No. 12-842

In the Supreme Court of the United States

REPUBLIC OF ARGENTINA, PETITIONER

v.

NML CAPITAL, LTD.

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

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

The Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1330, 1602 *et seq.*, provides that the property of a foreign state in the United States is immune from attachment, arrest, and execution, 28 U.S.C. 1609, unless the property is "used for a commercial activity in the United States" and falls within a statutory exception to immunity, 28 U.S.C. 1610(a). The question presented is:

Whether the court of appeals erred in affirming a discovery order requiring the production of comprehensive information concerning a foreign state's assets, without regard to whether those assets could be attached or executed upon in the United States under the FSIA.

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INTEREST OF THE UNITED STATES

This case concerns the scope of discovery available in enforcing a judgment against a foreign state under the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1330, 1602 *et seq.* The United States has a substantial interest in the proper interpretation and application of the FSIA's provisions and in the treatment of foreign states in United States courts. At the Court's invitation, the United States filed a brief at the petition stage of this case.

STATEMENT

1. The United States has long recognized that foreign sovereigns are generally immune from suit in our courts. See *The Schooner Exch.* v. *McFaddon*, 11 U.S. (7 Cranch) 116, 137 (1812) (explaining that sovereign immunity rests on the "perfect equality and absolute

independence of sovereigns, and th[e] common interest impelling them to mutual intercourse"). For much of the Nation's history, the United States adhered to the "absolute" theory of foreign sovereign immunity, under which foreign states were not subject to suit without their consent and foreign sovereign property was wholly shielded from judicial execution. See, *e.g.*, *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 486-487 (1983); *Permanent Mission of India to the United Nations* v. *City of N.Y.*, 551 U.S. 193, 199 (2007); *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 134 (1938).

During that period, the question sometimes arose whether that absolute immunity was applicable in a particular case. See, *e.g.*, *Republic of Mex.* v. *Hoffman*, 324 U.S. 30, 37 (1945). In recognition of the potential for international conflict inherent in such determinations, the courts developed the practice of deferring to the Executive Branch's judgment. See *Verlinden*, 461 U.S. at 486; *Ex parte Republic of Peru*, 318 U.S. 578, 588-589 (1943). In many cases, the Executive filed a suggestion of immunity, which the courts treated as dispositive. See, *e.g.*, *Hoffman*, 324 U.S. at 34. If the Executive made no recommendation, courts would decide immunity questions "in conformity to the principles accepted by the department of the government charged with the conduct of our foreign relations." *Id.* at 34-35.

In 1952, the Department of State adopted the "restrictive" theory of foreign sovereign immunity. Under that theory, foreign states were entitled to immunity from suit for their sovereign or public acts but not for their commercial acts. See *Verlinden*, 461 U.S. at 487. Even after 1952, however, the "property of

foreign states" continued to be "absolutely immune from execution" to satisfy a judgment. H.R. Rep. No. 1487, 94th Cong., 2d Sess. 27 (1976) (*House Report*); see, *e.g.*, *New York & Cuba Mail S.S. Co.* v. *Republic of Kor.*, 132 F. Supp. 684, 685 (S.D.N.Y. 1955); Theodore R. Giutarri, *The American Law of Sovereign Immunity: An Analysis of Legal Interpretation* 254-259, 263-266 (1970).

In 1976, Congress enacted the FSIA, 28 U.S.C. 1330, 1602 *et seq.*, which establishes comprehensive "legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities." *Verlinden*, 461 U.S. at 488. "For the most part, the Act codifies, as a matter of federal law, the restrictive theory of sovereign immunity." *Ibid.*; see 28 U.S.C. 1602 (noting recognition of restrictive theory in "international law" and providing that "[c]laims of foreign states to immunity should henceforth be decided * * * in conformity with the principles set forth in this chapter").

First, the FSIA sets forth a general rule that foreign states are immune from suit in U.S. courts, 28 U.S.C. 1604, and that such courts may exercise jurisdiction over a foreign state only if the suit comes within one of the specific exceptions to that rule, see 28 U.S.C. 1605-1607; *Republic of Austria* v. *Altmann*, 541 U.S. 677, 691 (2004). Those exceptions permit, *inter alia*, suits as to which "the foreign state has waived its immunity," 28 U.S.C. 1605(a)(1); suits based on the commercial activities of a foreign state carried on in the United States, 28 U.S.C. 1605(a)(2); and suits based on a foreign state's tortious acts or

omissions causing personal injury or death in the United States, 28 U.S.C. 1605(a)(5).

Second, the FSIA addresses the circumstances in which foreign-state property is subject to attachment, arrest, or execution. Section 1609 establishes a general rule that foreign-state property in the United States is immune from any such enforcement, even in cases in which jurisdiction over the state itself is proper. See 28 U.S.C. 1609 (stating that "[s]ubject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as [otherwise] provided"). Section 1610(a) then sets forth limited exceptions to that general rule, providing that foreign-state property in the United States "shall not be immune" from execution if it is "used for a commercial activity in the United States" and at least one of certain enumerated conditions (such as waiver of execution immunity, or use of the property "for the commercial activity upon which the claim is based") is satisfied. 28 U.S.C. 1610(a). The statute also mandates that even where an exception listed in Section 1610(a) would otherwise apply, certain foreign-state property nevertheless remains immune: property of a "foreign central bank or monetary authority held for its own account," 28 U.S.C. 1611(b)(1), and property used or intended to be used in connection with a military activity, 28 U.S.C. 1611(b)(2).

2. In 2001, petitioner Republic of Argentina (Argentina) "declared a temporary moratorium on principal and interest payments on more than $80 billion of public external debt." *NML Capital, Ltd.* v. *Banco*

Cent. de la República Arg., 652 F.3d 172, 175 (2d Cir. 2011), cert. denied, 133 S. Ct. 23 (2012). Since 2001, Argentina has not made payments on the defaulted bonds. *Ibid.* Instead, Argentina restructured approximately 92% of its debt by instituting global exchange offers in 2005 and 2010, pursuant to which creditors holding the defaulted bonds could exchange them for new securities with modified terms. *Id.* at 176 & n.4.

Respondent holds debt instruments on which Argentina defaulted. Respondent did not avail itself of Argentina's restructuring process for those bonds; rather, respondent (along with other bondholders) filed multiple actions in the United States District Court for the Southern District of New York seeking repayment of the original debt obligations. See Pet. App. 3-4. As a basis for the district court's jurisdiction over Argentina, respondent relied on a waiver of sovereign immunity from suit that was contained in the agreement governing the debt instruments when they were first issued. See *id.* at 4 & n.1; see also 28 U.S.C. 1605(a)(1).

Respondent ultimately obtained judgments against Argentina in the combined amount of approximately $1.6 billion. The district court also has granted summary judgment to respondent in six other cases in which respondent has demanded more than $900 million, including interest. Pet. App. 4.[1]

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[1] In the latter cases, the district court enjoined Argentina from making payments on the restructured bond debt unless it simultaneously makes payments on the original bond debt, and the Second Circuit affirmed the injunctions. See 727 F.3d 230 (2013). In doing so, the court of appeals rejected the position of the United States as amicus curiae that consensual restructuring is the appropriate means for resolving sovereign debt crises; that the injunc-

3. a. Because Argentina has not satisfied the judgments against it, respondent has "attempted to execute them against Argentina's property."[2] Pet. App. 4. In 2010, in an effort to "learn how Argentina moves its assets through New York and around the world," respondent served document subpoenas on two nonparty banks, Bank of America and Banco de la Nación Argentina (BNA). *Id.* at 5 (citation omitted); see *ibid.* (explaining inquiry into Argentina's "financial circulatory system") (citation omitted); *id.* at 41 (describing discovery as facilitating "forensic examination"). Unlike previous discovery requests, which had focused on Argentina's property located in the United States, the two subpoenas sought information about Argentina's assets located outside the United States. *Id.* at 5-6, 11 & n.6, 60-61. Both subpoenas sought comprehensive information relating to bank accounts maintained by Argentina anywhere in the world, as well as transaction histories and records of electronic funds transfers involving Argentina as a party. *Id.* at 5-6. The subpoenas also demanded the same information with respect to various Argentinian entities and persons—including government agencies, instrumentalities, and certain officials and employees—against whom respondent had not obtained a judgment. See 1:03-CV-

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tions could disrupt the orderly resolution of such crises; and that the injunctions were inconsistent with the FSIA and the well-established understanding of the *pari passu* clause that appeared in the bonds. A petition for a writ of certiorari is pending (No. 13-990 (filed Feb. 18, 2014)).

[2] The United States does not condone a foreign state's failure to satisfy the final judgment of a U.S. court imposing liability on the state. The United States consistently has maintained, and continues strongly to maintain, that Argentina should normalize relations with its creditors, both public and private.

08845 Docket entry No. (Docket No.) 338-1, at 13-18 (Aug. 9, 2010); Docket No. 366-1, at 1-2 (Nov. 1, 2010).

b. The district court approved the subpoenas "in principle" and granted respondent's motions to compel the banks' compliance. Pet. App. 7.[3] Although Argentina contended that the subpoenas were inconsistent with the FSIA's grant of presumptive immunity from execution, the court concluded that discovery into the worldwide assets of Argentina and related persons and entities was appropriate. *Id.* at 43-44. The court reasoned that Argentina could "very well be engaged in commercial activities in various places or activity which might involve attachable assets on some other theory in a foreign country." *Id.* at 44. The court stated that it intended to serve as a "clearinghouse for information about [Argentina's] commercial activity or other activity that might lead to attachments or executions anywhere in the world." *Id.* at 31; see Docket No. 457, at 7 (Apr. 19, 2012); see also *id.* at 4, 6, 15, 18-19 (requiring BNA to produce information on "transactions from Argentina to Spain or Argentina to Brazil" that never "came into the United States").

4. Argentina appealed the discovery order. The court of appeals affirmed, concluding that "Argentina's sovereign immunity is not infringed" by the order compelling the banks to comply with respondent's

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[3] The district court instructed the parties to negotiate about the subpoenas' terms, which were modified in certain respects. See Pet. App. 7-8, 10 n.5, 45, 49, 50-51. With respect to the BNA subpoena, for example, this resulted in withdrawal of requests for information about assets located in Argentina and accounts held by natural persons other than Argentina's president and her late husband. See *id.* at 8; Docket No. 452 (Dec. 14, 2011).

broad subpoenas. Pet. App. 9, 20; see *id.* at 87-88 (denying rehearing).[4]

First, the court of appeals stated that post-judgment discovery into a foreign state's property "does not implicate * * * immunity from attachment under the FSIA" because "[i]t does not allow [respondent] to attach Argentina's property." Pet. App. 15; see *id.* at 18. In the court's view, "[o]nce the district court had subject matter and personal jurisdiction over Argentina, it could exercise its judicial power over Argentina as over any other party," *ibid.*—including approving the kind of "broad post-judgment discovery in aid of execution" that the Second Circuit identified as "the norm in federal and New York state courts," *id.* at 13; see *id.* at 16. The court rejected the argument that discovery in aid of execution of a judgment against a foreign state must be "ordered circumspectly and only to verify allegations of specific facts crucial to an immunity determination." *Rubin* v. *The Islamic Republic of Iran*, 637 F.3d 783, 796 (7th Cir. 2011), cert. denied, 133 S. Ct. 23 (2012), cited in Pet. App. 17. The court deemed such "circumspect[ion]" appropriate only when a plaintiff seeks discovery "to initially establish that the court has subject matter jurisdiction over a sovereign." *Id.* at 18-19.

Second, the court of appeals stated that "the Discovery Order does not infringe on Argentina's sovereign immunity" because "the subpoenas at issue were directed at * * * commercial banks that have no claim to sovereign immunity." Pet. App. 19. In the court's view, "the banks' compliance" will "cause Ar-

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[4] The court of appeals exercised jurisdiction over the appeal under the collateral-order doctrine. Pet. App. 9-12.

gentina no burden and no expense," and "Argentina's sovereign immunity" is therefore not "endanger[ed]." *Id.* at 19-20.

SUMMARY OF ARGUMENT

The FSIA sets forth two separate and independent rules of immunity: immunity of a foreign state from suit, and immunity of the property of a foreign state from attachment, arrest, or execution. Each of those immunities has exceptions, but those exceptions are also independent of each other—and the exceptions with respect to immunity from execution are considerably narrower than the exceptions that permit a U.S. court to exercise jurisdiction over a foreign state. A foreign state's property therefore may remain immune from execution under the FSIA even though the foreign state is subject to a judgment entered by a U.S. court. That carefully constructed framework preserves comity—since judicial seizure of a foreign state's property may be regarded as a serious affront to the state's sovereignty and affect our foreign relations with it—and addresses concerns about reciprocity for the United States when sued abroad.

Consistent with these immunity provisions, a district court's authority to order discovery into the property of a foreign state is necessarily limited, and extends only to assets as to which there is a reasonable basis to believe that an exception to execution immunity under the FSIA applies. Broad, general discovery into presumptively immune foreign-state property would impose the very costs and burdens that the immunity is intended to shield against in the first place. Discovery therefore must be restricted to the facts necessary to verify that assets fall within the scope of such an exception—exactly the kind of tailoring that courts undertake in various other immunity contexts, including qualified immunity

cases. A court has jurisdiction over a foreign state in the first place only because a FSIA exception applies, and the FSIA and its exceptions therefore define the scope of the inquiry in which that court can engage.

Permitting more sweeping examination of a foreign state's assets by U.S. courts, thereby opening a substantial gap in what this Court has recognized to be a comprehensive scheme, would undermine the FSIA's purposes and have a number of adverse consequences. It would invade substantially a foreign state's sovereignty in an especially sensitive area and would be inconsistent with the comity principles the FSIA embodies. It would risk reciprocal adverse treatment of the United States in foreign courts. And it would more generally threaten harm to the United States' foreign relations on a variety of fronts. If Congress had wanted to authorize courts to issue discovery orders that could disrupt foreign policy in this way—a radical change to the prior legal regime, in which discovery of foreign-state property was not even contemplated because such property was absolutely immune from execution—Congress would have said so expressly. But it gave no indication of any such intent.

The district court in this case, styling itself a "clearinghouse" for virtually all information about Argentina's assets (Pet. App. 31), compelled discovery of several categories of foreign-state property that a U.S. court could not possibly execute against pursuant to the FSIA. The court improperly compelled discovery directed at assets located in other countries, even though the FSIA does not permit execution by a U.S. court except with respect to limited categories of foreign-state property located in the United States. The court also improperly compelled discovery of categories of property that are expressly immune from execution not only in the United

States but also elsewhere: central bank and military property, diplomatic property, and property belonging to individuals (including a sitting head of state) and entities other than the judgment debtor.

In allowing that discovery to proceed, the court of appeals believed that jurisdiction over Argentina authorized the discovery and that Argentina's sovereign immunity was not "affected" (Pet. App. 3). That approach disregards the separate immunity for foreign-state property that applies under the FSIA even when jurisdiction over a foreign state is proper. It takes no heed of the fact that a primary purpose of execution immunity is to protect against the burdens of litigation, including the burdens that Argentina has shouldered in this case. And, critically, it disregards the significant comity, reciprocity, and other foreign-relations concerns raised by wide-ranging discovery that treats a foreign state as if it were a mere private litigant—concerns that are not lessened when the discovery is directed at a bank or other third party. Accordingly, the judgment of the court of appeals should be reversed.

ARGUMENT

Under the Second Circuit's rule of decision, a district court may order sweeping discovery into a foreign state's property—including discovery against the foreign state itself—without regard to whether the discovery seeks information about property that is subject to execution in a U.S. court under the FSIA.[5]

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[5] Indeed, district courts have already relied on the Second Circuit's decision in ordering general asset discovery against a foreign state itself. See Docket No. 562, at 29-31; Docket No. 565 (Sept. 25, 2013); see also, *e.g.*, *Aurelius Capital Partners* v. *Republic of Arg.*, No. 07-CV-2715, Docket entry No. 592 (S.D.N.Y. Sept. 25, 2013); *Thai Lao Lignite (Thai.) Co., Ltd.* v. *Government of Lao*

That rule, which as in this case would allow discovery into a foreign sovereign's assets anywhere in the world, cannot be reconciled with the FSIA and the principles of comity and reciprocity it embodies.

A. The FSIA Establishes A General Rule Of Immunity From Execution For A Foreign State's Property

The FSIA codifies long-recognized foreign sovereign immunity principles by setting forth two general rules of immunity. First, a foreign state is immune from the jurisdiction of the court unless an exception to jurisdictional immunity applies. See 28 U.S.C. 1604-1607. Second, the property of a foreign state is immune from attachment, arrest, or execution unless an exception to that distinct rule of execution immunity applies. See 28 U.S.C. 1609-1611.

The exceptions to jurisdictional immunity and execution immunity are similar in certain respects, but they operate independently. Accordingly, "a waiver of immunity from suit does not imply a waiver of immunity from attachment of property, and a waiver of immunity from attachment of property does not imply a waiver of immunity from suit." Restatement (Third) of Foreign Relations Law of the United States § 456(1)(b) (1987); see *id.* § 456 cmt. e (citing 28 U.S.C. 1605 and 1610); see also *Walters* v. *Industrial & Commercial Bank of China, Ltd.*, 651 F.3d 280, 288 (2d Cir. 2011).

In addition, under the FSIA the exceptions to the immunity from execution afforded to foreign-state property are considerably narrower than the exceptions to the immunity from jurisdiction afforded to a

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People's Democratic Republic, 924 F. Supp. 2d 508, 518-519 (S.D.N.Y. 2013).

foreign state. In general, the property of a foreign state may be executed upon to satisfy a judgment only if the property is "used for a commercial activity in the United States" and certain other conditions are satisfied. 28 U.S.C. 1610(a).[6] When Congress enacted the FSIA against the backdrop of the established sovereign immunity regime that gave a judgment debtor no ability *at all* to execute against a sovereign's property, it only "partially lower[ed] the barrier of immunity from execution." *House Report* 27; see *id.* at 8 (FSIA execution provisions "remedy, in part, the [pre-FSIA] predicament of a plaintiff who has obtained a judgment against a foreign state").

As a result, a foreign state may be subject to a judgment entered by a U.S. court with jurisdiction to render it and yet the foreign state's property may remain immune under the FSIA from execution upon that judgment. See, *e.g.*, *De Letelier* v. *Republic of Chile*, 748 F.2d 790, 799 (2d Cir. 1984), cert. denied, 471 U.S. 1125 (1985); see also *Rubin* v. *The Islamic Republic of Iran*, 637 F.3d 783, 796 (7th Cir. 2011), cert. denied, 133 S. Ct. 23 (2012). "Congress fully intended to create rights without remedies, aware that plaintiffs would often have to rely on foreign states to voluntarily comply with U.S. court judgments." *Peterson* v. *Islamic Republic of Iran*, 627 F.3d 1117, 1128 (9th Cir. 2010); see *Walters*, 651 F.3d at 289.

The FSIA's narrow exceptions to the general rule of immunity from execution strike a careful balance intended to preserve comity and address reciprocity concerns. The "judicial seizure" of a foreign state's

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[6] In the context of certain terrorism-related judgments, somewhat different provisions may be applicable. See 28 U.S.C. 1610 note.

property "may be regarded as an affront to its dignity and may . . . affect our relations with it." *Republic of Philippines* v. *Pimentel*, 553 U.S. 851, 866 (2008) (citation and internal quotation marks omitted). Indeed, "at the time the FSIA was passed, the international community viewed execution against a foreign state's property as a greater affront to its sovereignty than merely permitting jurisdiction over the merits of an action." *Connecticut Bank of Commerce* v. *Republic of Congo*, 309 F.3d 240, 255-256 (5th Cir. 2002); see *Peterson*, 627 F.3d at 1127; *Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 14, 22 (1973) (statement of Acting Legal Adviser Brower); Ian Brownlie, *Principles of Public International Law* 346 (5th ed. 1998) (Brownlie) (noting that "forcible execution directed against [foreign-state] assets * * * may lead to serious disputes").

In light of these concerns, a prior court order is necessary to attach or execute upon a foreign state's property. 28 U.S.C. 1610(c). A judgment creditor bears the burden of identifying the particular property to be executed against and proving that it falls within a statutory exception to immunity from execution. See, *e.g.*, *Walters*, 651 F.3d at 297; *Rubin*, 637 F.3d at 796; *Walker Int'l Holdings Ltd.* v. *Republic of Congo,* 395 F.3d 229, 233 (5th Cir. 2004), cert. denied, 544 U.S. 975 (2005).

B. Discovery Into The Property Of A Foreign State Must Be Consistent With The FSIA's Immunity Provisions

Factual issues may arise when a judgment creditor seeks to demonstrate that a foreign state possesses assets that fall within one of the FSIA's exceptions to

execution immunity. In that circumstance, discovery may be appropriate to develop facts establishing that the assets in question are subject to execution under the FSIA. Although the FSIA does not expressly address the permissible scope of discovery under these circumstances,[7] a district court ordering discovery in aid of execution should not proceed as though only private interests were implicated. To the contrary, 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 execution immunity under Section 1610 applies.

1. That conclusion follows from the very nature of immunity, which protects against "the costs, in time and expense, and other disruptions attendant to litigation." *EM Ltd.* v. *Republic of Arg.*, 473 F.3d 463, 486 (2d Cir.) (citation omitted), cert. denied, 552 U.S. 818 (2007); see *Pimentel*, 553 U.S. at 865 (immunity is designed to "give foreign states and their instrumentalities some protection from the inconvenience of suit") (quoting *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 479 (2003)); cf. *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985) (qualified immunity protects government officials from "the costs of trial or * * * the burdens of broad-reaching discovery") (quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 817-818 (1982)). To permit burdensome and intrusive discovery into the property of a foreign state, without regard to whether that property could be subject to execution

[7] Only one provision of the FSIA, not relevant here, directly addresses a discovery-related matter. See 28 U.S.C. 1605(g) (allowing for stay of discovery against the United States in action relating to alleged terrorist acts by foreign state).

under the FSIA, would impose the very burdens and costs that immunity is intended to shield against and would therefore be inconsistent with the FSIA's execution immunity provisions. See 28 U.S.C. 1609-1611; *Rubin*, 637 F.3d at 795-797.

Indeed, courts in various immunity contexts have confined the scope of discovery to encompass only facts that are necessary to verify an alleged exception to immunity. Of particular relevance here, with respect to the jurisdictional immunity of a foreign state under the FSIA, the courts of appeals have uniformly limited discovery so as to "balance the need for 'discovery to substantiate exceptions to statutory foreign sovereign immunity' against the need to 'protect[] a sovereign's or sovereign agency's legitimate claim to immunity from discovery.'" *Butler* v. *Sukhoi Co.*, 579 F.3d 1307, 1314 (11th Cir. 2009) (quoting *First City, Tex.-Hous., N.A.* v. *Rafidain Bank*, 150 F.3d 172, 176 (2d Cir. 1998)); see, *e.g.*, *In re Papandreou*, 139 F.3d 247, 253 (D.C. Cir. 1998) (recognizing that such discovery "must proceed with circumspection, lest the evaluation of the immunity itself encroach unduly on the benefits the immunity was to ensure").[8] Similarly, in cases involving the qualified immunity of federal and state officials, discovery has been restricted so as to encompass only the facts necessary to decide

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[8] See also *Hansen* v. *PT Bank Negara Indon. (Pesero), TBK*, 601 F.3d 1059, 1063-1064 (10th Cir. 2010); *Kelly* v. *Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 849 (5th Cir.), cert. denied, 531 U.S. 979 (2000); *Federal Ins. Co.* v. *Richard I. Rubin & Co., Inc.*, 12 F.3d 1270, 1284 n.11 (3d Cir. 1993), cert. denied, 511 U.S. 1107 (1994); *Gould, Inc.* v. *Pechiney Ugine Kuhlmann*, 853 F.2d 445, 451 (6th Cir. 1988), abrogated on other grounds by *Republic of Arg.* v. *Weltover, Inc.*, 504 U.S. 607 (1992).

whether the immunity defense applies. See, *e.g.*, *Anderson* v. *Creighton*, 483 U.S. 635, 646-647 n.6 (1987) (discovery "should be tailored specifically to the question of [the defendant's] qualified immunity"); *Cole* v. *Ruidoso Mun. Schs.*, 43 F.3d 1373, 1387 (10th Cir. 1994).

The same considerations are implicated in the context of discovery into a foreign state's property for purposes of execution. Broad, general discovery into the character, use, location, or amount of a foreign state's property without regard to whether those assets are subject to execution in U.S. courts is no more appropriate, and no less intrusive, than broad, general discovery into the acts of a foreign state without regard to whether the state itself is subject to the jurisdiction of our courts. Because foreign-state property is presumed immune under the FSIA, and because that immunity is lifted only in limited circumstances and only as to property located in the United States and used for commercial purposes, a district court may not simply require disclosure of "all" of a foreign state's assets. *Rubin*, 637 F.3d at 785. Instead, it must proceed consistently with the general rule of immunity set forth in Section 1609.

All of the courts of appeals other than the Second Circuit to have addressed the issue have taken such a carefully tailored approach. Thus, as in the context of jurisdictional discovery under the FSIA, those courts have ruled that discovery concerning a foreign state's assets "should be ordered circumspectly and only to verify allegations of specific facts crucial to an immunity determination." *Rubin*, 637 F.3d at 796; see *Af-Cap, Inc.* v. *Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1095-1096 (9th Cir. 2007); *Connecticut Bank*, 309 F.3d at 260 n.10.

2. Confining discovery to assets as to which there is a reasonable basis to believe that an exception to immunity under the FSIA applies also follows from the fact that the court has jurisdiction over the suit to begin with only because of an exception to the immunity of the foreign state under the FSIA's "comprehensive" statutory regime. *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 488 (1983). A foreign state that becomes subject to the jurisdiction of a U.S. court because of an exception to its immunity in the United States under that statutory regime does not thereby become subject to free-ranging judicial inquiry into its affairs that fall outside the FSIA's exceptions—much less that take place outside the United States, anywhere in the world. Moreover, as part of the FSIA's comprehensive regime, Congress provided foreign states with an independent entitlement to immunity in connection with litigation to enforce a judgment, even if they are subject to the court's jurisdiction—and attendant discovery—for purposes of adjudicating the merits of the underlying suit. See 28 U.S.C. 1609; *Peterson*, 627 F.3d at 1127-1128; see also 28 U.S.C. 1602 (stating that "[c]laims of foreign states to immunity should henceforth be decided by courts of the United States * * * in conformity with the principles set forth in th[e] chapter" of which Sections 1609 and 1610 are a part).

3. Confining the scope of discovery in aid of execution in this manner not only follows from the text and structure of the FSIA, but also reflects the critical interests at stake and the extent to which a sweeping examination would undermine the purposes of the FSIA.

a. Sweeping requests for detailed information about a foreign state's financial holdings and transactions would represent a substantial invasion of its sovereignty and be

inconsistent with the comity principles that the FSIA embodies. As noted above, the "judicial seizure" of a foreign state's property "may be regarded as an affront to its dignity" at least to the same extent as subjecting a foreign state to suit. *Pimentel*, 553 U.S. at 866 (citation and internal quotation marks omitted). By the same token, permitting extensive discovery in aid of execution, without regard to whether any of the property inquired into may actually be subject to execution in U.S. courts under the FSIA, could impose significant burdens on the foreign state and impugn its dignity. Foreign states may be acutely sensitive to the invasiveness of such discovery requests because "the scope of American discovery is often significantly broader than is permitted in other jurisdictions." *Société Nationale Industrielle Aérospatiale* v. *United States Dist. Court for the S.D. of Iowa*, 482 U.S. 522, 542 (1987); see *id.* at 546 (explaining that courts ordering extraterritorial discovery should "demonstrate due respect for * * * any sovereign interest expressed by a foreign state"); Restatement (Third) of Foreign Relations Law of the United States, § 442, rep. n.1 (1987) (noting significant "friction" that can result from extraterritorial discovery requests); cf. *Daimler AG* v. *Bauman*, 134 S. Ct. 746, 763 (2014) (relying on "international comity" considerations and noting that "[o]ther nations do not share the uninhibited approach to personal jurisdiction advanced by the Court of Appeals").

Undermining international comity in this way is exactly the kind of harm that FSIA execution immunity is intended to prevent. In enacting a "comprehensive set of legal standards" to govern treatment of foreign states in U.S. courts, *Verlinden*, 461 U.S. at 488; see *id.* at 493, 496, Congress took care to preserve immunity from execution separately from, and more broadly than, immuni-

ty from jurisdiction. Parlaying jurisdiction for purposes of issuing a judgment on liability into an authorization for a court to order expansive discovery in aid of execution that a U.S. court cannot order would ignore the FSIA's carefully calibrated statutory structure and the objectives it was fashioned to further. It thereby would open a significant gap in the FSIA's comprehensive array of protections, and strongly increase the possibility that U.S. courts would issue orders that constitute an affront to foreign states' coequal sovereignty.

b. Such broad discovery could lead to reciprocal adverse treatment of the United States in foreign courts—a result that the FSIA is also aimed at avoiding. See *House Report* 9; see also *National City Bank* v. *Republic of China*, 348 U.S. 356, 362 (1955) (one basis for foreign sovereign immunity is "reciprocal self-interest"). The United States maintains extensive overseas holdings in support of its worldwide diplomatic, security, and law enforcement missions, and engages in widespread financial transactions (both in the United States and internationally) in connection with those and other activities. Because "some foreign states base their sovereign immunity decisions on reciprocity," *Persinger* v. *Islamic Republic of Iran*, 729 F.2d 835, 841 (D.C. Cir.), cert. denied, 469 U.S. 881 (1984), a U.S. court's allowance of unduly broad discovery concerning a foreign state's assets—especially assets beyond the jurisdiction of U.S. courts—could result in less favorable treatment for the United States in various respects when sued abroad. Cf. *Boos* v. *Barry*, 485 U.S. 312, 323 (1988) (highlighting importance of "concept of reciprocity" in international law and diplomacy and explaining that respecting diplomatic immunity of foreign states "ensures that similar protections will be accorded"); *McCulloch* v. *Sociedad*

Nacional de Marineros de Honduras, 372 U.S. 10, 21 (1963) (construing statute to avoid "invit[ing] retaliatory action from other nations"); *Persinger*, 729 F.2d at 841 (declining to adopt construction of FSIA that bore the "potential for international discord and for foreign government retaliation").[9] The United States, for example, would be gravely concerned about orders of a foreign court setting itself up as a "clearinghouse" (Pet. App. 31) for information about assets and transactions of the United States Government throughout the world, especially through compulsory discovery or disclosure orders issued at the behest of a private litigant.

c. Allowing sweeping discovery into foreign sovereigns' assets would also threaten harm to the United States' foreign relations more generally. Such discovery is likely to breed resentment, and if different district courts reach different results with respect to different foreign states—some permitting unlimited asset discovery, others imposing discretionary limits—then a perception of unequal treatment could arise. In the "vast external realm, with its important, complicated, delicate and manifold problems," *United States* v. *Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936), perceived affronts

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[9] Many foreign states have statutory provisions embodying a reciprocity principle. See, *e.g.*, Foreign States Immunities Act 1985 s. 42(1) (Australia) ("Where the Minister is satisfied that an immunity or privilege conferred by this Act in relation to a foreign State is not accorded by the law of the foreign State in relation to Australia, the Governor-General may make regulations modifying the operation of this Act with respect to those immunities and privileges in relation to the foreign State."); State Immunity Act, R.S.C. 1985, c. S-18, s. 15 (Canada) (similar); The State Immunity Ordinance, No. 6 of 1981, s. 16 (Pakistan) (similar); State Immunity Act, 1985, s. 17 (Singapore) (similar); State Immunity Act, 1978, c. 33, § 15(1) (Great Britain) (similar).

to foreign states over discovery issues may result over the long term in reduced cooperation in a variety of areas. That is the opposite of what the FSIA was intended to accomplish. See *House Report* 26-27 (expressing intent to "ease the conduct of foreign relations by the United States").

4. Congress should be expected to have spoken clearly if it actually intended to hazard such consequences by authorizing litigants to harness the power of U.S. courts to obtain discovery regarding foreign-state assets that are not subject to execution under the FSIA—including assets outside the United States that may be immune from execution or shielded from discovery, and be subject to specialized judicial proceedings, under the law of the state in which they are located.

It is important to keep in mind the backdrop against which Congress legislated. See *Republic of Arg.* v. *Weltover, Inc.*, 504 U.S. 607, 612-613 (1992); *Isbrandtsen Co., Inc.* v. *Johnson*, 343 U.S. 779, 783 (1952). Congress lifted only partially, and only in specified circumstances, what had previously been absolute immunity from execution against foreign-state property—a regime that necessarily did not contemplate discovery into a foreign state's assets for purposes of execution.[10] When Congress created limited exceptions to that execution immunity with regard to property in the United States, it may well have contemplated that some limited discovery in aid of execution by U.S. courts would be appropriate. Cf. *House Report* 23 (stating in context of discussion of jurisdictional immunity that the FSIA does not expressly "deal with questions of discovery" because "[e]xisting law

[10] We are not aware of any examples of such discovery prior to enactment of the FSIA. None appear in the legislative history of the FSIA, and the court below did not cite any.

appears to be adequate"). But had Congress intended to adopt an unprecedented approach to foreign-asset discovery, moving from no examination whatever to broad compulsory disclosure without regard to whether an asset was subject to execution in the United States, it surely would have said so. See *Gonzales* v. *Oregon*, 546 U.S. 243, 267 (2006); *Church of Scientology* v. *I.R.S.*, 484 U.S. 9, 17 (1987). It is 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 to the dignity of foreign states.

More generally, Congress must be presumed to be aware of "the danger of unwarranted judicial interference in the conduct of foreign policy." *Kiobel* v. *Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1663-1665 (2013). Unfettered judicial inquiry, driven by the interests of private parties, into the details of a foreign state's assets —whatever their nature (*e.g.*, military, law enforcement, and intelligence assets), and wherever they may be located throughout the world—surely would constitute such unwarranted interference, and Congress therefore could be expected to have given some affirmative indication if it wanted to extend the reach of a U.S. court to that unusual extent. See *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957) ("For us to run interference in * * * a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed."); cf., *e.g.*, *Morrison* v. *National Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877-2878 (2010).

Congress gave no such indication in the FSIA. To the contrary, the FSIA is wholly focused on execution taking place inside the United States by U.S. courts. See 28

U.S.C. 1609, 1610. In light of the FSIA's text, history, and context, the only reasonable conclusion is that Congress did not contemplate broad asset discovery without regard to whether execution pursuant to the order of a U.S. court under 28 U.S.C. 1610(c), based on an exception to the general rule of immunity under the FSIA, is available. A district court therefore does not have authority to order such discovery.[11]

C. The Discovery Permitted By The Court Of Appeals Is Inconsistent With These Principles

1. In this case, the district court (sustained by the court of appeals) disregarded the foregoing limitations by failing to require respondent to confine its discovery request to assets that could reasonably be expected to fall within an exception to FSIA execution immunity and be subject to execution in the United States. The district court exceeded its authority by compelling discovery that, in multiple respects, encompasses assets as to which there is no reasonable basis for disclosure.

a. Most centrally, the subpoenas at issue are improper insofar as they are directed to assets located in other countries. The FSIA provides that only foreign-state property that is both situated "in the United States" and "used for a commercial activity in the United States" is subject to execution, and only if certain additional requirements are met. 28 U.S.C. 1610(a). The FSIA therefore does not authorize U.S.

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[11] Even were the question here one of discretion rather than authority, the principles described above should be respected. At the least, as in other analyses under the Federal Rules, see, *e.g.*, *Pimentel*, 553 U.S. at 866-867; *Société Nationale*, 482 U.S. at 542-545, such discretion must be exercised with due regard for comity and the immunity protections afforded by the FSIA.

courts to order execution against sovereign property located outside the United States. See *Autotech Techs. LP* v. *Integral Research & Dev. Corp.*, 499 F.3d 737, 750 (7th Cir. 2007) ("The FSIA did not purport to authorize execution against a foreign sovereign's property * * * wherever that property is located around the world."), cert. denied, 552 U.S. 1231 (2008); cf. *FG Hemisphere Assocs., LLC* v. *Democratic Republic of Congo*, 637 F.3d 373, 379-380 (D.C. Cir. 2011) (identifying "serious[]" concerns raised by extraterritorial asset discovery against foreign sovereigns). Because discovery directed to assets located outside the United States is by definition not confined to aiding the court in exercising the limited execution authority conferred by Sections 1610 and 1611, the district court should not have allowed such discovery.

Respondent has argued (Br. in Opp. 20) that a foreign state's property located outside the United States enjoys no protection (and that a state therefore enjoys no protection from the burdens of discovery concerning that property) because the FSIA's guarantee of immunity applies only to a foreign state's "property *in the United States*." 28 U.S.C. 1609 (emphasis added). But the statute's exclusive focus on property located within the United States simply confirms the fundamental proposition that it would be unthinkable for a U.S. court, acting pursuant to carefully crafted exceptions to immunity under the FSIA, to presume to order the attachment of or execution against property of a foreign sovereign abroad. The FSIA—which establishes the comprehensive and exclusive framework for obtaining and enforcing judgments against a foreign state in U.S. courts, see *Argentine Republic* v. *Amerada Hess Shipping Corp.*,

488 U.S. 428, 434-435 (1989)—authorizes U.S. courts to order execution, and therefore discovery, only with respect to limited categories of foreign-state property that are located in the United States. Broader discovery of extraterritorial foreign-state assets that are not subject to execution under the FSIA would be irreconcilable with the principles of comity and reciprocity embodied in the statute.

A judgment creditor of a foreign sovereign, like a judgment creditor of a private defendant, can attempt to "obtain recognition" of a judgment in another country and call on that country's courts, consistent with that country's laws, to provide assistance in locating and executing against any assets that may be present there. *Autotech*, 499 F.3d at 751. Notably, because other jurisdictions generally allow much more limited discovery than is available in the United States, see *Société Nationale*, 482 U.S. at 546, respondent likely could not obtain the discovery it seeks in the courts of many foreign states. Moreover, the assets in question may be immune from execution or specifically shielded from discovery under the law of the state in which they are located. Respondent's effort to compel the disclosure in the United States of information about a foreign state's worldwide assets would thus circumvent the limitations imposed and protections afforded not only by the FSIA but also by foreign law, thus heightening the possibility of friction between Nations. See *ibid.*; *House Report* 26-27; see also *Peterson*, 627 F.3d at 1127-1128; cf. *Kiobel*, 133 S. Ct. at 1664-1665, 1668-1669.

b. In addition, the subpoenas improperly seek discovery of categories of property that are expressly immune from attachment or execution in the United

States and elsewhere: central bank and military property, diplomatic property, and property belonging to persons or entities other than the judgment debtor.

First, the subpoenas seek information about assets held by Argentina's Central Bank and its Ministry of Defense, see Docket No. 338-1, at 15, 18 (J.A. 63, 73), which are immune from execution under the FSIA. The FSIA provides that "the property * * * of a foreign central bank or monetary authority held for its own account" is absolutely immune from execution except where the central bank's immunity has been "explicitly waived." 28 U.S.C. 1611(b)(1). The FSIA also exempts from execution property that "is, or is intended to be, used in connection with a military activity" where the property is "of a military character" or "is under the control of a military authority or defense agency." 28 U.S.C. 1611(b)(2). Many other countries have adopted similar protections. See, *e.g.*, State Immunity Act, R.S.C. 1985, c. S-18 § 12(3) and (4) (Canada) (immunity for military and central bank property); Israel Foreign States Immunity Law, 5769-2008, §§ 17(d), 18 (same); The State Immunity Ordinance, No. 6 of 1981, s. 15(4) (Pakistan) (immunity for central bank property); State Immunity Act s. 16(4) (Singapore) (same).

Second, the subpoenas encompass diplomatic property, see Docket No. 338-1, at 13-14 (J.A. 57-63), which is categorically immune from execution under both the FSIA and international law. The FSIA specifically carves out "property * * * used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission" from operation of the statute's immovable-property exception to immunity from execution. 28 U.S.C. 1610(a)(4)(B). Additionally,

the Vienna Convention on Diplomatic Relations, to which the United States is a party, mandates that "premises" and "property" of a diplomatic mission "shall be immune from * * * attachment or execution." Vienna Convention on Diplomatic Relations art. 22(3), *done* Apr. 18, 1961, 23 U.S.T. 3227, 3228, 500 U.N.T.S. 95, 108; see *id.* art. 25 (requiring "full facilities for the performance of the functions of the mission"); 28 U.S.C. 1609 (stating that immunity from execution, and any exception thereto, is "[s]ubject to existing international agreements to which the United States is a party"). Courts have applied these provisions in determining that assets used for diplomatic purposes are not subject to execution. See, *e.g.*, *767 Third Ave. Assocs.* v. *Permanent Mission of the Republic of Zaire*, 988 F.2d 295, 298 (2d Cir.), cert. denied, 510 U.S. 819 (1993); *Avelar* v. *J. Cotoia Constr., Inc.*, No. 11-CV-2172, 2011 WL 5245206, at *4 (E.D.N.Y. Nov. 2, 2011) (holding that "[b]ank accounts used by [a] mission for diplomatic purposes" are immune from execution); see also, *e.g.*, Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Sept. 28, 2011 (Fr.), http://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/867_28_21103.html (affirming vacatur of attachments with respect to accounts related to the Argentine Embassy because funds were immune diplomatic property); Brownlie 347 & n.115.[12]

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[12] Central bank, military, and diplomatic property is also recognized as immune from execution under the United Nations Convention on Jurisdictional Immunities of States and Their Property. See G.A. Res. 59/38, art. 21(1)(a), (b), and (c), U.N. Doc. A/RES/59/38 (Dec. 2, 2004). Although the United States is not a party to that Convention and it has not yet entered force, it is the view of the United States that many of the Convention's protections, including these, reflect accepted international principles and practices regarding foreign-state immunity.

Third, the subpoenas are improper insofar as they seek information about the assets of persons and entities not subject to a judgment in respondent's favor, including Argentina's sitting president and independent agencies and instrumentalities. At least, absent a threshold showing that assets held by an individual actually belong to the state, an individual's assets could not be attached to enforce a judgment against a foreign state. And the FSIA—consistent with law in other countries—does "not permit execution against the property of one agency or instrumentality to satisfy a judgment against another," unless the plaintiff overcomes the presumption that separate juridical entities should "be treated as such."[13] *First Nat'l City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 626-628 (1983) (quoting *House Report* 29-30); see *id.* at 626-627 & n.18, 629; see also, *e.g.*, *Hercaire Int'l, Inc.* v. *Argentina*, 821 F.2d 559, 563-565 (11th Cir. 1987); *De Letelier*, 748 F.2d at 799.

Argentina is the sole judgment debtor here. Respondent has not established that any individual from whom it sought discovery is holding Argentina's assets. Nor has it established that any agency or instrumentality from which it sought discovery is "so extensively controlled by its owner" as to create "a relationship of principal and agent," or that it would "work fraud or injustice" to recognize such an entity's separate juridical status. *First Nat'l City Bank*, 462 U.S. at 629; see *id.* at 631-632. Moreover, respondent's requested discovery as to third parties—particularly with respect to a sitting head of state over whom the

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[13] As amended, the FSIA creates an exception to that principle, not relevant here, with respect to certain terrorism-related judgments. See 28 U.S.C. 1605A, 1610(g).

district court lacks jurisdiction—raises extraordinarily sensitive foreign policy concerns.

2. The court of appeals nevertheless allowed the discovery at issue to proceed, concluding that the rules governing discovery in aid of execution in cases involving private parties are fully applicable to a foreign state over which the district court has jurisdiction. The court's reasons do not withstand scrutiny.[14]

As an initial matter, the court of appeals erred in reasoning (Pet. App. 18) that once the district court "had subject matter * * * jurisdiction over Argentina," it could order discovery in aid of execution "as over any other party." That view mistakenly conflates the question of a court's jurisdiction to conduct supplemental enforcement proceedings, see *Kokkonen* v. *Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 379-380 (1994) (recognizing that federal courts generally have "ancillary jurisdiction" to "effectuate [their] decrees"), with the nature and scope of relief that a court is empowered to afford in those proceedings. Congress provided foreign states with an independent entitlement to immunity in connection with litigation to enforce a judgment. See 28 U.S.C. 1609; *Peterson*, 627 F.3d at 1127-1128.

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[14] In opposing certiorari, respondent argued that Argentina "'irrevocably waived'" its immunity, Resp. Supp. Br. in Opp. 11 (quoting Pet. App. 4 n.1), and thereby forfeited its right to object to post-judgment discovery. That issue need not be addressed here, since the court of appeals did not pass on it. In any event, the FSIA makes clear that waiver does not alone suffice to lift immunity from execution; a waiver of such immunity is effective only with respect to property present "in the United States" and "used for a commercial activity." 28 U.S.C. 1610(a)(1); see, *e.g.*, *Connecticut Bank*, 309 F.3d at 247.

That conclusion is not affected by the fact that under Federal Rule of Civil Procedure 69 "broad post-judgment discovery in aid of execution is the norm" in a "run-of-the-mill execution proceeding." Pet. App. 13-15. The FSIA, and the policies of comity and reciprocity that it reflects, provide protections that are not generally applicable in private-party litigation, including protections against subjecting sovereigns to "unwarranted litigation costs and intrusive inquiries." *Rubin*, 637 F.3d at 796-797. And Rule 69 itself provides that "a federal statute" like the FSIA "governs" where "appli[cable]." Fed. R. Civ. P. 69(a)(1); see *Rubin*, 637 F.3d at 794-795.

The court of appeals was also wrong to conclude that "because the district court ordered only discovery, not the attachment of sovereign property, * * * Argentina's sovereign immunity is not affected." Pet. App. 3. That conclusion disregards one of the basic purposes of sovereign immunity: to protect against the burdens of litigation, which include discovery. The court's assessment also disregards the distinct and significant foreign-relations concerns raised by wide-ranging discovery into a foreign state's assets as if the state were a private litigant. Indeed, this Office is informed by the Department of State that the decision below has raised significant concerns in that regard for the United States. The prospect of individual judgment creditors pursuing broad and intrusive inquiries into foreign sovereign financial holdings, potentially disrupting the foreign state's banking relationships, or delving into a head of state's bank accounts in the context of a suit against her government, could create serious impediments to the United States' bilateral relationships and have negative con-

sequences for the treatment of the United States in foreign courts. Cf. *Kiobel*, 133 S. Ct. at 1668-1669 (discussing reciprocity concerns for treatment of U.S. citizens in foreign courts).

Finally, the court of appeals erred in ruling that because the "discovery is directed at third-party banks, Argentina's sovereign immunity" under the FSIA "is not affected."[15] Pet. App. 3; *id.* at 19-20. Section 1609 provides that "the *property* in the United States of a foreign state shall be immune" from attachment and execution, 28 U.S.C. 1609 (emphasis added), and such immunity therefore "inheres in the property itself," *Rubin*, 637 F.3d at 799. Of course, the ultimate ability of a judgment creditor to attach or execute against sovereign property does not vary depending upon the party from whom asset discovery is sought.

Because the discovery at issue here is directed to property owned by or asserted to be owned by the foreign state (even if, as may often be the case, the requested information is in the possession of third parties), the foreign state has a substantial interest in the discovery. The disclosure of potentially sensitive financial information, without regard to whether the assets could be executed upon in the United States, is legitimately of significant concern to a foreign state regardless of who is required to make the disclosure. Third-party discovery requests concerning a foreign

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[15] Although the court of appeals assumed that the subpoenas were directed to non-immune private banks, Pet. App. 19, that court has previously held that BNA is a sovereign instrumentality of Argentina—which would mean that BNA and its property are presumptively immune under the FSIA. See *Seijas* v. *Republic of Arg.*, 502 Fed. Appx. 19, 20-23 (2d Cir. 2012) (unpublished); Pet. Br. 14 n.12.

state's property thus implicate the same comity and reciprocity concerns that are raised by discovery sought directly from the foreign state. Cf. *Société Nationale*, 482 U.S. at 546.[16] Moreover, contrary to the court of appeals' decision (Pet. App. 19-20), discovery requests directed at third parties may burden the foreign state itself, as it may have to participate in litigation over the scope and manner of the discovery, as Argentina has had to do in this case. Cf. *Rubin*, 637 F.3d at 796-797.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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[16] Those concerns are not ameliorated by a confidentiality order or withholding of privileged information. See Pet. App. 19-20. Such measures do not address the fact that any disclosure at all may raise significant comity and reciprocity concerns.

STATUTORY APPENDIX

1. 28 U.S.C. 1602 provides:

Findings and declaration of purpose

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. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

2. 28 U.S.C. 1603 provides:

Definitions.

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332 (c) and (e) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

3. 28 U.S.C. 1604 provides:

Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of

this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

4. 28 U.S.C. 1605 provides:

General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign

state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which

may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: *Provided*, That—

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive know-

ledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action

brought to foreclose a preferred mortgage, as defined in section 31301 of title 46. Such action shall be brought, heard, and determined in accordance with the provisions of chapter 313 of title 46 and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

[(e), (f) Repealed. Pub. L. 110-181, div. A, title X, § 1083(b)(1)(B), Jan. 28, 2008, 122 Stat. 341.]

(g) LIMITATION ON DISCOVERY.—

(1) IN GENERAL.—(A) Subject to paragraph (2), if an action is filed that would otherwise be barred by section 1604, but for subsection 1605A, the court, upon request of the Attorney General, shall stay any request, demand, or order for discovery on the United States that the Attorney General certifies 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, until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere.

(B) A stay under this paragraph shall be in effect during the 12-month period beginning on the date on which the court issues the order to stay discovery. The court shall renew the order to stay discovery for additional 12-month periods upon motion by the United States if the Attorney General certifies that 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.

(2) SUNSET.—(A) Subject to subparagraph (B), no stay shall be granted or continued in effect under paragraph (1) after the date that is 10 years after the date on which the incident that gave rise to the cause of action occurred.

(B) After the period referred to in subparagraph (A), the court, upon request of the Attorney General, may stay any request, demand, or order for discovery on the United States that the court finds a substantial likelihood would—

(i) create a serious threat of death or serious bodily injury to any person;

(ii) adversely affect the ability of the United States to work in cooperation with foreign and international law enforcement agencies in investigating violations of United States law; or

(iii) obstruct the criminal case related to the incident that gave rise to the cause of action or undermine the potential for a conviction in such case.

(3) EVALUATION OF EVIDENCE.—The Court's evaluation of any request for a stay under this subsection filed by the Attorney General shall be conducted ex parte and in camera.

(4) BAR ON MOTIONS TO DISMISS.—A stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules

12(b)(6) and 56 of the Federal Rules of Civil Procedure.

(5) CONSTRUCTION.—Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States.

5. 28 U.S.C. 1605A provides:

Terrorism exception to the jurisdictional immunity of a foreign state

(a) IN GENERAL.—

(1) NO IMMUNITY.—A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

(2) CLAIM HEARD.—The court shall hear a claim under this section if—

(A)(i)(I) the foreign state was designated as a state sponsor of terrorism at the time the act described in paragraph (1) occurred, or was so des-

ignated as a result of such act, and, subject to subclause (II), either remains so designated when the claim is filed under this section or was so designated within the 6-month period before the claim is filed under this section; or

(II) in the case of an action that is refiled under this section by reason of section 1083(c)(2)(A) of the National Defense Authorization Act for Fiscal Year 2008 or is filed under this section by reason of section 1083(c)(3) of that Act, the foreign state was designated as a state sponsor of terrorism when the original action or the related action under section 1605(a)(7) (as in effect before the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) was filed;

(ii) the claimant or the victim was, at the time the act described in paragraph (1) occurred—

(I) a national of the United States;

(II) a member of the armed forces; or

(III) otherwise an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment; and

(iii) in a case in which the act occurred in the foreign state against which the claim has been brought, the claimant has afforded the foreign

state a reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration; or

(B) the act described in paragraph (1) is related to Case Number 1:00CV03110 (EGS) in the United States District Court for the District of Columbia.

(b) LIMITATIONS.—An action may be brought or maintained under this section if the action is commenced, or a related action was commenced under section 1605(a)(7) (before the date of the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) not later than the latter of—

(1) 10 years after April 24, 1996; or

(2) 10 years after the date on which the cause of action arose.

(c) PRIVATE RIGHT OF ACTION.—A foreign state that is or was a state sponsor of terrorism as described in subsection (a)(2)(A)(i), and any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, shall be liable to—

(1) a national of the United States,

(2) a member of the armed forces,

(3) an employee of the Government of the United States, or of an individual performing a contract a-

warded by the United States Government, acting within the scope of the employee's employment, or

(4) the legal representative of a person described in paragraph (1), (2), or (3),

for personal injury or death caused by acts described in subsection (a)(1) of that foreign state, or of an official, employee, or agent of that foreign state, for which the courts of the United States may maintain jurisdiction under this section for money damages. In any such action, damages may include economic damages, solatium, pain and suffering, and punitive damages. In any such action, a foreign state shall be vicariously liable for the acts of its officials, employees, or agents.

(d) ADDITIONAL DAMAGES.—After an action has been brought under subsection (c), actions may also be brought for reasonably foreseeable property loss, whether insured or uninsured, third party liability, and loss claims under life and property insurance policies, by reason of the same acts on which the action under subsection (c) is based.

(e) SPECIAL MASTERS.—

(1) IN GENERAL.—The courts of the United States may appoint special masters to hear damage claims brought under this section.

(2) TRANSFER OF FUNDS.—The Attorney General shall transfer, from funds available for the program under section 1404C of the Victims of Crime Act of 1984 (42 U.S.C. 10603c), to the Administrator of the United States district court in which any case is pending which has been brought or maintained under this

section such funds as may be required to cover the costs of special masters appointed under paragraph (1). Any amount paid in compensation to any such special master shall constitute an item of court costs.

(f) APPEAL.—In an action brought under this section, appeals from orders not conclusively ending the litigation may only be taken pursuant to section 1292(b) of this title.

(g) PROPERTY DISPOSITION.—

(1) IN GENERAL.—In every action filed in a United States district court in which jurisdiction is alleged under this section, the filing of a notice of pending action pursuant to this section, to which is attached a copy of the complaint filed in the action, shall have the effect of establishing a lien of lis pendens upon any real property or tangible personal property that is—

(A) subject to attachment in aid of execution, or execution, under section 1610;

(B) located within that judicial district; and

(C) titled in the name of any defendant, or titled in the name of any entity controlled by any defendant if such notice contains a statement listing such controlled entity.

(2) NOTICE.—A notice of pending action pursuant to this section shall be filed by the clerk of the district court in the same manner as any pending action and shall be indexed by listing as defendants all named defendants and all entities listed as controlled by any defendant.

(3) ENFORCEABILITY.—Liens established by reason of this subsection shall be enforceable as provided in chapter 111 of this title.

(h) DEFINITIONS.—For purposes of this section—

(1) the term "aircraft sabotage" has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation;

(2) the term "hostage taking" has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages;

(3) the term "material support or resources" has the meaning given that term in section 2339A of title 18;

(4) the term "armed forces" has the meaning given that term in section 101 of title 10;

(5) the term "national of the United States" has the meaning given that term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22));

(6) the term "state sponsor of terrorism" means a country the government of which the Secretary of State has determined, for purposes of section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)), section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371), section 40 of the Arms Export Control Act (22 U.S.C. 2780), or any other provision of law, is a government that has repeatedly provided support for acts of international terrorism; and

(7) the terms "torture" and "extrajudicial killing" have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991 (28 U.S.C. 1350 note).

6. 28 U.S.C. 1606 provides:

Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

7. 28 U.S.C. 1607 provides:

Counterclaims

In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim—

(a) for which a foreign state would not be entitled to immunity under section 1605 or 1605A of this chapter had such claim been brought in a separate action against the foreign state; or

(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

8. 28 U.S.C. 1608 provides:

Service; time to answer; default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state,

by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other

agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state—

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made—

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision

thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

9. 28 U.S.C. 1609 provides:

Immunity from attachment and execution of property of a foreign state

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

10. 28 U.S.C. 1610 provides:

Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not

be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property—

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: *Provided*, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment, or

(6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement, or

(7) the judgment relates to a claim for which the foreign state is not immune under section 1605A or section 1605(a)(7) (as such section was in effect on January 27, 2008), regardless of whether the property is or was involved with the act upon which the claim is based.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2), (3), (5), or 1605(b) of this chapter, regardless of whether the property is or was involved in the act upon which the claim is based, or

(3) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605A of this chapter or section 1605(a)(7) of this chapter (as such section was in effect on January 27, 2008), regardless of whether the property is or was involved in the act upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if—

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state and not to obtain jurisdiction.

(e) The vessels of a foreign state shall not be immune from arrest in rem, interlocutory sale, and execution in actions brought to foreclose a preferred mortgage as provided in section 1605(d).

(f)(1)(A) Notwithstanding any other provision of law, including but not limited to section 208(f) of the Foreign Missions Act (22 U.S.C. 4308(f)), and except as provided in subparagraph (B), any property with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the Trading with the Enemy Act (50 U.S.C. App. 5(b)), section 620(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2370(a)), sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701-1702), or any other proclamation, order, regulation, or license issued pursuant thereto, shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state (including any agency or instrumentality or such state) claiming such property is not immune under section 1605(a)(7) (as in effect before the enactment of section 1605A) or section 1605A.

(B) Subparagraph (A) shall not apply if, at the time the property is expropriated or seized foreign state, the property has been held in title by a natural person or, if held in trust, has been held for the benefit of a natural person or persons.

(2)(A) At the request of any party in whose favor a judgment has been issued with respect to a claim for which the foreign state is not immune under section 1605(a)(7) (as in effect before the enactment of section 1605A) or section 1605A, the Secretary of the Treasury

and the Secretary of State should make every effort to fully, promptly, and effectively assist any judgment creditor or any court that has issued any such judgment in identifying, locating, and executing against the property of that foreign state or any agency or instrumentality of such state.

(B) In providing such assistance, the Secretaries—

(i) may provide such information to the court under seal; and

(ii) should make every effort to provide the information in a manner sufficient to allow the court to direct the United States Marshall's office to promptly and effectively execute against that property.

(3) WAIVER.—The President may waive any provision of paragraph (1) in the interest of national security.

(g) PROPERTY IN CERTAIN ACTIONS.—

(1) IN GENERAL.—Subject to paragraph (3), the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of—

(A) the level of economic control over the property by the government of the foreign state;

(B) whether the profits of the property go to that government;

(C) the degree to which officials of that government manage the property or otherwise control its daily affairs;

(D) whether that government is the sole beneficiary in interest of the property; or

(E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

(2) UNITED STATES SOVEREIGN IMMUNITY INAPPLICABLE.—Any property of a foreign state, or agency or instrumentality of a foreign state, to which paragraph (1) applies shall not be immune from attachment in aid of execution, or execution, upon a judgment entered under section 1605A because the property is regulated by the United States Government by reason of action taken against that foreign state under the Trading With the Enemy Act or the International Emergency Economic Powers Act.

(3) THIRD-PARTY JOINT PROPERTY HOLDERS.—Nothing in this subsection shall be construed to supersede the authority of a court to prevent appropriately the impairment of an interest held by a person who is not liable in the action giving rise to a judgment in property subject to attachment in aid of execution, or execution, upon such judgment.

11. 28 U.S.C. 1611 provides:

Certain types of property immune from execution

(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if—

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver; or

(2) the property is, or is intended to be, used in connection with a military activity and

(A) is of a military character, or

(B) is under the control of a military authority or defense agency.

(c) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be im-

mune from attachment and from execution in an action brought under section 302 of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 to the extent that the property is a facility or installation used by an accredited diplomatic mission for official purposes.