No. 12-842

**IN THE**
# Supreme Court of the United States

THE REPUBLIC OF ARGENTINA,

*Petitioner*,

v.

NML CAPITAL, LTD.,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF FOR FAMILY MEMBERS AND ESTATES OF VICTIMS OF STATE-SPONSORED TERRORISM AS AMICI CURIAE SUPPORTING RESPONDENT

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## INTEREST OF *AMICI CURIAE*[1]

*Amici curiae* are family members and estates of victims of terrorism. *Amici* either hold an outstanding judgment issued by a U.S. court against a state sponsor of terrorism or are currently litigating claims in a U.S. court against a state sponsor of terrorism.

*Amici* Beverly Burnett, Sylvia and Veronica Carver, Peter Gadiel, and Joan Molinaro lost family members in the terrorist attacks of September 11, 2001. Ms. Burnett's son, Tom Burnett, Jr., was one of the heroes of Flight 93 who stormed the cockpit to confront the terrorists, resulting in the plane's crash in Western Pennsylvania. The Carvers' sister, Sharon, was one of the 58 passengers on American Airlines Flight 77, which Al Qaeda hijackers crashed into the Pentagon. Mr. Gadiel's son, James, died while working at the World Trade Center, and Mr. Gadiel is now President of 9/11 Families for a Secure America. Ms. Molinaro is the mother of Carl Molinaro, a New York City firefighter who died evacuating survivors from the World Trade Center. These *amici* are now pursuing a civil action against Sudan (as well as other defendants) for its role in funding Al Qaeda.

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[1] The parties have consented to the filing of this brief, and letters confirming such consent have either been lodged with the Clerk or accompany this brief. No counsel for a party authored this brief in whole or in part, and no person or entity other than the *amici curiae* or their counsel made a monetary contribution intended to fund the preparation of this brief.

*Amici* Livingstone Madahana, Valerie Nair, Titus Wamai, and the estate of Adams Titus Wamai are family members (or the estate) of Americans killed in the 1998 bombings of the U.S. embassies in Nairobi, Kenya and Dar es Salaam, Tanzania. These *amici* have obtained a judgment against Sudan and Iran for those nations' roles in supporting the Al Qaeda terrorists responsible for the embassy bombings, which killed 224 people and injured thousands more. *See Owens v. Republic of Sudan*, 826 F. Supp. 2d 128, 157 (D.D.C. 2011).[2]

*Amici* Mary Neil Wyatt, Daniel Wyatt, Michelle Brown, and Amanda Lippelt, are family members of the late Ronald Wyatt, who has abducted and held hostage by the Kurdistan Workers Party in 1991. *See Wyatt v. Syrian Arab Republic*, 908 F. Supp. 2d 216, 220–21 (D.D.C. 2012). A district court held Syria liable based on its support of this terrorist organization and awarded $38 million in compensatory damages and $300 million in punitive damages to these *amici* and family members of another abductee. *Id.* at 231–33.

*Amici* Shlomo and Galit Leibovitch, together with their three surviving children and the estate of their deceased child, sued Syria and Iran for those nations' roles in supporting the Palestinian Islamic Jihad terrorist group. In 2003, these terrorists ambushed the Leibovitch family with assault weapons in Israel, killing one of the Leibovitch children and

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[2] Damage amounts are to be determined by a special master. *See Owens v. Republic of Sudan*, 826 F. Supp. 2d 128, 157 (D.D.C. 2011).

wounding another. *See Leibovitch v. Syrian Arab Republic*, 2011 WL 444762 at *4–5 (N.D. Ill.). A district court awarded the family $32 million in compensatory damages and $35 million in punitive damages. *See id.* at *10–11; Amended Order at 24, *Leibovitch* (No. 1:08-cv-01939) (Mar. 31, 2014).

As plaintiffs attempting to satisfy outstanding judgments against terrorist states, or expecting to do so in the future, *amici* have a unique understanding of the importance of post-judgment discovery in aid of execution. The Court's decision in this case will affect *amici*'s ability to recover damages from sovereign states that routinely and brazenly seek to evade responsibility for the catastrophic injuries they have inflicted through acts of terrorism.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The Republic of Argentina urges this Court to adopt a rule that sharply limits the traditional scope of post-judgment discovery, even in cases where the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. §§ 1330, 1602 *et seq*., undoubtedly withholds jurisdictional immunity from the foreign state. The effects of such a rule would be significant, extending well beyond the breach-of-contract suit at issue here. Indeed, if Argentina can avoid post-judgment discovery in this case, state sponsors of terrorism can likely avoid post-judgment discovery as well.[3] Interpreting the FSIA to assist terrorist states in avoiding their

[3] Four nations (Cuba, Iran, Sudan, and Syria) are currently designated by the United States as state sponsors of terrorism.

obligations to pay billions of dollars in judgments would run directly counter to Congress's efforts to make these states pay for their actions, and exacerbate the already acute difficulty victims face in collecting on judgments against state sponsors of terror-terrorism. Nothing in the text, structure, or purpose of the FSIA suggests that Congress intended this result.

I. A. *Amici* are among thousands of Americans who have lost family members to state-sponsored terrorism. Since 1996, Congress has passed a number of amendments to the FSIA to empower terrorism victims and their families to sue state sponsors of terrorism in U.S. courts. These amendments not only withdraw jurisdictional immunity from suit in U.S. courts, but also create a federal cause of action against state sponsors of terrorism. As a result of these amendments, many terrorism victims and their families have successfully sued foreign states, obtaining judgments entitling them to billions of dollars in compensatory and punitive damages.

B. Congress has also amended the FSIA to address the unique difficulties that terrorism victims face in enforcing judgments against state sponsors of terrorism. *First*, because of restrictions placed on terrorist states by U.S. sanctions laws, these states maintain few, if any, attachable assets in the United States. *Second*, terrorist states maintain secret (and complex) financial structures to keep their assets hidden and beyond the reach of both U.S. regulators and judgment creditors. *Third*, terrorist states typically cannot be compelled to comply with discovery

orders because, in nearly all circumstances, these states reject the authority of U.S. courts and refuse to appear in domestic courts.

Congress has addressed this problem by amending the FSIA to assist victims of terrorism in collecting judgments. These amendments have permitted attachment of diplomatic property and blocked assets, authorized pre-judgment attachment through the filing of a notice of *lis pendens*, and even required the Secretary of State and Secretary of the Treasury to assist victims in finding and attaching the assets of state sponsors of terrorism.

These amendments, while helpful, are not a complete solution to the collection problems faced by terrorism victims. Nor is there any reason to think that Congress intended these amendments to provide the exclusive method for satisfying judgments in terrorism-related cases. As Congress was well aware, the total amount of blocked and attachable assets within the United States is far from sufficient to satisfy all judgments in terrorism cases. Given this backdrop, the only reasonable inference to draw from the absence of an amendment expressly allowing for post-judgment discovery is that Congress understood that this discovery was already available under the Federal Rules of Civil Procedure.

II. This Court should decline Argentina's invitation to create an immunity from post-judgment discovery, and instead hold that the Federal Rules of Civil Procedure apply to the discovery at issue here. Such an immunity would be inconsistent with the text and structure of the FSIA, and it would frus-

trate Congress's efforts to assist terrorism victims in satisfying their judgments against foreign states.

A. The Federal Rules of Civil Procedure apply unless a federal statute expressly preempts them in a given case. Although the FSIA provides for various departures from standard procedures under the rules—including a provision allowing courts to stay discovery requested from the *U.S. government*—the statute provides no immunity from post-judgment discovery for foreign sovereigns. Congressional silence on post-judgment discovery thus dictates that the normal rules of discovery apply in FSIA cases.

B. An immunity from post-judgment discovery would plainly be at odds with the purpose of the FSIA's terrorism provisions. This immunity would frustrate Congress's intent to assist victims of terrorism, making it all but impossible for them to attach a terrorist state's assets. Congress has taken extraordinary steps to assist terrorism victims in collecting judgments against state sponsors of terrorism. It is inconceivable that, despite enacting these provisions, Congress intended to prevent terrorism victims from taking the same post-judgment discovery provided to plaintiffs in an ordinary civil case. The absence of a provision expressly addressing post-judgment discovery is powerful evidence that Congress understood that discovery procedures were already available to terrorism victims and that an immunity from post-judgment discovery does not exist.

## ARGUMENT

### I. Congress Has Repeatedly Amended The FSIA To Assist Terrorism Victims Without Ever Suggesting That Foreign Sovereigns Enjoy Immunity From Post-Judgment Discovery.

As originally enacted, the FSIA generally provided state sponsors of terrorism (like other foreign states) with both jurisdictional immunity from suit in U.S. courts and immunity from attachment of property in the United States. 28 U.S.C. §§ 1604, 1609. The effect of these provisions was to allow foreign states to assist in terrorist acts that injured and killed Americans without any fear of being forced to answer for their conduct in U.S. courts. To address this problem, Congress has repeatedly amended the FSIA, creating terrorism-related exceptions to both the jurisdictional and attachment immunities. In so doing, Congress has never suggested that state sponsors of terrorism enjoy the sort of implicit immunity from post-judgment discovery that Argentina seeks.

#### A. The FSIA Addresses The Problem Of State-Sponsored Terrorism By Allowing Suits Against Terrorist States.

*Amici* are among the many thousands of Americans who have been injured or killed, or have had family members injured or killed, by state-sponsored terrorism. Until the mid-1990s, *amici* had little hope of holding foreign states accountable for supporting terrorism. Because these governments were immune from suits in U.S. courts under the

FSIA, they could sponsor terrorist attacks on Americans with little fear of ever facing liability for the damage they caused.

That changed in 1996. In the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Congress added an exception to the FSIA's general grant of jurisdictional immunity, giving U.S. courts jurisdiction over civil suits against state sponsors of terrorism. *See* Pub. L. No. 104-132, Title II, § 221, 110 Stat. 1214 (Apr. 24, 1996) (codified at 28 U.S.C. § 1605(a)(7)). In the same year, Congress also enacted a provision, known as the Flatow Amendment, to provide U.S. citizens with a federal cause of action against officials and agents of terrorist states. *See* Civil Liability for Acts of State Sponsored Terrorism, Pub. L. No. 104-208, Title I, § 101(c), 110 Stat. 3009-172 (Sept. 30, 1996) (codified at 28 U.S.C. § 1605(a)(7)). The Flatow Amendment exposed terrorist states to liability not only for compensatory damages, but also for punitive damages, a level of sovereign liability not afforded by the FSIA in any other circumstance. *See id.* § 1605A(c)(4).

In one of the first cases under these new provisions, the family of Alisa Flatow, the victim for whom the Flatow Amendment is named, successfully sued Iran for its role in Alisa's death. *See Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1 (D.D.C. 1998).[4] The court held Iran "indirectly liable" for the

[4] Alisa Flatow was a 20 year-old college student on a study abroad program in Israel at the time of her death. She was fatally injured when a suicide bomber crashed a van full of explosives into a public bus on which she was a passenger. Flatow (continued…)

death "under the principles of *respondeat superior* and vicarious liability," and awarded the Flatow family $22.5 million in compensatory damages and $225 million in punitive damages. *See id.* at 5, 25-26.

Following *Flatow*, other victims also successfully litigated claims against terrorist states,[5] but in 2004 these suits were called into question by the D.C. Circuit's decision in *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024 (D.C. Cir. 2004). The D.C. Circuit held that AEDPA's amendments to the FSIA created a federal cause of action only against foreign state officials and agencies, but not against the foreign sovereign itself. *See id.* at 1033. As a result of this ruling, plaintiffs pursuing claims against terrorist states could not rely on the Flatow amendment, but instead were forced to plead state-law wrongful death or tort claims. *See In Re Islamic Republic of Iran Terrorism Litig.*, 659 F. Supp. 2d 31, 46 (D.D.C. 2009). While this proved no obstacle to many victims, others had their suits dismissed because the applicable state law did not provide a cause of action. *See, e.g.*, *Peterson v. Islamic Republic of Iran*, 515 F. Supp. 2d 25, 44–45 (D.D.C. 2007) (no cause of action under Pennsylvania or Louisiana law).

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died after undergoing hours of emergency head surgery. *See id.* at 6–8.

[5] *See, e.g.*, *Stern v. Islamic Republic of Iran*, 271 F. Supp. 2d 286 (D.D.C. 2003); *Hutira v. Islamic Republic of Iran*, 211 F. Supp. 2d 115 (D.D.C. 2002).

Congress responded to *Cicippio-Puleo* by amending the FSIA to more clearly provide a cause of action against foreign states. *See* National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083(a)(1), 122 Stat. 3 (Jan. 28, 2008) (codified at 28 U.S.C. § 1605A) (allowing suits against "[a] foreign state that is or was a state sponsor of terrorism," as well as against "any official, employee, or agent of that foreign state"). This amendment also expanded the class of victims who can bring suit under the FSIA to include non-citizen members of the U.S. armed forces and non-citizen government employees and contractors. *Id.* Congress also revived victims' claims that had been dismissed prior to the amendment. *See* 28 U.S.C. §§ 1605A(a)(2)(B); 1605A(a)(2)(A)(i)(II).

Congress's repeated amendments to the FSIA have permitted *amici* and many other Americans to successfully litigate claims against foreign sovereigns for supporting terrorist attacks on U.S. citizens. For example, *amici* Shlomo and Galit Leibovitch, along with their three surviving children and the estate of their deceased child, have obtained a judgment against Iran and Syria for a terrorist ambush on the family, which killed one child and injured another. *See Leibovitch*, 2011 WL 444762 at *10–11; Amended Order at 24, *Leibovitch* (No. 1:08-cv-01939) (Mar. 31, 2014). *Amici* Mary Neil Wyatt, Daniel Wyatt, Michelle Brown, and Amanda Lippelt have obtained a judgment against Syria for its role in supporting the terrorists who abducted and held hostage Ronald Wyatt. *See Wyatt*, 908 F. Supp. 2d at 231-33.

Many other cases are pending in federal courts, including suits seeking to hold foreign states accountable for their role in the terrorist attacks of September 11, 2001. For example, *amici* Beverly Burnett, Sylvia and Veronica Carver, Peter Gadiel, and Joan Molinaro lost family members in the attacks that day. Together with other victims, these *amici* are now pursuing a civil action against Sudan (as well as other defendants) for its role in funding Al Qaeda.

Congress's amendments to the FSIA have made foreign states accountable for their support of terrorist activities that injure or kill U.S. citizens. As of 2008, terrorism victims had obtained more than $19 billion in judgments against state sponsors of terrorism. *See* Congressional Research Service, *Suits Against Terrorist States By Victims Of Terrorism* 7 (Aug. 8, 2008). That total has grown considerably in recent years and will continue to grow in the future.

### B. The FSIA Assists Victims Of State-Sponsored Terrorism In Enforcing Judgments Against Foreign Sovereigns.

Obtaining judgments against state sponsors of terrorism is only the beginning of the long process of achieving a measure of justice for victims' families. Although terrorist states are subject "to sweeping liability," the "proverbial elephant in the room . . . is the fact that these judgments are largely unenforceable" because of various practical and legal obstacles plaintiffs face in recovering damages. *In Re Islamic*

*Republic of Iran Terrorism Litig.*, 659 F. Supp. 2d at 122. But far from ignoring this problem, Congress has addressed it by passing numerous measures to assist victims in enforcing their judgments.

### 1. Plaintiffs In Terrorism Cases Face Unique Difficulties In Recovering Judgments.

*Amici* and other plaintiffs in terrorism cases face unusual challenges in enforcing civil judgments, difficulties that go beyond the ordinary obstacles to collection from sovereign states.[6] Family members of terrorism victims face significant obstacles that arise both from the U.S. sanctions regime that excludes state sponsors of terrorism from U.S.-connected business dealings and from the illicit nature of the activities of terrorist states. As a result, "the vast majority of victims have not received compensation of any kind," leading one court to lament that, despite substantial adverse judgments, state sponsors of terrorism have "not been held accountable." *See In*

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[6] As evidenced by the facts of this case, enforcing a civil judgment against a foreign sovereign unwilling to satisfy the judgment is always difficult. The FSIA generally prohibits attachment of a sovereign's assets that are present in the United States, *see* 28 U.S.C. §§ 1609–11, and courts of the foreign sovereign are often legally prohibited from enforcing judgments against the state or insufficiently independent from the political branches to do so. *See* George K. Foster, *Collecting From Sovereigns: The Current Legal Framework for Enforcing Arbitral Awards and Court Judgments Against States and Their Instrumentalities, and Some Proposals for Its Reform*, 25 Ariz. J. Int'l & Comp. L. 665, 666 (2008). Further, other countries may not respect U.S. judgments and may therefore decline to attach assets located within its borders. *See id.* at 666–67.

*Re Islamic Republic of Iran Terrorism Litig.*, 659 F. Supp. 2d at 128.

*First*, state sponsors of terrorism are less likely than other sovereigns to have attachable assets in the United States. Federal law broadly prohibits business dealings with state sponsors of terrorism. *See* 31 C.F.R. §§ 538.203–538.205 (prohibiting business dealings involving Sudan); *id.* § 542.201 (blocking assets related to the Syrian government); *id.* § 515.201 (prohibiting transactions with Cuban government); *id.* §§ 560.201, 560.204 (prohibiting exportation and importation of goods and services to or from the Government of Iran). It also permits the federal government to freeze these states' assets located in the United States. *Id.* § 560.211. In light of these sanctions laws, state sponsors of terrorism typically keep their assets out of the reach of the U.S. government. The flow of attachable assets from these states into the United States is therefore virtually nonexistent.

*Second*, in an attempt to circumvent international sanctions regimes and to fund terrorist activity surreptitiously, state sponsors of terrorism often use secret and labyrinthine financial structures to hide their assets. An example is the Execution of Imam Khomeini's Order (EIKO), a massive network of front companies that manages finances for the Iranian government. The U.S. Treasury Department, which exposed this network in June 2013, indicates that EIKO operates "37 ostensibly private businesses," the purposes of which are "to generate and control massive, off-the-books investments [for the Iranian Government], shielded from the view of

the Iranian people and international regulators." *See* Press Release, U.S. Dep't of Treasury, *Treasury Targets Assets of Iranian Leadership*, Jun. 4, 2013. Similarly, to undermine sanctions on its oil industry, Iran employed front companies to disguise the fact that oil tankers were being purchased on behalf of the National Iranian Tanker Company and used to transport Iranian oil. *See* Press Release, U.S. Dep't of Treasury, *United States Exposes Iranian Shipping Scheme*, Mar. 14, 2013. Because the existence and location of secret finances are (by definition) unavailable to terrorism victims and their families, these assets are nearly impossible to attach.

*Third*, terrorist states in nearly all circumstances reject the authority of U.S. courts and decline to appear to defend against claims, resulting in default judgments. *See* Congressional Research Service, *Suits Against Terrorist States By Victims Of Terrorism* 7, (Aug. 8, 2008).[7] Because terrorist states are often not present to respond to post-judgment discovery orders, and they stand beyond the reach of contempt measures that a court could otherwise use

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[7] *See, e.g.*, *Eisenfeld v. Islamic Republic of Iran*, 172 F. Supp. 2d 1 (D.D.C. 2000) ($24.7 million in compensatory damages and $300 million in punitive damages); *Anderson v. Islamic Republic of Iran*, 90 F. Supp. 2d 107 (D.D.C. 2000) ($41.2 million in compensatory damages and $300 million in punitive damages); *Cicippio v. Islamic Republic of Iran*, 18 F. Supp. 2d 62 (D.D.C. 1998) ($65 million awarded in compensatory damages); *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1 (D.D.C. 1998) ($27 million in compensatory damages and $225 million in punitive damages); *Alejandre v. Republic of Cuba*, 996 F. Supp. 1239 (S.D. Fla. 1997) ($50 million in compensatory damages and $137.7 million in punitive damages).

to obtain compliance with the post-judgment discovery process.

### 2. Congress Has Amended The FSIA To Facilitate The Collection Of Judgments Against State Sponsors Of Terrorism.

Congress first addressed the issue of recovering on terrorism judgments in AEDPA. In addition to creating a new exception to jurisdictional immunity under the FSIA, AEDPA also allowed terrorism-judgment holders to attach the commercial property of terrorist states within the United States regardless of whether there is a connection between the property and the claim. *See* 28 U.S.C. § 1610(b)(2).

Given the difficulties in locating attachable assets of state sponsors of terrorism, *see supra* Part I.B.1, many of the first plaintiffs to obtain judgments sought to attach assets frozen by the U.S. government. *See, e.g.*, *Flatow v. Islamic Republic of Iran*, 74 F. Supp. 2d 18 (D.D.C. 1999); *Alejandre v. Republic of Cuba*, 996 F. Supp. 1239 (S.D. Fla. 1997). These attempts failed because the U.S. government successfully intervened in these cases and quashed the writs of attachment. *See generally* Sean D. Murphy, *State Jurisdiction and Jurisdictional Immunities: Satisfaction of U.S. Judgments Against State Sponsors of Terrorism*, 94 Am. J. Int'l L. 117 (2000).

In response to these rulings, Congress amended the FSIA to allow attachment of diplomatic property and frozen assets, while permitting the President to waive attachment under this provision if he deemed waiver necessary for national security

reasons. *See* Pub. L. No. 105-277, Div. A, Title I, § 117, 112 Stat. 2681-491 (Oct. 21, 1998) (codified at 28 U.S.C. § 1610(f)(1)(A)). Congress also took the extraordinary step of instructing senior executive officials to help terrorism victims locate assets to satisfy their judgments:

> At the request of any party in whose favor a judgment has been issued with respect to a claim [under the state-sponsor-of-terrorism provisions], the Secretary of the Treasury and the Secretary of State should make every effort to fully, promptly, and effectively assist any judgment creditor or any court that has issued any such judgment in identifying, locating, and executing against the property of that foreign state or any agency or instrumentality of such state.

28 U.S.C. § 1610(f)(2)(A).

Despite offering the prospect of Executive Branch assistance, this amendment provided little relief to terrorism victims. Upon signing the bill into law, the President immediately exercised his waiver authority to prevent attachment of foreign sovereign assets in terrorism cases. *See* Presidential Determination 99-1 (Oct. 21, 1998), *reprinted in* 34 WEEKLY COMP. PRES. DOC. 2088 (Oct. 26, 1998). The President exercised his waiver authority because, in his view, "the struggle to defeat terrorism would be weakened, not strengthened, by" allowing the attachment of frozen assets. *See* White House, Statement by the Press Secretary (Oct. 21, 1998).

Congress's efforts to allow judgment holders to attach frozen assets were thus frustrated as soon as the law took effect.

Congress responded to the President's waiver by enacting a new provision that required the liquidation of a portion of Cuba's frozen assets to pay certain judgments. *See* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 2002, 114 Stat. 1464, 1541 (Oct. 28, 2000). This bill also provided limited relief to certain plaintiffs with judgments against Iran by earmarking federal funds to offer an alternative to pursuing their claims against Iran in court. *Id.*

In 2002, Congress reaffirmed its intent to make blocked assets available for attachment by terrorism victims. *See* Terrorism Risk Insurance Act (TRIA), Pub. L. No. 107-297, 116 Stat. 2322 (Nov. 26, 2002) (codified at 28 U.S.C. § 1610 Note). The TRIA clarified Congress's intent to permit a presidential waiver only in limited circumstances. Under the TRIA, the President can no longer broadly waive the provision allowing attachment of terrorist states' property, but instead can waive attachment only for "property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations." 28 U.S.C. § 1610 Note.

In 2008, Congress again amended the FSIA to assist terrorism victims in collecting judgments from foreign sovereigns. *See* National Defense Authorization Act for Fiscal Year 2008, Pub. L. No.110-181, § 1083(a)(1), 122 Stat. 3 (Jan. 28, 2008) (codified at 28 U.S.C. § 1605A(g)(1)). This amendment permit-

ted, for the first time, *prejudgment* attachment of a foreign state's assets, by authorizing the filing of a notice of a "lien of *lis pendens* upon any real property or tangible personal property" of the terrorist state. *Id.* The amendment also permitted terrorism victims to attach property in which a terrorist state, or an agency or instrumentality of state, holds an interest either "directly or indirectly." *Id.* at § 1083(b)(3)(D) (codified at 28 U.S.C. § 1610(g)(1)). This measure was intended to allow attachment of any property in which the terrorist state has an economic interest. *See Conference* Report to Accompany H.R. 1585, National Defense Authorization Act for Fiscal Year 2008, H. R. Rep. No. 110-477, at 1001 (2007).

### 3. Congress Did Not Limit Terrorism Victims' Recovery To Blocked Assets.

Congress's repeated efforts to assist victims of state-sponsored terrorism have resulted in payment of some judgments against state sponsors of terrorism. For example, hundreds of millions of dollars in blocked assets have been paid to terrorism victims and their families. *See* Congressional Research Service, *supra*, at 18. But Congress's efforts are far from a complete solution. As one court explained, "the simple fact remains that very few blocked assets exist," and those that do are "a mere drop in the bucket . . . compared to the staggering [amount] in outstanding judgments" in terrorism cases. *In Re Islamic Republic of Iran Terrorism Litig.*, 659 F. Supp. 2d at 58.

According to the latest statistics, the U.S. is blocking $2.29 billion in assets related to the four states currently designated as sponsors of terrorism

(Cuba, Iran, Sudan, and Syria). *See* Office of Foreign Assets Control, U.S. Dep't of Treasury, *Terrorist Assets Report*, tbl. 1 (2012). These blocked assets are thus a small fraction of the total amount of terrorism-related judgments, which was estimated at $19 billion in 2008 and is considerably greater today. *See* Congressional Research Service, *supra*, at 68. This discrepancy has created a situation where "a few dozen plaintiffs in the earliest cases managed to obtain compensation for their losses, but hundreds of other equally deserving victims of terrorism . . . have gotten nothing." *In Re Islamic Republic of Iran Terrorism Litig.*, 659 F. Supp. 2d at 124.

Congress undoubtedly is well aware that blocked assets are insufficient to provide recovery for all of the losses victims of state-sponsored terrorism have sustained. In repeatedly amending the FSIA to assist these victims, Congress has never suggested that the victims could not invoke ordinary post-judgment discovery procedures to locate assets they could pursue worldwide in an effort to enforce the judgments they have won in U.S. courts. As explained in the following section, it is plain that such discovery is in fact available.

## II. An Immunity From Post-Judgment Discovery Would Be Contrary To The Text And Structure Of The FSIA And Would Frustrate Congress's Efforts To Assist Victims Of State-Sponsored Terrorism.

Argentina argues for an immunity from post-judgment discovery based on the absence of a provision in the FSIA that expressly provides for such dis-

covery. That same logic would dictate that terrorist states also have immunity from post-judgment discovery because, despite the many amendments discussed above, Congress has never expressly stated that terrorism victims may conduct post-judgment discovery under the Federal Rules of Civil Procedure. The Court should reject this argument as contrary to the text and structure of the FSIA.

The Court should also reject the argument because it would frustrate Congress's objective of holding state sponsors of terrorism accountable for their conduct. To achieve this objective, the FSIA must be interpreted to provide FSIA judgment holders with the same rights as other parties seeking to enforce judgments in U.S. courts, including the ability to conduct discovery pursuant to the Federal Rules of Civil Procedure. Given Congress's concerted efforts to assist terrorism victims in collecting judgments, Congress surely would have acted explicitly to deprive terrorist states of immunity from post-judgment discovery if it thought that such an immunity existed, or at least would have explained why it was not doing so. Congress's silence on the issue of post-judgment discovery is strong evidence that it expected this discovery to be available for terrorism victims just as it is available to plaintiffs in ordinary civil cases.

### A. The Federal Rules Of Civil Procedure Govern Post-Judgment Discovery Because The FSIA Imposes No Limitations On This Discovery.

Federal Rule of Civil Procedure 69 generally governs post-judgment discovery in civil proceedings. This rule must also govern post-judgment discovery in FSIA proceedings unless the FSIA contains a "plain statement of a pre-emptive intent." *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for S. Dist. of Iowa*, 482 U.S. 522, 539 (1987). In enacting and repeatedly amending the FSIA, Congress has paid special attention to the consequences of authorizing proceedings against foreign sovereigns under the Federal Rules of Civil Procedure. In some circumstances, Congress has determined that the federal rules are inadequate and has drafted special rules to apply in FSIA proceedings. In other circumstances, Congress has chosen not to depart from the traditional federal rules. Because Congress has not expressed any intent to displace the traditional rules governing post-judgment discovery, those rules must apply here.

The FSIA has always included a number of provisions that specifically depart from the Federal Rules of Civil Procedure. For example, it displaces Rule 4 by providing different rules for service in FSIA proceedings. 28 U.S.C. § 1608(a). It displaces Rule 12 by providing 60 days for the foreign sovereign to serve its answer to a complaint. *Id.* § 1608 (d). And it displaces Rule 55 by requiring a plaintiff to present evidence establishing its right to relief before a default judgment is entered. *Id.* § 1608(e).

As originally enacted, the FSIA was silent on procedures governing discovery. That silence was not an oversight. To the contrary, the legislative history makes clear that Congress considered the issue of discovery and concluded that the Federal Rules of Civil Procedure should govern FSIA proceedings. *See* H.R. Rep. No. 94-1487, at 23 (1976), 1976 U.S.C.C.A.N. 6604, 6621 ("The [FSIA] does not attempt to deal with questions of discovery. Existing law appears to be adequate in this area. . . . [If] a private plaintiff sought the production of sensitive governmental documents of a foreign state, concepts of governmental privilege would apply."). As the D.C. Circuit has explained, "Congress kept in place a court's normal discovery apparatus in FSIA proceedings." *FG Hemisphere Assocs., LLC v. Democratic Republic of Congo,* 637 F.3d 373, 378 (D.C. Cir. 2011).

In amending the FSIA, Congress has continued to consider the extent to which special rules are needed to govern FSIA proceedings. It has provided a special rule for discovery in just one instance. When Congress created an exception to jurisdictional immunity for state sponsors of terrorism, it expressly imposed a limitation on orders for discovery from the United States. That exception allows a court to stay the discovery if the Attorney General certifies that it "would significantly interfere with a criminal investigation or prosecution, or national security operation, related to the incident that gave rise to the cause of action." 28 U.S.C. § 1605(g)(1). Notably, this provision demonstrates Congress's concern with only a narrow set of discovery orders: those addressed to the U.S. government that would interfere

with prosecutorial or national security interests. There is no mention of discovery sought from foreign sovereign defendants, either in this provision or elsewhere in the statute, leaving such discovery to be governed by the Federal Rules of Civil Procedure.

Rather than cutting back on discovery against foreign states, Congress acted to help plaintiffs such as *amici* obtain more information about the assets of those states. When it amended the FSIA to allow terrorism victims to attach the blocked assets of the foreign state, Congress instructed the Secretary of State and Secretary of the Treasury to assist them in locating and identifying assets to satisfy their judgment. 28 U.S.C. § 1610(f)(2). In taking the remarkable step of authorizing private plaintiffs to enlist the help of senior executive officials in their search for assets, Congress never suggested that those same plaintiffs were barred from pursuing those same assets using traditional discovery under the federal rules. Reading such a bar into the FSIA, with no basis in the text of the statute, would be at odds with Congress's effort to make it easier for the victims of state-sponsored terrorism to obtain information on foreign state assets.

Indeed, the fact that Congress *did not* include in the FSIA a provision explicitly providing victims of terrorism with a right to post-judgment discovery strongly suggests that Congress did not believe that the FSIA generally limits such discovery. If Congress had understood the FSIA to restrict victims' access to information about terrorist states' assets that ordinarily would be available under the Federal Rules of Civil Procedure, it surely would have pro-

vided expressly for a right to such discovery for victims in addition to enlisting the investigative resources of the Executive Branch.

### B. An Immunity From Post-Judgment Discovery Would Frustrate Congress's Efforts To Assist Victims Of State-Sponsored Terrorism.

Applying the Federal Rules of Civil Procedure to post-judgment discovery in FSIA cases is not only supported by the statutory text, it also furthers Congressional intent. Congress has repeatedly acted to assist victims of terrorism in the recovery of damages in order to lessen the difficulty of enforcing judgments against terrorist states. *See supra* Part I.B. These efforts would be frustrated if foreign sovereigns were immune from post-judgment discovery in aid of execution. Such an immunity would make it all but impossible for victims to attach a terrorist state's foreign assets.

In light of the particular difficulties victims face in identifying and attaching assets of state sponsors of terrorism, post-judgment discovery is especially important in terrorism cases. Terrorism victims need access to the ordinary scope of post-judgment discovery to obtain information from third parties and identify assets abroad that may be attachable by a foreign court. While the prospects of successfully executing on such attachments are generally not good, foreign courts remain a legally viable method to pursue satisfaction of judgments. *See In Re Islamic Republic of Iran Terrorism Litig.*, 659 F. Supp. 2d at 123 n.48 ("This Court is not overlooking

the possibility of execution of judgments through enforcement proceedings in foreign jurisdictions, at least one scholar has recently suggested as a still-viable means of recovery in these actions.") (citing Debra M. Strauss, *Reaching out to the International Community: Civil Lawsuits as the Common Ground in the Battle Against Terrorism*, 19 Duke J. Comp. & Int'l L. 307 (2009)).

If the Court adopts Argentina's broad view of sovereign immunity and significantly restricts the scope of post-judgment discovery, even this narrow avenue of enforcement will be closed to terrorism victims. Plaintiffs in terrorism cases cannot be expected to identify and locate attachable assets of state sponsors of terrorism *before* obtaining discovery designed to shed light on those very assets. It is highly unlikely, given the secrecy and intransigence of terrorist states, that terrorism victims will successfully locate attachable assets without the aid of discovery. The consequences of such an immunity will be the denial of damage awards to terrorism victims and greater impunity for terrorist states.

In passing AEDPA to amend the FSIA, "Congress manifested its intent that U.S. nationals who are 'victims of terrorist states be given a judicial forum in which to seek redress.'" *Elahi v. Islamic Republic of Iran*, 124 F. Supp. 2d 97, 106 (D.D.C. 2000) (quoting *Daliberti v. Republic of Iraq*, 97 F. Supp. 2d 38, 50–51 (D.D.C. 2000)). Congress was motivated by the principle that "[t]hose nations that operate in a manner inconsistent with international norms should not expect to be granted the privilege of immunity from suit, that is within the prerogative of

Congress to grant or withhold." *Daliberti*, 97 F. Supp. 2d at 52. By exposing terrorist states to liability and enforcement of judgments, Congress sought to "deter terrorism [and] provide justice for victims." Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996) In short, Congress wanted "rogue governments who sponsor international terrorism [to] pay *literally*." 148 Cong. Rec. S11524, S11526 (Nov. 19, 2002) (statement of Sen. Harkin) (emphasis added).

In light of this clear congressional intent, the FSIA cannot be interpreted to provide an atextual immunity that would prevent terrorism victims from attempting to discover where terrorist states hide their assets. Congress has required the Executive Branch to assist victims in the search for assets to attach, exposed terrorist states to punitive damages, authorized attachment of blocked assets, and allowed for pre-judgment liens on foreign sovereign property within the judicial district. *See supra* Part I. It is inconceivable that Congress would enact such extraordinary measures but fail to afford victims the standard tools of post-judgment discovery generally available to plaintiffs in civil cases. The common sense explanation for why Congress has not expressly provided for post-judgment discovery in terrorism cases is that this discovery is already available under the FSIA, and that nothing in the statute renders foreign sovereigns immune from it.

## CONCLUSION

For the foregoing reasons, the judgment of the Second Circuit should be affirmed.

Respectfully submitted,

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