No. 12-842

IN THE

# Supreme Court of the United States

REPUBLIC OF ARGENTINA,

*Petitioner,*

*v.*

NML CAPITAL, LTD.,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF OF *AMICI CURIAE* INDIVIDUAL BONDHOLDER JUDGMENT CREDITORS IN SUPPORT OF RESPONDENT

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## INTEREST OF AMICI CURIAE[1]

The law firm of Duane Morris LLP represents various individual plaintiffs ("Individual Bondholder Judgment Creditors") who hold bonds issued by the Republic of Argentina ("Argentina") that are in default and who have been awarded judgments. Although bondholder identity should not change the outcome, Argentina paints the impression that all bondholders who declined to accept Argentina's exchange offers are "vulture funds" looking to exploit defaulted sovereign debt by purchasing bonds on secondary markets at discounted prices and then seeking full value of the debt through litigation. (Argentina's Brief, pp. 10-13). We wish to bring to the Court's attention the Individual Bondholder Judgment Creditors, individuals who purchased the bonds at the time of issue and at par value, hoping to benefit from their investment through interest payments and, upon maturity, full repayment of principal. They did not purchase the bonds as bets or hedges, but as "secure" investments to fund their retirements.

In 2001, Argentina unilaterally repudiated its obligation to pay on the bonds. Since that default, the Individual Bondholder Judgment Creditors have not received any interest payments, and their investments have become illiquid. As was their right to do, the Individual Bondholder Judgment Creditors refused to accept exchange offers in 2005 and 2010, which would

1. Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and that no person other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief. Both parties have consented to the filing of the brief by these *amici*. A full list of the *amici* are included as an appendix to this Brief.

have yielded only a small percentage of their actual investments. Despite its apparent ability to pay (*see NML Capital, Ltd. v Republic of Argentina,* 699 F.3d 246, 263 (2d Cir. 2012) ("*NML I*")), Argentina has steadfastly refused to make the payments that are due under the defaulted bonds – even to the Individual Bondholder Judgment Creditors who are anything but "vultures" – thereby demonstrating that Argentina's recalcitrance is not predicated upon any principled reason relating to the identity of the bondholders.

This Court's ruling on the Second Circuit's decision will have a dramatic effect on the Creditors' own attempts to collect on the Argentine bonds they purchased at par. Like NML, the Individual Bondholder Judgment Creditors have brought suits against Argentina in the Southern District of New York and obtained judgments.[2] And like NML, the Individual Bondholder Judgment Creditors have subpoenaed the documents of Banco de la Nación Argentina ("BNA") and Bank of America, N.A. ("BOA") in an attempt to determine the location of Argentina's assets and accounts both in the United States and abroad. BNA and BOA have both produced to the Individual Bondholder Judgment Creditors the same documents they produced to NML in response to the subpoenas at issue here.[3]

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2. *See Francheschi, et al. v. Republic of Argentina*, 03-CV-4693, 03-CV-8120, 04-CV-3314, 04-CV-6137, 04-CV-6594, 04-CV-7504, 05-CV-177, 05-CV-2943, 05-CV-3089, 05-CV-4299, 05-CV-4466, 05-CV-6002, 05-CV-6200, 05-CV-6599, 05-CV-8195, 05-CV-8687, 05-CV-10636, 07-CV-0098, 07-CV-5807 (S.D.N.Y.) (Griesa, J.).

3. All that remains is for the district court to approve confidentiality orders designed to allow counsel for the Individual

In its decision, the Second Circuit correctly determined that the post-judgment discovery NML seeks from BNA and BOA, which is the same discovery the Individual Bondholder Judgment Creditors seek, is not barred under the Foreign Sovereign Immunities Act ("FSIA") for two main reasons: (i) the FSIA does not restrict post-judgment discovery; and (ii) the subject banks are not sovereigns. *See EM Ltd. v. Republic of Argentina*, 695 F.3d 201, 207-10 (2d Cir. 2012) ("*EM Ltd.*").

Argentina would impose a different regime for post-judgment discovery against a foreign sovereign judgment debtor, transforming a limited immunity from attachment and execution to a near-encompassing immunity from post-judgment discovery. It would paradoxically allow discovery relating to previously *known* assets located in the United States, but deny any discovery relating to Argentina's other assets because such discovery supposedly offends the dignity of recalcitrant sovereign judgment debtors. Thus, the Individual Bondholder Judgment Creditors would be prohibited from using post-judgment discovery to locate assets that might have been filtered into the United States and would be precluded from using the information in support of other possible post-judgment remedies to assist in the collection of judgments. Instead, judgment creditors would be left to pursue admittedly limited discovery in foreign courts in order to locate, and then attempt the seizure of, assets in accordance with the law of the locale.

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Bondholder Judgment Creditors to discuss the documents with counsel for other similarly situated bondholders in order to more efficiently and effectively represent their collective interest.

While Argentina's imagined regime would pose burdens on any judgment creditor, the burden is particularly heavy on small individual investors, like the Individual Bondholder Judgment Creditors, who do not have the resources of large-scale investors like the hedge funds. Such individual investors cannot readily hire forensic experts to smoke out the identity and location of assets. Nor can they afford to go on a treasure hunt in multiple foreign forums. Furthermore, the lack of information would make other possible post-judgment remedial proceedings difficult, if not impossible, to bring. In essence, Argentina's regime would leave the Individual Bondholder Judgment Creditors with a right – the default judgment – and no real possibility of a remedy, unless Argentina suddenly decides to reverse the course it has followed for the last decade. How this regime would serve "the interests of justice" and protect the "rights of . . . litigants in United States courts" – the very purposes of the FSIA – is left unexplained.

## SUMMARY OF ARGUMENT

The central issue in this appeal is whether a judgment creditor can pursue post-judgment discovery seeking the identification of a sovereign judgment debtor's assets consistent with the FSIA. As an initial point, Argentina has explicitly waived any defenses based on sovereign immunity (including both jurisdictional *and* property immunity) in the bond agreements. As for the statutes implicated in the matter, there is little in the FSIA that pertains to discovery at all and that which exists cannot in any way be construed as a bar to the post-judgment discovery of Argentina's assets. And the legislative history is abundantly clear that the FSIA in itself poses no

limitation on discovery. The inference is unambiguous that discovery, including post-judgment discovery, is governed by Federal Rule of Civil Procedure ("FRCP") 26(b), and, more specifically, FRCP 69(a)(2), which addresses post-judgment discovery directly, various state statutes, including New York's, on post-judgment discovery, and the historical equitable powers of our courts to enforce their own judgments, all of which long pre-date the FSIA.

The Congress that passed the FSIA made very little change in the pre-FSIA post-judgment discovery and remedy structure. The FSIA itself says nothing about post-judgment discovery. Therefore, FRCP 69(a)(2) and the courts' equitable powers are the procedural mechanisms for obtaining such discovery. FRCP 69 permits a judgment creditor to obtain discovery from any person "as provided in [the Federal Rules of Civil Procedure] or by the procedure of the state where the court is located." Further, equity permits courts to make appropriate orders to enforce their judgments.

As for state law, the district court at issue here is located in New York, where the subject banks are also located and where Argentina has specifically agreed to jurisdiction over any controversy regarding the bonds. New York's Civil Practice Law & Rules ("CPLR") § 5223, which governs post-judgment discovery, states that "the judgment creditor may compel disclosure of all matter relevant to the satisfaction of the judgment . . . ." Further, the courts have an arsenal of statutory and equitable post-judgment procedures available to assure the satisfaction of judgments.

Argentina's paradoxical argument that a judgment creditor should identify an asset before discovery is permitted puts the cart before the horse. There is simply nothing in the FSIA which would remotely suggest that Congress intended such a drastic change in post-judgment discovery when it enacted the FSIA, converting the discovery process into a game of "hide and seek" where all odds favor the recalcitrant judgment debtor.

Argentina also takes the view that its sovereign assets held outside the United States by the two financial institutions cannot be utilized in "the satisfaction of the judgment." But that view is wrong in at least three distinct ways.

First, through a tracing of the flow of funds, the post-judgment evidence produced by the two financial institutions could well lead to evidence that Argentina is secreting commercial assets in the United States. If so, such assets would be subject to execution under the FSIA as § 1610(a) makes clear in light of Argentina's waiver of jurisdictional immunity.

Second, the mere fact that an asset is located outside the United States does not prohibit its attachment or execution. While a United States court could not issue such an order, it is certainly within a judgment creditor's power to ask a foreign court in which the asset is located to seize the asset so that the asset could be used to satisfy a United States judgment. Such requests are commonplace in international jurisprudence and the requested court can be expected to follow its own laws regarding procedure and immunity, taking into account whatever arguments Argentina wishes to advance. Certainly, there is nothing in the FSIA which

suggests that such a satisfaction procedure cannot be employed. Similarly, judgment creditors could take the information learned and institute proceedings directly in the foreign forum, another procedure not prohibited by the FSIA.

Finally, if Argentina's commercial assets are in the hands of a holder outside the United States, the federal courts sitting in New York are not without authority. There is personal jurisdiction over the banks and personal jurisdiction over Argentina. That being so, judgment creditors, armed with post-judgment discovery, can pursue a selection of post-judgment remedies in their attempts to have United States courts enforce their own judgments. Except for "attachment arrest and execution," nothing in the FSIA prohibits the employment of such procedures; indeed, § 1606 of the FSIA specifically states that the foreign state "shall be liable in the same manner and to the same extent as a private individual under like circumstances." In any such post-judgment proceeding, the holder and Argentina can muster whatever contrary arguments they have.

Of course, this Court need not now decide all the issues that might eventually arise from the employment of any of the post-judgment procedures. (Indeed, the Second Circuit made clear that it was reserving judgment on the question of whether the FSIA extends immunity to property held outside the United States. (*EM Ltd.*, 695 F.3d at 208.)) The question before the Court is whether the district court and the circuit court were correct in concluding that the post-judgment discovery sought here against a recalcitrant judgment debtor was consistent with the FSIA. (*see NML Capital, Ltd. v. Republic of Argentina*, 727 F.3d 230, 238 n.4 (2d Cir.

2013) ("*NML II*"), *petition for cert. filed*, 82 U.S.L.W. 3515 (Feb. 18, 2014) (No. 13-990); *see also EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 466 n.2 (2d Cir.), *cert. denied*, 552 U.S. 818 (2007)). *Amici* respectfully submit that the answer to the question is yes.[4]

Argentina, as always, has a different view. Argentina asserts that the purpose of the FSIA is to protect the dignity of sovereign nations and that the discovery sought here would somehow undermine that dignity and unfairly burden the judgment debtor Argentina, despite the fact that there is no statutory language that would support such a proposition and that the subpoenas are directed at banks, not Argentina. In addition, this argument runs counter to § 1602 of the FSIA, which as a declaration of congressional purpose, states that the courts of this country are entrusted with the "claims of foreign states to immunity" based upon "the principles set forth in [the FSIA.]" In considering those claims, the courts are directed to address the needs of sovereigns *and* litigants alike in a manner designed to achieve the "interests of justice". Argentina's argument also overlooks the facts that Argentina has waived its sovereign immunity protections, ignored the judgments of the federal courts, and made public remarks of continued defiance that demonstrate a lack of respect for a judicial system Argentina itself chose. *See NML II*, 727 F.3d at 238 ("[A]t the February 27, 2013 oral argument, counsel for Argentina told the panel that it

4. The district court has made many modifications, including ordering the parties to narrow the scope of information sought by the subpoena to exclude information regarding assets located in Argentina since the parties recognized that no Argentine court would permit attachment of such assets. *See EM Ltd.*, 695 F.3d at 204-05.

'would not voluntarily obey' the district court's injunctions, even if those injunctions were upheld by this Court.").

## ARGUMENT

As discussed below, Argentina has waived its sovereign immunity. The waivers here are very broad, extending to both jurisdictional and property immunity. Further, the FRCP, the post-judgment enforcement statutes of the various states (exemplified by New York's CPLR here), and the equitable remedies available to courts so that they can enforce their judgments, have all been utilized where appropriate as long as the subject court had personal and subject matter jurisdiction over the judgment debtor. Many of these post-judgment procedures long preceded the passage of the FSIA, which places little restraint on their use. This leads to the unmistakable inference that the Congress which passed the FSIA, knowing of the widespread use of these post-judgment procedures, made the conscious decision to place only certain, specified restrictions on the use of some of those procedures. A review of the language of the waivers, the relevant procedural rules, and the structure of the FSIA prove this inference correct.

### I. Argentina Waived Sovereign Immunity Under The Terms of the Bond Agreements

The Fiscal Agency Agreement of 1994 ("FAA") governs all the bonds at issue here, as well as the bonds of the Individual Bondholder Judgment Creditors and others. *NML II*, 727 F.3d at 237. In the FAA, Argentina irrevocably waived all sovereign immunity defenses "to the fullest extent permitted by the laws of such jurisdiction . . .".

*Joint Appendix* ("JA") 106. This language has been interpreted to be a complete jurisdictional waiver with the surviving attachment immunity limited to commercial property utilized in the United States. *Aurelius Capital Partners, LP v. Republic of Argentina*, 584 F.3d 120, 129-31 (2d Cir. 2009), *cert. denied*, 599 U.S. 988 (2010).

Through the FAA, Argentina also "consents generally for the purposes of the [FSIA] to the giving of any relief or the issue of any process in connection with any Related Proceeding or Related Judgment". JA 106-07. Thus, Argentina has specifically consented to "the giving of any relief" and "the issue of any process" in connection with the judgments here. The post-judgment discovery sought here is certainly within the ambit of Argentina's consent to "the giving of any relief".

As discussed in greater detail below, there is no provision in the FSIA – which is specifically embraced in the consent portion of the FAA (*EM Ltd.*, 695 F.3d at 203 n.1) – that purports to narrow or limit the discovery sought here. *See First City, Texas-Houston, N.A. v. Rafidain Bank*, 281 F.3d 48, 53-54 (2d Cir.), *cert. denied*, 537 U.S. 813 (2002) ("*Rafidain II*") ("The waiver by a foreign state under section 1605(a)(2), rendering it a party to an action, is broad enough to sustain the court's jurisdiction through proceedings to aid collection of a money judgment rendered in the case, including discovery pertaining to the judgment debtor's assets."); *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1477-78 (9th Cir. 1992); *FG Hemisphere Assocs., LLC v. Democratic Republic of Congo*, 637 F.3d 373, 379-380 (D.C. Cir. 2011). Normal rules of contractual construction require such specificity for the consent to be as limited as

Argentina now argues. *See C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 422 (2001) (refusing to accept narrow interpretation of arbitration clause in construction contract where language of contract did not support such a reading and limitation of waiver of immunity would have rendered the clause meaningless); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 59 (1995) (arbitration clause covering "any controversy" would not be read to bar claims for punitive damages absent express language to the contrary).

## II. The Federal Rules of Civil Procedure Permit Post-Judgment Discovery

The basic rule governing discovery in the courts of the United States is Federal Rule 26, which is entitled "Duty to Disclose, General Provisions Governing Discovery". The scope of discovery is governed by FRCP 26(b)(1), which empowers the courts of the United States to order discovery "of any matter relevant to the subject matter involved in the action" as long as the discovery "appears reasonably calculated to lead to the discovery of admissible evidence." FRCP 26(b)(1) discovery expressly includes the "location of documents or other tangible things . . ." While a party or any other person from whom discovery is sought can seek a protective order under Federal Rule 26(c), there can be little doubt that a party can seek discovery of documents and other tangible things regardless of where they are located if they are adjudged relevant to the proceeding. *See Nat'l Serv. Indus., Inc. v. Vafla Corp.*, 694 F.2d 246, 250 (11th Cir. 1982) (under Federal Rule 26, "[a] judgment creditor is entitled to discover the identity and location of any of the judgment debtor's assets, wherever

located."); *see also Minpeco, S.A. v. Hunt*, No. 81 CIV. 7619, 1989 WL 57704, at *2 (S.D.N.Y. May 24, 1989) (same).

The means of seeking such discovery is set forth in FRCP 34, which addresses document requests to parties, and FRCP 45, which addresses, among other things, documentary subpoenas to non-parties. A party affected by a third party subpoena can seek to modify or quash the subpoena, and a third party can seek similar relief. Both the party and non-party can argue a lack of relevance, non-application, cost and burden, confidentiality, violations of other laws, and a myriad of other concerns. The non-party banks have made such arguments to the lower courts here, and they were properly addressed.[5] There is certainly nothing in Rule 34 or Rule 45 that limits discovery to information or assets located in the United States. It would be all too easy, if this were the case, to relocate information and assets outside the United States to avoid discovery. For this reason, courts have permitted post-judgment discovery where it is at all relevant, as a matter of course. *See Rafidain II*, 281 F.3d at 54 ("Discovery of a judgment debtor's assets is conducted routinely under the Federal Rules of Civil Procedure.").

FRCP 69 governs post-judgment remedies, and Rule 69(a)(2) specifically governs post-judgment discovery. The Rule states that any judgment creditor "may obtain discovery from any person – including the judgment debtor – as provided in these rules or by the procedure of the state where the court is located." Further,

5. To the extent that Argentina is here complaining that the lower courts abused their discretion in allowing too much discovery, this question was not a question on which certiorari was granted. Thus, this question cannot now be raised. Sup. Ct. R. 14.1.

"proceedings supplementary to *and in aid of judgment* or execution" must accord with relevant state procedure. (emphasis added). Time and again, the courts of the United States have used Federal Rule 69 to conduct post-judgment discovery. *See Aviation Supply Corp. v. R.S.B.I. Aerospace, Inc.*, 999 F.2d 314, 317 (8th Cir. 1993) ("[T]he remedies of a judgment creditor include the ability to question the judgment debtor about the nature and location of assets that might satisfy the judgment."); *Minpeco v. Hunt*, No. 81–CIV–7619, 1989 WL 57704, at *1 (S.D.N.Y. May 24, 1989) (*quoting National Service Industries, Inc. v. Vafla Corp.*, 694 F.2d 246, 250 (11th Cir. 1982)) ("A judgment creditor is entitled to discover the identity and location of any of the judgment debtor's assets, wherever located").

To be sure, Rule 69 procedures must aid "judgment or execution" and Argentina argues that the procedures cannot aid if there can be no execution. (Notably, Argentina neglects to mention "judgment"). (Argentina's Brief, p. 33). But the procedures can help to locate hitherto unknown assets *in* the United States that can be subject to execution in the United States, and can help to locate assets subject to execution in a foreign court.[6] On the basis of the information discovered, both parties and non-parties can possibly be ordered to comply with the array of post-judgment remedies available to the courts. All of these actions are an aid to collecting a judgment, even when there is no execution. In short, nothing could be clearer than the application of Rule 69 to the present circumstances.

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6. The limitations of foreign discovery are well set forth in the Amicus Brief of the United States (p. 13).

## III. New York's Civil Practice Law and Rules Permit Post-Judgment Discovery

As set forth in FRCP 69, a court of the United States, sitting in New York, can employ the judgment enforcement rules of New York State in addition to the powers it possesses under the FRCP and the traditional equity powers of the federal courts. The applicable New York procedural rules are set forth in Article 52 of the CPLR entitled "Enforcement of Money Judgments." No less than fifty-two rules come under this Article. Several of these rules are of relevance here.

The principles of disclosure are set forth in the broadest terms in CPLR § 5223: "[T]he judgment creditor may compel disclosure of all matter relevant to the satisfaction of the judgment, . . . ." Obviously, the location of assets is "relevant to the satisfaction of the judgment . . . ." and New York courts have not been reticent in ordering post-judgment discovery where that standard is met. *See ICD Group, Inc. v. Israel Foreign Trade Co. (USA)*, 224 A.D.2d 293, 638 N.Y.S.2d 430 (1st Dep't 1996); *Ateni Maritime Corp. v. Great Marine Ltd.*, 225 A.D.2d 573, 573, 639 N.Y.S.2d 116, 117 (2d Dep't 1996); *Patterson, Belknap, Webb & Tyler, LLP v. Regia Mgmt. Corp.*, No. 97 CIV. 2624(HB), 1998 WL 788798, at *1 (S.D.N.Y. Nov. 10, 1998); *Raji v. Bank Sepah-Iran*, 139 Misc. 2d 1026, 1033, 529 N.Y.S.2d 420, 424 (Sup. Ct. N.Y. Cnty. 1988).

Post-judgment subpoenas are described in CPLR § 5224 and they include the comprehensive information subpoena, CPLR § 5224(a)(3), which can be served on either the judgment debtor or any other individual or entity possessing information pertinent to collection of judgment. Subdivision (a-1) makes absolutely clear that a person served with a documentary subpoena must produce

those materials "whether the materials sought are in the possession, custody or control of the subpoenaed person . . . *within or without the state*" (emphasis added). Not surprisingly, given this language, New York courts have ordered post-judgment discovery of great geographical breadth. *See Eitzen Bulk A/S v. Bank of India*, 827 F. Supp. 2d 234, 238 (S.D.N.Y. Oct. 5, 2011); *Aquavella v. Equivision, Inc.*, 181 Misc. 2d 322, 324, 694 N.Y.S.2d 547, 549 (N.Y. Sup. Ct. Monroe Cnty. 1999), *appeal dismissed,* 270 A.D.2d 972 (4th Dep't 2000); *Harbor Footwear Grp., Ltd. v. ASA Trading, Inc.,* Index No. 11990–03, 2004 WL 235189, at *3 (N.Y. Sup. Ct. Nassau Cnty. 2004).

As to sanctions for failure to comply with any enforcement procedure, including post-judgment subpoenas, every court "shall have power to punish a contempt of court committed with respect to an enforcement procedure." CPLR § 5210. *See also* CPLR § 5251. This power has been used in situations involving inquiries into foreign assets. *See Gavilanes v. Matavosian*, 123 Misc. 2d 868, 873, 475 N.Y.S.2d 987, 991 (N.Y. City Civ. Ct. 1984).

The contempt power of CPLR §§ 5210 and 5251 extends to other enforcement devices, such as CPLR § 5225, *Koehler v. Bank of Bermuda Ltd.*, 12 N.Y.3d 533, 541, 883 N.Y.S.2d 763, 769 (2009); CPLR § 5222, *McCarthy v. Wachovia Bank, N.A.*, 759 F. Supp. 2d 265, 274 (E.D.N.Y. 2011); and CPLR § 5227, *see* 197 Siegel's Prac. Rev. 1 (May 2008); *cf. CIMC Raffles Offshore (Singapore) Ltd. v. Schahin Holding S.A.,* 942 F. Supp. 2d 425, 430 (S.D.N.Y. 2013).[7]

7. While the United States cannot force a sovereign to comply with any post-judgment remedy imposed, the contempt power can be a powerful persuasive tool. *Richmark*, 959 F.2d. at 1478.

## IV. The Courts' Equitable Powers Permit Post-Judgment Discovery

Long before the FRCP or the CPLR, our Federal Courts were recognized to have equitable powers arising out of the pre-Revolution powers of the English Chancery courts. *See, e.g.,* Brent McKnight, *How Shall We Then Reason – The Historical Setting of Equity*, 45 Mercer L. Rev. 919, 927-35 (1994). Those powers were used as appropriate, including efforts to aid judgment creditors in collecting on judgments rendered by the courts. *See Local Loan Co. v. Hunt*, 292 U.S. 234, 239 (1934) (it is well settled that "[A] federal court of equity has jurisdiction of a bill ancillary to an original case or proceeding in the same court, whether at law or in equity, to secure or preserve the fruits and advantages of a judgment or decree rendered therein . . . ."). The use of those powers enhanced the perception of justice and fairness our courts have, and did much to preserve a judicial dignity that would have been eroded if there was a perception that our courts were unable or unwilling to enforce the judgments they reached.

In enforcing those judgments, courts used a variety of equitable powers, including the issuance of injunctions (*Deckert v. Independence Shares Corp.,* 311 U.S. 282, 290 (1940)), directing the levy of taxes (*Labette County Comm'rs v. U. S.*, 112 U.S. 217, 221-25 (1884)), and civil contempt (*Spallone v. U.S.*, 493 U.S. 265, 276 (1990); *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 794 (1987); *Shillitani v. U.S.*, 384 U.S. 364, 370 (1966)). *See also Peacock v. Thomas* 516 U.S. 349, 356 (1996) ("[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."); *Berger v. Heckler*, 771 F.2d 1556, 1568 (2d Cir. 1985) (quoting *Swann v Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971)) ("Where 'a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies'"). As was the case with Rule 69 and the various statutory post-judgment enforcement procedures utilized by the various States, Congress was aware of this long-term use of the equitable powers at the time the FSIA was enacted. To see the FSIA as a restriction on those inherent powers "would need much more clear guidance from Congress than we have…" *Autotech Techs. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 745 (7th Cir. 2007), *cert. denied*, 552 U.S. 1231 (2008).

Congress, aware of the foreign relations of the United States, could have curbed the judiciary's use of its equitable powers with respect to a sovereign's property, wherever located. Congress did not, except to curb the use of "attachment arrest, and execution" on some sovereign property located in the United States. Whether to apply other equitable powers, including post-judgment discovery, in aid of the enforcement of judgments is left to the discretion of the courts which ordered the judgments in the first place. Similarly, equitable powers can be employed against the sovereign if there is jurisdiction over the sovereign, as long as the exercise of those powers does not violate the FSIA's limited prohibitions.[8]

8. In the eyes of Argentina, all of "its property remains presumptively immune from judicial enforcement unless it is both located in the United States and used for a commercial activity

This is the basic truth recognized by the Second Circuit when it rested its discovery decision on the traditional equitable power of the judiciary. *See EM Ltd.*, 695 F.3d at 208 ("[T]he district court's power to order discovery to enforce its judgment does not derive from its ultimate ability to attach the property in question but from its power to conduct supplementary proceedings, involving persons indisputably within its jurisdiction, to enforce valid judgments."). That court was completely correct in its reliance on *Riggs v. Johnson County*, 73 U.S. 166, 187 (1868) which clearly held that "if the power is conferred to render the judgment or enter the decree, it also includes the power to issue proper process to enforce such judgment or decree." *See also NML I*, 699 F.3d at 263 ("[T]he FSIA imposes no limits on the equitable powers of a district court that has obtained jurisdiction over a foreign sovereign, at least where the district court's use of its equitable powers does not conflict with the separate execution immunities created by § 1609."). While those powers can be limited by Congress, the limits Congress has set are far more circumspect than the almost complete immunity imagined by Argentina.

* * *

There can be little doubt that the courts of the United States have considerable power to enforce their judgments, and that that power is not automatically restrained by the boundaries of the United States. The only question is whether the FSIA prohibits the exercise of those powers when a foreign sovereign is involved.

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here." (Argentina's Brief, p. 20). This view does not square with the language of the FSIA or the scope of Argentina's own waivers.

Here, it must be stressed that when Congress passed the FSIA, it was certainly aware of the post-judgment enforcement powers that historically have been exercised by the federal and state courts. If the use of these historical powers were a concern to Congress, one would think that the Congress would have written language in the Act to curb those powers. And to some extent Congress did, making clear that *certain* of those powers could only be exercised in what were deemed to be appropriate circumstances. The Congressional "failure" to "curb" post-judgment discovery or other enforcement means should properly be interpreted as an endorsement of the pre-existing experience. With that thought in mind, it is useful to review the FSIA to see what it says and does not say.

## V. The Foreign Sovereign Immunities Act Does Not Bar Post-Judgment Discovery

It can be agreed that the United States, for most of its constitutional history, observed a rule of near-absolute immunity for sovereigns, both as to jurisdiction and asset protection. (Argentina's Brief, pp. 3-4). It can also be agreed that the regime changed dramatically in 1952, when the Department of State changed its approach to sovereign immunity questions altogether. *Id.* Cases preceding this change have little meaning today.

Further, it can be agreed that in 1952, the United States abandoned the absolute immunity approach with respect to foreign sovereigns and instead adopted a restrictive approach instead with respect to jurisdictional immunity (but not property immunity, which remained absolute). (Argentina's Brief, p. 4). We can further agree

that application of this approach was entrusted to the Department of State, which basically dictated results to the judiciary with little regard for precedent. *Id*. This State Department-controlled era lasted until 1976 when Congress adopted the FSIA. *Id*. at 5. Thus, whatever occurred in the 1952-75 era is of little importance.

What matters is the FSIA, and more specifically the language thereof, since "foreign sovereign immunity is a matter of grace and comity on the part of the United States . . . ." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983). This concept of "grace and comity" finds expression in the FSIA. There can be no question, under the FSIA, that the mantle of responsibility with regard to immunities was shifted from the Executive Branch to the Judicial Branch, which was instructed to apply the FSIA to specific questions under the guidance provided by the specific statutory language, the consents, if any, of the foreign sovereign, and the international agreements of the Unites States. (Argentina's Brief, p. 5). These questions included questions of both jurisdictional immunity and, for the first time, property immunity.

There can be no argument that the FSIA has little to say about discovery. It has nothing to say about "supplemental proceedings" in aid of judgment collection. *See* 28 U.S.C. § 1602 et seq. And it has nothing to say about discovery pertaining to sovereign assets. *Id*. From this absence, Argentina and its *amici* conclude that the FSIA affirmatively precludes post-judgment discovery, supplemental proceedings, or any attempts to locate assets outside of the United States so that they could be seized under the law of the appropriate forum. (Argentina's Brief, pp. 27-32). This conclusion ignores the statutory language that does exist,

the consents and conduct of the foreign sovereign at issue, and the dignity of our judicial system which this particular foreign sovereign has been defying and insulting in what amounts to an assault on the credibility of our jurisprudence. See *NML II*, 727 F.3d at 238 n.4.

In considering the language of the Act, the first and foremost provision in 28 U.S.C. § 1602, entitled "Findings and declaration of purpose". The first finding is that a *judicial* determination of a foreign immunity claim would both "serve the interests of justice" and "protect the rights of both foreign states and litigants in United States courts." *Id.* The shift to judicial determination and away from State Department discretion cannot be more clear. Equally clear are the concepts that such judicial determination should consider the needs of the sovereign and the involved litigants, not favor one over another, and should bear in mind the service of "the interests of justice". *Id.*

The second finding concerns international law: Sovereigns are not immune from jurisdiction as far as their commercial activities are concerned and their commercial property is available for judgment. *Id.* Nothing in this finding restricts the commercial activities to activities in the United States or the commercial property to property located in the United States. The inference that the courts of the United States can address extraterritorial activities and properties where appropriate is unmistakable.

The next provision, 28 U.S.C. §1603, is a definitional one. Notably, the definition of "commercial activity" in sub-section (d) is very broad. *Id.* More notably, sub-section (e) defines "commercial activity carried on in the United

States by a foreign state". *Id.* The Congress' perceived need to have separate definitions in (d) and (e) strongly suggests that the FSIA has a wider geographical scope than Argentina would have this Court believe.

Section 1604 sets forth the basic rule of jurisdictional immunity, and Section 1605 sets forth the exceptions which include Argentina's waiver of jurisdictional immunity here under 28 U.S.C. § 1605 (a)(1). Of direct interest here, however, is subdivision (a)(2) which makes exceptions for (i) acts performed in the United States but related to the commercial activity of the foreign state elsewhere; and (ii) acts committed "outside the territory of the United States" but having an effect in the United States. *Id.* Under either of these exceptions, the need for extraterritorial discovery is palpable: the relationship between the act and the commercial activity is essential for a judicial determination of a claim of jurisdictional immunity.

Also of interest is subdivision (g) entitled "Limitation on discovery". This provision basically states that a member of the Executive Branch, the Attorney General, can bar such discovery in a case involving a terrorist act. 28 U.S.C. § 1605A. The obvious inference is that it is courts which control discovery in all other cases, with no subject matter or territorial limitation.

Next is 28 U.S.C. § 1606. If the foreign state is not immune from jurisdiction, it "shall be liable in the same manner and to the same extent as a private individual under like circumstances"; it hardly takes a flight of imagination to conclude this liability extends to the FSIA-consistent post-judgment collection efforts of a judgment

creditor, although Argentina argues that the placement of the language in the statutory scheme suggests that the provision only applies to jurisdictional immunity. But what good is establishing someone's liability without the ability to conduct post-judgment discovery? The concepts are inextricably intertwined.

Section 1609 sets forth the basic rule of "Immunity from attachment and execution of property of a foreign state" *i.e.*, that the property of foreign states in the United States is immune from the particular enumerated post-judgment remedies of "attachment arrest and execution" with the exceptions set forth in the trailing statutory provisions. This choice of language strongly suggests that other non-enumerated post-judgment remedies are available, wherever the property is located, but that the enumerated remedies are left to the applicable law of the nation in which the property is located.[9]

The exceptions to this circumscribed attachment immunity rule are set forth in Sections 1610 and 1611. There is no mention of post-judgment remedies other than attachment and execution, except insofar as the arrest of "vessels of a foreign state" is concerned: 28 U.S.C. § 1610(e). Nor is there any mention of discovery or "supplemental proceedings." Nor do either of the provisions address property outside the United States. The inference is that post-judgment remedies other than attachment arrest and execution can be used against property in the United

9. To circumvent this argument, Argentina contends that the words "attachment arrest and execution" should be read to include "supplemental proceedings", citing a House Report. (Argentina Brief, p. 6) Even if one assumes that a "supplemental proceeding" includes post-judgment discovery, the words of the House Report did not find their way into the statute.

States and all post-judgment remedies in accordance with foreign law can be utilized with respect to commercial property located outside the United States. Post-judgment discovery is not restricted, and it is fair to assume that the utilization of such discovery is best left to judicial discretion.

The silence regarding post-judgment discovery in the FSIA should not be read as an open invitation to place judicial restrictions on long-standing federal and state powers, and the use of equitable powers. Rather, the FSIA should only be found to impose such a restriction if the restriction can explicitly be found within the text of the statute itself. *See Milner v. Dep't of the Navy*, 131 S. Ct. 1259, 1267 (2011) (courts cannot construe a statute in a way that has "no basis or referent in [the statute's] language"); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 30 (2010) (courts cannot interpret a statute in such a way that has "no basis whatever in the text . . . .").

Circling back to the purposes expressed in Section 1602, Argentina has unequivocally waived not only jurisdictional immunity but also "consented generally for the purposes of the FSIA to the giving of any relief . . . in connection with any Related Proceeding or Related Judgment." (JA 106-07). For more than a decade, Argentina has denied the plain meaning of its waivers, which obviously support the post-judgment discovery sought here. Whether judicial endorsement of this denial "serves the interests of justice" or the "needs of the litigants" are issues fairly considered in any analysis under the FSIA.

So too is the question of whether Argentina's conduct erodes the credibility of the courts of the United States. Argentina has ignored its contractual commitments, it has ignored the judgments entered into by United States courts and it has openly and publicly said that it will continue to ignore the orders of the courts of the United States. It cannot be correct to suggest that this rogue conduct is beyond reproach where an "interests of justice" analysis is required under the FSIA.

## VI. Interpreting the Foreign Sovereign Immunities Act as Restricting Post-Judgment Discovery Would Violate Rules of Statutory Construction

Anytime the Congress passes new and comprehensive legislation, it changes the law. In thus changing the law, Congress raises the question of the extent to which pre-existing law in the area has been changed. When a provision in the legislation makes a specific change in pre-existing law, the judicial task is an easy one. Where the legislation is absolutely silent with respect to pre-existing law, the question becomes one of whether the pre-existing law is compatible with the aims and purposes of the legislation.

When analyzing whether a federal statute pre-empts federal law, courts look to whether "the statute '[speaks] directly to [the] question' otherwise answered by federal . . . law." *Oneida County, N.Y. v. Oneida Indian Nation of New York State*, 470 U.S. 226, 236-237 (1985) (common law remedies of Native Americans not pre-empted by Non-Intercourse Act); *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court for the Dist. of Iowa,* 482 U.S. 522, 529 (1987) (FRCP not

pre-empted by Hague Convention because no language in Convention explicitly supercedes FRCP on subject of discovery.) State common and statutory law is only superseded by federal legislation when Congress has exhibited a "clear and manifest" intent to do so. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (*quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). If the statute is silent as to pre-existing federal law or pre-existing state remedies, the presumption is that Congress did not intend to displace it. *See Samantar v. Yousuf*, 560 U.S. 305, 310 (2010) (no language in FSIA displacing common law claim against a foreign government official); *Oneida County, N.Y.*, 470 U.S. at 240; *Jones*, 430 U.S. 519, 525 (1977). The same holds true for the court's traditional equitable powers. Absent "the clearest command to the contrary from Congress, federal courts retain their equitable power….". *Califano v. Yamasaki*, 442 U.S. 682, 705 (1979); *see also Porter v. Warner Holding Co.*, 328 U.S. 395 (1946).

Before 1976, the property of a foreign sovereign was essentially immune from any post-judgment remedy, first because of the absolute immunity rule and secondly because of the manner in which the State Department exercised the discretion accorded to it in the 1952-75 period. In 1976, however assets of a judgment debtor, wherever located, become subject to post-judgment discovery.

When the FSIA legislation passed, the Congress unequivocally said that the assets of a foreign sovereign were immune from "attachment arrest and execution" unless certain conditions were met. The determination of whether the conditions were met was a judicial one,

and the assets of a foreign sovereign were no longer absolutely immune but instead certain assets had a clearly circumscribed immunity from specified remedies. On the other hand, the same Congress said nothing about post-judgment discovery or the array of other post-judgment remedies that have been long available to courts so that they might enforce their judgments. This rejection of some post-judgment procedures, and the implicit acceptance of others, seems to be a classic legislative approach designed to balance the needs of private litigants and foreign sovereigns.

The legislative history of the FSIA only bolsters the argument that Congress did not intend to limit post-judgment discovery by enacting the FSIA. The House Report for the FSIA states that "[t]he bill does not attempt to deal with questions of discovery. Existing law appears to be adequate in this area." H.R. REP. 94-1487, 23, 1976 U.S.C.C.A.N. 6604, 6621. This language could not be clearer.

The legislative intent conclusion seems inescapable. It is the courts, not the executive, that will make decisions. And they will do so in accordance with the language of the FSIA. That language clearly says that certain post-judgment procedures are excluded in certain circumstances. Any other post-judgment procedure, including post-judgment discovery, can be utilized if the court addressing the issue believes that utilization to be an appropriate exercise of its inherent power to enforce judgments, bearing in mind the stated purposes of the FSIA - - to serve the "interests of justice".

Tacitly recognizing that the virtual elimination of post-judgment discovery is unattainable, the Amicus Brief of the United States reluctantly concedes that Congress may have contemplated that "some limited discovery in aid of execution" should occur. (U.S. Brief, p. 7). It then suggests that such discovery be allowed when "there is a reasonable basis to believe that an exception to immunity exists." (U.S. Brief, p. 12). This formulation is inherently unworkable and unfair, particularly to investors who are not well-funded. It is almost impossible to know whether an asset is, or is not, exempt from immunity unless one knows more about the nature of the asset and its use, not to mention its existence.

In support of this approach, the United States cites three cases, *Walters v. Indus. and Commercial Bank of China Ltd.*, 651 F.3d 280 (2d Cir. 2011); *Walker Int'l Holdings Ltd v. Republic of Congo*, 395 F.3d 229 (5th Cir. 2004), *cert. denied*, 544 U.S. 975 (2005); and *Rubin v. Islamic Republic of Iran*, 637 F.3d 783 (7th Cir. 2011), *cert. denied*, 133 S. Ct. 23 (2012).

*Walters* and *Walker* are strange choices. In *Walters*, the Second Circuit clearly said that the issue of asset discovery outside the U.S. had not been appealed. 651 F.3d at 297. In *Walker*, the issue was not about discovery; it was about whether a security bond located in the United States was subject to attachment in the United States - - a question which turned on whether it had been used commercially in the United States. 395 F.3d at 236. Discovery was not the issue in either case.

The Seventh Circuit's decision in *Rubin* has little application here. Its threshold holding was that a court

must address immunity questions, whether or not immunity issues were raised by the sovereign. 637 F.3d at 799. Thus, the district court's decision to attach various antiquities, without addressing whether or not those antiquities were immune from attachment under § 1610 of the FSIA, was plain error. *Id*. at 801.

The second part of the decision concerned the district court's determination that the plaintiffs could conduct general discovery of all the sovereign's assets in the United States. In reversing the district court, the Seventh Circuit adopted, without any real analysis of the FSIA or the judiciary's equitable powers, the approach argued here by the United States. Beyond plain error, a distinguishing feature in *Rubin* rendering the case inapplicable here was that the sovereign (Iran) had *not* waived its jurisdictional and property immunities to the fullest extent permitted by law, as the Republic has here.

## VII. Argentina's Extra-Legal Arguments Are Inadequate to Bar Discovery

In addition to its inverted view of the meaning of the absence of discovery language in the FSIA, Argentina argues that the Second Circuit's holding is inconsistent with the "principles of foreign sovereign immunity" in three different ways: (i) foreign states are entitled to "grace and comity" in the courts of the United States; (ii) the FSIA is intended to protect foreign states from attendant litigation burdens, such as discovery; and (iii) the reciprocal interests of the United States. (Argentina's Brief, pp. 23-24; 39-50). These arguments fail for several reasons.

First, Argentina's reading of *The Schooner Exchange v. M'Faddon,* 11 U.S. 116 (1812), is flawed. In that case, the opinion of the Supreme Court stated clearly that a foreign sovereign who brings commercial assets into our territory has submitted fully and completely to the jurisdiction of the United States, while a different rule applies when that asset is a public asset, such as the warship that was at issue there. *Id.* at 144. The holding primarily rests on the Court's perception that the foreign relations of an infant country would be damaged by a seizure that was otherwise justified. "Grace and comity" had little to do with the decision. Nor should it have anything to do with the decision here where Argentina has come into this country and waived its various immunities in order to attract capital. As this Court has observed, there is a comity interest in allowing a foreign state to use its own courts[10] to resolve disputes and it offends the dignity of those courts if they are bypassed without good cause. *See Republic of the Philippines v. Pimentel*, 553 U.S. 851, 866 (2008). Those concerns do not apply where the foreign sovereign has agreed to a determination by a court of the United States (and has closed its own courts). *See First City, N.A. v. Rafidain Bank* ("*Rafidain I*"), 150 F.3d 172, 177 (2d Cir. 1998), *aff'd,* 281 F.3d 48 (2d Cir. 2002). Argentina "wants our law . . . but wants our law free from the claims of justice." *Nat'l City Bank v. Republic of China*, 348 U.S. 356, 361-62 (1955) (Frankfurter, J.).

Second, taken to its logical conclusion, the absence of discovery language in the FSIA means (at least to

10. However, the Second Circuit observed that the Argentine courts are closed to all the bondholders. *NML I*, 699 F.3d at 254, 260, and 262.

Argentina) that sovereigns should not be subjected to any discovery because it would be burdensome. Not so. Argentina consented to being sued here, and stipulated the application of New York law in an agreement that itself drafted. To argue that it should be relieved of normal discovery if it is sued is astounding. The burdens have been wilfully taken up. If the burdens prove too heavy, relief can be sought and indeed the banks have tried to seek such relief. The failure to convince the district court and the court of appeals that the discovery ordered here remains too burdensome is hardly "inconsistent with the immunity framework set forth in the FSIA." (Argentina's Brief, p. 39).

Third, although the "reciprocal interests of the United States" are a valid consideration (Argentina's Brief, p. 48), these interests must be evaluated in context. Indeed, an example of the United States conducting itself in a manner that would implicate this consideration is beyond the imagination.

In reality, the United States would not act as Argentina has, and most foreign jurisdictions would have no reason to be concerned with matters like post-judgment discovery. If the United States acted as Argentina has, foreign courts would presumably look to their immunities law, and the scope of the waivers given by the United States, to see if such discovery were warranted. While the possibility that Argentina would act in a vengeful manner exists, as its saber-rattling in the Second Circuit suggests, this is not a fear that should govern this Court's consideration of the interests of the United States.

## CONCLUSION

For the reasons above, the Individual Bondholder Judgment Creditors ask that the Court affirm the judgment of the Court of Appeals.

Respectfully submitted,

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# APPENDIX

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