No. 18-

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

REDACTED PETITION FOR A WRIT OF CERTIORARI

Attorneys for Petitioner

QUESTIONS PRESENTED

Under the Foreign Sovereign Immunities Act of 1976 (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. In a separate FSIA provision entitled "Actions against foreign states," Congress limited federal subject-matter jurisdiction in actions against foreign states to the civil context: "The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state . . . 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).

Through the FSIA, Congress also codified that "the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter." 28 U.S.C. § 1609.

Through 18 U.S.C. § 3231—a non-FSIA statute of general criminal jurisdiction enacted in 1948—Congress vested federal district courts with "original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States."

The questions presented are

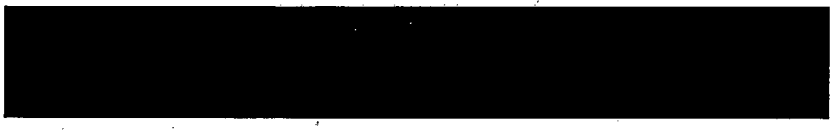
1. Does the FSIA grant foreign states sovereign immunity from American criminal jurisdiction?

2. Is 28 U.S.C. § 1330(a) the exclusive basis for subject-matter jurisdiction in a federal action against a foreign state, or can 18 U.S.C. § 3231 or another non-FSIA statute provide subject-matter jurisdiction in a federal action against a foreign state?

3. Do the FSIA's exceptions to jurisdictional immunity (28 U.S.C. §§ 1605–1607) apply only in cases for which 28 U.S.C. § 1330(a) supplies subject-matter jurisdiction?

4. Does the FSIA permit an American court to impose and enforce contempt sanctions (monetary or otherwise) against a foreign state?

CORPORATE DISCLOSURE STATEMENT



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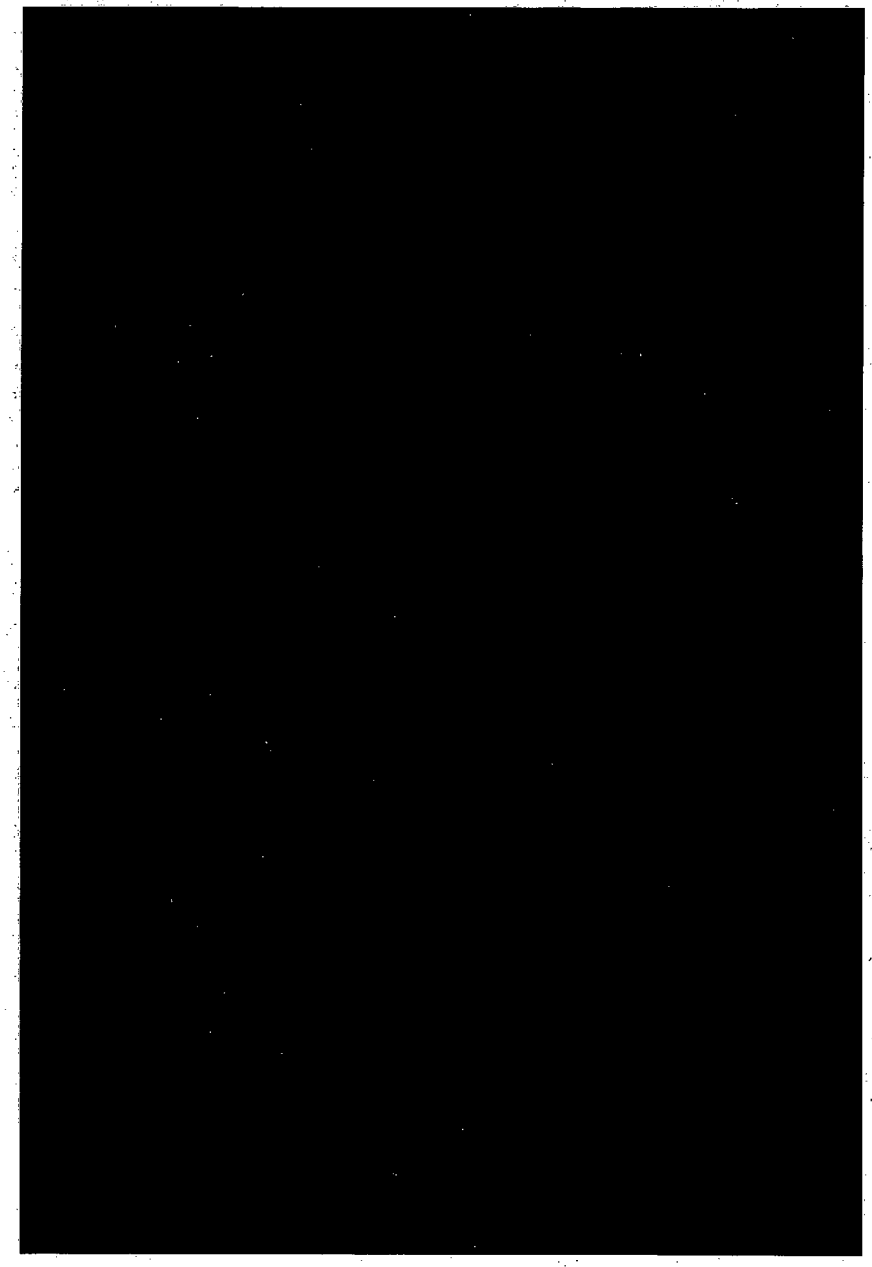

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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Country A petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the District of Columbia Circuit.[1]

OPINIONS BELOW

The court of appeals' judgment is reproduced at U. App. 1a.[2] The district court's contempt order is

[1] Because of the sealing order in place, we will refer to Petitioner—a wholly owned agency or instrumentality of a foreign state—as "Country A."

[2] We will refer to the Unsealed Petition Appendix as "U. App." and to the Sealed Petition Appendix as "S. App."

reproduced at S. App. 52a, its memorandum opinion at S. App. 16a.

JURISDICTION

The court of appeals issued its judgment and mandate on December 18, 2018. U. App. 1a, 7a. This Court has jurisdiction under 28 U.S.C. § 1254(1), but because Country A is immune from American criminal proceedings and because American courts have no subject-matter jurisdiction over criminal proceedings against Country A, the Court's jurisdiction is limited to "correcting the error of the lower court[s] in entertaining the suit." *United States v. Corrick*, 298 U.S. 435, 440 (1936); *see also Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986) (same) (citation omitted).

STATUTORY PROVISIONS INVOLVED

The FSIA (28 U.S.C. §§ 1330, 1332, 1391(f), 1441(d), 1602–1611) is reproduced at U. App. 13a–60a. The courts below purported to exercise subject-matter jurisdiction under 18 U.S.C. § 3231, which is reproduced at U. App. 9a.

INTRODUCTION

With its decision below, the D.C. Circuit became the first appellate court in American history to exercise criminal jurisdiction over a foreign state. Although two other circuits have previously suggested that the FSIA does not preclude an American court from exercising criminal jurisdiction over a foreign state, the ruling below represents the first time that an appellate court has taken that leap. In ruling as it

did, the D.C. Circuit broke from the FSIA's text, this Court's precedents, other circuits' holdings, and the longstanding rule in America and abroad that one sovereign may not exercise criminal jurisdiction over another. If left to stand, the ruling would wreak havoc on American foreign policy—possibly alienating U.S. allies, undermining diplomatic efforts, and inviting reciprocal treatment abroad for American agencies and instrumentalities. This Court should reverse the judgment below before those consequences materialize.

In past cases, this Court has shown sensitivity to those concerns. It has explained that "[a]ctions 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, e.g.*, *The Schooner Exchange v. McFaddon*, 11 U.S. 116, 135 (1812) (questions of foreign sovereign immunity are "very delicate and important inquir[ies]"). Those statements arose in the context of civil litigation, underscoring that even a civil suit against a foreign state—though perhaps authorized under the FSIA—can roil foreign relations. But the foreign-policy concerns that attend civil litigation against a foreign state pale in comparison to the foreign-policy nightmare that would ensue if American courts started enmeshing foreign states in domestic criminal proceedings.

The United States understands well the stakes: On the world stage, it has worked to preserve absolute immunity from criminal proceedings. And yet by subjecting Country A to American criminal

jurisdiction, the courts below have denied Country A the sovereign immunity that the United States enjoys abroad.

STATEMENT

1. In *Schooner Exchange*, this Court recognized that the "person of the sovereign" is exempt "from arrest or detention within a foreign territory." 11 U.S. at 137. "The Court's specific holding in *Schooner Exchange* was that a federal court lacked jurisdiction over a 'national armed vessel . . . of the emperor of France,' but the opinion was interpreted as extending virtually absolute immunity to foreign sovereigns . . . ." *Samantar v. Yousuf*, 560 U.S. 305, 311 (2010). For the next century and a half, "foreign states enjoyed absolute immunity from all actions in the United States." *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 821 (2018).

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.*, Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dept. of State, to Acting U.S. Attorney General Phillip B. Perlman (May 19, 1952) (Tate Letter), *reprinted in* 26 Dept. of State Bull. 984 (1952), and in *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 714 (1976) (Appendix 2 to Court's opinion). Those changes in the world economy prompted calls for changes to sovereign-immunity principles in civil matters—balancing a country's inherent sovereignty against the rights 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 in matters sounding in "contract and tort." Tate Letter at 985. But 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); *see also id.* at 94 ("The adoption of a restrictive doctrine has not been treated as having any relevance in relation to the Absolute Immunity of the foreign State from criminal proceedings.").

For good reason: Few things would offend sovereign dignity more than subjecting the sovereign to another country's criminal process, which is why the international community (including the United States) has long immunized foreign states and their leaders from domestic criminal jurisdiction. *See, 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); *United States v. Deutsches Kalisyndikat Gesellschaft*, 31 F.2d 199, 201 (S.D.N.Y. 1929) ("The 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); *Gaddafi case*, No. 1414 (Cass. crim. 2001) (France) (criminal proceedings against Colonel el-Gaddafi relating to bombing of French airliner dismissed on immunity grounds); *H.S.A. v. S.A. Cass 2e*, No. P.02 1139.F (Belgium) (Feb. 12, 2005), *translated in* 42 ILM 596 (2003) (criminal proceedings against Israeli Prime Minister Ariel Sharon alleging crimes against humanity dismissed on immunity grounds).

After the Tate Letter, the State Department bore primary responsibility for suggesting to American courts 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 one way or the other. *Id.*

Faced with that increasingly cumbersome regime, the Executive Branch "sought and supported the elimination of its role with respect to claims against foreign states and their agencies or instrumentalities." *Samantar*, 560 U.S. at 323 n.19. In 1976, Congress obliged and 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* Department of State Public Notice No. 507, 41 Fed. Reg. 50883, 50884 (Nov. 10, 1976) ("[I]t would be inconsistent with the

legislative intent of [the FSIA] for the Executive Branch to file any suggestion of immunity on or after January 19, 1977."). Since the FSIA's enactment, 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 443) and "must be applied by the District Courts in every action against a foreign sovereign." *Verlinden*, 461 U.S. at 493.

2. The FSIA codifies the longstanding rule from American and international law that domestic courts may not exercise criminal jurisdiction over a foreign state. *See Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1319 (2017) ("The [FSIA] for the most part embodies basic principles of international law long followed both in the United States and elsewhere."); H.R. Rep. No. 94-1487, at 14 (same).

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*, 137 S. Ct. at 1320. That jurisdictional immunity covers criminal proceedings: Congress granted foreign states immunity from the "jurisdiction" of American courts—civil and criminal.

But Congress did not stop there. Through 28 U.S.C. § 1330(a)—entitled "Actions against foreign states"—Congress also limited subject-matter jurisdiction in actions against foreign states to certain nonjury civil

claims: "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." *Amerada Hess*, 488 U.S. at 437 n.5 (quoting H.R. Rep. No. 94-1487, at 14); *see also* H.R. Rep. No. 94-1487, at 12–13 ("Section 1330 provides a comprehensive jurisdictional scheme in cases involving foreign states."); *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) . . . .").

As this Court has explained, "[s]ections 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." *Amerada Hess*, 488 U.S. at 434 (emphasis added). Even beyond *Amerada Hess*, this Court has consistently described the FSIA's jurisdictional scheme as "comprehensive." *See, e.g., Republic of Argentina v. NML Capital, Ltd.*, 573 U.S. 134, 141 (2014) ("We have used th[e] term [comprehensive] often and advisedly to describe the

Act's sweep."); *Samantar*, 560 U.S. at 323 (the FSIA is a "comprehensive solution for suits against [foreign] states"); *Republic of Austria v. Altmann*, 541 U.S. 677, 691 (2004) (the FSIA is a "comprehensive statute"); *Verlinden*, 461 U.S. at 488 (the FSIA is "a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities").[3] "After the enactment of the FSIA," the Court has held, "the Act—and not the pre-existing common law—indisputably governs the determination of whether a foreign state is entitled to sovereign immunity." *Samantar*, 560 U.S. at 313.

3. Congress's decision to withhold criminal jurisdiction over foreign states was not an oversight. 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)

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[3] As the Federal Judicial Center has explained, *Verlinden*'s "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." Federal Judicial Center, *The Foreign Sovereign Immunities Act: A Guide for Judges*, International Litigation Guide at 1 n.2 (2013).

(Pakistan) (same); State Immunity Act, ch. 313 (1979) (Singapore) (same); State Immunity Act 1978, c. 33, § 16, sch. 5 (U.K.) (same); *see also 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."). Indeed, the United Nations has promulgated a model convention that adopts the restrictive theory of immunity in the civil context but leaves intact absolute immunity from criminal proceedings. *See* G.A. Res. 59/38, U.N. Doc. A/RES/59/38 (Dec. 2, 2004); Fox & Webb, *The Law of State Immunity* at 314 ("The general understanding that [the U.N. convention] does not apply to criminal proceedings is in line with the received position of jurists and courts that [] an independent State [] enjoys absolute immunity in respect of criminal proceedings.").[4]

4. As the D.C. Circuit recognized below, Country A—a corporation wholly owned by a foreign state—

[redacted] S. App. 167a–168a. The Government did not cite any support for that supposed pre-FSIA distinction. Regardless, whatever was true before the FSIA was enacted, the FSIA defines "foreign state" to include a corporation majority-owned by a foreign state. 28 U.S.C. § 1603(a), (b).

"falls within the [FSIA's] definition of a 'foreign state.'" U. App. 2a (citing 28 U.S.C. § 1603).

Earlier this year, the U.S. Government served a grand jury subpoena on Country A. S. App. 8a. Country A understands that it is a witness in the investigation.

From the beginning, Country A explained that it is entitled under the FSIA to sovereign immunity from the subpoena and that American courts have no criminal jurisdiction over foreign states. S. App. 84a. The Government nevertheless demanded compliance with the subpoena. *Id.* at 85a.

Accordingly, Country A moved to quash the subpoena. S. App. 85a. In its motion, Country A argued (1) that as a foreign state, it is immune under the FSIA from complying with the grand jury subpoena and that American courts have no criminal jurisdiction over foreign states and (2) that the subpoena is unreasonable and oppressive under Federal Rule of Criminal Procedure 17(c) because it would require Country A to violate its own laws. *Id.* The Government conceded that Country A qualifies as a foreign state under the FSIA but argued that the FSIA does not apply in criminal proceedings and that, if it does, the FSIA's commercial-activity exception applies and overrides Country A's sovereign immunity. *Id.* The Government filed two *ex parte* briefs ostensibly supporting its argument about the commercial-activity exception. *Id.*

The district court denied Country A's motion to quash and ordered it to comply with the subpoena. S.

App. 85a. The court held that it had subject-matter jurisdiction over the matter, not under 28 U.S.C. § 1330(a) (the FSIA's sole jurisdiction-granting provision), but under 18 U.S.C. § 3231—a statute of general jurisdiction that gives federal district courts "original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States." S. App. 25a–26a. [redacted]

The district court went on to hold—using information that the Government provided in *ex parte* briefs—that the FSIA's commercial-activity exception applies. S. App. 29a–32a. [redacted]

The district court also rejected Country A's argument that the subpoena violates Rule 17(c)(2) because it would force Country A to violate its own laws. S. App. 32a–41a.

Country A appealed and moved the D.C. Circuit to stay the district court's order compelling it to comply with the subpoena. S. App. 87a. The Government moved to dismiss the appeal, arguing that Country A had to wait for a contempt order to appeal. *Id.* The D.C. Circuit granted the Government's motion, dismissed Country A's appeal, and denied Country A's stay motion as moot. *Id.* at 50a.

The next day, the Government asked the district court to hold Country A in contempt for failing to comply with the district court's order and to impose a sanction of $10,000 per day until Country A complied with the subpoena. S. App. 87a.[5] Country A opposed the motion, arguing that the district court lacked authority to impose a monetary sanction on a foreign state. *Id.* The district court again denied Country A sovereign immunity from the subpoena and held Country A in contempt. *Id.* The court sanctioned Country A $50,000 per day until it complies with the subpoena, but the court stayed its contempt order pending appeal. *Id.* at 87a–88a.

5. Country A appealed again, and on December 18, 2018, the D.C. Circuit panel affirmed in a three-page *per curiam* judgment (with an opinion to follow) just three days after an oral argument that included an *ex parte* session with the Government. U. App. 1a.

The panel "side[d] with the district court" and concluded that "subject-matter jurisdiction lies under 18 U.S.C. § 3231." U. App. 2a–3a. The panel conceded that this Court "has said—and the [D.C. Circuit] has repeated—that section 1330(a) is 'the sole basis for obtaining jurisdiction over a foreign state in our courts.'" *Id.* at 3a. (citing *Amerada Hess* and *Schermerhorn v. State of Israel*, 876 F.3d 351, 353

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[5] Meanwhile, Country A petitioned the D.C. Circuit for rehearing or rehearing *en banc* of its order dismissing Country A's original appeal, arguing that under this Court's and D.C. Circuit precedent, a foreign state does not have to suffer the indignity of a contempt order before appealing a denial of sovereign immunity. S. App. 87a. The D.C. Circuit denied the petition.

(D.C. Cir. 2017)). But the panel disregarded *Amerada Hess* and earlier circuit precedent because, by the panel's view, "the cases where the Court has referred to section 1330(a) as exclusive are all civil actions, and there is no indication that the Court intended to extend this reading to the criminal context." *Id.* at 3a. According to the panel, "[t]extually speaking, nothing in the [FSIA] purports to strip district courts of criminal jurisdiction; to the contrary, the Act's only provision related to subject-matter jurisdiction, 28 U.S.C. § 1330(a), *grants* subject-matter jurisdiction over certain 'nonjury civil action[s].'" *Id.*

The panel also reasoned that interpreting the FSIA to foreclose criminal jurisdiction over foreign states "would completely insulate corporations majority-owned by foreign governments from all criminal liability," which to the panel "seem[ed] in far greater tension with Congress's choice to codify a theory of foreign sovereign immunity designed to allow regulation of foreign nations acting as ordinary market participants." U. App. 3a (citing *Rubin*, 138 S. Ct. at 822). Accordingly, the panel held "that the [FSIA] leaves intact Congress's grant of subject-matter jurisdiction over criminal offenses." *Id.* at 4a.

The panel also held that "if section 1604's immunity applies, the commercial activity exception is likewise available in criminal proceedings." U. App. 4a. According to the panel, "the [FSIA] extends that exception to [any case] meeting its definition—a label noticeably broader than 'any civil action.'" *Id.* (quoting 28 U.S.C. § 1605(a)).

The panel also concluded "that the [FSIA] allows for the monetary judgment ordered by the district court." U. App. 5a (citing *FG Hemisphere Assocs., LLC v. Democratic Republic of Congo*, 637 F.3d 373, 376 (D.C. Cir. 2011)). But the panel punted on whether the district court can enforce its contempt sanction: "Whether and how that sanction can be executed on remand is a separate question for a later day." *Id.*[6]

In an unusual move no doubt spurred by concerns about the time constraints on the Government's investigation, the panel issued its judgment and mandate the same day. U. App. 1a, 7a. Country A moved the D.C. Circuit to recall and stay the mandate pending this Court's decision on Country A's petition for a writ of certiorari. S. App. 267a. The panel denied that motion on December 21, 2018. *Id.*

On December 22, Country A moved the Chief Justice to stay the proceedings below pending the Court's decision on Country A's certiorari petition. On December 23, the Chief Justice stayed the proceedings below pending further order from him or the Court. U. App. 8a.

This petition follows.

REASONS FOR GRANTING THE PETITION

In the last decade, this Court has granted certiorari in a number of cases raising questions under

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[6] The panel also rejected Country A's argument that complying with the subpoena would require it to violate its own laws. U. App. 5a–6a.

the FSIA in the civil context. *See, e.g.*, *Rubin*, 138 S. Ct. at 816; *Bolivarian Republic*, 137 S. Ct. at 1312; *Bank Markazi v. Peterson*, 136 S. Ct. 1310 (2016); *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390 (2015); *NML Capital*, 573 U.S. at 134; *Samantar*, 560 U.S. at 305. This case presents questions with far greater implications for American foreign policy and international diplomacy: It tests whether Congress (through the FSIA) broke ranks with the international community to allow criminal proceedings against foreign states in American courts.

On that question, the circuit courts are divided (even if in a lopsided fashion). Eight circuits (the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Ninth) have held that § 1330(a) is the exclusive basis for subject-matter jurisdiction in an action against a foreign state—with the Sixth Circuit holding that the FSIA forecloses criminal jurisdiction against a foreign state. Three courts of appeals (the Tenth, Eleventh, and now the D.C. Circuit) have held or suggested that an American court may exercise criminal jurisdiction over a foreign state—with the D.C. Circuit holding below that neither the FSIA nor this Court's precedents foreclose criminal jurisdiction over a foreign state.

The courts of appeals are also divided on whether the FSIA authorizes sanctions (monetary or otherwise) against a foreign state. The D.C. Circuit has said yes. The Fifth Circuit (backed by the Executive Branch) has said no.

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).[7] The existing conflicts undermine Congress's purpose on that score.

I. THE DECISION BELOW ENTRENCHES A CIRCUIT SPLIT ABOUT WHETHER THE FSIA GRANTS FOREIGN STATES IMMUNITY FROM AMERICAN CRIMINAL JURISDICTION.

This Court has explained (quoting the FSIA's legislative history) that "jurisdiction in actions against foreign states is comprehensively treated by [] section 1330." *Amerada Hess*, 488 U.S. at 437 n.5 (quoting H.R. Rep. No. 94-1487, at 14); *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) . . . ."). Indeed, the only jurisdiction-granting statute in the U.S. Code that incorporates the FSIA's immunity exceptions is § 1330(a)—proof that the exceptions apply only within § 1330(a)'s limits. That also confirms that the exceptions themselves—"[a]lmost all [of which] involve commerce or immovable property located in the United States"

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[7] The D.C. Circuit's judgment also undermines uniformity in another way: If § 1604's grant of immunity to foreign states does not reach criminal proceedings, then courts in all 50 states can exercise criminal jurisdiction over foreign sovereigns, ensuring a patchwork of conflicting approaches.

(*Bolivarian Republic*, 137 S. Ct. at 1320)—are civil in nature.

Consistent with the FSIA's text and this Court's precedents, the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Ninth 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 Ruggiero v. Compania Peruana de Vapores "Inca Capac Yupanqui"*, 639 F.2d 872, 878 (2d Cir. 1981) (Friendly, J.) ("The [House] reports thus confirm what is patent from the statutory language[:] Congress wished to provide a single vehicle for actions against foreign states or entities controlled by them, to wit, section 1330 and section 1441(d), its equivalent on removal, and to bar jury trial in each."); *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) ("[T]he plain reading of the statutory language, the legislative history and the overriding purpose of the [FSIA] requires the conclusion that sections 1330 and 1441(d) are jurisdictionally exclusive . . . ."); *Janvey v. Libyan Inv. Auth.*, 840 F.3d 248, 257 (5th Cir. 2016) (subject-matter jurisdiction under the FSIA

"extends to 'any nonjury civil action against a foreign state . . . as to any claim for relief in personam . . . .'"); *Keller v. Cent. Bank of Nigeria*, 277 F.3d 811, 820 (6th Cir. 2002) (same).[8]

In *Keller*, the Sixth Circuit held in no uncertain terms that the FSIA forecloses criminal jurisdiction over a foreign state. 277 F.3d at 820 ("The [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."), *abrogated on other grounds by Samantar v. Yousuf*, 560 U.S. 305 (2010); *see also Dale v. Colagiovanni*, 337 F. Supp. 2d 825, 842–43 (S.D. Miss. 2004) ("[FSIA] §§ 1605–1607 do not state any type of exception to sovereign immunity for criminal acts"), *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) (same).

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[8] *See also 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); *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).

Through its judgment below, the D.C. Circuit rejected the majority view to conclude that a federal court may exercise criminal jurisdiction over a foreign state under 18 U.S.C. § 3231—a non-FSIA statute of general criminal jurisdiction. Although the D.C. Circuit is to our knowledge the first circuit court to exercise jurisdiction over a foreign state under § 3231, two other circuits—the Tenth and the Eleventh—have concluded that the FSIA does not govern criminal proceedings against foreign states. *See Southway v. Cent. Bank of Nigeria*, 198 F.3d 1210, 1214 (10th Cir. 1999) ("We are unwilling to presume that Congress intended the FSIA to govern district court jurisdiction in criminal matters."); *United States v. Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997) (asserting that "the FSIA addresses neither head-of-state immunity, nor foreign sovereign immunity in the criminal context").

As a result, the circuit courts are split on a question of national—even international—importance. The need for clarity and uniformity on that question is a "compelling reason" justifying certiorari review. S. Ct. R. 10.

Along the same lines, the D.C. Circuit's alternative holding—that if the FSIA applies to criminal proceedings, so do the FSIA's immunity exceptions—conflicts with the Sixth Circuit's holding in *Keller* that the FSIA's immunity exceptions are civil in nature and do not allow for criminal proceedings against foreign states. 277 F.3d at 820.

a. In creating subject-matter jurisdiction over a foreign state under 18 U.S.C. § 3231, the D.C. Circuit flouted the FSIA's plain text and this Court's holdings that the FSIA is the sole basis for exercising jurisdiction in an action against a foreign state.

The courts below should have quashed the grand jury subpoena to Country A because enforcing a criminal subpoena is not a nonjury civil action against a foreign state involving a claim for relief. 28 U.S.C. § 1330(a).

A grand jury subpoena issues under Federal Rule of Criminal Procedure 17 and is a part of the American criminal process. "The grand jury has always occupied a high place as an instrument of justice in [America's] system of criminal law—so much so that it is enshrined in the Constitution." *United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 423 (1983); U.S. Const. amend. V. That is why every legal rule relating to the grand jury is in the criminal code or the criminal rulebook, not in their civil counterparts. *See, e.g.*, Fed. R. Crim. P. 6, 17; 18 U.S.C. §§ 3321–22. And by definition, grand jury proceedings are not "nonjury" actions.

Instead of stopping its search for subject-matter jurisdiction at § 1330(a), the D.C. Circuit looked outside the FSIA to find subject-matter jurisdiction under 18 U.S.C. § 3231. It could do so only by ignoring the FSIA's text and this Court's precedents. According to the court of appeals, a federal court can exercise criminal jurisdiction over a foreign state under 18

U.S.C. § 3231 because "nothing in the [FSIA] purports to strip district courts of criminal jurisdiction" and § 1330(a) "includes nothing at all about criminal jurisdiction." U. App. 3a.

The plaintiffs in *Amerada Hess* made the same mistake. They argued that nothing in the FSIA prevented federal courts from exercising subject-matter jurisdiction over Argentina under the Alien Tort Statute (28 U.S.C. § 1350) or the general admiralty statute (28 U.S.C. § 1333). 488 U.S. at 432. This Court rejected the notion that those or other non-FSIA statutes could supply jurisdiction in an action against 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. 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.

Driving home the point, the Court explained that Congress amended the diversity statute to delete a provision expressly creating jurisdiction over actions against foreign states but did not need to make similar changes to general jurisdictional statutes: "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." 488 U.S. at 437 n.5.

Amerada Hess lays bare the D.C. Circuit's error: The court of appeals purported to find jurisdiction in a statute (§ 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 circuit court 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.

The D.C. Circuit's mode of analysis also betrays a separate misunderstanding of the FSIA and this Court's precedents. The court of appeals uncoupled § 1604's immunity grant and corresponding immunity exceptions (28 U.S.C. §§ 1605–07) from § 1330(a)'s grant of subject-matter jurisdiction. But as this Court explained in *Amerada Hess*, those provisions "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.* No jurisdiction-granting statute other than § 1330(a) incorporates the FSIA's immunity exceptions.

If that were not enough, the FSIA's terrorism exception (§ 1605A) proves that Congress foreclosed criminal jurisdiction over foreign states. 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"—language that, consistent with § 1330(a), limits jurisdiction to civil proceedings. 28 U.S.C. § 1605A(a)(5).[9]

b. The D.C. Circuit substituted its policy preference for Congress's jurisdictional choices.

The court of appeals drove to its result in part because of concerns that the "contrary reading of the [FSIA] . . . would completely insulate corporations majority-owned by foreign governments from all criminal liability." U. App. 3a. But that is precisely what Congress intended. Absolute immunity from criminal jurisdiction was and is the rule in America and abroad. *See* Statement, *supra*, at 4–8; *see also* 28 U.S.C. § 1603(b) (defining "foreign state" to include "an agency or instrumentality of a foreign state"). It was not for the D.C. Circuit to second-guess Congress's policy choice. *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

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[9] Even that narrow exception to jurisdictional immunity in the civil context has proven troublesome in certain circumstances, prompting Congress to override the exception when broader diplomatic goals required it. *See, e.g., Republic of Iraq v. Beaty*, 556 U.S. 848, 856–57 (2009) (post-war statute authorized President to waive the FSIA's terrorism exception vis-à-vis Iraq).

view in the United States and around the globe. Congress understood that allowing American courts to exercise criminal jurisdiction over foreign states would expose American agencies and instrumentalities to criminal proceedings abroad.

In any case, the D.C. Circuit's parade of horribles finds no support in U.S. history. Since America's founding, foreign states have been immune from American criminal jurisdiction, and yet the United States is not overrun with criminal syndicates backed by foreign states. The D.C. Circuit also ignored that the Executive Branch and Congress have many non-judicial tools at their disposal to address foreign sovereigns that commit crimes in the United States. *See, e.g.*, *Heiser v. Islamic Republic of Iran*, 735 F.3d 934, 936 n.2 (D.C. Cir. 2013) (President has "broad powers to impose economic sanctions") (citation omitted); Congressional Research Service, *North Korea: Legislative Basis for U.S. Economic Sanctions* (2018) (listing possible sanctions).

The court of appeals' lapse into policymaking also surfaced in its conclusion that "there is no indication" that this Court intended its statements in civil cases about the FSIA's "comprehensive" regime "to extend . . . to the criminal context." U. App. 3a. That is wrong: There is every indication that Congress and this Court meant *comprehensively* when using the term "comprehensively." *See Amerada Hess*, 488 U.S. at 437 n.5 (quoting H.R. Rep. No. 94-1487, at 14); *see also* H.R. Rep. No. 94-1487, at 12–13 ("Section 1330 provides a comprehensive jurisdictional scheme in cases involving foreign states."). The court of appeals

disregarded Congress's and this Court's clear statements because of the court of appeals' policy preferences, not because the statements are unclear.

Taking a step back, the circuit court's conclusion is also counterintuitive. By its logic, federal courts have civil jurisdiction over foreign states only if Congress explicitly says so (in the FSIA), but they have criminal jurisdiction over foreign states unless Congress explicitly says that they do not. That, of course, is wrong: The lower federal courts do not have subject-matter jurisdiction unless Congress gives it to them. *Amerada Hess*, 488 U.S. at 433. In any case, 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, at 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 438. With its decision below, the D.C. Circuit broke from other circuits and turned *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.[10]

II. THE DECISION BELOW ALSO CEMENTS A CIRCUIT SPLIT ON WHETHER THE FSIA FORECLOSES SANCTIONS AGAINST A FOREIGN STATE.

The court of appeals also followed its earlier holding in *FG Hemisphere* that "contempt sanctions against a foreign sovereign are available under the FSIA" (637 F.3d at 379)—even as the court of appeals expressed doubt about whether American courts can enforce sanctions against a foreign state. U. App. 5a. 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 FSIA "describe[s] the available methods of attachment and execution against property

[10] The D.C. Circuit did not cite a single pre-FSIA case in which a federal court exercised jurisdiction under 18 U.S.C. § 3231 in an action against a foreign state.

of foreign states. Monetary sanctions are not included."). 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).

a. The FSIA codified the longstanding rule in domestic and international law that foreign sovereigns enjoy absolute immunity from contempt sanctions.

The D.C. Circuit was wrong to conclude—in *FG Hemisphere* and below—that an American *court* can impose contempt sanctions against a foreign state.[11] As the United States Government has explained in four recent appeals—including a Second Circuit case in which the Government argued (as *amicus curiae*) that the D.C. Circuit reached the wrong result in *FG Hemisphere*—nothing in the FSIA authorizes sanctions (monetary or otherwise) against a foreign state.

The FSIA "provides as a default that 'the property in the United States of a foreign state shall be immune from attachment arrest and execution.'" *Rubin*, 138 S. Ct. at 822 (quoting 28 U.S.C. § 1609). As with a foreign state's jurisdictional immunity, the FSIA codifies (at 28 U.S.C. §§ 1610 and 1611) certain limited exceptions to a foreign state's property's immunity from

[11] The district court lacked subject-matter jurisdiction over this dispute, so it necessarily lacked jurisdiction to hold Country A in contempt or to impose a sanction.

attachment and execution. But "there is no escaping the fact that [those exceptions] are more narrowly drawn" than the exceptions to jurisdictional immunity in §§ 1605–1607. *Autotech Techs.*, 499 F.3d at 749. The FSIA's exceptions "provide[] the sole, comprehensive scheme for enforcing judgments against foreign sovereigns." *Af-Cap*, 462 F.3d at 428.

None of the FSIA's exceptions authorizes contempt sanctions against a foreign state. The exceptions apply, for example, when a foreign sovereign has waived its immunity from attachment and execution (28 U.S.C. § 1610(b)(1)), when "the judgment relates to a *claim*" for which the sovereign is not immune under the commercial-activities exception (*id.* § 1610(b)(2)) (emphasis added), or when "the judgment relates to a *claim*" for which the sovereign is not immune under the terrorism exception (*id.* § 1610(b)(3)) (emphasis added). This case does not involve waiver or the terrorism exception. Nor does it involve "a claim for which the agency or instrumentality is not immune by virtue of [the commercial-activity exception]." *Id.* § 1610(b)(2). There is no "claim" in this case—and certainly no claim giving rise to the district court's sanctions order. *See* S. App. 101a; *see also Claim*, Black's Law Dictionary (10th ed. 2014) (a claim for relief is "[a] demand for money, property, or a legal remedy to which one asserts a right; especially, the part of a complaint in a civil action specifying what relief the plaintiff asks for"); U.S. Amicus Br. 7, *FG Hemisphere Assocs., LLC v. Democratic Republic of Congo*, No. 10-7046, 2010 WL 4569107, at *7 (D.C. Cir. Oct. 7, 2010) ("An order imposing monetary sanctions for contempt

of court does not involve a claim based upon commercial activity as required by § 1610(a)(2).''). Tracking the FSIA's plain language, the Fifth Circuit held in *Af-Cap* that the FSIA categorically prohibits monetary sanctions against a foreign state. 462 F.3d at 428.

The statutory language admits of no amibiguity, but if it did, the FSIA's legislative history confirms that contempt sanctions are not available against a foreign state. *See* H.R. Rep. No. 94-1487, at 22 ("[A] foreign diplomat or official could not be imprisoned for contempt because of his government's violation of an injunction. *Also a fine for violation of an injunction may be unenforceable if immunity exists under sections 1609–1610.*") (emphasis added). Eleven years later, the State Department's Deputy Legal Advisor explained—in testimony on proposed amendments to the FSIA—that the statute does not permit even the "*imposition* of a fine on a foreign state . . . for a state's failure to comply with a court order" and that, in any event, sanctions against foreign states are unenforceable. Hearing on H.R. 1149, H.R. 1689, and H.R. 1888, Before the Subcommittee on Administrative Law and Governmental Relations of the House Judiciary Committee, 100th Cong., 1st Sess., at 19 (1987) (emphasis added).

Which brings us full circle: When Congress enacted the FSIA, it codified the rule from international law granting foreign sovereigns absolute immunity from contempt sanctions. "[A]t the time the FSIA was passed, the international community viewed execution against a foreign state's property as a

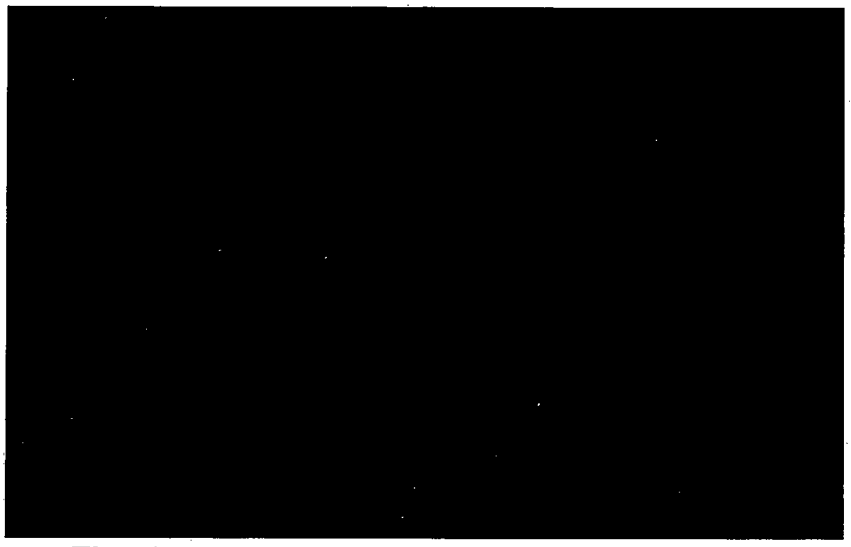
greater affront to its sovereignty than merely permitting jurisdiction over the merits of an action." *Conn. Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 255–56 (5th Cir. 2002); *Autotech Techs.*, 499 F.3d at 749 (before "the FSIA, the United States gave absolute immunity to foreign sovereigns from the execution of judgments"). To this day, absolute immunity from enforcement remains the rule in many countries. *See, e.g.*, Hazel Fox, *International Law and the Restraints on the Exercise of Jurisdiction by National Courts of States*, in M. Evans, ed., International Law 364, 366, 371 (2003) ("[I]mmunity from enforcement jurisdiction remains largely absolute."); *id.* at 371 (immunity rule extends to sanctions orders); European Convention on State Immunity, (E.T.S. No. 074), art. 18 (1972), http://conventions.coe.int/Treaty/en/Treaties/Html/074.htm (same); United Nations Convention on Jurisdictional Immunities of States and Their Properties, art. 24(1) (same).

To be sure, in crafting the limited exceptions to property immunity in §§ 1610 and 1611, Congress moved ever so slightly away from the absolute immunity that most other countries extend to foreign states and their agencies and instrumentalities. But that movement is measurable in inches, not feet. For all matters not covered by the FSIA's exceptions—including for contempt sanctions (monetary or non-monetary)—foreign states continue to enjoy absolute immunity from enforcement.

None of the FSIA's exceptions applies, so the district court should not have imposed contempt

sanctions against Country A. At the very least, the district court has no power to enforce its order.

b. The U.S. Government has argued consistently in other litigation that American courts have no authority to impose contempt sanctions on foreign states.



That has been the Executive Branch's position in at least four recent appeals. In each case, the Government has explained that the FSIA precludes American courts from enforcing sanctions awards against foreign states and that judicial restraint, the FSIA's legislative history, international law, and international comity all militate against courts' entering unenforceable sanctions orders in the first place.

Consider, for instance, the following passage from the U.S. Government's amicus brief in a recent Second Circuit appeal:

> Absent a specific waiver by the foreign state, an order of monetary contempt sanctions is unenforceable under the FSIA. Such orders are also inconsistent with international practice, can cause considerable friction with foreign governments, and open the door to reciprocal orders against the United States in foreign courts.

U.S. Amicus Br. 3, *SerVaas Inc. v. Mills*, No. 14-385, 2014 WL 4656925, at *3 (2d Cir. Sept. 9, 2014). The U.S. Government took the same position in *Af-Cap* (Fifth Circuit), *FG Hemisphere* (D.C. Circuit), and *Belize Telecom* (Eleventh Circuit). *See, e.g.*, U.S. Amicus Br. 3, *Af-Cap, Inc. v. Republic of Congo*, No. 05-51168 (5th Cir. Mar. 13, 2006); U.S. Amicus Br. 3, *FG Hemisphere*, 2010 WL 4569107, at *3; *see also* U.S. Amicus Br. 19, *Af-Cap*, No. 05-51168 (referring to Executive Branch's argument in *Belize Telecom Ltd. v. Government of Belize*, No. 05-12641 (11th Cir. Aug. 17, 2005)).

As the Government explained in all those cases, reciprocity concerns fueled Congress's policy choices on that score: "Where U.S. practice diverges from international practice, other governments may react by subjecting the United States to similar enforcement mechanisms when our Government litigates abroad." U.S. Amicus Br. 13, *Af-Cap*, No. 05-51168; *see also id.* at 2 ("the treatment of foreign states in U.S. courts has significant implications for the treatment of the

United States Government by the courts of other nations"). In *SerVaas*, the Government illustrated its point with a real-world example: When an American court in the District of Columbia levied $50,000-per-day monetary sanctions against Russia for not complying with a court order, Russia reciprocated by suing the United States and levying $50,000-per-day in sanctions against the American government. *See* U.S. Amicus Br. 26–27, *SerVaas*, 2014 WL 4656925, at *26–27.

Interpreting the FSIA to authorize monetary sanctions against a foreign state would also lead to a double standard. In its own courts, the United States enjoys absolute immunity from monetary sanctions unless Congress abrogates that immunity. *See* U.S. Amicus Br. 19–20, *Af-Cap*, No. 05-51168. American courts should not apply a different standard to foreign states. *Id.*

III. THE QUESTIONS PRESENTED ARE AMONG THE MOST IMPORTANT UNDER THE FSIA.

The questions presented in this petition go to the very nature of sovereign dignity and power. They rank among the most important that this Court could address in the sovereign-immunity context. Sovereign immunity derives "from standards of public morality, fair dealing, reciprocal self-interest, and respect for the 'power and dignity' of the foreign sovereign." *Nat'l City Bank of New York v. Republic of China*, 348 U.S. 356, 362 (1955). Among those standards, concerns about reciprocity—either the desire for it or fear of it—have played the largest role in shaping sovereign

immunity. *See, e.g.*, *Schooner Exchange*, 11 U.S. at 136–37 (sovereign immunity is grounded in "[a] common interest impelling [countries] to mutual intercourse"). In fact, 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"); *see also* Law of the People's Republic of China on Judicial Immunity from Compulsory Measures Concerning the Property of Foreign Central Banks (Oct. 25, 2005), art. 3 (with sovereign-immunity determinations, "the People's Republic of China shall apply the principle of reciprocity"); Federal Law on Jurisdictional Immunity of a Foreign State and a Foreign State's Property in the Russian Federation, art. 5 (Oct. 28, 2015) (same).[12]

Concerns about reciprocity lurk in the background of every decision under the FSIA—even as it is for Congress to calibrate American policy to address those concerns. But reciprocity concerns are front and center in this case. Through the FSIA, Congress codified the principle that one sovereign may not exercise criminal jurisdiction over another. With its decision below, the court of appeals erased that rule from the most prominent circuit in the United States—one that is

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[12] Headlines from the last month confirm that reciprocity remains the driving force in international law. *See, e.g.*, Chun Han Wong et al., *'No Coincidence': China's Detention of Canadian Seen as Retaliation for Huawei Arrest*, Wall Street Journal (Dec. 12, 2018), https://www.wsj.com/articles/no-coincidence-chinas-detention-of-canadian-seen-as-retaliation-for-huawei-arrest-11544619753?mod=searchresults&page=1&pos=1.

frequently the battleground for the most sensitive issues in the American legal system. In doing so, the court of appeals rejected holdings from this Court and from at least eight sister circuits (including the Sixth Circuit's decision in *Keller*). The resulting fissure in American immunity law will not go unnoticed on the world stage.

Ironically, it comes at a time when the United States is leading the resistance against certain countries' efforts to restrict immunity in the criminal context. 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), https://apnews.com/4831767ed5db484ead574a402a5e7a85 (U.S. National Security Advisor John Bolton: "The International Criminal Court unacceptably threatens American sovereignty and U.S. national security interests."); *see also* 22 U.S.C. § 7421(11) ("The United States will not recognize the jurisdiction of the International Criminal Court over United States nationals."); *id.* § 7423(b) ("[N]o United

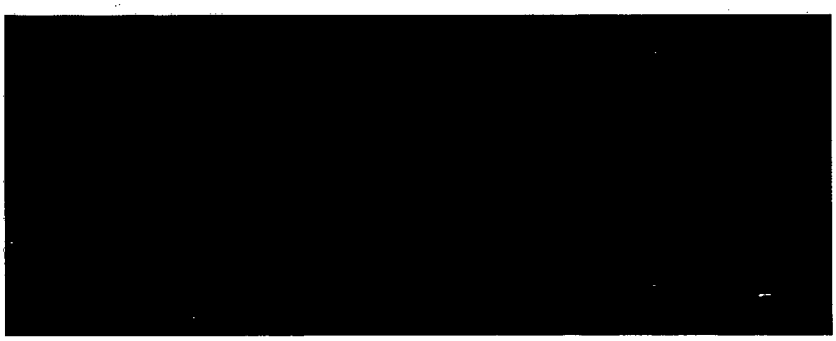
States Court, and no agency or entity of any State or local government, including any court, may cooperate with the International Criminal Court in response to a request for cooperation submitted by the International Criminal Court pursuant to the Rome Statute."). The United States has argued with the force of history that one foreign sovereign may not exercise criminal jurisdiction over another. But the courts below have now sent the opposite message to the world community.

This Court should reverse the D.C. Circuit's judgment before it upsets foreign relations in a way that an American judicial decision never should.

CONCLUSION

If left to stand, the judgment below could throw immunity principles into disarray around the world. This Court should grant certiorari and, having done that, should reverse the judgment below.

January 3, 2019



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