No. 12-842

In the Supreme Court of the United States

THE REPUBLIC OF ARGENTINA,
Petitioner,
v.
NML CAPITAL, LTD.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER

JONATHAN I. BLACKMAN
Counsel of Record
CARMINE D. BOCCUZZI
DANIEL J. NORTHROP
CLEARY GOTTLIEB STEEN & HAMILTON LLP
One Liberty Plaza
New York, New York 10006
(212) 225-2000
jblackman@cgsh.com
cboccuzzi@cgsh.com
dnorthrop@cgsh.com

Attorneys for Petitioner The Republic of Argentina

March 26, 2013

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Rules and Statutes

Other Authorities

REPLY BRIEF FOR PETITIONER

1. The petition presents the critically important question of whether, in the context of judgment enforcement proceedings against a foreign state, "the FSIA plainly applies and limits the discovery process," as the Seventh Circuit held in *Rubin v. Islamic Republic of Iran*, 637 F.3d 783, 795–97 (7th Cir. 2011), or whether the FSIA has no application, because, as the Second Circuit erroneously concluded, "[o]nce the district court had subject matter and personal jurisdiction over Argentina, it could exercise its judicial power over Argentina as over any other party." Pet. App. A at 18; *see also id.* at 16–17 (Second Circuit "disagree[s]" with *Rubin* because "[w]hether a particular sovereign asset is immune from attachment . . . under the FSIA . . . does not affect discovery").

NML is wrong to characterize this circuit split as "shallow." NML Opp. at 11, 15.

First, the difference in holding between *Rubin* and this case is hardly a legal nuance—the FSIA either applies to post-judgment processes (as the Seventh Circuit held, consistent with the Fifth and Ninth Circuits, *see infra*) or it does not (as the Second Circuit concluded). These diametrically opposed legal rules have already produced district court decisions within the Second Circuit applying its rule that the FSIA places no limitation on post-judgment asset discovery of a foreign sovereign. *See Thai Lao Lignite (Thailand) Co., Ltd. v. Gov't of Lao People's Democratic Republic*, No. 10 Civ. 5256, 2013 WL 541259, at *8 (S.D.N.Y. Feb. 11, 2013); *Aurelius Capital Partners v. Republic of Argentina*, No. 07 Civ. 2715, 2013 WL 857730, at *3

(S.D.N.Y. Mar. 7, 2013). Such decisions exist in no other circuit.

Second, NML is wrong that the Seventh Circuit is an "outlier" that will "recede." NML Opp. at 12. *Rubin* is consistent with decisions of the Fifth and Ninth Circuits, which have held that because the FSIA applies to post-judgment asset discovery, discovery must 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) (emphasis added) (internal quotation marks omitted); *Af-Cap Inc. v. Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1095–96 (9th Cir. 2007); *see also* U.S. *Rubin* Certiorari *Amicus*, 2012 WL 1891593, at *15, *19. This formulation—which the Second Circuit itself used in its own prior precedent concerning discovery of foreign states under the FSIA, *see* Rep. Pet. at 16–17—was cited by Argentina as the rule of decision here, but was rejected by the Second Circuit because of its unprecedented conclusion that the FSIA is irrelevant to post-judgment asset discovery.

NML is again wrong in trying to limit the holdings of the Fifth and Ninth Circuits as casual "suggestion[s]" to district courts. NML Opp. at 17. The instructions by these Courts of Appeals that discovery must relate to potentially attachable or executable assets follow directly from the legal principle, rejected by the Second Circuit (and only the Second Circuit), that the FSIA's limitations on judgment execution remedies are relevant to post-judgment discovery in aid of that execution. Numerous other circuit court decisions recognize that the FSIA limits the scope of

jurisdictional discovery to information that is crucial to an immunity determination under FSIA Section 1605.[1] These holdings support *Rubin*, *Connecticut Bank*, and *Af-Cap*, because the immunity afforded a foreign state's property in the execution context is broader than that afforded a foreign state in the jurisdictional context. *See Walters v. Indus. & Commercial Bank of China, Ltd.*, 651 F.3d 280, 289 (2d Cir. 2011); *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1127–28 (9th Cir. 2010). The justification for "circumspect" discovery is accordingly stronger with regard to post-judgment asset discovery. *See Rubin*, 637 F.3d at 797; U.S. *Rubin* Certiorari *Amicus*, 2012 WL 1891593, at *11.

Finally, NML's speculation that the Seventh Circuit will have the opportunity to reverse itself *en banc* rings hollow, NML Opp. at 17, because any plaintiffs wanting broad discovery of sovereign assets now have an open invitation to serve their subpoenas in the district courts of the Second Circuit. *See Thai Lao Lignite*, 2013 WL 541259; *Aurelius*, 2013 WL 857730. What is worse, the Second Circuit's decision has begun to sow confusion in other district courts. *See, e.g.*, *NML Capital, Ltd. v. Republic of Argentina*, No. CV 12-80185-MISC, 2012 U.S. Dist. LEXIS 1612192, at *2

---

[1] *See, e.g., Hansen v. PT Bank Negara Indonesia (Persero), TBK*, 601 F.3d 1059, 1063–64 (10th Cir. 2010); *Butler v. Sukhoi Co.*, 579 F.3d 1307, 1314 (11th Cir. 2009); *EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 486 (2d Cir. 2007); *In re Republic of Philippines*, 309 F.3d 1143, 1152 (9th Cir. 2002); *In re Papandreou*, 139 F.3d 247, 253 (D.C. Cir. 1998); *Fed. Ins. Co. v. Richard I. Rubin & Co., Inc.*, 12 F.3d 1270, 1284 n.11 (3d Cir. 1993); *Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 534 (5th Cir. 1992); *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 451 (6th Cir. 1988).

(N.D. Cal. Nov. 13, 2012) (applying *Rubin's* holding that FSIA protects sovereigns from burdens of discovery, but accepting Second Circuit's false distinction between discovery served on the sovereign itself and on third parties), *appeal filed*, No. 12-17738 (9th Cir. Dec. 12, 2012). The continued inconsistent application of the FSIA undermines the uniformity in the treatment of foreign sovereigns in United States courts, a primary concern of the statute. *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 622 n.11 (1983) ("*Bancec*"). NML's confidence that the Seventh Circuit will somehow self-correct was wholly absent from its counsel's certiorari petition in *Rubin*, which itself stressed the need for uniformity that is undermined by different circuit approaches. *See* Rep. Pet. at 21–22.

2. NML is also wrong that this case represents a "poor vehicle" because the subpoenas at issue here—which sought discovery concerning the Republic, its legally separate agencies and instrumentalities, and its officials—were addressed to third-party banks, and not the Republic itself. NML Opp. at 12. Whether the identity of the party served with the subpoena affects the scope of the FSIA's immunity provisions is not only addressed and answered by the reasoning and holdings of the decisions on both sides of the circuit split, *see* Rep. Pet. at 19–21, but will likely be determined by this Court's resolution of whether the FSIA limits post-judgment asset discovery in the first place. If the Court were to conclude that the FSIA does not limit such discovery, to whom the subpoenas were issued would be irrelevant. If, on the other hand, the Court agrees with the Republic, *Rubin*, and the majority of the circuits that the FSIA limits the permissible scope

of discovery to assets that can be executed on pursuant to Sections 1609 and 1610, the consequence of that holding is that a judgment creditor may not circumvent these restrictions by simply seeking the same information from a third party.

The Second Circuit's reductionist view that the FSIA is inapplicable to discovery directed at foreign state assets but served on third parties, solely because the sovereign does not in the first instance bear the burden of production, cannot be reconciled with Congress's effort, through its enactment of the FSIA, to protect sovereigns from the many burdens of litigation, including the cost, aggravation, and "intrusive inquiries" attendant to the discovery available in United States courts. *Rubin*, 637 F.3d at 796–97; *see also Republic of Philippines v. Pimentel*, 553 U.S. 851, 865 (2008).[2] NML's "forensic examination" of the Republic's international "financial circulatory system," Rep. Pet. at 9; Pet. App. C at 41, including detailed financial information concerning the Republic's current and deceased former Presidents and hundreds of entities that are presumed separate from the Republic, *see Bancec*, 462 U.S. at 626–27, indisputably qualifies as a burdensome "intrusive inquiry." *See* Rep. Pet. at 19.

---

[2] *Accord Peterson*, 627 F.3d at 1127; *EM Ltd.*, 473 F.3d at 486; *Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 849 (5th Cir. 2000); *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 443 (D.C. Cir. 1990); *In re Papandreou*, 139 F.3d at 251; *Aero Union Corp. v. Aircraft Deconstructors Int'l LLC*, No. 1:11-cv-00484, 2012 WL 3679627, at *8 (D. Me. Aug. 24, 2012); *Olympic Chartering, S.A. v. Ministry of Indus. & Trade of Jordan*, 134 F. Supp. 2d 528, 535 (S.D.N.Y. 2001).

But that is not all. Discovery served on third parties but concerning assets of a foreign state can and will result in a myriad of additional "inconvenience[s]," *Pimentel*, 553 U.S. at 865, to the state, including by: a) forcing the sovereign to defend itself in subsequent baseless litigation (the Republic has already borne the cost of litigating in Swiss courts NML's improper *ex parte* attachments of diplomatic bank accounts as a result of the Extraterritorial Asset Discovery Order); b) yielding information that cannot justify an attachment proceeding but which a judgment creditor can use as a basis to seek still more intrusive discovery; and c) forcing third parties to deem their costs of production a cost of doing business with a sovereign state, and to either pass those costs on or refuse to do business with the state. These are not "remote, speculative costs," NML Opp. at 14, but the logical result of permitting judgment creditors the unfettered right to use the "broad discovery in aid of execution" under Rule 69, *id*. at 18, to obtain from third parties information not obtainable from the sovereign itself concerning assets of the sovereign.

Moreover, *Rubin* is premised on the broadly accepted principles that "[sovereign] immunity inheres in the property itself" and that United States courts lack judgment enforcement powers with respect to all property not in the United States and used for a commercial activity here. *Rubin*, 637 F.3d at 796, 799; *Walters*, 651 F.3d at 291; *see also Peterson*, 627 F.3d at 1126–28; *Walker Int'l Holdings Ltd. v. Republic of Congo*, 395 F.3d 229, 233 (5th Cir. 2004). These principles apply whether discovery is sought from a sovereign or from a third party, and establish that *Rubin's* interpretation of the FSIA necessarily

precludes extraterritorial asset discovery, even if served on third parties.

3. NML is also wrong that "[n]othing has changed" since the Court denied certiorari in *Rubin* because the Second Circuit's holding below reflects the "view long endorsed" by that court. NML Opp. at 15 (citing *First City, Texas-Houston, N.A. v. Rafidain Bank*, 150 F.3d 172 (2d Cir. 1998) ("*Rafidain I*"); *First City, Texas-Houston, N.A. v. Rafidain Bank*, 281 F.3d 48 (2d Cir. 2002) ("*Rafidain II*")). In *Rafidain I*, the Second Circuit, in the context of *jurisdictional* discovery—not asset discovery—concerning a potential alter ego of Rafidain Bank, itself noted that FSIA immunity *must* be considered when granting discovery against a sovereign. *See* 150 F.3d at 177. In *Rafidain II*, the court held that subject matter jurisdiction over a foreign sovereign continued through post-judgment enforcement proceedings, "to the extent those procedures and responsibilities are related to [the sovereign's] *commercial activities in the United States*." 281 F.3d at 53 (emphasis added). The Second Circuit's holding in *EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 486 (2d Cir. 2007), that asset discovery was not proper as a matter of law because the record established that "[Section] 1610's 'commercial activity' exception to immunity from attachment does not apply," was consistent with this prior precedent; no circuit split existed before the Second Circuit reversed course and issued the decision below. U.S. *Rubin* Certiorari *Amicus*, 2012 WL 1891593, at *8.

NML counters that its reading of the *Rafidain* cases follows from a Ninth Circuit decision upholding an order requiring a commercial instrumentality of the

Chinese Government to provide discovery of its assets worldwide. NML Opp. at 16 (citing *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468 (9th Cir. 1992)). However, *Richmark* predates *Af-Cap*, was not even discussed by the *Af-Cap* court, and does not address discovery under the FSIA. *See Richmark*, 959 F.2d at 1471, 1474. NML's reading of *Richmark* further highlights the circuit split here: other than the Second Circuit in this case, Pet. App. A at 16, no other circuit, including the Ninth, has ever read *Richmark* to support the proposition that immunity considerations are irrelevant to post-judgment discovery of sovereign assets. *Cf. Rubin*, 637 F.3d at 797 (distinguishing *Richmark*); U.S. *Rubin* Certiorari *Amicus*, 2012 WL 1891593, at *21–22 (same).

4. NML argues that because Section 1610 of the FSIA does not explicitly discuss discovery, courts must have "broad discretion" to determine the proper bounds of discovery irrespective of the FSIA. NML Opp. at 19. However, discovery is not a self-executing right of a party; it requires the exercise of judicial power, governed by federal statute. *See* Fed. R. Civ. P. 69(a)(1) ("proceedings supplementary to and in aid of judgment or execution" governed by a federal statute to the extent it applies); *see also* Pet. App. A at 16 (authority to grant post-judgment discovery derives from authority "to conduct supplementary proceedings"). Because, as NML acknowledges, NML Opp. at 2, the FSIA sets forth the "sole, comprehensive scheme" for obtaining and enforcing a judgment against a sovereign state, *Af-Cap, Inc. v. Republic of Congo*, 462 F.3d 417, 428 (5th Cir. 2006), the FSIA, and specifically Sections 1609–1611, is the governing statute for all post-judgment proceedings against

foreign sovereigns, including discovery. That discovery by necessity is limited by the inquiry the FSIA gives United States courts jurisdiction to adjudicate—whether the property at issue is potentially property of the foreign state, used for a commercial activity in the United States.

Nor is NML helped by its invocation of the phrase "normal discovery apparatus" from *FG Hemisphere Assocs., LLC v. Democratic Republic of Congo*, 637 F.3d 373, 378 (D.C. Cir. 2011), NML Opp. at 19, since *FG Hemisphere* considered the permissibility of contempt sanctions under the FSIA, not the proper scope of discovery. The D.C. Circuit noted the United States Government's concern about discovery of foreign state assets outside the United States, but could not reach the issue as it had not been raised in the district court. *F.G. Hemisphere*, 637 F.3d at 379. In any event, the commentary from the House Judiciary Committee that "[t]he bill does not attempt to deal with questions of discovery," *id.* at 378 (citing H.R. Rep. No. 94-1487, at 17 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6627 ("Judiciary Committee Report")), hardly bears the weight NML places on it, since most statutes do not "deal with" discovery, but still define the scope of discovery in proceedings under them.[3]

Indeed, the Judiciary Committee's remark is premised on the belief that "[e]xisting law appears to

---

[3] The Judiciary Committee's vague comment must also be discounted because "Congress's 'authoritative statement is the statutory text, not the legislative history.'" *Chamber of Commerce of U.S. v. Whiting*, 131 S. Ct. 1968, 1980 (2011) (quoting *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005)).

be adequate in this area." Judiciary Committee Report at 23. That law includes Federal Rule of Civil Procedure 26, which requires that discovery be limited to information relevant to a party's claim or defense. When the "claim" is one of judgment enforcement against a sovereign, the only property not categorically immune from process in United States courts is that which is in the United States and used for a commercial activity here. *See* Pet. App. F at 92–94. Neither NML nor the Second Circuit explains how discovery that on its face exceeds this legal limit meets Rule 26's relevance requirement.

Extraterritorial discovery also offends this Court's longstanding precedent, recently reaffirmed in *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010), that Congressional legislation is presumed to apply domestically, not worldwide. This presumption establishes that whatever authority the FSIA confers on the judiciary, it does not empower it to serve as "a clearinghouse for information . . . that might lead to attachments or executions [against a foreign sovereign] *anywhere in the world*." Pet. App. C. at 31 (emphasis added). NML does not, because it cannot, dispute that the Second Circuit's holding is in direct conflict with *Morrison*, which in and of itself justifies this Court's review, as well as reversal of the decision below.

6. NML also ignores the foreign policy concerns of the United States, instead suggesting that this Court should deny certiorari because "debt markets work best when the rights of creditors are protected most effectively." NML Opp. at 21 (internal quotation marks omitted). NML's *ipse dixit* about what is best for the

"debt markets"—a rule providing unbounded, intrusive discovery that seems hardly consistent with effective market functioning—is at bottom irrelevant, because nothing in the text, structure, or history of the FSIA indicates any intent by Congress to assist the worldwide litigation strategies of professional holdout creditors. To the contrary, the statute was enacted against a backdrop of absolute sovereign immunity from execution and comity towards sovereigns, both of which are incompatible with the worldwide forensic examination endorsed by the Second Circuit.[4]

---

[4] Prior to the enactment of the FSIA, courts lacked the power to provide any post-judgment relief, and judgment creditors "had to rely on the foreign state to pay [a] judgment voluntarily." *Conn. Bank*, 309 F.3d at 252; *see also De Letelier v. Republic of Chile*, 748 F.2d 790, 799 (2d Cir. 1984). By partially lowering the barrier to post-judgment remedies by enacting Sections 1609–1610, Congress did not provide for plenary enforcement of judgments against foreign states in United States courts. *See* Pet. App. F at 92–94; Judiciary Committee Report at 28 (the attachment limitations set forth in Section 1610(a) apply to all "supplementary proceedings" under Rule 69).

CONCLUSION

For the reasons set forth above, a writ of certiorari should be granted.

Respectfully submitted,

JONATHAN I. BLACKMAN
Counsel of Record
CARMINE D. BOCCUZZI
DANIEL J. NORTHROP
CLEARY GOTTLIEB STEEN & HAMILTON LLP
One Liberty Plaza
New York, New York 10006
(212) 225-2000
jblackman@cgsh.com
cboccuzzi@cgsh.com
dnorthrop@cgsh.com

Attorneys for Petitioner
The Republic of Argentina

March 26, 2013