No. 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

SUPPLEMENTAL BRIEF FOR PETITIONERS

DAVID J. STRACHMAN
MCINTYRE TATE, LLP
321 South Main Street
Providence, R.I. 02903
(401) 351-7700

THEODORE B. OLSON
Counsel of Record
MATTHEW D. MCGILL
SCOTT P. MARTIN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
tolson@gibsondunn.com

Counsel for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

SUPPLEMENTAL BRIEF FOR PETITIONERS

Even as it maintains that the decision below does not warrant this Court's review, the government twice acknowledges that the clear holding of the Seventh Circuit—that the FSIA limits discovery in aid of execution to specific items identified by the judgment debtor as potentially subject to attachment—may "unduly limit [the] district court's discretion." U.S. Br. 8, 17. In plain English, that holding is wrong.

Unable to defend the decision below on its own terms, the government strains to recast the decision as resting on a discretionary balancing inquiry that it has cut from whole cloth. According to the government, "the district court must exercise its discretion consistent with the presumption of immunity established in Section 1609," which in turn requires the judgment creditor to "sho[w] that the discovery concerns potentially non-immune assets in light of the circumstances of the case and the balance between the judgment creditor's need for the information and the foreign state's claim to immunity." U.S. Br. 10, 16-17.

Yet one cannot find even a *single* reference to "discretion" in the Seventh Circuit's decision. That is because the Seventh Circuit did not evaluate the district court's exercise of its discretion or otherwise engage in a balancing inquiry. Instead, it held *as a matter of statutory interpretation* that "under the FSIA a plaintiff seeking to attach the property of a foreign state in the United States *must identify the specific property* that is subject to attachment and plausibly allege that an exception to [Section] 1609 attachment immunity applies." Pet. App. 32a (em-

phasis added). It is precisely this holding that the government now admits to be incorrect.

And rightly so: The FSIA itself contains no such limitation on post-judgment discovery. Even the government is forced to concede that "the FSIA does not expressly address the permissible scope of discovery for the purpose of determining whether assets of a foreign sovereign are immune from execution under Section 1609." U.S. Br. 10. And the legislative history, which the government declines even to quote, makes clear that this silence was not accidental: The FSIA "*does not attempt to deal with questions of discovery*." H.R. Rep. No. 94-1487, at 23 (emphasis added), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6621.

Similarly, the government does not defend the basis on which the Seventh Circuit attempted to distinguish decisions from the Second and Ninth Circuits—namely, that those decisions permitted discovery from foreign instrumentalities rather than sovereigns—and instead makes the new and erroneous argument that those decisions did not address the appropriate scope of post-judgment discovery under the FSIA. That is belied by the Seventh Circuit's own opinion, which acknowledged that the decisions held that the FSIA permits "general discovery" of judgment debtors. Pet. App. 30a. Yet even the government recognizes that the distinction drawn by the Seventh Circuit cannot bear the dispositive weight placed upon it, claiming that it "may be appropriate" for district courts to consider this distinction "in the exercise of [their] discretion," U.S. Br. 22. That is because, under the FSIA, foreign instrumentalities and sovereigns both are "foreign states," 28 U.S.C. § 1603(a), and the property of one is just as presump-

tively immune from attachment and execution as the other, *see id.* § 1609.

The government's brief thus lays bare the critical flaws in the decision below: It imposes limitations on post-judgment asset discovery that cannot be reconciled with the FSIA, and in doing so creates a split with the Second and Ninth Circuits. This Court's review is warranted.*

I. THE COURTS OF APPEALS ARE DIVIDED ON THE QUESTION PRESENTED.

The government devotes only four pages to discussing the real, and outcome-determinative, conflict among the circuits on the scope of post-judgment discovery against foreign states. *See* U.S. Br. 19-22. It cannot so easily wish away these conflicts.

A. The government maintains that the Second Circuit's *Rafidain* cases are distinguishable because the judgment creditor was purportedly seeking discovery "to determine whether another entity" was "subject to suit as the alter ego" of Rafidain, and because the Second Circuit's decision in *First City, Texas-Houston, N.A.* v. *Rafidain Bank*, 281 F.3d 48 (2d Cir. 2002) ("*Rafidain II*"), "concerned only 'the court's subject matter jurisdiction, not its discretion' in ordering discovery." U.S. Br. 19-20 (quoting *Rafidain II*, 281 F.3d at 54). The government is mistaken on both counts.

---

* Iran has argued that this case is an unsuitable vehicle for addressing the question presented because the Seventh Circuit also held that it should not have been required to appear. As Petitioners have explained, Iran is mistaken. Reply Br. 10-12. In any event, the government—like the University of Chicago—does not advance this argument.

The Second Circuit explained that the discovery sought from Rafidain was "calculated to aid [the judgment creditor's] collection on the money judgment entered against Rafidain." *Rafidain II*, 281 F.3d at 54 n.3. By establishing that the Central Bank was Rafidain's alter ego, and therefore that the Central Bank's assets were *also* those of Rafidain, the judgment creditor hoped to identify "assets sufficient to satisfy [its existing] judgment," *id.* at 54—not, as the government maintains, to pursue a new lawsuit against the Central Bank. The Second Circuit's decision to permit "full discovery against Rafidain" (*First City, Texas-Houston, N.A.* v. *Rafidain Bank*, 150 F.3d 172, 177 (2d Cir. 1998) ("*Rafidain I*")) thus directly "address[ed] the appropriate scope of discovery" to "determin[e] the immunity of th[e] sovereign's property from execution." U.S. Br. 20.

Nor can the government limit the *Rafidain* cases by claiming that the only issue in *Rafidain II* was subject-matter jurisdiction. After concluding that "jurisdiction continues long enough to allow proceedings in aid of any money judgment that is rendered in the case," the Second Circuit further explained the scope of those proceedings: "Discovery of a judgment debtor's assets is conducted routinely under the Federal Rules of Civil Procedure." *Rafidain II*, 281 F.3d at 54. On the specific issue of asset discovery, the Second Circuit quoted three separate decisions holding that "'[t]he 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.'" *Ibid.* (quoting *Aviation Supply Corp.* v. *R.S.B.I. Aerospace, Inc.*, 999 F.2d 314, 317 (8th Cir. 1993)).

The cases quoted by the Second Circuit explain that "'the judgment creditor must be given the freedom to make a broad inquiry to discover hidden or concealed assets of the judgment debtor.'" *Rafidain II*, 281 F.3d at 54 (quoting *Caisson Corp.* v. *County W. Bldg. Corp.*, 62 F.R.D. 331, 334 (E.D. Pa. 1974)). That is, of course, precisely what Petitioners sought in this case and were denied by the Seventh Circuit. The government's suggestion that the Second Circuit did not consider the "permissible *scope* of discovery" (U.S. Br. 21) is nonsense.

In any event, the government's interpretation of *Rafidain II* is belied by *Walters* v. *Industrial & Commercial Bank of China, Ltd.*, 651 F.3d 280 (2d Cir. 2011), which it discusses only in a footnote. The Second Circuit invoked *Rafidain II* to permit the judgment creditors to obtain "discovery pertaining to the judgment debtor's assets" even though they were unable to identify any "specific accounts or funds" that might be subject to attachment. *Id.* at 297. This decision cannot be reconciled with the Seventh Circuit's requirement that the judgment creditor identify "specific property" (Pet. App. 32a) as a prerequisite for post-judgment discovery.

B. The government similarly misses the mark in attempting to distinguish the Ninth Circuit's decision in *Richmark Corp.* v. *Timber Falling Consultants*, 959 F.2d 1468 (9th Cir. 1992). The government does not dispute that *Richmark* upheld an "asset discovery order" even broader than the one at issue here. U.S. Br. 21. It claims, however, that the Ninth Circuit did not address whether that order was consistent with the FSIA. This is incorrect.

As the Ninth Circuit explained, the FSIA "does not vest in Beijing [the state-owned judgment debtor]

a 'right' not to pay a valid judgment against it." 959 F.2d at 1477-78. But while the judgment creditor "can seek to execute the judgment in whatever foreign courts have jurisdiction over Beijing's assets," it "needs discovery in order to determine which courts those are." *Id.* at 1478. "Beijing may be *able* as a practical matter to conceal its assets from the district court and therefore avoid execution of [the] judgment," the Ninth Circuit emphasized, "but it has no *right* to do so." *Ibid.*

The Ninth Circuit's conclusion that the FSIA does not provide a foreign state with the "right" to "conceal its assets from the district court" cannot be reconciled with the Seventh Circuit's decision below. And that conflict, along with the conflict between the Seventh Circuit's decision and the *Rafidain* cases, warrants this Court's review.

C. The government mentions only in the final two paragraphs of its brief the purported distinction of the *Rafidain* cases and *Richmark* advanced by the Seventh Circuit: Unlike the decision below, those cases "concerned enforcement proceedings 'against an *instrumentality* of a foreign sovereign, not the foreign sovereign itself.'" U.S. Br. 21-22 (quoting Pet. App. 30a). The most the government can say about this distinction is that "it may be appropriate for a court, in the exercise of its discretion over discovery, to permit broader asset discovery against the instrumentality of a foreign state than against the foreign state itself." *Id.* at 22.

The issue addressed by the Seventh Circuit, however, was whether the FSIA imposes *categorical* limitations on post-judgment discovery from foreign states. The Seventh Circuit conceded that *Richmark* had affirmed "general discovery" to "identify [Bei-

jing's] assets," and that the *Rafidain* cases "affirmed an order permitting a judgment creditor to conduct general discovery against Rafidain Bank." Pet. App. 29a-30a. Yet it held that these decisions do not "provide support for the discovery order in this case" because they "authorized general discovery against an *instrumentality* of a foreign sovereign." *Id.* at 30a. As Petitioners have explained, there is no support for this distinction in the text of the FSIA, *see* Pet. 18-19, 21, which provides presumptive immunity to both foreign sovereigns and foreign instrumentalities—both are "foreign states," 28 U.S.C. § 1603(a). The government does not claim otherwise.

II. THE SEVENTH CIRCUIT INCORRECTLY DECIDED THE QUESTION PRESENTED.

The government devotes the bulk of its brief to rewriting the Seventh Circuit's decision. According to the government, the general-asset discovery order in this case is "irreconcilable with the FSIA's presumption of immunity" because, by "requir[ing] discovery that is untethered to any reasonable basis for asserting an exception to immunity," the district court drew an improper "balance between the judgment creditor's need for the information and the foreign state's claim to immunity." U.S. Br. 16-17. The government is incorrect that the discovery order is inconsistent with the discretionary analysis it proposes, but in any event this is decidedly not the holding of the Seventh Circuit.

The Seventh Circuit viewed the issue before it as the proper "interpretation of the FSIA." Pet. App. 18a. And it squarely held that the judgment creditor "must identify the specific property that is subject to attachment," and that "discovery in aid of execution is limited to the specific property the plaintiff has

identified." *Id.* at 32a. The Seventh Circuit did not hold that the district court *abused its discretion* in balancing the parties' respective interests, but that it committed *legal error* in ordering discovery that was not tied to identified assets. *See ibid.* The government's claim that the Seventh Circuit instead "held that a district court should exercise its discretion over discovery in aid of execution consistent with the presumption of immunity" (U.S. Br. 9) is fantasy.

The government strives so hard to recharacterize the decision below because it recognizes that the decision would "unduly limit" the ability of judgment creditors to obtain necessary information about a foreign state's assets. U.S. Br. 8, 17. But just as there is no support in the FSIA for the Seventh Circuit's categorical limitations on discovery, there is also no support for the government's balancing approach: The government simply begs the question in asserting that attachment immunity "evidenc[es] Congress's intent to protect foreign states from the burdens of litigation." U.S. Br. 13. The best "evidenc[e]" of "Congress's intent"—the FSIA itself—says nothing of the sort. Instead, "Congress kept in place a court's normal discovery apparatus in FSIA proceedings." *FG Hemisphere Assocs., LLC* v. *Democratic Republic of Congo*, 637 F.3d 373, 378 (D.C. Cir. 2011).

The government asserts that attachment immunity "exists not only to shield foreign state-owned property from seizure, but also to protect against 'the costs, in time and expense, and other disruptions attendant to litigation.'" U.S. Br. 11 (quoting *EM Ltd.* v. *Republic of Argentina*, 473 F.3d 463, 486 (2d Cir. 2007)). But that is true only for immunity from suit, not attachment immunity. *See EM Ltd.*, 473 F.3d at

486 (rejecting discovery because the plaintiff "failed to 'sho[w] a reasonable basis for assuming jurisdiction' over" the foreign state (quoting *Rafidain I*, 150 F.3d at 177)). Although "immunity from suit" includes an "entitlement not to stand trial or face the other burdens of litigation," *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985), the same reasoning does not apply to attachment immunity, which is implicated only after the foreign state's immunity from suit has been overcome, *see* Reply Br. 9-10. And the fact that a foreign state's property is "presumptively immune from attachment or execution" (U.S. Br. 13) says nothing about whether the foreign state can avoid discovery designed to identify its property.

Indeed, as the government acknowledges, foreign-state "property is presumptively immune" from attachment under the FSIA "whether or not the foreign state appears to assert immunity." U.S. Br. 10. The government never explains how a form of immunity that "inheres in the property" (Pet. App. 37a) could support the creation of a *separate* immunity from discovery that is personal to the foreign state. Neither the FSIA nor analogy to other forms of immunity supports the discovery immunity announced by the Seventh Circuit.

III. THE QUESTION PRESENTED IS IMPORTANT.

The government does not dispute that the proper scope of post-judgment discovery against foreign states is an exceedingly important issue, particularly given the amount of outstanding judgments. *See* Pet. 21-27; NML Br. 5-12. It maintains, however, that the decision below will not "foreclose all opportunities to uncover attachable assets." U.S. Br. 18. But neither of the options it proposes would provide

judgment creditors with any realistic possibility of locating attachable assets.

A. The government claims that, "[i]n some cases, the United States may consider engaging in diplomatic efforts" to "encourage the foreign state to pay the judgments outstanding against it." U.S. Br. 18. The government's qualification-riddled proposal is cold comfort to judgment debtors who need actual information about foreign assets, not a vague suggestion that the government will consider asking the foreign state to pay. It is especially weak in the context of lawsuits against Iran; there is no reason to believe the government's "encourage[ment]," even if provided, would convince Iran to pay the $10 billion in judgments against it. *See* Pet. 22.

In the only case cited by the government, the D.C. Circuit explained that granting relief from default judgments against foreign states would support "the State Department's continuing efforts to encourage foreign sovereigns generally to resolve disputes within the United States' legal framework." *FG Hemisphere Assocs., LLC* v. *Democratic Republic of Congo*, 447 F.3d 835, 838-39 (D.C. Cir. 2006). But the issue here is what is required by that "legal framework" when a foreign state refuses to pay judgments entered against it. It is no answer to say that foreign states might voluntarily choose to pay at some point. Tellingly, whatever "encourage[ment]" was provided in *FG Hemisphere* was apparently unsuccessful: The district court was forced to impose contempt sanctions for the foreign state's failure to provide post-judgment discovery. *See* 637 F.3d at 375.

B. The government also notes that, in cases brought under the FSIA's terrorism exception, the

judgment creditor "may request that the Secretary of State and the Secretary of the Treasury provide assistance in identifying or locating the property of the foreign state." U.S. Br. 18 (citing 28 U.S.C. § 1610(f)(2)(A)). This "assistance" is unavailable in other cases, including in lawsuits over the hundreds of billions of dollars currently outstanding in foreign sovereign debt. *See* NML Br. 7-8. And even where the "assistance" provision applies, it is purely hortatory: Although Section 1610(f) originally required the government to provide assistance in locating assets of a foreign-state judgment debtor, *see* 28 U.S.C. § 1610(f)(2)(A) (pre-2000) ("shall . . . assist"), the statute was amended in 2000 to provide only that the government "should make every effort to" assist judgment creditors in locating assets. 28 U.S.C. § 1610(f)(2)(A); *see also* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, sec. 2002(f), 114 Stat. 1464, 1543.

The government's suggestion that terrorist victims should be forced to rely on whatever assistance it chooses to provide is particularly remarkable given its "relentless resistance to be of any assistance." James Cooper-Hill, *If the Non-Person King Gets No Due Process, Will* International Shoe *Get the Boot?*, 32 Denv. J. Int'l L. & Pol'y 421, 442 (2004); *see also* Pet. 23 & n.3 (collecting sources). Its proposal would be effective only in ensuring that state sponsors of terrorism like Iran are *never* forced to pay the judgments entered against them by American courts.

* * *

Congress has twice amended the FSIA to allow lawsuits against state sponsors of terrorism, designed to "provid[e] justice to those who have suffered at the hands of terrorists" and "to deter future

state-sponsored terrorism." 154 Cong. Rec. S54 (daily ed. Jan. 2, 2008). The Seventh Circuit's decision thwarts both of these goals: It precludes terrorist victims like Petitioners from obtaining the discovery they need to identify potentially attachable assets, while simultaneously negating any deterrence effects of their lawsuits by allowing state sponsors of terrorism to avoid paying judgments against them. This Court's review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DAVID J. STRACHMAN
MCINTYRE TATE, LLP
321 South Main Street
Providence, R.I. 02903
(401) 351-7700

THEODORE B. OLSON
Counsel of Record
MATTHEW D. MCGILL
SCOTT P. MARTIN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
tolson@gibsondunn.com

Counsel for Petitioners

June 4, 2012