

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 REPUBLIC OF ARGENTINA, :

4 Petitioner : No. 12-842

5 v. :

6 NML CAPITAL, LTD. :

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8 Washington, D.C.

9 Monday, April 21, 2014

10

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States
13 at 10:02 a.m.

14 APPEARANCES:

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16 behalf of Petitioner.

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19 United States, as amicus curiae, supporting
20 Petitioner.

21 THEODORE B. OLSON, ESQ., Washington, D.C.; on behalf of
22 Respondent.

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1 P R O C E E D I N G S

2 (10:02 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Case 12-842, the Republic of
5 Argentina v. NML Capital, Ltd.

6 Mr. Blackman.

7 ORAL ARGUMENT OF JONATHAN I. BLACKMAN

8 ON BEHALF OF THE PETITIONER

9 MR. BLACKMAN: Mr. Chief Justice, and may it
10 please the Court:

11 The sweeping worldwide forensic examination
12 of foreign state property that the court of appeals
13 approved targets sovereign property that the FSIA makes
14 categorically immune from process of U.S. courts,
15 including diplomatic, military property, national
16 security assets, property of the States, current and
17 former presidents, and other property outside the United
18 States. This far exceeds the enforcement powers of U.S.
19 courts under the FSIA.

20 JUSTICE SOTOMAYOR: Aren't those issues of
21 privilege? And didn't the Court below permit you to
22 raise those questions as individual items came up? As
23 individual accounts? Because the subpoena is only
24 asking Bank of America for -- or the banks for their
25 information. Some of them may be of that nature. But

1 wasn't the district court going to monitor that?

2 MR. BLACKMAN: Well, two answers to your
3 question. First, Justice Sotomayor, the FSIA comes
4 logically and legally before issues of privilege as to a
5 specific asset. There's a categorical limitation of
6 execution and all process in aid of execution to
7 property in the United States used for a commercial
8 activity.

9 JUSTICE GINSBURG: That's on what you can
10 execute. FSIA itself doesn't say anything about
11 discovery. Is that right?

12 MR. BLACKMAN: The FSIA doesn't have a
13 provision except for 1605(g), which specifically talks
14 about discovery. But the statute very much delineates
15 the bounds of permissible discovery when it delineates
16 the universe of executable property. The legislature --

17 JUSTICE SCALIA: In an ordinary State case,
18 let's say, you get a judgment in -- in New York, and the
19 judgment is -- is not satisfied. And so there is this
20 kind of an inquiry into what property the -- the losing
21 defendant owns. Cannot you find out what property that
22 defendant owns in Florida?

23 MR. BLACKMAN: In Florida, certainly, yes.

24 JUSTICE SCALIA: But the New York court
25 has -- its writ does not run to Florida.

1 MR. BLACKMAN: The way Rule --

2 JUSTICE SCALIA: You have to bring
3 another -- another lawsuit in Florida, right? And so
4 also here, the writ -- the writ of the Second Circuit
5 doesn't run to -- to France. You may have to bring a
6 separate suit in France. But -- but I don't -- I don't
7 see that it goes beyond the bounds of what the -- of
8 what the law allows the discovery to -- to cover.

9 MR. BLACKMAN: Well, Rule 69, which has
10 never been construed in the area of discovery in aid of
11 execution by this Court, provides for discovery in aid
12 of execution. And in aid of execution logically needs
13 to mean the execution that could be ordered by the court
14 ordering the discovery.

15 JUSTICE SCALIA: But that's absolutely not
16 true because a New York court cannot order execution on
17 property in Florida. You have to bring another --
18 another cause of action in Florida. And yet, you
19 certainly can find out what -- what property the
20 deadbeat defendant owns in Florida.

21 MR. BLACKMAN: Rule 69 also says
22 specifically, Justice Scalia, that it is subject to a
23 Federal statute that governs where applicable. And the
24 advisory committee notes -- clearly lists the whole host
25 of exemption statutes.

1 JUSTICE GINSBURG: You're saying that you
2 can't inquire into property that would be exempt
3 anywhere. That's the difference. You may have to bring
4 a separate suit in Florida or probably if it's a Federal
5 judgment you just register it there. But in the typical
6 case, the judgment debtor is exposed, all of her assets
7 are exposed. Here I think what you're saying is the
8 statute, the Foreign Sovereign Immunities Act, confines
9 what can be executed. Whether Florida, France,
10 anyplace, it's got to be property -- commercial property
11 in the United States. Is that --

12 MR. BLACKMAN: That's -- that's exactly
13 correct, Justice Ginsburg. And I was referring to the
14 exemptions that are listed in the Advisory Committee
15 notes because they list things like homestead and
16 veterans benefits and other categories of assets.

17 JUSTICE BREYER: Well, what's the reason --
18 I mean, I read this like Justice Scalia. I thought when
19 you read Rule 69, obtaining discovery, you can obtain it
20 in aid of the judgment or execution as provided in the
21 these rules. So you look to the rule on discovery.
22 It's certainly broad enough to encompass this. I
23 thought, of course, you can get discovery, in an
24 appropriate case, to find out if the judgment creditor
25 or debtor has property in Florida. And the question is:

1 Well, can you do the same thing where the executable
2 property is in France?

3 MR. BLACKMAN: I think --

4 JUSTICE BREYER: And then I think that's the
5 issue, at least as I saw it. And I don't see -- well,
6 there are two -- three ways of doing it. One, you could
7 just say no. Two, you could say yes, but the State
8 Department has to tell you it won't mix everybody up.
9 Or you could say yes, but the State Department has the
10 right to come in and tell you it will mix everybody up.
11 I mean, those are three possibilities, or you could say
12 let's mix them all up. Are those -- those are the four.
13 In other words, the Court can just do it on its own.
14 So -- so I see four possibilities. Now, maybe I'm not
15 analyzing it correctly, but that's where I was, starting
16 where Justice Scalia started.

17 MR. BLACKMAN: If I could respond to some of
18 those points, Justice Breyer. Talking about the State
19 Department brings us back to why do we have this
20 statute. We have this statute to avoid ad hoc judicial
21 or political interventions. Before the statute, there
22 was absolute immunity for foreign state property.

23 JUSTICE BREYER: I know. But just to sort
24 of shorten this, I understand there's a statute. The
25 statute says nothing about discovery. The statute does

1 permit you to execute on property within the United
2 States anyway. And it does that under exceptions which
3 are relevant here. For example, on the back of a bond
4 they said, we waive all sovereign immunity. So -- so it
5 does allow for execution in the United States. It does,
6 in fact, say nothing about discovery in aid of
7 execution. The rules do.

8 Okay. So I've given you four possibilities
9 that I could see. There may be five or six. Which do
10 you favor? Why?

11 MR. BLACKMAN: I favor saying that "in aid
12 of execution" means in aid of execution permitted by the
13 substantive law. There's no statute that we've thought
14 of or could find where discovery is untethered from the
15 substantive provisions of the statute.

16 JUSTICE SOTOMAYOR: But that goes back to --

17 JUSTICE SCALIA: Do you -- do you contend
18 that you cannot levy upon commercial property in foreign
19 countries where those countries have the same kind of
20 Foreign Sovereign Immunities Act as we do? When you get
21 a judgment in New York, can you take that judgment and
22 levy upon commercial property of Argentina in France?

23 MR. BLACKMAN: To the extent and only to the
24 extent that the judgment would be recognized by a French
25 court.

1 JUSTICE SCALIA: Of course.

2 MR. BLACKMAN: A U.S. court could not levy
3 on them.

4 JUSTICE SCALIA: So you are entitled to find
5 out what -- what property Argentina has in France. And
6 your only complaint is you shouldn't be able to find out
7 what -- what non -- what -- what property that is not
8 subject to the Foreign Sovereign Immunities Act is in
9 France, right?

10 MR. BLACKMAN: Well, property that's subject
11 to the Foreign Sovereign Immunities Act is only property
12 in the United States used for commercial activity.

13 JUSTICE SCALIA: No, no. But you
14 acknowledge that -- that you can levy on property in
15 France. You can take your New York judgment, go to
16 France and so long as the property is commercial
17 property and France has the same, which it does, the
18 same modern rule that sovereign immunity does not extend
19 to commercial property, you can -- you can satisfy your
20 judgment in France.

21 MR. BLACKMAN: But that's a matter of, with
22 respect, the French law and what the French court would
23 permit, including discovery.

24 JUSTICE SCALIA: Of course. But that
25 doesn't mean you can't find out and go to France and

1 roll the dice in France, right?

2 MR. BLACKMAN: Well, we would suggest --

3 JUSTICE SCALIA: You're -- you're saying you
4 can't even play the game.

5 MR. BLACKMAN: No. We're saying that the
6 way you play the game is to do what the Respondent here
7 has done for many years, which is to pursue discovery of
8 property in the United States that's executable by the
9 process of a U.S. court. But if it wants to go
10 abroad --

11 JUSTICE SCALIA: I can't understand this.
12 You acknowledge that you can go after property in
13 France, but you assert you are not entitled to find out
14 what property Argentina has in France.

15 MR. BLACKMAN: That's a function of a
16 statute which deliberately circumscribes the normal
17 powers of a court.

18 JUSTICE BREYER: All right. Suppose I
19 don't -- I have exactly the same question. Is the only
20 reason that you cannot ask a New York court for
21 discovery to tell us where in the world there is
22 property upon which we can levy -- they don't want to
23 know about property where they can't levy. They
24 don't want to know about property they can't execute, so
25 they're happy to write into that, even if it isn't

1 written, which they think it is, we're only talking
2 about property that we can seize. No other property.

3 Now, you agree that we can go do that in
4 respect to property in California, Florida, and New
5 Mexico. Well, in today's world we want the same
6 information about France, Italy, and Turkey. And by the
7 way, we won't take one penny from those countries except
8 in accordance with the law of those countries, not a
9 penny. We'll get the information, we'll go over and go
10 ask the court. Now, why not?

11 MR. BLACKMAN: The reason, besides the
12 language of the statute, is comity.

13 JUSTICE BREYER: Well, I didn't find
14 language in the statute that forbids it, but I'll look
15 that up again. If the language is not an absolute
16 barrier, why not?

17 MR. BLACKMAN: Well, first of all, the order
18 here, Your Honor, isn't limited to property that's
19 executable.

20 JUSTICE BREYER: All right. Let's assume we
21 go back and we say it has to be limited to property that
22 they have a right to obtain to under execution. So
23 we're all agreed between the two of us we're going to do
24 that. Now, why not?

25 MR. BLACKMAN: Okay. Well, we would welcome

1 very much --

2 JUSTICE BREYER: Okay. Okay. I'm
3 interested, though, about Turkey, France and --

4 MR. BLACKMAN: The "why not" is because
5 logically, if you're thinking in terms of -- of the
6 statute, the statute doesn't distinguish between the
7 categories that I hope I heard the Court say you would
8 exclude, which the lower court here did not exclude and
9 which the plaintiff in fact was eagerly pursuing --
10 diplomatic, military, national security, et cetera. The
11 statute doesn't distinguish between those categories of
12 nonexecutable property and property outside the United
13 States, which under the terms of the statute, 1609 and
14 1610, is equally nonexecutable.

15 JUSTICE ALITO: Well, if there were a
16 limitation -- if there were a limitation of that sort,
17 how would the district court possibly decide what could
18 be executed on? And let's say there -- there are 40
19 countries where Argentina has property. The district
20 court would have to look at 40 issues of foreign law;
21 could this be executed on in Turkey, in Italy, in
22 France, et cetera?

23 MR. BLACKMAN: We would say no. And that's
24 why it shouldn't get into that thicket.

25 JUSTICE ALITO: No. But you said your

1 fallback position was at least it should be limited to
2 property that could be -- on which there could be
3 execution in the country where the property is located.
4 How would the Court go about doing that?

5 MR. BLACKMAN: I would impose, Justice
6 Alito, a bar that is consistent with international law
7 and practice, that discovery cannot extend under any
8 circumstances to diplomatic property, to military
9 property, to national security assets, to property of a
10 sitting or former head of state of a country, to state
11 officials, to entities other than --

12 JUSTICE KENNEDY: We're waiting. What about
13 property in another country? We're waiting.

14 MR. BLACKMAN: Okay. After you've drawn
15 that line, I would submit that the bright line should
16 simply be if it's property that a U.S. court could
17 execute on that's fair game for tailored discovery. But
18 we, I think, all agree that the U.S. court can't execute
19 on foreign property.

20 JUSTICE GINSBURG: In saying that, are you
21 giving up the argument you started to make before
22 Justice Breyer gave you four ways? You pointed out that
23 Rule 69, the discovery rule, says that -- that these
24 rules are subject -- "Statutes of the United States" --
25 the Foreign Sovereign Immunities Act is one -- "Statutes

1 of the United States, when applicable -- applicable,
2 govern under this rule," and then there's a slew of
3 examples of statutes that limit what you can attach,
4 what you can execute on. I thought that that's --
5 that -- if that's right, then your answer now, well, as
6 long it's the same kind of property in France, the
7 answer would be the only thing you can discover relates
8 to property in the United States.

9 MR. BLACKMAN: Absolutely, Justice Ginsburg.
10 I was giving a potential fallback in the event that
11 the Court doesn't agree with that. That is absolutely
12 Argentina's position.

13 JUSTICE ALITO: What if Argentina -- what if
14 Argentina were a private, a foreign company? Could you
15 get -- could you have discovery of assets in other
16 countries under Rule 69.

17 MR. BLACKMAN: That's a question this Court
18 has never actually addressed. It doesn't -- and I don't
19 think you need to address it here because you have a
20 governing statute, as Justice Ginsburg said, which is
21 deliberately designed to restrict the scope vastly.

22 JUSTICE SCALIA: No, wait, wait.

23 JUSTICE ALITO: The scope of execution.

24 JUSTICE BREYER: Right. The word -- there
25 are two different -- look at the rule. Rule 69 talks in

1 (a) about execution of money judgments. And in (a) it
2 talks about the need to conform to statute. In (b) it
3 talks about obtaining discovery. It doesn't say a word
4 about American statutes. It talks about the rules and
5 statutes of the state, but it uses the word execution.
6 So if you're saying it means execution in the United
7 States and nowhere else, it applies to the private
8 plaintiff just as much as -- the private defendant just
9 as much as to the -- to the other defendant.

10 MR. BLACKMAN: That would be a logical
11 reading. I don't think the Court need --

12 JUSTICE BREYER: If we need not, then I'm
13 back to my question: Why not allow it with all these
14 qualifications? And the only answer I've heard is from
15 Justice Alito, who says that it would be too complicated
16 to try to figure out all the laws of France and Turkey
17 in relation to execution. Is there anything you want to
18 add to that before you sit down?

19 MR. BLACKMAN: I want to add that, just as
20 the other slew of examples that I and Justice Ginsburg
21 were referring to deal with specific categories of
22 property that for good and sufficient reasons Congress
23 has exempted and, therefore, you don't get discovery
24 about them, the same is true of foreign state property.
25 And come back -- and I want to reserve time, with

1 the Court's permission, for rebuttal -- to the issue of
2 comity. How can it be appropriate for a U.S. court to
3 be asking a foreign state to turn over information about
4 property that is beyond the execution powers of
5 the Court?

6 JUSTICE SCALIA: I found it extraordinary
7 that we did not have -- I think this is correct -- a
8 single brief from foreign countries. They file all the
9 time when there is a case before us that they think
10 trenches upon their prerogatives. Not a single foreign
11 country, maybe because Argentina owes them money as well
12 as it does these plaintiffs.

13 MR. BLACKMAN: Justice Scalia, on the
14 question of owing money, one thing that's clear about
15 this statute is it's designed for uniform treatment of
16 states. It doesn't single out based on how much money
17 you owe or how long the judgment is unpaid. I mean-- That has to
18 be right. This has to be a legal and evenhanded ruling,
19 and with all respect to Mr. Olson's rhetoric, which I'm
20 sure you're about to hear, it has nothing to do with
21 Argentina. This is a rule for all states, which is why
22 the United States, talking about states, has supported
23 our position.

24 Thank you.

25 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

1 Mr. Kneedler?

2 ORAL ARGUMENT OF EDWIN S. KNEEDLER,

3 ON BEHALF OF THE UNITED STATES,

4 AS AMICUS CURIAE, SUPPORTING THE PETITIONER

5 MR. KNEEDLER: Mr. Chief Justice, and may it
6 please the Court:

7 The sweeping discovery order sustained by
8 the Second Circuit, which establishes a district court
9 in the United States as a clearinghouse for all of
10 Argentina's assets and transactions throughout the
11 world, is contrary not only to the FSIA and its
12 purposes, but to the fundamental principles of comity
13 and international reciprocity on which it rests. And I
14 want to point out that the United States --

15 JUSTICE SCALIA: Wait, wait, wait, wait,
16 wait, wait, wait. I thought that the whole purpose of
17 the Foreign Sovereign Immunities Act was to protect us
18 from you, from the State Department and the government
19 coming in and saying, Oh, you know, in this case, grant
20 this one, deny that one. I thought the whole purpose of
21 the FSIA was to enable us to look at the case and decide
22 it on the basis of the statute.

23 MR. KNEEDLER: Yes.

24 JUSTICE SCALIA: But now you're coming in
25 and saying, Oh, there are principles behind the statute

1 that we have to apply that extend -- extend the words of
2 the statute beyond what they say, and they say nothing
3 about -- about finding out the assets of people abroad.

4 MR. KNEEDLER: Our position is that it is
5 the statute that controls. The principles of comity and
6 reciprocity are ones that inform the interpretation of
7 the statute.

8 JUSTICE SCALIA: What provision of the
9 statute controls here?

10 MR. KNEEDLER: We think 1609, which
11 establishes an immunity from execution, and that
12 immunity from execution is subject to exceptions only
13 within the United States. But more broadly, the
14 structure -- the entire structure of the FSIA is on
15 matters within the United States. The exceptions from
16 immunity are for transactions --

17 JUSTICE SCALIA: So you think the discovery
18 is certainly okay with respect to those commercial
19 interests on which the plaintiffs can execute?

20 MR. KNEEDLER: Yes, we do, and if it is --

21 JUSTICE SCALIA: So this thing is a little
22 too broad.

23 MR. KNEEDLER: No. Within the United -- no,
24 within the United States. We believe that it cannot
25 extend to property outside the United States.

1 JUSTICE SCALIA: Well, why do you -- I'm
2 sorry.

3 MR. KNEEDLER: If I could just --

4 JUSTICE SOTOMAYOR: So you think they can't
5 go to France and-- with the American judgment and seek
6 commercial property there? Let's assume, undisputed,
7 there's a piece of land that they're using for a
8 business purpose.

9 MR. KNEEDLER: Yes, and that would be a
10 matter for French courts to decide under French law.
11 But the United States would be gravely concerned about
12 an order of a trial court in a foreign country, entered
13 at the behest of a private person, seeking to establish
14 a clearinghouse in that country of all the United
15 States' assets for its many diplomatic, military,
16 intelligence --

17 JUSTICE SOTOMAYOR: How often do you think
18 the U.S. is going to default on paying a judgment and
19 have people chase it all around the world?

20 MR. KNEEDLER: There are a number of
21 circumstances in which the United States would and some
22 in which it has. The United States takes a strict view
23 that there has to be a service of process with 60-days
24 notice.

25 JUSTICE KENNEDY: But the questions from

1 the Court so far have narrowed the issue to property on
2 which there could be execution in a foreign -- if it
3 were in a foreign nation, and you said, Well, military
4 and consulate. No, no. We're talking about property
5 that if here would be subject to execution. What's
6 wrong with asking the judgment debtor in this Court, in
7 this case, whether or not there are such assets, without
8 reference to military and government officials, et
9 cetera, property that's used in commercial transactions
10 on which there can be execution in the United States?

11 MR. KNEEDLER: If the discovery is about
12 assets in the United States, but if -- we agree --

13 JUSTICE KENNEDY: No, discovery is about
14 assets that can be executed on, but they are in other
15 countries. And you started saying, Oh, but the military
16 and so forth. That's not -- that's not this case.

17 MR. KNEEDLER: I was giving -- no, it is
18 this case.

19 JUSTICE KENNEDY: Well, it's this case on
20 the or- -- but it's not -- it's not what the Court has
21 been suggesting.

22 MR. KNEEDLER: Right. Our position is
23 basically a categorical one because, again, in the
24 reciprocal situation, the United States would be very
25 concerned about a foreign court setting itself up as a

1 clearinghouse for all United States' assets and
2 transactions around the world, whether or not --

3 JUSTICE BREYER: Clearinghouse, we're trying
4 to get away from this issue by assuming out of the case
5 the military things, all those lists. Then we're trying
6 to assume out of the case anything that isn't relevant
7 to an asset which you can attach and seize. And now
8 we've got two sets. In the United States everybody
9 agrees they can do it, and then there's a set abroad.
10 We have a statute we passed, a case, Intel, which says
11 that anybody in America can go -- you know, the Intel
12 case, anybody can go under 1728 and go ask a trial judge
13 to have the Los Angeles firm issue some discovery and
14 they are going to give that to the EU. We aid their
15 judgments all the time.

16 So what's the principle? What is wrong
17 where it's clear like that with a Court saying, We want
18 to find out if they have a supermarket chain in Sicily?

19 MR. KNEEDLER: What is wrong with that is a
20 foreign sovereign is not the same as a foreign private
21 person. The Foreign Sovereign Immunities Act -- and
22 this is consistent with Article 19 of the UN Convention,
23 which establishes immunity of foreign states. It
24 doesn't say with respect to property within the foreign
25 state.

1 JUSTICE SCALIA: Why haven't foreign
2 countries protested? Why aren't they here as amici? Is
3 there a single foreign state that has taken your
4 position?

5 MR. KNEEDLER: The State Department has
6 heard concerns from foreign countries, particularly
7 those that are --

8 JUSTICE SCALIA: Why haven't they told us?
9 They have to ask you to pass it along?

10 MR. KNEEDLER: I think they --

11 JUSTICE SCALIA: They file amicus briefs all
12 the time and if this is as horrific as you are painting
13 it, we would have had some briefs from them.

14 MR. KNEEDLER: If we -- if we look at the
15 backdrop against which the FSIA was enacted, in 1952 the
16 United States adopted the restrictive theory of
17 sovereign immunity for liability, but it maintained,
18 even then, the absolute immunity from execution. When
19 Congress passed the FSIA in 1976, it noted that
20 execution immunity was still somewhat controversial and
21 it did what the House report said was only partially
22 lift that immunity.

23 Well, prior to 1976, with an absolute
24 immunity from execution in the United States or abroad,
25 there could not have been any discovery.

1 CHIEF JUSTICE ROBERTS: Counsel, I don't
2 have a very good understanding about how this works in
3 practice. Let's say that the discovery request on a
4 French bank, the prevailing party has reason to believe
5 that this is where Argentina deposits its rental income
6 from properties around the United States. They know,
7 they think they know, that Argentina has -- you know,
8 owns a townhouse that it rents out in the United States,
9 and they think they will be able to discover where that
10 is by going to the French bank account and saying, well,
11 every month they get \$10,000 from this address in the
12 United States. Can that be discovered or not?

13 MR. KNEEDLER: Yes. If it's assets within
14 the United States, it can be discovered, but we think --

15 CHIEF JUSTICE ROBERTS: So they can -- so
16 the defendant that -- the prevailing party files a
17 request saying, give us anything that has anything to do
18 with assets in the United States on the French bank and
19 that's fine?

20 MR. KNEEDLER: We think it should be more
21 narrowly tailored, the discovery --

22 CHIEF JUSTICE ROBERTS: Do you leave out the
23 diplomatic --

24 MR. KNEEDLER: Well, it has to be reasonably
25 tailored to uncover assets that could be subject to

1 execution. But when the assets are abroad -- and I
2 would like to point out on Page 28 of the House Report,
3 which has been made something of in this case, the House
4 Report says "attachments in aid of execution," that
5 phrase is intended to include attachments, garnishments
6 and supplemental proceedings. As Page 52 of the
7 respondent's brief points out, supplemental proceedings
8 include discovery of assets in aid of execution. There
9 are several --

10 JUSTICE KAGAN: Mr. Kneedler, can I take you
11 back to a question, I think it was Justice Alito who
12 asked it. Assume that there was a suit between private
13 parties and the private party that won the judgment
14 thought that there were assets abroad. Do you have any
15 question that the discovery rules would allow for
16 discovery of what the person had abroad?

17 MR. KNEEDLER: We believe that Rule 69 would
18 allow that. But as Justice Ginsburg pointed out, it's
19 the exemption in the FSIA which we believe is
20 categorical, and this House Report I was referring to
21 when it was talking about supplemental proceedings,
22 which includes discovery, says after it's
23 specifically referring to rule 69--

24 JUSTICE KAGAN: But that's -- if you think
25 that Rule 69 allows that, I mean, my next question was

1 going to be what in the text would put a foreign
2 government in a different position than the -- than when
3 the suit involved only private parties?

4 MR. KNEEDLER: I will talk about the text.
5 Just-- the point I wanted to make about the committee report is
6 it specifically says, the property in question, meaning
7 subject to supplemental proceedings, must be used for
8 commercial activity in the United States. Congress's
9 understanding of the statute it passed was that it had
10 to do with assets in the United States and it comes --

11 JUSTICE KAGAN: What in the text -- what in
12 the text puts you in a different position -- if you have
13 that view of 69, which extends abroad as well as within
14 the United States, what in the text would suggest that
15 we're not under that rule?

16 MR. KNEEDLER: 1610's exceptions from
17 execution immunity are limited all to things within the
18 United States.

19 JUSTICE ALITO: But isn't the logical reason
20 for that -- why would Congress pass a law limiting
21 execution on property in another country where there's
22 no United States jurisdiction? How do you infer from
23 that a desire to limit discovery?

24 MR. KNEEDLER: It's true that the writs of
25 U.S. courts do not run to foreign countries. But it

1 isn't -- when it comes to a foreign sovereign, that
2 limitation is not just one of the writ not running as a
3 matter of the District Court's jurisdiction. It is also
4 a matter of the immunity of the foreign sovereign, and
5 this is the same point that comes with respect to
6 immunity from liability.

7 That is both jurisdictional of the Court,
8 but it is a substantive immunity for the foreign
9 sovereign, and we think the same thing is true with
10 respect to execution abroad. There is an immunity from
11 that and, therefore, an immunity from discovery.

12 JUSTICE KENNEDY: Just one question. I
13 thought that I would hear a lot about waiver in this
14 case. Does the waiver in the bonds not affect this case
15 or its outcome?

16 MR. KNEEDLER: It does not because
17 Section 1610 requires that the only property subject to
18 execution is property within the United States used for
19 commercial purposes, and that's true even when there is
20 a waiver. That's the threshold, and then there are
21 various categories and waiver is one of them so that the
22 property still must be used for commercial purposes
23 within the United States.

24 CHIEF JUSTICE ROBERTS: Thank you, Counsel.
25 Mr. Olson?

1 ORAL ARGUMENT OF THEODORE B. OLSON

2 ON BEHALF OF THE RESPONDENT

3 MR. OLSON: Thank you.

4 Mr. Chief Justice, and may it please the
5 Court:

6 I would like to start with something that
7 Mr. Kneedler has been talking about. He referred to the
8 House Report three or four times during his argument
9 today, and he referred to it six times in his brief.

10 He did not mention Page 23, the top of which
11 says, "This bill, the Foreign Sovereign Immunities Act,
12 does not attempt to deal with questions of discovery.
13 Existing law appears to be adequate in this area, for
14 example..." And then there are privileges that could be
15 raised. That is a piece of the legislative history that
16 the United States apparently has forgotten completely
17 about.

18 Secondly, the United States has said that
19 there's a common law backdrop to the Foreign Sovereign
20 Immunities Act dealing with discovery in aid of
21 execution, yet this Court, four years ago in the
22 Samantar case says indisputably the Foreign Sovereign
23 Immunities Act displaces the common law.

24 JUSTICE GINSBURG: But, Mr. Olson, you have
25 said -- you make this distinction between the exemption

1 in the Act and what can be discovered. But the
2 discovery rule itself, the advisory committee, the note
3 on the original drafting of the discovery rule says,
4 "Statutes of the United States on execution," and
5 certainly the Foreign Sovereign Immunities Act is a
6 statute of the United States on execution, "govern under
7 this rule." And in case you don't get the point, it
8 lists, oh, a few dozen statutes. For example, it says
9 that you can't execute -- assign, execute, levy or issue
10 other legal process against a Federal employee's
11 retirement annuities. And there are all kinds of
12 provisions, substantive provisions limiting what
13 property is subject to execution.

14 MR. OLSON: Yes, Justice Ginsburg. This
15 case is not about execution. This case is about finding
16 out information --

17 JUSTICE GINSBURG: But this is a note to the
18 discovery rule.

19 MR. OLSON: Yes.

20 JUSTICE GINSBURG: It says that Rule 69, the
21 discovery rule, is subject to statutes on execution.

22 MR. OLSON: But, 69(a)(2), as one of
23 your colleagues pointed out, is the discovery in aid of
24 execution. It provides the right to obtain information
25 with respect to that -- that might be under the Federal

1 Rules of Civil Procedure which were not displaced by the
2 Foreign Sovereign Immunities Act, and all we're talking
3 about here is information -- I should start with the
4 fact that this -- the context of this case is that
5 Argentina was able to sell bonds and to raise money in
6 the United States, on the capital markets of the United
7 States, only by agreeing to be bound by U.S. law, to be
8 sued in and subject to the judgments of U.S. courts, and
9 by waiving sovereign immunity and consenting to
10 attachment in aid of execution.

11 And there's even a reference in that waiver,
12 which was drafted for Argentina by sophisticated New
13 York counsel, in order to obtain money in the United
14 States had -- had Argentina said, and we won't pay the
15 judgments, we won't obey the orders of the United States
16 courts, we will resist discovery when we spirit money
17 outside of the United States, we will do all of those
18 things, it would never have been able to borrow any
19 money in the United States.

20 CHIEF JUSTICE ROBERTS: What exactly does
21 that have to do with the issues before this case?

22 MR. OLSON: Because exactly, Mr. Chief
23 Justice, that's the context of why my clients are
24 attempting to seek information with respect to where
25 Argentina has moved its assets, the lower courts, the

1 district court--

2 CHIEF JUSTICE ROBERTS: It seems to me that
3 that context is totally irrelevant. You have a
4 question, it doesn't matter what the basis of the
5 underlying judgement is. The question is one of
6 discovery.

7 MR. OLSON: Yes. And in every instance when
8 someone is attempting to execute on a judgment to pay --
9 there is no question it was jurisdiction of the Court to
10 issue the judgments, the judgments are valid and
11 binding. Now the -- the creditors are attempting to
12 find out where the assets are, there's a history in this
13 case, and it could be in any other case. That's why
14 it's a question of general application, every creditor,
15 judgment creditor is looking for the assets of the
16 judgment debtor and many judgment debtors move those
17 assets around in order to avoid having to pay the
18 judgment.

19 JUSTICE GINSBURG: Mr. Olson, but this is a
20 sovereign, and as I understand the Foreign Sovereign
21 Immunities Act, it says "execution, the foreign sovereign
22 has immunity, has immunity except -- except when we're
23 dealing with commercial property in the United States."
24 So the statute starts with a blanket immunity against
25 execution for the foreign sovereign and then says, but

1 there is an exception for property -- commercial
2 property in the United States.

3 MR. OLSON: Well, there's several answers to
4 that. First of all, Section 1606 of the Foreign
5 Sovereign Immunities Act, which is not mentioned in the
6 government's brief at all and the government
7 specifically takes the district judge to task for
8 treating Argentina like a private litigant, Section 1606
9 says if jurisdiction is established, the foreign state
10 shall be liable in the same manner and to the same
11 extent as a private individual under like circumstances.
12 So the Foreign Sovereign Immunities Act specifically
13 said that once jurisdiction is established, and was not
14 unquestionably established here, Argentina is to be
15 treated to the same manner and to the same extent as a
16 private litigant.

17 JUSTICE GINSBURG: I thought that that goes
18 to jurisdiction and liability, the judgment of
19 liability. Then there's a separate section on
20 execution. And those two are not the same. You can
21 have full authority to issue a judgment against
22 Argentina. The execution portions of the statute are
23 1609 to 11, not 1606.

24 MR. OLSON: That's exactly correct,
25 Justice Ginsburg. And when it comes time to execute on

1 property identified by Argentina -- it's actually -- the
2 discovery is not addressed to Argentina. It is
3 addressed to third-party banks.

4 JUSTICE GINSBURG: Could it be addressed to
5 Argentina on your theory? I think it could.

6 MR. OLSON: We believe that it could be
7 addressed to Argentina, no question. But this
8 particular case comes to you where the discovery is
9 addressed to non-sovereigns who have not appealed and
10 who are complying with the order pursuant to what the
11 District Court did.

12 JUSTICE GINSBURG: I thought they objected
13 to it. Didn't the banks object?

14 MR. OLSON: Pardon me, Your Honor?

15 JUSTICE GINSBURG: The banks, I thought that
16 they objected to the subpoena.

17 MR. OLSON: One of the parties objected to
18 the subpoena. There were objections going back and
19 forth. There was a narrowing of the scope of the
20 subpoena. The subpoenas themselves may be found -- and
21 it's not for all of the terrible things that my
22 colleague has mentioned, they are on the Joint Appendix
23 of 54 and 55 and 91.

24 JUSTICE SOTOMAYOR: It doesn't seem to me
25 that the narrowing was -- we've been assuming that what

1 we're talking about is discovery related to commercial
2 property. But the subpoena is written much more broadly
3 than that. It's asking for every piece of property that
4 Argentina has anywhere in the world.

5 MR. OLSON: It's asking for bank
6 transactions, Justice Sotomayor. And the reason for
7 that is, we do not know, and Argentina has provided
8 plenty of reason for us to be suspicious, as to where
9 property is, how it's denominated, what it's being used
10 for. If it is a piece of commercial -- if it's an
11 airline that says Argentine Air Force on the side of it,
12 it still could be commercial property. We need to know
13 what those assets are. The purpose for discovery is to
14 find what the assets are, where they are, what they're
15 being used for, where they moved, when they moved. And
16 that's why the bank subpoenas, which the banks are
17 complying with and the banks have not objected to and
18 the banks are not sovereigns, notwithstanding my
19 colleague has now said not in the lower courts, but in
20 this Court, that BNA, one of the banks is a sovereign,
21 but it has not claimed sovereign immunity and it has not
22 appeared here.

23 CHIEF JUSTICE ROBERTS: I'm sorry.
24 Finish --

25 MR. OLSON: I just -- the answer would be

1 that if you don't know what Argentina is doing with the
2 property and what labels it's slapping on the
3 property --

4 JUSTICE SOTOMAYOR: So I was right. This is
5 doing exactly what the Solicitor General is saying, it
6 is asking for an accounting of everything that Argentina
7 owns regardless of what its purpose is.

8 MR. OLSON: It is -- well, we don't know
9 what its purpose is until we find out what the
10 assets are.

11 JUSTICE SOTOMAYOR: So just answer yes.

12 MR. OLSON: Yes, the answer is yes. And
13 there's a reason for it.

14 CHIEF JUSTICE ROBERTS: Well, but doesn't
15 that seem pretty extraordinary? You just said you can
16 get a discovery about a plane that says Argentine Air
17 Force on the side of it. That seems, to me, to go to
18 the heart of what the Deputy Solicitor General was
19 talking about. That's pretty intrusive at a sovereign
20 level to say you can find out how many jet fighters
21 Argentina happens to have.

22 MR. OLSON: Well, what -- this subpoena
23 relates to bank transactions. If there-- and as the legislative
24 history that I referred to --

25 CHIEF JUSTICE ROBERTS: Just before you get

1 over there, I thought your position was that yes, you
2 can ask for discovery related to, you know, the
3 Argentine Air Force.

4 MR. OLSON: That's what the Federal Rules of
5 Civil Procedure provide, that --

6 JUSTICE BREYER: Could we say no to that and
7 just say, look, here is the difficult question in the
8 case, of course, every subpoena -- every subpoena has to
9 have limits, and the limits are typically limits that
10 have to do with the purpose of the subpoena, and where a
11 sovereign is involved, maybe a District Court has to be
12 more careful, but you are indeed searching for
13 information in respect to assets out of the country that
14 you could execute upon? Make that assumption with me
15 for a second.

16 MR. OLSON: I understand.

17 JUSTICE BREYER: If you want to fight it
18 later, go right ahead. But I have a question I'm trying
19 to get to, and it is this, on that assumption, and we're
20 only talking about butcher shops in Italy, there's
21 marvelous Argentine beef, it's delicious.

22 (Laughter.)

23 JUSTICE BREYER: And that's the kind of
24 thing you want to levy on. Okay. Fine. Now, if there
25 were property in the United States and it were against a

1 private person, another private person could get the
2 information. If it was against a sovereign, the private
3 person could get the information. If it's abroad and
4 the shops are in Sicily, a private person can get the
5 information despite the fact that to know about levying,
6 you may have to know a lot about Italian law. Now, if
7 it is a sovereign that you are trying to get the
8 information, the other side is saying that's different.
9 You say, why? Why -- I knew you were going to say why.
10 And the answer is going to be because there could be
11 various interferences. We can't even tell you exactly
12 what. But you're talking about every country in the
13 world. Who knows?

14 Now, assume that there is something to their
15 answer. Then where are we legally? We may be back A,
16 before the Tate letter, in which case we could say to
17 the State Department, if you see such a problem, come in
18 and tell us, or we could say to the District Courts, go
19 ask the State Department case by case. If Congress
20 wants to make a rule later, they can, but they haven't
21 yet. Or we could say something else. That's the
22 question -- those are the questions that I would like
23 answered.

24 MR. OLSON: Well, and part of the answer is
25 in the Altmann decision itself where you specifically

1 said the views of the United States with respect to the
2 construction of a statute of the Foreign Sovereign
3 Immunities Act, are not entitled to deference. If there
4 is objection by the State Department with respect to a
5 particular interest, a particular party, a particular
6 situation, it can set that forth. Instead, what the
7 United States has done is filed a brief with respect to
8 the construction of the statute.

9 And the other answer, Justice Breyer, is
10 specifically set out, if there are objections of that
11 nature, diplomatic objections, sovereignty objections
12 with respect to a particular official, again the
13 legislative history, and I know this may not be
14 persuasive to everyone here, but it's something that the
15 United States referred to as persuasive in its brief,
16 this Court found it persuasive in part in the Samantar
17 case four years ago. It specifically says if there are
18 those kind of objections, they are addressed to the
19 District Court, and the District Court can address them
20 and subject to an abuse of discretion standard. So it's
21 all right here. It's what Congress was intending.

22 JUSTICE KAGAN: Mr. Olson, can I just make
23 sure I understand the scope of your argument? I mean,
24 suppose there were some countries that executed on
25 assets that in the United States would be nonexecutable.

1 So suppose there were some countries that would execute
2 on military assets or diplomatic assets or so forth.
3 And somebody came into a U.S. court and said I want
4 discovery about those assets, because after all, they
5 are going to let me execute -- these other countries are
6 going to let me execute on them. It's in aid of the
7 judgment, so it fits within the discovery rules. What
8 should the United States say to a -- a United States
9 court say to a request like that, fine?

10 MR. OLSON: Yes. Because what you're
11 seeking is information about the assets. You are not
12 executing on the asset. And if the United States law
13 said that that would be extraterritorial application, if
14 it said you can't -- we're going to inhibit your ability
15 to accomplish an execution or an attachment but is
16 pursuant to the laws of a foreign country, pursuant to
17 decisions of a foreign tribunal, that would be the
18 extraterritorial application.

19 JUSTICE SCALIA: Well, that makes it a lot
20 harder for me because I thought you just looked to the
21 Foreign Sovereign Immunities Act. And anything that is
22 executable in this country under that, you can get
23 information on to try to execute abroad. But you are
24 saying, oh, no, it's more than that, it's stuff that you
25 couldn't execute on in this country, but that some

1 foreign countries will let you execute on. What am I
2 supposed to do, look at the law of all of these
3 countries?

4 MR. OLSON: No, no. That's the purpose of
5 discovery, Justice Scalia, so that the judgment creditor
6 can find out what the assets are, and then it -- it can
7 go to the courts of this country or the courts of
8 another country and to comply --

9 JUSTICE SCALIA: So it includes military
10 assets, diplomatic assets, everything?

11 MR. OLSON: Probably under-- diplomatic assets
12 are covered by a separate convention, as we mentioned in
13 our brief. Diplomatic assets and consulate affairs --

14 JUSTICE SCALIA: Military assets?

15 MR. OLSON: Military assets. Even
16 Section 1611 of the Foreign Sovereign Immunities Act
17 only exempts certain military aspects -- military
18 property. It has to be being used for military purpose
19 and so forth. So if you find out something that isn't
20 within the scope of that exemption, then you can execute
21 on it even in this country.

22 JUSTICE SCALIA: No. I'm saying it is
23 within the scope. It does -- it is those limited
24 military assets that you cannot execute on in this
25 country. And you are saying, well, so long as we can do

1 it abroad, we --

2 MR. OLSON: The problem, Justice Scalia, as
3 any litigant knows, you don't know what the judgment
4 debtor is doing with its assets. You don't know whether
5 it's disguising its assets. You don't know --

6 JUSTICE KENNEDY: No, no, no. But assume
7 the validity of the question. Does it -- why is it that
8 your position applies to military assets if that is --
9 that is beyond the scope of the Court's power here, but
10 on the assumption of Justice Scalia's question it's
11 within, and of your hypothetical, that it's subject to
12 execution in France?

13 MR. OLSON: The answer to that is, to the
14 extent that there's a specific objection with respect to
15 a scope -- the scope of the discovery, it can be
16 addressed by the district court as opposed to a blanket
17 prohibition on finding out information with respect to a
18 judgment debtor who has --

19 JUSTICE KENNEDY: Well, in making the rule,
20 we're asking whether or not our rule should take account
21 of this concern. And you say, well, it's up to the
22 district court. We're going to tell the district court
23 what to do. So what do we say on this point?

24 MR. OLSON: I think what you should say to
25 the DISTRICT court is what the Federal Rules of Civil

1 Procedure, which were not replaced by the Foreign
2 Sovereign Immunities Act, do. If it's relevant to the
3 subject matter or a defense of the action, as under --
4 pursuant to Rule 69(a)(2) and Rule 26, then it's
5 something that there may be specific objections or
6 specific concerns, but the Federal Foreign Sovereign
7 Immunities Act did not replace the Federal Rules of
8 Civil Procedure. It didn't intend --

9 JUSTICE GINSBURG: And they are statutes and
10 the rule, whether you divide it into the two parts, the
11 substance was the same. The rule says you look to
12 statutes of the United States. I don't know how -- I
13 don't know how you get around the fact that the
14 discovery rule itself says that the statutes of the
15 United States are relevant.

16 MR. OLSON: It says the discovery rule, Rule
17 69(a)(2) says the --

18 JUSTICE GINSBURG: I'm talking about
19 Advisory Committee notes.

20 MR. OLSON: Yes.

21 JUSTICE GINSBURG: What they meant. And
22 they meant that the discovery -- that there isn't a
23 world where we have statutes and then the Federal Rules.
24 There is an interplay between the two, and that's what
25 the Advisory Committee that drafted the rule told us

1 about it.

2 MR. OLSON: And I think that with respect to
3 that, that provision, those statements of the Advisory
4 Committee have to take -- be taken in the context that
5 the statute itself did not intend to address discovery
6 that's quite clear. Section 69(a)(2) specifically says
7 as provided in these rules or by the procedure of the
8 state in which the court is located. As the Second
9 Circuit specifically said, the rules in -- the laws in
10 the State of New York and the rules in -- and the
11 Federal Rules of Civil Procedure, discovery in aid of
12 execution is very broad and it may go to any person,
13 and if you meet the relevant standard anywhere the
14 property may be located.

15 JUSTICE GINSBURG: What about --

16 JUSTICE SCALIA: Let's assume -- let's
17 assume that New York has an exemption from -- from
18 levying on property. It says homestead, you can't levy
19 on homestead. But Florida does not have that exemption.
20 Can you, getting a judgment in a New York State court,
21 seek to discover what homestead property the defendant
22 has elsewhere?

23 MR. OLSON: Well, you assume the answer in
24 the question that you asked, Justice Scalia. We don't
25 know whether it's properly subject to a homestead until

1 we find out how many homes, where they are, who owns
2 them, what they're being used for. The rules are that
3 then you can --

4 JUSTICE SCALIA: Come on. I'm doing the
5 hypothetical, okay? And my hypothetical is the
6 discovery is what homes do you own in other states?

7 MR. OLSON: Yes.

8 JUSTICE SCALIA: The same language as the
9 New York statute --

10 MR. OLSON: I --

11 JUSTICE SCALIA: -- which exempts those
12 homes.

13 MR. OLSON: I submit --

14 JUSTICE SCALIA: Okay?

15 MR. OLSON: I submit that the Federal Rules
16 of Civil Procedure would allow a judgment creditor to
17 ask the bank or other persons or even the judgment
18 debtor, what homes do you own, yes.

19 JUSTICE SCALIA: And you think you can levy
20 on those homes --

21 MR. OLSON: No.

22 JUSTICE SCALIA: -- in Florida even though
23 New York wouldn't let you do it?

24 MR. OLSON: You could levy on those homes in
25 Florida if Florida allows you to do so, yes. You can

1 take that judgment in New York and go to Florida and
2 seek the enforcement or execution of that judgment.
3 This is the --

4 JUSTICE SCALIA: It's a judgment limited to
5 property other than homesteads. You take that judgment
6 to Florida, it doesn't expand. It's the same judgment.

7 MR. OLSON: Yes. It's a judgment for money
8 due. You borrowed money, you didn't pay it back, and
9 you have a judgment that entitles you to recover that
10 money.

11 JUSTICE SCALIA: But not from -- not from
12 homesteads.

13 MR. OLSON: Well, if that's your
14 hypothetical, that the judgment exempts homesteads, I
15 don't know whether the -- whether -- that gets pretty
16 far afield here. We're talking --

17 JUSTICE SCALIA: When you say you can't
18 execute on homestead property, it means any judgment in
19 New York excludes homesteads.

20 MR. OLSON: A judgment creditor who has a
21 bond in New York City and has -- and the debtor refuses
22 to pay it and gets a judgment from a court which has
23 jurisdiction, then can take that judgment and go to
24 other places where there is property located and execute
25 or attach on that property depending upon the laws --

1 JUSTICE GINSBURG: Mr. Olson, what --

2 MR. OLSON: -- of that jurisdiction.

3 JUSTICE GINSBURG: -- what about, there are
4 countries that have more restrictive views than we do
5 about what information, financial information, is
6 confidential. So this omnibus order says worldwide, we
7 want to know what property worldwide. And suppose the
8 country in which the property is located says: In our
9 system, this property is - if the information -- the
10 information that was sought from the bank was confidential. What
11 then?

12 MR. OLSON: This Court -- I think it's the
13 Société Nationale case -- has said that a court can
14 order discovery even with respect to where the person to
15 whom the discovery is addressed says I can't give you
16 that information. The case that your Court decided
17 involved Mexico, and the party claimed that, the laws of
18 Mexico will not let me provide that information. This
19 Court held that, yes, indeed the courts of the United
20 States may require the production of that information.
21 I think it's --

22 JUSTICE BREYER: Can you do this in
23 discovery normally? Can't someone go in and say I don't
24 think -- I think the subpoena or this order is too
25 broad. It will do da, da, da. There isn't that much

1 need for it. Please don't do it, judge. And the judge
2 has a lot of discretion to say no.

3 MR. OLSON: Exactly.

4 JUSTICE BREYER: All right. Now, is there
5 any objection on your part, which there may well be, if
6 we were to say one of the problems here is that this
7 order, although they may have reason for it, is
8 requiring discovery of airplanes, it's requiring
9 discovery of consulates, it's requiring discovery of all
10 of these other things, things that at least
11 presumptively our statutes would not allow them to
12 execute upon. Before you give an order allowing
13 discovery of that kind of thing, judge, you'd better
14 have very good reason for it.

15 MR. OLSON: Well, that's -- you are talking
16 about an abuse of discretion standard, and when you talk
17 about airplanes that may they be used for commercial
18 purposes, this Court has held --

19 JUSTICE BREYER: No, I'm not saying that --
20 no. I'm just saying where it is on its face something
21 that couldn't be discovered.

22 MR. OLSON: Well --

23 JUSTICE BREYER: Something that couldn't be
24 executed upon.

25 MR. OLSON: In this country, I think the --

1 JUSTICE BREYER: Be very, very careful. We
2 do those things, and they are very often ignored, but
3 nonetheless --

4 MR. OLSON: The district court went through
5 an elaborate process. It narrowed the scope of the
6 subpoenas with respect to property in Argentina. It
7 narrowed the scope of the subpoenas with respect to the
8 persons identified in the subpoenas. It responded to
9 concerns about that. It made itself available to
10 narrowing the scope of things. Argentina decided to
11 make a blanket objection to any information other than
12 information with respect to --

13 JUSTICE SOTOMAYOR: Mr. Olson.

14 MR. OLSON: -- assets that could be levied
15 on in the United States, and that we think is not the
16 correct interpretation of the FSIA or the Federal Rules.

17 JUSTICE SOTOMAYOR: If I am understanding
18 your position, you -- I think what you are saying, the
19 judgment here is only for money due, whatever the amount
20 was. And that's the judgment you have. How you get
21 that judgment paid depends on where the assets are
22 located, correct?

23 MR. OLSON: Yes.

24 JUSTICE SOTOMAYOR: And so any -- any
25 protection to those assets has to be provided by the

1 jurisdiction in which they're located.

2 MR. OLSON: That's correct, Your Honor.

3 JUSTICE SOTOMAYOR: So your position,
4 whether this is a sovereign or an individual, is that if
5 they get a homestead exemption in New York, if the
6 property is in New York, they're entitled to it, but if
7 they have property in Florida and Florida doesn't give a
8 homestead exemption, they can get that home -- they
9 can't get the home in New York, but they can get the
10 home in Florida.

11 MR. OLSON: Exactly. And if I haven't said
12 that --

13 JUSTICE SOTOMAYOR: And so in answer to
14 Justice Kagan's question, even though there might be a
15 country out there that doesn't make any property immune
16 by a sovereign, then you could go and attach any
17 property in that country?

18 MR. OLSON: To the extent-- Exactly. I think I understand
19 completely your question. My answer is precisely the
20 ability to attach or levy is dependent upon the law where
21 the place the property is located and there are many
22 jurisdictions that cover different things and we're
23 dealing with judgment debtors, which is -- and it's true
24 across the board, Justice Scalia. The judgment debtors
25 may be doing all sorts of things to avoid execution or

1 avoid paying their debts. In this case we have specific
2 findings by the courts below that Argentina has ample
3 resources to pay these debts. It submitted to
4 jurisdiction. It specifically stated that it will not
5 obey the orders of the courts of the United States,
6 including presumably any decision from this Court.

7 JUSTICE GINSBURG: How many of the
8 bondholders settled with Argentina? My understanding is
9 the vast majority of them did.

10 MR. OLSON: I'm --

11 JUSTICE GINSBURG: The vast majority of the
12 bondholders settled with Argentina.

13 MR. OLSON: Yes, because anybody who has
14 ever litigated against Argentina knows that it probably
15 may be less costly to just give in on whatever terms
16 Argentina offers. But the fact is that these are debts
17 undeniably due and owing, sovereign immunity was waived,
18 and I must emphasize the provision about the waiver
19 provisions which are in sections -- joint appendix 106
20 and 107, are as broad as the law allows, and they waive
21 immunity from suit, they consent to suit, they waived
22 the Sovereign Immunities Act and even at the last few
23 lines of the waiver it specifically talks about
24 execution in foreign countries.

25 JUSTICE KAGAN: If you win on the

1 categorical question that's presented here, do you think
2 it's still open to Argentina to go back to the district
3 court and to say, modify your ruling for this or that
4 privilege reason or because the order is overinclusive
5 or any of these more prudential considerations.

6 MR. OLSON: Yes, I believe that's the case,
7 Your Honor. Discovery is a continuing process, although
8 substantially the discovery demands have been met so
9 far, but it's a continuing process. There -- there can
10 be objections before with respect to, wait a minute,
11 that's our ambassador. Of course other laws cover that
12 sort of thing, and the judge was very careful about that
13 sort of thing.

14 JUSTICE ALITO: What exactly would a
15 district judge do in those circumstances? So you --
16 Argentina says this, this is military property. And
17 what would the judge inquire? What would the judge do
18 before deciding whether to allow discovery of something
19 like that? Would it look -- would it look to the law of
20 the country where the property is located? Would it
21 make some kind of factual inquiry as to whether it
22 really is military? What would go on?

23 MR. OLSON: I think the judge might ask for
24 some assurances that, from Argentina, that you are
25 telling the truth this time, that that's -- these are

1 really military assets and not something disguised as
2 military assets.

3 JUSTICE KENNEDY: Does the waiver extend to
4 military property?

5 MR. OLSON: The waiver extends as far as the
6 law will permit, and we submit that --

7 JUSTICE KENNEDY: Well, then the waiver just
8 restates the immunity that's provided in the Foreign
9 Sovereign Immunities Act.

10 MR. OLSON: No. The waiver --

11 JUSTICE KENNEDY: How does it go beyond
12 that?

13 MR. OLSON: It waives the Foreign Sovereign
14 Immunities Act defenses. It waives immunity from --

15 JUSTICE KENNEDY: But not as to military
16 property. So how do I know how far the waiver extends?

17 MR. OLSON: The waiver extends to anything
18 that -- Argentina has decided that in order to borrow
19 money in this country it had the sovereign right to
20 waive sovereign immunity under the laws of the United
21 States.

22 JUSTICE KENNEDY: I'm asking whether or not
23 the waiver extends to Argentine military property.

24 MR. OLSON: I believe that it does, Justice
25 Kennedy, because if you -- if you construed the Foreign

1 Sovereign Immunities Act of prohibiting a foreign
2 sovereign from waiving its immunity, you would cripple a
3 foreign sovereign from deciding that, I need to borrow
4 money and in order to borrow money --

5 JUSTICE KENNEDY: Does it waive immunity as
6 to a consular residence or an embassy building?

7 MR. OLSON: I think it depends upon the
8 circumstances, but there is a separate treaty that
9 covers consular affairs that is different than this,
10 that does provide immunity. And we're not talking about
11 any of those things. We're talking about bank
12 transactions which are covered by the subpoena to allow
13 a judgment creditor that has a judgment over Argentina,
14 and Argentina is not asking to be treated like a private
15 citizen as the law requires.

16 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

17 Mr. Blackman, you have 3 minutes remaining.

18 REBUTTAL ARGUMENT OF JONATHAN I. BLACKMAN

19 ON BEHALF OF THE PETITIONER

20 MR. BLACKMAN: Thank you. First, in answer
21 to Justice Kagan's question about going back, based on
22 the decision below in the next round the district court
23 specifically said: I don't care about limitation to
24 diplomatic, I don't care about limitation to military.
25 He said those might otherwise be good arguments, but the

1 Second Circuit has already passed upon that and the FSIA
2 doesn't apply. Full stop. So it's a chimera to think
3 that the district court is going to fix this. This
4 Court has to fix it.

5 Secondly, just to go to Mr. Olson's point,
6 these subpoenas, and I'm reading from JA-56, has as its
7 catch-all, paragraph 12, "each asset or property of any
8 kind whatsoever which Argentina owns." And then it goes
9 on for pages to list things that are supposedly within
10 the definition of "Argentina," including the ministry of
11 foreign affairs, the ministry of defense and the
12 national strategic military intelligence directorate.
13 So Justice Sotomayor was absolutely right, this covers
14 everything and the Second Circuit said that everything
15 is fair game.

16 On the broader points of the statute, the
17 FSIA, as this Court has held in the Amerada Hess case,
18 in Verlinden, and virtually every case you've decided
19 from Verlinden, which is the first one, is that this is
20 the comprehensive basis on which U.S. courts exercise
21 power over foreign states. And as Justice Ginsburg
22 pointed out, that power is very sharply broken down
23 between the broader power of jurisdiction to adjudicate,
24 which is what 1606 says -- once there is jurisdiction to
25 adjudicate, you are treated for purposes of that

1 adjudication like anyone else, and the much more limited
2 power to execute. And the legislative history
3 specifically says that the phrase in the statute in
4 1610(a) of "attachment in aid of execution" as opposed
5 to "execution," which is a separate word there, and
6 "attachment" is a separate word there. "Attachment in
7 aid of execution" means the whole panoply of
8 supplemental procedures that a court can use to assist
9 in execution.

10 Discovery in aid of execution, as the
11 language indicates in Rule 69, is one of those
12 procedures. There's no justification for saying that
13 that means goes way beyond the allowable end. Otherwise
14 you not only have the tail of discovery kind of wagging
15 the substantive dog; you have a tail that's cut off from
16 the dog. It's floating around in the ether. We can
17 take discovery of anything no matter if it's conceivably
18 within the reasonable scope of execution and the power
19 that the Federal court has or not. We think that's
20 wrong and we ask the Court to reverse it.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.
22 The case is submitted.

23 (Whereupon, at 11:04 a.m., the case in the
24 above-entitled matter was submitted.)

25

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