No. 12-842

IN THE

# Supreme Court of the United States

REPUBLIC OF ARGENTINA,

*Petitioner,*

*v.*

NML CAPITAL, LTD.,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit**

## SUPPLEMENTAL BRIEF FOR RESPONDENT


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## RULE 29.6 STATEMENT

The corporate disclosure statement included in the brief in opposition remains accurate.

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## SUPPLEMENTAL BRIEF FOR RESPONDENT

Just last year, the government recommended that this Court deny certiorari on the question whether post-judgment discovery from a foreign state is limited by the Foreign Sovereign Immunities Act of 1976 ("FSIA"). U.S. Br. 1, 8, 23, *Rubin* v. *Islamic Republic of Iran*, No. 11-431; *see also Rubin* v. *Islamic Republic of Iran*, 637 F.3d 783 (7th Cir. 2011), *cert. denied*, 133 S. Ct. 23 (2012). There, the government maintained that the Seventh Circuit's decision denying post-judgment discovery to victims of state-sponsored terrorism did not warrant review because "the precise content and import" of that ruling "remain to be determined in future cases." U.S. Br. 8, *Rubin*, No. 11-431.

Since then, the Seventh Circuit has not elaborated on "the precise content and import" of its holding. Yet, in a reversal of course acknowledged only in the final footnote of its brief, *see* U.S. Br. 20 n.7, the government now urges this Court to grant certiorari and to sharply limit the ability of creditors and victims of terrorism to recover on their judgments against sovereigns. None of the government's reasons for reversing course has merit.

At the threshold, this case does not even present the question that *Rubin* did: This case presents only the splitless question whether FSIA attachment immunity limits post-judgment discovery from non-sovereign, third-party commercial banks. The government nevertheless contends (peculiarly) that this is a suitable vehicle for considering the FSIA's limits on post-judgment discovery from foreign states. U.S. Br. 21-22. The government insists that the Court "would not [be] *prevent*[*ed*]" from deciding the FSIA's

limits on discovery served on sovereigns, *id.* at 21 (emphasis added), but it cannot dispute that this Court could resolve the case without reaching that issue. *See* Opp. 12-14.

In any event, the government's contention that the Second Circuit's decision "creates" a circuit split with the Seventh Circuit's decision in *Rubin* (U.S. Br. 18) is wrong. The Second Circuit's decision breaks no new ground but instead follows circuit precedent established more than a decade before *Rubin* was decided. Indeed, the Second Circuit itself recognized that *Rubin* "conflicted with [its] holding" in *First City, Texas-Houston, N.A.* v. *Rafidain Bank*, 281 F.3d 48 (2d Cir. 2002) ("*Rafidain II*"). Pet. App. 17. But this Court already has adjudged that conflict unworthy of review.

And so the government devotes most of its brief to the merits contention that the FSIA limits post-judgment discovery. *See* U.S. Br. 8-17. But the FSIA's text provides no support for that argument. Indeed, the government concedes that the FSIA "does not expressly address the permissible scope" of post-judgment discovery. *Id.* at 9. It instead relies on supra-textual "principles" that it believes "the FSIA was enacted to implement and safeguard." *Id.* at 11. But courts may not adopt a statutory construction that has "no basis or referent in [the statute's] language," *Milner* v. *Dep't of the Navy*, 131 S. Ct. 1259, 1267 (2011), and there is none here. As the legislative history confirms, the FSIA "does not attempt to deal with questions of discovery." H.R. Rep. No. 94-1487, at 23 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6621.

The government's "principles" thus could operate, if anywhere, only as a restraint on a district

court's discretion in supervising post-judgment discovery. But any analysis of the discretionary judgment here must also take account of the fact that Argentina comprehensively waived its sovereign immunity, promised not to claim any such immunity, and consented to "the giving of any relief or the issue of any process in connection with" the judgments entered against it. Pet. App. 4 n.1.

And the analysis likewise must also address the fact that Argentina is a uniquely recalcitrant litigant: Argentina has "literally proclaimed its repudiation of its legal obligations" by prohibiting its government from negotiating with dissenting creditors. *EM Ltd.* v. *Republic of Argentina*, 720 F. Supp. 2d 273, 279 (S.D.N.Y. 2010), *rev'd on other grounds*, 652 F.3d 172 (2d Cir. 2011). Instead it has litigated against NML, in particular, for more than a decade—inflicting massive burdens on this country's judicial system rather than negotiating a means to pay what it indisputably owes. And most recently, Argentina's highest officials "have publicly and repeatedly announced their intention to defy any rulings of [the Second Circuit] and the district court with which they disagree." *NML Capital, Ltd.* v. *Republic of Argentina*, 727 F.3d 230, 238 & n.4 (2d Cir. 2013). Indeed, its counsel told the Second Circuit directly that "it 'would not voluntarily obey'" the district court's orders, "even if [they] were upheld." *Id.* at 238.*

The government sheepishly acknowledges Argentina's sordid history as a debtor, U.S. Br. 4 n.2; but it fails to note either Argentina's contractual consent to

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* The oral argument is available at http://cvn.com/proceedings/nml-capital-v-republic-of-argentina-oral-argument-2013-03-27.

relief or its brazen position that it will flout any adverse judgment, and instead asks the Court to expend its time and effort to help Argentina. There is no reason for this Court to do so.

## I. THIS CASE IS A POOR VEHICLE FOR RESOLVING ANY QUESTION ON WHICH THE COURTS OF APPEALS HAVE DIVIDED.

This case is a poor vehicle to address the question whether (or to what extent) FSIA attachment immunity limits post-judgment discovery from a foreign state: The discovery here was served on non-sovereign, third-party commercial banks doing business in New York, and the Second Circuit upheld the discovery order on that independent basis. *See* Opp. 12-14; *see also* Pet. App. 19. This Court accordingly could resolve this case on that basis alone, without addressing any question involving foreign states.

The government notes that Argentina challenges "both bases for the court of appeals' decision" and that the Court might "not [be] prevent[ed]" from deciding the question presented. U.S. Br. 21-22. But the government's desire for this Court to resolve that issue provides no assurance that the Court would be able to do so.

Nor is it relevant that NML "has taken the position" that the decision below "establishes that the FSIA does not prevent the district court from ordering worldwide, general asset discovery from Argentina itself." U.S. Br. 21-22; *see also* Argentina Supp. Br. 1-4. Argentina's disagreement with the discovery ordered by the district court against it can be resolved in Argentina's pending appeal from that order. *See NML Capital Ltd.* v. *Republic of Argentina*, No. 13-4054 (2d Cir. Oct. 25, 2013). The pendency of

a case that could present Argentina's question is no warrant for certiorari in a case that does not.

## II. THE SHALLOW CIRCUIT SPLIT REGARDING POST-JUDGMENT ASSET DISCOVERY FROM FOREIGN STATES DOES NOT WARRANT THIS COURT'S REVIEW.

Even if this case squarely presented an issue on which the courts of appeals have divided, review still would not be warranted. *See* Opp. 15-18. The lower-court division is the result of the Seventh Circuit's outlier decision that the FSIA limits discovery in aid of execution, *see Rubin*, 637 F.3d at 799, which this Court already has determined to be uncertworthy, *see* 133 S. Ct. 23. The weight of lower-court authority supports the view long endorsed by the Second Circuit: that post-judgment discovery "would not intrude upon [a foreign state's] sovereign immunity," *First City, Texas-Houston, N.A.* v. *Rafidain Bank*, 150 F.3d 172, 177 (2d Cir. 1998) ("*Rafidain I*"), and that "[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 also Richmark Corp.* v. *Timber Falling Consultants*, 959 F.2d 1468, 1471-72, 1475, 1477-78 (9th Cir. 1992).

The government claims that the Second Circuit "acknowledged" that its decision "creates a circuit conflict with the Seventh Circui[t]." U.S. Br. 18. But the Second Circuit *actually* stated that such a conflict already existed. As it explained, "to the extent" that *Rubin* "concluded that the district court's subject matter jurisdiction over a foreign sovereign was insufficient to confer the power to order discovery from a person subject to the court's jurisdiction that is relevant to enforcing a judgment against the sov-

ereign," that decision "conflict[s] with [the] holding in *Rafidain II*." Pet. App. 17.

Declining to acknowledge that statement, the government instead disputes the Second Circuit's understanding of its own precedent. *See* U.S. Br. 18 n.6. The government insists that *Rafidain I* did not involve "the scope of post-judgment asset discovery." *Ibid.* But *Rafidain I* squarely held that "permit[ting] full discovery" against a sovereign judgment debtor "would not intrude upon [the foreign state's] sovereign immunity." 150 F.3d at 177.

The government is similarly unable to explain *Rafidain II*. It claims that the Second Circuit "emphasized that its holding concerned only 'the court's subject matter jurisdiction,'" and that "'[n]o doubt, courts should proceed with care' in ordering asset-related discovery." U.S. Br. 18 n.6 (quoting 281 F.3d at 54). But *Rafidain II* recognized that subject matter jurisdiction allows a court to order broad post-judgment discovery regarding sovereign assets; in counseling courts to "proceed with care," the court of appeals was recognizing only that a district court should exercise "discretion"—not that the FSIA limits post-judgment discovery. 281 F.3d at 54.

The Second Circuit's long-standing position is bolstered by the Ninth Circuit's decision in *Richmark*, which upheld an order requiring "an arm of the [Chinese] government" to provide "discovery [regarding its] assets worldwide," which was designed to "identif[y] . . . current assets in order to execute the judgment." 959 F.2d at 1471-72, 1475. The government suggests that *Richmark* did not involve a question of discovery under the FSIA because "[t]he court's only mention of the FSIA occurred in the context of its rejection of [the foreign sovereign instru-

mentality's] argument that the requirement that it post a bond in order to stay execution pending appeal was inconsistent with the FSIA." U.S. Br. 13 n.4. In fact, the Ninth Circuit's discussion of the FSIA occurred in the context of rejecting the argument that the instrumentality could avoid asset discovery based on execution immunity under the FSIA. *See* 959 F.2d at 1477-78.

Finally, the government is wrong to suggest (U.S. Br. 19) that the decision below conflicts with decisions cautioning that discovery should be ordered "circumspectly and only to verify allegations of specific facts crucial to the immunity determination." *Conn. Bank of Commerce* v. *Republic of Congo*, 309 F.3d 240, 260 n.10 (5th Cir. 2002) (internal quotation marks and alteration omitted); *see also Af-Cap Inc.* v. *Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1096 (9th Cir. 2007) (same). The Second Circuit has endorsed this same approach, *see* Opp. 17 (citing *EM Ltd.* v. *Republic of Argentina*, 473 F.3d 463, 486 (2d Cir. 2007)), but it is not "based on an interpretation of FSIA preemption," *Af-Cap Inc.*, 475 F.3d at 1096. Instead, it is a feature of the district court's "extensive control over the discovery process," *Flatow* v. *Islamic Republic of Iran*, 308 F.3d 1065, 1074 (9th Cir. 2002) (internal quotation marks omitted), which is perfectly consistent with the Second Circuit's emphasis on the "care" that district courts should exercise in this area, *Rafidain II*, 281 F.3d at 54. And the government does not—because it cannot—maintain that the district court's decision here to allow post-judgment discovery against a recalcitrant litigant that has consented to "any relief" or "any process" (Pet. App. 4 n.1) failed to show the adequate "circumspection."

The government cannot escape the position that it staked out in *Rubin*—that the question of the FSIA's limits on post-judgment discovery does not warrant review. The Court concluded that review was not warranted then, and neither Argentina nor the government has identified any change in the lower courts' positions to warrant review now.

## III. THE DECISION BELOW IS CORRECT AND RESPECTS THE BALANCE STRUCK IN THE FOREIGN SOVEREIGN IMMUNITIES ACT.

Federal law authorizes broad discovery in aid of execution. *See* Opp. 18-19. Congress kept that broad discovery apparatus in place in FSIA proceedings: While Sections 1609 and 1610 of the FSIA provide immunity from "attachment arrest and execution" for certain "property in the United States of a foreign state," 28 U.S.C. § 1609; *see also id.* § 1610, neither section says anything about discovery. The Second Circuit correctly held that the FSIA permits the discovery sought here.

A. Claiming that post-judgment discovery must "respec[t] the general rule of immunity Congress established in Section 1609" of the FSIA, U.S. Br. 9, the government proposes the following rule: When a district court considers a discovery request regarding foreign-state property, the court must require "the judgment creditor to demonstrate that the proposed discovery is directed toward assets for which there exists a reasonable basis to believe that an exception to immunity applies and that the court would have authority to order execution on the assets." *Id.* at 12.

The text of the FSIA provides no support for this rule. Indeed, the government concedes that "the FSIA does not expressly address the permissible scope" of post-judgment discovery in aid of execution.

U.S. Br. 9. To the contrary, 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's proposed approach is also unworkable. If the judgment debtor were aware of a potentially attachable asset held by the foreign state, it would not need discovery to identify that asset. But judgment debtors "nee[d] discovery" to identify the assets *in the first place*. *Richmark*, 959 F.2d at 1478. Argentina has repeatedly attempted to "conceal its assets from the district court and therefore avoid execution of [the] judgment," "but it has no *right* to do so." *Ibid.*

The government maintains that discovery affects Argentina's immunity because FSIA immunity protects sovereigns not only from liability and asset seizure, but also from the costs and burdens related to litigation. U.S. Br. 10; *see also id.* at 11. 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 176)). 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. And it is particularly misplaced where the defendant has ***waived*** its immunity under the FSIA. Pet. App. 4 n.1. In any event, NML's subpoenas impose no burden of litigation on Argentina: The sub-

poenas seek only business records from third-party banks that those banks already possess.

B. Even if the discovery here had been directed to Argentina itself, discovery is not attachment or execution; it is only discovery—and thus is permitted under the FSIA. The government's contrary arguments lack merit.

*First*, the government contends that "[t]he subpoenas are improper insofar as they are directed to assets located outside the United States." U.S. Br. 12. But the discovery here—served on banks conducting business in New York and seeking to uncloak Argentina's flow of funds around the world, *see* Pet. App. 5-6—is calculated to locate assets both in and outside the United States. And United States courts are authorized to allow, and routinely order, discovery regarding assets in other states and countries. Opp. 20. Nothing in the FSIA prohibits such discovery in the sovereign context. The government emphasizes that United States courts lack authority to order *attachment* or *execution* on sovereign property located outside the United States, U.S. Br. 13, but that says nothing about their authority to order *discovery*. Based on that discovery, NML "can seek to execute the judgment in whatever foreign courts have jurisdiction over [Argentina's] assets." *Richmark*, 959 F.2d at 1478.

*Second*, the government contends that "the subpoenas seek information about certain categories of property that are almost certainly immune from attachment or execution." U.S. Br. 15. But the FSIA does not grant sovereigns that defy judgments a right of secrecy. As the Second Circuit recognized, "if and when NML moves past the discovery stage and attempts to execute against Argentina's property,

Argentina will be protected by principles of sovereign immunity . . . to the extent that immunity has not been waived." Pet. App. 20.

*Third*, the government claims that the discovery order "has significant implications for the United States' foreign relations," U.S. Br. 19, including the Executive's "comity and reciprocity concerns," *id.* at 17. The implausibility of the government's concerns is demonstrated by its inability to marshal one concrete example from the decade-plus since the Second Circuit cemented its position that the FSIA does not limit post-judgment discovery in aid of execution. In any event, sovereign immunity determinations now are made by the courts according to the FSIA—no longer according to ad hoc Executive suggestion. *See Republic of Austria* v. *Altmann*, 541 U.S. 677, 689-91 (2004). The FSIA represents Congress's attempt to *balance* comity and reciprocity principles with the interest in providing creditors with a forum to resolve disputes against foreign states. *See* Opp. 20-21. The Executive's invocation of foreign-relations concerns cannot impose limits on creditor process that the text of the FSIA does not.

C. Finally, even if the government were correct that the FSIA limited post-judgment discovery, that still would not warrant reversal of the decision below. Argentina has "irrevocably agreed not to claim and has irrevocably waived such immunity to the fullest extent permitted" by law, and "consent[ed] . . . to the giving of any relief or the issue of any process in connection with" the judgments against it. Pet. App. 4 n.1. Neither Argentina nor the government claims that the limitations they would impose on discovery are jurisdictional; instead, they arise either from the FSIA's non-jurisdictional limitations on at-

tachment and execution or from some free-floating privilege drawn from the asserted purposes of the statute. Accordingly, there is no basis for ignoring Argentina's waiver of any immunity that it might otherwise possess with respect to post-judgment discovery.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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