules of Civil Procedure (except where Congress specifically provided otherwise). *See, e.g.*, *Senate Judiciary Committee Report*, at 8, 22-25, 32; *House Judiciary Committee Report*, at 23-25, 32.

Moore v. Regan, 453 U.S. 654, 686 (1981) ("It is quite unlikely that the same Congress that rejected proposals to limit the President's authority to conclude executive agreements sought to accomplish that very purpose *sub silentio* through the FSIA.").

Petitioner claims to find further support for its interpretation of the legislative history in the section of the House report addressing immunity from attachment. (Br. at 52). That section states that Section 1610's reference to "'attachment in aid of execution' is intended to include attachments, garnishments, and supplemental proceedings available under applicable Federal or State Law to obtain satisfaction of a judgment." *House Judiciary Committee Report*, at 28 (citing Fed. R. Civ. P. 69).

This passage cannot sustain the weight that Petitioner attempts to give it. The very next passage of this report sheds light on the meaning of the term "supplemental proceedings." It refers not to discovery proceedings but, instead, to the proceedings where attachment, execution or some other form of legal claim would be asserted against the judgment debtor's property. *Id.* This understanding of the term "supplemental proceedings" accords with the meaning given to it by this Court. *See Peacock*, 516 U.S. at 356-57 ("[W]e have approved the exercise of ancillary jurisdiction over a broad range of *supplementary proceedings* involving third parties to assist in the protection and enforcement of federal judgments—including *attachment, mandamus, garnishment, and the prejudgment avoidance of fraudulent conveyances*.") (citations omitted and emphasis added). Thus, contrary to Petitioner's argument, the reference to "supplemental proceedings" and Rule 69 in the

House Judiciary Committee Report does not demonstrate that Congress intended for the FSIA's execution provisions to impose limits on post-judgment discovery.

D. Interpreting the FSIA not to limit post-judgment discovery comports with one of the statute's core purposes: to provide a meaningful remedy to plaintiffs, including holders of foreign-sovereign debt.

When interpreting the FSIA, this Court has also considered the purposes behind the statute. *See Samantar*, 560 U.S. at 319-20, 325; *Permanent Mission of India*, 551 U.S. at 199, 202. Those purposes likewise support the view suggested by the text, structure and legislative history: that the FSIA does not erect an independent limit on post-judgment discovery in cases where the judgment debtor is a foreign state.

A primary purpose of the FSIA was to ensure that private parties could obtain meaningful recovery from foreign states operating in their commercial capacity. "Congress intended that one should generally be able to execute any judgments one could obtain." Joseph W. Dellapenna, *Suing Foreign Governments and Their Corporations* § 12.1, at 744 (2d ed. 2003) (footnote omitted). The FSIA makes this purpose apparent when it declares that judicial determinations of foreign sovereign immunity would protect not only the rights of foreign states but also those of "litigants in United States courts." 28 U.S.C. § 1602. This Court likewise repeatedly has recognized this purpose, including in cases brought by foreign plaintiffs against foreign states. *Verlinden*, 461 U.S. at 489-91. The Executive Branch repeatedly acknowledged this purpose during hearings on the draft legislation. For

example, the State Department's Legal Advisor discussed this goal when testifying in favor of the bill shortly before its enactment:

> [W]hen the foreign state enters the marketplace or when it acts as a private party, there is no justification in modern international law for allowing the foreign state to avoid the economic costs of the agreements which it may breach or the accidents which it may cause.
>
> The law should not permit the foreign state to shift these everyday burdens of the marketplace onto the shoulders of private parties.

Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the H. Comm. on the Judiciary, 94th Cong. 27 (1976) (statement of Monroe Leigh, Legal Advisor, Department of State) [hereinafter *1976 House Hearing*]; *see also id.* at 24 ("[T]he general purpose is simple: To assure that American citizens are not deprived of normal legal redress against foreign states who engage in ordinary commercial transactions or who otherwise act as a private party would."). The Justice Department's head of the Foreign Litigation Section testified to the same effect. *See id.* at 31 (statement of Bruno A. Ristau, Chief, Foreign Litigation Section of the Department of Justice) ("[P]rivate parties with claims against foreign states arising out of their commercial or private-law activities should not be denied their day in court by outmoded notions of absolute immunity which arose in the era of personal sovereigns.").

This goal of protecting the rights of litigants extends to holders of foreign-sovereign debt. Early drafts of

the FSIA retained immunity for foreign states from suits on debt obligations for general governmental purposes unless the state waived immunity (or the debt belonged to a political subdivision or agency or instrumentality of the foreign state). *See 1973 House Hearing*, at 36 (draft of bill); *1976 House Hearing*, at 10-11 (same). While animated by a concern that actions based on such debt might interfere with the development of capital markets in the United States, *see 1973 House Hearing*, at 22 (statement of Hon. Charles N. Brower, Legal Advisor, Department of State), the provision was criticized on the ground that it could "prevent plaintiffs from bringing suit with respect to a foreign state's guarantee of a debt obligation." *1976 House Hearing*, at 69 (written statement of the International Law and Transactions Division of the District of Columbia Bar). Moreover, the House and Senate Judiciary Committees noted that many sovereign debt obligations contained broad waivers of immunity and that, in all events, bond sales "should be treated like other similar commercial transactions." *See House Judiciary Committee Report*, at 10; *Senate Judiciary Committee Report*, at 6-7; *see also Weltover*, 504 U.S. at 615 ("[W]e perceive no basis for concluding that the issuance of debt should be treated as categorically different from other activities of foreign states."). Consequently, both committees removed the public debt provision following legislative hearings in the summer of 1976 and prior to adoption of the committee reports. Thus, the FSIA was designed to ensure that holders of foreign-sovereign debt were among those litigants whose "rights" it would protect.

Artificially limiting post-judgment discovery thwarts this purpose. Most of the exceptions to the immunity from execution contained in Section 1610(a) would not

apply to execution on a judgment based on a foreign-sovereign debt obligation. *See* 28 U.S.C. § 1610(a)(3)-(7). Unless the waiver exception is broadly interpreted, *see* Resp's Br. at 54-56, judgment creditors are left to rely on the exception for property used for a commercial activity. *See* 28 U.S.C. § 1610(a)(2). Yet, unlike real property or much personal property, public debt is intangible and liquid. Absent broad discovery, it would be exceedingly difficult for holders of sovereign debt to determine whether the property is "in the United States" or was "used for the commercial activity on which the claim is based." Moreover, post-judgment discovery also enables the judgment creditor to identify property located in other countries, where execution may be easier. *See supra* at 10-11. Thus, broad post-judgment discovery advances the FSIA's goal of ensuring that foreign states do not shift the "burdens of the marketplace onto the shoulders of private parties."

E. Petitioner's appeal to the FSIA's "principles" should be rejected and, in any event, can be addressed by other doctrines developed in ordinary discovery disputes.

Bereft of any support in the text, structure, legislative history or purposes of the FSIA, Petitioner falls back on various principles to support its interpretation of the statute. This appeal to extra-statutory principles should be rejected. First, it is inconsistent with the FSIA's design. Second, even if such an appeal were appropriate, Petitioner's principles do not support its argument. Third, in all events, other doctrines adequately address the underlying concerns.

1. Petitioner's appeal to extra-statutory principles is inconsistent with the FSIA.

Generalized appeals to principles are inappropriate in cases arising under the FSIA. As this Court previously has recognized, "[t]he question . . . is not what Congress 'would have wanted' but what Congress enacted in the FSIA." *Weltover*, 504 U.S. at 618. Consequently, such appeals create a significant risk of according to the FSIA a meaning other than what Congress adopted. Congress recognized as much. It did not license an all-encompassing appeal to principles. Rather, the FSIA simply provides that "[c]laims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles *set forth in this chapter*." 28 U.S.C. § 1602 (emphasis added). The FSIA does not affirmatively "set forth" any of the three principles identified by Petitioner, so this Court should not consider them.

2. Petitioner's principles do not support its rule.

Even if Petitioner's appeal were appropriate (and it is not), the three principles identified by Petitioner do not support the rule that it seeks. In some cases, this Court has rejected the argument; in others, existing discovery doctrines already address the concerns underlying Petitioner's principles. Consequently, there is no need to twist the FSIA's meaning.

Comity: Petitioner first invokes the principle of comity. (Br. at 41-44). Comity has many meanings, and this Court has referred to it in a variety of contexts: where federal law leaves a subject wholly unaddressed, such as the enforcement of foreign

judgments, *see Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895), or where questions have arisen about the extent to which Congress has exercised its prescriptive jurisdiction, *see Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 813 (1993) (Scalia, J., dissenting). In this case, however, Congress already has shown the degree of comity that it wishes to extend to foreign states by demarcating the boundaries of their immunity in the FSIA. It did not, however, exempt foreign states *already subject to jurisdiction* in United States courts from discovery that is otherwise authorized under the Federal Rules of Civil Procedure. *See 1976 House Hearing*, at 30 (statement of Bruno A. Ristau, Chief, Foreign Litigation Section of Department of Justice) ("[T]he adjudication of a commercial claim against a foreign state on the merits does not affront the sovereignty of a foreign nation because sovereignty, as such, is not implicated in such an adjudication. The foreign state makes its appearance in the marketplace as a merchant, not as a sovereign, and it is as a merchant that the foreign state is adjudged liable on its commercial obligations.").

Even if resort to comity might be appropriate, Petitioner is wrong to rely on the views of the Executive Branch. Petitioner observes that the United States Government has filed at least seven briefs *amicus curiae* since 2007 in which it has presented its view regarding the relationship between post-judgment discovery and the FSIA's provisions on immunity against execution. (Br. at 42). But the Executive Branch's views on the proper construction of the FSIA (much less Rule 69) "merit no special deference." *Altmann*, 541 U.S. at 701. Much like *Altmann*, this case raises a "pure question of statutory construction . . . well within the province of the

Judiciary." *Id.* (quoting *INS v. Cardoza-Fonesca*, 480 U.S. 421, 446, 448 (1987)).

Petitioner's appeal to the Executive Branch's proposed interpretation of the FSIA under the guise of comity not only is inconsistent with this Court's prior decisions, it also flies in the face of the FSIA. It would effectively revert to a system of politically-tinged immunity determinations, contrary to a principle that *was* expressly "set forth" in the FSIA and contrary to the Executive Branch's own position. *See* 28 U.S.C. § 1602 ("The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts."); *1973 House Hearing*, at 14 (statement of Hon. Charles N. Brower, Legal Advisor, Department of State) ("We at the Department of State are now persuaded—and may I say we have been for some time—that the foreign relations interests of the United States as well as the rights of litigants would be better served if these questions of law and fact were decided by the courts rather than by the executive branch.").

Even assuming that nonstatutory considerations of comity still play some residual role in construing the FSIA, the authorities relied upon by Petitioner do not support its argument. In particular, Petitioner misinterprets this Court's prior decision in *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522 (1987). *Aérospatiale* involved the question of whether a party seeking discovery of information located abroad was required to make "first resort" to the Hague Convention on the Taking of Evidence Abroad in Civil or

Commercial Matters. Tellingly, the defendants in *Aérospatiale* were state-owned entities, one of which was directly owned by the French Government and, thus, would have qualified as an agency or instrumentality. 482 U.S. at 525 n.2. Nowhere did the Court question that it had the power to issue direct discovery orders against such entities. *See id.* at 542. *See also Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 204-06 (1958); Restatement (Third) of the Foreign Relations Law § 442 (1987). While the Court held that comity principles should guide whether to require resort to the Convention (in lieu of a direct discovery order), nothing in its description of the "concerns that guide a comity analysis" turns on whether the object of the discovery is a foreign state or state-owned entity. *Aérospatiale*, 482 U.S. at 544 n.28.[6] On the contrary, the Court observed that "[i]t would be particularly incongruous to recognize such a preference" against direct discovery orders issued against sovereign-owned entities. *Id.* at 544 n.29.

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[6] Elsewhere in *Aérospatiale*, the Court remarked that "we have long recognized the demands of comity in suits involving foreign states, either as parties or as sovereigns with a coordinate interest in the litigation." 482 U.S. at 546. The only decision cited in connection with this statement is *Hilton*, 159 U.S. 113, where this Court *refused* to recognize a French court's money judgment. Thus, this sentence is best understood simply as a reminder that United States courts consider the interests expressed by foreign states (whether parties or not) when crafting discovery orders requiring the disclosure of information located abroad—something that courts already do. *See infra* at 28. *Aérospatiale* does not support the very different proposition advanced by Petitioner, namely that a foreign state, by virtue of its status, is subject to a different set of discovery rules or that the foreign state's status trumps consideration of the competing values that might justify a particular discovery order.

In short, at least in cases where a court's jurisdiction is established, comity principles do not entitle foreign states to a special immunity from discovery orders.

Burdens of Litigation: Relying on the Seventh Circuit's decision in *Rubin*, Petitioner next invokes the principle that sovereign immunity is designed partly to spare foreign-state defendants the burdens of litigation. (Br. at 44-48). *See also Rubin*, 637 F.3d at 795. It analogizes this case to cases of jurisdictional discovery against foreign states and claims of official immunity by domestic governmental officers.

Petitioner's reliance on this principle is inapt. Cases of jurisdictional discovery against foreign states involve instances where the court's jurisdiction over the defendant is contested. For example, if a sovereign's conduct does not fall within one of the exceptions contained in Section 1605, then the United States court lacks subject-matter jurisdiction over the suit and personal jurisdiction over the defendant. *See* 28 U.S.C. §§ 1330, 1604. In these circumstances, discovery imposes a potential burden on the defendant that would be inconsistent with the grant of immunity. (Of course, on the other hand, if discovery reveals that the defendant was *not* entitled to the claimed immunity, then the burden may be entirely justified). Since parties generally bear their own costs under the American rule, even when they prevail, the compliance costs associated with jurisdictional discovery may well be unrecoverable.

Post-judgment discovery stands on a different footing. In these situations, the court has established subject-matter and personal jurisdiction over the defendant. Consequently, the foreign state suffers no unfair burden by having to respond to post-judgment discovery. *See Rafidain Bank*, 150 F.3d at 177. While

certain property may be immune from discovery, the foreign state's "property" does not suffer from some unrecoverable burden by virtue of a disclosure about it. Thus, whatever rules properly govern the availability of jurisdictional discovery over a foreign state, they have no bearing on the entirely different question of post-judgment discovery against a foreign state properly subject to the court's jurisdiction.

Doctrines of official immunity are similarly unhelpful to Petitioner's cause. As this Court previously recognized in *Dole Food*, official immunity doctrines supply a poor analogy to any argument about the sweep of foreign sovereign immunity. For one thing, cases involving the official immunity of government actors (in contrast to cases involving foreign sovereign immunity) "do not involve the interpretation of a statute." 538 U.S. at 479. For another thing, official immunity doctrines are designed to "prevent the threat of suit from crippling the proper and effective administration of public affairs." *Id.* (citation and internal quotations omitted). By contrast, foreign sovereign immunity "is not meant to avoid chilling foreign states or their instrumentalities in the conduct of their business but to give [them] some protection from the inconvenience of a suit as a gesture of comity between the United States and other sovereigns." *Id.* In cases like this one, the need for that "gesture" drops out once a court concludes that the foreign state's conduct falls under one of the exceptions to immunity set forth in Section 1605 of the FSIA. At that point, any "inconvenience" suffered by the foreign state is justified by the need for it to be held accountable for its conduct, just like any other private party.

Protecting the Reciprocal Interest of the United States: Petitioner finally invokes the principle that the FSIA should be construed so as to protect the reciprocal interests of the United States. (Br. at 48-50). Nothing in the FSIA "set[s] forth" this principle. Nor can Petitioner point to any decision of this Court relying on this supposed principle to inform its interpretation of the FSIA.

Indeed, in a related context, this Court has cautioned against allowing consideration of the reciprocal interests of the United States to influence its interpretation of federal law. In *Banco Nacional de Cuba v. Sabbatino*, this Court observed that considerations of reciprocity generally have been limited to the foreign judgment enforcement context and declined to give the principle broader application to decide whether a foreign state had standing to sue. 376 U.S. 398, 411-12 (1964). In so holding, the Court explained that the political branches could employ "a variety of techniques" to ensure that the reciprocal interests of the United States are protected. *Id.* at 412. The reasons underpinning the holding in *Sabbatino*, which involved federal common law doctrines, apply with even greater force in this context, where the political branches have expressly spoken, through the FSIA, and did not tie the statute's sweep to the reciprocal treatment of the United States in foreign court.[7]

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[7] Even if it were appropriate to consider the reciprocal interests of the United States in cases under the FSIA, alternative doctrines already adequately address those interests. As this Court has recently recognized, the Executive Branch can suggest that a court defer to its views on the foreign relations implications of exercising its subject-matter jurisdiction. *See Altmann*, 541 U.S. at 701-02; *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21

3. Whatever residual value Petitioner's principles have, existing doctrines adequately address them.

To the extent Petitioner's three principles are valid, existing doctrines can address the underlying concerns and do not require special or novel rules of civil procedure for sovereign entities. For one thing, foreign states (or third-parties) can object to post-judgment discovery on the grounds available to any other judgment debtor. These might include, among others, grounds of relevance or burdensomeness. *See* Fed. R. Civ. P. 26(b)(2)(C). For another thing, foreign states can invoke privileges that might justify nondisclosure of the information. *See* Fed. R. Civ. P. 26(b)(5); *Reinsurance Co. of Am., Inc. v. Administratia Asigurarilor de Stat (Admin. of State Ins.)*, 902 F.2d 1275, 1278-83 (7th Cir. 1990) (considering privilege claim in post-judgment discovery). If post-judgment discovery required disclosure of information located abroad and foreign law precluded the disclosure, a court can weigh (as the district court already has done in this case) various interests, including the interests of the foreign state, in deciding whether to compel disclosure.[8] *See generally* Restatement (Third) of the

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(2004). Those implications include the risk that a particular exercise of jurisdiction might expose the United States to reciprocal treatment in a foreign forum. Tellingly, though, the United States did not make such a request in this case while the merits of the suit were pending. Nor has it done so in its brief to this Court. Any such request for case-specific deference would be especially unconvincing in this case in light of Argentina's unambiguous waiver of its immunity in the bond documents.

[8] Courts routinely have applied the Section 442 framework to resolve conflicts between their discovery orders and the laws of foreign states that purport to block the disclosure. *See generally* Gary B. Born & Peter B. Rutledge, *International Civil Litigation*

Foreign Relations Law § 442 (1987); *see also Reinsurance Co.*, 902 F.2d at 1278-83 (applying the Restatement § 442 test in the context of post-judgment discovery); Resp's Br. at 15 n.1 (citing docket entry where district court balanced applicable factors to decide whether to order disclosure of information located abroad where foreign law allegedly precluded it).

F. The Second Circuit properly held that the FSIA did not preclude post-judgment discovery in this case.

Under the principle articulated in this brief, the Second Circuit properly upheld the district court's order enforcing the subpoenas against the third-party banks. In light of Argentina's refusal to comply voluntarily with the judgments against it, the subpoenas represented a proper exercise of the district court's authority under Rule 69 to order discovery "in aid of" those judgments. The district court properly considered objections such as burdensomeness before enforcing the subpoenas.

The only issue before the Second Circuit (and the only issue before this Court) was Argentina's argument that the FSIA independently barred the subpoenas. The Second Circuit correctly rejected that argument: the FSIA does not provide a separate basis upon which a foreign state may object to post-judgment discovery. Because the FSIA does not bar post-judgment discovery against Argentina itself, it likewise does not supply an independent basis for

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in United States Courts 1019-20 (5th ed. 2011) (collecting cases); *cf. Aérospatiale*, 482 U.S. at 544 n.28 (adverting to the Section 442 standards, in their draft form, to guide a court's analysis whether to require resort to the Hague Evidence Convention).

objection to the subpoenas against the third-party banks.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

Appendix: List of *Amici* Law Professors

(Affiliations appear for identification purposes only.)

Julian Ku is a Professor of Law at Hofstra University where he is also the Faculty Director of International Programs. He teaches transnational law, constitutional law and foreign affairs law and has written widely on these subjects.

Jeremy A. Rabkin is a Professor of law at George Mason University Law School and previously a Professor of Government at Cornell University. He teaches constitutional, administrative, and international law and has written widely on these subjects.

John C. Yoo is the Heller Professor of Law at the University of California at Berkeley and a Visiting Scholar at the American Enterprise Institute. He teaches constitutional law, international civil litigation and foreign relations law and has written a number of books on the Constitution and foreign affairs.