No. 18-948

IN THE SUPREME COURT OF THE UNITED STATES

In re Grand Jury Subpoena

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

COUNTRY A'S REPLY BRIEF SUPPORTING ITS PETITION FOR A WRIT OF CERTIORARI

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If you could wager on what the Government will argue in a brief opposing certiorari, the sure bet is that the Government will contend that there is no circuit split or that the case is a poor vehicle for resolving the questions presented (or both). *See*, *e.g.*, Br. in Opp. 17, *Mont v. United States*, No. 17-8995 (Sept. 17, 2018) ("this case is not a suitable vehicle for consideration of the question presented"); Br. in Opp. 12, *Rehaif v. United States*, No. 17-9560 (Oct. 24, 2018) (same). Sometimes, those arguments ring true. Other times, they feel like the output of a macro on a special anti-certiorari computer in the Government's office.

This time, the Government went with the macro version. It argues that this case is a poor vehicle for resolving the central question of subject-matter jurisdiction—suggesting that the lower courts somehow avoided answering that question. That is not true. *See, e.g.*, U. App. 2a–3a (D.C. Circuit: "[S]ubject-matter jurisdiction lies under 18 U.S.C. § 3231"). It is also beside the point: The Constitution obligates federal courts to test subject-matter jurisdiction regardless of whether the parties do. *See Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). There can never be a vehicle problem with a question of subject-matter jurisdiction.

So in this case, as always, subject-matter jurisdiction remains at the fore, and the FSIA confirms that 28 U.S.C. § 1330(a) is the exclusive basis for subject-matter jurisdiction in a case against a

foreign state. This Court and eight other circuits have agreed. *See, e.g.*, *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 437 n.5, 438 (1989); Pet. 18–19. The D.C. Circuit broke from those precedents to hold that American courts can exercise subject-matter jurisdiction over a foreign state under 18 U.S.C. § 3231, a statute of general criminal jurisdiction outside the FSIA that does not mention foreign states.

This Court should grant certiorari to retire the D.C. Circuit's revisionist take on the FSIA and on this Court's precedents. In doing so, this Court will vindicate the FSIA's text, stop the damage to Country A's sovereign dignity, and reduce the risk that American agencies and instrumentalities will face reciprocal treatment abroad—a risk that the Government strangely ignores.

In past cases, this Court has answered questions under the FSIA about discovery (*see Republic of Argentina v. NML Capital, Ltd.*, 573 U.S. 134 (2014)), attachment and execution (*see Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816 (2018)), and other important issues. But all those issues pale in comparison to the question of whether American courts can entertain criminal proceedings against a foreign state. The D.C. Circuit's answer to that question—unsupported by the FSIA's text—could throw international law into disarray. It is time for this Court to weigh in. *See, e.g.*, Jimmy Hoover, *Mystery Mueller Case Could Shape Foreign Immunity Law*, Law360 (Jan. 9, 2019) ("[T]here's a surprising lack of case law about [the] FSIA in the criminal

context, so a Supreme Court ruling on the subject could be significant.") (internal quotation marks omitted).

I. SECTION 1330(A) IS THE ONLY STATUTE THAT SUPPLIES SUBJECT-MATTER JURISDICTION OVER FOREIGN STATES.

The FSIA confirms that foreign states are immune from American criminal jurisdiction and that § 1330(a) is the sole basis for subject-matter jurisdiction in an action against a foreign state. On the immunity side, Congress chose the broadest language possible: "[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 to 1607 of this chapter." 28 U.S.C. § 1604. That immunity covers criminal proceedings: Congress granted foreign states immunity from the "jurisdiction" of American courts—civil and criminal. If Congress had wanted to limit § 1604's immunity provision to civil matters, it would have said so.

But Congress did not stop there. It paired § 1604 with 28 U.S.C. § 1330(a), limiting subject-matter jurisdiction to certain "nonjury civil action[s] against a foreign state . . . ." 28 U.S.C. § 1330(a). Section 1330(a) is the only statute in the U.S. Code that grants subject-matter jurisdiction in cases involving foreign states. It is also the only jurisdiction-granting statute that incorporates the FSIA's immunity exceptions—proof that subject-matter jurisdiction in a case against a foreign state must lie under § 1330(a) or not at all.

It was that statutory structure that led this Court in *Amerada Hess* to explain that "jurisdiction in actions against foreign states is comprehensively treated by [] section 1330." 488 U.S. at 437 n.5 (quoting H.R. Rep. No. 94-1487, at 14 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6613). Since then, this Court and the lower courts have repeated that holding many times. *See, e.g.*, *id.* at 437 (noting "the comprehensiveness of the statutory scheme"); *Samantar v. Yousuf*, 560 U.S. 305, 323 (2010) (the FSIA is a "comprehensive solution for suits against [foreign] states"); *see also Goar v. Compania Peruana de Vapores*, 688 F.2d 417, 421 (5th Cir. 1982) ("§ 1330(a) is the sole source of federal jurisdiction"). There is no reasonable way to read phrases like "comprehensively treated" to mean "comprehensively treated except in criminal proceedings"—which is how the Government tries to marginalize *Amerada Hess* and Country A's other cases. Opp. 14–16.

The Government obfuscates when it contends that Country A's "primary arguments" rest on this Court's decisions and not on the FSIA's text. Opp. 14. From the outset, Country A has focused its arguments on the FSIA's jurisdictional and immunity provisions. It has also—as litigants in American courts do—supplemented its text-based arguments by relying on this Court's and other courts' precedents interpreting the FSIA's text.

The Government also hypothesizes that in the criminal context, a federal court can pair one of the FSIA's exceptions to jurisdictional immunity with any jurisdictional statute outside the FSIA—including 18

U.S.C. § 3231. Opp. 12. But as this Court explained in *Amerada Hess*, §§ 1330(a) and 1604 "work in tandem" (488 U.S. at 434), not in isolation. Section 1604 grants the foreign state immunity when no exception applies, and § 1330(a) confers jurisdiction on the federal court when an exception applies. *Janvey v. Libyan Inv. Auth.*, 840 F.3d 248, 257 (5th Cir. 2016).

The Government also argues that Country A's petition is a "poor vehicle" because the lower courts assumed without deciding that § 1604's immunity grant applies to criminal proceedings. Opp. 24. There is no vehicle problem: Both lower courts found (read: created) subject-matter jurisdiction under § 3231, and subject-matter jurisdiction is the lead argument in Country A's petition. *See* Pet. i–ii (Questions Presented 1, 2, and 3).

II. THE GOVERNMENT'S ARGUMENTS ARE COUNTERINTUITIVE.

Taking a step back, the Government's arguments make little sense. By the Government's logic, American courts have civil jurisdiction over foreign states only if Congress explicitly said so (in the FSIA) but have criminal jurisdiction over foreign states unless Congress explicitly said that they do not. Opp. 13. The Government never tries to explain why Congress needed to enact a jurisdiction-granting statute for civil cases but did not need to do the same for criminal cases. Nor does it explain why Congress, in the face of longstanding international law recognizing absolute immunity in the criminal context, would calibrate civil jurisdiction over foreign states to remarkable levels of granularity (*see, e.g.*, 28

U.S.C. § 1608) but would leave criminal jurisdiction over foreign states wide open.

The Government's arguments also stand against this Court's reasoning in *Amerada Hess* that "[i]n 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*" general grants of subject-matter jurisdiction to confirm that they do not apply to foreign states. 488 U.S. at 437.

III. HISTORY SUPPORTS COUNTRY A'S JURISDICTIONAL ARGUMENTS.

History supports Country A's arguments that § 1330(a) is the only basis for subject-matter jurisdiction against a foreign state. The Government does not cite a single pre-FSIA case in which a federal court exercised jurisdiction over a foreign state under 18 U.S.C. § 3231, and it cites only one post-FSIA case in which a district court made that mistake. *See In re Grand Jury Proceeding Related to M/V Deltuva*, 752 F. Supp. 2d 173 (D.P.R. 2010). The Government also ignores that three courts have held that foreign state-owned corporations are not subject to American criminal jurisdiction. *See Keller v. Cent. Bank of Nigeria*, 277 F.3d 811, 820 (6th Cir. 2002); *Dale v. Colagiovanni*, 337 F. Supp. 2d 825, 842–43 (S.D. Miss. 2004), *aff'd in part, rev'd in part on other grounds by* 443 F.3d 425 (5th Cir. 2006); *Gould, Inc. v. Mitsui Mining & Smelting Co.*, 750 F. Supp. 838, 843–44 (N.D. Ohio 1990). The absence of cases in which courts exercised criminal jurisdiction over a foreign state refutes the Government's theory that federal courts

have always enjoyed plenary criminal jurisdiction over foreign state-owned corporations. Opp. 17–19.

For similar reasons, the Government's handful of examples in which American prosecutors tried to enmesh foreign state-owned companies in criminal matters (Opp. 18–19) supports Country A's position, not the Government's. In the most recent case, a Chinese company's attorneys made a special appearance to contest only service, and the Ninth Circuit did not address immunity or jurisdictional questions. *In re Pangang Grp. Co.*, 901 F.3d 1046, 1049 (9th Cir. 2018). In the next-most-recent case, the district court's unpublished opinion does not suggest that the Chinese corporate defendant was majority-owned by the Chinese government or that the company raised sovereign immunity as a defense. *See United States v. Ho*, No. 16-cr-46, 2016 WL 5875005, at *6 (E.D. Tenn. Oct. 7, 2016).

The Government's older cases are worse. The district court's unpublished opinion in *United States v. Jasin*, No. 91-cr-00602, 1993 WL 259436, at *1 (E.D. Pa. July 7, 1993) does not say whether the corporate defendant was majority-owned by a foreign state, and there is no indication that the corporation ever raised sovereign immunity as a defense. The same was true of *In re Sealed Case*, 825 F.2d 494, 495 (D.C. Cir. 1987), which *reversed* an order holding a foreign-owned bank in contempt. And as the Government recognizes, neither *In re Grand Jury Investigation of Shipping Industry*, 186 F. Supp. 298 (D.D.C. 1960) nor *In re Investigation of World Arrangements*, 13 F.R.D. 280 (D.D.C. 1952) held that courts have subject-

matter jurisdiction in criminal actions against foreign sovereigns. Opp. 19 n.13. In fact, the *World Arrangements* court said the opposite.

IV. FOR JURISDICTIONAL PURPOSES, CONGRESS CHOSE TO TREAT FOREIGN STATES AND THEIR AGENCIES AND INSTRUMENTALITIES AS ONE AND THE SAME.

The Government also skates over the fact that, for purposes of subject-matter jurisdiction and jurisdictional immunity, Congress chose to treat foreign states and their agencies and instrumentalities as one and the same. Under 28 U.S.C. § 1603, a "foreign state" includes the foreign state itself *and* a majority-owned "agency or instrumentality." 28 U.S.C. § 1603(a), (b). That has led the Federal Judicial Center to explain that foreign agencies and instrumentalities enjoy absolute immunity from American criminal proceedings. *See* Federal Judicial Center, *The Foreign Sovereign Immunities Act: A Guide for Judges, International Litigation Guide* at 1 n.2 (2013); *see also* Pet. 9 n.3. The Government never grapples with Congress's policy choice on that score—even as the Government acknowledges that the rule in America and abroad is that foreign states are absolutely immune from criminal proceedings. *See* Opp. 17.

The Government also argues that the foreign statutes that Country A cited in its petition "state that they do not apply to criminal cases." Opp. 17. Not so. Those statutes confirm that the country's *exceptions to*

immunity do not apply in criminal proceedings. Pet. 9–10.

Like the D.C. Circuit, the Government relies on Dickinson's article for the notion that international law does not extend immunity from criminal jurisdiction to state-owned corporations. Opp. 17. Country A has already explained in its Supplemental Brief (at 10) that the article says nothing of the sort. The Government's continued reliance on the article is also strange given that Congress chose to define "foreign state" to include agencies and instrumentalities. Even if Congress extended *greater* immunity to agencies and instrumentalities than exists under international law, that was Congress's prerogative. *See 62 Cases of Jam v. United States*, 340 U.S. 593, 596 (1951).

V. THE CIRCUIT SPLIT ON THE JURISDICTIONAL QUESTION IS REAL.

The Government also tries to ward off certiorari review by arguing that there is no circuit split on the jurisdictional question. It mischaracterizes the Sixth Circuit's opinion in *Keller* as suggesting "that a criminal prosecution could proceed if authorized by an 'international agreement.'" Opp. 21. On the contrary, the *Keller* court explained that "[t]he jurisdictional grant of the FSIA [§ 1330(a)] is silent on the subject of criminal actions" and quoted with approval a district court's reasoning that "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." 277 F.3d at 818–20 (quoting *Gould*, 750 F. Supp. at 843–

44). That is, of course, the opposite of what the D.C. Circuit held. Supp. App 6a–7a. The circuit split is real.[1]

And it extends beyond the Sixth and D.C. Circuits. Eight circuits have held that § 1330(a) "is the exclusive source of subject matter jurisdiction in suits involving foreign states." *Shapiro v. Republic of Bolivia*, 930 F.2d 1013, 1017 (2d Cir. 1991); *see also* Pet. 18–19. The Government tries to downplay that conflict by arguing that those cases were all civil matters (*see* Opp. 22), but that is unsurprising because American courts have never possessed criminal jurisdiction over foreign states. At the very least, this Court should weigh in to clarify whether *Amerada Hess* and scores of other cases implicitly included a civil-case limitation in their holdings that the FSIA's jurisdictional scheme is exclusive.

VI. THE GOVERNMENT ACKNOWLEDGES THAT THE CIRCUITS ARE SPLIT ON WHETHER A COURT MAY IMPOSE OR ENFORCE CONTEMPT SANCTIONS AGAINST A FOREIGN STATE.

The Government concedes that "a narrow circuit conflict exists about imposition of contempt sanctions" (Opp. 28), but it tries to discount that conflict by arguing that the three cases creating the conflict

[1] The Government is wrong that a single prosecutor's decision to charge a Chinese corporate defendant in *United States v. Ho*, No. 16-cr-46 (E.D. Tenn. Oct. 7, 2016) should somehow inform this Court's reading of the Sixth Circuit's *Keller* decision. Opp. 23. As this litigation proves, federal prosecutors sometimes overreach.

(including *Af-Cap, Inc. v. Republic of Congo*, 462 F.3d 417 (5th Cir. 2006)) arose in the civil context. Opp. 28. That argument leads straight back to the central question of whether American courts have criminal jurisdiction over foreign states and reinforces that this Court should answer the jurisdictional question now.

The Government also argues that the three circuit-split cases all involved a foreign state as opposed to a state-owned agency or instrumentality (Opp. 28–29), but when it comes to contempt sanctions, that distinction is irrelevant. None of the FSIA's property-immunity exceptions authorizes the District Court's sanctions order—and certainly not the exception requiring "*a claim* for which [the foreign state] is not immune by virtue of" § 1605's commercial-activity exception. 28 U.S.C. § 1610(b)(2) (emphasis added). "Claim" means civil claim for relief. The Government's request that the District Court order Country A to comply with the subpoena does not constitute a claim for relief. *Cf.* Opp. 26–27. Nor does its request for sanctions. Courts around the country have held as much in analogous contexts. *See, e.g.*, *Nogess v. Poydras Ctr., L.L.C.*, 728 F. App'x 303, 305 (5th Cir. 2018) (*per curiam*) (motion for sanctions is not a "claim[] for relief in this suit"); *Mulay Plastics, Inc. v. Grand T. W. R. Co.*, 742 F.2d 369, 371 (7th Cir. 1984) (same).

The Government's third argument is that the circuit-split cases are distinguishable because the Government was not the party asking for sanctions in those cases. Opp. 29. The Government forgets that, through the FSIA, Congress eliminated the

Executive's role in sovereign-immunity determinations. The Government does not get to decide when the FSIA applies.

VII. THE GOVERNMENT IGNORES COUNTRY A'S RECIPROCITY ARGUMENTS.

In its petition, Country A explained that if left undisturbed, the D.C. Circuit's ruling will create a foreign-policy nightmare, guaranteeing reciprocal treatment for U.S. agencies and instrumentalities abroad. Pet. 34–38. The Government does not respond to those arguments.

CONCLUSION

This Court should grant certiorari and, having done that, should reverse the judgment below.

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