No. 12-842

IN THE

Supreme Court of the United States

REPUBLIC OF ARGENTINA,

Petitioner,

v.

NML CAPITAL, LTD.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE HISPANIC AMERICAN CENTER FOR ECOMONIC RESEARCH AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICUS CURIAE* [1]

The Hispanic American Center for Economic Research (HACER) is a 501(c)(3) organization that promotes the values of personal and economic liberty, limited government under the rule of law, and individual responsibility. Lacking traditions that consistently uphold the rule of law, the free society remains a work-in-progress throughout the Spanish-speaking countries of the Western hemisphere.

Given the importance of the Supreme Court case of *Argentina vs. NML Capital* not only for Argentina, but also for the countries in the region which have higher respect for contracts, HACER would like to focus this Court's attention on the importance to other countries of a proper interpretation of the Foreign Sovereign Immunities Act.

SUMMARY OF ARGUMENT

The text of the Foreign Sovereign Immunities Act (FSIA) presumes the availability of post-judgment discovery of Argentina's assets, directed at least to third parties. The text of the FSIA is not as opaque as some believe. Employing a series of traditional, but often ignored, canons of construction demonstrates that the correct interpretation of the FSIA permits the post-judgment discovery order in this case. Traditional statutory interpretation, as applied to the

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[1] No counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Respondent has filed a blanket consent letter with the Clerk's Office. Petitioner's consent letter is being filed with this brief.

Louisiana State University Law Center is not a signatory to this brief and the views expressed here are those of counsel.

FSIA, involves comparing various sections of the Act and viewing their relationships through the lens of several canons.

Argentina's claim that the FSIA does not authorize U.S. courts to order discovery from third parties requests this Court to create common law, rather than to engage in statutory interpretation. Argentina's arguments claiming third-party immunity from discovery as to Argentina's property rest on fallacies that contradict the text. The consequences of Argentina's position would be to cloak private parties with sovereign immunity from responding to legitimate post-judgment discovery requests. Argentina, moreover, signed an explicit waiver of its immunity from post-judgment attachment and execution, another text it wishes to avoid.

ARGUMENT

The text of the Foreign Sovereign Immunities Act (FSIA) presumes the availability of post-judgment discovery of Argentina's assets, directed at least to third parties. Even apart from its explicit waiver, Argentina's claim that the FSIA does not authorize U.S. Courts to order discovery from third parties concerning immune property rests on fallacies that contradict the text. Argentina, however, cannot possibly make any arguments to contradict the text of its explicit waiver of immunity. So Argentina simply refuses to acknowledge the waiver that it cannot dispute.

In pertinent part, the waiver explicitly provides that

> from execution of a judgment or from any other legal or judicial process or remedy, and to the extent that in any such jurisdiction

> there shall be attributed such an immunity, the *Republic has irrevocably agreed not to claim and has irrevocably waived such immunity to the fullest extent permitted* by the laws of such jurisdiction (and consents generally for the purposes of the Foreign Sovereign Immunities Act to the giving of any relief or the issue of any process in connection with any Related Proceeding or Related Judgment), (emphasis added).

J.A. at 106.

Apart from the waiver, the issue of post-judgment discovery should be resolved by interpreting the FSIA according to traditional canons of interpretation. The United States Departments of State and Justice, in an *amicus curiae* brief, have expressed concern about the impact of this Court's decision on other countries and their reciprocal relations with this country. Their brief, however, makes no mention of the fact that most other countries, including Latin American countries, base their laws primarily on statutes. Their judges and lawyers are accustomed to the rules of statutory interpretation, but not to the vagaries of judge-made, common law. Concern, therefore, about the impact of this case abroad should consider the need for an interpretation based on traditional rules of statutory construction.

The failure of judges to apply traditional rules of interpretation to the FSIA has created considerable confusion. This confusion affects important interests in the non-common-law world. In 2010, the General Counsel for the New York Federal Reserve Bank said the following in a lecture to members of the Central Reserve Bank of Peru.

> Making one's way through the FSIA's provisions can be daunting. Judges in the United States have called the FSIA "remarkably obtuse," a "statutory labyrinth," with a "bizarre structure," and "deliberately vague provisions."[2]

We believe that actually the FSIA is a fairly intelligible statute. Applying traditional canons of textual interpretation is what clarifies the statute's meaning. Doing so leaves no room for Petitioner's attempt to create third-party immunity to prevent post-judgment discovery of Argentina's property.

I. The District Court's Discovery Order is Perfectly Consistent with the FSIA.

The words of the FSIA "are of paramount concern and what they convey, in their context, is what the text means." Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012, Thompson/West; St. Paul, Mn,) (Hereinafter "*Reading Law*") at 56. The FSIA makes only one reference to discovery (section 1605(g)) and it concerns pre-trial discovery. The words of the FSIA, "in their context," including its lone reference to discovery, however, leave no doubt that the FSIA permits the post-judgment discovery ordered by the district court.

In explicating the text of the FSIA, we begin with the whole-text canon. *See Reading Law* at 167. While the Second Circuit opinion below, *EM Ltd. v. Republic*

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[2] Thomas C. Baxter Jr., General Counsel and Executive Vice President, Federal Reserve Bank of New York, "Recent Developments in Key Legal Issues of International Reserves Investments", www.newyorkfed.org › ... › Speeches (last visited March 31, 2014).

of Argentina, 695 F. 3d. 201 (2d Cir. 2012), is correct in noting that nothing in the text bars post-judgment discovery of the kind ordered by the district court, *see id*. at 210, reading the text of the FSIA as a whole also provides positive support for that conclusion.

A. The Text of Sections 1610 (Exceptions) and 1603 (Definitions) Presume and Often Necessitate Broad Post-Judgment Discovery.

While "[n]o canon of interpretation is absolute," *Reading Law* at 59, several canons support the conclusion that the FSIA not only presumes, but may require such discovery. The most obviously applicable one is the predicate-act cannon: "Authorization of an act also authorizes a necessary predicate act," *Id*. at 192.

> In the context of legislation, it has long been held that "whenever a power is given by a statute, everything necessary to making it effectual or requisite to attaining the end is implied."
>
> *Id*.at 192-93., quoting James Kent, *Commentaries on American Law* *464 (Charles M. Barnes ed., 13th ed. 1884).

Post-judgment discovery, pursuant to Fed. R. Civ. P. 69(a), is "necessary to making [the FSIA] effectual or requisite to attaining the end [and therefore] is implied."

Although the Second Circuit's opinion in this case did not mention the predicate-act canon, it actually did apply it.

> The district court's power to order discovery to enforce its judgment does not derive from its ultimate ability to attach the property in

> question but from its power to conduct supplementary proceedings, involving persons indisputably within its jurisdiction, to enforce valid judgments. [*First City, Texas-Houston, N.A. v.*] *Rafidain* [*Bank*] II, 281 F. 3d at 53-54; *cf. Riggs v. Johnson Cnty.*, 73 U.S. 166, 187, 6 Wall. 166, 18 L.Ed. 768 (1867) ("*Process subsequent to judgment is as essential to jurisdiction as process antecedent to judgment, else the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution*.")

695 F.3d at 208 (emphasis added).

Section 1610 empowers Respondent NML to attach or execute on assets which fall within its list of exceptions to foreign-state immunity. As previously pointed out, the first of these exceptions covers waivers. Even in the absence of waiver, however, a judgment-creditor would often—if not almost always—need to resort to discovery in order to distinguish assets 1) that do from those that do not fall within the exceptions of 1610 and 2) that fall within subsection (b) from those in subsection (a).

The exceptions listed in (a) of 1610 authorize the judgment-creditor to attach or execute on property only if that property (1) belongs to "a foreign state as defined by section 1603(a);" (2) is "used for a commercial activity in the United States;" and 3) is located "in the United States." The quoted terms of (1) and (2) are defined in section 1603. It is apparent that parts of those definitions will require discovery in certain situations. In particular, the coverage of the term "a foreign state as defined by section 1603(a)" extends beyond what in ordinary usage might be

considered a foreign state. Consequentially, the ordinary-meaning canon does not apply to the term "foreign state." *See Reading Law* at 69. Rather, the interpretive-direction canon applies. *Id*. at 225. That means that "Definition sections and interpretation clauses are to be carefully followed." *Id*.

Carefully following the definition in Section 1603(a) of "foreign state" means focusing on two categories within the definition that are treated differently in the exceptions listed in Section 1610. Section 1603(a) provides that "A 'foreign state'… includes a *political subdivision* of a foreign state or *an agency or instrumentality* of a foreign state as defined in subsection (b), (emphasis added). The words "Agency or instrumentality," but not "political subdivision," are then defined in Subsection (b) of 1603. Subsection (b)(2) also recognizes that a political subdivision of a foreign state may own or control an agency and instrumentality.

In order to avoid confusion, we will refer to the foreign state itself as the sovereign. A sovereign like Argentina and its political subdivisions enjoy greater protection under Section 1610 than do their agencies and instrumentalities. Subsection (a) provides exceptions which apply to the sovereign, its political subdivisions, and their agencies and instrumentalities because all fall within the definition of "foreign state." Subsection (b) of 1610, however, provides additional exceptions applicable only to agencies and instrumentalities. Distinctions between the sovereign or its political subdivisions and their agencies and instrumentalities can be critical to success or not with respect to post-judgment attachment. See, for example, *NML Capital Ltd.. V. Banco Central De La Republica Argentina*, 652 F.3d 172, 180-81 (2d. Cir.

2011) (suggesting that NML missed the opportunity to attach certain of assets by, *inter alia*, failing to argue a principal-agency relationship between the sovereign and the bank.)

Establishing a principal-agency relationship will often require discovery. Without post-judgment discovery, the judgment-creditor may be unable to establish whether property is that of 1) the sovereign or a political subdivision; 2) a corporation that is an agency or instrumentality of the sovereign or a political subdivision; or 3) a corporation that is not an agency or instrumentality of the sovereign. A foreign sovereign, such as Argentina, attempting to hide assets may well use corporations as agents or instrumentalities to move assets around the world. A corporation that arguably acts as an agency or instrumentality of a foreign state will be more vulnerable to having its property seized if it can be proved that it "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." Sec. 1603(b)(2).

A judgment-creditor must be able to direct discovery at least towards those corporations in order to probe the possible existence of a principal-agency relationship. For Argentina, it becomes imperative to frustrate discovery that might clarify the critical statutory distinctions: not only whether property is located "in the United States" and "used for commercial activity in the United States," but also whether certain corporations are agencies or instrumentalities of the sovereign or its subdivisions.

In *De Letelier v. Chile*, 748 F.2d 790, *cert. denied*, 471 U.S. 1125 (1985), the Second Circuit prevented the judgment creditor from executing on property of LAN

Chile Airlines due, *inter alia*, to LAN's separate juridical status from the Republic of Chile. *De Letelier* distinguished this Court's decision in *First National City Bank v Banco Para El Comercio Exterior de Cuba* (*Bancec*), 462 U.S. 611 (1983), which had disregarded separate corporation identities based on "international equitable principles." Nevertheless, *De Letelier* read *Bancec* to say:

> The broader message is that foreign states cannot avoid their obligations by engaging in abuses of corporate form. The *Bancec* Court held that a foreign state instrumentality is answerable just as its sovereign parent would be if the foreign state has abused the corporate form, or where recognizing the instrumentality's separate status works a fraud or an injustice.

748 F. 2d at 794

B. The FSIA's 1996 Amendment Creating Its Lone Limitation to Discovery, Section 1605(g), Implies the Absence of other Limitations on Discovery.

Section 1605(g) suggests the relevance of several canons. The lone limitation on discovery in section 1605(g) permits the US Attorney General to request a stay of pre-trial discovery directed at the U.S. Government when he "certifies [it] 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." The subsection continues by providing a limitation on the length and a possible renewal of the stay. Although the last part of the subsection preserves "privileges ordinarily available to the United States," the FSIA nowhere

allows the United States as broad a limitation on *pre-trial* discovery as Argentina is asserting for *post-judgment discovery*.

Although the negative-implication canon "must be applied with great caution, since its application depends so much on context," *Reading Law* at 107, it seems to apply here. One part of the statute only contains a limitation on discovery. That limitation, subsection (g) of 1605, lies within that part of the statute dealing with jurisdiction. Elsewhere, the FSIA sections on jurisdiction and those on attachment and execution have parallel provisions. Compare 1) sections 1604 and 1609, both using mostly identical language on the principles of immunity; and 2) sections 1605(a)(1)-(3) and 1610(a)(1)-(3) which have similar, but not identical, language on the general exceptions to immunity. No such parallelism exists between the jurisdiction and attachment/execution with regard to discovery.

Also, the related-statutes canon, *see Reading Law* at 252, supports reading these different sections of FSIA "in *pari materia*." The same canon also suggests that the FSIA should not be read to clash with the Federal Rules of Civil Procedure on discovery ("laws dealing with the same subject—being in *pari materia*—(translated as "in a like matter) should if possible be interpreted harmoniously." *Id*.)

Consider also that Section 1605(g) represents an amendment to the FSIA. According to the reenactment canon, "If the legislature amends or reenacts a provision other than by way of a consolidating statute or restyling project, a significant change in language is presumed to entail a change in meaning." *Reading Law*, at 256. No one can doubt that the addition of subsection (g) of 1605 is a significant change. In

context, the amendment adding subsection (g) reflects a concern that without adding this limitation the US Government would be subject to pre-trial discovery under the circumstances listed therein. That implies that the FSIA, prior to the amendment, contained no limitations on even on pre-trial discovery.

II. Argentina's Attempt to Narrow the FSIA Rests on Fallacies that Contradict the Text.

Argentina contends that reading the FSIA as narrowly limiting post-judgment discovery conforms to "established principles of statutory construction." Pet. Br. at 26. In particular, it mentions a canon "that statutes are presumed not to abolish common law principles," *id*. at 33, especially when sovereign immunity is involved. *Id.* at 34. Of course, sovereign immunity has eroded over time. In 1952, the State Department adopted the "restrictive" theory of sovereign immunity. In 1976, with the FSIA, Congress basically codified the "restrictive" theory. *See Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488 (1983). Still, Congress further restricted the immunity. "Even after 1952, however, the 'property of foreign states' continued to be 'absolutely immune from execution to satisfy a judgment.'" Br. U.S. at 2-3. Then the FSIA removed the immunity for certain, foreign-state property, as discussed above. Moreover, the FSIA displaced the common law on sovereign immunity, providing in Section 1602 that "[c]laims for foreign states to immunity should henceforth be decided … in conformity with the principles set forth in this chapter." Like many advocates, however, Argentina's brief urges this Court to engage in common-law judging to limit the text of the FSIA in an attempt to avoid the statute's "fair meaning." *See*

Reading Law at 3 ("In an age when democratically prescribed texts (such as statutes, ordinance, and regulations) are the rule, the judge's principal function is to give those texts their fair meaning.")

Argentina also attempts to limit the effect of the text in Section 1606 on "Extent of Liability" ("the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances"), saying it refers only to a finding of liability and not to execution on the judgment. As noted above, during the period 1952 to 1976 sovereign property was still absolutely immune despite adoption of the restrictive theory. Whether or not Section 1606 applies to attachment, it certainly does nothing to limit attachment or execution. The immunity and exceptions applicable to attachment and execution on a judgment are stated later, in Sections 1609, 1610, and 1611. In those sections, nothing in the text supports Argentina's claim to blanket immunity from discovery that might involve immune assets, which immunity claims not only for itself, but for third parties.

These and other dimensions of Argentina's mis-interpretation of the FSIA rest on two main two points: 1) that the FSIA carves out only a narrow exception as to property that is subject to attachment and execution ("Congress authorized enforcement proceedings only to the extent they directed to that narrow category of sovereign property." Pet. Br. at 22); and 2) that post-judgment discovery is basically limited to that narrow category of property (the discovery order covers "property that falls far outside the narrow exception to immunity." *Id.*). Argentina posits, therefrom, "assets that are *indisputably immune*" (emphasis added) not only from attachment

and execution, but from post judgment discovery. *Id*. at 25.

A. If there is a category of "sovereign assets that are indisputably immune" from post-judgment discovery it is not property outside the United States, but Diplomatic Property Inside the United States.

1. Argentina introduces into the heading, ARGUMENT, a novel category of assets that it labels "indisputably immune" from court-ordered, post-judgment discovery. ("The FSIA does not permit … discovery concerning sovereign assets that are *indisputably immune*…" Pet. Br. at 25 (emphasis added).). Creation of the term "indisputably immune" imposes on the text a concept not grounded therein. As discussed below, the FSIA's recognition of immunity from attachment and execution assets is properly divided between "presumptive" and "absolute" immunity. Even absolutely immune property is not absolutely immune or "indisputably immune" from discovery. Argentina, however, attempts to extend the immunity of the assets from attachment and execution to immunity from discovery.

The only category of property that could be labelled "indisputably immune" is diplomatic property. Diplomatic property consists of the buildings and properties of Argentina's missions in other countries, i.e., embassies and consulates. Although such properties are not foreign sovereign territory, embassies and consulates nevertheless represent the functional and symbolic core of a foreign country's sovereign mission to the United States. As a matter of age-old custom

and modern treaty, based on the principle of reciprocity, foreign-mission property enjoys not only immunity from attachment or execution, but complete "inviolability."

The FSIA incorporates and respects these principles of diplomatic law. In particular, the FSIA is perfectly consistent with Article 22 of the Vienna Convention on Diplomatic Relations.[3] That is to say, Article 22 confirms that foreign mission property is "inviolable." Moreover, Article 22 also explicitly preserves the immunity of foreign-mission property from attachment or execution.

Diplomatic property would appear to be the only category of assets that could properly be called "indisputably immune." As discussed in the next two parts, non-diplomatic property may be absolutely immune under Section 1611 or presumptively immune under Section 1610, but not "indisputably immune from discovery," which will often be required to determine whether the property is in fact immune. Such property, which ultimately may be shown to be

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[3] Article 22, The Vienna Convention on Diplomatic Relations.

1. The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.

2. The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.

3. The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.

immune, cannot be considered—certainly prior to discovery—"indisputably immune."

B. Property Outside the United States is not "indisputably Immune" from Post-Judgment Discovery.

Argentina's primary aim is to prevent discovery of assets held outside the United States. Argentina argues that because such assets are immune from attachment, they must also be immune from discovery. This derivative immunity has no basis in the text. In the exceptions in Section 1610(a) and (b), the property to be attached or executed upon must be "in the United States." Of course, as the Second Circuit opinion in this case recognized, a district court simply has neither the jurisdiction to issue an attachment order, nor the power to enforce one outside the United States. See 695 F.3d at 208 ("a district court sitting in Manhattan does not have the power to attach Argentinian property in foreign countries."). The district court, however, does have the "power to conduct supplementary proceedings, involving persons indisputably within its jurisdiction, to enforce valid judgments." *Id*. Thus, the Extraterritorial canon, see *Reading Law* at 268, which Argentina invokes, Pet. Br. at 37, simply does not apply.

Property outside the United States may be immune only due to its location at the moment. Once inside the United States, the same property would be subject to attachment and execution if "the property is or was used for the commercial activity upon which the claim is based." Section 1610(a)(2). Argentina proposes a reading of the FSIA which would allow it to conceal any assets that are easily moveable in and out of the United States.

1. Property listed in Section 1611, although absolutely immune from attachment, is not absolutely immune from discovery, at least through third parties.

a. Military Property. The first and third subsections of 1611 apparently do not apply.[4] Argentina, however, contends at several points that discovery about military property is barred because 1611(b) provides for its absolute immunity, Pet. Br, at 25, 28, 40, and 50. 1611(b)(2) does recognize immunity for property which "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 military equipment and that immunity is not subject to any exceptions.

The military equipment broadly defined in 1611(b)(2) is comparable to the diplomatic immunity described above. Like diplomatic property, military property represents the core of a foreign state's sovereignty. Nevertheless, that immunity 1) does not resolve factual matters as to when particular property actually becomes the military property protected by 1611(b)(2) and 2) does not mean that discovery cannot be addressed to third parties.

This Court's unanimous opinion in *Argentina v. Weltover*, 504 U.S. 607 (1992), which distinguishes between sovereign and commercial activity, notes that "a contract to buy army boots or even bullets is a 'commercial' activity, because private companies can similarly use sales contracts." *Id*. at 614-15. In

[4] Organizations covered by the International Organizations Immunities enjoy absolute immunity. Section 1611(a). Absolute immunity under subsection (c), an action under one particular statute, is also inapplicable.

practice, distinguishing the point when contracted-for army boots or bullets become property of a foreign state for purposes of 1611(b)(2) will require discovery at least from one or more third parties.

Suppose a foreign state contracts to purchase army boots and bullets from a supplier in the United States. Further suppose that the contract requires a down payment. It is unlikely that, under the contract, ownership of the property will transfer to the foreign state until full payment for, or delivery of, the property is made. If the supplier still owns the property, the judgment-creditor should be able to execute on the down payment. If the foreign state has cleverly provided in the contract that title passes immediately upon the supplier's receipt of the down-payment, then the judgment-creditor cannot execute on this property. A judgment-creditor needs to know whether a down payment has been made and whether a transfer of ownership under the contract has occurred. The judgment-creditor cannot know these things without knowing what the contract provides and what payments have been made. Such knowledge is virtually unattainable without discovery, at least from third parties.

Argentina treats discovery directed at third parties as indistinguishable from discovery from itself. Argentina argues that either is equally insulting to its sovereignty. This Court need not resolve whether it is ever permissible for a judgment-creditor to obtain discovery from the foreign state regarding the status of property ordered for the military, whether merely contracted for, or actually acquired. Discovery from third parties such as suppliers and banks regarding the status of contracted-for military property, however, actually avoids a potential affront to a foreign

state's sovereignty. If federal discovery from third-parties is not available, the judgment-creditor, where allowed by state law, would be well advised simply to execute on the property while in the possession of the supplier. If the property happens to be owned by the foreign state, the foreign state itself will likely have to contest the seizure, just as Argentina is contesting the discovery order below directed at third parties. The sovereign may well have to produce the information demonstrating its ownership that otherwise would have been gained from third-party discovery.

b. Central Bank Funds. Unlike property owned by a foreign state's military, central bank funds are not always immune and, even if immune, may not be immune from discovery directed not only to third parties, but to the bank itself.

Under 1611, central bank funds must be "held for its own account" in order to be absolutely immune. A central bank may well claim that assets are immune, but the matter may be in doubt. The doubt may present legal or factual issues. NML lost in the Second Circuit on two legal issues as to immunity of Argentine reserves held at the New York Federal Reserve bank. *NML Capital Ltd. V. Banco Cent. De la Republica Argentiana*, 652 F.3d 172 (2d Cir. 2011), *cert. denied*, 133 S. Ct. 23 (2012). The Second Circuit held that 1) that immunity under 1611(b)(1) does not require a central bank be independent from the parent state, *id*. at 190 and 2) that funds "held in an account in the name of a central bank. . . are *presumed* to be immune from attachment." *Id.* at 194 (emphasis added.)

The test adopted under the second holding of the case anticipates the necessity, at times, for discovery when a judgment-creditor seeks to overcome the presumption of immunity. After adopting the particular

test in its holding, the court continued: "A plaintiff, however, can rebut that presumption by *demonstrating with specificity* that the funds are not being used for central banking functions as such functions are normally understood, regardless of their 'commercial nature.'" *Id*. (emphasis added; footnote omitted). Such specificity necessarily requires detailed information about how the central bank is using certain funds. That information could only be obtained through discovery, most likely addressed to the central bank itself.

2. If property that is absolutely immune is not "indisputably immune" from discovery, property that has only "presumptive immunity" cannot be "indisputably immune" from discovery. Although the FSIA does not use the term "presumpive immunity," courts have done so. *See e.g*., *Rubin v. Islamic Rep. of Iran*, 637 F.3d.783, 795 (7th Cir. 2011), *cert. denied*, 133 S. Ct. 23 (2012). The term captures the relationship established between the immunity provisions, 1604 (jurisdiction) and 1609 (attachment and execution of property) and their respective exception sections which follow (1605 and 1610). The immunity of Sections 1604 and 1609 is only presumptive because a creditor may be able to overcome the presumption by establishing its entitlement to one or more of the exceptions provided. It is axiomatic, therefore, that any property that may only be "presumptively immune" cannot possibly be "indisputably immune."

The premise for Argentina's claim against post-judgment discovery directed to third parties is the false notion that presumptive immunity is stronger for attachment or execution of property than for jurisdiction. Argentina relies on *Rubin*, 637 F.3d 783,

which reaffirms Seventh Circuit precedent that "the exceptions to Sec.1609 immunity are drawn more narrowly than the exceptions to Sec. 1604 jurisdictional immunity." 637 F.3d at 797. That statement rests on extended dicta in *Autotech Techs. L.P. v. Integral Research and Dev. Corp*., 499 F.3d 737 749-51 (7th Cir. 2007), *cert. denied*, 532 U.S. 1231 (2008). ("Although lack of proper notice is enough to dispose of the present appeal, we deem it useful to address Integral's alternative arguments" at 749.) The erroneousness of *Autotech*'s reasoning for narrowing the text is exemplified by the unreality of the following statement characterizing as a "limitation" on attachment and execution the fact that it extends only to property located in the United States.

> The FSIA did not purport to authorize execution against a foreign sovereign's property, or that of its instrumentality, wherever that property is located around the world. We would need some hint from Congress before we felt justified in adopting such a *breathtaking* assertion of extraterritorial jurisdiction.
>
> 499 F.2d at 750 (emphasis added).

Suppose Congress (without or over a veto from the President) was to exhibit such ignorance that it authorized attachment outside of the United States, just how would that work? This situation would differ from providing mutual recognition of judgments between or among different countries. Any attempt to enforce that kind of extraterritoriality would be more than "breathtaking." It would be impossible—unless the US is prepared to send US Marshalls or the military abroad to enforce an attachment. Thus, the "failure" of Congress to authorize the impossible does

not mean that it has "narrowly" drawn the exceptions to immunity from attachment and execution.

Nevertheless, Argentina's entire argument rests on this erroneous premise, unsupported by the text, that the exemptions from attachment and execution must be viewed more narrowly than the exceptions to jurisdiction. See Pet. Br. at 31 ("The scope of immunity from attachment or execution is drastically narrower than the scope of immunity from suit.") From that premise, Argentina contends that the scope of discovery must be conducted "at least with the same circumspection that applies to the jurisdictional immunity." *Id*. Although *Rubin* supports this argument, *Rubin* recognizes, but dismisses the fact, that it and other cases dealing with post-judgment discovery have taken language from a Fifth Circuit case, *Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528 (5th Cir. 1992), dealing only with jurisdictional discovery. 637 F. 3d at 795.

The Second Circuit opinion, however, agreed with the Seventh and other circuits on jurisdictional discovery, namely that before subject matter jurisdiction has been established discovery must be circumspect because the issue of immunity and discovery are intertwined. ("Because sovereign immunity protects a sovereign from the expense, intrusiveness, and hassle of litigation, a court must be 'circumspect' in allowing discovery before the plaintiff has established that the court has jurisdiction over the foreign sovereign defendant under the FSIA," citing *First City, Texas-Houston, N.A. v. Rafidian Bank*, 150 F.3d 172, 176-77 (2d Cir. 1998). The Second Circuit opinion in this case, however, then correctly distinguished post-judgment discovery, stating that as to "discovery from a defendant over which the district

court indisputably had jurisdiction, [the same] concerns voiced in *Rafidian I* are not present and our precedents relating to jurisdictional discovery are inapplicable." *Id.*

III. While Positing Derivative Immunity from Post Judgment Discovery for Third Parties, Argentina Ignores its own Broad Waiver of Immunity from Attachment and Execution.

A. Argentina Attempts to Bar Discovery from All Third Parties.

While sovereign immunity has clearly been restricted since 1952, Argentina is attempting to extend sovereign immunity to private parties. First, Argentina's primary authority for its position, the Seventh Circuit opinion in *Rubin*, does not even involve third-party discovery. Argentina, moreover, does not limit its immunity from post-judgment discovery to corporations that are agencies or instrumentalities of Argentina, which at least would correspond to the definition of "a foreign state." The contradiction in Argentina's position as to third parties is that it would extend a sovereign's immunity from post-judgment discovery to entities whose property is immune from attachment precisely because they are not agencies or instrumentalities of the sovereign.

Consider the consequences of Argentina's argument in light of *De Letelier*, discussed above, where the judgment-creditor could not seize the LAN aircraft because the airline corporation was a "separate juridical person." The Seventh Circuit's test in *Rubin* would apparently permit post-judgment discovery directed at other foreign airlines that appear to be "national airlines" in order to determine whether the

airline owning the aircraft is actually operating as a separate juridical person. Under the test in *Rubin*, an aircraft is "specific property that is subject to attachment and [the judgment creditor could] plausibly allege that an exception to Sec. 1609 attachment immunity applies." 637 F.3d at 799. On the other hand, under the *Rubin* test, discovery directed to the airline could not ask about cargo carried in the aircraft unless the judgment-creditor is able to identify specific property that plausibly falls within an exception.

Suppose a an airline that was formerly a "national airline" has been separately incorporated and operated it in such a way that it is not an agency or instrumentality of "a foreign state." Suppose also that the sovereign has a policy of shipping whatever property it sends abroad as cargo only on what formerly was the "national airline." Under the *Rubin* test, even though it is clear that the airline's aircraft regularly carry property of the sovereign, a judgment-creditor cannot ask the airline to identify property owned by the sovereign, its political subdivisions, and its agencies and instrumentalities. If this Court adopts the *Rubin* test, as urged by Argentina, the sovereign would be able both 1) to insulate the aircraft from attachment through separate incorporation for the airline, which is not property of a "foreign state;" and 2) cover the private airline with sovereign immunity from post-judgment discovery.

The absurdity of Argentina's argument should be patent in this aircraft example. Cloaking private commercial aircraft with sovereign immunity from post-judgment discovery would allow the sovereign to fly property of a sovereign-debtor used in commercial activity into the United States with no questions

asked. That amounts to turning a private aircraft into a gigantic "diplomatic pouch."[5]

B. Argentina Ignores Its Explicit Waiver of Immunity from Attachment and Execution.

In order to obtain badly needed financing, Argentina signed a Fiscal Agency Agreement explicitly agreeing to a very broad waiver of its immunity from attachment and execution.

> the Republic has irrevocably agreed not to claim and has irrevocably waived such immunity to the fullest extent permitted by the laws of such jurisdiction (and consents generally for the purposes of the Foreign Sovereign Immunities Act to the giving of any relief or the issue of any process in connection with any Related Proceeding or Related Judgment).

J.A. 106-107.

This waiver language in the Fiscal Agency Agreement in this case is the same as that at issue in in *NML Capital Ltd. v. Banco Central De La Republica*

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[5] See the definition and explanation provided on the website of the U.S. State Department. www.state.gov/ofm/.../c37011.htm (quoted in the pertinent part, last consulted March 27, 2014)

Diplomatic Pouch Defined

A diplomatic pouch (or "bag") is any properly identified and sealed package, pouch, envelope, bag, or other container that is used to transport official correspondence, documents, and other articles intended for official use, between:

> Embassies, legations, consular posts, and the foreign office of any government;
>
> . . . .
>
> . . . .

Inviolability of Diplomatic Pouches.

Argentina, 652 F.3d 172 (2d. Cir. 2011), *cert. denied* 133 S. Ct. 23 (2012). Indeed, this waiver language is also the same or similar as in other loan documents. *See id*. at 22. This language, as *Banco Central* states, explicitly waived Argentina's immunity from attachment, although not that of the bank.

> Here, *while the Republic waived immunity under the FSIA for "the Republic or any of its revenues, assets or property*," the Republic's waiver did not mention the "instrumentalities" of the Republic or BCRA [Banco Central De La Republica Argentina] in particular, much less BCRA's reserves at FRBNY [the Federal Reserve Bank of New York]. As we previously observed, "although the Republic's waiver of immunity from attachment is worded broadly, it does not appear to clearly and unambiguously waive BCRA's immunity from attachment, as it must do in order to be effective." EMI 473 F.3d at 485 n. 22.

652 F.3d at 196. (Emphasis added.)

BCRA escaped attachment because the waiver as to it was not "explicit." Section 1611 provides greater protection to a sovereign debtor's assets than does Section 1610. That is to say, 1611(b)(1) requires that property of a foreign central bank or monetary authority held for its own account is immune unless "explicitly waived." 1611(b)(2) makes no provision for waiver of military property. On the other hand, as to property covered by Section 1610, i.e., "property in the United States of a foreign state" and "used for a commercial activity in the United States," a waiver of immunity from attachment or execution may be accomplished "either explicitly or by implication."

After *Banco Central*, which Argentina won, it cannot possibly deny that it has explicitly waived immunity from attachment and execution on the property covered by the waiver. The appellate opinion below cites and quotes the waiver as to jurisdiction and attachment. 695 F.3d at 203 and note 1. A footnote in Argentina's brief[6] contends that NML has failed to

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[6] Pet. Br. At 19, n.15.

> Although NML never raised the argument in the district court, and therefore forfeited it, NML argued to the Second Circuit that the Republic had purportedly waived its immunity from post-judgment discovery in the Fiscal Agency Agreement governing the bonds. The Second Circuit properly did not discuss this point. *See Allianz Ins. Co. v. Lerner*, 416 F.3d 109, 114 (2d Cir. 2005) ("[I]t is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal." (internal quotation marks omitted)). In any event, like every other court to consider the issue, the Second Circuit had previously held that even with a waiver of immunity, a court's power is still limited to what the FSIA permits. *EM Ltd. v. Republic of Argentina*, 473 F.3d. 463, 481 n.19 (2d Cir. 2007) (Republic's waiver extends "only to the 'extent permitted under the laws of the jurisdiction.' . . . Under the laws of this jurisdiction, courts may grant the remedies of attachment, arrest and execution against a foreign state's property only if the property is eligible for attachment under a specific provision of the FSIA.") (citing *Conn. Bank of Commerce v. Republic of Congo*, 309 F.2d 240, 247 (5th Cir. 2002) ("[I]f a foreign sovereign waives its immunity from execution, U.S. courts may execute against property in the United States . . . used for a commercial activity in the United States . . . . Even when a foreign state completely waives its immunity from execution, courts in the U.S. may execute only against property that meets these two statutory criteria." (internal quotation marks omitted)); *Aurelius Capital Partners, LP v. Republic of Argentina*, 584 F.3d 120, 129-30 (2d Cir. 2009) (same). This uniform reading is compelled by the plain text of FSIA Section

raise, i.e., has waived, the issue. Other than the footnote, Argentina's brief on the merits completely ignores the issue. After having failed to honor so many of its own very explicit waivers, Argentina may realize that it would be just too unseemly to argue an implied waiver by NML as a way to avoid yet another of its own very explicit waivers.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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1610(a), which provides that "[t]he property in the United States of a foreign state . . . used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution . . . *if*—(1) the foreign state has waived its immunity from attachment in aid of execution or from execution." Stat. App. 13a–14a (emphasis added). A waiver of immunity accordingly opens the door to the limited universe of property defined in the preceding text of Section 1610(a); it does not expand that universe.