No. 12-842

In the Supreme Court of the United States

REPUBLIC OF ARGENTINA, PETITIONER

v.

NML CAPITAL, LTD.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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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) (Supp. V 2011). 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 brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted.

STATEMENT

1. The United States has long recognized that foreign sovereigns are generally immune from suit in our courts. See *The Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch) 116, 137 (1812). For much of the Nation's history, the Executive Branch—to which this Court deferred—applied a theory of absolute immunity, under which foreign states could not be subject to suit without their consent, and foreign sovereign property was shielded from judicial seizure. 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); *The Schooner Exchange*, 11 U.S. (7 Cranch) at 144.

In 1952, the Department of State adopted the "restrictive" theory of foreign sovereign immunity, under which foreign states would be granted immunity from suit for their sovereign acts but not their commercial acts. *Permanent Mission of India*, 551 U.S. at 199; *Verlinden*, 461 U.S. at 487. Even after 1952, however, the "property of foreign states [continued to be] absolutely immune from execution" to satisfy judgments against the state. H.R. Rep. No. 1487, 94th Cong., 2d Sess. 27 (1976) (*House Report*).

In 1976, Congress enacted the Foreign Sovereign Immunities Act (FSIA). 28 U.S.C. 1330, 1602 *et seq.* The FSIA establishes that foreign states are immune from the jurisdiction of a United States court, except in specifically enumerated circumstances. See 28 U.S.C. 1604, 1605, 1605A, 1607 (2006 & Supp. V 2011); see also *House Report* 14. Section 1609 of the FSIA further establishes a general rule that foreign state property in the United States is immune from attachment or execution. Section 1610(a) then sets forth limited exceptions to the rule of immunity provided in Section 1609, under which property owned by a foreign state in the United States "shall not be immune" from execution if it is "used for a commercial activity in the United States" and certain enumerated conditions are satisfied.

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

tral 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 any payments on the defaulted bonds. *Ibid.* Instead, Argentina restructured approximately 92% of its debt by launching global exchange offers in 2005 and 2010, pursuant to which creditors holding the defaulted bonds could exchange them for new securities with modified terms that substantially reduced the value of the securities. *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. In an agreement governing the debt instruments when they were first issued, Argentina had waived its sovereign immunity from suit as to any claims arising from those instruments. Pet. App. 4 & n.1; see 28 U.S.C. 1605(a)(1). Respondent, along with other bondholders, filed multiple actions seeking repayment of the original debt obligations in the United States District Court for the Southern District of New York. Respondent subsequently obtained judgments against Argentina in the combined amount of approximately $1.6 billion, and the district court 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 has enjoined Argentina from making payments on the restructured bond debt unless it simultaneously makes payments on the original bond debt held by respondent and others. Rejecting the United States' arguments as amicus curiae that the injunctions were inconsistent with the FSIA and the well-established understanding of the *pari passu* clauses that appeared in the bonds, and that the injunctions could disrupt

3. a. Because Argentina has not satisfied the judgments against it, respondent has "attempted to execute 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," *id.* at 5 (citation omitted), respondent served document subpoenas on two non-party banks, Bank of America and Banco de la Nación Argentina (BNA). 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 accounts maintained anywhere in the world, as well as transaction histories and records of electronic funds transfers, by or on behalf of Argentina, its agencies, instrumentalities, political subdivisions, employees, and specifically identified individuals. *Id.* at 5-6; see 03-cv-8845 Docket entry

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the orderly resolution of sovereign debt crises, the Second Circuit affirmed the injunctions, but remanded for clarification as to their operation. 699 F.3d 246 (2012). This Court recently denied Argentina's petition for a writ of certiorari to review the Second Circuit's interlocutory decision. See No. 12-1494, 2013 WL 3211846 (Oct. 7, 2013). The Second Circuit subsequently entered a final decision affirming the injunctions. 727 F.3d 230 (2013). The court of appeals recently denied Argentina's petition for rehearing. See 12-105 Docket entry No. 1038 (2d Cir. Nov. 19, 2013).

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

No. (Docket No.) 338-1, at 12-17 (S.D.N.Y. Aug. 9, 2010); *id*. No. 366-1 (Nov. 1, 2010).

b. The district court approved the subpoenas in principle, and granted respondent's motions to compel the banks' compliance with the requested discovery. Although Argentina contended that the subpoenas were inconsistent with the FSIA's grant of presumptive immunity from execution, the district court concluded that discovery into the worldwide assets of Argentina and related persons and entities was appropriate. Pet. App. 43-44. The court reasoned that "the Republic, through various entities, c[ould] 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 further 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; Docket No. 457, at 7 (Mar. 26, 2012).

4. Argentina appealed the discovery order. The court of appeals affirmed.[3] Pet. App. 1-20.

The court of appeals first held that post-judgment discovery into a foreign state's property does not implicate immunity from attachment under the FSIA. The court reasoned that compelling discovery concerning Argentina's worldwide assets does not implicate the sovereign immunity that inheres in those assets because requiring disclosure does not in itself "allow [respondent] to attach Argentina's property." Pet. App. 15. The court also explained that Argentina was subject to the district court's jurisdiction for

[3] The court of appeals concluded that the district court's order was appealable under the collateral order doctrine. Pet. App. 9-12.

purposes of determining liability, see 28 U.S.C. 1605(a)(1), and that "[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." Pet. App. 18. Thus, the court reasoned, the district court need not tailor discovery to balance the need for discovery against Argentina's claim to immunity. *Id.* at 19. The court of appeals acknowledged that its conclusion conflicted with *Rubin* v. *Islamic Republic of Iran*, 637 F.3d 783 (2011), cert. denied, 133 S. Ct. 23 (2012), in which the Seventh Circuit held that discovery in aid of execution of a judgment against a foreign sovereign must be "ordered circumspectly and only to verify allegations of specific facts crucial to an immunity determination." *Id.* at 796 (citation omitted).

The court of appeals then stated that a "second principal reason for holding that the discovery order does not infringe on Argentina's sovereign immunity" is that the subpoenas were directed at "commercial banks that have no claim to sovereign immunity." Pet. App. 19. In the court's view, "the banks' compliance with [the] subpoenas will cause Argentina no burden and no expense," *ibid.*, and as a result, "Argentina's sovereign immunity is not affected," *id.* at 3.

5. The court of appeals denied rehearing. Pet. App. 87-88.

DISCUSSION

Departing from the decisions of other courts of appeals, the Second Circuit erroneously permitted blanket discovery into a foreign state's assets located outside the United States, even though the property could not be attached or executed upon by the district court or any United States court. The court of ap-

peals also erred in holding that the fact that the discovery was directed to third parties eliminated any sovereign-immunity concerns. Those issues are important and recurring, and the court of appeals' decision raises significant foreign-policy concerns for the United States. The petition for a writ of certiorari should be granted.

I. THE COURT OF APPEALS BROADLY HELD THAT THE FSIA DOES NOT CONSTRAIN GENERAL DISCOVERY INTO A FOREIGN STATE'S ASSETS

The court of appeals held that the sovereign-immunity principles embodied in the FSIA's execution provisions do not constrain the district court's authority to order broad post-judgment discovery into sovereign assets that are not subject to attachment under the FSIA. In the court of appeals' view, "[w]hether a particular sovereign asset is immune from attachment must be determined separately under the FSIA, but this determination does not affect discovery," Pet. App. 16, and the district court "could exercise its judicial power over Argentina as over any other party, including ordering third-party compliance with the disclosure requirements." *Id.* at 18.

As a result of the decision below, then, the governing rule in the Second Circuit is that a district court may order 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 immune from attachment by a United States court under the FSIA. Indeed, district courts have already relied on the decision below in ordering general asset discovery against a foreign state itself. See *Thai Lao Lignite (Thai.) Co.* v. *Government of Lao People's Democratic Repub-*

lic, 924 F. Supp. 2d 508, 519 (S.D.N.Y. 2013) (citing Second Circuit decision in holding that "discovery may proceed as broadly as it would in a typical post judgment context without regard to immunity issues"); see also *Servaas Inc.* v. *Republic of Iraq*, No. 09-cv-1862, 2013 WL 3146787, at *5 (S.D.N.Y. June 19, 2013) (same); *Aurelius Capital Partners* v. *Republic of Arg.*, No. 07-cv-2715, 2013 WL 857730, at *3 (S.D.N.Y. Mar. 7, 2013) (ordering extraterritorial asset discovery against Argentina itself and rejecting assertion that "the FSIA limits the scope of execution-related discovery to assets located in the United States").

II. THE COURT OF APPEALS' DECISION IS INCORRECT

A. Courts Must Exercise Their Authority To Order Discovery Concerning A Foreign State's Assets Consistent With The FSIA's Presumptive Immunity From Execution And The Comity And Reciprocity Concerns Embodied In The Statute

1. The FSIA codifies, with some modifications, long-recognized foreign sovereign-immunity principles by establishing two general rules of immunity. First, a foreign state is immune from the jurisdiction of the court unless an enumerated exception to immunity applies. See 28 U.S.C. 1604, 1605, 1605A, 1607 (2006 & Supp. V 2011). Second, the property of a foreign state is immune from attachment and execution unless an exception to that immunity applies. 28 U.S.C. 1609-1611 (2006 & Supp. V 2011).

Consistent with pre-FSIA practice, under which foreign state property was absolutely immune from execution even if the sovereign had been held to be subject to suit, the exceptions to attachment immunity are narrower than, and independent of, the exceptions

to jurisdictional immunity. *Rubin* v. *Islamic Republic of Iran*, 637 F.3d 783, 796 (7th Cir. 2011), cert. denied, 133 S. Ct. 23 (2012); see *Peterson* v. *Islamic Republic of Iran*, 627 F.3d 1117, 1128 (9th Cir. 2010). Even when the foreign state has been held subject to the court's jurisdiction under Sections 1605 through 1607, the "property in the United States of a foreign state," 28 U.S.C. 1609, is immune unless it is "used for a commercial activity in the United States" and certain other conditions are satisfied, 28 U.S.C. 1610(a) (Supp. V 2011). See *Walters* v. *Industrial & Commercial Bank of China, Ltd.*, 651 F.3d 280, 289 (2d Cir. 2011).

Because the FSIA expressly provides that a foreign state's property is immune under Section 1609 absent an applicable exception, see *Peterson*, 627 F.3d at 1127-1128, a judgment creditor seeking to enforce a judgment against the property of a foreign sovereign bears the burden of identifying the property to be executed upon and proving that it falls within an 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. *Congo,* 395 F.3d 229, 233 (5th Cir. 2004), cert. denied, 544 U.S. 975 (2005).

2. When the availability of an asset for execution turns on factual issues, a judgment creditor may seek discovery to develop facts establishing that the property is subject to execution under the FSIA. Although the FSIA does not expressly address the permissible scope of discovery under these circumstances, see *House Report* 23, a district court ordering discovery should not proceed as though only private interests were implicated, but should instead tailor discovery in a manner that respects the general rule of immunity Congress established in Section 1609.

The presumptive immunity in the FSIA protects foreign sovereigns not only from liability or seizure of their property, but also from "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); *Rubin*, 637 F.3d at 796-797; *Peterson*, 67 F.3d at 1127 (similar). To permit burdensome and intrusive discovery into the property of a foreign state, without regard to whether that property could be subject to execution under the FSIA, would be inconsistent with both the FSIA's protections and the comity principles the statute implements. See *Rubin*, 637 F.3d at 795-797. The court of appeals was therefore 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.

The court of appeals made a similar error 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." The FSIA unambiguously provides that even when a foreign state is subject to suit, its property remains immune from attachment or execution except as specifically provided in Sections 1610 and 1611. 28 U.S.C. 1609. Congress thus 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 *Peterson*, 627 F.3d at 1127-1128.

Discovery in aid of execution accordingly should be conducted in a manner that respects the comity and reciprocity principles that the FSIA was enacted to implement and safeguard. See *Peterson*, 627 F.3d at 1127-1128; cf. *National City Bank of N.Y.* v. *Republic of China*, 348 U.S. 356, 362 (1955). This Court has long recognized that "[t]he judicial seizure" of a foreign state's property "may be regarded as an affront to its dignity and may . . . affect our relations with it" at least to the same extent as subjecting a foreign state to suit. *Republic of Philippines* v. *Pimentel*, 553 U.S. 851, 866 (2008) (citation and internal quotation marks omitted; brackets in original). Similarly here, permitting extensive discovery in aid of execution, irrespective of whether any specified property may actually be subject to attachment, could impose significant burdens on the foreign state and impugn its dignity, which could harm the United States' foreign relations.

Such discovery could also lead to reciprocal adverse treatment of the United States in foreign courts. The United States maintains extensive overseas holdings as part of its worldwide diplomatic missions and security operations. 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 United States court's allowance of unduly broad discovery concerning a foreign state's assets may cause the United States to be subjected to similar treatment abroad. Cf. *Boos* v. *Barry*, 485 U.S. 312, 323 (1988) (highlighting importance of the "concept of reciprocity" in international law); *McCulloch* v. *Socie-*

dad Nacional de Marineros de Hond., 372 U.S. 10, 21 (1963).

B. The Court Of Appeals Erred In Upholding The District Court's Discovery Order

1. Consistent with the principles discussed above, a district court presented with a discovery request concerning foreign-state property must consider the judgment creditor's interest in discovery in the context of the foreign state's "legitimate claim to immunity," *EM Ltd.*, 473 F.3d at 486, and the principles of comity and reciprocity reflected in the FSIA. Specifically, the court should require the judgment creditor to demonstrate that the proposed discovery is directed toward assets for which there exists a reasonable basis to believe that an exception to immunity applies and that the court would have authority to order execution on the assets. Thus, as most courts of appeals to have addressed the question have held, 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 (quoting *EM Ltd.*, 473 F.3d at 486); see *Connecticut Bank of Commerce* v. *Congo*, 309 F.3d 240, 260 n.10 (5th Cir. 2002); *Af-Cap, Inc.* v. *Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1095-1096 (9th Cir. 2007).

2. The district court's order exceeded the limits on appropriate discovery into a foreign state's assets.

The subpoenas are improper insofar as they are directed to assets located outside the United States. The FSIA modified in part the prior legal regime, under which all foreign-state property was absolutely immune from execution, by providing that foreign-state property "in the United States" and "used for a

commercial activity in the United States" is subject to execution if certain additional requirements are met. 28 U.S.C. 1610(a) (Supp. V 2011). The FSIA therefore does not authorize United States courts to order attachment of or execution on 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). Because discovery directed to assets located outside the United States is by definition not tailored to aiding the court in exercising the execution authority conferred by Sections 1610 and 1611, the district court should not have allowed discovery into those assets.[4]

Respondent argues (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 concern-

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[4] Respondent argues (Br. in Opp. 16), that the court in *Richmark Corp.* v. *Timber Falling Consultants*, 959 F.2d 1468 (9th Cir.), cert. dismissed, 506 U.S. 948 (1992), approved worldwide asset discovery against Beijing Ever Bright, a foreign sovereign instrumentality. But there Ever Bright argued that compliance would violate Chinese state secrecy laws, not that the discovery was inconsistent with the FSIA. The court's only mention of the FSIA occurred in the context of its rejection of Ever Bright's argument that the requirement that it post a bond in order to stay execution pending appeal was inconsistent with the FSIA. *Id.* at 1477-1478.

ing 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 that statutory language is properly read to reflect the long-established understanding that United States courts as a general matter have no authority to execute upon assets located outside the United States, in another Nation. To enforce a United States judgment by attaching assets in another country, a plaintiff must "obtain recognition * * * of the U.S. judgment in the courts of that country," and then avail itself of that country's procedures for enforcement. *Autotech*, 499 F.3d at 751. Consistent with that understanding of the limits of United States courts' jurisdiction, the FSIA authorizes courts to order execution—and therefore discovery—only with respect to limited categories of foreign-state property that are located in the United States. That framework is the exclusive means of enforcing judgments against a foreign state in United States courts. See *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-435 (1989).

The text and history of the FSIA contain no indication that Congress intended to authorize litigants to harness the power of United States courts to obtain discovery regarding extraterritorial foreign-state assets that are not subject to execution under the FSIA and that may be immune from execution and/or shielded from discovery under the law of the state in which they are located. Permitting such extraterritorial discovery would raise the comity and reciprocity concerns that the FSIA's execution-immunity provisions were enacted to prevent. See *House Report* 26-27; *Peterson*, 627 F.3d at 1127-1128; cf. *Société Natio-*

nale Industrielle Aérospatiale v. *United States Dist. Ct. for the S.D. of Iowa*, 482 U.S. 522, 546 (1987) (extraterritorial discovery in cases "involving foreign states, either as parties or as sovereigns with a coordinate interest in the litigation," raises comity concerns, and courts ordering discovery should "demonstrate due respect for * * * any sovereign interest expressed by a foreign state"). Indeed, because "the scope of American discovery is often significantly broader than is permitted in other jurisdictions," *id.* at 542, respondent likely could not obtain such sweeping discovery in the courts of many other Nations. 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. Such sweeping discovery may be regarded by foreign states as demonstrating a lack of respect and may cause friction in the United States' foreign relations.

In at least two additional respects, the subpoenas seek information about certain categories of property that are almost certainly immune from attachment or execution, whether in the United States or elsewhere. First, the subpoenas seek information about assets—such as diplomatic property and assets held by Argentina's Central Bank and its Ministry of Defense—that are immune from execution under the FSIA as well as the laws of foreign states. Docket No. 388-1, at 14, 17; 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); Vienna Convention on Diplomatic Relations art. 22(3), *done* Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95 (providing

for immunity from execution for diplomatic property); see also 28 U.S.C. 1611(b)(1) and (2) (immunity for central bank and military property). Second, the subpoenas seek information about the assets not only of the judgment debtor—Argentina—but also of Argentina's agencies and instrumentalities, as well as certain officials. Absent a showing that assets held by an individual are actually assets belonging to the state, an individual's assets could not be attached to enforce a judgment against a state. Nor does the FSIA "permit execution against the property of one agency or instrumentality to satisfy a judgment against another" (*House Report* 29) unless the plaintiff overcomes the presumption that separate juridical entities should be treated as such. See *First Nat'l City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 626-628 (1983). Respondent has not made that showing.

3. The court of appeals was also incorrect to hold categorically that because the "discovery is directed at third-party banks, Argentina's sovereign immunity" under the FSIA "is not affected."[5] Pet. App. 3; *id.* at 19. Immunity from attachment and execution "inheres in the property itself." *Rubin*, 637 F.3d at 799. Because the discovery is directed to property owned by the foreign state (even if, as may often be the case, the requested information about the assets is in the possession of third parties), the foreign state has a

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[5] Although the court of appeals assumed that the subpoenas were directed to non-immune private banks, Pet. App. 19, the court has held that BNA is a sovereign instrumentality of Argentina—which would mean that BNA itself, 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).

substantial interest in the discovery. Third-party discovery requests concerning a foreign state's property therefore implicate the comity and reciprocity concerns raised by discovery against the foreign state itself. Cf. *Société Nationale*, 482 U.S. at 546. The disclosure of potentially sensitive sovereign financial information, without regard to whether the assets could be executed upon in the United States or indeed anywhere in the world, would legitimately be of significant concern to the state irrespective of who is required to make the disclosure.

Moreover, contrary to the court of appeals' decision, Pet. App. 19, 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. To be sure, once the district court concludes that the discovery would be directed to assets for which there is a reasonable basis to believe that an exception to immunity applies and the court could order execution, see *ibid.*, the court, in exercising its authority to compel compliance with particular discovery requests, may consider whether the principal burden of discovery would be borne by a private party rather than the state itself. But for the reasons stated, the court of appeals erred in holding that sovereign-immunity considerations were irrelevant purely because the discovery order was directed to third-party banks.

III. THIS COURT'S REVIEW IS WARRANTED

A. The Court Of Appeals' Holding That The FSIA Does Not Constrain Post-Judgment Asset Discovery Conflicts With The Decisions Of Other Courts Of Appeals

As the Second Circuit acknowledged, its decision creates a circuit conflict with the Seventh Circuit's holding in *Rubin*, *supra*.[6] Pet. App. 17. In *Rubin*, the Seventh Circuit reversed a district court order permitting general asset discovery into Iran's assets in the United States on the ground that the order was not tailored to discovery concerning assets that might be subject to attachment under the FSIA. The court explained that one of the purposes of the FSIA's general rule of immunity for foreign-state property is to shield foreign sovereigns from the burdens of "unwarranted litigation costs and intrusive inquiries about their * * * assets," and that as a result, "the FSIA plainly applies and limits the discovery process." 637

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[6] Contrary to respondent's argument (Br. in Opp. 15-17), the Second Circuit had not previously held that a district court may order asset discovery without regard to the FSIA's limitations on execution. In *First City, Texas-Houston, N.A.* v. *Rafidain Bank*, 150 F.3d 172, 177 (2d Cir. 1998), the court permitted discovery against Rafidain, a foreign state instrumentality that had been held non-immune, concerning whether another entity could be subject to suit as Rafidain's alter ego. The court had no occasion to address the scope of post-judgment asset discovery. In *First City, Texas-Houston, N.A.* v. *Rafidain Bank*, 281 F.3d 48 (2d Cir.), cert. denied, 537 U.S. 813 (2002), the court held that the district court's jurisdiction over Rafidain continued through post-judgment execution proceedings, but it emphasized that its holding concerned only "the court's subject matter jurisdiction, not its discretion" in ordering discovery, and that "[n]o doubt, courts should proceed with care" in ordering asset-related discovery. *Id.* at 54.

F.3d at 795-796. The Seventh Circuit therefore held that a district court should order post-judgment asset discovery "circumspectly and only to verify allegations of specific facts crucial to an immunity determination." *Id.* at 796 (citation omitted).

The Fifth and Ninth Circuits have similarly recognized that sovereign immunity principles limit the appropriate scope of post-judgment discovery directed at a foreign sovereign's assets. See *Connecticut Bank of Commerce*, 309 F.3d at 260 n.10 (district court should "limit any additional discovery to facts relating to the immunity determination" in execution action); *Af-Cap, Inc.*, 475 F.3d at 1095-1096 (in execution action, discovery order was consistent with the "admonition that discovery against a foreign sovereign should be ordered circumspectly and only to verify allegations of specific facts crucial to the immunity determination") (citation, internal quotation marks, and emphasis omitted).

B. The Question Presented Is Important

The extent to which a foreign state's property may be the subject of broad-ranging discovery, regardless of whether that property could be subject to execution in the United States, is an important question that has significant implications for the United States' foreign relations. See pp. 11-12, *supra*. The question is also a recurring one, as the number of decisions addressing the appropriate scope of post-judgment discovery into a foreign state's assets demonstrates. See pp. 7-8, 12, *supra*.

This Office is informed by the Department of State that the decision below has raised significant foreign-relations concerns for the United States. The far-reaching nature of the discovery order in this case—

which requires production of information about extraterritorial assets and transactions of a foreign state, as well as those of state agencies and officials (including a sitting head of state) who are not the subject of the action and whose assets respondents have not shown to be subject to execution—raises especially sensitive foreign-policy concerns. The prospect of individual judgment creditors relying on the decision to pursue such broad and intrusive inquiries into foreign sovereign financial holdings, potentially disrupting the foreign state's banking relationships, or to delve 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. Permitting such comprehensive discovery may also have reciprocal consequences for the treatment of the United States in foreign courts.

The need for this Court's review is particularly pronounced in light of the special role New York, and the courts of the Second Circuit, play in litigation involving foreign sovereigns. Many suits and judgment-enforcement proceedings against foreign states take place in the Second Circuit because many foreign states, agencies, and instrumentalities hold financial assets in New York or conduct financial transactions there. The court of appeals' decision, which denies foreign sovereigns the protections of FSIA immunity in the context of post-judgment discovery, has already emboldened judgment creditors to demand sweeping discovery of foreign-state assets, see pp. 7-8, *supra*, and will likely continue to do so in the future.[7]

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[7] Respondent observes (Br. in Opp. 23) that, in response to this Court's request for the views of the Solicitor General, the United States recommended that the Court deny review in *Rubin*. Be-

C. This Case Is A Suitable Vehicle To Resolve The Question Presented

Contrary to respondent's argument (Br. in Opp. 12-14), the court of appeals' reliance, as an additional justification for its decision, on the fact that the subpoenas were directed to non-immune third parties, does not render this case a poor vehicle to resolve the circuit split created by the court of appeals' decision.

The fact that the court of appeals' decision rested in part on the third-party nature of the discovery would not prevent this Court from deciding the question whether the FSIA limits the appropriate scope of post-judgment discovery into a foreign state's assets. The court of appeals made clear that its conclusion that the FSIA does not constrain post-judgment discovery—regardless of the identity of the entity to whom the discovery is directed—was independently sufficient to support its judgment. *E.g.*, Pet. App. 19; pp. 7-8, *supra*.

Because Argentina would have to establish that both grounds of the Second Circuit's decision are incorrect in order to prevail in this case, respondent contends (Br. in Opp. 14) that this case "could be resolved on [the] straightforward ground" that the discovery is directed to third parties. But Argentina has challenged both bases for the court of appeals' deci-

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cause the Seventh Circuit correctly held that the FSIA's limitations on execution constrain post-judgment asset discovery, its decision did not subject foreign states to wide-ranging discovery that is inconsistent with the FSIA. At the time of the *Rubin* decision, moreover, there was no circuit conflict. U.S. Amicus Br., *Rubin*, *supra*, at 19-22 (No. 11-431). The decision below gives rise to the circuit conflict, as well as the comity and reciprocity concerns, that warrant further review.

sion, and both are fairly included in the question presented. See Pet. i, 18-21. And as discussed above, the view of the United States is that *both* of the Second Circuit's holdings—that the FSIA does not constrain the appropriate scope of post-judgment discovery, and that third-party discovery does not implicate the FSIA—are incorrect and present significant foreign relations concerns. The presence of the additional disputed issue in this case thus does not suggest that the case is an unsuitable vehicle, but rather underscores the need for this Court's review.

Indeed, respondent has taken the position in subsequent proceedings before the district court in this case that the court of appeals' decision establishes that the FSIA does not prevent the district court from ordering worldwide, general asset discovery from Argentina itself. See Docket No. 553, at 6-10 (June 27, 2013) (respondent argued that under the Second Circuit's decision, asset discovery "does not implicate immunity" and broad discovery against Argentina is permissible). The district court has since granted respondent's requested discovery based on its understanding that the court of appeals held in the decision below that "the Foreign Sovereign Immunities Act does not really prevent discovery" against Argentina. 03-cv-8845 Docket entry No. 562, at 30 (transcript of Sept. 3, 2013 proceedings); *id.* No. 565 (ordering compliance).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 2013