11-431

IN THE

Supreme Court of the United States

JENNY RUBIN *et al.*,

Petitioners,

—v.—

ISLAMIC REPUBLIC OF IRAN, *et al.*,

Respondents.

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

BRIEF OF NML CAPITAL, LTD., EM LTD., FFI FUND LTD., FYI LTD., AURELIUS CAPITAL MASTER, LTD., AURELIUS CAPITAL PARTNERS, LP, ACP MASTER, LTD., AURELIUS OPPORTUNITIES FUND II, LLC AND BLUE ANGEL CAPITAL I LLC AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Section 1609 of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ l330, l332(a), l39l(f) & l60l-l6ll ("FSIA"), provides that the property of a foreign state and its agencies and instrumentalities is immune from post-judgment attachment and execution unless that property falls within a statutory exception to immunity. In contrast to the Second and Ninth Circuits, the Seventh Circuit interpreted this provision as permitting post-judgment discovery only with respect to specific property that Petitioners could identify as potentially subject to such an exception. Applying the limitation that it created, the Seventh Circuit reversed an order compelling the Islamic Republic of Iran to provide general discovery regarding its assets in the United States, which Petitioners had requested in order to obtain information necessary to enforce their outstanding judgment against Iran.

The question presented is whether Section 1609 of the FSIA limits post-judgment discovery to property that first can be specifically identified by the party seeking discovery as potentially subject to an exception from attachment and execution immunity.

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AS AMICI CURIAE IN SUPPORT OF PETITIONERS**

INTEREST OF *AMICI CURIAE*

Amici NML Capital, Ltd., EM Ltd., FFI Fund Ltd., FYI Ltd., Aurelius Capital Master, Ltd., Aurelius Capital Partners, LP, ACP Master, Ltd., Aurelius Opportunities Fund II, LLC and Blue Angel Capital I LLC (collectively, the "Amici") are funds that invest, either directly or through affiliates, in sovereign debt through the secondary debt market in the United States.[1] Investors in certain of the Amici include universities, pension funds, not-for-profit organizations, and individual investors. Collectively, the Amici or their affiliates have litigated before numerous U.S. federal and state courts (as well as foreign courts) in their efforts to enforce judgments against sovereign debtors, including the Republic of Peru, the Republic of Congo, and the Republic of

[1] The Amici are filing this brief with the consent of all parties. The written consents have been lodged with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. More than ten days prior to the due date, counsel for *amici* provided all counsel of record with notice of intent to file.

Argentina, among others, and have been involved in many of the leading decisions on the scope of judgment enforcement under the FSIA. The Amici thus have extensive practical experience with the problems facing judgment creditors in such efforts.

The Amici's most recent and extensive litigation involves bonds issued by the Republic of Argentina ("Argentina"). In 2001, Argentina committed the largest sovereign debt default in history. Pursuant to the bond terms, Argentina expressly consented to jurisdiction in New York and explicitly waived any claim of immunity. Shortly after the default, bondholders began to file actions against Argentina.

Argentina has never paid a judgment rendered in favor of any of the Amici, and it has never admitted that any of its assets are subject to execution to satisfy those judgments. The Argentine legislature codified this policy in early 2005 by enacting a law that essentially prohibits Argentina from satisfying those judgments. The ensuing litigation, in which at least 150 actions were filed, has resulted in the entry of at least 100 judgments in the United States District Court for the Southern District of New York, at least 19 decisions issued by the United States Court of Appeals for the Second Circuit, at least 4 petitions for writs of certiorari to this Court, and related proceedings in other courts throughout the United States and Europe.

Petitioner Jenny Rubin ("Rubin") was denied post-judgment discovery through application of a rule of immunity that is contrary both to the text of the

FSIA and to the expectations of investors in sovereign debt instruments. The Amici submit that the issues presented in this case are of exceptional importance to sovereign debt enforcement litigation and to the broader market for sovereign debt issuances. Accordingly, the Court should grant Rubin's petition for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

As explained in Rubin's petition, the Seventh Circuit's opinion is contrary to the text and purpose of the FSIA, to the opinions of the Second Circuit in *First City, Texas-Houston, N.A. v. Rafidain Bank*, 150 F.3d 172 (2d Cir. 1998) ("*Rafidain I*"), and *First City, Texas-Houston, N.A. v. Rafidain Bank*, 281 F.3d 48 (2d Cir. 2002) ("*Rafidain II*"), and to the opinion of the Ninth Circuit in *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1472 (9th Cir. 1992).

When a court obtains jurisdiction over a foreign state, and especially when that jurisdiction is based on a waiver of sovereign immunity, that jurisdiction permits "proceedings to aid collection of a money judgment rendered in the case, including discovery pertaining to the judgment debtor's assets. Otherwise, the FSIA would in some cases confer jurisdiction to do no more than render an unenforceable, permanently unsatisfied judgment." *Rafidain II*, 281 F.3d at 53-54. This is consistent with the FSIA's general prescription that a "foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606. Indeed, the FSIA's only restriction on discovery is a provision allowing the Attorney General to request a limited discovery stay in terrorism-related cases. 28 U.S.C. § 1605(g).

Thus, the Second Circuit has squarely held that, in the context of the FSIA, once subject matter jurisdiction is established and a judgment is entered, "[d]iscovery of a judgment debtor's assets is conducted routinely under the Federal Rules of Civil Procedure." *Rafidain II*, 281 F.3d at 54; *see id*. ("The remedies of a judgment creditor include the ability to question the judgment debtor about the nature and location of assets that might satisfy the judgment.") (quoting *Aviation Supply Corp. v. R.S.B.I. Aerospace, Inc.*, 999 F.2d 314, 317 (8th Cir. 1993)). Moreover, this discovery is not limited to the United States, but rather extends to "the judgment debtor's assets, wherever located." *Id.* (quoting *Minpeco v. Hunt*, No. 81 Civ. 7619, 1989 WL 57704, at *1 (S.D.N.Y. May 24, 1989)). The Ninth Circuit concurs and, in fact, has held that post-judgment discovery under the FSIA extends to any of a foreign state's assets, wherever they might be located—even outside the United States. *See Richmark Corp.*, 959 F.2d at 1472 (affirming an order providing for worldwide discovery of assets belonging to an arm of the Chinese government); *accord FG Hemisphere Assocs., LLC v. Democratic Republic of Congo*, 637 F.3d 373 , 375-76 (D.C. Cir. 2011) (affirming a sanctions order that was predicated on the Congo's failure to comply with a worldwide discovery order).

The Amici agree with petitioners that review is warranted to resolve this Circuit conflict. In addition to the issues of exceptional importance that are presented in this case and described in the Rubin petition, the Amici submit this brief to describe two equally important reasons further warranting review:

First, if the Seventh Circuit's discovery rule is allowed to stand, it will be substantially more difficult for creditors of foreign states to enforce their judgments in the United States and elsewhere—thereby facilitating the efforts of foreign states, like Argentina, that ignore judgments of the U.S. courts with impunity while simultaneously hiding their assets from creditors.

Second, in making judgment enforcement against foreign states more difficult, the Seventh Circuit's discovery rule increases the risks to investors of holding sovereign bonds, with significant adverse consequences for the broader market for sovereign debt issuances.

I. REVIEW IS WARRANTED BECAUSE THE SEVENTH CIRCUIT'S OPINION WOULD EFFECTIVELY PRECLUDE JUDGMENT CREDITORS FROM OBTAINING MEANINGFUL DISCOVERY IN ACTIONS AGAINST FOREIGN STATES

Sovereign assets are extraordinarily difficult to locate in the absence of discovery—particularly when sovereign debtors are represented, as they often are, by experienced counsel and can strip the relevant jurisdictions of all easily identifiable assets before and immediately after default. The Seventh Circuit's opinion, if allowed to stand, would render post-judgment discovery useless in most, if not all, actions against foreign states by requiring, as a predicate to discovery, the showing of facts that only discovery can supply. That, in turn, would render money judgments against foreign states nearly unenforceable if the sovereigns refuse to pay their legal obligations.

The Seventh Circuit's discovery limitation—that a judgment creditor must specifically identify an asset that is potentially not subject to attachment and execution immunity—would allow a foreign state to use assets for countless commercial activities right under the nose of the court whose judgment it is refusing to pay, so long as the foreign state and its counterparties do not publicly disclose the existence of those activities. *See generally* 28 U.S.C. § 1610 (describing exceptions to attachment and execution immunity). To obtain any discovery about such clandestine assets and activities, a creditor would not only be required to identify an asset with specificity, but also to show that the asset was used for a commercial activity in the United States. This moots any utility of post-judgment discovery, which a creditor must necessarily use to find assets and, in the FSIA context, to gather evidence regarding the asset's use.

It is unrealistic to assert, as the Seventh Circuit did, that a creditor can use non-judicial means to identify assets *before* seeking post-judgment discovery. Consider the example of a foreign state's account at a financial institution. There is no question that such an account could be used for commercial activities in the United States, and thus would be subject to attachment and execution under the FSIA. *See*, *e.g.*, *EM Ltd. v. Republic of Argentina*, 389 F. App'x 38 (2d Cir. 2010) (affirming attachment of sovereign trust account). In the past, some of the Amici have fortuitously identified a foreign state's specific accounts by, for example, locating custodian or other agreements that require maintenance of the accounts. However, information about the vast majority of accounts at financial institutions (including sovereign accounts) is kept private and only made available to the customer and the financial institution itself. That information cannot be revealed to a third party absent a subpoena compelling disclosure. And, under the Rubin decision, a sovereign would argue that a subpoena would not be permissible unless a judgment creditor could first identify with specificity the account that is the subject of the subpoena. Of course, if a creditor knew that information, the subpoena would not be necessary. Discovery, including general asset discovery, is therefore the only practical and reliable way to learn about the existence of a foreign state's accounts at financial institutions. Moreover, even if a judgment creditor was somehow able to obtain this information outside the discovery process, a foreign state would argue that the Seventh Circuit's opinion precludes discovery as to that account—because the creditor would lack, absent discovery, the information necessary to prove that the account is used for a commercial activity or the subject of another attachment and execution immunity exception.

The Seventh Circuit's suggested remedy for this problem—asking the Secretaries of State and of the Treasury for assistance—only applies in terrorism-related cases, and thus is useless in commercial cases. *See* 28 U.S.C. § 1610(f)(2)(A). Indeed, providing such assistance in commercial cases would be antithetical to the purpose of the FSIA, which was to separate litigation against foreign states from the Executive Branch to the greatest extent possible. Congress's limited exception for sponsors of terrorism did not undermine this purpose.

The Amici's litigation against Argentina provides a prime example of what occurs when a judgment creditor is prevented from obtaining general asset discovery. Despite the clear holdings in the *Rafidain* cases, Argentina has argued at least 11 separate times that the Second Circuit did not mean what it said. Instead, Argentina has asked the district court to disregard the Second Circuit's instruction by restricting post-judgment discovery in a manner similar to the Seventh Circuit. The Argentine effort to block discovery has redoubled since the *Rubin* opinion was issued. Tellingly, Argentina claims that none of its property in the United States is subject to attachment or execution—and thus that its judgment creditors could not satisfy the *Rubin* test.[2] Argentina's position is essentially that it can block *all* post-judgment asset discovery in the United States, regardless whether that discovery

[2] Argentina's claim is belied by the fact that the Second Circuit has held that some of the property that creditors have been fortunate enough to find is subject to attachment and execution. *See, e.g.*, *EM Ltd.*, 389 F. App'x 38; *Capital Ventures Int'l v. Republic of Argentina*, 282 F. App'x 41 (2d Cir. 2008).

is sought from Argentina itself or by subpoena from non-parties.

The district court has long recognized that it has the power to order post-judgment discovery relating to all of Argentina's assets wherever they may be located, and consistent with *Rafidain*, it has issued orders compelling discovery commensurate with the full scope of its powers. It recognized, as did the district courts in *Richmark* and *FG Hemisphere*, that such general, worldwide discovery is appropriate because, even if an asset cannot be attached and executed upon in the United States, it may be subject to attachment and execution elsewhere. Argentina (unsuccessfully) sought, citing the Seventh Circuit's *Rubin* opinion, to stay these recent orders pending expedited appeals to the Second Circuit. *See NML Capital, Ltd. v. the Republic of Argentina*, No. 11-4065 (2d Cir.).

The district court in which the Amici's judgments against Argentina were entered had not previously ordered general, worldwide asset discovery; consequently, the Amici have located few assets upon which they can attempt to execute—despite a huge investment of judicial and other resources. As a result, U.S. courts have been burdened with countless dozens of motion cycles and subsequent appeals related to the efforts of the Amici and other judgment creditors to enforce their judgments. Thus, virtually all of the dollar value of the outstanding judgments against Argentina has not been secured or paid by an attachment or execution, even though the judgments against Argentina have been outstanding for many years. This vicious cycle is poised to continue with respect to Argentina and future sovereign debtors if the *Rubin* petition is not granted.

II. REVIEW IS WARRANTED BECAUSE THE SEVENTH CIRCUIT'S OPINION WOULD ADVERSELY AFFECT THE MARKETS FOR SOVEREIGN DEBT ISSUANCES

If the Seventh Circuit's opinion is allowed to stand, it will have a significant negative effect on secondary markets for sovereign debt—and in particular, the debt of financially troubled foreign states. The secondary debt market has two important functions: it allows lenders to decrease their exposure to particular debt issuances; and it ensures primary market lenders a minimum, immediate recovery through a sale to a secondary market lender in the event of a default. The primary market for sovereign debt factors both of these functions into the interest rates at which it is possible for a foreign state to issue debt. If secondary market lenders are nonexistent, or if they will provide only minimal value to primary lenders, the primary market will demand a higher interest rate for sovereign debt issuances.

The Second Circuit recognized this economic reality in *Elliott Assoc. v. Banco de la Nacion*, 194 F.3d 363, 380 (2d Cir. 1999) in evaluating a champerty defense. It noted that if such a defense could prevent a secondary market purchaser from enforcing defaulted sovereign debt, the secondary market would cease to function, and that:

> This would therefore add significantly to the risk of making loans to developing nations with poor credit ratings. The additional risk would naturally be reflected in higher borrowing costs to such nations. It could even make loans to some of them unobtainable in New York. A well-developed market of secondary purchasers of defaulted sovereign debt would thereby be disrupted and perhaps destroyed even though its existence provides incentives for primary lenders to continue to lend to high-risk countries.

Id. at 380.

The United States is one of the primary markets for the issuance and trading of sovereign debt, and hundreds of billions of dollars of sovereign debt instruments—particularly from emerging markets—are issued here and governed by the law of a U.S. state. Typically, these instruments contain waivers of the foreign states' immunity and consents to jurisdiction in certain courts located in the United States. Accordingly, the United States is at the heart both of foreign sovereign debt markets and of sovereign debt enforcement litigation.

Foreign states do not choose a U.S. forum out of generosity; instead, they do so because the debt markets demand it if the foreign states wish to obtain a reasonable interest rate, or in some cases, any loans at all. The predictability and reliability of United States courts following the Federal Rules of Civil Procedure to grant and enforce judgments assures creditors, such as the Amici, that they will not be at the mercy of the foreign state to obtain a recovery on their bonds. The more likely a foreign state is to default on its loans, the more important such assurances are—and thus the more their diminution will be factored into, and increase, interest rates for financially troubled sovereign borrowers.

If the Seventh Circuit's limitations on discovery involving foreign states—and the ensuing practical limitations on judgment enforcement—become the standard practice of United States courts, it would ensure Argentina-like results for all future sovereign debt litigation here. The Amici and other creditors would be required to undertake long, expensive, and often fruitless private investigations—followed by equally long and expensive litigation—to find any property against which a judgment could be enforced. The more difficult and expensive it is to enforce foreign sovereign debt, the less secondary market purchasers, such as the Amici, are willing to pay for it—and the more primary markets must compensate for that risk by increasing interest rates for all financially troubled foreign states. Thus, it would be reasonable to expect that a premium will be added to all future debt offerings of financially troubled foreign states, to their detriment.

CONCLUSION

For the foregoing reasons, the Amici respectfully request that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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