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

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QUESTION PRESENTED

Section 1609 of the Foreign Sovereign Immunities Act of 1976 ("FSIA") provides that the property of a foreign state and its instrumentalities is immune from execution and attachment unless the property falls within a statutory exception to immunity. 28 U.S.C. § 1609. The exceptions applicable to foreign state property are narrower than the exceptions applicable to foreign instrumentality property. *Id.* §§ 1610(a), (b). The question presented is:

Whether the FSIA authorizes a district court to order general asset discovery against a foreign *state* where the plaintiff has made no effort to identify the property sought and offered no articulated basis to believe the property would fall within an exception to immunity.

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BRIEF IN OPPOSITION

INTRODUCTION

Petitioners seek review based on a purported conflict between the Seventh Circuit's decision below and decisions of the Second and Ninth Circuits. But the court below examined both cases petitioners rely on and explained why they are inapposite. Among other differences, those cases address discovery against foreign *instrumentalities*. This case, by contrast, involves an attempt to seek general asset discovery against a *foreign state itself*.

As the court below explained, "the immunity exceptions in the [Foreign Sovereign Immunities Act] for property owned by an *instrumentality* of a foreign state are much broader than the exceptions for property

owned by the foreign state itself." Pet. App. 29a. Because an instrumentality's property is more readily attachable, asset discovery is less likely to impose burdens that are excessive in relation to its legitimate objects. By contrast, discovery against a foreign *state* is far more likely to extend to unattachable property. Sovereign dignity, moreover, is impaired to a much greater degree. If and when a court ever allows general asset discovery against a foreign *state*, there will be time enough for this Court to review the issue. At this juncture, there is no conflict and no other compelling basis for review.

In any event, this case is a poor vehicle for review. The Seventh Circuit separately held—in a ruling that petitioners ignore—that the district court's discovery order was a product of its earlier, erroneous ruling that Iran had to appear in order to assert immunity. That separate ruling, unchallenged here, requires reversal of the district court's discovery order regardless of the question on which petitioners seek review.

STATEMENT

I. Statutory Framework

A. The Foreign Sovereign Immunities Act

Throughout most of this Nation's history, foreign sovereigns were completely immune from suit, and their property was immune from attachment or execution. See *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983); *Dexter & Carpenter* v. *Kunglig Jarnvagsstyrelsen*, 43 F.2d 705, 708 (2d Cir. 1930), cert. denied, 282 U.S. 896 (1931). In the 1950s, however, the United States adopted the "restrictive" theory of immunity, which generally confines immunity to a sovereign's "public" as opposed to "strictly commercial" acts. *Verlinden*, 461 U.S. at 486-487. In 1976, Congress enacted the Foreign Sovereign Immunities Act ("FSIA"), which largely codified

those principles. Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended at 28 U.S.C. §§ 1330, 1602 *et seq.*).

The FSIA addresses the immunity of foreign sovereigns from *suit* separately from the immunity of those sovereigns' property from *attachment and execution*. Consistent with the traditional presumption of immunity from suit, the Act provides that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States." 28 U.S.C. § 1604. The Act then sets forth limited exceptions to that immunity from suit in Sections 1605 to 1607.

The FSIA also codifies the traditional presumption of immunity for sovereign property, declaring that "the property in the United States of a foreign state shall be immune from attachment arrest and execution." 28 U.S.C. § 1609. The Act then sets forth limited exceptions to that immunity from attachment and execution in Sections 1610 and 1611. Thus, even where a plaintiff has obtained a judgment against a foreign sovereign under one of the exceptions to immunity from suit, the plaintiff cannot attach property to satisfy the judgment unless he further demonstrates that one of the FSIA's exceptions to immunity from attachment applies.

B. The FSIA's Distinct Treatment of Sovereign States and Their Instrumentalities

During the 20th century, governments increasingly established "instrumentalities"—separate juridical entities run as distinct economic enterprises—to engage in a variety of commercial pursuits. See *First Nat'l City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 624-626 (1983). The FSIA thus addresses the immunity of both foreign states and their instrumentalities.

The Act defines "agency or instrumentality of a foreign state" as "a separate legal person, corporate or otherwise," that is "an organ of a foreign state or political

subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof," subject to certain exceptions. 28 U.S.C. §1603(b). It also defines "foreign state" to include the state's instrumentalities. *Id.* §1603(a). For that reason, the Act's basic presumptions of immunity—that "a foreign state" is immune from suit, *id.* §1604, and that "property in the United States of a foreign state" is immune from attachment and execution, *id.* §1609—apply no less to a foreign state's instrumentalities and their property than to the foreign state and its own property.

In numerous respects, however, the Act treats states and their instrumentalities differently by separately addressing instrumentalities. For example, foreign states may not be held liable for punitive damages, but instrumentalities may be. 28 U.S.C. §1606. Foreign states and their instrumentalities are also treated differently for purposes of where they may be sued, *id.* §1391(f)(3)-(4), their liability under the Act's "takings" exception, *id.* §1605(a)(3), and service of process, *id.* §1608.

Most important for present purposes, the Act's exceptions to immunity from attachment and execution differ depending on whether the property belongs to the foreign state or one of its instrumentalities; the exceptions are much narrower when foreign *state* property is at issue. Section 1610(a) addresses foreign state property. It provides that property "used for a commercial activity in the United States" is not immune from attachment if one of certain further conditions is met. 28 U.S.C. §1610(a). Thus, foreign *state* property is attachable only where the *property itself* is used for a commercial activity.

By contrast, Section 1610(b) provides further exceptions to immunity applicable to "property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States." 28 U.S.C. §1610(b). That provision requires only that the

instrumentality be engaged in commercial activity—not that the particular property itself be used for that purpose. The Act thus "draws a sharp distinction between the property of states and the property of state instrumentalities": "The property of states may be attached only if it is or was used in commercial activity; the property of state instrumentalities may be attached without any such limitation, so long as the instrumentality itself is engaged in commercial activity in the United States * * * ." *Restatement (Third) of Foreign Relations Law of the United States* § 460 cmt. b (1987) ("*Restatement*"); see also *Ministry of Def. & Support for Armed Forces of Islamic Republic of Iran* v. *Elahi*, 546 U.S. 450, 452 (2006) (per curiam).

C. The 1996 Terrorism Amendments

This case involves certain terrorism-related provisions that were not traditional exceptions to immunity but were added to the FSIA in 1996. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221, 110 Stat. 1214, 1241-1243. Section 1605(a)(7) (later amended and recodified as Section 1605A) denies immunity *from suit* for claims for "personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources * * * for such an act," if asserted against certain foreign states that the Executive Branch has designated as sponsors of terrorism. 28 U.S.C. § 1605(a)(7) (2006).

The 1996 amendments also added exceptions to immunity from attachment. Like prior law, they distinguish between states and instrumentalities. Foreign *state* property may be attached to satisfy a terrorism judgment, but only if the *property itself* is "used for a commercial activity in the United States." 28 U.S.C. § 1610(a)(7). By contrast, an *instrumentality's* property may be attached to satisfy a terrorism judgment so long

as the *instrumentality* engages in commercial activity: "*[A]ny* property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States" may be attached to satisfy such a judgment. *Id.* § 1610(b)(2) (emphasis added).

II. PROCEEDINGS BELOW

A. District Court Proceedings

Petitioners are individuals wounded in a September 1997 suicide bombing by Hamas in Jerusalem, as well as relatives who suffered emotional distress or loss of companionship. Pet. App. 4a. They sued Iran under Section 1605(a)(7) of the FSIA, claiming that it had provided training and support to Hamas. *Id.* at 5a. Iran did not appear. *Ibid.* The district court held an evidentiary hearing and then issued a default judgment against Iran for $71.5 million. *Ibid.*

1. The current proceedings arise out of plaintiffs' attempts to satisfy that judgment by attaching collections of Persian antiquities in American museums. After registering the judgment in the U.S. District Court for the Northern District of Illinois, plaintiffs served the University of Chicago's Oriental Institute and the Field Museum of Natural History with discovery requests. Pet. App. 5a-6a. Plaintiffs identified three collections of antiquities they sought to attach and execute against. *Id.* at 6a. Two, known as the Persepolis and Chogha Mish collections, were discovered in the 1930s and 1960s by University of Chicago archaeologists. *Ibid.* Iran loaned the collections to the University "for long-term study and to decipher the Elamite writing that appears on some of the tablets included among the discoveries." *Ibid.* The third group of antiquities, known as the Herzfeld collection, was discovered by German archaeologist Ernst Herzfeld in the early 20th century. *Id.* at 7a. The Field Museum

purchased some of the artifacts from Herzfeld in 1945. See *ibid.*

While plaintiffs contended that the collections were subject to attachment under Section 1610(a)(7) of the FSIA, the museums vigorously urged that the collections were immune and that no exception applied. Pet. App. 7a-8a.[1] Rather than resolve that dispute, the magistrate judge issued a report and recommendation finding that immunity from attachment was an affirmative defense that only the foreign state could assert. *Id.* at 8a. The museums objected, but the district court agreed with the magistrate judge. *Ibid.* Accordingly, unless Iran appeared in the case to assert its immunity, the defense would be waived, notwithstanding the museums' arguments that the property was immune.

2. As a result, Iran entered an appearance to assert its immunity. Pet. App. 8a-9a. Iran's appearance "dramatically altered the course of the proceedings." *Id.* at 9a. "The plaintiffs promptly shifted their attention to Iran, seeking discovery not just on the three museum collections but on *all* Iranian assets in the United States." *Ibid.* Among other things, they sought "'[a]ll documents, including without limitation any communication or correspondence, concerning any and all tangible and intangible assets, of whatever nature and kind, in which Iran

[1] The museums have an obvious interest in defending the immunity of antiquities in their possession. Failure to do so might imperil their ability to retain and study collections from around the globe and secure additional antiquities to enrich the United States's understanding of ancient civilizations and the origins of modern society. See Museums C.A. Br. 22. The museums also have an interest in protecting the artifacts to satisfy any legal obligations they owe to foreign sovereigns to return the property after study is complete. See *id.* at 21. That interest is particularly acute for the Chogha Mish collection, which is currently the subject of a claim before the Iran-United States Claims Tribunal in The Hague. Pet. App. 6a-7a.

and/or any of Iran's agencies and instrumentalities has any legal and/or equitable interest, that are located within the United States.'" *Ibid.*

Iran sought a protective order. Pet. App. 9a. General asset discovery against a foreign sovereign, it urged, was inconsistent with both the FSIA and international comity. *Id.* at 69a-70a, 77a. The United States filed a statement of interest supporting Iran's position. *Id.* at 77a.

The magistrate judge rejected the arguments of Iran and the United States. Pet. App. 69a-70a, 77a-81a. In his view, plaintiffs were entitled to discover "all information that is reasonably calculated to lead to admissible evidence." *Id.* at 70a. "By inquiring about Iran's assets generally," he reasoned, "the Plaintiffs, and ultimately the Court, will be able to determine which of those assets fall within the domain of assets that are amenable to attachment and execution under the FSIA * * * ." *Ibid.* "[W]hen Iran appeared in this Court to assert its defense of sovereign immunity," he asserted, "Iran availed itself of this forum and took the risk that the Plaintiffs might expand their inquiries beyond the three sets of artifacts then at issue." *Id.* at 80a.

The district court overruled Iran's objections to that order. Pet. App. 83a-94a. "Iran," it ruled, "remains obligated to respond to the requests for discovery * * * , including discovery relating to its assets in the United States." *Id.* at 94a. "[O]nce Iran filed an appearance * * * to assert immunity from execution upon its assets," the court reasoned, "it also voluntarily obligated itself to comply with requirements imposed on all litigants, including the obligation to respond to requests for discovery." *Ibid.*

B. The Seventh Circuit's Decision

Iran appealed, the museums intervened on appeal, and the United States appeared as *amicus* in support of

their position. Pet. App. 11a. The Seventh Circuit reversed. *Id.* at 1a-40a. Agreeing with the United States, the museums, and Iran, the court of appeals held that both the district court's ruling requiring Iran to appear to assert immunity and the district court's approval of general asset discovery against a foreign state were "seriously flawed" and "cannot be reconciled with the text, structure, and history of the FSIA." *Id.* at 3a.

1. The court of appeals first addressed the permissible scope of discovery. Pet. App. 23a-32a. "The FSIA," it noted, "does not directly address the extent to which a judgment creditor may pursue discovery to establish that the property he is seeking to attach fits within one of the statutory exceptions to the attachment immunity conferred by §1609." *Id.* at 24a. Nonetheless, "[a]s a general matter, it is widely recognized 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. In that regard, the court explained, foreign sovereign immunity is comparable to qualified immunity, which shields federal officers from disruptive discovery. *Id.* at 23a-24a (citing *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937, 1953 (2009)).

The district court's general asset discovery order flouted those principles. As the court of appeals noted, Section 1609 "codifies the common-law rule that property of a foreign state in the United States is *presumed* immune from attachment and execution." Pet. App. 26a. The district court's order "turn[ed] this presumptive immunity on its head." *Ibid.* "Instead of confining the proceedings to the specific property the plaintiffs had identified as potentially subject to an exception under the FSIA, the court gave the plaintiffs a 'blank check' entitlement to discovery regarding *all* Iranian assets in the United States." *Id.* at 26a-27a.

"Three other circuits," the court noted, "have addressed the question of discovery in the context of attachment proceedings against foreign-state property in the United States under the FSIA, and 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." Pet. App. 27a (citing *EM Ltd.* v. *Republic of Argentina*, 473 F.3d 463, 486 (2d Cir. 2007); *Af-Cap, Inc.* v. *Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1095-1096 (9th Cir. 2007); and *Conn. Bank of Commerce* v. *Republic of Congo*, 309 F.3d 240, 260 n.10 (5th Cir. 2002)). Those circuits had all "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.'" *Ibid.* (quoting *EM Ltd.*, 473 F.3d at 486).

The Seventh Circuit agreed with those precedents. "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." Pet. App. 27a. Those consequences undermined the FSIA's immunity from attachment, because "[o]ne of the purposes of the immunity codified in §1609 is to shield foreign states from these burdens." *Ibid.*

The court of appeals specifically addressed the two cases petitioners invoke in this Court and explained why both are inapposite. Pet. App. 28a-30a. *Richmark Corp.* v. *Timber Falling Consultants*, 959 F.2d 1468 (9th Cir. 1992), involved a contract dispute between an American company and Beijing Ever Bright Industrial Co., a Chinese state-controlled corporation. Pet. App. 28a. The suit was thus against a foreign *instrumentality*, not a foreign *state*. *Id.* at 29a. That distinction was crucial because "the immunity exceptions in the FSIA for property

owned by an *instrumentality* of a foreign state are much broader than the exceptions for property owned by the foreign state itself." *Ibid.*

First City, Texas-Houston, N.A. v. *Rafidain Bank*, 150 F.3d 172 (2d Cir. 1998), was similarly inapt. Like *Richmark*, *Rafidain* involved "discovery against an *instrumentality* of a foreign sovereign, not the foreign sovereign itself." Pet. App. 30a. *Rafidain* was also inapposite for a second, "[e]qually important" reason. *Ibid.* The plaintiff was not seeking general asset discovery with no articulated basis for believing that any property would fall within an exception to immunity. Rather, it was seeking discovery for one specific purpose: "to substantiate its claim that the defendant instrumentality of Iraq was the alter ego of the Central Bank of Iraq—a claim that if proven would have allowed the judgment creditor to pursue the assets of the Central Bank." *Ibid.* Accordingly, "[n]either *Richmark* nor *Rafidain Bank* provide support for the discovery order in this case." *Ibid.*

The court of appeals drew further support from the *Restatement (Third) of Foreign Relations Law*. As the *Restatement* explains, "the FSIA provides weaker immunity protection for the property of foreign-state instrumentalities because 'instrumentalities engaged in commercial activities are akin to commercial enterprises.'" Pet. App. 30a n.13 (quoting *Restatement* § 460 cmt. b). Because "'the primary function of [foreign] states is government,'" by contrast, "'their amenability to post-judgment attachment should be limited to particular property.'" *Ibid.* (quoting *Restatement* § 460 cmt. b). Accordingly, "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." *Id.* at 32a.

2. The court of appeals also reversed on a separate ground. The district court, it held, should not have rejected the museums' assertions that the property was immune and required Iran to appear in order to assert the immunity itself. Pet. App. 32a-38a. That ruling, the court of appeals noted, "precipitated Iran's appearance and led directly to the imposition of the general-asset discovery order against it." *Id.* at 17a. On that question too, the district court had "fail[ed] to give effect to the statutory text." *Id.* at 32a.

Section 1609, the Seventh Circuit explained, "cloaks the foreign sovereign's property with a presumption of immunity from attachment and execution unless an exception applies; under § 1609 *the property* is protected by immunity and may not be attached absent proof of an exception." Pet. App. 33a. "It follows from this language that the immunity does not depend on the foreign state's appearance in the case. The immunity inheres in the property itself, and the court must address it regardless of whether the foreign state appears and asserts it." *Ibid.* Indeed, even when no party raises the issue, "the court must independently satisfy itself that an exception to § 1609 immunity applies before ordering attachment or other execution on foreign-state property in the United States." *Id.* at 38a.

REASONS FOR DENYING THE PETITION

Petitioners seek review based on a purported circuit conflict involving cases the court below fully analyzed and found to be consistent with its holding. Those cases involved foreign *instrumentalities*—state-owned commercial enterprises engaged in economic pursuits such as banking or lumber harvesting. This case, by contrast, involves an attempt to seek general asset discovery from a *foreign state itself*. The FSIA clearly and repeatedly distinguishes between foreign states and their instru-

mentalities, permitting more liberal remedies against the latter in light of their closer resemblance to private enterprises. Agreeing with the United States's position, the Seventh Circuit properly held that that same distinction applies here and that the district court erred in ordering general asset discovery against a foreign state absent any effort to identify the property sought or any articulated basis to believe the property would fall within an exception to immunity. There is no circuit conflict over that issue, and the Seventh Circuit's decision is amply supported by the FSIA's text and structure.

In any event, this case is a singularly poor vehicle in which to address the question. The Seventh Circuit reversed on *two* grounds. The discovery order was not merely overbroad in view of Iran's sovereign status; it was also a product of Iran's improperly coerced appearance. Absent the district court's erroneous (and now-overturned) ruling that Iran had to appear in order to assert immunity, the discovery order never would have been entered. The propriety of a discovery order should not be addressed in a case where an unchallenged ruling requires the order to be reversed regardless.

I. Petitioners Fail To Identify A Circuit Conflict

The FSIA repeatedly distinguishes between foreign states and their instrumentalities. Nowhere is that distinction more prominent than in the context of execution and attachment. Property of a foreign *state* is attachable only if the *property itself* is "used for a commercial activity in the United States." 28 U.S.C. §1610(a). By contrast, an instrumentality's U.S. property is attachable to satisfy certain judgments so long as the *instrumentality* is "engaged in commercial activity in the United States"—whether or not the particular *property to be attached* is used for that purpose. *Id.* §1610(b). The FSIA thus "draws a sharp distinction between the property of

states and the property of state instrumentalities." *Restatement* § 460 cmt. b. "Congress sharply restricted immunity from execution against agencies and instrumentalities, but was more cautious when lifting immunity from execution against property owned by the State itself." *De Letelier* v. *Republic of Chile*, 748 F.2d 790, 799 (2d Cir. 1984), cert. denied, 471 U.S. 1125 (1985).

That distinction is "critical." *Ministry of Def. & Support for Armed Forces of Islamic Republic of Iran* v. *Elahi*, 546 U.S. 450, 452 (2006) (per curiam). It reflects the distinct roles of states and instrumentalities: "[I]nstrumentalities engaged in commercial activities are akin to commercial enterprises," so immunity is more limited. *Restatement* § 460 cmt. b. By contrast, "the primary function of states is government," so "their liability should be limited to particular claims and their amenability to post-judgment attachment should be limited to particular property." *Ibid.*

Although petitioners struggle to avoid that distinction, it wholly undermines their claim of conflict. The Second and Ninth Circuit cases on which they rely involved foreign *instrumentalities*, not foreign *states*. And the court below relied squarely on that distinction—among others—to justify its holding.

A. The Second Circuit's Decisions in *Rafidain* Do Not Authorize General Asset Discovery Against Foreign States

Petitioners first assert that the decision below conflicts with the Second Circuit's decisions 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.) ("*Rafidain II*"), cert. denied, 537 U.S. 813 (2002). Pet. 17-19. Those decisions are inapposite for multiple reasons.

1. In *Rafidain*, the plaintiff sued Rafidain Bank (a commercial bank owned by the Republic of Iraq) and the Central Bank of Iraq (that country's central banking authority) over a loan agreement. *Rafidain I*, 150 F.3d at 174. It was "undisputed" that both defendants were "'agenc[ies] or instrumentalit[ies] of a foreign state.'" *Ibid.* The district court entered a default judgment against Rafidain under the FSIA's "commercial activities" exception. See *ibid.* The plaintiff then sought discovery from Rafidain—*not* to identify attachable assets, but to support its theory that the Central Bank could be sued as Rafidain's alter ego. *Ibid.* The district court permitted only limited discovery and then dismissed the suit against Central Bank. *Id.* at 174-175.

The Second Circuit reversed, finding that the limitations imposed on discovery were an abuse of discretion. 150 F.3d at 176-177. Although "the district court properly considered the comity concerns implicated by allowing jurisdictional discovery from a foreign sovereign," the court of appeals held, it "abused its discretion by * * * failing to recognize that these comity concerns do not apply to Rafidain." *Ibid.* "Because Rafidain is a party to this suit, has been found to fit within the FSIA's 'commercial activity' exception and because First City has a judgment against Rafidain, allowing First City to seek further discovery from Rafidain" to support its theory that Central Bank was liable as Rafidain's alter ego "would not intrude upon the sovereign immunity, if any, of Rafidain." *Id.* at 177.

On remand, Rafidain failed to respond to the discovery demands, was held in contempt, and appealed the denial of its motion to vacate the sanction. *Rafidain II*, 281 F.3d at 50-52. The issue on the second appeal was merely whether the district court had subject-matter jurisdiction to enforce the discovery demands, not whether they were overbroad: "Rafidain is challenging the court's subject

matter jurisdiction, not its discretion." *Id.* at 54. The court of appeals upheld jurisdiction: "[W]here subject matter jurisdiction under the FSIA exists to decide a case," the court held, "jurisdiction continues long enough to allow proceedings in aid of any money judgment that is rendered in the case," such as "discovery regarding a possible alter ego of Rafidain that may have assets sufficient to satisfy First City's judgment." *Ibid.*

2. Contrary to petitioners' contention, nothing in either of the Second Circuit's two opinions suggests that that court would "permit discovery against a foreign-*state* judgment creditor to proceed *as usual* under the federal rules," as if the sovereign were no different from an ordinary private party. Pet. 18 (emphasis added). *Rafidain* involved a foreign-*instrumentality* judgment creditor: It was "undisputed" that Rafidain was an "'agenc[y] or instrumentalit[y] of a foreign state,'" not a foreign state itself. 150 F.3d at 174. And far from mandating discovery "as usual," the Second Circuit emphasized the importance of the respondent's sovereign status. See *id.* at 176 (district court "properly considered the comity concerns implicated by allowing jurisdictional discovery from a foreign sovereign"); 281 F.3d at 54 ("No doubt, courts should proceed with care in pursuing the assets of foreign governments and their instrumentalities * * * ."). Those sovereign interests are far more gravely impaired when the respondent is a sovereign state rather than a mere commercial instrumentality. Nothing in the Second Circuit's opinions suggests that a respondent's sovereign status must be ignored in post-judgment attachment proceedings, much less that the court would have approved the sort of wide-ranging general asset discovery against a foreign state at issue here.

Rafidain is also plainly inapposite for another reason. The plaintiff there was not seeking general asset discovery with no basis to believe that an exception to immunity

applied. Indeed, it was not seeking discovery for purposes of attachment *at all*. Instead, as the Seventh Circuit recognized, it was seeking discovery "to substantiate its claim that the defendant instrumentality of Iraq was the alter ego of the Central Bank of Iraq." Pet. App. 30a. The plaintiff sought only documents relevant to that discrete issue, such as "various organizational documents * * * relevant to the possible existence of an alter ego relationship" and documents that would "prove that [the Central Bank] extensively controls Rafidain." 150 F.3d at 174, 176; see also 281 F.3d at 50. The plaintiff emphasized the narrow scope of its requests: "A quick reading of First City's discovery requests shows that they are neither intrusive nor burdensome; rather, they are fairly well-tailored to address the issue of an alter ego relationship." Reply Br. in No. 97-7532, at 15 (2d Cir. Sept. 19, 1997). Demanding that a foreign state catalogue and hand over a list of all its property in the United States, whether attachable or not, is plainly more burdensome and far more offensive to sovereign dignity than discovery from an instrumentality on a discrete alter ego issue.

Unable to obscure those obvious differences between the cases, petitioners attempt to extrapolate a conflict by carving out isolated quotations from the Second Circuit's opinions. They point to the court's observation in the first opinion that further discovery "'would not intrude upon the sovereign immunity, if any, of Rafidain.'" Pet. 14, 17 (quoting 150 F.3d at 176). But petitioners misinterpret that comment. *Rafidain* had nothing to do with discovery for purposes of *attachment*; the plaintiff was seeking discovery to support its pending *suit* against the Central Bank. 150 F.3d at 174-176. The only immunity at issue was immunity from *suit* under Section 1604, not immunity from *attachment* under Section 1609, and Rafidain's immunity from *suit* had already been found inapplicable by virtue of the commercial activities excep-

tion. *Id.* at 176. Where discovery seeks to identify attachable *property*, by contrast, it also implicates the defendant's separate immunity from *attachment*. *Rafidain* did not address that separate immunity from attachment, much less suggest that a plaintiff could obtain general asset discovery from a foreign state without plausibly alleging that any exception to that immunity applies.[2]

Petitioners' arguments based on the second appeal in *Rafidain* are similarly meritless. Petitioners assert that the "critical distinction between this case and *Rafidain II* is * * * that the Seventh Circuit viewed * * * attachment immunity as giving rise to non-statutory limitations on discovery, whereas the Second Circuit in *Rafidain II* did not." Pet. 19. But in *Rafidain II*, the respondent challenged only the district court's *subject-matter jurisdiction*. 281 F.3d at 53-54. As a result, the Second Circuit did not review the discovery order on the merits. *Ibid.* The court's jurisdictional ruling says nothing about the permissible *scope* of such orders when properly challenged, as they were here. Indeed, far from approving broad discovery against foreign sovereigns, the court repeatedly stressed that sovereign status is relevant to the proper scope of discovery. See p. 16, *supra*. Those observations necessarily imply that sovereign status can "giv[e] rise to non-statutory limitations on discovery." Pet. 19. Where, as here, the plaintiff seeks general asset discovery from a foreign state itself rather than discovery on a discrete issue from a mere instrumentality, the sovereign's interests are necessarily far greater and the

[2] On remand, the plaintiff in *Rafidain* served a separate subpoena seeking "post-judgment discovery from Rafidain and restraint of assets in aid of enforcing the default judgment." 281 F.3d at 51. Rafidain moved to quash solely on the ground of improper service, and did not appeal the denial of that motion. *Id.* at 51 & n.1. Consequently, only the alter ego discovery was at issue on appeal.

prerequisites to discovery must accordingly be more demanding.

In short, *Rafidain* (1) involved discovery against a foreign instrumentality, not a foreign state; (2) involved discovery targeted to the specific issue of alter ego liability, not general asset discovery; (3) concerned immunity from suit, not attachment; and (4) on the second appeal, did not address the proper scope of discovery at all. Those facts wholly undermine petitioners' claim of conflict.[3]

B. The Ninth Circuit's Decision in *Richmark* Does Not Authorize General Asset Discovery Against Foreign States

Petitioners also assert a conflict with the Ninth Circuit's decision in *Richmark Corp.* v. *Timber Falling Consultants*, 959 F.2d 1468 (9th Cir. 1992). Pet. 19-21. But that case is similarly inapposite.

1. In *Richmark*, a third-party plaintiff obtained a default judgment against Beijing Ever Bright Industrial Co., a Chinese government-owned corporation, in a dispute over a lumber contract. See 959 F.2d at 1471-1472. While the appeal was pending, the plaintiff served discovery requests seeking to "identify Beijing's assets worldwide." *Id.* at 1472. Beijing Ever Bright refused to comply and was held in contempt. *Ibid.*

Beijing Ever Bright challenged the discovery order on appeal. 959 F.2d at 1474. But it did *not* contend that the order was overbroad under the FSIA because it sought general asset discovery from a foreign instrumentality. Instead, it urged that complying with the order would

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[3] To the extent there is any doubt over the scope of *Rafidain*—and there should be none—the Second Circuit should resolve it. Indeed, petitioners' counsel is currently litigating the propriety of a general asset discovery order under the FSIA in another case pending in that court. See *NML Capital Ltd.* v. *Republic of Argentina*, No. 11-4065 (2d Cir.).

violate Chinese secrecy laws. *Ibid.* The Ninth Circuit considered a number of factors purportedly relevant to that foreign secrecy-law defense. *Id.* at 1474-1479. One factor was whether Beijing Ever Bright could have avoided the need to disclose the information. *Id.* at 1477-1478. The court held that it could, either by posting a supersedeas bond or by paying the judgment pending appeal. *Ibid.* The court's entire discussion of the FSIA appears in one fleeting paragraph in its discussion of that foreign secrecy-law defense.

In that paragraph, the Ninth Circuit rejected the argument that forcing Beijing Ever Bright to post a bond or pay the judgment pending appeal would "violate its 'immunity' from execution" under the FSIA. 959 F.2d at 1477. Although "section 1610 does not empower United States courts to levy on assets located outside the United States," the court explained, "it does not vest in Beijing a 'right' not to pay a valid judgment." *Id.* at 1477-1478. The plaintiff could "seek to execute the judgment in whatever foreign courts have jurisdiction over Beijing's assets," and could obtain "discovery in order to determine which courts those are." *Id.* at 1478.

2. *Richmark* is inapposite for much the same reasons as *Rafidain*: It involved a foreign instrumentality, not a foreign state. See 959 F.2d at 1471-1472; *id.* at 1477 (citing 28 U.S.C. § 1610(b), the provision applicable to instrumentalities). Petitioners are thus wrong to insist that "the Ninth Circuit's holding in *Richmark* would permit the discovery requested" here. Pet. 20-21. Nothing in the Ninth Circuit's cursory analysis indicates that the court would have reached the same result in a suit against a foreign *state*. To the contrary, the court assumed that Beijing Ever Bright's assets would be attachable wherever found: The plaintiff could "seek to execute the judgment in whatever foreign courts have jurisdiction over Beijing's assets." 959 F.2d at 1478. That as-

sumption might be plausible for a foreign *instrumentality*, but it is plainly unwarranted for a foreign *state*. See pp. 4-6, *supra* (instrumentality assets more readily attachable under the FSIA); H.R. Rep. No. 94-1487, at 14 (1976) (FSIA "incorporates standards recognized under international law").[4]

Moreover, the plaintiff in *Richmark* was not seeking to locate assets in the United States for attachment *under the FSIA*. It was seeking to execute the judgment under *foreign* law, "in whatever *foreign* courts have jurisdiction over Beijing's assets." 959 F.2d at 1478 (emphasis added). The Seventh Circuit in this case grounded its holding on *the FSIA's* sharp limitations on attachment—limitations that were irrelevant to the Ninth Circuit's analysis. Pet. App. 29a. To be sure, the Ninth Circuit's holding was wrong: U.S. courts should not allow worldwide asset discovery to facilitate potential foreign attachment proceedings. But the Ninth Circuit's error concerned an issue different from the Seventh Circuit's interpretation of the FSIA here.

Despite being on the books for 20 years, *Richmark* has never been cited by the Ninth Circuit or any other appellate court for the proposition that the FSIA licenses a district court to order general asset discovery against a foreign sovereign or its instrumentalities. The respondent there did not even challenge the discovery request on the ground that it was overbroad—only on the unrelated ground that compliance would violate Chinese secrecy laws. 959 F.2d at 1474. The opinion's single paragraph addressing the FSIA is buried in an essentially

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[4] Nor is it relevant that the discovery sought here is "narrower" in the sense that it is geographically limited to the United States. Pet. 21. Because Iran is a foreign *state*, the discovery order necessarily covers a wide range of unattachable property, and in that sense the order is broader than the one in *Richmark*.

unrelated discussion of those secrecy issues. *Id.* at 1477-1478. Given the unlikelihood that the case will ever be followed on this point, *Richmark* cannot establish a conflict worthy of this Court's review, whatever its holding.

C. The Decision Below Properly Distinguished *Rafidain* and *Richmark*

While *Rafidain* and *Richmark* involved suits against foreign instrumentalities, this case involves a suit against a foreign state—the Islamic Republic of Iran itself. Pet. App. 1a. The Seventh Circuit relied squarely on that fact in distinguishing the Second and Ninth Circuit decisions. It deemed *Richmark* inapposite because "Ever Bright was an instrumentality of the People's Republic of China, and the discovery order at issue in *Richmark* was limited to Ever Bright's assets." *Id* at 29a. *Rafidain* was similarly inapposite because it involved "discovery against an *instrumentality* of a foreign sovereign, not the foreign sovereign itself." *Id.* at 30a.

Petitioners complain that the Seventh Circuit "never explained" why the distinction between states and instrumentalities matters. Pet. 18. But the court's reasoning is clear: "[T]he immunity exceptions in the FSIA for property owned by an *instrumentality* of a foreign state are much broader than the exceptions for property owned by the foreign state itself." Pet. App. 29a. And because "the FSIA's immunity provisions aim to protect foreign sovereigns from * * * the cost and aggravation of discovery," *id.* at 23a, that difference in the permissible scope of *attachment* necessarily affects the appropriate scope of *discovery concerning attachment*. Instrumentality assets may be more appropriately subject to discovery because, once an instrumentality has been found to have engaged in commercial activity, *all* of the instrumentality's assets in the United States are potentially attachable. 28 U.S.C. §1610(b). By contrast, the state's own assets remain immune unless the particular assets

are used for a commercial activity. *Id.* § 1610(a). General asset discovery against a foreign state is thus all but certain to extend to a broad array of unattachable property.[5]

Simply put, the showing a plaintiff must make to justify discovery despite a presumption of immunity necessarily turns on the scope of any exceptions to that immunity. As petitioners acknowledge (Pet. 11-12), courts have widely held that, where a plaintiff seeks to *sue* a foreign sovereign, "discovery should be ordered circumspectly and only to verify allegations of *specific facts* crucial to an immunity determination." *Arriba Ltd.* v. *Petroleos Mexicanos*, 962 F.2d 528, 534 (5th Cir.) (emphasis added), cert. denied, 506 U.S. 956 (1992). Similarly, when the plaintiff seeks to *attach* a foreign state's assets, the foreign state should be subjected to the burdens of discovery only if the plaintiff has made a plausible showing that particular property is subject to attachment. Absent that requirement, general asset discovery is simply a fishing expedition with no legitimate basis to believe that any attachable assets will be found—an abuse that is especially serious given the far graver dignitary concerns at stake when the respondent is a foreign state rather than a mere instrumentality. Petitioners, however, have not even identified the assets they seek to attach, much less made any plausible claim that the assets fall within an exception to immunity.

If a court ever permits general asset discovery against a foreign state, this Court will have time enough to review the decision. But no court of appeals has ever done so. Nor has any court ever rejected the Seventh Circuit's

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[5] That the FSIA defines "foreign state" to include instrumentalities (Pet. 18-19) proves nothing. Although that definition renders both state property and instrumentality property presumptively immune, the FSIA clearly distinguishes between the two for purposes of the *exceptions*. See pp. 4-6, *supra*.

holding that the differences between foreign states and instrumentalities justify different limits on discovery for purposes of attachment. Because the Seventh Circuit properly reconciled its decision with the cases petitioners invoke, this Court's review is unwarranted.

II. Petitioners Identify No Other Basis For Review

Petitioners also seek review based on the merits of the Seventh Circuit's holding (Pet. 10-16) and claims about the case's importance (Pet. 21-27). Neither provides any basis for review.

A. Petitioners' Merits Arguments Do Not Justify Review

The Seventh Circuit—like every other court of appeals that has addressed the issue—properly recognized that sovereign defendants are entitled to special consideration in litigation, and that "[d]iscovery 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." Pet. App. 27a. Those considerations amply justified the court's holding that general asset discovery in the absence of any articulated basis for overcoming immunity falls outside a district court's discovery authority when the defendant is a foreign state.

Petitioners admit that a sovereign's immunity from *suit* warrants limitations on discovery, but insist that sovereign status is no longer relevant once a judgment has been entered and discovery is sought only for purposes of attachment. Pet. 11-13. That argument is baseless. Where Congress grants immunity from a particular legal process, courts should be circumspect in ordering discovery concerning that process. Pet. App. 23a-24a. The FSIA grants immunity from suit and immunity from attachment in two separate provisions, 28 U.S.C. §§ 1604,

1609, subject to two different sets of exceptions, *id.* §§1605-1607, 1610-1611. It thus treats suits and attachments as two distinct proceedings subject to two distinct immunities. Immunity from attachment warrants circumspection in attachment proceedings, no less than immunity from suit warrants circumspection in liability proceedings.[6]

Petitioners urge that, even if a *district court* may consider sovereign status in exercising discretion over discovery, courts of appeals may only offer "guidance," not impose rules like a prohibition on general asset discovery. Pet. 15-16. But petitioners cite no authority for that proposition, and for good reason: "Discretion is not whim, and limiting discretion according to legal standards helps promote the basic principle of justice that like cases should be decided alike." *Martin* v. *Franklin Capital Corp.*, 546 U.S. 132, 139 (2005). "For these reasons, [this Court has] often limited courts' discretion * * * despite the absence of express legislative restrictions." *Ibid.* For example, this Court has held that discovery against federal officers is generally impermissible until threshold qualified immunity questions are resolved. See *Mitchell* v. *Forsyth*, 472 U.S. 511, 526-527 (1985); *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818-819 (1982). Here, the court of appeals properly concluded that, in light of the unique burdens and dignitary offense that general asset discovery entails, such orders are beyond the range of a district court's permissible discretion.

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[6] Petitioners' reliance on Section 1606 (Pet. 12) is unavailing for the reasons given by the court of appeals. Pet. App. 28a. That provision states only that a sovereign whose immunity is overcome "shall *be liable* in the same manner and to the same extent as a private individual." 28 U.S.C. §1606 (emphasis added). It does not require a court to disregard sovereign status when determining the appropriate *scope of discovery*.

The Seventh Circuit did nothing more than apply the same rule other courts routinely apply when a plaintiff seeks asset discovery from a foreign sovereign: "'[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.) (quoting *Rafidain*, 150 F.3d at 176) (emphasis added), cert. denied, 552 U.S. 818 (2007); see also *Af-Cap, Inc.* v. *Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1095-1096 (9th Cir. 2007); *Conn. Bank of Commerce* v. *Republic of Congo*, 309 F.3d 240, 260 n.10 (5th Cir. 2002). Those cases include decisions from the same circuits that decided *Rafidain* and *Richmark*, confirming that petitioners overread the two decisions. The Seventh Circuit properly declined to be the first court to embrace petitioners' rule that sovereigns must be treated the same as private parties for purposes of general asset discovery. That eminently reasonable holding does not warrant review.

B. Petitioners' Claims of Importance Are Unfounded

Petitioners urge that there is a total of more than $11 billion in terrorism judgments outstanding against various sovereigns, including $9.6 billion again Iran. Pet. 22. But the same source they cite for those figures makes clear that the assets available to satisfy those judgments are only a tiny fraction of that amount. Iran, for example, is listed as having only approximately $50 million in assets in the United States. Jennifer K. Elsea, Congressional Research Service, *Suits Against Terrorist States by Victims of Terrorism* 75 & tbl. B-1 (Aug. 8, 2008); see also Office of Foreign Assets Control, *Nineteenth Annual Report to the Congress on Assets in the United States of Terrorist Countries and International Terrorism Program Designees* 12-13 & tbls. 1-2 (May 2011).

Regardless of the outcome of this case, the vast majority of those judgments are likely to go unpaid.

As the Seventh Circuit noted, moreover, plaintiffs have means other than discovery to help locate assets. Pet. App. 31a-32a. The FSIA directs the Executive Branch to "fully, promptly, and effectively assist any judgment creditor * * * in identifying, locating, and executing against" property to satisfy a terrorism judgment. 28 U.S.C. § 1610(f)(2)(A). While petitioners complain that that provision is ineffective because Congress authorized the President to waive it and he did so (Pet. 23), that is factually incorrect. The President's waiver authority (as amended in 2000) extends only to Section 1610(f)(1), not Section 1610(f)(2), see 28 U.S.C. § 1610(f)(3); the President waived only the former provision, see 65 Fed. Reg. 66,483 (Oct. 28, 2000). Section 1610(f)(1) contains unrelated provisions addressing certain "blocked" assets. See 28 U.S.C. § 1610(f)(1). It does not modify the Executive's duty to provide assistance under Section 1610(f)(2).

Finally, petitioners and their *amici* assert that general asset discovery is necessary to preserve a "well-functioning market for sovereign debt." Pet. 24-27. But sovereign debt markets have functioned well for centuries without general asset discovery, despite occasional defaults like Argentina's. Besides, debt instruments raise different issues not properly addressed in this case. For example, investors routinely insist on contractual waivers of immunity from both suit and attachment when purchasing sovereign debt. See, *e.g.*, Ronald J. Silverman & Mark W. Deveno, *Distressed Sovereign Debt: A Creditor's Perspective*, 11 Am. Bankr. Inst. L. Rev. 179, 188 (2003); cf. 28 U.S.C. § 1610(a)(1), (b)(1). If general asset discovery were deemed necessary to ensure the effectiveness of those waivers, the parties could also negotiate consents to discovery in bond indentures as well. Such issues are appropriately considered in a case that actu-

ally involves sovereign debt instruments. See, *e.g.*, p. 19 n.3, *supra*. They should not be addressed in a case where plaintiffs seek to satisfy a tort judgment by seizing ancient Persian artifacts held by American museums for study and whatever other assets they might find.

III. THIS CASE IS A POOR VEHICLE

Finally, the Seventh Circuit's separate holding regarding Iran's coerced appearance makes this a singularly poor case in which to address general asset discovery. The court of appeals did not merely hold that the district court's general asset discovery order contravened the FSIA's presumption of immunity. Pet. App. 23a-32a. It also held that the order had been procured by the district court's erroneous requirement that Iran appear in order to assert that immunity. *Id.* at 32a-38a. Even if this Court reversed on the question presented, that separate holding would remain and require reversal of the discovery order. "This Court 'reviews judgments, not statements in opinions.'" *California* v. *Rooney*, 483 U.S. 307, 311 (1987). Consequently, "[i]f the resolution of a clear conflict is irrelevant to the ultimate outcome of the case before the Court, certiorari may be denied." Eugene Gressman *et al.*, *Supreme Court Practice* 248 (9th ed. 2007). That is the appropriate course here.

The Seventh Circuit held that the district court erred by requiring Iran to appear in order to assert the immunity of its artifacts. Pet. App. 32a-38a. As the Seventh Circuit explained, that erroneous ruling "precipitated Iran's appearance and led directly to the imposition of the general-asset discovery order against it." *Id.* at 17a. Both the magistrate judge and the district court expressly relied on Iran's appearance to justify permitting the discovery: "[W]hen Iran appeared in this Court to assert its defense of sovereign immunity," the magistrate judge reasoned, "Iran availed itself of this forum and took the risk that the Plaintiffs might expand their in-

quiries beyond the three sets of artifacts then at issue." *Id.* at 80a; see also *id.* at 94a (affirming that order because, "once Iran filed an appearance * * * to assert immunity from execution upon its assets, it also voluntarily obligated itself to comply with requirements imposed on all litigants, including the obligation to respond to requests for discovery."). The discovery order was thus a direct product of the improper appearance order, and the invalidity of the latter order requires that the former be reversed wholly apart from the issues on which petitioners seek review.

Petitioners do not challenge the Seventh Circuit's ruling on the appearance issue. They nowhere deny that the reversal on that issue independently requires reversal of the discovery order. And they do not explain why this Court should review the permissible scope of a discovery order that is invalid regardless. If this Court reversed, petitioners might try to seek asset discovery from Iran anew on remand, even absent Iran's appearance. But they had not done so before Iran appeared, and it is highly doubtful that the district court would allow them to do so given its earlier reliance on Iran's appearance to justify the discovery. Even if the district court did allow discovery, it is still more doubtful that the Seventh Circuit would sustain such an order. It makes no sense to review the scope of a discovery order that must be reversed regardless, especially when there are grave doubts whether the order could or would be reentered on remand even if the Court reversed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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