OCTOBER 23, 2018—FILED UNDER SEAL
ORAL ARGUMENT NOT YET SCHEDULED

No. 18-3071

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

IN RE GRAND JURY SUBPOENA NO. 7409
FILED UNDER SEAL

Appeal from the United States District Court
For the District of Columbia
Case No. 18-gj-0041
The Honorable Chief Judge Beryl A. Howell

BRIEF FOR APPELLANT [redacted]

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CORPORATE DISCLOSURE STATEMENT

[redacted]

[redacted]

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

In accordance with Circuit Rule 28(a)(1)(A), Movant-Appellant [redacted] certifies as follows:

1. Parties and amici.

The Appellant (Movant below) is [redacted] The Appellee (Respondent below) is Special Counsel Robert S. Mueller. There were no amicus filings in the district court, and no amicus party has sought leave to file a brief in this Court.

2. Rulings under review.

The rulings under review are Chief Judge Beryl A. Howell's September 19, 2018 (JA 295) and October 5, 2018 (JA 355–361) orders denying [redacted] sovereign immunity, denying [redacted] motion to quash Grand Jury Subpoena No. 7409, ordering [redacted] to comply with the subpoena by October 1, 2018, and holding [redacted] in contempt for failing to comply with the September 19 order. Those orders are entries 19 and 30 on the district court's docket. The district court issued a separate memorandum opinion with its September 19 order. JA 296–326 (entry 20).

3. Related cases.

On October 3, 2018, this Court dismissed [redacted] initial appeal of the district court's September 19 order for lack of appellate jurisdiction.

Case No. 18-3068, Dkt. 1753661 [redacted] petition for rehearing of that ruling remains pending. [redacted] is not aware of any other related cases.

Respectfully submitted October 23, 2018.

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GLOSSARY OF ABBREVIATIONS

FSIA: Foreign Sovereign Immunities Act

JA: Joint Appendix

INTRODUCTION

Until 1952, "the State Department generally held the position that foreign states enjoyed absolute immunity from all actions in the United States." *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 821 (2018). The United States wasn't alone in that approach: Until the mid-20th century, absolute immunity was the rule in international law.

As the global economy evolved in the 20th century, so too did the international community's approach to sovereign immunity—at least in the civil context. In 1952, the Tate Letter (written by the State Department's then-Acting Legal Adviser Jack Tate) memorialized a shift in the United States' approach to sovereign immunity in civil actions. With the Tate Letter, the United States adopted a more restrictive view of sovereign immunity in matters involving "contract and tort." 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). For good reason: Few things offend sovereign dignity more than subjecting a foreign sovereign to another country's criminal process.

It should come as no surprise, then, that when Congress enacted the Foreign Sovereign Immunities Act (FSIA) in 1976, it codified the longstanding rule from international law that U.S. courts may not exercise criminal jurisdiction over a foreign sovereign or otherwise subject a foreign sovereign to the American criminal process. Under the

FSIA, "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). "[J]urisdiction in actions against foreign states is comprehensively treated by [] section 1330." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 437 n.5 (1989) (quoting H.R. Rep. No. 94-1487, at 14 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6613).

In July, the Special Counsel served a grand jury subpoena—issued under Federal Rule of Criminal Procedure 17—on [redacted] wholly owns [redacted] so [redacted] qualifies as a "foreign state" under the FSIA—a fact that the Special Counsel does not dispute. JA 111; *see also id.* at 303. The subpoena would require [redacted] to disclose [redacted] moved to quash the subpoena on the grounds that it enjoys sovereign immunity from the subpoena and that, in any case, the subpoena is unreasonable and oppressive under Rule 17(c) because it would force [redacted] to violate [redacted].

The district court rejected both arguments. In doing so, the court invented a counter-textual rule that breaks with the FSIA, Supreme Court precedent, and longstanding international law: According to the district court, it could exercise jurisdiction over [redacted] under 18 U.S.C. § 3231—a general statute that supplies jurisdiction to federal district courts over "all offenses against the laws of the United States"—so long as "one of the FSIA's substantive exceptions to immunity apply." JA 306. It then concluded (based on *ex parte* filings) that the FSIA's commercial-activity exception applies. *Id.* at 311–12. In purporting to exercise jurisdiction over [redacted] under § 3231, the district court transgressed the Supreme Court's holding in *Amerada Hess* that "the FSIA provides the sole basis for obtaining jurisdiction over a foreign state." 488 U.S. at 443.

Indeed, the district court committed the very error that the *Amerada Hess* Court corrected: The district court manufactured jurisdiction over a foreign sovereign based on a statute that "by its terms does not distinguish among classes of defendants" and "has the same effect after the passage of the FSIA as before with respect to defendants other than foreign states." *Id.* at 438. Neither § 3231 nor any other U.S. statute empowers American courts to enmesh a foreign state in the American criminal process. American jurisdiction over foreign sovereigns is limited to certain nonjury civil actions against foreign states involving

a claim for relief. That does not include proceedings emanating from a grand jury, which is part of the American criminal process.

The district court also erred in rejecting [redacted] argument that the grand jury subpoena is unreasonable and oppressive under Rule 17(c) because it would force [redacted] to violate [redacted]. [redacted]

The district court was able to conclude otherwise only by Americanizing [redacted]

It ignored the Supreme Court's instruction to give "substantial" weight to a foreign sovereign's views of its own laws. *Animal Sci. Prods., Inc. v.*

Hebei Welcome Pharm. Co., 138 S. Ct. 1865, 1873 (2018). It gave [redacted] views "little weight" instead. JA 315.

The district court alternatively held that the Special Counsel's interest in the subpoenaed documents overrides [redacted] interest in complying with [redacted]. That first-of-its-kind ruling is irreconcilable with this Court's decision in *In re Sealed Case*, 825 F.2d 494, 495 (D.C. Cir. 1987), [redacted] The ruling also exacerbates the harm to [redacted] sovereign dignity—not to mention international comity more broadly.

A few days after the district court denied [redacted] motion to quash, [redacted] filed a notice of appeal with this Court, citing precedent allowing a sovereign to immediately appeal an order denying sovereign immunity. A panel of this Court dismissed that appeal on October 3. It held that [redacted] had to endure a contempt order before appealing.

That was manifest error. The rule in this Circuit and others is that a sovereign has a right to immediately appeal a denial of sovereign immunity—regardless of whether that denial comes in the context of a motion to dismiss, discovery order, or motion to quash. [redacted] should not have been forced to suffer the indignity of a contempt order before appealing the September 19 denial of its sovereign immunity: "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).

The law is equally clear that [redacted] original appeal divested the district court of jurisdiction such that when the district court held [redacted] in contempt on October 5, it did so lacking jurisdiction—both because [redacted] is immune from the subpoena and because jurisdiction over the matter had transferred to this Court.

* * *

"Actions against foreign sovereigns in [American] courts raise sensitive issues concerning the foreign relations of the United States. . . ." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493 (1983). The United States understands well those sensitive interests: On the world stage, it continues to demand absolute immunity from criminal proceedings. And yet by rejecting [redacted] claim to sovereign immunity, the district court denied [redacted] the sovereign dignity that the United States expects from other countries.

STATEMENT OF JURISDICTION

On September 19, 2018, the U.S. District Court for the District of Columbia (Chief Judge Beryl A. Howell) entered an order and memorandum opinion denying [redacted] sovereign immunity and compelling it to respond to Grand Jury Subpoena No. 7409. JA 295–326.

Because [redacted] enjoys sovereign immunity from the grand jury subpoena, the district court lacked subject-matter jurisdiction to enter that order. [redacted] filed a Notice of Appeal on September 24, 2018. *Id.* at 327. On October 3, this Court dismissed that original appeal, but [redacted] has petitioned for rehearing of that decision. Case No. 18-3068, Dkt. 1753661, 1754075.

On October 5, 2018, the district court held [redacted] in civil contempt for failing to comply with the September 19 order but stayed the contempt order pending appeal. JA 355–61. Because [redacted] enjoys sovereign immunity from the grand jury subpoena, the district court also lacked subject-matter jurisdiction to enter its October 5 order. On October 9, 2018, [redacted] filed a Notice of Appeal of the October 5 order. *Id.* at 387.

This Court has jurisdiction under 28 U.S.C. § 1291 over both timely appeals. But because the district court lacked subject-matter jurisdiction, this Court has jurisdiction only to correct the district court's jurisdictional error.

STATEMENT OF THE ISSUES

1. Does the FSIA or any other U.S. statute supply criminal jurisdiction over foreign states?

2. Is a foreign state immune (under the FSIA or otherwise) from complying with a grand jury subpoena?

3. May a federal court exercise jurisdiction over a foreign state under 18 U.S.C. § 3231—a statute that vests federal district courts with jurisdiction "of all offenses against the laws of the United States" but says nothing about foreign states?

4. Do the FSIA's exceptions to sovereign immunity (28 U.S.C. §§ 1605-1607) apply outside the context of a nonjury civil action against a foreign state involving a claim for relief?

5. Did the district court err in compelling [redacted] (a foreign state under the FSIA) to comply with a grand jury subpoena when compliance would require [redacted] to violate [redacted]?

6. May an American court impose a monetary sanction (like a contempt fine) on a foreign sovereign? If so, may it enforce the fine if no FSIA exception to execution or attachment applies (28 U.S.C. §§ 1610, 1611)?

7. Does a foreign sovereign have a right to immediately appeal an order denying it sovereign immunity from a subpoena?

STATUTES AND REGULATIONS

The pertinent statutory authorities are reproduced in the addendum to this brief at pages 1a–26a.

STATEMENT OF THE CASE

[redacted]

In July 2018, the Special Counsel served a federal grand jury subpoena on [redacted] JA 21. From the outset, [redacted] explained that as an agency or instrumentality of [redacted], it is entitled to sovereign immunity from the subpoena. *Id.* 26–27. [redacted]

Unsatisfied with [redacted] response, the Special Counsel asked [redacted]. JA 9. [redacted] explained that disclosing those materials would expose it to [redacted]. *Id.* at 10. [redacted]

[redacted] *Id.* at 100. The Special Counsel nevertheless persisted in demanding compliance with the subpoena, and the parties reached an impasse.

Accordingly, [redacted] moved to quash the subpoena. JA 8–16. In its motion, [redacted] argued (1) that as a foreign sovereign, it is immune from complying with the grand jury subpoena and (2) that the subpoena is unreasonable and oppressive under Rule 17(c) because it would require [redacted] to violate [redacted]. *Id.* The Special Counsel conceded that [redacted] qualifies as a foreign state under the FSIA but argued that the FSIA does not apply in the criminal context and that, in any event, the FSIA's commercial-activity exception overrides [redacted] sovereign immunity. JA 106–23. The Special Counsel filed two *ex parte* briefs ostensibly supporting its argument about the commercial-activity exception. *Id.* at 302–03.

On September 19, the district court denied [redacted] sovereign immunity from the subpoena, denied [redacted] motion to quash, and ordered [redacted] to comply with the subpoena by October 1. JA 326. The court held that it had jurisdiction over [redacted] not under 28 U.S.C. § 1330(a) (the FSIA's jurisdictional provision), but under 18 U.S.C. § 3231—a general statute that gives federal district courts "original

jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States." JA 305–06. The court reasoned that a court can exercise jurisdiction over a foreign sovereign under a statute other than the FSIA so long as "one of the FSIA's substantive exceptions to immunity apply." *Id.* at 306.

The court went on to hold—using information that the Special Counsel provided in *ex parte* briefs—that the FSIA's commercial-activity exception applies. JA 311–12. The district court acknowledged that [redacted] "obviously" could not address the *ex parte* information and noted [redacted] difficult position in not being privy to the information reviewed and relied upon." *Id.* at 312. "Difficult" was an understatement. The *ex parte* filings put [redacted] in an impossible position.

The district court also rejected [redacted] alternative argument that the subpoena violates Rule 17(c)(2) because compliance would require [redacted] to violate [redacted]. JA 321. According to the district court, [redacted]. *Id.* at 314–19. The court discounted [redacted] three affidavits [redacted]. *Id.* at 315.

The district court alternatively held that even if [redacted] prohibited [redacted] from complying with the subpoena, the Special Counsel's interest in the records outweighed [redacted] interest in abiding by [redacted]. JA 322–26.

[redacted] filed a notice of appeal on September 24, 2018, divesting the district court of jurisdiction. JA 327.

On September 27, 2018, [redacted] moved this Court to stay the district court's order compelling it to comply with the subpoena. [redacted] explained that under D.C. Circuit precedent—including *Princz v. Fed. Republic of Germany*, 998 F.2d 1 (D.C. Cir. 1993) (per curiam)—a stay was unnecessary but that [redacted] was filing the motion "out of an abundance of caution." Case No. 18-3068, Dkt. 1752906 at 2. The Special Counsel moved to dismiss the appeal on October 1. On October 3, this Court dismissed [redacted] original appeal and denied [redacted] stay motion as moot. *Id.*, Dkt. 1753661.

The next day, the Special Counsel moved the district court to hold [redacted] in contempt for failing to comply with the district court's order. JA 330. On October 5, 2018, [redacted] petitioned this Court for rehearing or rehearing *en banc* of the Court's October 3 order. The same day, the district court again denied [redacted] sovereign immunity from the subpoena and held [redacted] in contempt for failing to comply with the court's September 19 order. *Id.* at 355–61. The district court fined [redacted]

[redacted] $50,000 per day until it produces the subpoenaed records, but the court stayed its contempt order pending appeal. *Id.* at 361.

This appeal follows.

STANDARD OF REVIEW

Federal courts are courts of limited jurisdiction: "[T]he courts created by statute must look to the statute as the warrant for their authority, certainly they cannot go beyond the statute . . . ." *Cary v. Curtis*, 44 U.S. 236, 245 (1845). "Without jurisdiction the court cannot proceed at all in any cause." *Ex parte McCardle*, 74 U.S. 506, 514 (1868).

Accordingly, "every federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review." *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986) (internal quotation marks omitted). If the lower court lacked jurisdiction, then the appellate court has jurisdiction "merely for the purpose of correcting the error of the lower court in entertaining the suit." *United States v. Corrick*, 298 U.S. 435, 440 (1936); *see also United States v. Nordic Village, Inc.*, 503 U.S. 30, 32, 39 (1992) (reversing based on "jurisdictional defense" of "sovereign immunity" "raised for the first time on appeal"). This Court reviews *de novo* the district court's jurisdictional rulings. *See, e.g.*, *G.S.S. Grp. Ltd. v. Nat'l Port Auth. of Liberia*, 822 F.3d 598, 604–05 (D.C. Cir. 2016).

The district court's interpretation of [redacted] is a legal question subject to *de novo* review. *Animal Sci.*, 138 S. Ct. at 1873. "In the spirit of international comity, . . . a federal court should carefully consider a foreign state's views about the meaning of its own laws." *Id.* (internal quotation marks omitted).

The district court's ruling that the grand jury subpoena [redacted] satisfies Rule 17 would ordinarily be subject to review for arbitrariness. *See In re Subpoena Served Upon Comptroller of the Currency*, 967 F.2d 630, 633 (D.C. Cir. 1992). But when a district court's ruling about a subpoena rests on a legal error, the ruling warrants no deference. *Id.* Because forcing [redacted] to comply with the subpoena would offend diplomatic niceties, the Court should analyze the district court's Rule 17(c) rulings with a particularly careful eye. *See In re Sealed Case*, 825 F.2d at 498.

Whether [redacted] had a right to immediately appeal the district court's order requiring it to comply with the subpoena is a question of law subject to *de novo* review. *Princz v. Fed. Republic of Germany*, 26 F.3d 1166, 1169 (D.C. Cir. 1994).

SUMMARY OF THE ARGUMENT

The district court lacked jurisdiction to compel [redacted] (a foreign sovereign) to comply with the grand jury subpoena or to hold [redacted] in contempt for failing to do so.

I. Foreign states have always been immune from the American criminal process. Consistent with that history and international law, Congress limited American courts' jurisdiction over foreign sovereigns to a particular species of case—a "nonjury civil action against a foreign state . . . as to any claim for relief in personam." 28 U.S.C. § 1330(a). Proceedings arising from a grand jury subpoena are not a non*jury* action, let alone a nonjury civil action against a foreign state involving a claim for relief.

The district court reached the opposite conclusion by turning the FSIA and Supreme Court precedent on their heads. It held that courts can find jurisdiction over foreign sovereigns in statutes outside the FSIA—including 18 U.S.C. § 3231, a statute that says nothing about foreign states and instead generally gives district courts jurisdiction over offenses against the United States. That is wrong. "[J]urisdiction in actions against foreign states is comprehensively treated by [] section 1330." *Amerada Hess*, 488 U.S. at 437 n.5 (internal quotation marks omitted). The district court disregarded that teaching and, in so doing, violated [redacted] national sovereignty and principles of international

comity. Meanwhile, the United States continues to reject other countries' efforts to subject American officials and instrumentalities to foreign criminal proceedings.

The district court also lacked jurisdiction to impose a $50,000-per-day fine on [redacted] The FSIA does not provide for monetary sanctions against a foreign state. At the very least, the district court cannot enforce the fine because it does not come within one of the FSIA's immunity exceptions for executing against or attaching a foreign state's property.

II. The district court also erred by rejecting [redacted] argument that the subpoena is unreasonable and oppressive under Rule 17(c)(2) because it would require [redacted] to violate [redacted].

A. [redacted] but it reached that conclusion only by giving short shrift to [redacted] three affidavits and then Americanizing [redacted]

[redacted]

B. Worse still was the district court's alternative holding that [redacted] must comply with the subpoena even if that means violating [redacted]. This Court held the opposite in *In re Sealed Case*, 825 F.2d at 495, [redacted]

III. The panel in [redacted] first appeal erred by holding that [redacted] had to suffer the indignity of a contempt order before appealing the district court's September 19 order denying sovereign immunity. That result conflicts with this Court's precedent, including its decision in *In re Papandreou*, 139 F.3d at 251. There, the Court granted a writ of mandamus to hold that Greek government officials could seek immediate appellate review of a district court's order compelling their depositions *before* the district court held them in contempt. The panel's order also conflicts with decisions from other Courts of Appeals holding that a party claiming unqualified immunity from a subpoena can immediately appeal the denial of a motion to quash. [redacted] should not have been forced to

endure a contempt order before appealing the denial of its immunity claim.

ARGUMENT

I. BECAUSE [redacted] IS A FOREIGN STATE UNDER THE FSIA, THE DISTRICT COURT LACKED JURISDICTION TO COMPEL [redacted] TO COMPLY WITH THE GRAND JURY SUBPOENA OR TO HOLD [redacted] IN CONTEMPT FOR FAILING TO DO SO.

"The FSIA provides the sole basis for obtaining jurisdiction over a foreign state." *Amerada Hess*, 488 U.S. at 443. It limits jurisdiction over foreign states to certain "nonjury civil action[s]" involving a "claim for relief in personam." 28 U.S.C. § 1330(a). A federal grand jury subpoena is not a "nonjury civil action" against a foreign state involving a "claim for relief in personam."

In finding jurisdiction over [redacted] under 18 U.S.C. § 3231 (by way of the FSIA's commercial-activity exception), the district court spurned the FSIA's text, Supreme Court precedent, and established international law.

A. American courts have never possessed criminal jurisdiction over foreign states or otherwise had power to subject a foreign state to the American criminal process.

For most of America's history, "foreign states enjoyed absolute immunity from all actions in the United States." *Rubin*, 138 S. Ct. at 821;

see also Verlinden, 461 U.S. at 486 (same); *De Moitez v. The South Carolina*, 1 Bee 422, 17 F. Cas. 574 (Adm. Ct., Pa. 1781) (no American jurisdiction in case against vessel belonging "to a sovereign independent state"). Absolute immunity was rooted in the maxim *par in parem non habet imperium*—"an equal has no power over an equal." The United States was not unique in extending absolute immunity to foreign sovereigns; until the early 1950s, most countries did the same. *See, e.g.*, Tate Letter, "Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments," 26 Dept. State Bull. 984, 985 (1952) (listing countries that, until the early 1950s, granted absolute immunity).

In American jurisprudence, the Supreme Court's 1812 opinion in *The Schooner Exchange* proved the lodestar on questions of sovereign immunity. Writing for the Court, Chief Justice John Marshall recognized that sovereigns are immune "from arrest or detention"—the criminal process—in foreign territory. *The Schooner Exchange v. McFaddon*, 11 U.S. 116, 137 (1812). Marshall also explained the principles underpinning sovereign immunity:

> One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended

> to him. This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to wave the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.

Id. After *The Schooner Exchange*, American courts extended absolute immunity to foreign sovereigns for the next century and a half. *Rubin*, 138 S. Ct. at 821.

By the mid-twentieth century, international trade had reached new heights, with foreign countries and their instrumentalities often leading the push toward a globalized economy. *See, e.g.*, Tate Letter at 985 (noting "the widespread and increasing practice on the part of governments of engaging in commercial activities" abroad). Those changes in the world economy prompted calls for a more practical framework for evaluating sovereign immunity in civil matters—one balancing a country's inherent sovereignty against the needs of private actors doing business with the sovereign. In 1952, the Tate Letter reflected the evolving global consensus: Foreign sovereigns' participation in commercial markets "ma[de] necessary a practice which . . . enable[d] persons doing business with them to have their rights determined in the courts." *Rubin*, 138 S. Ct. at 821–22 (quoting Tate Letter at 985).

So was born America's so-called "restrictive approach" to sovereign immunity. Tate Letter at 985. Under the restrictive approach, "[i]mmunity typically was afforded in cases involving a foreign sovereign's public acts, but not in cases arising out of a foreign state's strictly commercial acts." *Rubin*, 138 S. Ct. at 822. But the Tate Letter worked no change in the rule that foreign sovereigns enjoy absolute immunity from the American criminal process. *See* Fox & Webb, *The Law of State Immunity* at 91. The Tate Letter was about civil matters—those sounding in "contract and tort." Tate Letter at 985.

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

Faced with that increasingly cumbersome ad hoc regime, Congress enacted the FSIA in 1976 "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). Since then, the Supreme 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.

B. The FSIA limits American courts' jurisdiction over foreign states to "nonjury civil actions" against foreign states involving a "claim for relief."

In denying [redacted] sovereign immunity from the grand jury subpoena, the district court misread the FSIA. A straightforward reading of the statute confirms that [redacted] is immune from responding to the subpoena. *See, e.g.*, *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 306 (2014) ("[R]easonable statutory interpretation must account for both the specific context in which language is used and the broader context of the statute as a whole.") (internal quotation marks, alteration omitted); *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. . . . When the words of a statute are unambiguous, . . . judicial inquiry is complete.") (internal quotation marks omitted).

The FSIA's declaration of purpose.

Consider first the FSIA's declaration of purpose:

> The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the

> jurisdiction of such courts would serve the interests of justice and *would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities.* Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

28 U.S.C. § 1602 (emphasis added). That provision confirms at least three things.

First, the provision speaks in terms of protecting the "rights of both *foreign states and litigants* in United States courts"—language that contemplates civil proceedings, not criminal proceedings.

Second, when Congress wrote in 1976 that "[u]nder international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned," the background rule in international law was restrictive immunity in civil matters but absolute immunity in criminal matters. *See, e.g.*, Fox & Webb, *The Law of State Immunity* 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."). That is why Congress went on to explain that under international law, a foreign state's "commercial property may be levied upon for the satisfaction of

judgments rendered against them in connection with their commercial activities." Congress was talking about civil litigation, not the criminal process. *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' 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").

Third, the provision confirms that Congress intended the FSIA to serve as the "comprehensive set of legal standards governing claims of immunity." *Verlinden*, 461 U.S. at 488.

The FSIA's immunity provision.

Consider next the FSIA's immunity provision: "Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state *shall be immune from the jurisdiction of the courts of the United States and of the States* except as provided" in 28 U.S.C. §§ 1605–07. 28 U.S.C. § 1604 (emphasis added). 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).

The FSIA's jurisdictional provision.

Consider next the FSIA's jurisdictional provision:

> 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). Section 1330(a) establishes a number of things.

First, the statute confers "original jurisdiction without regard to the *amount in controversy*"—familiar language used only in the civil context. *See, e.g.*, 28 U.S.C. § 1332; 42 U.S.C. § 660.

Second, the statute creates jurisdiction only over certain "nonjury civil actions." "Nonjury" means nonjury; Congress took pains to ensure that an American jury will never sit in judgment over a foreign state. *See Ruggiero v. Compania Peruana de Vapores Inca Capac Yupanqui*, 639 F.2d 872, 875 (2d Cir. 1981) (Friendly, J.) ("no jury can be had in an action in a federal court against a foreign state"); *see also Universal Consol. Cos., Inc. v. Bank of China*, 35 F.3d 243, 245 (6th Cir. 1994) ("a suit against a foreign state was unknown to the common law" in 1791) (internal citation omitted). "Civil action" means "[a]n action brought to enforce, redress, or protect a private or civil right; a noncriminal litigation." *Civil Action*, Black's Law Dictionary (10th ed. 2014).

Third, the statute creates jurisdiction only over nonjury civil actions "*against*" foreign states. "Against" means "[i]n opposition to."

Oxford English Dictionary (3d ed. 2012, online ed. accessed Oct. 17, 2018).

Fourth, for jurisdiction to lie against a foreign state, the nonjury civil action against the foreign state must involve a "claim for relief in personam" (28 U.S.C. § 1330(a))—language used only in the civil context. 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." *Claim*, Black's Law Dictionary (10th ed. 2014).

There is no hint in § 1330(a) that Congress gave American courts non-civil jurisdiction over foreign states, and there is no other provision in the U.S. Code vesting American courts with criminal jurisdiction over foreign sovereigns.

The FSIA's removal provision.

Consider next the FSIA's removal provision:

> Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury.

28 U.S.C. § 1441(d). Again, Congress's use of "civil action" shows that it never intended American courts to subject foreign sovereigns to the

American criminal process. And if § 1330(a)'s "nonjury" language was not clear enough, Congress repeated in § 1441(d) that a jury may play no part in a case against a foreign state.

The FSIA's exceptions to immunity.

Consider next the FSIA's exceptions to immunity (28 U.S.C. §§ 1605–1607). "Almost all the exceptions involve commerce or immovable property located in the United States." *Bolivarian Republic*, 137 S. Ct. at 1320. With each exception, Congress has decided that, in the particular circumstance underlying the exception, the foreign state should not enjoy immunity from a nonjury civil action against it.

Perhaps the most familiar of those exceptions is the "commercial activity" exception—the one that the district court relied on below. The commercial-activity exception applies when "the action is based upon a commercial activity carried on in the United States by the foreign state . . . or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2). But neither the commercial-activity exception nor any other FSIA exception can expand § 1330(a)'s grant of jurisdiction beyond certain nonjury civil actions involving a claim for relief. Even if the commercial-activity exception applied outside the context of nonjury civil actions involving a claim for relief—it does not—the exception would not apply here (at least

based on the information available to [redacted]. *See Odhiambo v. Republic of Kenya*, 764 F.3d 31, 35-36 (D.C. Cir. 2014). And it would violate notions of sovereign dignity and international comity to strip a foreign sovereign of its immunity based on *ex parte* filings that the sovereign cannot contest.

In any case, there is no exception to sovereign immunity for criminal matters generally or grand jury proceedings specifically. On the contrary, the terrorism exception (§ 1605A) proves that Congress went out of its way to avoid subjecting foreign states to the American criminal process. Section 1605A strips foreign states' immunity from certain actions involving "personal injury" or "death" caused by (among other acts) "an act of torture, extrajudicial killing, aircraft sabotage, [and] hostage taking," but it does so only inasmuch as "money damages are sought"—language that, consistent with § 1330(a), limits jurisdiction to civil proceedings. 28 U.S.C. § 1605A.

* * *

In *Amerada Hess*, the Supreme Court explained how the FSIA's provisions work together: Section 1604 "bars federal and state courts from exercising jurisdiction when a foreign state is entitled to immunity, and § 1330(a) confers jurisdiction on district courts to hear *suits brought by United States citizens and by aliens* when a foreign state is not entitled

to immunity." 488 U.S. at 434 (emphasis added). Because § 1330(a) is the only way for a federal court to exercise jurisdiction in a case involving a foreign sovereign, the immunity exceptions in §§ 1605–07 do not and could not expand jurisdiction beyond § 1330(a)'s limits. *See* 28 U.S.C. § 1330(a) (granting "original jurisdiction" when "the foreign state is not entitled to immunity either under sections 1605–1607").

Consistent with the FSIA's text, the Sixth Circuit has held that U.S. courts have no criminal jurisdiction over foreign states. *See Keller v. Cent. Bank of Nigeria*, 277 F.3d 811, 820 (6th Cir. 2002) ("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); *Gould, Inc. v. Mitsui Min. & Smelting Co., Ltd.*, 750 F. Supp. 838, 844 (N.D. Ohio 1990) (FSIA withholds criminal jurisdiction over foreign sovereigns). The cases going the other way—including *Southway v. Cent. Bank of Nigeria*, 198 F.3d 1210 (10th Cir. 1999), and *United States v. Hendron*, 813 F. Supp. 973, 975 (E.D.N.Y. 1993)—started from the backwards assumption that jurisdiction over foreign states exists unless Congress says otherwise. *See Southway*, 198 F.3d at 1214 ("We are unwilling to presume that Congress intended the FSIA to govern district

court jurisdiction in criminal matters."); *Hendron*, 813 F. Supp. at 976 ("no hint that Congress was concerned that a foreign defendant in a criminal proceeding would invoke the Act *to avoid a federal court's jurisdiction*") (emphasis added). In fact, the opposite is true. *Amerada Hess*, 488 U.S. at 437–38.

Congress's decision to withhold criminal jurisdiction was not an oversight. Immunity from criminal process is the rule in international law. *See Bolivarian Republic*, 137 S. Ct. at 1319 ("The [FSIA] for the most part embodies basic principles of international law long followed both in the United States and elsewhere."); H.R. Rep. 94-1487 at 14 (FSIA "incorporates standards recognized under international law"). Many countries have adopted a restrictive approach to sovereign immunity in the civil context but withheld criminal jurisdiction over foreign states. *See, e.g.,* Foreign States Immunities Act 87 of 1981 § 2 (South Africa) ("The provisions of this Act shall not be construed as subjecting any foreign state to the criminal jurisdiction of the courts of the Republic."); State Immunity Act, R.S.C. 1985, c. S-18 (Canada) (no criminal jurisdiction over foreign states); The State Immunity Ordinance (Ordinance No. 6/ 1981) (Pakistan) (same); State Immunity Act, ch. 313 (1979) (Singapore) (same); State Immunity Act 1978, c. 33, § 16, sch. 5 (U.K.) (same).

In tracking international law on that score, Congress no doubt recognized that American courts' exercising criminal jurisdiction over foreign states would "infringe[] international law's requirements of equality and non-intervention." Fox & Webb, *The Law of State Immunity* at 91–92.

C. American courts lack jurisdiction to enforce the grand jury subpoena because it did not issue in a nonjury civil action against a foreign state involving a claim for relief.

The district court should have quashed the criminal subpoena to [redacted] because enforcing a grand jury subpoena is not a nonjury civil action against a foreign state involving a claim for relief. A grand jury subpoena issues under Federal Rule of Criminal Procedure 17 and is a part of the American criminal process.

Indeed, "[t]he 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; *see also Costello v. United States*, 350 U.S. 359, 361–62 (1956). 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. §§ 401, 3321–22. Because the FSIA precludes jurisdiction in criminal matters

like grand jury proceedings, the district court had no jurisdiction over [redacted] [redacted] And neither does this Court.

There is more. Even putting aside for a moment the question of whether the FSIA supplies jurisdiction in *any* criminal proceeding, it does not supply jurisdiction in grand *jury* proceedings. By definition, grand *jury* proceedings are not a "nonjury" action. They are also not a nonjury *civil* action. And in all events, issuing and serving a grand jury subpoena is not a "claim for relief in personam." 28 U.S.C. § 1330(a).

D. In purporting to find jurisdiction over [redacted] outside of 28 U.S.C. § 1330(a), the district court flouted the FSIA's plain language and Supreme Court precedent.

The district court reached a contrary conclusion by ignoring the FSIA's plain language and Supreme Court precedent. According to the district court, federal courts can exercise criminal jurisdiction over foreign states under any number of statutes outside the FSIA so long as a litigant "demonstrates that one of the FSIA's exceptions to immunity applies." JA 306. The court went on to hold that 18 U.S.C. § 3231—which gives federal district courts jurisdiction over "offenses against the laws of the United States"—supplies jurisdiction over [redacted] *Id.* at 305–06.

The district court's reasoning fails at every point in the analysis. The district court started from the faulty premise that "Section 1330(a) does not facially purport to be the exclusive basis for exercising

jurisdiction over a non-plaintiff foreign state." JA 305. But as the Supreme Court has explained, "jurisdiction in actions against foreign states is *comprehensively* treated by [] section 1330." *Amerada Hess*, 488 U.S. at 437 n.5 (emphasis added) (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) . . . ."). There is no reconciling the district court's statement with the FSIA's text or Supreme Court precedent.

In another passage, the district court speculated that "[t]he FSIA's omission of any statute specifically conferring jurisdiction over non-civil matters against foreign states thus simply may reflect Congress' judgment that the existing scope of federal jurisdiction over non-civil actions against foreign states required no expansion." JA 308. The plaintiffs in *Amerada Hess* made the same argument. They tried to invoke the district court's jurisdiction under the Alien Tort Statute (28 U.S.C. § 1350) and the general admiralty statute (28 U.S.C. § 1333) to support their claims against Argentina. *Amerada Hess*, 488 U.S. at 432. The Supreme Court rejected the notion that those or other non-FSIA statutes could supply jurisdiction over a foreign state:

> In light of the comprehensiveness of the statutory scheme in the FSIA, we doubt that even the most meticulous draftsman

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

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

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

Id. at 438.

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

> The FSIA amended the diversity statute to delete references to suits in which a "foreign stat[e] is a party either as a plaintiff or defendant. . . and added a new paragraph (4) that preserves diversity jurisdiction over suits in which foreign states are plaintiffs. As the legislative history explained,

> "since jurisdiction in actions against foreign states is comprehensively treated by the new section 1330, a similar jurisdictional basis under section 1332 becomes superfluous." . . . *Unlike the diversity statute, however, the Alien Tort Statute and the other statutes conferring jurisdiction in general terms on district courts cited in the text did not in 1976 (or today) expressly provide for suits against foreign states.*

Amerada Hess, 488 U.S. at 437 n.5 (emphasis added).

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

To support its theory of roaming federal jurisdiction over foreign states, the district court relied on the following sentence from *Amerada Hess*: "Unless the present case is within § 1605(b) or another exception to the FSIA, the statute conferring general admiralty and maritime jurisdiction on the federal courts does not authorize the bringing of this action against petitioner." *Amerada Hess*, 488 U.S. at 438–39; JA 306.

But the district court stripped that sentence of its context. Considered in context, the sentence exposes the district court's error:

> Respondents also argue that the general admiralty and maritime jurisdiction, § 1333(1), provides a basis for obtaining jurisdiction over petitioner for violations of international law, notwithstanding the FSIA. . . . But Congress dealt with the admiralty jurisdiction of the federal courts when it enacted the FSIA. Section 1605(b) expressly permits an in personam suit in admiralty to enforce a maritime lien against a vessel or cargo of a foreign state. *Unless the present case is within § 1605(b) or another exception to the FSIA, the statute conferring general admiralty and maritime jurisdiction on the federal courts does not authorize the bringing of this action against petitioner.*

Amerada Hess, 488 U.S. at 438–39 (emphasis added). The Supreme Court was not saying in that paragraph that the general statute conferring admiralty-and-maritime jurisdiction (§ 1333(1)) independently supplies jurisdiction over a foreign state. On the contrary, and as the passages from *Amerada Hess* quoted above confirm, the Court spent its opinion explaining that no statute *other than the FSIA* can supply jurisdiction over a foreign sovereign. *See, e.g.*, *Amerada Hess*, 488 U.S. at 434, 437–38.

No, in context, the Court was explaining only that the FSIA exception relating to admiralty-and-maritime liens (§1605(b)) "expressly permits an *in personam* suit in admiralty to enforce a maritime lien against a vessel or cargo of a foreign state" and that unless that or

another FSIA exception applied, American courts had no jurisdiction over Argentina. *Amerada Hess*, 488 U.S. at 438. No FSIA exception grants federal courts criminal jurisdiction over foreign states. And none could: § 1330(a) limits jurisdiction over foreign states to certain nonjury civil actions involving a claim for relief. Congress understood that exercising criminal jurisdiction over a foreign sovereign presents more acute diplomatic concerns.

E. Expanding American jurisdiction over foreign sovereigns to include grand jury proceedings would violate international comity.

And then there is the matter of international comity—which rests (at least in part) on notions of reciprocity. *See Nat'l City Bank of New York v. Republic of China*, 348 U.S. 356, 362 (1955) (sovereign immunity derives "from standards of public morality, fair dealing, reciprocal self-interest, and respect for the 'power and dignity' of the foreign sovereign").[1] Although immunity from criminal process remains the background rule in international law, efforts to change that (at least in part) are afoot.

[redacted]

Take, for instance, the International Criminal Court's Rome Statute, which represents some countries' efforts to restrict foreign sovereign immunity in certain criminal proceedings. *See* Rome Statute of the International Criminal Court, art. 5, July 17, 1998, 2187 U.N.T.S. 90. We don't have to speculate about how the United States would react if the International Criminal Court or a foreign state tried to enmesh the United States in a foreign criminal process. The United States has rejected the International Criminal Court. *See, e.g.*, Matthew Lee, *Bolton: International Criminal Court 'already dead to us,'* AP NEWS (Sept.11, 2018), *available at* https://apnews.com/4831767ed5d b484ead574a402a 5e7a85. (U.S. National Security Adviser John Bolton: "The International Criminal Court unacceptably threatens American sovereignty and U.S. national security interests."). It has argued that one foreign sovereign may not exercise criminal jurisdiction over another. Yet the Special Counsel has delivered the opposite message to [redacted]

F. The district court lacked jurisdiction to impose a monetary sanction (like a contempt fine) on [redacted] and in any event cannot enforce the fine imposed.

The district court also violated the FSIA by imposing a monetary fine on [redacted] The FSIA does not authorize monetary penalties against a foreign state. *See 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 of foreign states. Monetary sanctions are not included."). This Court previously rejected that argument when the U.S. Government made it supporting a different foreign state. *See FG Hemisphere Assocs., LLC v. Democratic Republic of Congo*, 637 F.3d 373, 379 (D.C. Cir. 2011).

In all events, this Court recognized in *FG Hemisphere* that an American court lacks jurisdiction to enforce a contempt order that ventures beyond the FSIA's immunity limits for executing against or attaching a foreign state's property (28 U.S.C. §§ 1610, 1611)—even if the court had inherent power to issue the contempt order in the first instance. 637 U.S. at 378–80. "With respect to the immunity of property, the FSIA similarly 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). No provision in §§ 1610 or 1611 authorizes enforcement of the $50,000-per-day monetary fine against [redacted]

II. THE GRAND JURY SUBPOENA VIOLATES RULE 17(C)(2) BECAUSE IT WOULD REQUIRE [redacted] (A FOREIGN SOVEREIGN) TO VIOLATE [redacted].

The grand jury subpoena would require [redacted] (a foreign sovereign) to [redacted]. That is by

definition unreasonable and oppressive under Rule 17(c)(2). The district court sustained the subpoena by discounting [redacted] and elevating the Special Counsel's interest in the subpoenaed material over [redacted] interest in abiding by [redacted].

A. [redacted] prohibits [redacted] from complying with the subpoena.

[redacted] carried its burden of showing "that [foreign] law prevents compliance with the [subpoena]" (*see In re Sealed Case*, 825 F.2d at 498) by submitting a [redacted].

The Special Counsel acknowledged below that [redacted]

[redacted]

[redacted]And even if there were some question on that score, the district court should have resolved any ambiguity in [redacted] favor because [redacted] submitted sworn declarations [redacted]. Earlier this year, the Supreme Court explained that "[i]n the spirit of international comity, a federal court should carefully consider a foreign state's views about the meaning of its own laws" and should give "substantial" weight to those views. *Animal Sci.*, 138 S. Ct. at 1873. Contrast the Supreme Court's teaching with the district court's decision to give "little weight" to [redacted] evidence.[2] JA 315.

1. [redacted]

[redacted]

[2] The district court discounted [redacted] declarations in part because they came from "in-house and retained counsel"—the implication being that [redacted] should have submitted evidence from disinterested, outside parties. JA 315. But [redacted] *is* an agency or instrumentality [redacted], so the district court should have given [redacted] views substantial weight.

[redacted]

To explain the district court's mode of analysis is to understand the error in it: [redacted] The district court's faulty grammatical analysis led it to reject sworn declarations [redacted]

[3] [redacted]

[redacted]

The district court should not have substituted its guess about the meaning [redacted] for sworn declarations [redacted].

In any case, if it is *de rigueur* to use American rules to interpret [redacted], then what about the canon against absurd results? *See Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1068 (D.C. Cir. 1998). By the district court's view, [redacted]

And that says nothing of the harm to international comity that would flow from elevating an Americanized version of [redacted]

[redacted] over a foreign sovereign's understanding of its own laws. *See Hilton v. Guyot*, 159 U.S. 113, 164 (1895) (comity "is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation"); *JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V.*, 412 F.3d 418, 423 (2d Cir. 2005) (comity is "shorthand for good neighbourliness, common courtesy, and mutual respect between those who labour in adjoining judicial vineyards") (citation omitted). The district court should have given "substantial" weight to [redacted] understanding of [redacted]. *Animal Sci.*, 138 S. Ct. at 1873. Instead, it gave [redacted] declarations "little weight."[4]

2. [redacted]

[redacted]

[4] [redacted]

[redacted]

In ruling as it did, the district court upended the presumption that [redacted] it is referring to its own laws, not the unidentified laws of unidentified countries [redacted]. The United States Code, for instance, includes several provisions that reference other laws by subject matter alone, but no one would suggest that the references incorporate other countries' laws. *See, e.g.*, 16 U.S.C. § 497a (reference to "the public land laws or mining laws"); 18 U.S.C. § 1544 ("the laws regulating the issuance of passports"); 38 U.S.C. § 1703A(i)(2)(B) ("all laws that protect against employment discrimination"). In any event, sworn declarations [redacted]

[redacted]

The district court held otherwise, [redacted] but, again, by applying American interpretive rules. This time, it was the *King v. Burwell* canon that courts should construe statutes "with a view to their place in the overall statutory scheme." JA 317. [redacted]

The district court's starting point—[redacted]—was wrong for the same reasons that [redacted] was wrong. The court applied American interpretive rules to a [redacted]. It did so in the teeth of sworn testimony [redacted].

Beyond that, [redacted]

If left to stand, the district court's ruling would lead to the anomalous result [redacted]

[redacted]

B. Rule 17(c)(2) prohibits a subpoena that requires a foreign sovereign to violate its own laws.

The district court alternatively held that even if [redacted] prohibited [redacted] from disclosing the requested documents, the Special Counsel's interest in obtaining those documents outweighs [redacted] interest in not violating [redacted]. JA 322. That ruling is remarkable, to say the least: We are not aware of any other decision from an American court holding that a prosecutor's interest in subpoenaed information outweighs a foreign sovereign's interest in complying with its own laws.

For good reason: Since its founding, America has, consistent with international law, not subjected other foreign sovereigns to the American criminal process. *See* Section I. But even beyond that, notions of comity and reciprocal foreign dignity have, we are sure, stopped federal prosecutors in the past from trying to force a foreign government to violate its own laws. Any other approach would wreak havoc on U.S. foreign policy.[5]

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[5] Courts sometimes balance several factors to determine whether to compel a private company or citizen to respond to a subpoena when the response would violate foreign law. *First Am. Corp. v. Price Waterhouse*

This Court recognized as much in *In re Sealed Case*, 825 F.2d at 495. There, a grand jury issued a subpoena to a bank owned by a foreign sovereign. *Id.* at 496. The bank resisted on the basis that compliance would require it to violate a third country's laws. *Id.* The district court brushed aside the bank's objection and held it in contempt. *Id.*

This Court reversed. Although the Court did not "decide the general issue of whether a court may ever order action in violation of foreign laws," [redacted] This Court also expressed serious doubts about *ever* requiring a non-party (much less a sovereign) to violate foreign law on foreign soil: "[I]t causes us considerable discomfort to think that a court of law should order a violation of law, particularly on the territory of the sovereign whose law is in question." *Id.* at 498–99; *see also id.* ("[O]ur government and our people would be affronted if a foreign court tried to compel someone to violate our laws within our borders."). The Court understood that its

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LLP, 154 F.3d 16, 22 (2d Cir. 1998). That balancing approach does not apply when (as here) the subpoena would require a *foreign sovereign* to violate its own laws. But even if the Court applied the balancing test, the burden of requiring a foreign sovereign to violate its own laws would outweigh all other factors.

ruling might hamper a criminal investigation but explained that comity demanded no less: "Though we recognize that the grand jury's investigation may nonetheless be hampered, perhaps significantly, we are unable to uphold the contempt order against the bank." *Id.* at 499.

That same result should have obtained below. A grand jury subpoena that would require a foreign sovereign to violate foreign law—"on the territory of the sovereign whose law is in question" (*id.*)—is by definition unreasonable and oppressive under Rule 17(c). It's even worse than that: It is a blow to international comity.

The district court tried to distinguish *In re Sealed Case*, but its efforts on that score only accentuate the error below. According to the district court, it matters that the subpoena in *In re Sealed Case* required the bank to violate a *third country's* laws while the subpoena to [redacted] required it to violate its *own* laws. JA 325. On that point, the district court had things exactly backwards: If anything, the subpoena to [redacted] is worse because it requires a foreign sovereign to violate its own laws rather than another country's laws. At any rate, this Court explained that the subpoena in *In re Sealed Case* failed scrutiny in part because it required a violation of law "on the territory of the sovereign whose law is in question." 825 F.2d at 499.

The district court also suggested that, unlike the Special Counsel, the government in *In re Sealed Case* might have had "alternative means"

of obtaining the information. JA 326. The district court ignored that [redacted] suggested an alternative to the Special Counsel that would avoid infringing [redacted] sovereign immunity: [redacted]

Even if that option was unavailable, this Court recognized in *In re Sealed Case* that sometimes a prosecutor is not entitled to information if getting it would do violence to other important interests. 825 F.2d at 499. Sovereign dignity is one of those interests.

The district court also ignored the Restatement's teaching:

> If disclosure of information located outside the United States is prohibited by a law, regulation, or order of a court or other authority of the state in which the information or prospective witness is located, or of the state of which a prospective witness is a national . . . a court or agency *should not ordinarily impose sanctions of contempt, dismissal, or default on a party that has failed to comply with the order for production*, except in cases of deliberate concealment or removal of information or of failure to make a good faith effort.

Restatement (Third) of Foreign Relations Law § 442(2) (1987) (emphasis added). If that is the rule for the run-of-the-mill witness, then how much more should it hold true when the witness is a foreign sovereign?

III. [redacted] HAD A RIGHT TO IMMEDIATELY APPEAL THE DISTRICT COURT'S ORIGINAL ORDER DENYING [redacted] SOVEREIGN IMMUNITY.

[redacted] did not have to endure a contempt order before appealing the district court's September 19 order denying [redacted] sovereign immunity and compelling it to comply with the subpoena. The panel in Case Number 18-3068 should not have dismissed [redacted] original appeal.

> Contrast the panel's statement in [redacted] first appeal that
>
> [r]equiring [redacted] to obtain a contempt order before appealing does not subject [redacted] to the burdens of litigation contemplated by the cases allowing immediate appeals of discovery orders and denials of motions to dismiss where an appellant asserted sovereign immunity.

with the following language from this Court's earlier decision in *Papandreou*:

> Respondents' suggestion that the Ministers should be forced to take the contempt route betrays a misunderstanding of immunity or diplomacy or both. . . . A contempt order offends diplomatic niceties even if it is ultimately set aside on appeal.

139 F.3d at 251.

The panel's order in [redacted] first appeal also conflicts with this Court's decisions in *Nyambal v. IMF*, 772 F.3d 277, 280 (D.C. Cir. 2014) ("Just as a district court's denial of sovereign immunity finally determines the foreign state's right to be immune from the burden of a lawsuit, a court's grant of jurisdictional discovery denies an international

organization protection from similar burdens.") and *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 443 (D.C. Cir. 1990) ("[S]overeign immunity is an immunity from trial and the attendant burdens of litigation, and not just a defense to liability on the merits").

Those decisions are not outliers. Courts across the country have held that a party claiming unqualified immunity can immediately appeal the denial of immunity—whether the denial comes in the context of a motion to dismiss, a discovery dispute, or (as here) a motion to quash a subpoena. In [redacted] first appeal, the panel held that although foreign sovereigns can generally immediately appeal denials of sovereign immunity—including in the motion-to-dismiss context[6]—that rule does not apply when a district court denies a sovereign's motion to quash a subpoena. *See* Case No. 18-3068, Dkt. 1753661. That was error. Cases from the Second, Eighth, and Tenth Circuits confirm that when a party claims unqualified immunity from a subpoena, it can immediately appeal an order denying its motion to quash the subpoena. *See In re Grand Jury Subpoenas Returnable Dec. 16, 2015*, 871 F.3d 141, 146 (2d Cir. 2017); *Bonnet v. Harvest (U.S.) Holdings, Inc.*, 741 F.3d 1155, 1158-59 (10th Cir.

[6] Every court of appeals to have addressed the issue (including this Court) has held that a foreign sovereign claiming immunity can immediately appeal the denial of a motion to dismiss. *See, e.g.*, *Foremost-McKesson,* 905 F.2d at 443; *see also Gupta v. Thai Airways Int'l, Ltd.*, 487 F.3d 759, 763 & n.6 (9th Cir. 2007) (collecting cases).

2014); *Alltel Commc'ns, LLC v. DeJordy*, 675 F.3d 1100, 1102 (8th Cir. 2012).

As those courts understood, a denial of unqualified immunity—whatever the context—justifies an immediate appeal under the collateral-order doctrine because the district court's decision satisfies all three *Cohen* factors: It (1) conclusively determines the immunity question, (2) resolves an important issue separate from the merits (in this case, the enforceability of the underlying subpoena), and (3) would effectively evade appellate review after a final judgment. *See In re Grand Jury Subpoenas*, 871 F.3d at 146; *see also La Reunion Aerienne v. Socialist People's Libyan Arab Jamahiriya*, 533 F.3d 837, 843 (D.C. Cir. 2008) (setting out requirements for collateral-order jurisdiction).

In arguing against an immediate appeal, the Special Counsel relied on *United States v. Ryan*, 402 U.S. 530 (1971) and *Cobbledick v. United States*, 309 U.S. 323 (1940), but neither case involved a denial of sovereign immunity. Those cases teach that a witness *generally* cannot appeal a motion-to-quash denial before a court holds them in contempt. But the point of a general rule is that it admits of exceptions—and one exception is a claim of sovereign immunity. Indeed, the Second Circuit in *In re Grand Jury Subpoenas* articulated the general rule from *Ryan* and *Cobbledick* but then explained that the rule does not apply when a

district court denies a witness's claim of unqualified immunity. 871 F.3d at 146.

The same reasoning applies here. So far as a sovereign's right to an immediate appeal is concerned, the key is not *the degree* to which the district court's order burdens the sovereign with the judicial process but that it burdens the sovereign with the judicial process *at all*. *See, e.g.*, *Nyambal*, 772 F.3d at 280. If a foreign sovereign must get a contempt order before appealing and the appellate court later holds that the sovereign is entitled to immunity, then nothing can undo the contempt order's blow to the sovereign's dignity. As this Court put it in *Papandreou*, a contempt order "offends diplomatic niceties even if it is ultimately set aside on appeal." *Papandreou*, 139 F.3d at 251. [redacted] has already suffered that indignity here, but this Court can prevent it in future cases against foreign sovereigns.

In ruling as it did, the panel created an unworkable regime under which a foreign sovereign may seek an immediate appeal of an order denying sovereign immunity in every circumstance except a challenge to a subpoena. That counterintuitive regime would pave the way for courts in this Circuit to infringe foreign sovereigns' immunity and dignity anytime a party seeks information from a foreign sovereign under a subpoena.

Again from *Papandreou*: "The typical discovery privilege protects only against disclosure; where a litigant refuses to obey a discovery order, appeals a contempt order, and wins, the privilege survives unscathed. For an immunity, *this is not good enough*." 139 F.3d at 251 (emphasis added).

Not good enough for an order compelling the *Papandreou* depositions. Not good enough for an order compelling [redacted] to respond to a grand jury subpoena.

* * *

When [redacted] filed its first notice of appeal on September 24, all jurisdiction over the case transferred from the district court to this Court, so the district court had no power to enter a contempt order on October 5. *See Princz*, 998 F.2d at 1 ("Because an appeal properly pursued from the district court's order divests the district court of control over those aspects of the case on appeal, exclusive jurisdiction to resolve the threshold issue [of sovereign immunity] vests in this court, and the district court may not proceed to trial until the appeal is resolved.") (internal citations omitted).

CONCLUSION

[redacted] is immune from the grand jury subpoena, so the district court lacked jurisdiction to order [redacted] to comply with the subpoena,

to hold [redacted] in contempt for failing to do so, or to impose a monetary fine on [redacted] It also lacks jurisdiction to enforce the contemplated monetary fine. This Court should vacate the district court's orders and, having done that, should hold that [redacted] is immune from responding to the grand jury subpoena.

Respectfully submitted on October 23, 2018.

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CERTIFICATE OF SERVICE

I certify that today I served this **Appellant's Brief** by hand delivery on the following:

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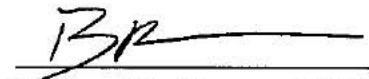

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