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

REPLY BRIEF FOR PETITIONERS

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The Seventh Circuit's decision places Petitioners and numerous other judgment creditors in an untenable Catch-22: They may obtain discovery in aid of execution from a foreign sovereign only if they can identify specific assets that are likely subject to attachment, but they can identify those assets only if they obtain discovery. In stark contrast, the Second and Ninth Circuits have correctly recognized that the Foreign Sovereign Immunities Act ("FSIA") does not prohibit a judgment creditor from seeking general-asset discovery to identify a foreign sovereign's potentially attachable assets.

Respondents attempt to paper over this conflict by noting that the Second and Ninth Circuits addressed discovery against foreign instrumentalities rather than foreign sovereigns. But nothing in their decisions turned on this purported distinction, and for good reason: Both foreign sovereigns and foreign instrumentalities are presumptively immune from attachment because both are "foreign states" under the FSIA. Thus, if the Seventh Circuit were correct that general-asset discovery is inappropriate here because of Iran's presumptive immunity, the same reasoning would apply to its instrumentalities. And while Respondents note that the FSIA's exceptions to attachment immunity are broader for instrumentalities than for sovereigns, they cannot explain how those differences could dictate the availability of general-asset discovery against an instrumentality while *categorically* prohibiting such discovery against a sovereign.

There is no way to reconcile the Seventh Circuit's decision with those of the Second and Ninth Circuits.

Perhaps for this reason, Iran claims that any conflict is unimportant because, although there are $9.6 billion in unpaid terrorism-related judgments against Iran alone, government researchers have been able to identify only $50 million worth of Iranian assets in the United States. Iran Opp. 26. This is chutzpah: That Iran and other governments have been so successful in concealing or transferring their assets should enhance, not undermine, the need for this Court's review.

In any event, the question presented is not limited to terrorist victims holding judgments against state sponsors of terrorism. As *amici* have explained, the scope of post-judgment discovery permitted by the FSIA is an issue of "exceptional importance" for *all* creditors of foreign sovereigns—judgment and otherwise. NML *Amicus* Br. 4. The Seventh Circuit's decision risks "render[ing] money judgments against foreign states nearly unenforceable," which would have a "significant negative effect" on the massive "secondary markets for sovereign debt." *Id.* at 6, 10.

With many billions of dollars in outstanding judgments and debts at stake, held by parties ranging from victims of terrorism to commercial creditors, the question presented is undeniably important. This Court's review is warranted.

I. THE SEVENTH CIRCUIT'S DECISION CREATES A CIRCUIT SPLIT ON THE SCOPE OF POST-JUDGMENT DISCOVERY UNDER THE FSIA.

The Seventh Circuit held below that, under the FSIA, "discovery in aid of execution is limited" to "specific property" identified by the judgment creditor as potentially subject to attachment. Pet. App. 32a. This decision cannot be reconciled with *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. 2002) ("*Rafidain II*"), or with *Richmark Corp.* v. *Timber Falling Consultants*, 959 F.2d 1468 (9th Cir. 1992). Each of these cases upheld "discovery in aid of execution" over the objections of a judgment debtor that was (like Iran) presumptively immune from attachment, even though the requested discovery was not "limited" to "specific property." Respondents' attempts to distinguish the *Rafidain* cases and *Richmark* are unavailing.

A. Like the Seventh Circuit, Respondents claim there is no circuit split because "[t]he Second and Ninth Circuit cases on which [Petitioners] rely involved foreign *instrumentalities*, not foreign *states*." Iran Opp. 14. But under the FSIA, foreign instrumentalities *are* foreign states: As Iran acknowledges in a footnote, "the FSIA defines 'foreign state' to include instrumentalities," and thus "both state property and instrumentality property" are "presumptively immune." *Id.* at 23 n.5; *see also* 28 U.S.C. § 1603(a). For this reason, the Seventh Circuit's holding that discovery limitations are warranted based on "the presumptive immunity of foreign state property under [Section] 1609" (Pet. App. 25a) would apply with equal force to instrumentalities. *See* Pet. 18-19.

1. Respondents counter that "the exceptions" to attachment immunity "are much narrower when foreign *state* property is at issue" than for foreign instrumentalities. Iran Opp. 4. Because a foreign instrumentality's assets are subject to additional exceptions from attachment immunity, *see* 28 U.S.C. § 1610(b), Chicago insists, "[a] court might . . . permit

general discovery of the assets of an instrumentality," "while denying general discovery of the assets of the sovereign itself." Chicago Opp. 13-14.

Nothing in the text of Section 1610 even remotely suggests that discovery in aid of execution is limited to specifically identified and potentially attachable assets of foreign sovereigns, but essentially unlimited with respect to foreign instrumentalities. The assets of all foreign states, including foreign instrumentalities, are presumptively but not categorically immune from attachment and execution. *See* 28 U.S.C. § 1609. And Respondents never explain how the fact that Section 1610(b) makes attachment more broadly available against instrumentalities could justify concluding that a judgment creditor can *never* obtain general-asset discovery against a foreign sovereign.

The issue is not what post-judgment discovery a court "might" choose to "permit" or "den[y]." Chicago Opp. 13-14. Although Iran accuses Petitioners of arguing that "sovereign status must be ignored in post-judgment attachment proceedings," Iran Opp. 16, courts have the discretion to "weig[h] the benefits of additional discovery against the intrusiveness [to the foreign sovereign] of permitting such discovery." *Rafidain I*, 150 F.3d at 175; *see also* Pet. 15. But the Seventh Circuit went much farther, adopting an inflexible rule that "general discovery of the assets of the sovereign itself" (Chicago Opp. 14) must *always* be denied. There is no support for such a wooden approach.

2. Nothing in the *Rafidain* cases or *Richmark* would support the distinction imagined by the Seventh Circuit between sovereigns and instrumentalities for purposes of post-judgment discovery.

In *Rafidain I*, the Second Circuit identified three reasons why "allowing First City to seek further discovery from Rafidain would not intrude upon [Rafidain's] sovereign immunity." 150 F.3d at 177. The court noted that (1) "Rafidain is a party to this suit," (2) Rafidain "has been found to fit within the FSIA's 'commercial activity' exception" to immunity from suit, and (3) the judgment creditor "has a judgment against Rafidain." *Ibid.* Each of these points could apply equally to a foreign sovereign. *See*, *e.g.*, 28 U.S.C. § 1605(a)(2) ("commercial activity" exception to immunity from suit applicable to "the foreign state"). Yet the Second Circuit nowhere suggested that Rafidain's status as a foreign instrumentality was a relevant factor—let alone the decisive one—in permitting "full" (150 F.3d at 177) post-judgment discovery.

Similarly, the Ninth Circuit in *Richmark* did not draw any distinction between foreign sovereigns and instrumentalities in upholding the general-asset discovery order at issue. Rather, consistent with the FSIA's definition of "foreign state" to "includ[e]" an "agency or instrumentality," 28 U.S.C. § 1603(a), the Ninth Circuit treated the instrumentality before it as similarly situated to a foreign sovereign. The court stated that "Section 1610 provides for the execution of judgments against *foreign sovereigns*." 959 F.2d at 1477 (emphasis added). And the "purpose of section 1610," it noted, "is to provide a remedy against *foreign states* who fail to pay judgments against them." *Id.* at 1478 (emphasis added). Respondents assume (Iran Opp. 20) the Ninth Circuit would have rejected general-asset discovery if the judgment debtor had been China, rather than its instrumentality, but the opinion neither states nor suggests as much.

B. Implicitly acknowledging that the Seventh Circuit's attempted distinction of the *Rafidain* cases and *Richmark* cannot be reconciled with the reasoning of those decisions, Respondents devote considerable effort to identifying a number of other purported distinctions.

1. Respondents maintain that the *Rafidain* cases are distinguishable because First City was "seeking discovery to support its pending *suit* against the Central Bank." Iran Opp. 17. Not so. As the Second Circuit noted, First City was "seek[ing] production of evidence calculated to aid [its] collection on the money judgment entered *against Rafidain*." *Rafidain II*, 281 F.3d at 54 n.3 (emphasis added). The Second Circuit permitted this discovery because "[t]he court already had subject matter jurisdiction over Rafidain," and thus the FSIA's "comity concerns do not apply." *Rafidain I*, 150 F.3d at 177.

The Second Circuit held that the district court "should have permitted *full discovery* against Rafidain." *Rafidain I*, 150 F.3d at 177 (emphasis added). And the parties in *Rafidain* understood that decision as permitting "discovery for purposes of *attachment*," Iran Opp. 17. As Iran begrudgingly acknowledges, First City on remand "served a separate subpoena seeking 'post-judgment discovery from Rafidain and restraint of assets in aid of enforcing the default judgment.'" *Id.* at 18 n.2 (quoting *Rafidain II*, 281 F.3d at 51). After the district court denied Rafidain's motion to quash, Rafidain did not resist. *See ibid.*

The Second Circuit's opinion in *Rafidain II* further confirms that it viewed general-asset discovery as appropriate. Although Respondents claim the decision "says nothing about the permissible *scope* of [discovery] orders," Iran Opp. 18, the Second Circuit

cited, with approval, *three* separate decisions upholding general-asset discovery from judgment debtors on the ground that "'the judgment creditor must be given the freedom to make a broad inquiry to discover hidden or concealed assets,'" 281 F.3d at 54 (quoting *Caisson Corp.* v. *County W. Bldg. Corp.*, 62 F.R.D. 331, 334 (E.D. Pa. 1974)).

It is untenable for Respondents to suggest that, when the Second Circuit agreed in an FSIA case that "'[a] judgment creditor is entitled to discover the identity and location of any of the judgment debtor's assets,'" *Rafidain II*, 281 F.3d at 54 (quoting *Minpeco, S.A.* v. *Hunt*, 81 Civ. 7619, 1989 WL 57704, at *1 (S.D.N.Y. May 24, 1989)), it was just "recit[ing] general statements about discovery," Chicago Opp. 15. Instead, the Second Circuit recognized that "[d]iscovery of a judgment debtor's assets is conducted routinely under the Federal Rules of Civil Procedure," *Rafidain II*, 281 F.3d at 54 (citing Fed. R. Civ. P. 69(a)), even where the judgment debtor is a foreign sovereign or instrumentality.

Yet even if there may once have been "any doubt over the scope of *Rafidain*," the Second Circuit has *already* "resolve[d] it." Iran Opp. 19 n.3. In *Walters* v. *Industrial & Commercial Bank of China, Ltd.*, the Second Circuit denied a request to attach Chinese assets held by several banks because the judgment creditors had not identified which "specific accounts or funds" they sought to attach. 651 F.3d 280, 297 (2d Cir. 2011). The court emphasized that the judgment creditors "ha[d] not yet exhausted their powers of discovery pertaining to the judgment debtor's assets pursuant to Fed. R. Civ. P. 69(a) and our holding in *First City, Texas-Houston, N.A.* v. *Rafidain Bank*, 281 F.3d at 53-54." 651 F.3d at 297. Thus, the Se-

cond Circuit recognized that the judgment creditors could "pursu[e] Rule 69 discovery . . . as to China's potentially recoverable assets," *ibid.*, even though they had not previously identified *any* assets that might be subject to attachment.

As *Walters* makes clear, the *Rafidain* cases permit judgment creditors to obtain the general-asset discovery necessary to identify a foreign sovereign's "potentially recoverable assets." 651 F.3d at 297. The Seventh Circuit's decision below cannot be reconciled with that holding.

2. Turning to *Richmark*, Iran notes that the judgment creditor was seeking discovery about Ever Bright's "assets worldwide," 959 F.2d at 1472, not attempting to "locate assets in the United States for attachment *under the FSIA*." Iran Opp. 21. But this makes the conflict more stark rather than less. The Seventh Circuit would permit post-judgment discovery only if the judgment creditor can "plausibly allege" that the "specific property" at issue will ultimately be subject to attachment. Pet. App. 32a. But that test can *never* be satisfied with respect to foreign property because United States courts cannot "levy on assets located outside the United States." *Richmark*, 959 F.2d at 1477.

Consistent with the general rule that a judgment creditor is entitled to full discovery into the judgment debtor's assets, *Richmark* permitted "worldwide asset discovery" designed to "facilitate potential foreign attachment proceedings." Iran Opp. 21. That decision cannot be reconciled with the strict discovery limitations announced by the Seventh Circuit. And the fact that Iran accuses the Ninth Circuit of engaging in only a "cursory analysis" in "one fleeting paragraph" that "was wrong" (*id.* at 20-21) simply em-

phasizes the conflict with the supposedly correct decision below.

II. THE SEVENTH CIRCUIT INCORRECTLY DECIDED THE QUESTION PRESENTED.

This Court's review is particularly appropriate because the decision below so profoundly misunderstands the Court's reasoning in concluding that immunity from suit also entails immunity from the "burdens of 'such *pretrial* matters as discovery.'" *Behrens* v. *Pelletier*, 516 U.S. 299, 308 (1996) (quoting *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985)). Respondents, like the Seventh Circuit, insist there is "no reason" why "immunity from execution, like other litigation immunities," should not "protec[t] against the burdens of discovery." Chicago Opp. 8. But this argument ignores the critical difference between attachment immunity and immunity from suit.

Just as "*immunity from suit*" is "effectively lost if a case is erroneously permitted to go to trial," *Mitchell*, 472 U.S. at 526, it is similarly undermined if "'insubstantial claims'" are not "resolved prior to discovery," *Anderson* v. *Creighton*, 483 U.S. 635, 640 n.2 (1987) (quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982)). That is because immunity from suit is an "entitlement not to stand trial *or face the other burdens of litigation*," *Mitchell*, 472 U.S. at 526 (emphasis added)—including the "burdens of broad-reaching discovery," *Harlow*, 457 U.S. at 818.

Respondents nowhere explain how this reasoning could be applied to discovery regarding Iran's assets. Limitations on *post-judgment* asset discovery are not necessary to vindicate the FSIA's grant of jurisdictional immunity from *suit*; Iran has already been found subject to the jurisdiction of the United States

courts and all of the "burdens of litigation" (*Mitchell*, 472 U.S. at 526) that entails. Nor are such limitations necessary to vindicate the FSIA's immunity from *attachment* and *execution*; that immunity restricts the sovereign property subject to attachment and execution, whether or not it was disclosed in asset discovery, which, of course, is not itself an act of attachment or execution.

Respondents' theory that limitations on post-judgment asset discovery are implicit in the FSIA's immunity from attachment and execution is particularly misguided because, as the Seventh Circuit held, "[t]he immunity inheres in the property," and "does not depend on an appearance and special pleading by the foreign state itself." Pet. App. 37a; *see also*, *e.g.*, *Walters*, 651 F.3d at 291 ("execution immunity inures in the property itself"). Unlike Section 1604, which states that "a foreign state shall be immune" from suit, 28 U.S.C. § 1604, Section 1609 provides that "the *property* in the United States of a foreign state *shall be immune* from attachment arrest and execution," *id.* § 1609 (emphases added). Yet the discovery immunity advanced by Respondents is not limited to immune property, but instead is a free-floating personal right of the sovereign to be free from post-judgment asset discovery. That construction of the FSIA finds no support in its text or in this Court's decisions that immunity from suit also imposes limitations on discovery. The Court's review is warranted.

III. THIS CASE IS AN IDEAL VEHICLE FOR RESOLVING THE QUESTION PRESENTED.

In holding that "discovery in aid of execution is limited to the specific property" identified by the judgment creditor, Pet. App. 32a, the Seventh Circuit

incorrectly resolved an important question of federal law in a manner that conflicts with decisions of the Second and Ninth Circuits. Iran claims, however, that this Court's review is unwarranted because the Seventh Circuit separately held that the district court should have addressed attachment immunity regardless of whether Iran had appeared. According to Iran—but, tellingly, not Chicago—that "separate holding" would "require reversal of the discovery order," "[e]ven if this Court reversed on the question presented." Iran Opp. 28. Iran is mistaken.

The Seventh Circuit did not hold that its decision on the appearance issue would independently require reversal of the district court's discovery order. The *legal* effect of the appearance order was denial of the museums' attempt to resist attachment of several antiquities collections, *see* Pet. App. 8a, because the district court believed that "attachment immunity under [Section] 1609 is an affirmative defense that can only be asserted by the foreign state itself," *id.* at 32a. The Seventh Circuit disagreed, holding that attachment immunity "does not depend on an appearance and special pleading by the foreign state itself." *Id.* at 37a. As Iran and the museums jointly argued on remand to the district court, "the Seventh Circuit's opinion means that the Museums' filings should be reinstated, and that the Museums should be allowed to assert the immunity of the sovereign to prevent execution on property in their possession." D.E. 567, at 3 n.3.

Iran appears to assume that, following the Seventh Circuit's decision, its earlier appearance was withdrawn. Iran cites no authority for the proposition that withdrawal of its appearance would require vacatur of the district court's earlier decisions. And,

in any event, Iran's appearance has *not* been withdrawn: Following remand, Iran has continued to litigate this case just as it did before the Seventh Circuit's decision. Indeed, when the district court ordered the parties to submit a status report following the decision below, Iran's submission indicated its intent to "complete discovery and briefing" with respect to its "Motion to Declare Property Exempt." D.E. 564, at 2. Thus, even if Iran *could* have withdrawn its appearance following the Seventh Circuit's decision, it has elected not to do so. The appearance issue addressed by the Seventh Circuit is irrelevant to the validity of the discovery order.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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