No. 12-842

In the Supreme Court of the United States

THE 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 THE JUDICIAL CRISIS NETWORK AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae the Judicial Crisis Network ("JCN") is dedicated to strengthening liberty and justice in America by defending the Constitution as envisioned by its Framers: a federal government of defined and limited powers, dedicated to the rule of law, and supported by a fair and impartial judiciary. JCN promotes these constitutional principles at every level and branch of government, focusing on legislative and legal efforts opposing attempts to undermine the rule of law, expand the power of government, politicize the enforcement of the law, threaten American sovereignty, supplant American law with foreign or international law; or bias the legal system on behalf of politically favored groups or individuals. JCN's efforts are conducted through various outlets, including print, broadcast, and internet media, and through educating and organizing citizens to participate in this mission.

SUMMARY OF ARGUMENT

Argentina marketed the bonds at issue in this case by promising to waive its sovereign immunity to suit as well as its immunity to attachment and execution of any property located anywhere in the world. Now Argentina is attempting to go back on those promises by arguing that the Foreign Sovereign Immunities Act

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[1] Counsel for both parties have consented to the filing of this *amicus* brief. The Respondent has filed blanket consent with the Court, and the written consent of Petitioner accompanies this brief. No counsel for a party authored this brief in whole or in part. No person, other than amicus curiae, its members, or its counsel, made a monetary contribution that was intended to fund preparing or submitting this brief.

("FSIA") confers an attachment and execution immunity that is nonwaivable as to property located outside the United States. This novel reading of the FSIA—to create a sort of nonwaivable super-immunity—is inventive, but it directly contravenes the principles of sovereign immunity and the nearly two centuries of common law practice that inform the FSIA's provisions. What is more, it finds no support in the text, history, or purpose of the statute.

In its essence, sovereign immunity is a personal privilege against liability without consent. See *Clark v. Barnard,* 108 U.S. 436, 447 (1883). Since the doctrine made its first appearance in American law in 1812, this Court has consistently held that a foreign state may waive its immunity in its discretion. Courts have long understood immunity as waivable to whatever extent and in whatever manner the sovereign chooses, precisely because it is a discretionary sovereign privilege.

Argentina would have this Court abandon these longstanding principles in favor of its new theory of nonwaivable super-immunity. But nothing in the FSIA supports this result. The text announces no new rule conferring, or addressing the waiver of, attachment and execution immunity for property located outside the United States. Similarly, neither the statute's purpose nor history reflects any intention to *expand* a foreign state's ability to protect its assets. Rather, the FSIA enacted the *restrictive* view of sovereign immunity, which limits the ability of foreign states to claim immunity for commercial activities. There is no reason to think that in codifying the more narrow theory of foreign sovereign immunity, Congress meant to create

a nonwaivable immunity from attachment and execution. The statute was instead passed to give the Judiciary, rather than the Executive, the authority to decide when a foreign sovereign was subject to liability when it had not waived its immunity.

This Court has repeatedly instructed that statutes enacted against a set of settled common law principles should not be read to alter those principles unless the text says so affirmatively, or the background rules are clearly contrary to the statute's purpose. *See, e.g., United States v. Texas*, 507 U.S. 529, 534 (1993). Argentina's reading of the FSIA would turn textual silence into an entirely new immunity doctrine, one radically out of step with existing precedent and law. If Argentina wants to avoid its bond obligations, it cannot claim the FSIA's support in doing so.

The United States and Argentina also argue that discovery may only extend to assets subject to an exception from the immunity afforded by the FSIA. U.S. Br. at 15; Pet. Br. 26-32. Even if the FSIA can be read to prevent a foreign state from waiving its immunity from attachment and execution, this position is incorrect. The FSIA does not impose discovery limits beyond those required by the Federal Rules of Civil Procedure. And there is no reason to think, even if additional limitations somehow applied, that such limits would be nonwaivable.

ARGUMENT

I. Section 1609 Of The FSIA Does Not Grant A Nonwaivable Immunity

When it issued the bonds at the center of this case, Argentina waived all immunity from suit as well as immunity from attachment and execution of any and all of its "assets or properties" located anywhere in the world. Specifically, Argentina entered the following waiver:

> To the extent that the Republic or any of its revenues, assets or properties shall be entitled . . . to any immunity . . . from attachment prior to judgment, f[ro]m attachment in aid of execution of judgment, from execution of a judgment or from any other legal or judicial process or remedy, . . . the Republic has irrevocably agreed not to claim and has irrevocably waived such immunity to the fullest extent permitted . . . (and consents generally for the purposes of the Foreign Sovereign Immunities Act to the giving of any relief or the issue of any process in connection with any Related Proceeding or Related Judgment) . . . .

Pet. App. 4 & N.1.

This waiver is clear and unequivocal, without limitation based on geography or class of property. But now Argentina is attempting to renege on its pledge by claiming that the Foreign Sovereign Immunities Act of 1976 ("FSIA") limits the authority of United States courts to attach or execute the property of foreign sovereigns to only that property located within the United States. In effect, Argentina is arguing that the

FSIA gives it a form of nonwaivable, super-sovereign immunity as to its property and assets. That claim is entirely at odds with the principles of sovereign immunity and the common law concept of restrictive immunity the FSIA codifies. And it finds no support in the text, history, or purpose of the FSIA itself. This Court should reject Argentina's novel theory of super-immunity.

A. Historical Practice Reflects That Sovereign Immunity Could Be Waived

At its heart, sovereign immunity "is the privilege of the sovereign not to be sued without its consent." *Virginia Office for Prot. and Advocacy v. Stewart*, 131 S.Ct. 1632, 1637 (2011); *Bonet v. Yabucoa Sugar Co.*, 306 U.S. 505, 506 (1939) (A sovereign "cannot be sued without its consent"). The foreign version of the doctrine is rooted in the principle of comity, *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983), and made its first appearance in this country long before the FSIA, in Chief Justice Marshall's opinion for the Court in *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812). In that case, Chief Justice Marshall explained that "[a] foreign sovereign is not understood as intending to subject himself to a jurisdiction incompatible with his dignity, and the dignity of his nation." *Id.* at 137. Or as this Court has subsequently put it, sovereign immunity is "a personal privilege" against nonconsensual liability. *Clark v. Barnard,* 108 U.S. 436, 447 (1883).

But precisely because immunity is a sovereign privilege, it may be waived by the sovereign "at [its] pleasure." *Id.* Indeed, the Court held in *Alden v. Maine*, 527 U.S. 706 (1999), that one of the most basic

principles of sovereign immunity is that it "bars suit only in the absence of consent." *Id*. at 755. That is to say, sovereign immunity is neither inalienable nor unlimited: it protects only the *nonconsenting* sovereign. *Id*. at 755-56; *see Clark*, 108 U.S. at 447.

It is therefore unsurprising that prior to the enactment of the FSIA, federal courts routinely exercised jurisdiction over consenting foreign states. *See, e.g., Porto Rico v. Ramos*, 232 U.S. 627 (1914) (consent); *Richardson v. Fajardo Sugar Co.*, 241 U.S. 44 (1916) (waiver); *Nat'l City Bank of New York v. Republic of China*, 348 U.S. 356 (1955) (counter-claim); *see also* Restatement (Second) of Foreign Relations Law § 70 (1965) (foreign states are entitled to waive immunity by treaty, by contracting with a private party, and by counterclaiming). This jurisdiction derived from the inherent authority of a foreign state to waive the immunities to which it is otherwise entitled.

Moreover, under both the absolute and restrictive theories of sovereign immunity that pre-dated the FSIA, the ability of a foreign state to consent to suit was not limited to the fact of suit itself but included the ability to waive immunity to attachment and execution of property. The Fourth Circuit's decision in *Flota Maritima Browning De Cuba, Sociadad Anonima v. Motor Vessel Ciudad De La Habana*, 335 F.2d 619 (4th Cir. 1964) is instructive. In that case, the court of appeals allowed a foreign state to waive its execution immunity. The Fourth Circuit began by acknowledging the distinction "between jurisdictional immunity and immunity from execution of the property of a sovereign" and noted that "waiver of the former is not

necessarily a waiver of the latter." *Id.* at 626. Nevertheless, the court concluded that "the difference between the jurisdictional immunity of the Sovereign and that of his property from execution is unavailing to the Republic of Cuba here, for *both were waived*." *Id.* (emphasis added).

The Restatement similarly sanctioned waivers as to the common law immunities, including the common law immunity from attachment and execution. Restatement (Second) of Foreign Relations Law § 70 (1965). "A foreign state may waive the immunity to which it is entitled . . . by international agreement or by agreement with a private party, including an agreement made before the institution of proceedings." *Id.* The Restatement drafters took care to note that courts should not imply a waiver of execution from a waiver of immunity to suit, *id.* at § 70(3), but the drafters were clear that execution and attachment immunity may be expressly waived based on "the reasonable interpretation of the intended effect of the waiver," *id*. at cmt. c.

It was just as well-settled at common law that immunity, both as to jurisdiction and as to attachment and execution, could be waived by treaty. *See Et Ve Balik Kurumu v. B.N.S. Intern. Sales Corp.*, 204 N.Y.S.2d 971, 976 (N.Y. Sup. Ct. 1960). Between 1948 and 1958, for example, the Department of State negotiated fourteen treaties, each providing that, for business activities in the territory of the other, the signatory nations could not claim or enjoy immunity from suit or immunity from execution upon their property. *Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354,

358 (2d Cir. 1964); Restatement (Second) of Foreign Relations Law § 69 cmt. 2 (1965). These treaties sought to put the business dealings of foreign states on footing equal with private business activities.[2] Similarly, in 1958, the United States ratified the Convention on the Territorial Sea and the Contiguous Zone, which provided that government vessels operated for commercial purposes were subject to the same enforcement measures as private vessels. Restatement (Second) of Foreign Relations Law § 69 cmt. 2 (1965) (citing U.N.Doc. A/Conf.13/L.38, 38 Dep't State Bull 1111 (1958), 52 Am. J. Int'l L. 83 (1958)).

B. The FSIA Does Not Alter The Longstanding Principle That Sovereign Immunity May Be Waived

Argentina contends that the FSIA somehow abrogated these fundamental principles of sovereign immunity—and nearly two centuries of common law practice—by making attachment and execution immunity nonwaivable as to property located outside

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[2] A typical provision waived immunity as to suit and as to execution, thus putting the business dealings of foreign states on equal footing with privately owned business activities. The Treaty of Friendship, Commerce and Navigation between the United States and Italy, for example, provided that the signatories would not "claim or enjoy, either for [themselves] or for [their] property, immunity therein from taxation, from suit, from execution of judgment, or from any other liability to which a privately owned and controlled enterprise is subject therein." Treaty of Friendship, Commerce and Navigation, U.S.-Italy, Feb. 2, 1948, 63 Stat. 2255, art. XXIV, para. 6. *See also Victory Transport*, 336 F.2d 354, 364 n.15 (citing Friendship, Commerce and Navigation Treaty, US-Israel, Aug. 23, 1951, 5 U.S.T. 550, art. XVIII, para. 3).

the United States. This theory finds no support in the plain text of the statute or its historical background.

The text of the FSIA codifies the restrictive theory of sovereign immunity. In so doing, it retains the two forms of sovereign immunity recognized at common law: immunity from suit and immunity from attachment and execution. Section 1604 codifies the general rule of immunity from suit: "[A] foreign state shall be immune from the jurisdiction of the courts of the United States and of the States" except as otherwise provided in the Act. 28 U.S.C. § 1604. Section 1605 codifies the companion rule that a sovereign may "waive[] its immunity either expressly or by implication" and thereby subject itself to the jurisdiction of U.S. courts. 28 U.S.C. § 1605. When this exception applies, "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606. Finally, Sections 1609 and 1610 address immunity from attachment and execution for property located in the United States. Section 1609 states the general rule of immunity for such property, 28 U.S.C. § 1609, while Section 1610 makes clear, again in keeping with the familiar "common-law principle," *Rubin v. Islamic Republic of Iran*, 637 F.3d 783, 793 (7th Cir. 2011), that foreign sovereigns may waive attachment and execution immunity expressly or impliedly. 28 U.S.C. § 1610.

Argentina claims that because Sections 1609 and 1610 refer only to property located within the United States, the FSIA abrogates the common law rule that sovereigns may waive immunity as to property located in other locations. Two courts of appeal have embraced

this contention, s*ee EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 481 n.19 (2d Cir. 2007); *Conn. Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 247 (5th Cir. 2002), holding that property must both be located within the United States and used for commercial purposes before a foreign state's waiver of immunity will be effective in U.S. courts.

But this interpretation reads language into the text that is simply not there. Section 1609 does not provide that a foreign sovereign has immunity as to property located outside the United States. Far from it: Section 1609 has precisely nothing to say on this topic. Section 1610(a) is similarly silent on the question of waiver as to property located beyond U.S. borders. Given the preexisting common law practice and the longstanding principles of sovereign immunity, the appropriate inference from this statutory silence is not that Congress abolished the usual rules of waiver, but that it left them where they lay.

This Court has instructed that statutes enacted against a common law background "are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." *United States v. Texas*, 507 U.S. 529, 534 (1993). The FSIA is one of those statutes. This Court has repeatedly recognized that the FSIA "codified" the "restrictive theory" of sovereign immunity. *Samantar v. Yousuf*, 560 U.S. 305, 319 (2010); *Austria v. Altmann*, 541 U.S. 677, 691 (2004); *Verlinden*, 461 U.S. at 488. As recently as 2010, the Court noted that "[t]he doctrine of foreign sovereign immunity developed as a matter of common law long before the FSIA was enacted in

1976." *Samantar*, 560 U.S. at 311. Consequently, in keeping with this Court's canons of interpretation, the FSIA's silence as to property located outside the United States should not be interpreted to abolish the pre-existing common law rule, applied in connection with the restrictive theory, that immunity as to attachment and execution of such property could be waived. *See Norfolk Redev. & Housing Auth. v. C. & P. Tel. Co.*, 464 U.S. 30, 35–36 (1983) (statutes presumed not to abolish background common law principles).

There is nothing in the purpose of the statute that would indicate otherwise. On the contrary, the history of the FSIA confirms that the statute leaves firmly in place the common law rule that, under the "restrictive theory" codified by the FSIA, attachment and execution immunity may be waived. By codifying the "restrictive" theory of sovereign immunity, the FSIA was intended to remove political considerations from the immunity determination. *Verlinden*, 461 U.S. at 488. For a century and half, the United States generally accorded "absolute" immunity in all actions against friendly foreign sovereigns. That changed in 1952: In the so-called Tate Letter, the State Department adopted what it called a "restrictive" theory of foreign sovereign immunity. Going forward, foreign sovereign immunity would be "confined to suits involving the foreign sovereign's public acts, and [would] not extend to cases arising out of a foreign state's strictly commercial acts." *Verlinden*, 461 U.S. at 487.

The new "restrictive" theory of foreign sovereign immunity proved "troublesome" in application. *Id.*; *Samantar*, 560 U.S. at 312; *Altmann*, 541 U.S. at 690-

91. The responsibility for determining whether immunity existed under the new standard fell to the Executive Branch. When named as a party to a suit, a foreign state could request that the State Department issue a suggestion of immunity. If the State Department did so, the court would be obliged to dismiss. As a result, foreign nations routinely brought pressure to bear on Executive Branch officials, and "political considerations" sometimes led to "suggestions of immunity in cases where immunity would not [otherwise] have been available under the restrictive theory." *Verlinden*, 461 U.S. at 487. To complicate matters further, foreign states did not always contact the State Department, and in these cases, the federal courts were required to determine whether sovereign immunity existed without Executive Branch guidance. *Id.* As a consequence, foreign sovereign immunity determinations became inconsistent. The "governing standards were neither clear nor uniformly applied" and questions of sovereign immunity were resolved "in two different branches, subject to a variety of factors … including diplomatic considerations." *Id.* at 488.

Congress passed the FSIA to provide a uniform set of standards for determining whether sovereign immunity existed. The FSIA, this Court has explained, was enacted "in order to free the Government from the case-by-case diplomatic pressures, to clarify the governing standards, and to 'assur[e] litigants that ... decisions are made on purely legal grounds and under procedures that insure due process.'" *Verlinden*, 461 U.S. at 488 (quoting H.R. Rep. No. 94-1487, p.7 (1976), reprinted in [1976] U.S. Code Cong. & Ad. News 6604). Section 1602 of the FSIA lays out the Act's two main purposes: (1) to codify the restrictive theory of

sovereign immunity; and (2) to remove politics from the immunity determination, so that claims of sovereign immunity would be decided by the courts.

The FSIA expresses no intention to modify the substantive common law rules governing immunity and waiver. Indeed, the so-called restrictive theory of immunity the FSIA codifies was developed to address the question of immunity *in the absence of consent*. The Tate Letter of 1952 set out a policy for "granting immunity from suit to foreign governments made parties defendant in the courts of the United States without their consent." Letter from Jack B. Tate, Acting Legal Adviser, Department of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), reprinted in 26 Dep't of State Bull. 984–985 (1952), and in *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 711 (1976) (Appendix 2 to opinion of White, J.). In adopting the "restrictive" theory of foreign sovereign immunity, the State Department announced that such immunity "should no longer be granted in certain types of cases." *Id.* But as the Tate Letter explained, even under the "absolute" theory of sovereign immunity, consent subjected a sovereign to the courts of another sovereign. *Id.* The new, restrictive theory distinguished between public and private acts, according immunity only for the former, but it in no way diminished the ability of a sovereign to waive the immunity that still existed under the restrictive theory. *See id.*

In view of this robust and longstanding common law background, it is, as the United States aptly puts it in its brief in this case, "particularly unlikely that Congress would have silently undertaken such a

radical departure from established norms in the context of a statute so highly sensitive to comity and reciprocity concerns and the dignity of foreign states." U.S. Br. 23. Nothing about the text of the FSIA, its history, or its purpose suggests that Congress meant to adopt the restrictive theory of immunity, yet create an unprecedented super-immunity for attachment and execution. And the common-law principles against which the FSIA was enacted foreclose Argentina's claim to a novel, super-immunity from attachment and execution of property outside the United States.

Foreign-sovereign immunity has always been based on "reciprocal self-interest [ ] and respect for the 'power and dignity' of the foreign sovereign." *Nat'l City Bank of N.Y. v. Republic of China,* 348 U.S. 356, 362 (1955). Argentina's attempt to escape its contractual obligations here should not obscure the fact that to confer on foreign sovereigns a nonwaivable, super-sovereign immunity would have the ironic consequence of diminishing those sovereign's prerogatives rather than vindicating them. In the end, sovereign immunity is about consent. *See Stewart*, 131 S.Ct. at 1637 (sovereign immunity "is the privilege of the sovereign not to be sued without its consent."). Argentina has consented here. Its attempt to rewrite the FSIA should not excuse it from the consequences.

II. The FSIA Does Not Make Post-Judgment Discovery Immunity Nonwaivable

The United States argues that discovery "must be tailored in a manner that respects the general rule of immunity from execution set forth in Section 1609 and may extend only to assets as to which there is a reasonable basis to believe that an exception to

immunity under Section 1610 applies." U.S. Br. 15; *see also* Pet. Br. 26-32. Even assuming that the FSIA prevents a foreign state from waiving its immunity from attachment and execution (it does not), the United States' position is incorrect for two reasons. First, the text, structure, and history of the FSIA all indicate that the statute does not impose discovery limits beyond those required by the Federal Rules of Civil Procedure. Second, even if the FSIA could be read to impose additional constraints upon the discovery process, there is no reason to think that such limits would be nonwaivable.

The Government and Argentina agree that "the FSIA does not expressly address [post-judgment] discovery." Pet. Br. 22; *see* U.S. Br. 15. That is putting it mildly. The FSIA barely mentions discovery at all and the ordinary tools of statutory interpretation indicate that Congress did not intend to limit the post-judgment discovery routinely available to judgment creditors.

Argentina and the Government extrapolate discovery limitations from the execution immunity conferred by Section 1609 and the exceptions to that immunity conferred by Section 1610. But those provisions say nothing about discovery. Indeed, the only provision of the FSIA that addresses discovery authorizes a stay in certain terrorism cases where discovery would "significantly interfere with a criminal investigation or prosecution, or a national security operation." 28 U.S.C. § 1605(g)(1). The plain text of the FSIA thus fails to limit discovery.

Further, when Congress wanted to replace the normal rules of civil procedure in the FSIA, it did so

expressly. *See Samantar*, 560 U.S. at 317. Consider Section 1608. The provision specifically alters the usual rules of service. That Congress did not similarly address discovery suggests Congress did not intend to replace its usual rules. If Congress had intended to alter those rules, it would have said so. *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 341-42 (2005) ("We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest."). Further, for the immunities recognized by the FSIA—immunity from suit and from post-judgment attachment and execution—Congress was careful to delineate the breadth of those immunities. That Congress not only failed textually to provide an immunity from discovery, but also was silent as to the scope of and limitations on any such immunity indicates Congress did not intend to create an immunity from discovery.

Legislative history also makes clear that the FSIA "does not attempt to deal with questions of discovery," H.R. Rep. No. 94–1487, p. 23 (1976), much less create a nonwaivable super-immunity from discovery. This is because, as the House Report explains, "[e]xisting law appears to be adequate in this area:" "if a private plaintiff sought the production of sensitive governmental documents of a foreign state, concepts of governmental privilege would apply." *Id*. As the D.C. Circuit has held, instead of limiting discovery or making these limitations nonwaivable, Congress "kept in place a court's normal discovery apparatus in FSIA proceedings." *FG Hemisphere Assocs., LLC v.*

Democratic Republic of Congo, 637 F.3d 373, 378 (D.C. Cir. 2011); *Samantar*, 560 U.S. at 328 (Scalia, J., concurring in the judgment) (history indicates Congress' "failure to deal with discovery").

Even if the FSIA limits post-judgment discovery, Argentina waived those limitations. In its offering to bondholders, Argentina waived its immunity "to the fullest extent allowed under the law." Pet. App. 4 & n.1. Argentina further told prospective bondholders that it would "consent[] generally for the purposes of the Foreign Sovereign Immunities Act to the giving of any relief or the issue of any process in connection with any Related Proceeding or Related Judgment." Pet. App. 4 & n.1. This waiver covers the waterfront. It certainly encompasses post-judgment discovery—a process related to a judgment.

The text of the FSIA does not indicate that, if an immunity from discovery were implied, Congress would intend that immunity to be nonwaivable. With every grant of immunity, Congress ordinarily included a corresponding provision that the immunity could be waived. *See* 28 U.S.C. § 1605(a)(1); 28 U.S.C. § 1610(a)(1). If post-judgment discovery immunity were implicit in any grant of immunity, an exception for waiver would likewise be implicit. But, as noted above, Congress's decision not to confer an immunity from discovery should be the end of the matter. As this Court has explained, "'[d]rawing meaning from silence is particularly inappropriate ... [when] Congress has shown that it knows how to [address an issue] in express terms.'" *Samantar*, 560 U.S. at 317 (alteration in original) (quoting *Kimbrough v. United States*, 552 U.S. 85, 103 (2007)).

The FSIA reflects Congress's deliberate balance between the interests of foreign states and the interests of those with claims against these states. The admittedly important concerns regarding foreign relations and comity are adequately addressed through the Federal Rules of Civil Procedure. Indeed, in *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for the S. Dist. of Iowa*, 482 U.S. 522 (1987), a case against a foreign state with similar international implications, this Court declined to limit discovery in light of comity. The federal district courts, this Court wrote, were up to the task; they were to "exercise special vigilance to protect foreign litigants" and to supervise proceedings "particularly closely to prevent discovery abuses." *Société Nationale*, 482 U.S. at 546. The demands of comity in suits had long been part of civil litigation, and this Court declined to "articulate specific rules to guide this delicate task of adjudication." *Id.* (citing *Hilton v. Guyot*, 159 U.S. 113 (1895).

The Second Circuit held that the discovery order at issue "does not implicate Argentina's immunity from attachment" because it "does not allow NML to attach Argentina's property, or indeed to have any legal effect on Argentina's property at all." Pet. App. 15. Whether NML may attach or otherwise affect property is a question for another day. If NML attempts to execute against Argentina's property, the legality of that attachment will be governed by the laws of the country in which the property is located, and Argentina "will be protected by principles of sovereign immunity … to the extent that immunity has not been waived." Pet. App. 20. The normal rules regarding privileged and confidential information, personal jurisdiction, the presumption against extraterritoriality, and the

district court's broad authority over discovery, which may include comity interests, may well limit post-judgment discovery. *See Société Nationale*, 482 U.S. at 543-44. But those questions are not at issue here.

CONCLUSION

For the reasons listed above, Argentina may not rely upon a nonwaivable immunity from attachment and execution to short-circuit the post-judgment litigation processes it consented to expressly. This Court should affirm the decision of the court below.

Respectfully submitted,

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