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No. 18A669

IN THE SUPREME COURT OF THE UNITED STATES

IN RE GRAND JURY SUBPOENA

[redacted]REPLY BRIEF IN SUPPORT OF ITS 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 SUPREME COURT AND CIRCUIT JUSTICE FOR THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INTRODUCTION

If history is any guide, then [redacted] must be correct that 18 U.S.C. § 3231 does not supply (and has never supplied) American courts with criminal jurisdiction over foreign states. The Solicitor General has not cited a single *pre*-FSIA case in which a court exercised criminal jurisdiction over a foreign state under § 3231. And outside of the D.C. Circuit's judgment below, he has identified only one *post*-FSIA case in which a district court mistakenly did so. Against the D.C. Circuit's judgment and that single district-court decision stand this Court's precedents and decisions from eight other circuits confirming that 28 U.S.C. § 1330(a) is the exclusive basis for subject-matter jurisdiction in an action against a foreign state.

In his opposition brief, the Solicitor General rewrites history, the FSIA's text, and this Court's precedents. He argues (1) that, despite what Congress said in the FSIA's immunity provision (28 U.S.C. § 1604), Congress did not mean to immunize foreign states from American criminal jurisdiction, (2) that Congress did not mean to define "foreign state" to include "agencies and instrumentalities" (at least not for criminal proceedings) (*see id.* § 1603(a), (b)), and (3) that this Court did not mean "comprehensive" when it described the FSIA's "statutory scheme" as "comprehensive" in case after case. *See, e.g.*, *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 437 n.5, 438 (1989). The FSIA's text and this Court's precedents refute each of those arguments, as do the decisions from eight other circuits. That includes the Sixth Circuit's decision in *Keller v. Central Bank of Nigeria*, 277 F.3d 811, 820 (6th Cir. 2002), in which the court held in no uncertain terms that the FSIA precludes criminal jurisdiction over foreign states.[1]

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[1] [redacted] arguments are and always have been grounded in the FSIA's text and this Court's precedents interpreting the FSIA's text. The Solicitor General's contention that [redacted] arguments derive only from certain statements in this

At the very least, [redacted] has shown a "reasonable likelihood" that this Court will grant certiorari and a "fair prospect" that this Court will reverse the D.C. Circuit's judgment. The judgment threatens to upend Congress's comprehensive statutory scheme and all but guarantees that foreign courts will subject American agencies and instrumentalities to criminal proceedings abroad.

* * *

Although this Court's rules give [redacted] 90 days to file a certiorari petition (*see* Supreme Ct. R. 13(1)), [redacted]ntends to file its petition by January 4, 2019. That also weighs in favor of this Court's extending the stay.

I. UNDER THE FSIA, FOREIGN STATES ARE IMMUNE FROM AMERICAN CRIMINAL JURISDICTION, AND 28 U.S.C. § 1330(A) IS THE ONLY STATUTE THAT COULD SUPPLY SUBJECT-MATTER JURISDICTION OVER A FOREIGN STATE.

Contrary to the Solicitor General's arguments (Opp. 12–15), the FSIA confirms that foreign states are absolutely immune from American criminal jurisdiction and that federal courts cannot look outside of § 1330(a) to find subject-matter jurisdiction in an action against a foreign state. Congress could not have chosen broader language in § 1604 (the FSIA's immunity provision): 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 sections 1605 to 1607 of this chapter." 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). That jurisdictional immunity covers criminal proceedings: Congress granted foreign states immunity from the "jurisdiction" of American courts—civil and criminal.

Court's opinions (Opp. 14) is wrong. The contention is also odd given that this Court's precedents interpreting the FSIA are binding on litigants and courts in the United States.

But Congress did not stop there. Through 28 U.S.C. § 1330(a)—entitled "Actions against foreign states"—Congress limited subject-matter jurisdiction in actions against foreign states to certain nonjury civil matters: "The district courts shall have original jurisdiction without regard to amount in controversy of any *nonjury civil action against a foreign state* as defined in section 1603(a) of this title *as to any claim for relief in personam* with respect 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) (emphasis added). In *Amerada Hess*, this Court explained 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); *see also* H.R. Rep. No. 94-1487, at 12–13 ("Section 1330 provides a comprehensive jurisdictional scheme in cases involving foreign states."); *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 489 (1983) (same). Indeed, there is no statute in the U.S. Code other than § 1330(a) that expressly confers subject-matter jurisdiction in actions against foreign states.

The Solicitor General argues that the lower courts' decision to assume that § 1604's immunity grant applies to criminal proceedings militates against this Court's granting certiorari review. Opp. 31. That is wrong for two reasons. First, the lower courts did not just assume that they had subject-matter jurisdiction under 18 U.S.C. § 3231; they affirmatively held that they had jurisdiction under that non-FSIA statute. The D.C. Circuit concluded that "subject-matter jurisdiction lies under 18 U.S.C. § 3231." Ex. 1 at 2. In reaching that conclusion, the court of appeals flouted the FSIA's text, ignored this Court's precedents, and broke from eight other circuits. Second, in any event, foreign sovereign immunity is jurisdictional in nature—§ 1604 is entitled "[i]mmunity of a foreign state from jurisdiction"—so a court cannot assume immunity. It must decide it.

The Solicitor General also ignores the FSIA's text by arguing that, in criminal matters, courts can find subject-matter jurisdiction in any number of statutes of general jurisdiction outside of the FSIA. Congress calibrated subject-matter jurisdiction in the FSIA to track the longstanding rule barring criminal jurisdiction over foreign states. *See, e.g.*, *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) and others*, Case No. (2006) UKHL 26, para. 31 (United Kingdom) ("A state is not criminally responsible in international or English law, and therefore cannot be directly impleaded in criminal proceedings."); Hazel Fox & Philippa Webb, *The Law of State Immunity* 314 (3d ed. 2013) ("an independent State [] enjoys absolute immunity in respect of criminal proceedings.").

The FSIA's text confirms that § 1330(a) is the exclusive source of federal subject-matter jurisdiction in any action against a foreign state, but if the text left any doubt on that score, the statute's legislative history erases it. *See* H.R. Rep. No. 94-1487, at 14 ("jurisdiction in actions against foreign states is comprehensively treated by [] section 1330"); *see also id.* at 12–13 ("Section 1330 provides a comprehensive jurisdictional scheme in cases involving foreign states."). Applying the FSIA's text and looking to the statute's legislative history, this Court has held many times that § 1330(a) is the sole basis for subject-matter jurisdiction in an action against a foreign state. *See, e.g.*, *Amerada Hess*, 488 U.S. at 437 ("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 . . . ."); *id.* at 438 (statutes 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" could never grant subject-matter jurisdiction in cases involving foreign states); *Samantar v. Yousuf*, 560 U.S. 305, 323 (2010) (describing the FSIA as a "comprehensive solution for suits against [foreign]

states"). Lower courts have held the same. *See, e.g.*, *Goar v. Compania Peruana de Vapores*, 688 F.2d 417, 421 (5th Cir. 1982) ("Every appellate court that has considered whether § 1330(a) is the sole source of federal jurisdiction in suits against corporations owned by foreign states has concluded that it is.") (collecting cases). There is no reasonable way to read phrases like "comprehensively treated" to mean "comprehensively treated except in criminal proceedings." At the very least, the Solicitor General is wrong that this Court could not disagree with the D.C. Circuit's less-than-plain reading of the FSIA's text and this Court's precedents.

The Solicitor General also makes a related error: He hypothesizes that in the criminal context, courts can pair an FSIA exception with any jurisdictional statute outside of the FSIA (including 18 U.S.C. § 3231). That argument betrays a misunderstanding of the FSIA and this Court's precedents. 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. *Id.* Indeed, § 1330(a) is the only jurisdiction-granting provision in the U.S. Code that incorporates the FSIA's immunity exceptions. *See also Janvey v. Libyan Inv. Auth.*, 840 F.3d 248, 257 (5th Cir. 2016) ("The FSIA provides 'the sole basis for obtaining jurisdiction over a foreign state in [federal and state] courts.' It furnishes both the immunity itself, which applies to any 'foreign state,' and the only exceptions to that immunity. If an exception applies, the FSIA also specifies the only basis for personal and subject matter jurisdiction over the foreign state.") (citation omitted). The D.C. Circuit was wrong to couple the FSIA's commercial-activity exception with a statute outside the FSIA that says nothing about that exception.

II. AMERICAN COURTS HAVE ALWAYS LACKED CRIMINAL JURISDICTION OVER FOREIGN STATES, WHICH EXPLAINS WHY [redacted] HAS NOT CITED CASES QUASHING GRAND JURY SUBPOENAS TO FOREIGN STATES AND WHY THE SOLICITOR GENERAL HAS CITED ONLY ONE CASE IN WHICH ONE DISTRICT COURT MISTAKENLY EXERCISED JURISDICTION UNDER 18 U.S.C. § 3231.

The Solicitor General suggests that the dearth of cases quashing grand jury subpoenas to foreign sovereigns supports his position. Opp. 2. Quite the opposite: It supports [redacted] position. As [redacted] explained in its stay application, American courts have never possessed subject-matter jurisdiction in criminal proceedings against foreign sovereigns. *See* Appl. 11–12, 17–18 (citing, *e.g.*, *People v. Weiner*, 378 N.Y.S.2d 966, 974 (N.Y. Crim. Ct. 1976) (foreign sovereigns enjoy "unlimited," "absolute" immunity from criminal proceedings)). It should come as no surprise, then, that the Solicitor General musters no more than a handful of examples in American history in which prosecutors *tried* to enmesh a foreign state in criminal proceedings. Few courts have ever had occasion to quash a criminal subpoena or dismiss an indictment on sovereign-immunity grounds because there is no such thing as a domestic criminal proceeding against a foreign state.[2]

It should also come as no surprise that the Solicitor General has cited no pre-FSIA case in which a federal court exercised subject-matter jurisdiction over a foreign sovereign under 18 U.S.C. § 3231. Or that he has cited only one post-FSIA case in

[2] One of the Solicitor General's cited cases—*In re Investigation of World Arrangements*, 13 F.R.D. 280 (D.D.C. 1952)—quashed a grand jury subpoena to a foreign state on sovereign-immunity grounds. In addition, at least three courts have held in the civil RICO context that foreign states are immune from indictment. *See Keller*, 277 F.3d at 820; *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, 844 (N.D. Ohio 1990).

which a single district court made that mistake.[3] *See In re Grand Jury Proceeding Related to M/V Deltuva*, 752 F. Supp. 2d 173 (D.P.R. 2010). The absence of cases in which courts exercised criminal jurisdiction over a foreign state refutes the Solicitor General's theory that federal courts have always enjoyed plenary criminal jurisdiction over foreign states and their agencies and instrumentalities.

For similar reasons, the Solicitor General's handful of examples in which American prosecutors *tried* to enmesh foreign-owned companies in criminal matters (Opp. 24–25) supports [redacted] view. Setting aside the district court's decision in *Deltuva*, the Solicitor General's collection of cases (if you can call it that) contains only two opinions from the past 25 years. In the first case—in which a Chinese company's attorneys made a special appearance to contest only service—the Ninth Circuit did not address any immunity or jurisdictional questions. *In re Pangang Group Co.*, 901 F.3d 1046, 1049 (9th Cir. 2018). If the company qualifies as a foreign state under the FSIA, it may very well raise those arguments at the first opportunity. And in the second 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 district court certainly never addressed that issue. Those cases hardly support the Solicitor General's position that the lower courts properly exercised jurisdiction under § 3231.

The Solicitor General's older cases are no better. 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 sovereign, and there is no indication that the corporation ever

[3] In that case, the district court started from the same backwards assumption that the lower courts embraced here—that criminal jurisdiction over foreign states exists unless Congress expressly says otherwise. *Cf. Deltuva*, 752 F. Supp. 2d at 177 & n.2.

raised sovereign immunity as a defense. The same was true of the D.C. Circuit's opinion in *In re Sealed Case*, 825 F.2d 494, 495 (D.C. Cir. 1987), which reversed an order holding a foreign-owned bank in contempt (without discussing sovereign immunity or jurisdiction). And as [redacted] argued in its stay application, the district court in *In re Grand Jury Investigation of Shipping Industry*, 186 F. Supp. 298, 318–20 (D.D.C. 1960) deferred judgment on whether the state-owned corporation was entitled to immunity, and the district court in *World Arrangements*, 13 F.R.D. at 288–91 quashed a subpoena to a foreign instrumentality on sovereign-immunity grounds. Appl. 17–18 & n.9.

To accept the Solicitor General's view, this Court would have to conclude that despite American courts' always having subject-matter jurisdiction in criminal proceedings against foreign states, generations of state and federal prosecutors over America's history have chosen not to serve criminal process on foreign states and that American courts at every level chose never to exercise criminal jurisdiction over foreign states. In any case, whatever was true before the FSIA, Congress made clear through the FSIA that subject-matter jurisdiction in actions against foreign states is limited to certain nonjury civil matters. 28 U.S.C. § 1330(a).

III. CONSISTENT WITH INTERNATIONAL LAW, CONGRESS EXTENDED IMMUNITY TO FOREIGN SOVEREIGNS' AGENCIES AND INSTRUMENTALITIES.

The Solicitor General also ignores that, for purposes of 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 sovereign itself *and* an "agency or instrumentality" so long as that entity is majority-owned by the sovereign. 28 U.S.C. § 1603(a), (b). If an entity is a foreign state under § 1603, then it is entitled to sovereign immunity under § 1604. *See id.* § 1604. That has led the Federal Judicial Center to conclude 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) (reference to "civil actions" in *Verlinden* "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") (emphasis added). There is no reconciling the Solicitor General's argument with § 1603.

At bottom, the Solicitor General's argument reflects a policy disagreement with Congress. The same disagreement led the D.C. Circuit to reject [redacted] arguments: "[A] contrary reading of the [FSIA]," the D.C. Circuit reasoned, "would completely insulate corporations majority-owned by foreign governments from all criminal liability." Ex. 1 at 2. But that is precisely what Congress intended—and neither the D.C. Circuit nor the Solicitor General has the prerogative to override that decision. *See 62 Cases of Jam v. United States*, 340 U.S. 593, 596 (1951) ("Congress expresses its purpose by words. It is for us to ascertain—neither to add nor to subtract, neither to delete nor to distort."); *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"). That is especially so given that Congress's jurisdictional choices reflect the prevailing view in the United States and around the globe.[4] Congress understood that any jurisdictional scheme allowing American courts to exercise criminal jurisdiction over foreign states would expose

[4] The Solicitor General argues that several foreign statutes cited by [redacted] "state that they do not apply to criminal cases." Opp. 23. The Solicitor General misreads those statutes. In context, certain of the statutes are making the point that the *exceptions to immunity* do not apply in criminal proceedings. With others, the statute says unequivocally that foreign states enjoy absolute immunity from criminal proceedings. *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.").

American agencies and instrumentalities to criminal proceedings abroad. [redacted]

Taking a step back, the Solicitor General's position is counterintuitive. By his 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. Why would Congress, in the face of longstanding international law recognizing absolute immunity in the criminal context, calibrate civil jurisdiction over foreign states so carefully but leave criminal jurisdiction over foreign states wide open? Criminal jurisdiction stokes diplomatic concerns in ways that civil jurisdiction does not. *See* Fox & Webb, *The Law of State Immunity* at 91–92. And why would Congress leave foreign states exposed to American criminal jurisdiction while the United States extends absolute immunity from American criminal jurisdiction to designated foreign diplomats? *See, e.g.*, 22 U.S.C. § 254d; Vienna Convention on Diplomatic Relations, Apr. 18, 1961, entered into force in the United States Dec. 13, 1972, 23 U.S.T. 3227, art. 31 ("A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State.").

"In light of the comprehensiveness of the statutory scheme in the FSIA," this Court doubted in *Amerada Hess* "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. With its decision below, the D.C. Circuit broke from other circuits to turn *Amerada Hess* on its head: According to the court of appeals, the most meticulous draftsman *would have* amended *pro tanto* statutes of general criminal jurisdiction to confirm that they do not apply to foreign states.

IV. THE COURTS OF APPEALS ARE SPLIT ON WHETHER AMERICAN COURTS CAN EXERCISE CRIMINAL JURISDICTION OVER FOREIGN STATES AND WHETHER COURTS CAN IMPOSE AND ENFORCE MONETARY SANCTIONS AGAINST FOREIGN STATES.

The Solicitor General also argues that this case does not present a circuit split because the Sixth Circuit's opinion in *Keller*, 277 F.3d 811 involved a civil RICO case, not a criminal matter. Opp. 26. But that court's holding—that the FSIA does not allow criminal jurisdiction against a foreign sovereign—squarely conflicts with the D.C. Circuit's holding. The Sixth Circuit in *Keller* held that "the FSIA grants immunity to foreign sovereigns from criminal prosecution, absent an international agreement stating otherwise" and that "the FSIA does not provide an exception for criminal jurisdiction." 277 F.3d at 820. The D.C. Circuit, on the other hand, held that the FSIA "leaves intact Congress's grant of subject-matter jurisdiction over criminal offenses" and that criminal jurisdiction can be applied through the FSIA's exceptions. Ex. 1 at 2. Those are opposite holdings.[5] It is ironic that the Solicitor General tries to confine *Keller* to the civil RICO context when he argues (at Opp. 20) that the Tenth Circuit's civil RICO decision in *Southway v. Central Bank of Nigeria*, 198 F.3d 1210 (10th Cir. 1999) supports his view that the FSIA does not apply to criminal proceedings.

Keller aside, the D.C. Circuit's judgment and the Tenth Circuit's decision in *Southway* also conflict with the holdings of eight other circuits—the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Ninth—that 28 U.S.C. § 1330(a) "is the exclusive source of subject-matter jurisdiction in suits involving foreign states."

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[5] The Solicitor General also suggests that "*Keller* contemplated that jurisdiction could exist in a criminal case" if an international agreement abrogated a foreign state's immunity. Opp. 27–28. But *Keller* never said that. In explaining that "the FSIA grants immunity to foreign sovereigns from criminal prosecution, absent an international agreement stating otherwise" (277 F.3d at 820), the Sixth Circuit was speaking only to the immunity side of the equation. Even if an international agreement removed a foreign state's immunity from jurisdiction, there still must be *jurisdiction*. *Keller* never suggested that § 3231 could supply subject-matter jurisdiction in actions against a foreign state.

Shapiro v. Republic of Bolivia, 930 F.2d 1013, 1017 (2d Cir. 1991); *see also Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela*, 863 F.3d 96, 113–15 (2d Cir. 2017) ("*Amerada Hess* in its holding as well as its language confirms our decision that [a non-FSIA statute] does not constitute an independent grant of subject matter jurisdiction over a foreign sovereign."); *Rex v. Cia. Pervana de Vapores, S.A.*, 660 F.2d 61, 65 (3d Cir. 1981) ("We conclude, therefore, that Congress intended all actions against foreign states to be tried without a jury, and to be brought under 28 U.S.C. § 1330(a)."); *Williams v. Shipping Corp. of India*, 653 F.2d 875, 881 (4th Cir. 1981) ("sections 1330 and 1441(d) are jurisdictionally exclusive"); *Janvey*, 840 F.3d at 257 ("The FSIA provides 'the sole basis for obtaining jurisdiction over a foreign state in [federal and state] courts.'") (citation omitted); *Wolf v. Fed. Republic of Germany*, 95 F.3d 536, 541 (7th Cir. 1996) (same); *Cmty. Fin. Grp., Inc. v. Republic of Kenya*, 663 F.3d 977, 980 (8th Cir. 2011) (same); *McKeel v. Islamic Republic of Iran*, 722 F.2d 582, 585 (9th Cir. 1983) (same). The circuit split is real, and it is time for this Court to weigh in.

And that is not the only circuit split presented. The courts of appeals are also split on whether an American court can impose and enforce contempt sanctions against a foreign state—issues that [redacted] has argued at every step in this case (*cf.* Appl. 3 & n.2) and that it will feature in its certiorari petition later this week.

The D.C. Circuit followed its earlier holding in *FG Hemisphere Associates, LLC v. Democratic Republic of Congo* that "contempt sanctions against a foreign sovereign are available under the FSIA" (637 F.3d 373, 379 (D.C. Cir. 2011))—even as the court of appeals expressed doubt about whether American courts can enforce sanctions against a foreign state. In *FG Hemisphere*, the D.C. Circuit acknowledged that it was following the Seventh Circuit's decision in *Autotech Technologies LP v. Integral Research & Development Corp.*, 499 F.3d 737, 744 (7th Cir. 2007) and rejecting the Fifth Circuit's contrary ruling in *Af-Cap, Inc. v. Republic of Congo*, 462 F.3d 417, 428

(5th Cir. 2006). The conflict is real and, like the other questions presented, has ramifications for America's relationships with other countries. A contempt order "offends diplomatic niceties even if it is ultimately set aside on appeal." *In re Papandreou*, 139 F.3d 247, 251 (D.C. Cir. 1998).[6]

In the mine-run case, those conflicts would warrant certiorari review. In a case going to the heart of foreign sovereign immunity under the FSIA, the conflicts are intolerable. Congress passed the FSIA in part to ensure "a uniform body of law" in immunity matters." *Verlinden*, 461 U.S. at 489 (quoting H.R. Rep. No. 94-1487, at 32).

V. THE D.C. CIRCUIT'S JUDGMENT WILL UPSET AMERICAN FOREIGN RELATIONS AND WILL PRODUCE A BOOMERANG EFFECT ON THE UNITED STATES.

The D.C. Circuit's ruling would create a foreign-policy nightmare and would guarantee that foreign courts will embroil United States agencies and instrumentalities in domestic criminal proceedings. The Solicitor General's only response is that those consequences may not materialize because, a handful of times in the past 50 years, American prosecutors have tried to prosecute or subpoena foreign-owned companies. Opp. 34; *see also* Opp. 24–25. Again, that American prosecutors have up to this point *attempted* to enmesh foreign states in our criminal system only a handful of times supports [redacted] position, not the Solicitor General's. And several of the cases that the Solicitor General cites came out in the foreign sovereign's favor (*see, e.g.*, *World Arrangements*, 13 F.R.D. at 288–91; *In re Sealed Case*, 825 F.2d at 495), so they did not upset longstanding American and international law in the way that the D.C. Circuit's ruling does.

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[6] As [redacted] forthcoming petition will explain, the United States Government has argued [redacted] position (as *amicus curiae*) in no fewer than four recent appeals.

Other than citing those cases, the Solicitor General has no response to [redacted] argument that if the D.C. Circuit's judgment is left to stand, one can expect foreign states to drag American agencies into criminal proceedings in their courts. The Solicitor General does not contest that many countries have effectively reduced sovereign immunity to reciprocity. *See, e.g.*, *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 841 (D.C. Cir. 1984) ("some foreign states base their sovereign immunity decisions on reciprocity"). The D.C. Circuit's judgment will draw attention on the world stage, particularly because (in a bit of severe irony) the United States is leading the charge in resisting certain countries' efforts to undo the longstanding rule immunizing foreign states from other countries' criminal jurisdiction. *See* Appl. 25–26; *see also* 22 U.S.C. § 7423(b) ("[N]o United States Court, and no agency or entity of any State or local government, including any court, may cooperate with the International Criminal Court in response to a request for cooperation submitted by the International Criminal Court pursuant to the Rome Statute.").

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

In response to [redacted] argument that operating under the specter of a contempt sanction deals a daily (and irreparable) blow to [redacted] sovereignty, the Solicitor General points to the general rule that "the mere payment of money is not considered irreparable." Opp. 32 (quotation omitted). But that misses the point: Each day that an American court imposes a monetary sanction on a foreign state is an irreparable blow to that state's sovereign dignity. That is precisely the point of [redacted] cited cases holding that any burden of litigation (which would include contempt sanctions) inflicts irreparable harm on a foreign sovereign if it turns out that the sovereign is immune. *See* Appl. 27.

The Solicitor General also argues that the blow to [redacted] national sovereignty is softened because [redacted] "is a corporation that is owned by a foreign

state, not the foreign state itself." Opp. 33–34. That ignores that through the FSIA, Congress has chosen to treat foreign instrumentalities as foreign states. *See, e.g.*, 28 U.S.C. § 1603(a), (b). Nor is it true that the secrecy of a grand jury proceeding diminishes the affronts to [redacted] national sovereignty. Opp. 34. The harms to [redacted] sovereign dignity accrue regardless of whether the public knows about them.

VII. TIMING CONSTRAINTS ON THE SPECIAL COUNSEL'S INVESTIGATION DO NOT TRUMP [redacted] NATIONAL SOVEREIGNTY OR SOVEREIGN IMMUNITY.

The Court should also reject the Solicitor General's argument that this case's six-month lifespan weighs against a stay. Opp. 35; *see also id.* 31–32. If the Special Counsel had followed the FSIA, he would never have served a criminal subpoena on [redacted] in the first place. [redacted] (a foreign state) should not be penalized for asking American courts to follow longstanding American law.

In any event, [redacted] has acted with all haste to vindicate its rights: It agreed to an expedited briefing schedule with the court of appeals, moved the D.C. Circuit to recall the mandate just two days after the mandate issued, applied for an emergency stay with this Court *one day* after the D.C. Circuit denied [redacted] motion to recall the mandate, and will file its petition for certiorari 73 days before the deadline. This Court should not credit the Solicitor General's timing concerns at the expense of [redacted] instrumentality's sovereign immunity.

CONCLUSION

This Court should stay the proceedings below while [redacted] petition for writ of certiorari is pending. And if the Court grants certiorari, it should stay the proceedings below pending its decision on the merits.

Respectfully submitted on January 2, 2019.

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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 22 because the original and nine copies of the Application have been filed with the Clerk.

2. 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 15 pages.

Respectfully submitted on January 2, 2019.

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CERTIFICATE OF SERVICE

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

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Respectfully submitted on January 2, 2019.

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