No. 12-842

In the Supreme Court of the United States

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

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

SUPPLEMENTAL BRIEF OF PETITIONER

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November 22, 2013

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Petitioner the Republic of Argentina (the "Republic") respectfully submits this supplemental brief under Rule 15.8 to bring to the Court's attention developments since the filing of the Petition that further demonstrate why certiorari should be granted, and further refute respondent's assertion that the Second Circuit's decision is narrow or limited in its implications.

1. The Petition presents a critical issue of federal statutory interpretation on which the courts of appeals are divided: whether the broad immunity from execution afforded foreign state property under the Foreign Sovereign Immunities Act ("FSIA") "does not affect" discovery in aid of execution on sovereign property, as held by the Second Circuit, Pet. App. A at 16, or instead limits asset discovery to property plausibly subject to execution under the FSIA, as held by the Seventh, Fifth, and Ninth Circuits. *Compare* Pet. App. A at 18 *with Rubin v. Islamic Republic of Iran*, 637 F.3d 783, 799 (7th Cir. 2011), *cert. denied*, 133 S. Ct. 23 (2012); *Af-Cap, Inc. v. Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1095-96 (9th Cir. 2007); *Conn. Bank of Commerce v. Republic of Congo*, 309 F.2d 240, 247 (5th Cir. 2002); *see also* Pet. at 14-22; Reply at 1-4. Relying on the Second Circuit's erroneous decision, the district court, on September 26, 2013, entered a discovery order against the Republic (the "Discovery Order") that goes even further than the order that was the subject of the Second Circuit's decision, and shows the mischief and danger to the foreign relations of the United States from the court of appeals' error.

This latest Discovery Order, enabled by the Second Circuit's ruling that the FSIA has no bearing on discovery of sovereign property, compels the Republic to comply with broad asset discovery requests that target indisputably immune sovereign property, including not only property located outside the United States, but also sensitive military and diplomatic property that the FSIA shields from creditor remedies. *See* Order, *NML Capital, Ltd. v. Republic of Argentina*, No. 03 Civ. 8845 (TPG) (S.D.N.Y. Sept. 26, 2013). The Discovery Order compels the Republic to produce to respondent wide-ranging categories of documents and information concerning *all* U.S. property owned by the Republic and 21 other entities, including the Ministry of Defense, the Ministry of Foreign Affairs, and the Central Bank of Argentina, as well as information detailing the Republic's relationship with the Central Bank and other entities whose property is not subject to execution for the Republic's debt. *See* Exhibit A to Declaration of Eric C. Kirsch, *NML Capital, Ltd. v. Republic of Argentina*, No. 03 Civ. 8845 (TPG) (S.D.N.Y. June 27, 2013). In a parallel order, the district court compelled the Republic to produce to other plaintiffs similarly broad categories of information concerning the property, wherever located around the world, of not only the Republic, but also 393 other entities, including military and diplomatic entities, entities separate from the Republic, and individuals such as the Republic's current and deceased former President. *See* Exhibit 1 to Declaration of Eric B. Finklestein, *Aurelius Capital Master, Ltd. v. Republic of Argentina*, No. 10 Civ. 8339 (S.D.N.Y. Oct. 10, 2012); Exhibit K to Declaration of Daniel B. Rapport, *Aurelius Capital Partners, LP v. Republic of Argentina*, No. 07 Civ. 2715 (S.D.N.Y. May 27, 2013)

(reflecting revised list of entities defined as "Argentina").

Discovery of this nature against a foreign state is wholly unprecedented. We are aware of no case compelling a foreign state to comply with discovery, in purported aid of execution, that targets diplomatic and military property, without any showing whatsoever that the information sought could lead to the discovery of property subject to execution. One can readily imagine the reaction of the United States to an order of a foreign court demanding that it produce information in a civil action about its military and diplomatic assets abroad.

The district court could not have been clearer that in entering this unprecedented Order, it was relying entirely on the Second Circuit's decision, which had expressly disagreed with the Seventh, Fifth, and Ninth Circuits' holdings that discovery in aid of execution on sovereign property is limited by the FSIA. *See* Sept. 3, 2013 Hr'g Tr. at 31:1-5 ("[T]he Court of Appeals has made certain rulings on discovery. One of the central features of those rulings is that the Foreign Sovereign Immunities Act does not really prevent discovery of the kind being sought. That is out of the picture."); *see also id*. at 3:13-17 (NML's counsel stating that the Second Circuit ruled that the FSIA "does not have anything to do with post-judgment discovery. It is not a limitation on post judgment discovery, in that parties are entitled to discovery with respect to the assets of their judgment debtor. And the FSIA imposes no

restrictions on that."). [1] The unprecedented Discovery Order, by avowedly treating military and diplomatic property of a foreign state as open to full-bore U.S. discovery on the basis of the Second Circuit's ruling, puts the lie to respondent's assertion that this case creates merely an inconsequential circuit split on this weighty issue. NML Opp. at 15-18.

2. The Discovery Order also puts the lie to respondent's assertion that the Second Circuit's decision can somehow be limited to discovery of sovereign property directed to non-sovereign third parties. *Id.* at 11-14. The Second Circuit's erroneous ruling that the FSIA does not apply to post-judgment discovery in aid of execution is not so limited, and the Discovery Order relying on that decision is squarely directed to the Republic itself. Indeed, as was always to be anticipated, it is the same respondent that opposes certiorari because the Second Circuit's decision only involved discovery directed to non-sovereign banks that has now successfully invoked that decision to obtain broad discovery of immune property from the Republic directly.

3. Since the filing of the Petition, the Second Circuit's decision has created confusion among the district courts of other Circuits. In the Fifth and Sixth

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[1] The district court did not require respondent to make any showing that its discovery requests could lead to attachable property that could satisfy its U.S. judgments. Nor did plaintiffs demonstrate that property outside the United States was relevant in any way. As the Republic noted, plaintiffs' attempts to seize property in other countries have all been rejected as legally improper by those nations' courts. Pet. at 7-8.

Circuits, for example, district courts recently have been presented, in post-judgment proceedings involving respondent, with the same issues presented by the Petition, including whether discovery served on a non-sovereign third-party seeking information about immune property located outside the United States runs afoul of the FSIA. Recognizing the significance of the clear circuit split presented here and the uncertainty created by the Second Circuit's decision, those courts have stayed these discovery proceedings until the disposition of the Petition. *See* Stipulation for Stay of Proceedings, *NML Capital, Ltd. v. Republic of Argentina*, No. 13-mc-51030 (E.D. Mich. Sept. 19, 2013); Order Staying Case, *NML Capital, Ltd. v. Republic of Argentina*, No. 3:12-mc-86-L (N.D. Tex. Sept. 25, 2013); Order Staying Case, *NML Capital, Ltd. v. Republic of Argentina*, No. 3:12-mc-80-O (N.D. Tex. Sept. 25, 2013). The Court should give these lower courts the guidance they seek by granting the Petition and resolving the important issues presented by it.

CONCLUSION

The recent developments in the Republic's debt litigation further demonstrate the need for review of this case. The Petition should be granted.

Respectfully submitted,

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