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

BRIEF IN OPPOSITION FOR RESPONDENT THE UNIVERSITY OF CHICAGO

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QUESTION PRESENTED

Petitioners seek to execute a judgment against respondent Iran. Section 1609 of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1609, provides that the property of foreign states is immune from attachment and execution unless that property falls within a statutory exception.

The question presented is:

Whether, in the circumstances of this case, the court of appeals erred in reversing a district court order requiring Iran to comply with a discovery request that demanded all documents concerning all assets within the United States in which Iran has any legal or equitable interest.

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STATEMENT

1. The Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. §§ 1330, 1602 *et seq.*, codifies the "legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488 (1983). The FSIA provides that, subject to certain exceptions, foreign states "shall be immune from the jurisdiction of the courts of the United States and of the States." 28 U.S.C. § 1604.

Even if a court has lawfully asserted jurisdiction over a foreign state and entered a judgment against it, however, the FSIA provides an additional immunity against the execution of the judgment. Under Section 1609 of the FSIA, 28 U.S.C. § 1609, a foreign state "shall be immune from attachment arrest and execution except as provided in [28 U.S.C. §§] 1610 and 1611." Those exceptions, insofar as they apply to foreign states, extend only to property "used for a commercial activity in the United States" (28 U.S.C. § 1610), and not all such property is subject to attachment and execution. See 28 U.S.C. §§ 1610, 1611.

2.a. Petitioners are individuals who were injured by a terrorist attack carried out by Hamas in Jerusalem in 1997. Pet. App. 4a-5a. Petitioners sued respondent Iran in the United States District Court for the District of Columbia, alleging that Iran was responsible for the attack by virtue of support it gave to Hamas. *Id.* at 5a. When Iran failed to appear, the district court, after appropriate proceedings, concluded that the case fell within an FSIA exception and entered a $71.5 million judgment against Iran. *Ibid.*

Petitioners then registered their judgment with the United States District Court for the Northern District of Illinois. They served two museums in Chicago—the Oriental Institute of the University of Chicago and the Field Museum of Natural History—with a Citation to Discover Assets. See Fed. R. Civ. P. 69(a); Illinois Compiled Statutes, ch. 735, sec. 5/2-1402. The Citation required the museums to identify any assets of Iran in their possession. The University identified two collections—the Persepolis and Choga Mish Collections—that were excavated by University archeologists, in collaboration with Iranian authorities, many decades ago and shipped to Chicago for reconstruction and long-term research. See Pet. App. 6a. These artifacts are small clay tablets with writing pressed into their surfaces; they are some of the earliest known examples of written text.[1]

In subsequent proceedings, petitioners broadened the discovery requests directed at the University, seeking information about every item of Iranian origin in the University's collection. The Oriental Institute, like other museums, owns many antiquities of Persian origin. Apart from the Persepolis and Choga Mish Collections, which are understood by all to be Iranian property, no Iranian entity has ever disputed the University's title to these artifacts.

b. In response to petitioners' initial discovery requests, the museums asserted that any Iranian assets in their possession were immune from attachment and

1. Petitioners asserted that the Herzfeld Collection at the Field Museum, excavated in Iran in the first third of the twentieth century and sold to the Museum in 1945, is Iranian property, even though Iran does not claim ownership of these artifacts. See Pet. App. 7a.

execution under Section 1609 of the FSIA. Petitioners responded that only Iran itself could assert a sovereign immunity defense. The United States filed a statement of interest supporting the museums and opposing petitioners' contention. The district court, adopting the magistrate judge's recommendation, ruled in favor of petitioners, holding that sovereign immunity could be asserted only by the foreign state itself. Pet. App. 3a.

At that point, Iran entered an appearance in the district court and raised the defense of immunity from attachment under Section 1609. Petitioners then sought discovery against Iran. Among other things, petitioners sought "[a]ll documents * * * concerning any and all tangible and intangible assets, of whatever kind, in which Iran and/or any of Iran's agencies and instrumentalities has any legal and/or equitable interest, that are located in the United States." After extensive proceedings, the magistrate judge ruled that Iran was required to comply with petitioners' discovery requests. Pet. App. 9a; see *id.* at 11a.

Iran objected to the magistrate judge's order. The district judge overruled the objection, saying that Iran's concerns were "overblown" and that petitioners were "not seeking general discovery about every conceivable asset of Iran's in the United States." Pet. App. 92a. Petitioners moved for reconsideration, asserting that they were in fact seeking general asset discovery. The district judge acknowledged that she "had misapprehended the scope of [petitioners'] requests for discovery" (*id.* at 93a) but reaffirmed her order rejecting Iran's objections and required Iran to comply with the general asset discovery request. *Id.* at 93a-94a.

3. Iran appealed, and the museums intervened. The Seventh Circuit concluded that it had jurisdiction over the appeal and could consider both the district court's ruling that sovereign immunity had to be asserted by Iran itself, and the ruling upholding general asset discovery. Pet. App. 12a-17a. The court then reversed both rulings.

a. The Seventh Circuit first held that "[t]he general-asset discovery order issued in this case is incompatible with the FSIA." Pet. App. 32a (footnote omitted). The court began from the premise that "the FSIA's immunity provisions aim to protect foreign sovereigns from the burdens of litigation, including the cost and aggravation of discovery." *Id.* at 23a, citing *Republic of the Philippines v. Pimentel*, 553 U.S. 851, 865 (2008), and *Dale Food Co. v. Patrickson*, 538 U.S. 468, 479 (2003). The court noted that "[t]hree other circuits have addressed the question of discovery in the context of attachment proceedings against foreign-state property in the United States under the FSIA" (Pet. App. 27a) and that "all have agreed that the court must proceed narrowly, in a manner that respects the statutory presumption of immunity and focuses on the specific property alleged to be exempt." *Ibid.*

Specifically, the Seventh Circuit explained,"[t]he Second, Fifth, and Ninth Circuits have repeated an identical message to the district courts: '[D]iscovery should be ordered circumspectly and only to verify allegations of specific facts crucial to an immunity determination.'" Pet. App. 27a (internal quotation marks and citations omitted; second modification in original). The court stated: "We agree." *Ibid.* The court further reasoned (*ibid.*):

> Discovery orders that are broad in scope and thin in foundation unjustifiably subject foreign states to unwarranted litigation costs and intrusive inquiries about their American-based assets. One of the purposes of the immunity codified in § 1609 is to shield foreign states from these burdens.

The court then concluded 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 § 1609 attachment immunity applies." Pet. App. 32a.

b. The court of appeals also reversed the district court's ruling that only Iran, and not the museums, could assert the defense of sovereign immunity. The court held that the district court's ruling was inconsistent with the text of Section 1609: "'[T]he property in the United States of a foreign state *shall* be immune from attachment arrest and execution *except* as provided in sections 1610 and 1611 of this chapter.'" Pet. App. 32a (emphasis and modification in original). The court explained that the FSIA "cloaks the foreign sovereign's property with a presumption of immunity from attachment and execution" unless the property falls within a statutory exception. Pet. App. 33a. Under Section 1609, the court said, "*the property* is protected by immunity. * * * The immunity inheres in the property itself, and the court must address it regardless of whether the foreign state appears and asserts it." Pet. App. 33a (emphasis in original).

ARGUMENT

The decision of the court of appeals is correct, and there is no conflict in the circuits. The ruling of the court below on the discovery issue reflects an appropriate accommodation, in the context of this case, of the interests of judgment creditors, on the one hand, and the sovereign immunity codified by Section 1609, on the other.[2] No court of appeals has reached a conflicting result; in fact, as the court below emphasized, its ruling was fully consistent with the decisions of every other court of appeals that has addressed this issue. Review by this Court is therefore unwarranted.

1. a. As the court below explained, sovereign immunity—like other litigation immunities—is designed to protect the sovereign not just from liability but from the burdens of litigation, including, importantly, the burdens imposed by discovery. See, *e.g.*, *Republic of the Philippines v. Pimentel*, 553 U.S. 851, 865 (2008); *Dale Food Co. v. Patrickson*, 538 U.S. 468, 479 (2003); *Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 143-44 (1993) (state sovereign immunity); *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009) (qualified immunity of government officials). But petitioners assert that once Iran was properly subject to the jurisdiction of the District Court for the District of Columbia, and a default judgment was entered, Iran lost any claim to immunity from the burdens of discovery in the subsequent

2. Petitioners challenge only the court of appeals' ruling on the discovery issue. They do not dispute the court of appeals' ruling that the district court erred in holding that the sovereign immunity defense could be raised only if Iran itself appeared and raised it. See Pet. i, 9n.1.

attachment and execution proceedings. See Pet. 12: "Once the plaintiff has overcome a foreign state's jurisdictional immunity from suit * * * the foreign state no longer has any statutory 'protection from the inconvenience of suit.'" (citation omitted). "[B]y definition," petitioners contend, "the judgment creditor has already overcome the foreign state's jurisdictional immunity from suit, and thus its right to be free from th[e] burdens" of litigation. Pet. 10 (emphasis omitted).

This extravagant claim—that once a sovereign has been found liable, sovereign immunity imposes no limits on the discovery that may be used to attach and execute on the sovereign's assets—has never been accepted by any court of appeals. On the contrary, as the court below explained, every one of the other courts of appeals that have addressed the question—the Second, Fifth, and Ninth Circuits— has issued "an identical message to the district courts." Pet. App. 27a. The message is that in attachment and execution proceedings against a sovereign, which are governed by Section 1609 of the FSIA, discovery must be carefully circumscribed:

> "'[D]iscovery should be ordered circumspectly and only to verify allegations of specific facts crucial to an immunity determination.'" *EM Ltd. v. Republic of Argentina,* 473 F.3d 463, 486 (2d Cir. 2007) (quoting *First City, Texas-Houston, N.A. v. Rafidain Bank*, 150 F.3d 172, 176 (2d Cir. 1998)); *Conn*[*ecticut*] *Bank of Commerce* [*v. Republic of Congo*], 309 F.3d [240,] 260 n.10 [(5th Cir. 2002)] (quoting *Arriba* [*Ltd. v. Petroleos Mexicanos*], 962 F.2d [528,] 534 [(5th Cir. 1992)]); *AfCap, Inc. v. Chevron*

> *Overseas (Congo) Ltd.*, 475 F.3d 1080, 1095-96 (9th Cir. 2007) (emphasis omitted) (quoting *Conn. Bank of Commerce*, 309 F.3d at 260 n.10).

The court below explicitly "agree[d]" with these other courts of appeals. Pet. App. 27a.

There is a reason that petitioners' position has been unanimously rejected by the lower courts. The FSIA confers two distinct immunities on sovereigns: not just an immunity from the jurisdiction of federal and state courts, but an immunity from execution and attachment even after jurisdiction is successfully invoked and even, as in this case, when a judgment has been rendered. The immunity from execution has its own historic roots, distinct from the jurisdictional immunity; indeed, in important respects, the immunity from execution is even broader than the immunity from jurisdiction. See *Autotech Technologies LP v. Integral Research & Development Corp.*, 499 F.3d 737, 749 (7th Cir. 2007), quoted at Pet. App. 26a.

Petitioners provide no reason—and none is apparent—for rejecting the consensus of the courts of appeals that the immunity from execution, like other litigation immunities, protects against the burdens of discovery, not just against the loss of property. Compared to the discovery that might be undertaken in connection with the inquiry into jurisdictional immunity, the discovery involved in executing a damages judgment against a sovereign has the potential to be at least as burdensome, and to inquire into matters that are at least as sensitive. Petitioners object that without the far-reaching discovery they sought here, they will be unable to locate sovereign assets. It is of course true that any limit on discovery might, in some

circumstances, prevent judgment creditors from reaching assets on which they are, in principle, entitled to levy. But as the court of appeals said, that is a consequence of the balance struck by the FSIA. Like every other immunity, by definition, Section 1609 has the effect of depriving parties of relief to which they would otherwise be entitled.

Petitioners invoke Section 1606 of the FSIA, 28 U.S.C. § 1606, which provides that, once a sovereign's jurisdictional immunity from suit has been overcome, "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances." Pet. 12. This provision, by its plain language, is irrelevant to the issue in this case. Section 1606 speaks of liability, not susceptibility to attachment and execution. As the court below explained (Pet. App. 28a):

> The critical error in [petitioners' Section 1606] argument is that it mixes the scope of *liability* with the scope of *execution*. Although Iran may be found liable in the same manner as any other private defendant, the options for executing a judgment remain limited. That is the point of [Section] 1609.

In fact, as the court of appeals also pointed out (see Pet. App. 31a), the FSIA provides judgment creditors who, like petitioners, have established that the defendant sovereign was complicit in acts of terrorism with an additional means of discovering assets on which they might execute. Section 1610(f)(2) of the FSIA provides that, upon request, "the Secretary of the Treasury and the Secretary of State should make every effort to fully, promptly,

and effectively assist [such a] judgment creditor * * * in identifying, locating, and executing against the property of th[e] foreign state or any agency or instrumentality of such state." 28 U.S.C. § 1610(f)(2)(A). Petitioners say (Pet. 23) that this remedy is inadequate because the President may waive it, but petitioners appear to have misread the FSIA, which does not give the President this power.[3] In any event, whatever discretion the Executive Branch has is simply part and parcel of the FSIA immunity. Petitioners complaint on this score reveals that their grievance, in fact, is not with the court of appeals' approach but rather with the existence of the Section 1609 immunity from execution.

b. In what appears to be an argument in the alternative (although they do not describe it as such), petitioners acknowledge that courts may properly restrict discovery in attachment and execution proceedings against a foreign sovereign in order to take account of the interests protected by Section 1609. See Pet. 15 ("[A] district court can appropriately 'weig[h] the benefits of additional discovery against the intrusiveness to [the foreign state] of permitting such discovery.'") (citations omitted; modifications in original). This is a fallback position from petitioners' central claim—that because Section 1609 comes into play only after a sovereign has been found liable, Section 1609 does not afford "*any* statutory 'protection from the inconvenience of suit'" (Pet. 12; emphasis added and citation omitted).

3. Section 1610(f)(3) of the FSIA, which petitioners cite (Pet. 23), gives the President the power to waive the provisions of Section 1610(f)(1), not Section 1610(f)(2). See 28 U.S.C. 1610(f)(3).

In this connection, petitioners emphasize the Seventh Circuit's statements that a judgment creditor must "identify the specific property he seeks to attach" and that a court may not "compel a foreign state to submit to general discovery about all its assets in the United States." Pet. App. 4a; see *id.* at 32a. Petitioners characterize this as "transforming * * * discretionary guidance to district courts in ruling on discovery requests into an absolute bar on general-asset discovery under the FSIA." Pet. 15.

The court of appeals in this case, however, was responding to a discovery demand of exceptional breath—a demand for "[a]ll documents, including without limitation any communication or correspondence, concerning any and all tangible and intangible assets, of whatever kind, in which Iran and/or any of Iran's agencies and instrumentalities has any legal and/or equitable interest, that are located in the United States" (Pet. App. 9a). Indeed petitioners' demand was so broad that the district judge reflexively assumed that Iran had exaggerated what petitioners were demanding—until petitioners themselves informed the judge to the contrary.

Moreover, petitioners appear to have made this discovery demand as a matter of routine, without any showing of necessity or special circumstances. As the court of appeals specifically noted, the demand was not just "broad in scope" but also "thin in foundation." Pet. App. 27a. The Seventh Circuit's rejection of petitioner's general asset discovery demand—far from "transforming" the existing legal regime, as petitioners assert—was based on the court's explicit agreement with three other courts of appeals that discovery should be ordered "'circumspectly.'" *Ibid.* (citation omitted). No discovery demand by petitioners in this case has been rejected

on grounds of inadequate specificity, except for the one exceptionally sweeping and inadequately justified demand. Petitioners' suggestion that the Seventh Circuit has dramatically narrowed the scope of discovery available to judgment creditors is, therefore, wholly unfounded.

Finally, the court of appeals was well aware that Iran entered an appearance in this case—thus subjecting itself to this discovery demand—only in response to the district court's ruling that sovereign immunity would be waived if Iran did not appear. "[T]he district court's refusal to consider §1609 attachment immunity without an appearance by the foreign state precipitated Iran's appearance and led directly to the imposition of the general-asset discovery order against it." Pet. App. 17. As the court of appeals held, the district court plainly erred in ruling that sovereign immunity could be asserted only by Iran. Petitioners do not defend the district court's ruling on this issue, and the question presented in the petition does not comprise the court of appeals' reversal of that ruling.

The order that Iran submit to general asset discovery was, therefore, the direct result of a erroneous ruling that had already wrongly narrowed Iran's sovereign immunity. In these circumstances, there is simply no basis for petitioners' claim that the court of appeals acted unreasonably in holding that petitioners could not seek general asset discovery—and certainly no reason for this Court to intervene in this case.

2. Petitioners assert (Pet. 16-21) that the decision below conflicts with decisions from the Second and Ninth Circuits: *First City, Texas-Houston, N.A. v. Rafidain Bank* (*"Rafidain I"*), 150 F.3d 172 (2d Cir. 1998), *First City,*

Texas-Houston, N.A. v. Rafidain Bank ("Rafidain II"), 281 F.3d 48 (2d Cir. 2002), and *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468 (9th Cir. 1992). As we have noted, the court below explicitly agreed with the approach that the Second and Ninth (and Fifth) Circuits took to discovery in connection with execution against a foreign sovereign. So it should not be surprising that there is no conflict among the circuits. And, as the court of appeals explained, there is in fact no conflict between its decision and the cases that petitioner cites. Pet. App. 28a-30a.

The cases cited by petitioners involved discovery directed not at a foreign sovereign but at an instrumentality of a foreign sovereign. Petitioners' claim that this should make no difference (Pet. 18-19) is mistaken. The FSIA treats foreign sovereigns differently from instrumentalities—in a way that is directly relevant to the appropriateness of general asset discovery.

The property of a foreign sovereign is immune from attachment and execution unless *that property* is "used for a commercial activity in the United States." 28 U.S.C. § 1610(a).[4] By contrast, if an instrumentality is "engaged in commercial activity in the United States," then "*any*" property of that instrumentality may be subject to attachment and execution. 28 U.S.C. § 1610(b) (emphasis added). See *Ministry of Defense and Support for Armed Forces of Islamic Republic of Iran v. Elahi*, 546 U.S. 450, 452 (2006) ("The difference is critical."). A court might, therefore, permit general discovery of the

4. Even then, the property can be subject to attachment and execution only in certain circumstances. See 28 U.S.C. 1610(a)(1)-(a)(7).

assets of an instrumentality—since all of its assets are potentially subject to attachment and execution—while denying general discovery of the assets of the sovereign itself, because only a subset of those assets can be subject to attachment. It follows that petitioners err when they infer, from decisions supposedly permitting general asset discovery in cases involving instrumentalities, that those courts would have allowed general asset discovery against Iran.

Quite apart from that, there are other important distinctions between this case and the cases petitioners cite. In *Rafidain I*, the discovery request—unlike petitioners' here—was not designed to uncover potentially immune assets of a sovereign judgment debtor. Rather, the discovery in *Rafidain I* was part of an attempt to show that the judgment debtor, Rafidain, was the alter ego of an entity—the Iranian central bank—that would otherwise have been immune. The discovery was directed solely toward that issue, and solely at Rafidain. See 150 F.3d at 177 ("First City's motion to compel sought information from Rafidain that could have revealed whether there was merit to its allegation that [the central bank] extensively controls Rafidain."). See Pet. App. 30a (noting this additional distinction between *Rafidain I* and the decision below). The willingness of the Second Circuit to allow discovery specifically on the alter ego question against an instrumentality says nothing about whether it would permit general asset discovery against a sovereign.

Rafidain II involved questions of subject matter and personal jurisdiction—neither of which is in issue here. See 281 F. 3d at 53. Unlike the judgment debtor in

Rafidain II, Iran does not claim that the district court lacked jurisdiction over it in the attachment and execution proceedings; Iran claims that petitioners' discovery demand was too broad. The court of appeals in *Rafidain II* recited general statements about discovery (*id.* at 54), but the breadth of a discovery demand was not in issue in that case.

In *Richmark*, the principal issue was that the foreign instrumentality claimed that its domestic law forbade it to comply with the discovery request. The court in *Richmark* noted that the judgment debtor, an instrumentality of the Chinese government, did not object to the general nature of the discovery demand or suggest that the generality of the demand was burdensome; its only objection was based on the alleged illegality under Chinese law. See 959 F. 2d at 1475. This is yet another reason for rejecting petitioners' claim that their discovery demand would have been upheld in the Ninth Circuit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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