FILED UNDER SEAL

No. 18-A669

IN THE SUPREME COURT OF THE UNITED STATES

[redacted]

Applicant,

v.

UNITED STATES OF AMERICA,

Respondent.

[redacted] EMERGENCY APPLICATION UNDER SUPREME COURT RULE 23 AND 28 U.S.C. § 2101(f) FOR AN IMMEDIATE STAY OF PROCEEDINGS DURING THE PENDENCY OF [redacted] PETITION FOR CERTIORARI

DIRECTED TO THE HONORABLE JOHN G. ROBERTS, JR.,
CHIEF JUSTICE OF THE UNITED STATES AND
CIRCUIT JUSTICE FOR THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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GLOSSARY

FSIA: Foreign Sovereign Immunities Act

[redacted]

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TO THE HONORABLE JOHN G. ROBERTS, JR., CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE DISTRICT OF COLUMBIA CIRCUIT:

Earlier this year, Special Counsel Robert Mueller served a grand jury subpoena on [redacted]—is a "foreign state" as the Foreign Sovereign Immunities Act defines the term. *See* D.C. Circuit's December 18, 2018 Judgment (Ex. 1) at 1 ("[T]here is no question that [redacted] falls within the Act's definition of a 'foreign state.'"). From the outset, [redacted] argued that it is immune under the FSIA from complying with a criminal subpoena because American courts lack criminal jurisdiction over foreign states. The Special Counsel has argued from the outset that the FSIA does not apply to criminal proceedings and that, if it does, the statute's exceptions can support criminal jurisdiction over a foreign state.

In pressing those arguments, the Special Counsel—who has no authority to interpret the FSIA or set American foreign policy—has spurned the FSIA's text, this Court's precedents, and the longstanding rule in America and abroad that one sovereign may not exercise criminal jurisdiction over another. Indeed, since the Founding, foreign states have enjoyed absolute immunity from American criminal jurisdiction. *See The Schooner Exchange v. McFaddon*, 11 U.S. 116, 137 (1812); *Samantar v. Yousuf*, 560 U.S. 305, 311 (2010) (courts interpreted *The Schooner Exchange* as "extending virtually absolute immunity to foreign sovereigns"); *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 821 (2018) (until 1952, "the State Department generally held the position that foreign states enjoyed absolute immunity from all actions in the United States").

Through the FSIA, Congress codified that longstanding rule. Under the FSIA, "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided" in 28 U.S.C. §§ 1605–07. 28 U.S.C.

§ 1604. The FSIA "starts from a premise of immunity and then creates exceptions to the general principle." *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1320 (2017). In a separate provision entitled "Actions against foreign states," Congress limited subject-matter jurisdiction under the FSIA to certain "nonjury civil actions" against foreign states involving a "claim for relief . . . to which the foreign state is not entitled to immunity under either sections 1605–07 of this title or under any applicable international agreement." 28 U.S.C. § 1330(a).

On multiple occasions, this Court has explained that "jurisdiction in actions against foreign states is comprehensively treated by [] § 1330." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 437 n.5 (1989) (quoting H.R. Rep. No. 94-1487, at 14 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6613). Following the statute's plain language and this Court's teaching, the Sixth Circuit has held that American courts lack criminal jurisdiction over foreign states (*see Keller v. Central Bank of Nigeria*, 277 F.3d 811 (6th Cir. 2002)), and both the Second and Fourth Circuits have held that no jurisdictional statute other than § 1330(a) can supply subject-matter jurisdiction in an action against a foreign state. *See Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela*, 863 F.3d 96, 113–15 (2d Cir. 2017); *Williams v. Shipping Corp. of India*, 653 F.2d 875, 881 (4th Cir. 1981).[1]

That was Congress's design. In enacting the FSIA, Congress stripped any previously existing jurisdiction over foreign states and then affirmatively granted federal courts jurisdiction only through § 1330(a). Indeed, the only jurisdiction-granting statute in the U.S. Code that incorporates the FSIA's immunity exceptions is 28 U.S.C. § 1330(a)—proof that the exceptions operate only within § 1330(a)'s grant

[1] *See also* Federal Judicial Center, *The Foreign Sovereign Immunities Act: A Guide for Judges*, International Litigation Guide at 1 n.2 (2013) ("reference to 'civil actions' does not suggest . . . that states or their agencies or instrumentalities can be subject to criminal proceedings in U.S. courts; nothing in the text or legislative history supports such a conclusion").

of jurisdiction over certain nonjury civil actions involving a claim for relief. Congress's refusal to expressly grant criminal jurisdiction over foreign states is not an aberration: American courts have (consistent with international law) always understood that they have no criminal jurisdiction over foreign states, not least because criminal matters present more acute diplomatic concerns than nonjury civil suits.

Breaking from the FSIA's plain text, this Court's plain teaching, and at least three of its sister circuits, the D.C. Circuit below issued a judgment (with an opinion ostensibly to follow) holding that 18 U.S.C. § 3231—a statute of general criminal jurisdiction that says nothing about foreign states—supplies criminal jurisdiction over foreign states. The D.C. Circuit also held that *if* the FSIA applies to criminal proceedings, its exceptions do, too. Adding insult to injury, the D.C. Circuit issued its mandate the same day as the judgment—before the court even issued an opinion—cutting off the normal period for seeking rehearing or rehearing *en banc* and sending the case back to the District Court where [redacted] may face a $50,000-per-day contempt sanction starting December 28, 2018.[2] [redacted] moved the D.C. Circuit to recall its mandate and to then stay issuing the mandate pending [redacted] forthcoming certiorari petition, but the circuit court denied the motion, leaving [redacted] now facing the indignity of contempt sanctions that could start within a week.

The D.C. Circuit's rush to judgment—no doubt spurred by concerns about time constraints on the Special Counsel's investigation—has placed [redacted] (concededly a foreign state) in the impossible position of possibly suffering the indignity of $50,000-per-day contempt sanctions while it seeks Supreme Court review or

[2] We say "may face" because [redacted] has argued and will continue to argue that no immunity exception under the FSIA authorizes the imposed monetary sanction. *See* [redacted] Opening Court of Appeals Brief (Ex. 3) at 39; [redacted] Court of Appeals Reply Brief (Ex. 5) at 22–24. [redacted] will press that and other arguments in its forthcoming petition for a writ of certiorari.

undermining its sovereign immunity by complying with the criminal subpoena before those fines possibly start running on December 28. That is by any definition irreparable harm to a foreign state claiming immunity from American jurisdiction.

The D.C. Circuit's ruling also threatens a sea change in American foreign relations. "Actions against foreign sovereigns in [American] courts raise sensitive issues concerning the foreign relations of the United States . . . ." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493 (1983); *see also Nat'l City Bank of New York v. Republic of China*, 348 U.S. 356, 362 (1955) (sovereign immunity derives "from standards of public morality, fair dealing, reciprocal self-interest, and respect for the 'power and dignity' of the foreign sovereign"); *The Schooner Exchange*, 11 U.S. at 135 (foreign sovereign immunity is a "very delicate and important" question). The United States understands well those sensitive interests: On the world stage, it continues to demand absolute immunity from criminal proceedings. And yet by rejecting [redacted] claim to sovereign immunity, the D.C. Circuit denied [redacted] the sovereign dignity that the United States enjoys in other countries. If left to stand, the judgment will upset American foreign policy, strain this country's relations with [redacted], and risk (and in some cases, guarantee) reciprocal treatment for American agencies and instrumentalities abroad. [redacted]

Given the existing circuit split and profound implications for sovereign immunity in American courts and American foreign relations, there is more than a reasonable probability that this Court will grant certiorari and more than a fair prospect that the Court will hold (as it has before) that "jurisdiction in actions against foreign states is comprehensively treated by [] § 1330." *Amerada Hess*, 488 U.S. at

437 n.5 (internal quotation marks omitted). As you would expect, the case—although under seal—has generated widespread media attention and speculation about the parties and issues involved. *See, e.g.*, Katelyn Polantz (CNN), *Mystery Mueller mayhem at a Washington court* (Dec. 15, 2018).[3] Already, the press is speculating that the case is headed to this Court. *See, e.g.*, Tony Mauro (National Law Journal), *What Happens if Mystery D.C. Circuit Grand Jury Case Reaches the Supreme Court?* (Dec. 21, 2018).[4] This Court should stay all proceedings below (including any threatened accrual of the contempt fine) while [redacted] certiorari petition is pending. *See* Supreme Ct. R. 23.1; 28 U.S.C. § 2101(f). This Court should act on [redacted] stay application before December 28, 2018—the day that monetary sanctions may start accruing.

BACKGROUND

In July 2018, the Special Counsel served a federal grand jury subpoena on [redacted] Ex. 3 at 9; *see also* Grand Jury Subpoena No. 7409 (Ex. 6). [redacted] is not a target of the Special Counsel's investigation.

From the outset, [redacted] explained that as an agency or instrumentality of [redacted] it is entitled to sovereign immunity from the subpoena.

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[3] https://www.cnn.com/2018/12/14/politics/mueller-grand-jury-mysterious-friday/index.html

[4] https://www.law.com/nationallawjournal/2018/12/21/what-happens-if-mystery-dc-circuit-grand-jury-case-reaches-the-supreme-court/?kw=What%20Happens%20If%20Mystery%20DC%20Circuit%20Grand%20Jury%20Case%20Reaches%20the%20Supreme%20Court?&et=editorial&bu=National LawJournal&cn=20181221&src=EMC-Email&pt=NewsroomUpdates&slreturn=20181122080351

Ex. 3 at 9.[5] [redacted]. *Id.* That search turned up nothing responsive. *Id.*

Unsatisfied with [redacted] response, the Special Counsel asked [redacted]. Ex. 3 at 9. [redacted] explained that disclosing those materials would expose it [redacted], but the Special Counsel nevertheless persisted in demanding compliance with the subpoena and the parties reached an impasse. *Id.* at 9–10.

Accordingly, [redacted] moved to quash the subpoena. Ex. 3 at 10. In its motion, [redacted] argued (1) that as a foreign sovereign, it is immune from complying with the grand jury subpoena and (2) that the subpoena is unreasonable and oppressive under Federal Rule of Criminal Procedure 17(c) because it would require [redacted] to violate [redacted]. *Id.* The District Court rejected both arguments on September 19 and directed [redacted] to respond to the subpoena by October 1. *Id.*; *see also* District Court's September 19, 2018 Order (Ex. 7) at 1. Although acknowledging that [redacted] is a foreign state under the FSIA, the District Court looked outside the FSIA to find subject-matter jurisdiction over [redacted] under 18 U.S.C. § 3231—which says that "the district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States." Ex. 3 at 10–11. In finding jurisdiction under § 3231, the District Court spurned this Court's holding in *Amerada Hess* that subject-matter jurisdiction in an action against a foreign state can never lie under a statute of general jurisdiction that "by its terms does not distinguish among classes of defendants" and "has the same effect after the passage of the FSIA as before with respect to defendants other than foreign states."

[5] The Special Counsel, the District Court, and the D.C. Circuit have all acknowledged that [redacted] qualifies as a foreign state under the FSIA.

488 U.S. at 438. It then relied on *ex parte* information that the Special Counsel submitted to conclude that the FSIA's commercial-activity exception applied. Ex. 3 at 11. In an understatement, the District Court acknowledged '[redacted] difficult position in not being privy to the information reviewed and relied upon." *Id.*

[redacted] appealed the district court's order. Ex. 3 at 12. The D.C. Circuit dismissed [redacted] appeal as premature. It held that [redacted] needed to get a contempt order before appealing. D.C. Circuit's October 3, 2018 Order (Ex. 9) at 1. The court did so despite precedent in the D.C. Circuit and other federal appellate courts holding that foreign sovereigns are entitled to immediately appeal a denial of sovereign immunity. *See, e.g.*, *In re Papandreou*, 139 F.3d 247, 251 (D.C. Cir. 1998) (a contempt order "offends diplomatic niceties even if it is ultimately set aside on appeal").

On October 5, the District Court held [redacted] in contempt for failing to comply with the court's September 19 order, again denying [redacted] claim to sovereign immunity. District Court's October 5, 2018 Order (Ex. 10) at 6. The court also fined [redacted] $50,000 per day until it produces the subpoenaed records but stayed that fine until seven days after any mandate from the Court of Appeals affirming the District Court's judgment. *Id.* at 6–7. [redacted] filed its second appeal a few days later.

The D.C. Circuit held oral argument on December 14, 2018. After oral argument, the court conducted a closed *ex parte* session with the Special Counsel, ostensibly to discuss the redacted, *ex parte* materials that the Special Counsel included in its appellate brief. [redacted] attorneys were not party to that session.

Four days later, the Court of Appeals issued a three-page judgment affirming the district court on all grounds. Ex. 1. The Court of Appeals agreed with the District Court that 18 U.S.C. § 3231 supplies jurisdiction over this case, reasoning that "the cases where [the Supreme] Court has referred to section 1330(a) jurisdiction as

exclusive are all civil actions." Ex. 1 at 2–3. The D.C. Circuit also held that even assuming that [redacted] is entitled to immunity under FSIA § 1604—which, again, says that a "foreign state shall be immune from the jurisdiction of the courts of the United States and of the States" subject to certain exceptions—the commercial-activity exception can and does strip that immunity in this criminal proceeding. The court did not file an opinion—the judgment says that the opinion will issue "at a later date"—but the court nonetheless took the extraordinary step of directing the clerk to "issue the mandate forthwith." Ex. 1 at 1, 3. The mandate issued on the same day as the judgment.

That unusual move had two consequences: It prevented [redacted] from seeking rehearing from the D.C. Circuit and triggered the seven-day countdown for the district court's $50,000-per-day fine against [redacted]. The fine may start to accrue as early as December 28.

Unless this Court stays all lower-court proceedings—including any attempt to enforce the daily monetary sanction against [redacted] may possibly accrue millions of dollars in fines while it prepares its forthcoming petition for certiorari and while that petition is pending. That would be a hard pill for *anyone* to swallow—much less a foreign state whose immunity arguments flow from the FSIA's plain text and this Court's instruction that "jurisdiction in actions against foreign states is comprehensively treated by [] section 1330." *Amerada Hess*, 488 U.S. at 437 n.5 (citation omitted). [redacted] should not be put to the indignity of possibly accruing $50,000 in fines each day while it seeks Supreme Court review.

REASONS FOR GRANTING THE APPLICATION

"To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that the majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). All three factors are present.

I. THERE IS A "REASONABLE PROBABILITY" THAT THIS COURT WILL GRANT CERTIORARI AND A "FAIR PROSPECT" THAT THE COURT WILL REVERSE THE JUDGMENT BELOW.

This case cries out for Supreme Court review: It involves a circuit split presenting important and novel questions about foreign sovereign immunity that could have cascading effects in American foreign policy. The D.C. Circuit's judgment conflicts with the FSIA's plain text, this Court's holdings in numerous cases, other circuits' decisions, and longstanding international law.

A. The FSIA codified the longstanding rule that foreign states enjoy absolute immunity from American criminal jurisdiction and process.

Before explaining the D.C. Circuit's error, we first preview the FSIA's general framework and the background against which Congress enacted the statute. Enacted in 1976, the FSIA gives foreign states blanket immunity "from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter or existing international agreements." 28 U.S.C. § 1604. At the same time, the FSIA also grants courts jurisdiction over only "any nonjury civil action against a foreign state . . . to which the foreign state is not entitled to immunity either under sections 1605–1607 of this title or under any applicable international agreement." 28 U.S.C. § 1330(a). By limiting jurisdiction to "nonjury" matters,

Congress took pains to ensure that an American jury will never sit in judgment over a foreign state. *See Ruggiero v. Compania Peruana de Vapores Inca Capac Yupanqui*, 639 F.2d 872, 875 (2d Cir. 1981) (Friendly, J.) ("no jury can be had in an action in a federal court against a foreign state").

As this Court explained in *Amerada Hess*, § 1604 and § 1330(a) "work in tandem: § 1604 bars federal and state courts from exercising jurisdiction when a foreign state is entitled to immunity, and § 1330(a) confers jurisdiction on district courts to hear *suits brought by United States citizens and by aliens* when a foreign state is not entitled to immunity." 488 U.S. at 434 (emphasis added). Nothing in the FSIA suggests that Congress intended the FSIA's immunity exceptions to apply outside of § 1330(a) cases. On the contrary, the only jurisdiction-granting provision in the U.S. Code that incorporates the FSIA's immunity exceptions is § 1330(a)—proving that the immunity exceptions operate only within § 1330(a)'s limits. *See also Verlinden*, 461 U.S. at 489 ("If one of the specified exceptions to sovereign immunity applies, a federal district court may exercise subject matter jurisdiction *under § 1330(a)* . . . .") (emphasis added); H.R. Rep. No. 94-1487, at 14 ("Section 1330 provides a comprehensive jurisdictional scheme in cases involving foreign states"); *Republic of Arg. v. NML Capital, Ltd.*, 573 U.S. 134, 141 (2014) ("We have used th[e] term [comprehensively] often and advisedly to describe the Act's sweep."). "The FSIA provides the sole basis for obtaining jurisdiction over a foreign state." *Amerada Hess*, 488 U.S. at 439.

That structure is not unusual. Congress enacted the FSIA against the backdrop of absolute immunity from criminal jurisdiction—a rule that traces to *The Schooner Exchange*. *See, e.g.*, *The Schooner Exchange*, 11 U.S. at 137 ("person of the sovereign" is exempt "from arrest or detention within a foreign territory"). American courts followed that rule in all cases (criminal and civil) for a century and a half. By the mid-twentieth century, international trade had reached new heights, with foreign

countries and their instrumentalities often leading the push toward a globalized economy. *See, e.g.*, Tate Letter, "Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments," 26 Dept. State Bull. 984, 985 (1952). Those changes in the world economy prompted calls for a more practical framework for evaluating sovereign immunity in civil matters—one balancing a country's inherent sovereignty against the needs of private actors doing business with the sovereign. In 1952, the Tate Letter reflected the evolving global consensus: Foreign sovereigns' participation in commercial markets "ma[de] necessary a practice which . . . enable[d] persons doing business with them to have their rights determined in the courts." *Rubin*, 138 S. Ct. at 821–22 (quoting Tate Letter at 985).

So was born America's so-called "restrictive approach" to sovereign immunity. Tate Letter at 985. Under the restrictive approach, "[i]mmunity typically was afforded in cases involving a foreign sovereign's public acts, but not in cases arising out of a foreign state's strictly commercial acts." *Rubin*, 138 S. Ct. at 822. The Tate Letter was about civil matters—those sounding in "contract and tort." Tate Letter at 985. The shift from absolute to restrictive immunity in the civil context "left untouched the position in criminal proceedings." Hazel Fox & Philippa Webb, *The Law of State Immunity* 91 (3d ed. 2013). For good reason: Few things offend sovereign dignity more than subjecting a foreign sovereign to another country's criminal process.

After the Tate Letter, the State Department bore primary responsibility for informing the American judiciary whether a foreign sovereign was entitled to immunity in a particular case. *Verlinden*, 461 U.S. at 488. That *ad hoc* approach proved unworkable: The State Department's views often reflected little more than the diplomatic sentiments *du jour*, and in some cases, the Department refused to weigh in on a foreign sovereign's immunity. *Id.*

Faced with that increasingly cumbersome regime, the State and Justice Departments lobbied Congress to eliminate their role in state immunity determinations. In 1976, Congress enacted the FSIA "to free the Government from case-by-case diplomatic pressures, to clarify the governing standards, and to assure litigants that decisions are made on purely legal grounds and under procedures that insure due process." *Verlinden*, 461 U.S. at 488 (internal alterations omitted); *see also Samantar*, 560 U.S. at 323 n. 19 (2010) (the State Department "sought and supported the elimination of its role with respect to claims against foreign states and their agencies or instrumentalities").[6] Since then, this Court has explained multiple times that "the FSIA provides the sole basis for obtaining jurisdiction over a foreign state," *Amerada Hess*, 488 U.S. at 439, and "must be applied by the District Courts in every action against a foreign sovereign." *Verlinden*, 461 U.S. at 493.

Like the Tate Letter, the FSIA worked no change in the longstanding rule that foreign sovereigns are absolutely immune from American criminal jurisdiction. *See* Federal Judicial Center, *The Foreign Sovereign Immunities Act* at 1 n.2 ("nothing in the text or legislative history supports . . . a conclusion" that "states or their agencies or instrumentalities can be subject to criminal proceedings in U.S. courts"). In fact, Congress crystalized that rule by withholding criminal jurisdiction from American courts.

B. No statute other than § 1330(a) can supply subject-matter jurisdiction in an action against a foreign state.

The D.C. Circuit ignored Congress's carefully calibrated jurisdictional framework by purporting to find subject-matter jurisdiction in 18 U.S.C. § 3231, a statute outside the FSIA that says nothing about foreign sovereigns. Ex. 1 at 2–3.

[6] Ignoring those facts, the Special Counsel argued below that the FSIA does not apply to criminal proceedings and that, as a result, the pre-FSIA common-law regime still governs in the criminal context such that courts should defer to the Executive Branch on state immunity questions in that context.

That was clear error. In ruling as it did, the D.C. Circuit ignored the FSIA's text, Supreme Court precedent, and established international law. At the very least, there is a "reasonable possibility" that four Justices would grant certiorari to review the error and a "fair prospect" that five Justices would vote to reverse.

1. This Court has repeatedly held that the FSIA's jurisdictional scheme is "comprehensive" and is the "sole basis" for obtaining subject-matter jurisdiction in cases involving foreign states.

To understand the D.C. Circuit's error, one need look no further than this Court's teaching that "jurisdiction in actions against foreign states is *comprehensively* treated by [] section 1330" and that "the FSIA provides the *sole basis* for obtaining jurisdiction over a foreign state." *Amerada Hess*, 488 U.S. at 437 n.5 (emphasis added) (quoting H.R. Rep. No. 94-1487, at 14); *id.* at 439 (emphasis added); *see also NML Capital*, 573 U.S. at 141 ("We have used th[e] term [comprehensively] often and advisedly to describe the Act's sweep."). The word "comprehensively" means comprehensively—*not* "comprehensively, but only in civil matters." *Cf. NML Capital*, 573 U.S. at 141 ("[a]fter the enactment of the FSIA, the Act—and not the pre-existing common law—indisputably governs the determination of whether a foreign state is entitled to sovereign immunity") (internal quotation marks omitted). Many lower courts (including the D.C. Circuit in cases other than this one) have taken this Court at its word. *See, e.g., Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1178 (D.C. Cir. 1994) ("The FSIA, enacted in 1976, is the sole means of obtaining jurisdiction over a foreign state defendant in federal court."); *Williams*, 653 F.2d at 881 ("[T]he plain reading of the statutory language, the legislative history and overriding purpose of the [FSIA] requires the conclusion that sections 1330 and 1441(d) are jurisdictionally exclusive . . . ."); *see also* H.R. Rep. 94-1487, at 13 ("Section 1330 provides a comprehensive jurisdictional scheme in cases involving foreign states. Such broad jurisdiction in the Federal courts should be conductive to uniformity in

decision, which is desirable since a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences.").

The D.C. Circuit erred by reading a civil-case limitation into this Court's teaching that the FSIA's jurisdictional scheme is comprehensive. *See also NML Capital*, 573 U.S. at 141 ("[A]ny sort of immunity defense made by a foreign sovereign in an American court must stand on the Act's text. Or it must fall."). There is no reconciling the D.C. Circuit's judgment with the FSIA's text or this Court's precedent.

2. This Court has held that statutes of general jurisdiction can never supply jurisdiction over an action against a foreign state.

For similar reasons, the D.C. Circuit also erred in jettisoning this Court's holding that statutes of general jurisdiction that do not "distinguish among classes of defendants" and have "the same effect after the passage of the FSIA as before with respect to defendants other than foreign states" can never supply jurisdiction over a foreign state. *Amerada Hess*, 488 U.S. at 438. That holding should have commanded a different outcome below.

Much like the Special Counsel in this case, the plaintiffs in *Amerada Hess* tried to invoke the district court's jurisdiction under the Alien Tort Statute (28 U.S.C. § 1350) and the general admiralty statute (28 U.S.C. § 1333) to support their claims against Argentina. *Amerada Hess*, 488 U.S. at 432. This Court rejected the notion that those or other non-FSIA statutes could supply jurisdiction over a foreign state:

> In light of the comprehensiveness of the statutory scheme in the FSIA, we doubt that even the most meticulous draftsman would have concluded that Congress also needed to amend *pro tanto* the Alien Tort Statute and presumably such other grants of subject-matter jurisdiction in Title 28 as § 1331 (federal question), § 1333 (admiralty), § 1335 (interpleader), § 1337 (commerce and antitrust), and § 1338 (patents, copyrights, and trademarks). Congress provided in the FSIA that "[c]laims of foreign states to immunity should henceforth be decided by courts of the United States in conformity with the principles set forth in this chapter," and very likely it thought that should be sufficient.

Id. at 437–38 (emphasis in original). The Court went on:

> We think that Congress' decision to deal comprehensively with the subject of foreign sovereign immunity in the FSIA, and the express provision in § 1604 that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605–1607," preclude a construction of the Alien Tort Statute that permits the instant suit. . . . The Alien Tort Statute by its terms does not distinguish among classes of defendants, and it of course has the same effect after the passage of the FSIA as before with respect to defendants other than foreign states.

Id. at 438.

To drive home the point, the Court explained that Congress amended the diversity statute to delete a provision expressly creating jurisdiction over actions against foreign sovereigns but did not need to make similar changes to general jurisdictional statutes:

> The FSIA amended the diversity statute to delete references to suits in which a "foreign stat[e] is a party either as a plaintiff or defendant . . . and added a new paragraph (4) that preserves diversity jurisdiction over suits in which foreign states are plaintiffs. As the legislative history explained, "since jurisdiction in actions against foreign states is comprehensively treated by the new section 1330, a similar jurisdictional basis under section 1332 becomes superfluous." . . . Unlike the diversity statute, however, the Alien Tort Statute and the other statutes conferring jurisdiction in general terms on district courts cited in the text did not in 1976 (or today) expressly provide for suits against foreign states.

Id. at 437 n.5 (emphasis added).

Amerada Hess lays bare the D.C. Circuit's error: The court purported to find jurisdiction in a statute (18 U.S.C. § 3231) that "does not distinguish among classes of defendants" and that "has the same effect after the passage of the FSIA as before with respect to defendants other than foreign states." *Amerada Hess*, 488 U.S. at 437. Like the Second Circuit in *Amerada Hess*, the D.C. Circuit erroneously concluded that Congress intended "federal courts [to] continue to exercise jurisdiction over foreign

states . . . outside the confines of the FSIA." *Id.* at 435. It failed to grasp that Congress has not left sensitive issues of foreign sovereign immunity to the vagaries of general statutes like § 3231.

In rejecting *Amerada Hess*'s teaching, the D.C. Circuit reasoned that "[t]extually speaking, nothing in the [FSIA] purports to strip the district courts of criminal jurisdiction." Ex. 1 at 2. That conclusion suffers from at least three problems.

First, § 1604—which is itself of jurisdictional dimension—says that "a foreign state shall be immune from the jurisdiction of the courts of the United States and the States" except as provided in the listed FSIA exceptions.[7] (emphasis added); *see also Arch Trading Corp. v. Republic of Ecuador*, 839 F.3d 193, 206 (2d Cir. 2016) ("Absent [] an exception, the immunity conferred by the FSIA strips courts of both subject matter and personal jurisdiction over the foreign state."). Congress knows how to use the "civil" modifier when it wants to. Indeed, it did so in the FSIA's sole jurisdiction-granting provision, § 1330(a)—but not in § 1604. Reading those provisions together shows that Congress withheld criminal jurisdiction over foreign states.[8]

Second, the D.C. Circuit answered the wrong question. The question is not whether the FSIA explicitly denies criminal jurisdiction—it does—but rather whether Congress has *affirmatively granted* criminal jurisdiction in actions against

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[7] For similar reasons, the D.C. Circuit also committed clear legal error by assuming (instead of deciding) that the FSIA grants immunity through § 1604. *See* Ex. 1 at 1. Foreign sovereign immunity is jurisdictional in nature—§ 1604 is entitled "[i]mmunity of a foreign state from jurisdiction"—so courts cannot assume immunity. They must decide it.

[8] Congress could have provided for criminal jurisdiction when it enacted the so-called terrorism exception (§ 1605A) in 1996 and amended it in 2008, but it did not. Indeed, that exception proves that Congress went out of its way to avoid subjecting foreign states to the American criminal process. Section 1605A strips foreign states' immunity from certain actions involving "personal injury" or "death" caused by (among other acts) "an act of torture, extrajudicial killing, aircraft sabotage, [and] hostage taking," but it does so only inasmuch as "money damages are sought." 28 U.S.C. § 1605A.

foreign states. *See, e.g., Amerada Hess*, 488 U.S. at 438; *see also Mobil Cerro Negro*, 863 F.3d at 113–14 (statute of general jurisdiction "should not be read as providing an independent basis for courts to exercise subject matter jurisdiction over foreign sovereigns, or, at the very least, should no longer be read [after the FSIA] as providing such a basis, even if it once did"); *Cary v. Curtis*, 44 U.S. 236, 245 (1845) ("[T]he courts created by statute must look to the statute as the warrant for their authority, certainly they cannot go beyond the statute . . . .").

Third, the D.C. Circuit wrongly assumed that American courts had criminal jurisdiction over foreign sovereigns before the FSIA. Consistent with international law, American courts have always viewed sovereign immunity as an inherent limitation on their jurisdiction. *See, e.g., The Schooner Exchange*, 11 U.S. at 132 (holding that "a public armed ship in the service of a foreign sovereign" was "exempt from the jurisdiction of the country"); *Samantar*, 560 U.S. at 311 ("The Court's specific holding in *The Schooner Exchange* was that a federal court lacked jurisdiction over 'a national armed vessel . . . of the emperor of France'"); *Rubin*, 138 S. Ct. at 821 ("foreign states enjoyed absolute immunity from all actions in the United States" before 1952); *The Parlement Belge* (1880) L.R. 5 P.D. 197 (same rule in international law); *see also People v. Weiner*, 378 N.Y.S. 2d 966, 974 (N.Y. Crim. Ct. 1976) (foreign sovereigns enjoy "unlimited," "absolute" immunity from criminal proceedings). American courts held that view even when jurisdictional statutes used "general words" that otherwise might suggest jurisdiction. *See Berizzi Bros. Co. v. The Pesaro*, 271 U.S. 562, 576 (1926) (dismissing *in rem* suit against a foreign-owned public ship "for want of jurisdiction" even though the Judicial Code granted district courts jurisdiction over "all civil causes of admiralty and maritime jurisdiction").[9]

[9] In the proceedings below, the Special Counsel cited a handful cases that he claimed stand for the proposition that American courts have always possessed criminal

When Congress enacted the FSIA, it codified that longstanding rule. *See Bolivarian Republic of Venezuela*, 137 S. Ct. at 1319. Indeed, the Special Counsel has yet to point us to a single pre-FSIA case where a court invoked 18 U.S.C. § 3231 to subject a foreign sovereign to the criminal process. And even if the Special Counsel or D.C. Circuit had pointed to one or two cases fitting that description (neither did), that would prove [redacted] point, not the Court's judgment or the Special Counsel's argument. *Compare Amerada Hess*, 488 U.S. at 436–37 (noting that "Congress' failure to enact a *pro tanto* repealer of the Alien Tort Statute when it passed the FSIA in 1976 may be explained at least in part by the lack of certainty as to whether the Alien Tort Statute conferred jurisdiction in suits against foreign states.").

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jurisdiction over foreign states. They don't. The court in *In re Investigation of World Arrangements*, 13 F.R.D. 280 (D.D.C. 1952) quashed a grand jury subpoena to a British-sovereign-owned oil company for lack of jurisdiction, citing "the law of nations," "reciprocal rights of immunity," and the "risk of belligerent action if government property is . . . seized or injured." 13 F.R.D. at 291. In *In re Grand Jury Investigation of Shipping Industry*, 186 F. Supp. 298 (D.D.C. 1960)—a case in which the government issued subpoenas to "more than 150 shipping firms"—the court "reserve[d] its views as to the issuance of the subpoena as it relates to the Philippine National Lines," a company that claimed sovereign immunity. *Id.* at 301, 319–20. In *United States v. Ho*, No. 16-cr-46, 2016 WL 5875005 (E.D. Tenn. Oct. 7, 2016) the court mentioned in passing that a Chinese power company was listed as a co-defendant in the matter. *Id.* at *6. The Chinese company never appeared in the case, and there is no discussion of sovereign immunity. And in *United States v. Deutsches Kalisyndikat Gesellschaft*, 31 F.2d 199 (S.D.N.Y. 1929)—a pre-FSIA antitrust case that did not involve a "foreign sovereign" as the district court understood the term—the court explained that "[t]he person of the foreign sovereign and those who represent him are immune, whether their acts are commercial, tortious, *criminal*, or not, no matter where performed. Their person and property are inviolable." (emphasis added).

The Special Counsel has cited only one district court case—*one*—in which a court held that it had criminal jurisdiction over a foreign sovereign under § 3231. *Cf. In re Grand Jury Proceeding Related to M/V Deltuva*, 752 F. Supp. 2d 173 (D.P.R. 2010). That one district court case exists does not prove the Special Counsel's argument. It proves [redacted]

No American law—no statute, no Supreme Court decision—has ever provided jurisdiction over foreign states in criminal matters. But even assuming against history that § 3231 provided jurisdiction over foreign sovereigns at one time, the statute "should no longer be read" as providing an independent basis for subject matter jurisdiction in light of the FSIA. *Mobil Cerro Negro*, 863 F.3d at 113–14. The D.C. Circuit flouted this Court's holdings in *Amerada Hess*, *Verlinden*, *NML Capital*, and many other cases by purporting to find subject-matter jurisdiction in a statute other than § 1330(a).

One other point: The D.C. Circuit also said that *Amerada Hess* supports the position that "sections 1330(a) and 3231 'readily could be seen as supplementing one another,' because criminal jurisdiction can be confined to those cases where the Act's exceptions to immunity apply." Ex. 1 at 2 (quoting *Amerada Hess*, 488 U.S. at 438). That mischaracterizes *Amerada Hess*. This Court held there that other jurisdictional statutes outside the FSIA do not "supplement[]" the FSIA because Congress decided "to deal comprehensively with the subject of foreign sovereign immunity in the FSIA." 488 U.S. at 438.

3. This Court and several courts of appeals have held that the FSIA's immunity exceptions apply only within § 1330(a) jurisdictional limits.

The D.C. Circuit also made a related error: It assumed that the FSIA's exceptions (including the commercial-activity exception[10]) apply outside of § 1330(a)'s limits. They do not. This Court said so in *Verlinden*: "If one of the specified exceptions to sovereign immunity applies, a federal district court may exercise subject matter

[10] That exception applies when "the action is based upon a commercial activity carried on in the United States by the foreign state . . . or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2).

jurisdiction under § 1330(a) . . . ." 461 U.S. at 489 (emphasis added). And in *Amerada Hess*: "Section 1604 and 1330(a) work in tandem: § 1604 bars federal and state courts from exercising jurisdiction when a foreign state is entitled to immunity, and § 1330(a) confers jurisdiction on district courts to hear suits brought by United States citizens and by aliens when a foreign state is not entitled to immunity." 488 U.S. at 434. Lower courts have agreed. *See, e.g.*, *Williams*, 653 F.2d at 881 (for cases involving foreign states, "sections 1330 and 1441(d) are jurisdictionally exclusive"). Because § 1330(a) could never supply jurisdiction here—it is limited to "nonjury civil action[s] . . . as to any claim for relief in personam"—the FSIA's exceptions could never abrogate [redacted] immunity from American criminal jurisdiction. Again, the only jurisdiction-granting statute in the U.S. Code that incorporates the FSIA's immunity exceptions is 28 U.S.C. § 1330(a).

And the exceptions themselves are civil in nature: "Almost all the exceptions involve commerce or immovable property located in the United States." *Bolivarian Republic*, 137 S. Ct. at 1320. With each exception, Congress has decided that, in the particular circumstance underlying the exception, the foreign state should not enjoy immunity from a nonjury civil action against it.

The D.C. Circuit was wrong to conclude that the commercial-activity exception can apply in § 3231 cases, but it added insult to injury by holding that the exception applied here based on the Special Counsel's *ex parte* filings and its *ex parte* oral argument. That one-sided procedure did violence in the worst way to [redacted]national dignity and to international comity generally. The Special Counsel has yet to point us to a case where a court stripped a sovereign's immunity based on materials that the foreign state could not contest.

4. Through § 1604, Congress extended absolute immunity from criminal jurisdiction to foreign agencies and instrumentalities.

In its judgment, the D.C. Circuit also suggested that adopting [redacted] position would "insulate corporations majority-owned by foreign governments from all criminal liability." Ex. 1 at 2. But that is exactly what Congress intended, for all the reasons that we have given—not least that § 1604 cloaks *all* foreign agencies and instrumentalities with immunity from American criminal jurisdiction and that any other rule would violate longstanding notions of reciprocity and comity in foreign relations. *See also Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 818 (1988) ("even in the interest of justice," a court "may not in any case . . . extend its jurisdiction where none exists"). In most countries around the globe, American agencies and instrumentalities are "insulated" from all criminal liability. The D.C. Circuit's judgment could change that.

In all events, the D.C. Circuit should not have worried that foreign agencies and instrumentalities might commit crimes in this country with impunity. History shows no such pattern. But even if it did, the Executive Branch and Congress have many tools at their disposal to address foreign sovereigns that commit crimes in the United States. *See, e.g., Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 381 (2000) ("Congress's explicit delegation to the President of power over economic sanctions . . . invested him with the maximum authority of the National Government . . . in harmony with the President's own constitutional powers."); Congressional Research Service, *North Korea: Legislative Basis for U.S. Economic Sanctions* (2018) (listing possible sanctions).

C. [redacted] forthcoming petition will present a circuit split.

This Court will also likely grant certiorari because the courts of appeals are split on whether American courts have subject-matter jurisdiction in criminal matters against foreign states. *Cf.* Supreme Ct. R. 10(a) (circuit split on an important

issue is a compelling reason for granting certiorari); *Maryland v. King*, 567 U.S. 1301, 1301 (2012) (Roberts, C.J.) ("reasonable probability this Court will grant certiorari" when appellant presented split of authority).

Consistent with the FSIA's text, the Sixth Circuit has held that U.S. courts have no criminal jurisdiction in actions against foreign states. *See Keller*, 277 F.3d at 820. As that court recognized—and as [redacted] has argued all along—§ 1604 says "that a 'foreign state shall be immune from the jurisdiction of the courts of the United States,' and does not limit this grant of immunity to civil cases." *Id.* The *Keller* court went on to hold that "[t]he [FSIA] provides that jurisdiction over a foreign sovereign will exist only if there is a relevant international agreement or an exception listed in 28 U.S.C. §§ 1605–1607. Plaintiff has not cited [a relevant] international agreement . . . and the FSIA does not provide an exception for criminal jurisdiction." *Id.*; *see also Gould, Inc. v. Mitsui Min. & Smelting Co., Ltd.*, 750 F. Supp. 838, 844 (N.D. Ohio 1990) (same conclusion; "since the FSIA is the only method of obtaining jurisdiction over foreign sovereigns, and § 1330(a) refers only to civil, and not criminal, actions there is no criminal jurisdiction over defendant Pechiney/Trefimetaux, an agency of the French government.").

The Second and Fourth Circuits have all but said the same thing. In *Williams*, 653 F.2d 875, the Fourth Circuit held that the FSIA "establishes comprehensive and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states in either federal or state courts in the United States" and that, for actions against foreign states, "sections 1330 and 1441(d) are jurisdictionally exclusive."[11] *Id.* at 878, 881. The Fourth Circuit also explained (quoting Judge

[11] Section 1441(d) provides that "[a]ny civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending" and must "be tried by the court without jury."

Friendly) that the jurisdictional scheme in the foreign-sovereign context is *sui generis*: "The courts must learn to accept that, in place of the familiar dichotomy of federal question and diversity jurisdiction, the [FSIA] has created a tripartite division[—]federal question cases, diversity cases and actions against foreign states." *Id.* at 881 (quotation marks omitted).

The Second Circuit in *Mobil Cerro Negro* also rejected the argument that a statute outside the FSIA could supply subject-matter jurisdiction over a foreign state. 863 F.3d at 124–25. In that case, the asserted basis for jurisdiction was 22 U.S.C. § 1650a. Explaining that the Supreme Court has "often" described the FSIA's sweep as "comprehensive," the Second Circuit held that § 1650a—which "does not 'distinguish' among classes of private defendants"—"should not be read as providing an independent basis for courts to exercise subject matter jurisdiction over foreign sovereigns, or, at the very least, should no longer be read [after the FSIA] as providing such a basis, even if it once did." 863 F.3d at 113–15. Although *Mobil Cerro Negro* and *Williams* were not criminal cases—until now, there has been *no such thing* as a criminal action against a foreign state—those courts' reasoning tracks the Sixth Circuit's in *Keller*.

The D.C. Circuit has now disagreed with those courts by holding that American courts can exercise criminal jurisdiction over foreign sovereigns under statutes outside the FSIA—including § 3231. And the D.C. Circuit is not alone on that side of the ledger: The Tenth Circuit took a similar tack in *Southway v. Central Bank of Nigeria*, 198 F.3d 1210 (10th Cir. 1999), a civil RICO case. Although the Tenth Circuit did not hold that § 3231 can supply jurisdiction over a foreign state in criminal proceedings, the court reasoned that § 1604's immunity grant does not apply to criminal proceedings and that Congress would have explicitly repealed criminal statutes of general jurisdiction if it had intended foreign sovereigns to enjoy immunity. *Id.* at 1214; *see also id.* at 1216 ("We are unwilling to presume that

Congress intended the FSIA to govern district court jurisdiction in criminal matters."). As the D.C. Circuit did below, the Tenth Circuit started from the backwards assumption that jurisdiction over foreign states exists unless Congress says otherwise. In fact, the opposite is true. *Amerada Hess*, 488 U.S. at 437–38; *see also Mobil Cerro* Negro, 863 F.3d at 113–15 (even if statute of general jurisdiction once "provid[ed] an independent basis for courts to exercise subject matter jurisdiction over foreign sovereigns, [it] should no longer be read" that way after the FSIA).

D. The D.C. Circuit's decision puts the United States on the wrong side of international law and will wreak havoc on American foreign policy.

This Court will very likely grant certiorari because the case involves delicate issues of foreign relations and international comity that the D.C. Circuit's decision (if left to stand) would throw into disarray. *See* Supreme Ct. R. 10(c) (related reason for certiorari is if the "United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court."). Time and again, the Court has explained that foreign sovereign immunity is a sensitive issue that affects both American foreign policy and the immunity that the United States and its agencies receive abroad. *See, e.g., Verlinden*, 461 U.S. at 493–94 (Congress enacted the FSIA in light of the "sensitive issues concerning the foreign relations of the United States"); *see also The Schooner Exchange*, 11 U.S. at 135 (questions of foreign sovereign immunity are "very delicate and important inquir[ies]").

The D.C. Circuit's judgment implicates those issues many times over. To begin, the judgment conflicts with international law, which Congress codified for the most part in enacting the FSIA. *See Bolivarian Republic*, 137 S. Ct. at 1319 ("The [FSIA] for the most part embodies basic principles of international law long followed both in the United States and elsewhere."); H.R. Rep. 94-1487, at 14 (FSIA "incorporates

standards recognized under international law"). Absolute immunity from criminal process is the rule in international law. Most countries have adopted a restrictive approach to sovereign immunity in the civil context but withheld criminal jurisdiction over foreign states. *See, e.g.*, Foreign States Immunities Act 87 of 1981 § 2 (South Africa) ("The provisions of this Act shall not be construed as subjecting any foreign state to the criminal jurisdiction of the courts of the Republic."); State Immunity Act, R.S.C. 1985, c. S-18 (Canada) (no criminal jurisdiction over foreign states); The State Immunity Ordinance (Ordinance No. 6/ 1981) (Pakistan) (same); State Immunity Act, ch. 313 (1979) (Singapore) (same); State Immunity Act 1978, c. 33, § 16, sch. 5 (U.K.) (same). In codifying international law on that score, Congress no doubt recognized that American courts' exercising criminal jurisdiction over foreign states would "infringe[] international law's requirements of equality and non-intervention." Fox & Webb, *The Law of State Immunity* at 91–92.

There is more. The D.C. Circuit's judgment upsets notions of international comity—which rest at least in part on reciprocity. *See Nat'l City Bank*, 348 U.S. at 362 (sovereign immunity derives "from standards of public morality, fair dealing, reciprocal self-interest, and respect for the 'power and dignity' of the foreign sovereign"). Although immunity from criminal process remains the background rule in international law, efforts to change that (at least in part) are afoot.

Take, for instance, the International Criminal Court's Rome Statute, which represents some countries' efforts to restrict foreign sovereign immunity in certain criminal proceedings. *See* Rome Statute of the International Criminal Court, art. 5, July 17, 1998, 2187 U.N.T.S. 90. We don't have to speculate about how the United States would react if the International Criminal Court or a foreign state tried to enmesh the United States in a foreign criminal process. The United States has rejected the International Criminal Court. *See, e.g.*, Matthew Lee, *Bolton: International Criminal Court 'already dead to us,'* AP NEWS (Sept. 11, 2018),

available at https://apnews.com/4831767ed5db484ead574a402a 5e7a85 (last visited Dec. 22, 2018) (U.S. National Security Adviser John Bolton: "The International Criminal Court unacceptably threatens American sovereignty and U.S. national security interests."). It has argued that one foreign sovereign may not exercise criminal jurisdiction over another. Yet the Special Counsel (and now the D.C. Circuit) has delivered the opposite message to [redacted] and to the world community.

The D.C. Circuit's decision will pave the way for foreign states' enmeshing American agencies in the criminal process abroad and will expose the United States to other types of retaliation by foreign states—including both allies and foes. [redacted] If the D.C. Circuit's judgment is left to stand, no one should be surprised when foreign states try to embroil the Department of Defense, the Department of State, or the National Security Administration in domestic criminal proceedings. Congress designed the FSIA in part to avoid that outcome.

II. ABSENT A STAY, [redacted] WILL SUFFER SUBSTANTIAL IRREPARABLE HARM.

[redacted] will suffer irreparable harm if this Court does not stay all lower-court proceedings, including the district court's contempt order. Both the D.C. Circuit and the District Court acknowledged that [redacted] is a foreign state under the FSIA. It is entitled to absolute immunity from criminal process in American courts, but it has already suffered the indignity of that immunity being denied three times—twice by the district court and once by the D.C. Circuit—and being ordered to comply with a subpoena that would require [redacted] to violate its own laws. Making matters worse, every day that [redacted] must operate under the specter of a contempt sanction deals another blow to [redacted] that cannot be undone. [redacted] should

not have to endure another day with a contempt sanction hanging over its head—much less the possibility of the fine accruing—while it tries to vindicate [redacted] national sovereignty. Nor should [redacted] suffer the added irreparable burden of litigating whether the district court can enforce that fine (which would be the first proceeding that would take place if this Court denied a stay).

Those affronts to sovereignty cannot be undone. As courts around the country have explained, any "burden[] of litigation" inflicts irreparable harm on a foreign sovereign if it turns out that the sovereign is immune from jurisdiction or enforcement. *See, e.g.*, *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 443 (D.C. Cir. 1990) (internal quotation marks omitted) ("sovereign immunity is an immunity from trial and the attendant burdens of litigation, and not just a defense to liability on the merits"); *In re Papandreou*, 139 F.3d at 251 ("The infliction of [the burdens of litigation on a foreign sovereign] may compromise it just as clearly as would an ultimate determination of liability."); *United States v. Moats*, 961 F.2d 1198, 1203 (5th Cir. 1992) ("the risk of harm from having to defend the lawsuit" is an "irreparable loss"); *see also Kiowa Indian Tribe of Okla. v. Hoover*, 150 F.3d 1163, 1172 (10th Cir. 1990) ("The Tribe's full enjoyment of its sovereign immunity is irrevocably lost once the Tribe is compelled to endure the burdens of litigation.").

What was true in those cases is truer here. A $50,000 contempt fine against a foreign state is not a mere burden of litigation. It is an insult to the foreign state's independence and dignity.

That is not the only irreparable harm. By immediately issuing its mandate, the D.C. Circuit has tried to cut off [redacted] appellate rights (lest it potentially incur millions of dollars in fines while its lawyers prepare a certiorari petition and while that petition is pending). It should not be that way. A foreign sovereign should not be put to the choice of forgoing attempts to vindicate its sovereign dignity or potentially accruing millions of dollars in fines while it seeks review in this Court.

This Court should not countenance the untenable choice that the D.C. Circuit manufactured by issuing its mandate on the same day as its judgment.

* * *

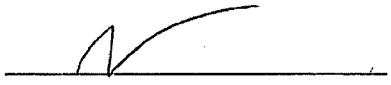
The United States would never stand for the treatment that [redacted] has suffered in this litigation. If the tables were turned, the United States would no doubt argue—with all the force of history and international comity—that it would suffer irreparable harm from the mere threat of a contempt fine, not to mention that fine accruing and the United States' litigating the fine's enforcement. It is time for an American court to vindicate [redacted] and immunity from American criminal jurisdiction. Without a stay, the harm to [redacted] cannot be undone.

CONCLUSION

This case presents a novel and important question that is ripe for this Court's review. The case has already gathered media attention of historic proportions—including speculation that the case might be headed to this Court. Given those circumstances, there is more than a "reasonable probability" that this Court will accept certiorari and more than a "fair prospect" that it will reverse. This Court should stay the proceedings below during the pendency of [redacted] petition for writ of certiorari. And if the Court grants certiorari, it should stay the proceedings below pending its decision on the merits.

FILED UNDER SEAL

Respectfully submitted on December 22, 2018.



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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This document complies with the form and content requirements of Supreme Court Rule 23 because the application identifies the judgment sought to be reviewed and has appended a copy of the orders and opinions below. The D.C. Circuit's December 18 judgment is at Exhibit 1 and its mandate (of the same day) is at Exhibit 2. The District Court's September 19 order and opinion are at Exhibits 7 and 8. That court's October 5 order is at Exhibit 10. The D.C. Circuit's December 21 order denying [redacted] motion to recall the mandate and stay its re-issuance is at Exhibit 14.

2. This document complies with the form and content requirements of Supreme Court Rule 22 because the original and nine copies of the Application have been filed with the Clerk.

3. This document complies with the form and content requirements of Supreme Court Rule 33.2 because it has been presented double-spaced on 8.5- by 11-inch paper and, excluding the parts of the document exempted by Supreme Court Rule 33.1(d), contains 28 pages.

Respectfully submitted on December 22, 2018.

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CERTIFICATE OF SERVICE

I certify that today I served this **Emergency Application for an Immediate Stay of Proceedings** by hand delivery in accordance with Supreme Court Rule 29.3 on the following:

Robert S. Mueller III, Special Counsel
Zainab Ahmad, Senior Assistant Special Counsel
U.S. Department of Justice
Special Counsel
950 Pennsylvania Ave NW
Room B-103
Washington, D.C.

I also certify that I will serve this **Emergency Application for an Immediate Stay of Proceedings** by hand delivery on the following, in accordance with Supreme Court Rule 29.4(a), as soon as Mr. Francisco's office is open to receive the delivery:

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Respectfully submitted on December 22, 2018.

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