# ECF No. 45

FILED UNDER SEAL



**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| IN RE GRAND JURY SUBPOENA NO. 7409 | Grand Jury Action No. 18-gj-0041 (BAH)<br><br>Chief Judge Beryl A. Howell<br><br>**FILED UNDER SEAL**<br>UNDER LCrR 6.1 |

**COMBINED MOTION FOR A DECLARATION THAT THIS COURT'S OCTOBER 5, 2018 ORDER IS UNENFORCEABLE AND THAT [redacted] PROPERTY IS IMMUNE FROM EXECUTION OR ATTACHMENT AND MOTION FOR A STAY OF THIS COURT'S CONTEMPT ORDER PENDING THE SUPREME COURT'S DISPOSITION OF [redacted] PETITION FOR A WRIT OF CERTIORARI**

On October 5, 2018, this Court held [redacted] (concededly a foreign state under the Foreign Sovereign Immunities Act) in contempt for not complying with Grand Jury Subpoena No. 7409 and fined [redacted] $50,000 per day until it complied with the subpoena. The Supreme Court temporarily stayed this Court's October 5 contempt order, but the Supreme Court lifted that temporary stay yesterday. [redacted] sealed petition for certiorari (attached as Exhibit A) remains pending.

As [redacted] has argued in its certiorari petition, American courts lack subject-matter jurisdiction over this proceeding (including over any effort to enforce the contempt order) because the FSIA limits subject-matter jurisdiction in actions against foreign states to certain nonjury civil matters involving a claim for relief. The FSIA is the sole basis for obtaining subject-matter jurisdiction over a foreign state. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 437 n.5 (1989) ("jurisdiction in actions against foreign states is comprehensively treated by [] section 1330"); *id.* at 443 ("the FSIA provides the sole basis for obtaining jurisdiction over a foreign state"). Recognizing that this Court and the D.C. Circuit have held otherwise, this Court

still may not enforce its October 5 sanctions order because the FSIA does not authorize contempt sanctions against [redacted] (a foreign state).

Indeed, even while this Court and the D.C. Circuit have held that [redacted] is not entitled to jurisdictional immunity under 28 U.S.C. § 1604, the FSIA leaves no doubt that [redacted] *property* is absolutely immune from execution or attachment. In keeping with longstanding international law, the FSIA grants a foreign state's property immunity from execution or attachment: Section 1609 provides that "[s]ubject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment or arrest and execution except as provided in sections 1610 and 1611 of this chapter." 28 U.S.C. § 1609. Then, in § 1610, Congress created narrow exceptions to that immunity for a foreign state's property "in the United States."[1] 28 U.S.C. § 1610. Nothing in § 1610 (or § 1611) authorizes execution against or attachment of a foreign state's property to satisfy a contempt order, so the analysis must stop there. *See, e.g.*, H.R. Rep. No. 94-1487, at 22, *reprinted in* 1976 U.S.C.C.A.N. 6604 ("[A] fine for violation of an injunction may be unenforceable if immunity exists under sections 1609–1610.").

But the Court does not need to take our word for it. The United States Government has made that same argument time and again in appeals before the Second, Fourth, Fifth, and Eleventh Circuits. This Court should hold that the FSIA does not authorize execution against or attachment of [redacted] property to satisfy the Court's contempt fine. And because this Court must apply the

[1] Section 1611 does not contain any other immunity exceptions. That section describes three instances where "[n]otwithstanding the provisions of section 1610," a foreign state's property may be immune.

FSIA (*see Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493 (1983)), there is no other basis for enforcing the contempt order against [redacted]

Alternatively, this Court should stay its contempt order pending the Supreme Court's ruling on [redacted] certiorari petition. [redacted] filed its petition on January 3, 2019. Given the expedited nature of this litigation, there is every reason to believe that the Supreme Court will decide [redacted] petition on an accelerated schedule. Through its petition, [redacted] asks the Supreme Court to resolve a circuit split touching on sensitive issues in American foreign relations and international law. Those circumstances warrant a stay.

## BACKGROUND

This Court is familiar with the facts, so we will provide the short version. On July 11, 2018, the Special Counsel served Grand Jury Subpoena No. 7409 on [redacted] moved to quash the subpoena because [redacted] is immune from criminal process in the United States, American courts lack subject-matter jurisdiction in criminal proceedings against a foreign state, and the subpoena is unreasonable and oppressive under Rule 17(c) because compliance would require [redacted] to violate its own laws. Dkt. 3. This Court denied [redacted] motion on September 19, 2018 and ordered [redacted] to comply with the subpoena by October 1, 2018. Dkt. 19. [redacted] appealed that order, but the D.C. Circuit dismissed the appeal as premature on October 3.

Two days later, this Court entered a Memorandum and Order holding [redacted] in contempt for not complying with the September 19 order and sanctioning [redacted] $50,000 per day until it complied with the subpoena. Dkt. 30 at 7. But the Court also stayed the sanctions' accrual pending [redacted] appeal and ordered that the sanctions "shall not accrue during the pendency of the

appeal, and shall only begin accruing seven (7) business days after the Court of Appeals' issuance of a mandate affirming this Court's order." *Id.*

The parties briefed the appeal on an expedited basis in the D.C. Circuit. On December 18, the Court of Appeals affirmed this Court's September 19 order. Case No. 18-3071, Dkt. 1764819 at 1. Although the D.C. Circuit held that this Court had authority to enter the October 5 sanctions order, it did not decide whether that order was enforceable: "Whether and how that sanction can be executed on remand is a separate question for a later day." *Id.* at 3 (citing *FG Hemisphere Associates, LLC v. Democratic Republic of Congo*, 637 F.3d 373, 377 (D.C. Cir. 2011)). Because the D.C. Circuit issued its mandate at the same time as its judgment, [redacted] immediately moved the D.C. Circuit to recall the mandate and stay its re-issuance pending [redacted] forthcoming petition for certiorari. The D.C. Circuit denied that motion on December 21.

The next day, [redacted] filed an emergency stay application in the Supreme Court. On December 23, Chief Justice John Roberts granted a temporary stay of this Court's Order "holding [redacted] in contempt, including the accrual of monetary penalties" pending "further order of the undersigned or of the Court." Case No. 18A669, December 23, 2018 order. The Special Counsel opposed [redacted] stay request on December 28, and [redacted] replied on January 2. [redacted] filed a petition for certiorari on January 3.

On January 8, the Supreme Court lifted the administrative stay. *See* Case No. 18A669, Order dated January 8, 2019. [redacted] petition for certiorari remains pending.

## ARGUMENT

The FSIA immunizes a foreign state's property from execution or attachment except in limited circumstances. As the FSIA's text confirms and the Executive Branch has consistently argued, a contempt order is not one of those limited circumstances. Even the D.C. Circuit—which

has held that a district court has authority to *enter* a contempt order against a foreign state—has recognized that a contempt order may not be enforceable against a foreign state. *See FG Hemisphere*, 637 F.3d at 375 (recognizing that it would be "problematic" if a court tried to enforce a contempt order against a foreign state). This Court has no authority to enforce its contempt order against [redacted] (a foreign state).

Alternatively, this Court should stay its contempt order until the Supreme Court resolves [redacted] petition for certiorari. The pendency of that petition alone provides good reason for a stay. But other factors also militate in favor of a stay: In its certiorari petition, [redacted] presents the Supreme Court with a circuit split touching on sensitive foreign-policy and international-law issues and asks the Supreme Court to resolve questions that this Court and the D.C. Circuit decided—whether federal courts have criminal subject-matter jurisdiction over foreign states and whether federal courts have authority to enter unenforceable sanctions orders in the first place.

## I. [redacted] PROPERTY IS IMMUNE FROM EXECUTION OR ATTACHMENT.

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

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.'"[2] *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 822 (2018) (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 attachment and execution. But "there is no escaping the fact that [those exceptions] are more narrowly drawn" than the exceptions to jurisdictional

[2] As the Seventh Circuit has explained, "[i]t is . . . of no small moment that the FSIA authorizes execution only against properties 'in the United States.'" *Autotech Techs. LP v. Integral Res. & Dev. Corp.*, 499 F.3d 737, 750 (7th Cir. 2007).

immunity in §§ 1605–1607. *Autotech Techs. LP v. Integral Res. & Dev. Corp.*, 499 F.3d 737, 749 (7th Cir. 2007). The FSIA's exceptions "provide[] the sole, comprehensive scheme for enforcing judgments against foreign sovereigns." *Af-Cap, Inc. v. Republic of Congo*, 462 F.3d 417, 428 (5th Cir. 2006).

None of the FSIA's exceptions authorizes contempt sanctions against a foreign state. Section 1610(a) creates seven exceptions to property immunity, none of which applies: (1) "the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver"; (2) "the property is or was used for the commercial activity upon which the claim is based"; (3)"the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law"; (4) "the execution relates to a judgment establishing rights in property -- (A) which is acquired by succession or gift, or (B) which is immovable and situated in the United States: *Provided*, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission"; (5) "the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment"; (6) "the judgment is based on an order confirming an arbitral award rendered against the foreign state"; or (7) "the judgment relates to a claim for which the foreign state is not immune under section 1605A . . . regardless of whether the property is or was involved with the act upon which the claim is based."

Section 1610(b) sets out three additional exceptions that apply only to the property of foreign agencies or instrumentalities, but none of those exceptions applies either: (1) "the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver"; (2) "the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2), (3), or (5) or 1605(b) of this chapter . . . regardless of whether the property is or was involved in the act upon which the claim is based"; or (3) "the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605A of this chapter . . . regardless of whether the property is or was involved with the act upon which the claim is based." 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). And there is no "claim" in this case—and certainly no claim giving rise to this Court's contempt order. *See generally* Dkt. 30 (contempt order); *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"). As the Executive Branch explained in *FG Hemisphere*, "an order imposing monetary sanctions for contempt of court does not involve a claim based upon commercial activity as required by § 1610(a)(2)." 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).

Tracking the FSIA's plain language, the Fifth Circuit held in *Af-Cap* that the FSIA categorically prohibits contempt sanctions against a foreign state. 462 F.3d at 428. And although

the D.C. Circuit has held that courts have inherent authority to issue sanctions orders against foreign states, it has recognized that those orders may be unenforceable if none of § 1610's exceptions applies. *See FG Hemisphere*, 637 F.3d at 377 ("The FSIA is a rather unusual statute that explicitly contemplates that a court may have jurisdiction over an action against a foreign state and yet be unable to enforce its judgment unless the foreign state holds certain kinds of property subject to execution. Otherwise a plaintiff must rely on the government's diplomatic efforts, or a foreign sovereign's generosity, to satisfy a judgment."); *id.* at 375 (noting that an "attempt to enforce the [contempt] sanction . . . could prove problematic").

The FSIA admits of no ambiguity, but if it did, the FSIA's legislative history confirms that contempt sanctions are not enforceable 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 after Congress enacted the FSIA, 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, Congress moved ever so slightly away from the absolute immunity that most other countries extend to the property of 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 enjoy absolute immunity from enforcement. This Court's contempt order is unenforceable. *See FG Hemisphere*, 637 F.3d at 377 (court cannot enforce its sanctions order if no exception to property immunity applies).

**B. The U.S. Government has argued consistently in other litigation that American courts have no authority to enforce contempt sanctions against foreign states.**

When [redacted] briefed the issue of the contempt fine's enforceability before the D.C. Circuit, the Special Counsel did not try to explain how the $50,000-per-day monetary sanction comes within one of the FSIA's property immunity exceptions. Instead, he argued that "[g]iven the Executive Branch's primacy in foreign policy, courts should not second-guess its judgment as

to the proper role of comity concerns." Opp. 49 (Case No. 18-3071). In arguing for Tate-Letter-style deference to the Executive Branch, the Special Counsel does not represent the Executive's views, for the Executive Branch has argued in other litigation that the FSIA forecloses contempt sanctions against a foreign state.

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 adopted the same intepretatiion of the FSIA 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 a court to enforce 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.*

## II. ALTERNATIVELY, THIS COURT SHOULD STAY THE CONTEMPT ORDER PENDING THE SUPREME COURT'S RULING ON [redacted] PETITION FOR CERTIORARI.

Alternatively, this Court should stay its contempt order pending the Supreme Court's disposition of [redacted] certiorari petition. A stay requires an applicant to prove "(1) that it has a substantial likelihood of success on the merits; (2) that it will suffer irreparable injury if the stay is denied; (3) that issuance of the stay will not cause substantial harm to other parties; and (4) that the public interest will be served by issuance of the stay." *United States v. Philip Morris, Inc.*, 314 F.3d 612, 617 (D.C. Cir. 2003). These factors "must be balanced against each other." *Serono Labs., Inc. v. Shalala*, 158 F.3d 1313, 1318 (D.C. Cir. 1998). All four factors are satisfied.

### 1. [redacted]has a substantial likelihood of success on the merits.

There is a substantial likelihood that the Supreme Court will grant [redacted]petition for writ of certiorari and reverse. This case cries out for Supreme Court review: It involves a circuit

split presenting important and novel questions about foreign sovereign immunity that could have cascading effects in American foreign policy. The D.C. Circuit's judgment and opinion conflict with the FSIA's plain text, the Supreme Court's holdings in numerous cases, other circuits' decisions, and longstanding international law.

This Court and the D.C. Circuit exercised subject-matter jurisdiction under 18 U.S.C. § 3231, a statute outside the FSIA that says nothing about foreign states. But the Supreme Court has repeatedly held that "jurisdiction in actions against foreign states is *comprehensively* treated by [] section 1330" and that "the FSIA provides the *sole basis* for obtaining jurisdiction over a foreign state." *Amerada Hess*, 488 U.S. at 437 n.5 (emphasis added) (quoting H.R. Rep. No. 94-1487, at 14); *id.* at 439 (emphasis added); *see also Republic of Argentina v. NML Capital, Ltd.*, 573 U.S. 134, 141 (2014) ("We have used th[e] term [comprehensively] often and advisedly to describe the Act's sweep."). The word "comprehensively" means comprehensively—*not* "comprehensively, but only in civil matters." *Cf. NML Capital*, 573 U.S. at 141 ("[a]fter the enactment of the FSIA, the Act—and not the pre-existing common law—indisputably governs the determination of whether a foreign state is entitled to sovereign immunity") (internal quotation marks omitted). Many courts (including the D.C. Circuit in cases other than this one) have followed this teaching. *See, e.g.*, *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1178 (D.C. Cir. 1994) ("The FSIA, enacted in 1976, is the sole means of obtaining jurisdiction over a foreign state defendant in federal court."); *Williams 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 overriding purpose of the [FSIA] requires the conclusion that sections 1330 and 1441(d) are jurisdictionally exclusive . . . ."); *see also* H.R. Rep. 94-1487, at 13 ("Section 1330 provides a comprehensive jurisdictional scheme in cases involving foreign states. Such broad jurisdiction in the Federal

courts should be conductive to uniformity in decision, which is desirable since a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences.").

The Supreme Court has also held that statutes of general jurisdiction that do not "distinguish among classes of defendants" and have "the same effect after the passage of the FSIA as before with respect to defendants other than foreign states" can never supply jurisdiction over a foreign state. *Amerada Hess*, 488 U.S. at 438. Much like the Special Counsel in this case, the plaintiffs in *Amerada Hess* tried to invoke the district court's jurisdiction under the Alien Tort Statute (28 U.S.C. § 1350) and the general admiralty statute (28 U.S.C. § 1333) to support their claims against Argentina. *Amerada Hess*, 488 U.S. at 432. The Supreme Court rejected the notion that those or other non-FSIA statutes could supply jurisdiction over a foreign state. *Id.* at 437–38. There is a substantial likelihood that the Supreme Court would apply the same reasoning to this case.

The D.C. Circuit's decision also cements a circuit split. 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.[3] Three courts of appeals (the

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[3] *See Shapiro v. Republic of Bolivia*, 930 F.2d 1013, 1017 (2d Cir. 1991); *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,

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 the Supreme Court's precedents foreclose criminal jurisdiction over a foreign state.[4]

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). This Court's and the D.C. Circuit's decisions conflict with that holding.

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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*, 653 F.2d at 881 ("[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); *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).

[4] *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").

In manufacturing jurisdiction under § 3231, the D.C. Circuit reasoned that "[t]extually speaking, nothing in the [FSIA] purports to strip the district courts of criminal jurisdiction." Case No. 18-3071, Dkt. 1764819 at 2. That reasoning also creates a split with the Second Circuit, which has held that "[a]bsent [] an exception, the immunity conferred by the FSIA strips courts of both subject matter and personal jurisdiction over the foreign state." *Arch Trading Corp. v. Republic of Ecuador*, 839 F.3d 193, 206 (2d Cir. 2016).

And this Court's and the D.C. Circuit's decisions sanctioning [redacted] also conflict with the Fifth Circuit's decision in *Af-Cap*, 462 F.3d 417. In *Af-Cap*, the Fifth Circuit held that the FSIA "describe[s] the available methods of attachment and execution against property of foreign states" and that "[m]onetary sanctions are not included." *Id.* at 428. The D.C. Circuit (in this case and in *FG Hemisphere*) held the opposite.

This Court and the D.C. Circuit also broke with history and international law by denying [redacted] sovereign immunity. Consistent with international law, American courts have always viewed sovereign immunity as an inherent limitation on their jurisdiction. *See, e.g.*, *The Schooner Exchange v. McFaddon*, 11 U.S. 116, 132 (1812) (holding that "a public armed ship in the service of a foreign sovereign" was "exempt from the jurisdiction of the country"); *Samantar*, 560 U.S. at 311 ("The Court's specific holding in *The Schooner Exchange* was that a federal court lacked jurisdiction over 'a national armed vessel . . . of the emperor of France'"); *Rubin*, 138 S. Ct. at 821 ("foreign states enjoyed absolute immunity from all actions in the United States" before 1952); *The Parlement Belge* (1880) L.R. 5 P.D. 197 (same rule in international law); *see also People v. Weiner*, 378 N.Y.S. 2d 966, 974 (N.Y. Crim. Ct. 1976) (foreign sovereigns enjoy "unlimited," "absolute" immunity from criminal proceedings). American courts held that view even when jurisdictional statutes used "general words" that otherwise might suggest jurisdiction. *See Berizzi*

*Bros. Co. v. The Pesaro*, 271 U.S. 562, 576 (1926) (dismissing *in rem* suit against a foreign-owned public ship "for want of jurisdiction" even though the Judicial Code granted district courts jurisdiction over "all civil causes of admiralty and maritime jurisdiction").[5]

When Congress enacted the FSIA, it codified that longstanding rule. *See Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1319 (2017). Indeed, the Special Counsel has yet to point us to a single pre-FSIA case in which a federal court invoked 18 U.S.C. § 3231 to exercise subject-matter jurisdiction over a foreign state. No American law has ever provided subject-matter jurisdiction over foreign states in criminal matters. But even assuming against history that § 3231 provided jurisdiction over foreign states at one time, the

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

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

statute "should no longer be read" as providing an independent basis for subject matter jurisdiction in light of the FSIA. *Mobil Cerro Negro*, 863 F.3d at 113–14.

There is a substantial likelihood that the Supreme Court will grant [redacted] petition for writ of certiorari and reverse for those reasons.

**2. Absent a stay, [redacted] will suffer irreparable harm.**

[redacted] will suffer irreparable harm if this Court does not stay its contempt order. This Court, the D.C. Circuit, and the Special Counsel have acknowledged that [redacted] is a foreign state under the FSIA. Operating under the specter of an ever-increasing contempt sanction while [redacted] attempts to vindicate its rights before the Supreme Court would deal a blow to [redacted] sovereignty that cannot be undone. Indeed, as courts around the country have explained, any "burden[] of litigation" inflicts irreparable harm on a foreign sovereign if it turns out that the sovereign is immune from jurisdiction or enforcement. *See, e.g.*, *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 443 (D.C. Cir. 1990) (internal quotation marks omitted) ("sovereign immunity is an immunity from trial and the attendant burdens of litigation, and not just a defense to liability on the merits"); *In re Papandreou*, 139 F.3d 247, 251 (D.C. Cir. 1998) ("The infliction of [the burdens of litigation on a foreign sovereign] may compromise it just as clearly as would an ultimate determination of liability."); *United States v. Moats*, 961 F.2d 1198, 1203 (5th Cir. 1992) ("the risk of harm from having to defend the lawsuit" is an "irreparable loss"); *see also Kiowa Indian Tribe of Okla. v. Hoover*, 150 F.3d 1163, 1172 (10th Cir. 1990) ("The Tribe's full enjoyment of its sovereign immunity is irrevocably lost once the Tribe is compelled to endure the burdens of litigation.").

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

**3. A stay will not harm the Special Counsel.**

A stay will not harm the Special Counsel. The accrual or non-accrual of an unenforceable contempt sanction is unrelated to the Special Counsel's interest in the subpoenaed documents.

Additionally, [redacted] has acted with all haste to vindicate its rights: It agreed to an expedited briefing schedule with the Court of Appeals, moved the D.C. Circuit to recall the mandate just two days after the mandate issued, applied for an emergency stay with the Supreme Court *one day* after the D.C. Circuit denied [redacted] motion to recall the mandate, and filed its petition for certiorari 74 days before the deadline. This Court should not credit any timing concerns at the expense o[redacted] instrumentality's sovereign immunity.

**4. A stay will serve the public interest.**

The Supreme Court will very likely grant certiorari because the case involves delicate issues of foreign relations and international comity that the D.C. Circuit's decision (if left to stand) would throw into disarray. *See* Supreme Ct. R. 10(c) (reason for certiorari is if the "United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court."). Time and again, the Supreme Court has explained that foreign sovereign immunity is a sensitive issue that affects both American foreign policy and the immunity that the United States and its agencies receive abroad. *See, e.g.*, *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 493–94 (1983) (Congress enacted the FSIA in light of the "sensitive issues concerning the foreign relations of the United States"); *see also The Schooner Exchange*, 11 U.S. at 135 (questions of foreign sovereign immunity are "very delicate and important inquir[ies]").

The D.C. Circuit's decision implicates those issues many times over. For starters, the judgment conflicts with international law, which Congress codified for the most part in enacting the FSIA. *See Bolivarian Republic*, 137 S. Ct. at 1319 ("The [FSIA] for the most part embodies

basic principles of international law long followed both in the United States and elsewhere."); H.R. Rep. 94-1487, at 14 (FSIA "incorporates standards recognized under international law"). Absolute immunity from criminal process is the rule in international law. Most countries have adopted a restrictive approach to sovereign immunity in the civil context but withheld criminal jurisdiction over foreign states. *See, e.g.*, Foreign States Immunities Act 87 of 1981 § 2 (South Africa) ("The provisions of this Act shall not be construed as subjecting any foreign state to the criminal jurisdiction of the courts of the Republic."); State Immunity Act, R.S.C. 1985, c. S-18 (Canada) (no criminal jurisdiction over foreign states); The State Immunity Ordinance (Ordinance No. 6/ 1981) (Pakistan) (same); State Immunity Act, ch. 313 (1979) (Singapore) (same); State Immunity Act 1978, c. 33, § 16, sch. 5 (U.K.) (same). In codifying international law on that score, Congress recognized that American courts' exercising criminal jurisdiction over foreign states would "infringe[] international law's requirements of equality and non-intervention." Hazel Fox & Philippa Webb, *The Law of State Immunity* 91–92 (3d ed. 2013).

There is more. A contempt order against a foreign state upsets notions of international comity—which rest in part on 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"). The D.C. Circuit's decision will pave the way for foreign states' enmeshing American agencies in the criminal process abroad and will expose the United States to other retaliation by foreign states—including both allies and foes. [redacted] Given how this litigation has played out, no one should be surprised

when foreign states try to embroil the Department of Defense, the Department of State, or the National Security Administration in criminal proceedings abroad. Congress enacted the FSIA in part to avoid that outcome.

## CONCLUSION

This Court should hold that [redacted] property is absolutely immune from execution or attachment and that the Court cannot enforce its contempt order. Alternatively, this Court should stay its contempt order until the Supreme Court decides [redacted] petition for certiorari.

Respectfully submitted on January 9, 2019.

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FILED UNDER SEAL

**CERTIFICATE OF SERVICE**

I certify that today I served this **Combined Motion for a Declaration and Motion for a Stay** by email on the following:

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EXHIBIT A
FILED UNDER SEAL

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?

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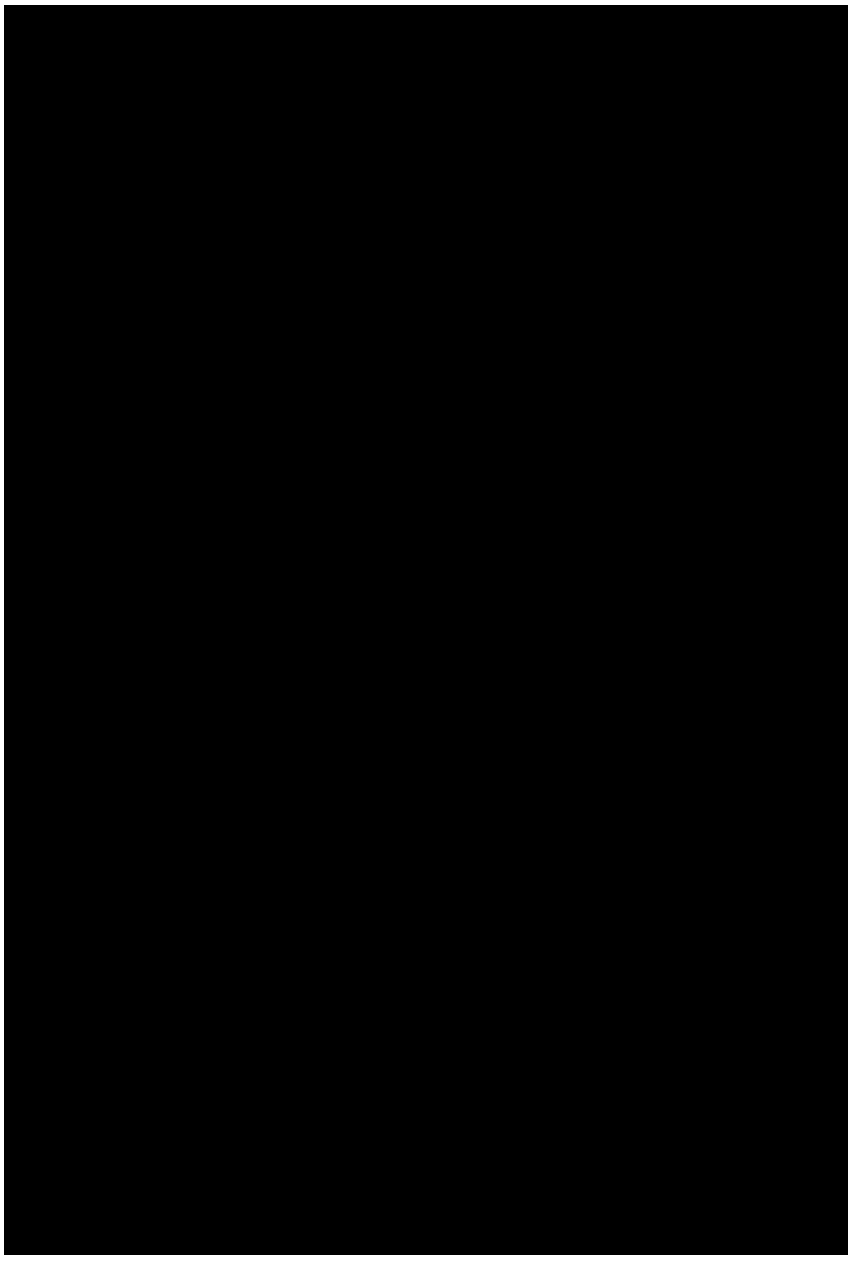

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# Supreme Court of The United States

*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

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—

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[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

[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"

[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

[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/4831767ed5db484ead5 74a402a 5e7a85 (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

*Attorneys for Petitioner*

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

1. This document complies with the form and content requirements of Supreme Court Rule 12 because the original and 40 copies of the petition have been filed with the Clerk.

2. This document complies with the form and content requirements of Supreme Court Rule 33.1 because a redacted copy has been prepared in 6.125- by 9.25-inch paper and is typeset in Century Schoolbook 12-point font with 2-point or more leading between lines.

3. This document complies with the form and content requirements of Supreme Court Rule 33.1(d) because, excluding the parts of the document exempted by Supreme Court Rule 33.1(d), the document contains 8,990 words.

Respectfully submitted on January 3, 2019.

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

| | |
|---|---|
| IN RE GRAND JURY SUBPOENA NO. 7409 | Case No. 18-gj-0041<br><br>**UNDER SEAL**<br>UNDER LCrR 6.1 |

**[PROPOSED] ORDER**

[redacted] filed a Combined Motion for a Declaration that this Court's October 5, 2018 Order Is Unenforceable and that [redacted] Property is Immune from Execution or Attachment and Motion for a Stay of the Contempt Fine's Accrual Pending the Supreme Court's Disposition of [redacted] Petition for Certiorari. Having considered all of the papers filed in connection with the Motion, the Court issues the following Order:

IT IS HEREBY ORDERED that [redacted] Motion for a Declaration that this Court's October 5, 2018 Order Is Unenforceable and that [redacted] Property is Immune from Execution or Attachment is GRANTED. This Court's October 5, 2018 order is unenforceable, and [redacted] property in the United States is absolutely immune from execution or attachment in satisfaction of the contempt fine in this Court's October 5, 2018 order.

[IN THE ALTERNATIVE] IT IS HEREBY ORDERED that [redacted] Motion for a Stay of the Contempt Fine's Accrual Pending the Supreme Court's Disposition of [redacted] Petition for Certiorari is GRANTED. The contempt fine will not begin accruing until after the Supreme Court denies [redacted] petition for certiorari or, if the Supreme Court grants the petition, after the Supreme Court denies [redacted] relief on the merits.

Dated: January __, 2019.

BERYL A. HOWELL
Chief Judge

# ECF No. 51

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**



| | |
|---|---|
| IN RE GRAND JURY SUBPOENA NO. 7409 | Case No. 18-gj-0041<br>**UNDER SEAL**<br>UNDER LCrR 6.1 |

[redacted] **STATUS REPORT**

In accordance with this Court's January 10, 2019 minute entry, [redacted] and the Special Counsel conferred about the proposed briefing schedule for [redacted] pending motion for a declaration, when the contempt fine starts accruing, and the proposed order related to Alston & Bird's request for permission to issue a press release. After it became clear that the parties disagreed on those issues, the Special Counsel suggested that the parties file separate reports.

[redacted] has included below its position on the briefing schedule and the contempt fine's accrual. [redacted] proposed order is attached as a separate document.

1. **Briefing schedule for [redacted] pending motion to declare the contempt order unenforceable.**

[redacted] proposes that the Special Counsel must respond to [redacted] pending motion for a declaration within five days of that motion's filing (January 14, 2019) and that [redacted] must file any reply two days later (January 16, 2019). In every other instance, the Special Counsel has requested hyper-accelerated briefing schedules. Now that the Special Counsel believes that the contempt fines are accruing, it wants to slow down the briefing schedule on [redacted] pending motion. That is manifestly unfair to [redacted] which has argued—in line with the Foreign Sovereign Immunities Act's text and the Executive Branch's consistent position in all other

cases—that this Court's contempt fine is unenforceable.[1] It is also unfair because the Special Counsel is asking for an extended briefing schedule while also asking this Court to escalate the contempt sanctions. [redacted] has conveyed to the Special Counsel that it would be amenable to an extended briefing schedule if the Special Counsel agreed not to try to enforce the contempt fine in the interim, but the Special Counsel refused.

Besides that, the Special Counsel ostensibly consulted with relevant Department of Justice officials about the enforceability issues before the Special Counsel filed its D.C. Circuit brief, so [redacted] sees little reason why the Special Counsel needs additional time to respond—additional time that [redacted] has never gotten.

**2. Timeline for the contempt fine.**

As the Court knows, [redacted] remains committed to its arguments that it is immune from American criminal jurisdiction, that American courts do not have subject-matter jurisdiction over the pending criminal proceedings involving [redacted], and that American courts do not have authority to enforce any contempt sanction against [redacted]. With that said, [redacted] has reanalyzed the relevant orders and calculates that the $50,000-per-day fine will begin accruing on January 14, 2019:

- The contempt order says that the fine will "begin accruing seven (7) business days after the Court of Appeals' issuance of a mandate affirming this Court's order."
- The Court of Appeals issued its mandate on December 18.
- On December 23, 2018, Chief Justice Roberts stayed this Court's "order holding [redacted] in contempt, including the accrual of monetary penalties," until further order from the Chief Justice or the Supreme Court. When the Chief Justice stayed the contempt order on December 23, three business days had passed since the D.C. Circuit issued its mandate.

[1] If this Court holds that its contempt order is enforceable, then [redacted] will appeal that order immediately.

- On January 8, 2019, the Supreme Court lifted the stay, so four business days must pass before the contemplated fine begins accruing. January 14 is the fourth business day after January 8.

Dated: January 11, 2019.

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**CERTIFICATE OF SERVICE**

I certify that today I served this **Status Report** by email on the following:

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

Respectfully submitted on January 11, 2019.

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*Counsel for* [redacted]

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

| | |
|---|---|
| IN RE GRAND JURY SUBPOENA NO. 7409 | Case No. 18-gj-0041<br><br>**UNDER SEAL**<br>UNDER LCrR 6.1 |

**[PROPOSED] ORDER**

On January 10, 2019, the Court held a sealed status conference in the above-captioned matter. During that hearing, counsel for Alston & Bird LLP asked for the Court's permission to issue the following statement to the press to correct the misleading suggestions in media coverage about the firm and its attorneys relating to this matter and to end the ensuing reputational damage to the firm and harassment of the firm's attorneys: [redacted]

Having heard oral argument on the matter, the request is DENIED. Neither party's counsel is authorized to make any statement to the press other than "No Comment."

SO ORDERED.

Dated: January __, 2019.

BERYL A. HOWELL
Chief Judge

# ECF No. 52

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| IN RE: | ) | GJ 18-41 |
| Grand Jury Subpoena 7049 | ) | |
| | ) | |
| Interested Parties, [redacted] | ) | January 10, 2019 |
| | ) | 9:31 a.m. |
| UNITED STATES OF AMERICA. | ) | Washington, D.C. |
| | ) | |

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*** SEALED ***

**TRANSCRIPT OF MOTION HEARING**
**BEFORE THE HONORABLE BERYL A. HOWELL,**
**UNITED STATES DISTRICT COURT CHIEF JUDGE**

**APPEARANCES:**

**FOR THE MOVANT:**

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**FOR THE GOVERNMENT:**

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Court Reporter:

Elizabeth Saint-Loth, RPR, FCRR
Official Court Reporter
Washington, D.C. 20001

Proceedings reported by machine shorthand, transcript produced by computer-aided transcription.

* * * * * SEALED * * * * *

* * * * * *S E A L E D* * * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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|---|---|---|
| IN RE: | ) | GJ 18-41 |
| Grand Jury Subpoena 7049 | ) | |
| | ) | |
| Interested Parties, | ) | January 10, 2019 |
| [redacted] | ) | 9:31 a.m. |
| UNITED STATES OF AMERICA. | ) | Washington, D.C. |
| | ) | |

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**** SEALED ****

**TRANSCRIPT OF MOTION HEARING**
**BEFORE THE HONORABLE BERYL A. HOWELL,**
**UNITED STATES DISTRICT COURT CHIEF JUDGE**

**APPEARANCES:**

**FOR THE MOVANT:**

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Court Reporter:

Elizabeth Saint-Loth, RPR, FCRR
Official Court Reporter
Washington, D.C. 20001

Proceedings reported by machine shorthand, transcript produced by computer-aided transcription.

PROCEEDINGS

THE DEPUTY: Matter before the Court, grand jury matter 18-41, in regards to Grand Jury Subpoena No. 7049; interested parties: [redacted] and the United States of America.

Counsel, please come forward and identify yourselves for the record.

MS. AHMAD: Good morning, Your Honor. Zainab Ahmad, Michael Dreeben, Adam Jed, and Scott Meisler for the United States.

THE COURT: Good morning.

MR. BOONE: Good morning, Your Honor. Brian Boone, Adam Biegel, and Ted Kang for [redacted]

THE COURT: Okay. Good morning to you all.

I was hoping I wasn't going to see you all on this case at least again; but surprise, surprise. Here you are, again.

All right. So why don't you -- this was a status conference that was requested by the special counsel's office. So why don't I hear first from you about what you want to cover this morning.

I mean, I think obviously -- I mean, you may have known before I did that there was going to be a motion coming, so we should set up a briefing schedule for the motion that's been filed by [redacted] But what other items

do you have on your agenda this morning?

MS. AHMAD: Your Honor, we have two.

The first relates, of course, to the contempt sanction we wanted to appeal before Your Honor; give you our position on the date that the sanctions began to accrue, and talk about possibly setting a schedule for escalation of the sanctions.

THE COURT: Escalation over the $50,000 a day?

MS. AHMAD: Potentially.

THE COURT: My recollection is you all asked for something much smaller than that.

MS. AHMAD: We wouldn't ask for any escalation now. But in the event that [redacted] did not comply in a certain period of time, we would ask that the schedule be raised.

THE COURT: On the theory that, if the $50,000 isn't working to compel, we need to raise the stakes?

MS. AHMAD: Exactly that.

THE COURT: I got it.

MS. AHMAD: Also, we did not know that [redacted] was planning to file a motion. And we do have --

THE COURT: I just thought you were prescient. Let's all meet together and go over the briefing schedule.

MS. AHMAD: But we have a response to that for Your Honor. Just to quickly summarize it, we believe it

should be held in abeyance because it's not yet ripe since there has been no judgment of enforcement.

That all being said, late last night [redacted] raised -- I should say, starting yesterday afternoon, CNN identified Alston & Bird as the law firm that likely represented the subpoena recipient in this matter.

THE COURT: I saw that.

MS. AHMAD: Yes. And yesterday evening [redacted] raised with us a desire to issue a public statement in response to that article. We have significant concerns that [redacted] proposed statement violates local Rule 57.7 of the court's rules and would substantially prejudice the investigation.

We told [redacted] -- we asked [redacted] to hold off on making that statement so we could raise that issue with Your Honor today. And my understanding is that Mr. Biegel is here to represent the firm in connection with that matter and that [redacted] would like to proceed on that issue first.

THE COURT: Okay.

MS. AHMAD: So, if Your Honor is amenable, I will start by saying that the CNN article, as you may well know, identified the law firm as likely having represented the subpoena recipient based on a few different factors; one was that opposing counsel, after one of the hearings in this case, told a CNN reporter that he was from Alston & Bird and

represented "a country"; this is according to the article.

The other piece of information they used to support their claim was that opposing counsel's -- the biography of one of opposing counsel on -- the website biography of one of opposing counsel states that he represents numerous entities and individuals in connection with Special Counsel Mueller's investigation.

CNN may also have other sources for that information, but they don't specifically identify them.

The article does not set forth the position on who opposing counsel likely represents in this matter but, instead, goes through some historical representations that might bear light on that question. For example --

THE COURT: Well, what more public statement has to be made than what's already on the firm's website or in one of the biography pages for one of the lawyers that the lawyers representing somebody in connection with the special counsel's office?

MS. AHMAD: I don't think anything more.

It's the opposing side who is proposing making an additional statement. And what they wish to make -- what they wish to say is: [redacted]

[redacted]

One thing I want to add is that --

THE COURT: Just one second -- because I don't have a copy of my local rules here --

MS. AHMAD: I do, Your Honor. I can hand it up to you.

THE COURT: I didn't know you were going to be bringing this up, and I don't know where my local rule is.

(Whereupon, the Court confers with staff.)

THE COURT: I'm sorry for the interruption.

MS. AHMAD: Your Honor, I have a copy of both -- two copies of the local rule that I'm citing, as well as the

CNN article.

So, specifically, we would direct your attention to Rule 57.7(b)(2) which prohibits, with respect to a grand jury, any lawyer associated with or participating in the investigation from making extrajudicial statements that are likely to be disseminated by public communication that either go beyond the public record or do not serve the interest of the grand jury, just to summarize the exceptions listed thereafter.

I would note that --

THE COURT: It's amazing things we have buried in our local rules; they're so helpful.

MS. AHMAD: One thing I would note here is that my understanding is that Alston & Bird is representing themselves for purposes of this proceeding, which isn't to say that they are not here representing [redacted] because, at least in our discussions, it is the reputational interest of Alston & Bird that the firm has raised to us as the reason they need to make this statement. [redacted] as Your Honor knows --

THE COURT: It gets so much attention with the mystery, so I don't know why you would want to resolve that mystery anymore than you already have on the bio of the lawyer involved at Alston & Bird.

MS. AHMAD: Right.

* * * * * SEALED * * * * *

[redacted] as Your Honor knows, has, at every stage of this litigation, protested very loudly about the harm to its sovereign dignity from being associated with any criminal proceeding and from being held in contempt. So I would imagine that [redacted] may well share an interest in not being identified as the subpoena recipient with the United States.

But our position is that -- and for reasons we can expand upon ex parte, if Your Honor would like or brief if Your Honor would like, is that by -- this proposed statement will harm the investigation by, firstly, implicitly confirming that Alston & Bird represents the subpoena recipient here because for them to respond to an article saying they represent the subpoena recipient, [redacted] -- [redacted]

THE COURT: Okay. Let's move on from this fairly quickly. Let me hear from Alston & Bird.

MR. BIEGEL: Thank you. Good morning, Your Honor.

My name is Adam Biegel. I am general counsel and loss prevention partner for the Washington, D.C. office of Alston & Bird. I have not appeared in this case so far, so I'd request a verbal notice of appearance --

* * * * * SEALED * * * * *

THE COURT: Nice to meet you.

MR. BIEGEL: Nice to meet you, too -- and I appreciate you hearing us on this issue. Our firm's --

THE COURT: Just because you are getting a lot of pressure from the press -- and they're very aggressive -- doesn't mean you have to respond. Just get a backbone and be strong.

MR. BIEGEL: No. That's absolutely correct. I think that's part of being a lawyer and part of being a large law firm, that your name is thrown around in many ways, shapes, and forms.

I think there are a couple of issues that I want to bring to the Court's attention because I don't think this is simply about media attention or simply about a fact buried in some of the press reports.

The concern is not only the reputational interest that was referenced, there is also a physical safety issue.

Frankly, to explain to the Court what has actually occurred since these articles were written yesterday, members of our law firm have received voice mails and emails of a very disturbing nature, some involving threats about -- comments about being traders and wishing physical harm, and then saying a variety of things that I would prefer not to repeat in open court, but we're happy to provide written summaries of and text, whether it's social media or

otherwise --

THE COURT: I am a federal judge in Washington, D.C. You think I haven't heard any of these things or --

MR. BIEGEL: You may have heard some of these things.

THE COURT: -- everything that you have seen?

MR. BIEGEL: And so the concern -- I mean, it has troubled our firm significantly enough so that certain members of attorneys' families who have appeared in this case feared for their safety, we took additional security precautions at our various nine offices around the United States. So I think this was something very different, frankly, than just your name being thrown around in the press. And I think the impetus for it, frankly, was -- contrary to what the special counsel has said --

THE COURT: Why is it that you think that making a public statement that [redacted] -- you know, make people who are calling you all traders and agitated by your representation of some foreign entity, [redacted] is going to make that any better?

MR. BIEGEL: Quite frankly --

THE COURT: [redacted]

[redacted]

MR. BIEGEL: Frankly, I think that certainly is a concern for the public relations professionals. But I think it is something unique [redacted] because contrary to what the special counsel asserted, that -- you know, [redacted] So our firm simply -- and I think that also led directly to the volume, tenor, and seriousness of the threats mentioning foreign leaders by name, [redacted] I don't think the level of seriousness and threats we'd receive would be the same or we would be before the Court to ask this.

It is simply trying to make a factual statement that we believe is actually consistent with and provided for in the local criminal rules, as well as our First Amendment rights as a firm and our partners to exercise. And we think, essentially, what the special counsel is asking for is a blanket gag order from us making a truthful statement that can help protect the lives, safety, and reputation of our firm and their family members.

THE COURT: Okay. Number one, this is not a gag

order.

Number two, this barring counsel involved in grand jury investigations from talking about what they're doing and how they're doing it and who they're representing and refraining from talking about their work is in order to enforce Federal Rule of Criminal Procedure 6(e). And that's the reason for our local rule. So --

MR. BIEGEL: Correct. And we have full respect for rule.

THE COURT: -- I really don't want you to sort of go down this line of a gag order.

[redacted]

MR. BIEGEL: With all due respect --

THE COURT: I think it's a little shortsighted on

your part.

MR. BIEGEL: -- our firm has represented and -- as a matter of public record, we have made foreign agent registration statements. We have represented for years other foreign countries and understood the press coverage that comes with that.

All we are asking for here is, in this unique circumstance, to be able to make a factual and truthful statement [redacted] without touching on the grand jury secrecy, without touching on the client at issue, and respecting the identity of Country A to use our -- to exercise our rights, which we believe are consistent with the First Amendment and the local rule, to make a limited statement.

The rule that was cited by the special counsel, frankly, allows far more to be said in your typical even grand jury proceeding by counsel. And it's within the discretion of the Court, in part C of that rule, to make other orders that are fair and just given the circumstances.

I do not see us back here, you know, wanting to have you be an approver of press releases. We believe this is -- I think given the focus of the special counsel's investigation -- a unique aspect of it; and we'd simply request the right to protect our rights, as well as the physical safety of our law firm.

THE COURT: You certainly have the rights to protect the physical safety of your law firm and all of the employees who work there. My sympathy is extended to everybody who has been subjected to these kinds of phone calls.

I am well aware of the difficulties that that causes for families. I am well aware of the difficulties it causes for all of the employees of the firm. I know you don't have U.S. Marshals Service and deputy marshals and court security officers as the courthouse does; but the less said about this, the better.

And it's unfortunate that Alston & Bird was identified, unfortunate that there are web bios for attorneys at the firm that highlight and confirm the participation of the firm in some aspect of the special counsel's investigation which has now been tied to this subpoena issue. But for protection of this grand jury investigation your request is denied. "No comment" is what I would recommend you do.

MR. BIEGEL: May I ask for clarification from the Court since this -- we did attempt to resolve this with the special counsel collegiately, trying to seek a limited statement that would respect their investigational interests as well as the interests of us as a law firm.

Is the direction of the Court -- is it that its

interpretation of the local rule that there may not be any statement in any regard concerning anything related to this case, which I would submit is overbroad and essentially, functionally, a gag order that -- I just want clarification from the Court about how -- because we came here trying to -- before issuing anything, trying to first work with them collegiately and, also, do this with the involvement of the Court so there was no misunderstanding of the ramifications of what was proposed.

THE COURT: I see. So your suggested words to them that you couldn't get their consent to, you want to know if you can keep working on trying to get some set of words to respond to the press --

MR. BIEGEL: We are not -- we did not believe we needed --

THE COURT: -- that you couldn't elicit special counsel's consent to so that you can keep coming back to me?

No. You may not talk about the nature of your representation of the entity in this case with any further identification of what they are or are not.

MR. BIEGEL: Okay. May we request a written order on that so we can review further and then evaluate further options as well?

THE COURT: You can submit a proposed order, otherwise you can rest on my oral statement. What is public

now is what the D.C. Circuit has said, and that's it.

You are representing [redacted] that's referred to -- or foreign corporation that's referred to in that opinion, with no more information about the nature of [redacted], period.

MR. BIEGEL: All right. Thank you, Your Honor.

THE COURT: All right. Next issue, which is a scheduling order on [redacted] pending motion seeking declaration of the -- that the contempt order is not enforceable and a stay pending resolution of the petition before the Supreme Court. So have you all talked about that, or have you been focused on the words of a public comment?

MS. AHMAD: We have not talked about that, Your Honor. And our position with respect to scheduling of briefing on the motion for a declaration that the order is unenforceable is that it is premature at this stage because there is no order seeking enforcement.

We are merely in the position of having a contempt order that has been imposed but has only very recently taken effect because of all of the appellate litigation. And I think we need to -- D.C. Circuit has approved that contempt order and actually said, in their opinion, that enforcement was a question for another day and separate from the

propriety of the contempt order.

So our proposal would be that we allow the contempt order to remain in place for, hopefully, a sufficient amount of time --

THE COURT: I view this as two separate issues.

They have asked for a declaration that the October 5 order is not enforceable. And they have also asked for a stay of the contempt order pending the Supreme Court's resolution of the pending petition. So you are mixing the two.

We need to have a briefing schedule on the motion for -- for a motion -- on both, actually, even though I -- I am not going to issue a stay today. By my count, the $50,000 starts becoming due on the 15th which is next Tuesday.

MS. AHMAD: Your Honor, I think our -- is that because Your Honor is considering the mandate returned on the date that the Supreme Court lifted the stay?

THE COURT: Yes.

MS. AHMAD: Okay.

THE COURT: Because, by my count, there were -- as I have done my little chart -- the mandate from the D.C. Circuit issued on December 18th; so the 19th, 20th, and 21st were business days for which there is no stay.

The Supreme Court issued -- then issued a stay

through the 8th. So then you start counting the other seven business days from the 9th, 10th, and 11th, and then a business day is Monday the 14th. And then you get the money due, unless the records are turned over, on the 15th. That's how I have counted.

How have you counted?

MS. AHMAD: Your Honor, we are happy to accept your calculation.

We counted that the mandate returned on the 18th. And there are -- seven business days from that date was December 28th. Sanctions did not, however, begin accruing then because, as of the 22nd, the Supreme Court had stayed the accrual of sanctions, but the mandate had returned. So our counting began with lifting of the stay --

THE COURT: So you count the Supreme Court stay as --

MS. AHMAD: We don't believe it interferes with the return of the mandate. We do believe it prevents accrual of the sanctions during its pendency.

THE COURT: Yes. Okay. So accrual -- explain your reasoning.

When -- so the bottom line for [redacted] -- and I think the answer you want to get is: When do the fines start accruing, correct?

MS. AHMAD: Yes.

THE COURT: And by your calculation, when did the fine start accruing?

MS. AHMAD: Yesterday because, by our calculation the -- this Court's order said that sanctions would begin accruing seven days from the issuance of the mandate; that was the 28th.

The Supreme Court's stay did not stay the issuance of the mandate; it stayed only the accrual of sanctions.

So although the mandate was returned then, therefore, the conditions set forth in Your Honor's order was met. Sanctions did not in fact begin accruing on the 28th because the Supreme Court's stay was in place.

Supreme Court's stay was lifted two days ago, on the 7th. That not being a full business day, we don't think it's fair to count it because [redacted] didn't have a full day in order to comply with the subpoena, which is why we would suggest that yesterday, the 8th, is the first day that sanctions began accruing.

THE COURT: I see. That's interesting. That wasn't what -- how I was counting it; but that's interesting. Okay.

MS. AHMAD: So our position -- to answer Your Honor's question regarding a briefing schedule -- and I fear that I am not being clear.

With respect to their request for a stay, we

believe that the Supreme Court has already denied that request, and this is redundant. And we're happy to brief that according to whatever schedule Your Honor sets.

With respect to the motion to declare the judgment order unenforceable, we believe there has not been a judgment order and so they are effectively, through that motion, asking for declaratory relief to which they are not entitled. So we don't think that that motion is ripe for briefing at this stage.

THE COURT: So you don't think that the enforceability part of their motion becomes ripe until they accrue -- they start accruing all of the fines, and then you go off and try and seize assets somewhere?

MS. AHMAD: That's exactly correct.

THE COURT: And then try and enforce the contempt order?

MS. AHMAD: That is exactly correct.

That's the distinction the D.C. Circuit made in FG Hemisphere and one that they also made in this case where they say, citing FG Hemisphere, their ruling on the propriety of the contempt sanction, and enforcement is a question for another day. We do not believe that other day has yet arrived.

THE COURT: Okay. Well -- so what are you asking me to do here today, Ms. Ahmad?

MS. AHMAD: We wanted to get Your Honor's approval for our reading of the date of the accrual of the sanctions so that there was clarity for [redacted]

THE COURT: Well, clearly, I have been looking at it differently, so I am going to want to think this through. I want to hear from [redacted] in terms of how they have been viewing the accrual.

Do you all disagree with the special counsel or not?

MR. BOONE: Candidly, Your Honor, we would have counted it the same way as special counsel.

THE COURT: You counted it the same way as special counsel. Wow. So I was just going to --

MR. BOONE: As much as I hate to admit that --

THE COURT: No, that's fine. Then I was being too literally focused on when -- on the fine aspect of this.

Okay. So by that count, then if both sides concur that the fine started accruing on January 8th, then they're up to -- as of today, up to already $150,000.

MS. AHMAD: No. January 8th was just yesterday, Your Honor.

THE COURT: January 8th.

MR. BOONE: Yesterday was January 9th.

MS. AHMAD: I'm sorry.

THE COURT: January 9th. So as of today -- as of

today it would be $150,000. Yes?

MS. AHMAD: Yes.

MR. BOONE: Your Honor, we were counting as of yesterday, not as of January the 8th. So maybe they're accruing --

MS. AHMAD: I think I'm getting confused on the date. We believe it started accruing the day after the Supreme Court lifted the stay.

THE COURT: Okay. This is what you all are going to do: You are going to jointly submit your analysis of the dates of the accrual, when the fine started accruing and -- but one of the things that surprised me about getting the briefing yesterday is I had understood -- and I haven't gone back to look at the transcripts or the papers. But I had understood that [redacted] had said they were going to be willing to comply with the subpoenas once the D.C. Circuit -- the appellate process had been -- if the D.C. Circuit agreed with the contempt order.

Was that incorrect?

MR. BOONE: That is incorrect, Your Honor.

Our argument was and is, and will remain, that this Court, and every American court, lack subject matter jurisdiction over [redacted] in this criminal proceeding. We recognize that the D.C. Circuit and this Court have held otherwise, but we continue to press those arguments in our

Cert Petition before the Supreme Court.

THE COURT: All right. So how are we going to proceed?

MS. AHMAD: We will submit our joint submission regarding the date that accrual began, and the amount that has been accrued to date.

What the Government proposes and would seek from Your Honor is that the $50,000 daily fine remain in place for a week. And if, at the end that week, [redacted] has not in fact complied, that it double to a $100,000 daily fine for another week. And if, at the end of that week, [redacted] has not complied, then it triple to a $300,000 daily fine for another week. And if, at the end of that week, [redacted] has not complied, we would seek a status conference again to appear before Your Honor; and the Government would have to consider its options at that point, whether further escalation or criminal contempt, or something else along those lines.

THE COURT: Okay. All right.

MS. AHMAD: That's all from us, Your Honor.

Thank you.

THE COURT: And you will submit that in some kind of written motion.

MS. AHMAD: We will, Your Honor.

MR. BOONE: And just two brief points.

So $50,000 a day is already too much for a foreign state, it offends my client's sovereign dignity; really no way for America to treat [redacted] honestly.

Secondly, our motion is ripe. Our point is that this Court can never enter an order of enforcement bearing to its October 5th order. So the FSIA does not provide this Court with any authority at all, full stop, to ever enter a sanction order against our client.

THE COURT: Okay. All right. So both of you are going to be submitting, jointly, your analysis of when the fine starts accruing.

I would like the Government to respond to the pending motion. How much time do you need?

MS. AHMAD: Just a moment, Your Honor.

(Whereupon, Government counsel confer.)

THE COURT: If I can just clarify, if you could -- you just need to respond to the portion of the motion that's asking for a declaratory judgment about the lack of enforceability.

The portion of your motion that's asking for a stay of the contempt order pending the Supreme Court's resolution of the Cert Petition -- unless you want to say something more, I am prepared to deny that aspect of it.

MR. BOONE: Okay.

THE COURT: So the only part of the pending motion

that you would need to respond to is the first part.

MS. AHMAD: Your Honor, we need to consult with some other Department of Justice components who we'll be working with regarding our response. So would it be possible for us to submit a proposed date to Your Honor later today?

THE COURT: Yes. Just confer with the other side, and that can be part of your joint submission.

MS. AHMAD: Thank you.

MR. BOONE: Just one other clarification, Your Honor.

Will you be issuing a written order denying our stay? Was this your ruling?

THE COURT: Yes. I can do that.

MR. BOONE: Thank you, again.

THE COURT: All right. Let me just ask [redacted]

You know, if, after all of this litigation, does [redacted]-- how long is it going to take [redacted] to pull together these documents and produce them?

MR. BOONE: I think we would have to confer with our client to give you a definitive answer. I am not sure that we're prepared to answer that fully today. That's the best I can do, I think.

THE COURT: So, in order to get that consultation, put a little fire under that consultation, the -- it makes

me more sympathetic to the Government's proposal that the $50,000-a-day fine be increased after a week.

MR. BOONE: Well, with respect --

THE COURT: Do you appreciate that?

MR. BOONE: I guess maybe I appreciate it.

Again, we're talking about a foreign state. Everybody agrees that this qualifies as -- our client qualifies as a foreign state under the FSIA, so there are inherent sovereign dignity interests that are being offended every single day that a contempt order stays in place.

Our argument about jurisdiction -- about immunity is not merely academic, we believe it. We will continue to press it until we can't press it anymore. And so I hope you appreciate that as well, Your Honor.

THE COURT: No. I have from the outset.

MR. BOONE: Thank you.

THE COURT: All right. Anything further today?

MS. AHMAD: No, Your Honor.

THE COURT: Okay. You are all excused.

THE DEPUTY: All rise. This Honorable Court is adjourned.

(Whereupon, the proceeding concludes, 10:06 a.m.)

* * * * *

**CERTIFICATE**

I, ELIZABETH SAINT-LOTH, RPR, FCRR, do hereby certify that the foregoing constitutes a true and accurate transcript of my stenographic notes, and is a full, true, and complete transcript of the proceedings to the best of my ability.

Dated this 11th day of January, 2019.

/s/ Elizabeth Saint-Loth, RPR, FCRR
Official Court Reporter

# ECF No. 53

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

| | |
|---|---|
| **IN RE GRAND JURY SUBPOENA NO. 7409** | No. 18-gj-041<br>**Under Seal** |

# GOVERNMENT'S PROPOSAL ON ACCRUAL AND SCHEDULE OF CONTEMPT SANCTIONS

By minute order dated January 10, 2019, the Court ordered the parties to submit a joint status report proposing a briefing schedule, explaining the parties' agreed-upon understanding of when contempt sanctions began to accrue in this case, and proposing an order concerning Alston & Bird's request to issue a public statement about this matter. Because the parties have been unable to agree on the proper resolution of any of the three issues identified by the Court, each side is separately filing the requested status report. The government's view is presented below.

## I. Briefing Schedule

On the evening of January 9, 2016, [redacted] moved for a declaration that the Court's contempt order—which was upheld on appeal—is "unenforceable and [redacted] property is immune from execution or attachment." Mot. 1 (capitalization omitted). The motion raises issues that overlap with those that [redacted] presented to the Supreme Court in its sealed petition for a writ of certiorari. Specifically, the fourth question presented in that petition states: "Does the [Foreign Sovereign Immunities Act] permit an American court to impose *and enforce* contempt sanctions (monetary or otherwise) against a foreign state?" Pet. ii (emphasis added). As [redacted] does in its January 11, 2019 motion in this Court, the certiorari petition argues that under the Act, [redacted] property falls outside of the statutory exceptions that permit attachment and execution of property. Pet. 29-33. Much of the language and argument in [redacted] motion is identical to the text of the certiorari petition pending before the Supreme Court.

The government respectfully requests that its response to [redacted] motion be due on January 23, 2019, the default due date under this Court's Local Rules. *See* LCrR 47(b). A response to [redacted] motion requires substantial coordination with other components in the government, including the Solicitor General's office, which has responsibility for responding to the certiorari petition. The response to that petition is currently due on or about February 6, 2019. In addition, responding to [redacted] motion will require coordination with other components of the government, possibly including personnel whose availability is limited because of the shutdown. The response is further complicated by the fact that no judgment against [redacted] beyond the contempt order—has been entered and no enforcement action has been taken. The hypothetical posture of [redacted] motion therefore requires the government to consider a range of enforcement actions that may involve other components or agencies. Because the government's response here requires coordination, including with agencies affected by the ongoing government shutdown, the government respectfully requests that the Court permit two weeks to prepare the response.

There is no compelling necessity for shortening the default time for submitting a response. In its opinion in this case, the D.C. Circuit adhered to its practice, announced in *FG Hemisphere Assocs., LLC v. Democratic Republic of Congo*, 637 F.3d 373 (D.C. Cir. 2011), of "dividing the question of a court's power to impose sanctions from the question of a court's ability to enforce that judgment through execution." Slip op. at 18 (quoting *FG Hemisphere*, *supra*, at 377). The court of appeals therefore held that "the form of [this court's] contempt order was proper" and stated "[w]hether and how that order can be enforced by execution is a question for a later day." *Id.* That day has not yet arrived. Before this Court determines whether to issue an advisory opinion on enforcement, orderly briefing of these questions will assist the Court's consideration.

## II. Accrual of Contempt Sanctions

At the status conference held in this matter yesterday, the parties both represented to the Court that they agreed that the contempt sanctions imposed by the Court's October 5, 2018 order began to accrue the day after the Supreme Court lifted its administrative stay in this matter, *i.e.*, on January 9, 2019. In its minute order issued after the conference, the Court ordered the parties to explain their "agreed upon understanding" regarding the accrual date. After the order was issued, however [redacted] counsel informed the government that [redacted] no longer adhered to the position on the accrual date that they had advanced at the hearing.

The government adheres to its stated view that the sanctions began accruing on January 9, 2019, when the last of the two stay orders was lifted. On October 5, 2018, the Court (1) ordered that [redacted] was in contempt; (2) assessed a fine of $50,000 per day until [redacted] was willing to complete production of the subpoenaed records; and (3) stayed the civil contempt sanctions pending appeal and providing that the sanctions would only begin accruing "seven business days after the Court of Appeals' issuance of a mandate affirming this Court's order." On December 18, the D.C. Circuit upheld this Court's order of contempt and issued its mandate. Accordingly, on December 28—7 business days after issuance of that mandate—this Court's stay expired.

Sanctions did not begin to accrue, however, because on December 23, 2018, the Chief Justice issued a second stay—an administrative stay of this Court's order "holding the applicant in contempt, including the accrual of monetary penalties." The Supreme Court vacated that stay on January 8, 2019. At that point, with no stay in place, this Court's October 5 order took effect, and [redacted] was liable for "$50,000 per day . . . until such time as [redacted] is willing to complete production of the subpoenaed records." Contempt Order at 6. The contempt order took effect late

in the day on January 8. The government understands that order to impose sanctions each full day that it is in effect, therefore beginning on January 9.

No unfairness could result from this interpretation. [redacted] has been on notice for months of its obligation to produce the records and easily could and should have assembled the records been prepared to produce them. When the mandate issued on December 18 of last year, [redacted] was then on notice that it had seven business days to produce the records. Nothing in the Chief Justice's December 23 administrative stay suggested that [redacted] would receive an additional grace period if the Supreme Court ultimately denied [redacted] application for a stay pending certiorari. Indeed, as of the hearing yesterday, [redacted] also understood that sanctions began accruing when the Supreme Court lifted its administrative stay.

[redacted] new position rests on the idea that the Chief Justice's December 23 administrative stay meant that if it were lifted, [redacted] would still have three business days under this Court's stay order. That misunderstands both the Chief Justice's and this Court's stay order. The Chief Justice's stay did not reference or have any effect on this Court's stay. To the contrary, the Chief Justice's stay expressly referred to "the order of the United States District Court for the District of Columbia holding the applicant in contempt, including the accrual of monetary penalties" and made no reference to this Court's stay. In any event, even if the Chief Justice's stay could be read as applying to the entirety of this Court's October 5 order, that would not create the sort of tolling rule that [redacted] belatedly claims. When the Supreme Court lifted its stay on January 8, this Court's prior stay, which was timed to the issuance of the D.C. Circuit's mandate, would no longer be applicable.

Accordingly, the government submits that sanctions began to accrue on January 9, 2019. The government will separately address by motion its proposal that, if [redacted] continues to fail to comply, the sanctions be escalated.

**III. Media Contact Restrictions**

At the status conference, the government brought to the Court's attention [redacted] counsel's intention to make public statements about this case. In response to news stories tying Mr. Boone and Mr. Kang to this case, Alston & Bird intended to issue a press statement that they [redacted] in connection with the Special Counsel's investigation. The government expressed concern that this statement may violate Local Rules 57.7(b)(1) and 57.7(b)(2), which regulate attorneys practicing before this Court. The government also expressed concern that the proposed statement, by itself and in conjunction with other information gleaned by the media, posed a substantial risk to the secrecy of the grand jury's investigation. And the government raised the question whether the proposed statement by Alston & Bird would also be adverse to the interests of its client in this matter, which presumably prefers that the public not speculate about its involvement in the case. The Court denied Alston & Bird's request and "recommend[ed]" that it give "no comment" to the press. Tr. 14. In response to a request for clarification, the Court made clear that it did not want counsel to suggest a similar statement and "keep coming back" to the Court. Tr. 15. Accordingly, the Court clarified that Alston & Bird may not make public statements "about the nature of [its] representation of the entity in this case with any further identification of what they are or are not" and invited them to submit a proposed order. Tr. 15.

The government respectfully shares the concern expressed by the Court that public statements about this matter may tend to violate the Court's Local Rules and pose the risks

discussed at the hearing. The government also believes that seriatim requests to convey substantially the same information as contained in Alston & Bird's original proposal would be burdensome to the Court and unnecessary, as all such statements would carry a similar substantial likelihood of violating the Court's local rules and causing material prejudice to the secrecy of ongoing grand jury proceedings. *See Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1075-1076 (1991); *see also In re Grand Jury Proceedings (Miller)*, 493 F.3d 152, 154 (D.C. Cir. 2007) (per curiam). Accordingly, the government suggests that the Court make clear that it views the proposed statement and material equivalents as violating the Local Rules and as substantially likely to materially prejudice these proceedings and be adverse to [redacted]. A narrowly tailored proposed order to that effect is attached.

Respectfully submitted,

ROBERT S. MUELLER, III
Special Counsel

Dated: January 11, 2019 By: _____

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**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

| | |
|---|---|
| IN RE GRAND JURY SUBPOENA NO. 7409 | Case No. 18-gj-0041<br><br>**UNDER SEAL**<br>UNDER LCrR 6.1 |

**[PROPOSED ORDER]**

Upon consideration of the arguments presented at the status conference held on January 10, 2019, and in light of the factual representations made by the government concerning potential harm to both the ongoing grand jury investigation and Alston & Bird's client [redacted] the Court hereby finds that:

1. Alston & Bird's proposal to provide a statement to the media that "Alston & Bird [redacted] in connection with the Special Counsel's investigation" (the "proposed disclosure") is precluded by Local Rules 57.7(b)(1) and 57.7(b)(2).
2. There is a substantial likelihood that dissemination of the proposed disclosure would materially prejudice the due administration of justice and be adverse to [redacted] interests;
3. For the same reasons, the witness's attorneys are precluded from making materially identical statements that confirm their representation of the subpoena recipient in this matter or describe the recipient.

SO ORDERED.

Date

THE HONORABLE BERYL A. HOWELL
CHIEF UNITED STATES DISTRICT JUDGE

# ECF No. 55

FILED UNDER SEAL



**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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|---|---|
| IN RE GRAND JURY SUBPOENA NO. 7409 | Grand Jury Action No. 18-gj-0041 (BAH)<br>Chief Judge Beryl A. Howell<br>**FILED UNDER SEAL** UNDER LCrR 6.1 |

**SUPPLEMENT TO [redacted]**
**JANUARY 11, 2019 STATUS REPORT AND PROPOSED ORDER**

In his January 11, 2019 status report and proposed order, the Special Counsel miscasts this Court's oral ruling from the January 10 status conference. At that conference, the Court prohibited Alston & Bird from making the following statement to the press (despite the threats and hate mail that last week's CNN article spawned): "Alston & Bird [redacted] in connection with the Special Counsel's investigation." *See* Hearing Trans. 14 ("for the protection of this grand jury investigation your request is denied"); *id.* 15 ("You may not talk about the nature of your representation of the entity in this case with any further identification of what they are or are not."). That ruling violates the First Amendment—and both [redacted] and Alston & Bird reserve all legal options vis-à-vis that order[1]—but it is not the subject of this supplement.

[1] The days are long gone when courts could hold judicial proceedings in absolute secrecy. *See In re Oliver*, 333 U.S. 257, 268–69 (1948) ("The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French monarchy's abuse of the lettre de cachet. All of these institutions obviously symbolized a menace to liberty."). So are the days when courts could enter gag orders prohibiting parties and their lawyers from saying anything to anyone: "[P]rior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).

For now, Alston and [redacted] ask this Court to clarify that Alston can publicly confirm that it represents the entity that received Grand Jury Subpoena No. 7409—without disclosing anything related to that entity's identity or origin.[2] Going far beyond this Court's oral ruling, the Special Counsel's January 11 proposed order asks this Court to order that "the witness's attorneys are precluded from making materially identical statements that confirm their representation of the subpoena recipient in this matter or describe the recipient." Special Counsel's Proposed Order 1 (paragraph 3). The Special Counsel has taken the same position in recent emails between the parties, arguing that Alston cannot publicly confirm that it represents "Corporation A" or "Country A."

That exceptional position does violence in the worst way to Alston's First Amendment rights. But it also disregards this Court's oral ruling. During the January 10 status conference, the Court explained on the record that Alston *can* publicly confirm that it represents the unnamed entity described in the D.C. Circuit's opinion: "What is public now is what the D.C. Circuit has said, and that's it. You are representing [redacted] that's referred to—or foreign corporation that's referred to in [the D.C. Circuit's] opinion, with no more information about the nature [redacted] the area of the world it comes from or . . . where it doesn't come from." Hearing Trans. 15–16.

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Consistent with the heavy presumption against prior restraints, Federal Rule of Criminal Procedure 6 does not impose *any* secrecy requirement on a grand jury witness (*see* Fed. R. Crim. P. 6(e)(2)), and Local Rule 57.7(2) allows a grand jury witness's counsel to speak publicly about a number of different things, including "to inform the public that the investigation is underway," "to describe the general scope of the investigation," and "to warn the public of any dangers." Nothing in Rule 6 or Local Rule 57.7 prohibits [redacted] or Alston & Bird from telling the world that Alston [redacted] in the Special Counsel's investigation. And if they did, they would violate the First Amendment.

[2] [redacted] has authorized Alston's confirming that the firm represents Country A.

The Court was right to allow Alston that limited statement (even though it was wrong to refuse Alston permission to issue a one-sentence press release). The invocation of grand jury interests is not a "talisman" that dissolves First Amendment protections (*Butterworth v. Smith*, 494 U.S. 624, 630 (1990)), including a lawyer's right to confirm that he represents an unnamed party to litigation. That this case involves a grand jury proceeding does not reduce the First Amendment to nil. *Cf. id.* ("grand juries are expected to operate within the limits of the First Amendment") (citation omitted). The Special Counsel has identified no precedent supporting his argument that he can prohibit an adversary's attorneys from confirming that they represent a subpoenaed witness. There is no support for that anti-constitutional position. We left the Star Chamber behind nearly 400 years ago. The Special Counsel is inviting this Court to commit reversible error by suggesting that the Court can prevent Alston from confirming that it represents Country A.[3]

And contrary to the Special Counsel's suggestion, that prior restraint would harm both Alston and [redacted] certiorari petition remains pending, and Alston plans to speak to potential *amici* about supporting [redacted] petition. Alston would disclose only what the D.C. Circuit has disclosed through its judgment and opinion (and whatever the Supreme Court or the D.C. Circuit unseals in response to the pending motions to unseal from the Reporters Committee

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[3] [redacted]

for Freedom of the Press), but Alston can't do even that without confirming that it represents Country A. If this Court imposes the prior restraint that the Special Counsel seeks, [redacted] and Alston will seek immediate extraordinary relief from both the D.C. Circuit and the Supreme Court.[4]

* * *

Alston and [redacted] ask the Court to reiterate (through the attached proposed order) what it has already held: Alston can disclose its representation of Country A. The Court should consider that order instead of the proposed order that Alston and [redacted] submitted on January 11—before they saw the Special Counsel's proposed order. And again, Alston and [redacted] reserve their rights to challenge this Court's order preventing Alston from [redacted] in this investigation.[5]

Respectfully submitted on January 15, 2019.

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[4] "Freedom of speech includes both the right to speak freely and the right to refrain from speaking at all." *Janus v. Am. Fed'n of State, Cty., and Mun. Employees Council 31*, 138 S. Ct. 2448, 2463 (2018); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995) ("[O]ne important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say."); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) ("The right to speak and the right to refrain from speaking are complementary components of the broader concept of individual freedom of mind."). Even if Alston changed its mind about whether to disclose its involvement, the First Amendment guarantees Alston that right.

[5] The Special Counsel also is wrong to suggest that Alston's proposed statement to the media is not in its client's interest. On the contrary, [redacted] expressly authorized Alston to make that statement.

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*Counsel for* [redacted]

FILED UNDER SEAL

**CERTIFICATE OF SERVICE**

I certify that today I served this **Supplement to** [redacted] **Status Report and Proposed Order** by email on the following:

Robert S. Mueller III, Special Counsel
Zainab Ahmad, Senior Assistant Special Counsel
U.S. Department of Justice
Special Counsel
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Respectfully submitted on January 15, 2019.

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FILED UNDER SEAL



**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

| | |
|---|---|
| IN RE GRAND JURY SUBPOENA<br>NO. 7409 | Case No. 18-gj-0041<br>**UNDER SEAL**<br>UNDER LCrR 6.1 |

**[PROPOSED] ORDER**

On January 10, 2019, the Court held a sealed status conference in the above-captioned matter. At the Court's request, the parties filed status reports and proposed orders related to that hearing on the next day. Alston & Bird filed a supplement to its report and proposed order on January 15.

Having considered those filings and [redacted] supplement, and consistent with the Court's statements at the January 10, 2019 status conference, the Court orders that Alston & Bird can confirm that it represents the subpoenaed witness (designated as either "Corporation A" or "Country A"). Alston and [redacted] are prohibited from making any statements related to [redacted] origin or identity.

SO ORDERED.

Dated: January __, 2019.

BERYL A. HOWELL
Chief Judge

# ECF No. 56

FILED UNDER SEAL



**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| IN RE GRAND JURY SUBPOENA NO. 7409 | Grand Jury Action No. 18-gj-0041 (BAH)<br>Chief Judge Beryl A. Howell<br>**FILED UNDER SEAL**<br>UNDER LCrR 6.1 |

**MOTION FOR A STAY OF THE CONTEMPT FINES' ACCRUAL UNTIL THIS COURT RULES ON [redacted] PENDING MOTION FOR A DECLARATION**

On January 9, 2019, [redacted] (a foreign state under the Foreign Sovereign Immunities Act) filed a motion for a declaration that this Court's October 5, 2018 contempt order or any other contempt order is unenforceable and that the Special Counsel cannot execute against or attach any of [redacted] property in the United States or elsewhere. That motion will be fully briefed in eight days. This Court should stay the accrual of the $50,000-per-day contempt fine until the Court rules on that motion.

All four stay factors are present. There is a substantial likelihood that [redacted] will prevail on the enforceability issue because the FSIA does not authorize contempt sanctions against a foreign state, the statute immunizes [redacted] property from execution or attachment to satisfy a contempt order (*see* 28 U.S.C. § 1609), and none of the FSIA's exceptions to property immunity applies. *See id.* §§ 1610–1611. That result is in line with longstanding international law. It is also in line with the Executive Branch's consistent approach outside this litigation that contempt sanctions against foreign states are unenforceable.

As important, [redacted] will suffer irreparable harm without a stay. Every day that unenforceable contempt fines accrue (which will begin on January 14, 2019) is another day of

offense to [redacted] national sovereignty. The cases are clear on that score. *See, e.g.*, *In re Papandreou*, 139 F.3d 247, 251 (D.C. Cir. 1998) ("A contempt order offends diplomatic niceties even if it is ultimately set aside on appeal."). The Special Counsel's new request that this Court escalate the sanctions on a weekly basis—and then consider imposing *criminal* sanctions—only aggravates that irreparable injury and threatens to damage [redacted] in the long term.

The last two stay factors are also present. Neither the Special Counsel nor the American public has any interest in unenforceable contempt fines accruing against a foreign state (and [redacted] As the Government has explained in past cases, the balance of equities tilts strongly in [redacted] favor. So does the fact that this Court will—in all likelihood—decide [redacted] motion within the next two or three weeks. For all those reasons, this Court should stay the contempt fines' accrual until the Court decides [redacted] pending motion.

## BACKGROUND

On October 5, 2018, this Court entered a Memorandum and Order holding [redacted] in contempt for not complying with Grand Jury Subpoena No. 7409 and sanctioning [redacted] $50,000 per day until it complied with the subpoena. Dkt. 30 at 7. But the Court also stayed the sanctions' accrual pending [redacted] appeal and ordered that the sanctions "shall not accrue during the pendency of the appeal, and shall only begin accruing seven (7) business days after the Court of Appeals' issuance of a mandate affirming this Court's order." *Id.*

The parties briefed the appeal on an expedited basis in the D.C. Circuit. On December 18, the Court of Appeals affirmed this Court's September 19 order. Case No. 18-3071, Dkt. 1764819 at 1. Although the D.C. Circuit held that this Court had authority to enter the October 5 sanctions order, it did not decide whether that order was enforceable: "Whether and how that sanction can

be executed on remand is a separate question for a later day." *Id.* at 3 (citing *FG Hemisphere Assocs., LLC v. Democratic Republic of Congo*, 637 F.3d 373, 377 (D.C. Cir. 2011)).

On [redacted] application, the Supreme Court temporarily stayed this Court's October 5 contempt order, but the Supreme Court lifted that stay on January 8. *See* Case No. 18A669, Order dated January 8, 2019. In the meantime, [redacted] filed a petition for certiorari on January 4. Among other things, the petition argues that this Court had no authority to enter its October 5 order and that, in any event, the order's contempt fines are unenforceable. The petition remains pending.

On January 9, one day after the Supreme Court lifted its stay, [redacted] moved this Court for a declaration that the Court's October 5 order is unenforceable and that [redacted] property is immune from execution or attachment. [redacted] also simultaneously moved for a stay of this Court's contempt order until the Supreme Court decides [redacted] petition for certiorari.

At the Special Counsel's request, this Court held a status conference on January 10. During that hearing, the Special Counsel asked the Court to escalate contempt sanctions if [redacted] fails to comply with the subpoena—by doubling the fines (to $100,000) for each day in the second week of non-compliance, tripling the fines (to $300,000) for each day in the third week, and considering further escalation (including criminal sanctions) after that. Also during the hearing, this Court denied [redacted] stay motion. By [redacted] count, the $50,000-per-day fine will begin accruing on January 14, 2019.[1]

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[1] On January 11, [redacted] explained its calculation of the fine accrual. At the January 10 hearing, [redacted] counsel and the Special Counsel's attorney thought that the parties agreed on the accrual date, but after later discussing the issue with the Special Counsel and reanalyzing the relevant orders, it became clear that the parties do not agree. The orders say what they say, and they confirm that the fines won't begin accruing until January 14, 2019.

On January 11, the Court set a briefing schedule on [redacted] motion for a declaration: The Special Counsel must respond to [redacted] motion by January 18, and [redacted] must reply by January 22.

## ARGUMENT

This Court should stay the contempt fines' accrual until the Court decides whether its October 5 order is enforceable. A stay requires an applicant to prove "(1) that it has a substantial likelihood of success on the merits; (2) that it will suffer irreparable injury if the stay is denied; (3) that issuance of the stay will not cause substantial harm to other parties; and (4) that the public interest will be served by issuance of the stay." *United States v. Philip Morris, Inc.*, 314 F.3d 612, 617 (D.C. Cir. 2003).

There is a high likelihood that [redacted] motion on enforceability—which is grounded in the FSIA's plain text and backed by the Executive Branch's consistent arguments in other cases—will carry the day. Beyond that, if this Court's contempt order is unenforceable (it is), then there is no reason why the fines should accrue until the Court decides that issue. And there is every reason why they shouldn't. [redacted] is a foreign state. It should not have to endure the daily accrual of unenforceable fines, not to mention the Special Counsel's new request to impose escalating fines and possibly even criminal sanctions against [redacted] This Court should stay the contempt fines' accrual until the Court determines whether those fines are enforceable in the first place.

### I. THERE IS A SUBSTANTIAL LIKELIHOOD THAT [redacted] WILL PREVAIL ON ITS MOTION FOR A DECLARATION.

[redacted] is entitled to the requested declaration. Even while this Court and the D.C. Circuit have incorrectly held that [redacted] is not entitled to jurisdictional immunity under 28 U.S.C. § 1604, the FSIA leaves no doubt that [redacted] *property* is absolutely immune from execution

or attachment.[2] Section 1609 "provides as a default that 'the property in the United States of a foreign state shall be immune from attachment arrest and execution.'" *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 822 (2018) (quoting 28 U.S.C. § 1609). Although the FSIA codifies (at 28 U.S.C. § 1610) "narrowly drawn" exceptions to property immunity (*see Autotech Techs. LP v. Integral Res. & Dev. Corp.*, 499 F.3d 737, 749 (7th Cir. 2007)), none of those exceptions applies here. [redacted] has never waived its immunity. *Cf.* 28 U.S.C. § 1610(a)(1), (b)(1). And this Court's contempt order does not relate to any "claim" in this case. *Cf. id.* § 1610(a)(2), (b)(2). As the Special Counsel argued to the D.C. Circuit, the term "claim" is confined to the civil context. *See* Appellee's Br. 17 (arguing that the legislative history's discussion of "the plaintiff's claim" suggests that the FSIA addresses civil actions); *id.* 14 ("The contours of the immunity framework further demonstrate a uniform focus on civil actions."); *see also* 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"). Because this Court must apply the FSIA (*see Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493 (1983)), there is no other basis for enforcing the contempt order against [redacted]

The Special Counsel apparently agrees that none of the FSIA's property-immunity exceptions applies. When he briefed the enforceability issue before the D.C. Circuit, he made no

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[2] As [redacted] has argued at every stage in this litigation, American courts lack subject-matter jurisdiction over this proceeding (including over any effort to enforce the contempt order) because the FSIA limits subject-matter jurisdiction in actions against foreign states to certain nonjury civil matters involving a claim for relief. The FSIA is the sole basis for obtaining subject-matter jurisdiction over a foreign state. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 437 n.5 (1989) ("jurisdiction in actions against foreign states is comprehensively treated by [] section 1330"); *id.* at 443 ("the FSIA provides the sole basis for obtaining jurisdiction over a foreign state").

mention of those exceptions, arguing instead that the courts should defer to the Executive Branch's balancing of comity factors. Appellee's Br. 49. That argument that flies in the face of the Executive Branch's statutory-based arguments in other cases.

The case law is also on [redacted] side: The only court of appeals to have addressed the enforceability issue (to our knowledge) has held that sanctions against foreign states are unenforceable. Tracking the FSIA's plain language, the Fifth Circuit held in *Af-Cap Inc. v. Republic of Congo* that the FSIA categorically prohibits contempt sanctions against a foreign state. 462 F.3d 417, 428 (5th Cir. 2006). Even the D.C. Circuit—which has incorrectly held that courts have inherent authority to issue sanctions orders against foreign states—has recognized that those orders may be unenforceable if none of § 1610's exceptions applies. *See FG Hemisphere*, 637 F.3d at 377 ("The FSIA is a rather unusual statute that explicitly contemplates that a court may have jurisdiction over an action against a foreign state and yet be unable to enforce its judgment unless the foreign state holds certain kinds of property subject to execution. Otherwise a plaintiff must rely on the government's diplomatic efforts, or a foreign sovereign's generosity, to satisfy a judgment."); *id.* at 375 (noting that an "attempt to enforce the [contempt] sanction . . . could prove problematic"). There is every reason to believe that given the FSIA's plain text (not to mention its legislative history), the D.C. Circuit would hold that sanctions orders are unenforceable if presented the opportunity. *See also* H.R. Rep. No. 94-1487, at 22 ("[A] fine for violation of an injunction may be unenforceable if immunity exists under sections 1609–1610.").

If that were not enough, the Executive Branch has argued many times that contempt sanctions against foreign states are unenforceable. In at least four recent appeals, 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. *See* U.S. Amicus Br. 3, *SerVaas Inc. v. Mills*, No. 14-385, 2014 WL 4656925, at *3 (2d Cir. Sept. 9, 2014) ("Absent a specific waiver by the foreign state, an order of monetary contempt sanctions is unenforceable under the FSIA."); *see also* U.S. Amicus Br. 3, *Af-Cap Inc. v. Republic of Congo*, No. 05-51168 (5th Cir. Mar. 13, 2006) (same); U.S. Amicus Br. 3, *FG Hemisphere*, 2010 WL 4569107, at *3 (same); U.S. Amicus Br. 19, *Af-Cap*, No. 05-51168 (referring to Executive Branch's identical argument in *Belize Telecom Ltd. v. Government of Belize*, No. 05-12641 (11th Cir. Aug. 17, 2005)). As the Government recognized in those cases, few things can kindle reciprocity by foreign states as quickly as one country's levying sanctions on another. *See, e.g.*, U.S. Amicus Br. 13, *Af-Cap*, No. 05-51168 ("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.").

The FSIA compels the conclusion that the October 5 contempt sanctions are unenforceable. There is more than a "substantial" likelihood that [redacted] will prevail on its pending motion.

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

[redacted] will suffer irreparable harm if this Court does not stay its contempt order. This Court, the D.C. Circuit, and the Special Counsel have acknowledged that [redacted] is a foreign state under the FSIA. Operating under the specter of an ever-increasing contempt sanction while [redacted] attempts to vindicate its legal rights would deal a blow to [redacted] sovereignty that cannot be undone. Indeed, as courts around the country have explained, any "burden[] of litigation" inflicts irreparable harm on a foreign sovereign if it turns out that the sovereign is immune from jurisdiction or enforcement. *See, e.g.*, *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 443 (D.C. Cir. 1990) (internal quotation marks omitted) ("sovereign immunity is an

immunity from trial and the attendant burdens of litigation, and not just a defense to liability on the merits"); *In re Papandreou*, 139 F.3d at 251 ("The infliction of [the burdens of litigation on a foreign sovereign] may compromise it just as clearly as would an ultimate determination of liability."); *United States v. Moats*, 961 F.2d 1198, 1203 (5th Cir. 1992) ("the risk of harm from having to defend the lawsuit" is an "irreparable loss").

Adding insult to injury, the Special Counsel has recently proposed that this Court double the daily fine for the second week of accrual, triple the fine for the third week, and consider criminal sanctions after that. Those threats are bad enough given [redacted] sovereign status. But they are all the worse because they threaten penalties that this Court could never enforce. A foreign state should never have to endure that kind of indignity while it is pressing immunity arguments. *See In re Papandreou*, 139 F.3d at 251 ("A contempt order offends diplomatic niceties even if it is ultimately set aside on appeal.").

## III. A STAY WILL NOT HARM THE SPECIAL COUNSEL.

A stay will not harm the Special Counsel. The accrual or non-accrual of an unenforceable contempt sanction is unrelated to the Special Counsel's interest in the subpoenaed documents.

In addition, [redacted] proposed stay would likely last for less than two weeks. The Special Counsel's response to [redacted] motion for a declaration is due on January 18, and [redacted] reply is due on January 22.[3] If the Court schedules a hearing on the motion that week, then the Court may very well rule on [redacted] motion within two weeks of the motion's filing. The requested stay's short length weighs in [redacted] favor.

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[3] In the Special Counsel's January 11 status report, he asked the Court to issue a longer-than-usual briefing schedule for [redacted] pending motion and to consider escalating the fines in the interim. The Court should not allow the Special Counsel to have his cake and eat it too.

## IV. A STAY WILL SERVE THE PUBLIC INTEREST.

The public has no interest in this Court's allowing unenforceable contempt fines to accrue against a foreign sovereign. On the contrary, it has every interest in that *not* happening. Allowing an unenforceable contempt fine to accrue violates international law. *See* 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); *see also Conn. Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 255–56 (5th Cir. 2002) ("at 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."). The public interest is in this country's courts abiding by international law, not violating it.

As the United States Government has explained, an unenforceable contempt order against a foreign state also upsets notions of international comity more generally: "[Monetary sanctions] orders are . . . 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*, 2014 WL 4656925, at *3; *see also Nat'l City Bank of New York v. Republic of China*, 348 U.S. 356, 362 (1955) (sovereign immunity derives "from standards of public morality, fair dealing, reciprocal self-interest, and respect for the 'power and dignity' of the foreign sovereign"). In view of those reciprocity concerns, the public has every interest in America's not being subjected to unenforceable contempt sanctions abroad. *See, e.g.*, U.S. Amicus

Br. 26–27, *SerVaas*, 2014 WL 4656925, at *26–27 (citing example of Russian court's levying $50,000-per-day monetary sanctions against the United States in retaliation for American court's levying $50,000-per-day sanctions against Russia).

## CONCLUSION

[redacted] pending motion for a declaration will be ripe for this Court's decision in eight days. As that motion explains, the FSIA precludes enforcement of this Court's October 5 order. There is no reason why the Special Counsel needs the fines to accrue between now and this Court's ruling on that motion, but there is every reason why [redacted] should not have to endure that indignity in the interim. This Court should stay the contempt fines' accrual until the Court decides [redacted] motion.

Respectfully submitted on January 15, 2019.

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FILED UNDER SEAL

**CERTIFICATE OF SERVICE**

I certify that today I served this **Motion for a Stay** by email on the following:

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**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| IN RE GRAND JURY SUBPOENA NO. 7409 | Case No. 18-gj-0041<br><br>**UNDER SEAL**<br>UNDER LCrR 6.1 |

**[PROPOSED] ORDER**

On January 9, 2019, [redacted] filed a Motion for a Declaration that this Court's October 5, 2018 Order Is Unenforceable and that [redacted] Property is Immune from Execution or Attachment. On January 15, [redacted] filed a Motion for a Stay of the Contempt Fines' Accrual Until this Court Rules on [redacted] Pending Motion for a Declaration.

Having considered all of the papers filed in connection with the Motion for a Stay, the Court GRANTS that motion. The contempt fines in this Court's October 5 order will not accrue before the Court rules on [redacted] Motion for a Declaration.

Dated: January __, 2019.

BERYL A. HOWELL
Chief Judge

# ECF No. 58

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| **IN RE GRAND JURY SUBPOENA NO. 7409** | No. 18-gj-041<br>**Under Seal** |

**GOVERNMENT'S OPPOSITION TO MOTION FOR A DECLARATION THAT THIS COURT'S OCTOBER 5, 2018 ORDER IS UNENFORCEABLE AND THAT [redacted] PROPERTY IS IMMUNE FROM EXECUTION OR ATTACHMENT**

The United States of America, by Special Counsel Robert S. Mueller, III, files this opposition to the motion of [redacted] for a declaration that this Court's contempt order is unenforceable. On October 5, 2018, this Court issued an order holding [redacted] in contempt and assessing [redacted] a $50,000 sanction per day, until it produces records described in a July 11 subpoena. On December 18, 2018, the D.C. Circuit affirmed the order, held that this Court may impose monetary sanctions, and made clear that questions about how to enforce those sanctions if [redacted] accrued liability and then refused to pay need not yet be considered. On January 3, 2019, [redacted] filed a petition for a writ of certiorari challenging this Court's contempt order and urging, among other things, that the sanctions cannot be enforced. That petition remains pending.

[redacted] now seeks (Mot. 5-11, 20) a declaration that under the Foreign Sovereign Immunities Act (FSIA), [redacted] property is immune from attachment and execution of the contempt judgment. This Court should decline to issue any such advisory declaration. The issue is not ripe for decision and will not be presented unless a series of contingencies comes to pass—including [redacted] refusal to comply with the order despite the now-accruing monetary sanctions and the government's choosing to use monetary enforcement mechanisms to collect those

sanctions. [redacted] is not entitled to an advance reading on enforcement options as it assesses whether to comply with a valid order of this Court.

[redacted] legal position also lacks merit. Assuming that the FSIA applies to criminal cases, its exceptions to immunity from execution apply as well. [redacted] would not be immune from execution of a judgment in this case because the judgment would "relate[] to a claim" for which the Court has found that [redacted] "is not immune by virtue of" the FSIA's commercial-activity exception, 28 U.S.C. § 1610(b)(2). Assuming without deciding that the FSIA applies, this Court and the court of appeals held that, even if it does, [redacted] is not immune from a proceeding to compel compliance with the subpoena because the FSIA's commercial-activity exception is satisfied. A judgment on the Court's contempt sanctions would relate to that claim—and that position is entirely consistent with the position that the United States has taken in private civil actions involving foreign *states*, as opposed to foreign *instrumentalities*. And in any event, [redacted] mistakenly assumes that FSIA applies in the first place.

For all of those reasons, [redacted] motion for a declaration should be denied.

**BACKGROUND**

1. On July 11, 2018, the government served on [redacted] a grand jury subpoena for [redacted] records. The subpoena specified that [redacted] was to provide all responsive documents, even if located abroad. Although the subpoena's return date was July 27, 2018, the government extended it three times to address concerns that [redacted] had raised.

On August 16, 2018, [redacted] moved to quash the subpoena, arguing that it is immune from the jurisdiction of U.S. courts under the FSIA and that the subpoena was unreasonable and oppressive under Federal Rule of Criminal Procedure 17(c) because compliance would violate foreign law. At the hearing on the motion, the government requested an order compelling

compliance with the subpoena. On September 19, this Court denied the motion to quash and ordered [redacted] to produce the subpoenaed materials by October 1, 2018. The Court "assume[d], without deciding, that the FSIA applies" and concluded that where the FSIA's grant of immunity applies, so do the statute's exceptions. Op. 9-13. The Court held that if a statutory exception to immunity applied—such as the commercial-activity exception—jurisdiction over a criminal proceeding could exist under 18 U.S.C. § 3231. Op. 10-13. The Court determined that the facts in the government's *in camera* submissions were sufficient to satisfy the exception. Op. 14-17.[1] The Court further made clear that it was "prepared to impose contempt sanctions for failure to comply with the subpoena." Op. 30.

2. [redacted] appealed the September 19 order and moved for a stay pending appeal. On the government's motion, the D.C. Circuit dismissed that appeal for lack of jurisdiction and dismissed [redacted] motion as moot. Order, *In re: Grand Jury Subpoena*, Case No. 18-3068 (D.C. Cir. Oct. 3, 2018) (citing *United States v. Ryan*, 402 U.S. 530, 532 (1971)).

3. On October 4, 2018, the government moved for civil contempt. [redacted] did not dispute that it had failed to produce the required records or claim that it was unable to locate or assemble the records. Instead, [redacted] urged that while its appeal was pending, this Court had no power to adjudicate the contempt and that although the D.C. Circuit had dismissed its appeal for lack of jurisdiction, a petition for rehearing en banc remained pending and the mandate had therefore not issued. Opp. 3-5 (Doc. 29). In addition to repeating and expanding on its argument that the FSIA deprived the Court of jurisdiction, *id.* at 5-8, [redacted] also contended (*id.* at 8) that "the FSIA does not authorize the Court to levy a monetary penalty" because it does not authorize

[1] The Court additionally rejected [redacted] Rule 17 argument. Op. 17-31.

enforcement of such sanctions, but noted that the argument was foreclosed by *FG Hemisphere Associates, LLC v. Democratic Republic of Congo*, 637 F.3d 373, 379 (D.C. Cir. 2011).

After a hearing, the Court found "no dispute that" [redacted] had failed to comply with the court's September 19 order and rejected [redacted] other arguments against contempt. Memorandum and Order (Oct. 5, 2018) (Doc. 30). The Court concluded that "voluminous" precedent foreclosed [redacted] argument that the district court lacked jurisdiction to enter a contempt order while [redacted] premature appeal was pending. *Id.* at 3-6. The Court imposed civil contempt sanctions of $50,000 per day but stayed accrual of those fines until "seven (7) business days after the Court of Appeals' issuance of a mandate affirming" this Court's order. *Id.* at 6-7.

4. [redacted] appealed the contempt order, and the D.C. Circuit expedited briefing and argument. On December 18, 2018, the D.C. Circuit issued a per curiam judgment—with opinion to follow—affirming this Court's judgment. The D.C. Circuit "decline[d] to resolve whether foreign sovereigns are entitled to claim the protection of the Act's immunity provision, 28 U.S.C. § 1604, in criminal proceedings." *In re Grand Jury Subpoena*, No. 18-3071, 2018 WL 6720714, at *1 (D.C. Cir. Dec. 18, 2018). The court instead "assume[d] that immunity extends to the criminal context," *id.,* and concluded that if one of the FSIA's exceptions to immunity was applicable, this Court had jurisdiction to enforce the subpoena under 18 U.S.C. § 3231. *Id.* at *1-*2. A "contrary reading of the Act," the court explained, "would completely insulate corporations majority-owned by foreign governments from all criminal liability" and would be contrary to "Congress's choice to codify a theory of foreign sovereign immunity designed to allow regulation of foreign nations acting as ordinary market participants." *Id.* at *1. After "a searching inquiry of the government's legal theory and its supporting evidence," the court concluded that the FSIA's

commercial-activity exception, 28 U.S.C. § 1605(a)(2), applies. *Id.* at *2. The court also held that the FSIA "allows for the monetary judgment ordered by the district court" and noted that "[w]hether and how" that judgment can be enforced "is a separate question for a later day." *Id.* at *3 (citing *FG Hemisphere*, 637 F.3d at 373, 376-377, 379).[2]

5. On December 20, 2018, [redacted] moved the D.C. Circuit to recall its mandate and stay re-issuance of its mandate, so that this Court's stay would remain in effect. On December 21, the court of appeals denied the motion "without prejudice to seeking relief in district court." Order, Case No. 18-3071.

6. On December 22, rather than seeking relief in this Court, [redacted] filed an application in the Supreme Court for a stay pending the filing and disposition of a petition for a writ of certiorari. On December 23, the Chief Justice entered an administrative stay. After the Chief Justice referred the application to the Court, the Court denied the application and vacated the administrative stay. *In re Grand Jury Subpoena*, No. 18A669 (Jan. 8, 2019).

7. On January 8, the D.C. Circuit issued its opinion in this case. The court noted the government's argument that "no part" of the FSIA "applies to criminal proceedings." *In re: Grand Jury Subpoena*, _ F.3d _, No. 18-3071, 2019 WL 125891, at *2 (D.C. Cir. Jan. 8, 2019). The court did not decide that question, however. Instead it held that even if the FSIA applies, [redacted] nonetheless would lack immunity in this action. *Id.* The court held that 18 U.S.C. § 3231 and the district court's "inherent contempt power in aid of its criminal jurisdiction" provide the authority to hear this matter. *Id.* at *2-*7.

[2] The court separately rejected [redacted] argument that compliance with the subpoena would require it to violate foreign law. 2018 WL 6720714, at *2.

The court of appeals rejected [redacted] contention that 28 U.S.C. § 1330(a), which grants jurisdiction over civil actions against foreign states, implicitly bars the exercise of other jurisdiction against foreign states. Among other things, the court concluded that such a rule is difficult "to reconcile with the Act's context and purpose." 2019 WL 125891, at *4. The court noted Congress's stated intention that foreign states and instrumentalities would not be immune "insofar as their commercial activities are concerned." *Id.* (quoting 28 U.S.C. § 1602). The court further observed that immunity in criminal cases would mean that "a foreign-sovereign-owned, purely commercial enterprise operating within the United States could flagrantly violate criminal laws" and "the U.S. government would be powerless to respond, save through diplomatic pressure." *Id.* Such a rule would also "signal to even non-sovereign criminals that if they act through such an enterprise, the records might well be immune from criminal subpoenas." *Id.* The court expressed great "doubt" that Congress would have "so dramatically gutted the government's crime-fighting toolkit." *Id.* The court also noted that the FSIA and its legislative history are silent about criminal proceedings. *Id.* at *5. If Congress intended to resolve such a "fraught question" in the manner [redacted] urges, the court reasoned, Congress would have addressed the subject clearly in the Act's text and discussed it during the legislative process. *Id.*

The court of appeals further held that the commercial-activity exception applies here. The court observed that Section 1605(a)'s exceptions to immunity are categorically applicable "in any case" and that the commercial activity exception contains no textual limitation to civil cases. 2019 WL 125891, at *6. The court found that the record establishes that "this 'action'—that is, the subpoena—is 'based upon'" [redacted] covered commercial activity with the requisite nexus to the United States. *Id.* at *6-*7.

Finally, the court of appeals held that "contempt sanctions against a foreign sovereign are available." 2019 WL 125891, at *7 (quoting *FG Hemisphere*, 637 F.3d at 379). The court noted that "[w]hether and how that order can be enforced by execution is a question for a later day." *Id.*[3]

8. On January 15, 2019 moved for a stay of the accrual of contempt fines pending this Court's disposition of its motion for a declaration that the sanctions are unenforceable. The same day, this Court denied that motion, explaining that "the Court's authority to impose contempt sanctions on and thus for the sanctions to accrue, is secure." Order 8 (Jan. 15, 2019) (Doc. 57). The Court explained that the D.C. Circuit and this Court have previously made clear that "the power to impose contempt sanctions against a foreign sovereign and the power to enforce any monetary penalties are distinct." *Id*. at 9. "Thus, even if ultimately prevails on the argument that the fines are unenforceable, a question which has not been resolved in this matter, the fines are properly accruing." *Id.*

## DISCUSSION

### I. This Court Should Decline To Rule On Request For An Advisory Opinion

request for a "declaration" that a contempt judgment issued by this Court would be unenforceable seeks an advisory opinion. This Court held that it has the authority to hold in contempt and assess penalties. The D.C. Circuit affirmed that holding, ruling that, assuming that the FSIA applies, "'contempt sanctions against a foreign sovereign are available under the' Act" and "the form of [the] contempt order was proper." 2019 WL 125891, at *7 (quoting *FG Hemisphere*, 637 F.3d at 379). The court of appeals also made clear that "[w]hether and how that order can be enforced by execution is a question for a later day." *Id*. That

[3] The court separately rejected argument that compliance with the subpoena would require it to violate foreign law. 2019 WL 125891, at *7-*8.

day has not yet arrived. [redacted] is currently in contempt and is accruing sanctions. But the Court has not yet reduced those sanctions to a judgment for a sum certain. And [redacted] has not yet refused to pay such a judgment. If and when that occurs, the government and this Court may choose to take steps to execute the judgment and otherwise collect the debt owed by [redacted] to the United States. But while this Court is free to offer its tentative views on enforcement issues to help guide the parties, [redacted] is not entitled to seek a definitive opinion.

Courts generally may not issue advisory opinions. *See, e.g.*, *Flast v. Cohen*, 392 U.S. 83, 96-97 (1968). Among other things, this rule ensures that courts decide legal questions that are "precisely framed and necessary for decision." *Id.* Once a matter is properly before a court, the court may choose to give guidance on legal issues affecting the parties. But courts generally should "make decisions only when they have to, and then, only once," *American Petroleum Inst. v. EPA,* 683 F.3d 382, 387 (D.C. Cir. 2012). And it is a "cardinal principle of judicial restraint" that "if it is not necessary to decide more, it is necessary not to decide more." *PDK Labs., Inc. v. Drug Enforcement Admin.*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in judgment). Thus, in this very case, the court of appeals held that "contempt sanctions against a foreign sovereign are available," but it also explained that "[w]hether and how that order can be enforced by execution is a question for a later day." 2019 WL 125891, at *7.

The ordinary reticence to issue opinions on matters that are not yet squarely presented should govern here. It is not necessary to adjudicate whether and how the contempt sanctions may be enforced. And it may never be necessary to do so. If [redacted] complies with an order to pay accrued sanctions, it would not be necessary to consider execution. If [redacted] does not comply, it is not yet clear whether and how the government would seek to collect that debt. *See generally* 28 U.S.C. §§ 3202-3205. While [redacted] frames its argument as a categorical bar to

enforcement, it is unclear whether [redacted] asserted immunity—even if it were applicable—would apply equally to all forms of collection. *Cf. American Petroleum Inst.*, 683 F.3d at 386-387 (courts should prudentially decline to entertain actions where doing so may "solidify or simplify the factual context and narrow the legal issues at play"). For example, the government has not yet considered whether it may be able [redacted]

While [redacted] is seeking an advisory opinion from this Court, it is also asking the Supreme Court to address the same issues. The fourth question presented in [redacted] pending certiorari petition states: "Does the [Foreign Sovereign Immunities Act] permit an American court to impose *and enforce* contempt sanctions (monetary or otherwise) against a foreign state?" Pet. ii (emphasis added). As [redacted] does in its motion in this Court, the certiorari petition argues that under the FSIA, [redacted] property falls outside of the statutory exceptions that permit attachment and execution of property. *See* Pet. 29-33. Much of the language and argument in [redacted] motion is identical to the text of the certiorari petition pending before the Supreme Court. The government does not believe that certiorari is warranted. But if the Supreme Court did grant review, it would be in a position to consider the very questions on which [redacted] is asking this Court to opine. In opposing contempt, [redacted] urged this Court to "decline to rule on the contempt motion" because [redacted] then-pending rehearing petition left open the possibility that the D.C. Circuit would address the validity of the subpoena and this Court should "avoid a

[4] Additionally, if [redacted] does not comply with an order to pay the judgment, the government may consider whether it has other means to compel [redacted] to pay the judgment and to produce the subpoenaed records. For example, the government could consider criminal contempt, or an order and subsequent contempt finding against [redacted] in the United States who are capable of causing [redacted] to comply, *see Wilson v. United States*, 221 U.S. 361, 376-377 (1911); *Elec. Workers Pension Trust Fund of Local Union #58 v. Gary's Elec. Serv. Co.*, 340 F.3d 373, 382 (6th Cir. 2003).

potentially inconsistent ruling with the D.C. Circuit." Opp. 5. Although that was not a reason for the Court to defer issuing a contempt judgment against a recalcitrant witness, it is a relevant factor when deciding whether to issue what is effectively an advisory opinion.

Finally, [redacted] has no entitlement to a declaration about the consequences of violating this Court's orders, presumably for the purpose of deciding whether to comply with those orders at all. [redacted] has suggested that its "motion is ripe" because "the FSIA does not provide this Court with any authority at all, full stop, to ever enter a sanction order." 1/10/19 Tr. 22. But as this Court recently explained, its "authority to impose contempt sanctions on [redacted] and thus for the sanctions to accrue, is secure." Order at 8 (Jan. 15, 2019) (Doc. 57). Whether a court can impose sanctions and whether, if ignored, the government can execute on an ensuing judgment are, in the context of this case, separate issues. *Id.* at 9. A party is not entitled to an anticipatory judicial ruling about the legal options for enforcement before deciding whether it will comply with a court's orders in the first place.

**II. The Contempt Sanctions Are Enforceable**

If, as the Court has previously assumed, the FSIA applies to these proceedings to compel compliance with a grand jury subpoena by a foreign instrumentality, so do the FSIA's exceptions to immunity—and the judgment may be executed consistent with the FSIA. That position is not in conflict with the position taken by the government in amicus filings in *private* civil actions involving foreign *states.* And in any event, [redacted] reliance on the FSIA fails at the threshold because—as the government has previously argued in this case—the FSIA does not apply in criminal matters.

### A. If the Foreign Sovereign Immunities Act Applies, It Permits Execution Of The Contempt Judgment In This Case

The FSIA provides that subject to existing international agreements, a foreign state, agency, or instrumentality's property in the United States is "immune from attachment arrest and execution," with various exceptions. 28 U.S.C. § 1609; *see* 28 U.S.C. § 1610, 1611. As discussed in Part II.C, *infra*, this immunity extends to execution of judgments in civil actions and does not govern criminal proceedings, such as proceedings to compel compliance with a federal grand jury subpoena. But assuming that the FSIA's immunity from execution of judgments applies in criminal cases, [redacted] property in the United States would not be immune from execution of the judgment in this case.

The FSIA provides exceptions to the immunity from execution that partially parallel the exceptions to immunity from jurisdiction. *See* 28 U.S.C. § 1610(a), (b). A narrower set of exceptions applies to foreign states, but a broader set of exceptions applies to agencies and instrumentalities like [redacted] *See* 28 U.S.C. § 1610(a), (b). As relevant here, for states, agencies, and instrumentalities, their property in the United States is not immune from attachment and execution if "the property is or was used for the commercial activity upon which the claim is based." 28 U.S.C. § 1610(a)(2). For agencies and instrumentalities (but not states) that are "engaged in commercial activity in the United States," their property in the United States is subject to an additional exception: it is not immune from execution if "the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of" the commercial activity exception, "regardless of whether the property is or was involved in the act upon which the claim is based." 28 U.S.C. § 1610(b)(2). Because "state instrumentalities engaged in commercial activities are akin to commercial enterprises" their immunity from execution of judgments "is exceptional and limited." Restatement (Third) of Foreign Relations Law of the United States § 460 cmt. b (1987).

The exception for instrumentalities in Section 1610(b)(2) applies here. [redacted] is engaged in commercial activity in the United States. It has property in the United States. And a fixed, monetary contempt judgment would "relate[] to a claim for which [redacted] is not immune" under the commercial-activity exception, 28 U.S.C. § 1610(b)(2). The term "claim" is expansive and includes any means to obtain, or demand for, money, property, or a thing. Black's Law Dictionary 224 (5th ed. 1979) (defining "claim" to include the "[m]eans by or through which claimant obtains possession or enjoyment of privilege or thing," a "[d]emand for money or property," and a "[r]ight to payment . . . [or] equitable remedy"). As [redacted] own filing acknowledges (*see* Mot. 7), the term "claim" includes not just a "demand for money" but also a demand for "property" and "a legal remedy to which one asserts a right." Black's Law Dictionary 301 (10th ed. 2014) (def. 3); *accord* Merriam-Webster's Online, ("a demand for something due or believed to be due") (def. 1), https://www.merriam-webster.com/dictionary/claim; Oxford English Dictionary Online ("A demand for something as due; an assertion of a right to something") (def. 1), http://www.oed.com/view/Entry/33645.

The subpoena issued by the grand jury required the production of documents, and the government's request for enforcement of the subpoena sought to compel production of the evidence to which the grand jury was entitled, backed by sanctions if [redacted] did not produce it.[5] The D.C. Circuit described the grand jury subpoena as the "action" for purposes of the FSIA's commercial-activity exception, *see* 2019 WL 125891, at *7, and the government's request to

[5] The government did not file a written motion to compel, but at the hearing on [redacted] motion to quash, the government requested the Court to deny the motion to quash and requested "that an order be entered compelling compliance." 9/11/18 Tr. 49. The Court acted in accordance with the government's request and, in its September 19 order, "directed" [redacted] "pursuant to the grand jury subpoenas served by the Special Counsel's Office, to complete production of the subpoenaed records by October 1, 2018." Doc. 19, at 1.

compel compliance represented the means by which the government sought a remedy—namely, an order mandating production of the evidence or a sanction for non-production. That request thus constituted a "claim" within the meaning of the FSIA. A request for an order compelling compliance is the standard procedure to require the production of documents from a witness who refuses to produce them. *See, e.g.*, *In re Sealed Case*, 832 F.2d 1268 (D.C. Cir. 1987). Furthermore, the Court's contempt order, and a future judgment entered with respect to the accrued sanctions, "relates" to that claim. The contempt sanctions are logically and practically derivative of the subpoena and the request to compel; sanctions are the very means to require [redacted] to comply with the subpoena, and any future judgment would therefore be directly connected to the underlying "claim." *See Mellouli v. Lynch*, 135 S. Ct. 1980, 1991 (2015) ("To 'relate to' means 'to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with.'"); Black's Law Dictionary 1479 (10th ed.) (defining "related" as "[c]onnected in some way; having relationship to or with something else") (def. 1). Finally, the claim is one for which [redacted]—an "instrumentality"—"is not immune by virtue of [S]ection 1605(a)(2)," *i.e.,* the commercial-activity exception. 28 U.S.C. § 1610(b)(2). This Court and the D.C. Circuit held that jurisdiction is proper because the action is "based . . . 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).

[redacted] contrary position would lead to a result that Congress could not have intended—effectively "insulat[ing] corporations majority-owned by foreign governments" from monetary sanctions to compel compliance with criminal process, *In re Grand Jury Subpoena*, 2018 WL 6720714, at *1 (rejecting similar conclusion); *In re: Grand Jury Subpoena*, 2019 WL 125891, at *4 (same), no matter how domestic the conduct. [redacted]

[redacted] commercial businesses could provide a haven for criminal activity and would have a shield against sanctions for failing to provide evidence located in the United States of domestic criminal conduct by U.S. citizens. Although they could be subpoenaed and held in contempt, they could refuse to comply knowing that the government could not directly enforce a monetary contempt sanction. It is implausible that "Congress so dramatically gutted the government's crime-fighting toolkit," *see In re: Grand Jury Subpoena*, 2019 WL 125891, at *4. Nor is it plausible to maintain that Congress and the Executive Branch—which drafted the FSIA—would have adopted such a rule "without so much as a whisper" to that effect in the Act's extensive legislative history, *see Samantar v. Yousuf*, 560 U.S. 305, 319 (2010).[6]

[redacted] asserts (Mot. 7) that "there is no 'claim' in this case" and "certainly no claim giving rise to this Court's contempt order." But, as discussed, the entire basis of this proceeding is the grand jury's subpoena demanding evidence and the government's request to enforce it. And [redacted] effort to construe the word "claim" to exclude such enforcement proceedings is not supported by the government's brief in *FG Hemisphere*, which [redacted] quotes out of context (Mot. 7). Unlike in that case, this case involves Section 1610(b)(2). As the quoted language makes clear, the government's amicus filing in *FG Hemisphere* addressed 28 U.S.C. § 1610(a)(2)—the narrower exception to immunity that applies to foreign *states* for "property . . . used for the

[6] As [redacted] notes (Mot. 8), the House Report stated that courts would not always be able to enforce "injunction[s] or specific performance," observing that "a fine for violation of an injunction may be unenforceable if immunity exists under sections 1609-1610." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 22 (1976). That statement acknowledges only that where the FSIA applies, not every sanction may be later enforced—for example because no relevant property is in the United States. Similarly, the 1987 testimony cited by [redacted] (Mot. 8), occurred eleven years after the FSIA was passed and does not support [redacted] claim that sanctions are always unenforceable. *See Hearing Before the Subcomm. on Admin. Law & Governmental Relations of the H. Comm. on the Judiciary on H.R. 1149, H.R. 1689, & H.R. 1888*, 100th Cong., 1st Sess. 19 (1987).

commercial activity upon which the claim is based"—and did not construe the word "claim" in isolation. And the underlying claim that provided the basis for jurisdiction there did not involve a demand for the "property" at issue in the discovery motion or ensuing contempt proceedings for noncompliance with a discovery order. Here, [redacted] is a separate, commercial enterprise that is owned by a foreign government and engaged in commercial activity in the United States. The immunity of its property from execution of judgments is therefore governed by Section 1610(b)(2), not Section 1610(a)(2). Under Section 1610(b)(2), a future execution of a judgment for the contempt sanctions would "relate to" the claim for which [redacted] has been found not to be immune under the FSIA.[7]

### B. The Government's Position Here Is Consistent With Those Taken In Amicus Briefs Filed In Civil Actions

[redacted] urges that the government's position here is inconsistent with positions it advanced in other cases that "American courts have no authority to enforce contempt sanctions." Mot. 9-11; *see also* Mot. 7 (quoting the government's amicus brief in *FG Hemisphere*). [redacted] relies on briefs in which the United States has argued that monetary contempt sanctions against a foreign state for failure to comply with a discovery order or other injunctive order would likely be unenforceable. Initially, these were all civil actions governed by the FSIA. As argued below, the FSIA does not apply here. But in all events, the government's position in those cases was based on materially different facts and evaluated those facts under the narrower exception to execution immunity in Section 1610(a)(2) rather than the broader exception in Section 1610(b)(2).

The amicus briefs cited by [redacted] all concerned monetary contempt sanctions against a foreign state itself, not a state-owned commercial enterprise. Those briefs accordingly concerned

[7] [redacted] does not contend that any of the further exceptions in 28 U.S.C. § 1611 could apply to its property.

28 U.S.C. § 1610(a)(2), under which property of a foreign state may be subject to execution in satisfaction of a judgment only if the property is in the United States and "is or was used for the commercial activity upon which the claim is based." 28 U.S.C. § 1610(a)(2). *See, e.g.*, U.S. Br. 6, *FG Hemisphere*, No. 10-7046 (D.C. Cir. Oct. 7, 2010) ("Absent a foreign state's waiver of immunity from execution, an order of monetary contempt sanctions against a foreign state is unenforceable under § 1610(a)."). Here, in contrast, [redacted] is an instrumentality, and thus its property is subject to the broader exception in 28 U.S.C. § 1610(b)(2). Under that provision, execution is permitted against an instrumentality's property in the United States "regardless of whether the property is or was involved in the act upon which the claim is based," so long as "the judgment relates to a claim for which the agency or instrumentality is not immune" under the commercial-activity exception, 28 U.S.C. § 1610(b)(2), and the property is not otherwise immune, *see* 28 U.S.C. § 1611.[8] Additionally, those briefs all concerned monetary contempt sanctions against a foreign state for failure to comply with a discovery order or other injunctive order that was collateral to the underlying "claim" that was the basis for jurisdiction under the FSIA and potential liability. In contrast, here, the very claim that would yield any future judgment to be enforced is one for which [redacted] has been held "not immune by virtue of" the commercial-activity exception, 28 U.S.C. § 1610(b)(2).

[8] In *SerVaas Inc. v. Republic of Iraq*, sanctions were entered against both Iraq and the Ministry of Industry, but the court of appeals had previously held that the Ministry was part of the foreign state itself, not an agency or instrumentality. *See* 653 Fed. App'x. 22, 24-25 (2d Cir. 2011). The United States' discussion of immunity accordingly addressed only sanctions against the foreign state itself. *See* U.S. Br. 18, *SerVaas*, No. 14-385 (2d Cir. Sept. 9, 2014) (discussing Section 1610(a) but not Section 1610(b)). The United States also filed a statement of interest in *Chabad v. Russian Federation*, No. 05-cv-1548 (D.D.C. Feb 3, 2016), arguing that a sanctions order that had been entered against Russia for not complying with an order to turn over particular property located abroad was unenforceable under Section 1610(a). *See* U.S. Br. 9-10, *Chabad*, ECF No. 151 (Feb. 3, 2016). The brief did not address any question about enforceability under Section 1610(b).

Accordingly, the government's position in the cited amicus briefs and the government's position here are entirely consistent. Those briefs involved civil actions, foreign states, and different statutory requirements. Nothing in those briefs addressed or cast doubt on the government's ability to execute on a judgment for contempt sanctions entered after a foreign instrumentality that is not immune under the FSIA violated a court order to produce documents required by a grand jury subpoena.

### C. The Foreign Sovereign Immunities Act Does Not Apply To Enforcing Sanctions In Criminal Matters

This Court and the D.C. Circuit both assumed that the FSIA applies to criminal matters and held that even if it does, [redacted] lacked immunity under the FSIA. [redacted] argument that contempt sanctions are not enforceable rests on the premise that the FSIA's immunity framework would bar enforcement steps. [redacted] is well aware of the government's position that the FSIA does not apply to criminal cases, including execution of judgments in criminal cases. *See* Gov't Br. 49, No. 18-3071 (D.C. Cir. Nov. 7, 2018); *see also id.* at 12-17; Gov't Mem. in Opp., *In re Grand Jury Subpoena*, No. 18A669, at 19-20 (S. Ct. Dec. 28, 2018). [redacted] motion merely assumed that the FSIA applies. But [redacted] argument fails at the threshold: the FSIA does not bar enforcement of judgments in criminal cases because it does not apply in criminal cases.

The Supreme Court has repeatedly stated that the FSIA provides "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." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488 (1983) (emphasis added); *accord Republic of Austria v. Altmann*, 541 U.S. 677, 691 (2004) (same); *Republic of Argentina v. NML Capital, Ltd.*, 573 U.S. 134, 141 (2014) (same). "[T]he Act confers on foreign states two kinds of immunity"—the immunity from jurisdiction, 28 U.S.C. § 1604, and an immunity from attachment of property and execution of judgment, 28 U.S.C.

§ 1609. *NML Capital*, 573 U.S. at 142. The Supreme Court has never suggested that either kind of immunity applies in criminal cases. Indeed, the text points to an exclusively civil focus. *See* Gov't Br. 12-15, No. 18-3071 (D.C. Cir. Nov. 7, 2018) (collecting textual provisions).

The FSIA's background, purpose, and legislative history confirm that its immunity provisions were designed to address civil cases. *See Samantar*, 560 U.S. at 316 n.9, 319 n.12, 320-325 (conducting a similar analysis in concluding that the FSIA does not apply to suits against foreign government officials for acts in their official capacity). As the D.C. Circuit recently observed, "the 'Act and its legislative history do not say a single word about possible criminal proceedings." *In re: Grand Jury Subpoena*, 2019 WL 125891, at *5 (quoting Joseph W. Dellapenna, *Suing Foreign Governments and Their Corporations* 37 (2d ed. 2003)). "To the contrary, the relevant reports and hearings suggest Congress was focused, laser-like, on the headaches born of private plaintiffs' civil actions against foreign states." *Id.* Thus, the Executive Branch proposed the FSIA to govern "[h]ow, and under what circumstances, . . . private persons [can] maintain a lawsuit against a foreign government or against a commercial enterprise owned by a foreign government." *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearing Before the Subcomm. on Admin. Law & Governmental Relations of the H. Comm. on the Judiciary on H.R. 11315*, 94th Cong., 2d Sess. 24 (1976) (State Department); *see id.* at 29 (describing the need to "legislate comprehensively regarding the competence of American courts to adjudicate disputes between private parties and foreign states" relating to "activities which are of a private law nature") (Justice Department). The Executive understood the FSIA's provisions for attachment and execution as governing such civil actions. Thus, the Executive Branch explained that the FSIA would "provide U.S. citizens with the remedy of execution to satisfy a final judgment

against a foreign state." *Id.* at 26 (State Department); *see id.* at 28. These drafters understood the FSIA's provisions as governing civil actions.

As reflected in the committee reports, members of Congress shared that understanding. The House Report described the Act's purpose as "to provide when and how parties can maintain a *lawsuit* against a foreign state or its entities in the courts of the United States and to provide when a foreign state is entitled to sovereign immunity." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 6 (1976) (emphasis added). The Report noted the need for "comprehensive provisions" to "inform parties when they can have recourse to the courts to assert a legal claim against a foreign state," *id.* at 7, and repeatedly referred to "plaintiffs," "suit(s)," "litigants," and "liability," *id.* at 6-8, 12—all terms that suggest civil actions. The Report thus described the provisions governing immunity from execution of judgment as part of the comprehensive framework for civil actions. It explained that in addition to addressing jurisdictional immunity, the FSIA confers jurisdiction on federal courts, creates "procedures for commencing a lawsuit . . . in both Federal and State courts," and provides "circumstances under which attachment and execution may be obtained . . . to satisfy a judgment against foreign states in both Federal and State courts." *Id.* at 12. The Report explained that the immunity from attachment would prohibit the then-common "practice of attempting to commence a suit by attachment of a foreign state's property," which would be "rendered unnecessary by the liberal service and jurisdictional provisions of the bill." *Id.* at 26. It explained that such attachment "ha[d] been criticized as involving U.S. courts in litigation not involving any significant U.S. interest or jurisdictional contacts, apart from the fortuitous presence of property in the jurisdiction." *Id.* And the Report noted that attachment could "give rise to serious friction in United States' foreign relations," particularly where "plaintiffs obtain numerous attachments"

and "[t]his shotgun approach has caused significant irritation to many foreign governments." *Id.* at 27.

No text or legislative history indicates that the immunity from attachment and execution concerned judgments in criminal cases. *See In re: Grand Jury Subpoena*, 2019 WL 125891, at *5. Immunity in criminal matters "simply was not the particular problem to which Congress was responding." *Samantar*, 560 U.S. at 323 (discussing officials). On the contrary, the government, not a private party, controls whether to initiate a federal criminal matter against a foreign sovereign entity and what steps to take when collecting a judgment. *See Pasquantino v. United States*, 544 U.S. 349, 369 (2005); *see also United States v. Sinovel Wind Group*, 794 F.3d 787, 792 (7th Cir. 2015). Additionally, as *Samantar* noted with respect to foreign-official actions, although questions of immunity in criminal proceedings "did arise in the pre-FSIA period, they were few and far between." *See Samantar*, 560 U.S. at 323. For example, the same survey cited in *Samantar, id.* at 323 n.18, identifies only one criminal case from the Tate Letter era where the Executive formally addressed immunity. Sovereign Immunity Decisions of the Dept. of State, May 1952 to Jan. 1977 (M. Sandler, D. Vagts, & B. Ristau eds. 1977) (citing *In re Grand Jury Investigation of Shipping Indus*, 186 F. Supp. 298 (D.D.C. 1960)). And the government is unaware of any dispute in a criminal case about paying a fine or contempt sanction. Given the relative infrequency of criminal cases involving foreign sovereigns as compared to ordinary civil disputes, Congress would not have been focused on the differing considerations and practices inherent in criminal investigations when it enacted the FSIA. *See Samantar*, 560 U.S. at 323 & n.18. It would not have silently intended to bar them.

## CONCLUSION

For the foregoing reasons, [redacted] motion should be denied.

Respectfully submitted,

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Special Counsel

Dated: January 18, 2019

By: */s/ Zainab Ahmad*

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# ECF No. 59

FILED UNDER SEAL



**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

| | |
|---|---|
| IN RE GRAND JURY SUBPOENA NO. 7409 | Grand Jury Action No. 18-gj-0041 (BAH)<br>Chief Judge Beryl A. Howell<br>**FILED UNDER SEAL**<br>UNDER LCrR 6.1 |

**[redacted] REPLY SUPPORTING ITS MOTION FOR A DECLARATION THAT THIS COURT'S OCTOBER 5, 2018 ORDER IS UNENFORCEABLE AND THAT [redacted] PROPERTY IS IMMUNE FROM EXECUTION OR ATTACHMENT**

The Special Counsel's response to [redacted] motion proves that he will take any position to try to win: In one breath, he argues that the FSIA does not apply to this criminal proceeding—that "the text [of the FSIA] points to an exclusively civil focus." Opp. 18. In the next, he argues that one of 28 U.S.C. § 1610's exceptions to property immunity—an exception that he within a few pages argues *does not* apply in criminal proceedings—applies in this criminal proceeding. Pressing alternative arguments is one thing. What the Special Counsel is doing is quite another.[1]

For the Special Counsel, this is now win at all costs—even costs to American foreign relations. The Special Counsel has not cited any case or brief in which the Government has ever attempted to enforce or even supported an attempt to enforce contempt sanctions against a foreign state. On the contrary, the Government has (until now) consistently interpreted the FSIA to preclude enforcement of contempt sanctions against a foreign state. In arguing the opposite, the

[1] [redacted] is immune from American criminal jurisdiction. *See* 28 U.S.C. § 1604. And this Court has no subject-matter jurisdiction over this case. *See id.*; 28 U.S.C. § 1330(a). [redacted] continues to press those arguments before the Supreme Court.

Special Counsel is departing not only from the FSIA's plain text but also from the Executive Branch's longstanding interpretation of the statute.

That is not all. In every case but this one, the Executive Branch has explained that enforcing contempt sanctions against a foreign state would damage America's relationships with other countries and would ensure reciprocal treatment abroad for American agencies and instrumentalities. *See* Mot. 9–11; U.S. Amicus Br. 3, *Af-Cap Inc. v. Republic of Congo*, No. 05-51168 (5th Cir. Mar. 13, 2006) (contempt order "is likely to be viewed as inconsistent with the dignity afforded sovereigns by other sovereigns" and "has significant implications for the treatment of the United States Government by the courts of other nations"). The Special Counsel never once mentions those concerns, much less explains how enforcing contempt sanctions against a foreign state in a *criminal* proceeding would roil foreign relations less than enforcement in the civil context would. *Compare* Opp. 15–17.

The Special Counsel knows all this, which is why he tries to postpone this Court's reaching the enforceability question. He argues that [redacted] motion is premature because he hasn't yet asked this Court to enforce any contempt sanction. That argument is a stall tactic. It is also wrong. The Special Counsel ignores that the accrual of unenforceable contempt fines qualifies as concrete irreparable harm to [redacted] sovereign dignity. *See, e.g.*, *In re Papandreou*, 139 F.3d 247, 251 (D.C. Cir. 1998) (contempt order against foreign states or their officials "offends diplomatic niceties even if it is ultimately set aside on appeal"). As a foreign state, [redacted] doesn't need to wait for federal marshals to show up on its doorstep before challenging the fines' enforceability. This Court should declare the fines unenforceable before [redacted] suffers another day of harm to its sovereign dignity. If the tables were turned, the United States Government would take the same position. *Cf.* U.S. Amicus Br. 20–21, *Af-Cap*, No. 05-51168 (Executive Branch argued that "it

would undoubtedly lead to great public outcry" if a foreign litigant tried to compel the U.S. Government to "turn over assets").

Even beyond that concrete harm to [redacted] sovereign dignity, [redacted] has Article III standing because the threat of enforcement is imminent. Time and again, the Supreme Court has held that a litigant has Article III standing and can seek a declaratory judgment once the Government threatens enforcement action. *See, e.g.*, *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128–29 (2007) ("[W]here threatened action by government is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat—for example, the constitutionality of a law threatened to be enforced."). The threat of enforcement is real: The Special Counsel has already sought daily fines, suggested that the Court escalate the fines on a weekly basis, and even suggested that a motion for criminal contempt might be just around the corner. The Special Counsel has not cited a single case holding that a party must wait until the Government seeks to enforce a ruling or judgment before challenging the court's authority to enforce the ruling or judgment. In fact, the cases say the opposite.

* * *

This is not the first time that the Government has bruised the rule of law in pursuit of some end. *See, e.g.*, *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866). And it won't be the last. But the rule of law remains. And in this case, the rule of law—the FSIA—confirms that this Court has no authority to enforce a contempt sanction (monetary or non-monetary) against [redacted]

## I. [redacted] MOTION IS RIPE.

The Special Counsel argues that [redacted] motion is premature, but Supreme Court precedent says otherwise. A motion for declaratory judgment is ripe so long as the movant has Article III standing: "Basically, the question in each case is whether the facts alleged, under all the

circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *MedImmune*, 549 U.S. at 127. Here, [redacted] has Article III standing in at least two ways: (1) the accrual of unenforceable contempt sanctions qualifies as concrete harm to [redacted] sovereign dignity that would stop if this Court concluded that the fines are unenforceable, and (2) the Special Counsel has threatened to seek enforcement of the accruing fines and, worse, to seek escalation of those fines and even criminal penalties.

### A. The accruing unenforceable fines represent concrete irreparable injury to [redacted] sovereign dignity.

As it stands, [redacted] (a foreign state under the FSIA) suffers concrete irreparable injury every day that unenforceable contempt fines accrue. The cases confirm that any burden of litigation—including the daily accrual of an unenforceable contempt fine—offends a foreign state's dignity and qualifies as *irreparable* injury. *See, e.g.*, *In re Papandreou*, 139 F.3d at 251; *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 443 (D.C. Cir. 1990) ("sovereign immunity is an immunity from trial and the attendant burdens of litigation, and not just a defense to liability on the merits") (internal quotation marks omitted); *see also Kiowa Indian Tribe of Okla. v. Hoover*, 150 F.3d 1163, 1172 (10th Cir. 1990) ("The Tribe's full enjoyment of its sovereign immunity is irrevocably lost once the Tribe is compelled to endure the burdens of litigation."). More to the point, if "execution against a foreign state's property [is] a greater affront to [a foreign state's] 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)), then the accrual of unenforceable contempt sanctions necessarily qualifies as concrete injury for Article III purposes. *See Philippines v. Pimentel*, 553 U.S. 851, 866 (2008) (attempted seizure of foreign state's property is a "specific affront" to the state's dignity). If this Court concludes that it has no

authority to enforce any contempt sanction (monetary or non-monetary) against [redacted] then the fines will stop accruing. The dispute is ripe.

In other cases, the U.S. Government has argued that a contempt order inflicts dignitary harms on a foreign state. *See, e.g.*, U.S. Amicus Br. 4, *Af-Cap Inc.*, No. 05-51168 (a contempt "order is likely to be viewed as a significant affront to the dignity and sovereignty of the foreign state"). The Government has even argued that those dignitary harms are "particularly acute" when (as here) a contempt order "purports to control the foreign state's conduct within its own borders." *Id.* at 12–13. [redacted] motion presents a justiciable controversy.

**B. In any case, [redacted] motion is ripe because the threatened enforcement of the accruing fines qualifies as a concrete injury giving rise to a concrete dispute.**

The Special Counsel has threatened enforcement action against [redacted] by seeking and obtaining $50,000 per-day fines, defending on appeal this Court's order levying fines, asking this Court to escalate the fines on a weekly basis, and even threatening criminal sanctions. Whether this Court can enforce any existing or threatened sanctions is a live dispute.

Supreme Court precedent confirms as much. The Supreme Court has explained that "where threatened action by government is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat—for example, the constitutionality of a law threatened to be enforced." *MedImmune*, 549 U.S. at 128–29. All that is required is a "genuine threat of enforcement." *Id.*; *see also id.* ("Given this genuine threat of enforcement, we did not require, as a prerequisite to testing the validity of the law in a suit for injunction, that the plaintiff bet the farm, so to speak, by taking the violative action."). Indeed, the Declaratory Judgment Act exists precisely to ensure that litigants do not need to wait until Government enforcement before clarifying or vindicating their rights. *Id.*; *see also Abbott Labs. v. Gardner*, 387 U.S. 136, 152 (1967) (putting the challenger to the choice between abandoning his rights or

risking enforcement is "a dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate").

The threat of enforcement here is actual and imminent, not hypothetical or remote. The Supreme Court has held that a motion for a declaration "must be permitted" when an order or regulation "requires an immediate and significant change in the [movant's] conduct of [its] affairs with serious penalties attached to noncompliance"—especially when the order or regulation "is directed at [the movant] in particular." *Abbott Labs.*, 387 U.S. at 153–54. This Court has ordered [redacted] to comply with the subpoena or face accruing fines, and the Special Counsel has now threatened increased penalties (against a foreign state, no less)—proving that the threat of enforcement is genuine. *See United States Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1815 (2016) (risk of civil penalties of up to $37,500 per day was "serious" and warranted pre-enforcement review).

[redacted] challenge to the enforceability of the sanctions order also presents a live controversy because [redacted] fear of prosecution is not "imaginary or speculative." *See Steffel v. Thompson*, 415 U.S. 452, 459 (1974) (quoting *Younger v. Harris*, 401 U.S. 37, 41 (1974)). In *Steffel*, the Supreme Court held that two warnings from the police to "stop handbilling" or face arrest sufficed to show that the "petitioner's concern with arrest [had] not been 'chimerical.'" *Id.* (quoting *Poe v. Ullman*, 367 U.S. 497, 508 (1961)); *see also Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014) ("[W]e have permitted pre-enforcement review under circumstances that render the threatened enforcement sufficiently imminent."). The Special Counsel has already threatened that he might seek criminal sanctions against [redacted] employees. Opp. 9 n.4. [redacted] motion is ripe because it challenges the enforceability of the order that has "provided the basis for [those] threats of criminal prosecution." *Steffel*, 415 U.S. at 459.

**C. The Special Counsel's claimed "alternatives" to enforcement prove that [redacted] motion is ripe.**

The Special Counsel also argues that the enforceability question is premature, suggesting that he may pursue alternatives to enforcement. None of those supposed alternatives makes [redacted] motion premature.

First, the Special Counsel argues that the enforceability question is not ripe because [redacted] may ultimately comply with the order to pay monetary sanctions. Opp. 8. That makes no sense. [redacted] has asked this Court to declare the contempt order unenforceable precisely because [redacted] reasonably believes that, under the FSIA and Supreme Court precedent, it is not required to pay any monetary sanctions.

Second, the Special Counsel argues that instead of seeking attachment and execution against [redacted] property, he could [redacted]

Third, the Special Counsel argues that he could seek criminal contempt or contempt against [redacted] U.S. employees. Opp. 9 n.4. That proves [redacted] point: A credible fear of criminal sanctions is enough to sustain a declaratory judgment. *Steffel*, 415 U.S. at 459; *see also*

*MedImmune*, 549 U.S. at 128–29 ("[W]e do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat . . . .").[2]

## II. THE FSIA CONFIRMS THAT THIS COURT LACKS AUTHORITY TO ENFORCE CONTEMPT SANCTIONS (MONETARY OR NON-MONETARY) AGAINST [redacted]

[redacted] and its property are absolutely immune from any effort to enforce a contempt sanction—monetary or non-monetary. Section 1609 "provides as a default that 'the property in the United States of a foreign state shall be immune from attachment arrest and execution.'" *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 822 (2018) (quoting 28 U.S.C. § 1609). That provision admits of no exception for criminal proceedings, and none of § 1610's exceptions to property immunity applies.

The Special Counsel's arguments to the contrary are dizzying in their contradictions. Beginning on page 18, the Special Counsel argues that the FSIA has an "exclusively civil focus" (Opp. 18; *see also* D.C. Circuit Appellee Br. 12, 15), which means that the FSIA's exceptions to property immunity are civil in nature and could never apply in this criminal proceeding. But just a few pages earlier, the Special Counsel pretends as if the FSIA were not "exclusively civil" in nature by arguing that one of § 1610's exceptions can and does apply in this criminal proceeding. He also argues against all evidence that his position is consistent with the Executive Branch's earlier interpretations of the FSIA—even though the Executive Branch has always argued that the

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[2] As the record confirms, [redacted] employees in the United States do not have access to or authority over [redacted], so they do not have authority to comply with the subpoena. Accordingly, any attempt to hold them in contempt would be unlawful and ineffective.

FSIA categorically bars contempt sanctions against a foreign state and its agencies and instrumentalities. The Executive Branch correctly interpreted the FSIA in those earlier cases.

### A. Section 1610(b)(2) does not apply.

Despite spending much of his brief and much of his previous briefing arguing that "the text [of the FSIA] points to an exclusively civil focus" (Opp. 18), the Special Counsel now argues that one of the exceptions to attachment and execution immunity (§ 1610(b)(2)) applies in this criminal proceeding. To describe the Special Counsel's argument is to understand its frivolity. For § 1610(b)(2) to apply, the judgment must relate to a *claim*: "[A]ny property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States" if "the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of [the commercial-activity exception]." "Claim" means civil claim for relief, and as the Government has argued in other cases, there is no claim in the context of efforts to enforce contempt sanctions.

#### 1. There is no claim.

A claim 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).[3] Courts around the country have held that an order imposing sanctions (including for contempt of court) does not involve a "claim." *See SEC v. Faulkner*, No. 3:16-CV-1735-D, 2018 U.S. Dist. LEXIS 184550, at *6 (N.D. Tex. Oct. 29, 2018)

[3] The Special Counsel cited Black's definition but left out key language—"especially, the part of a complaint in a civil action specifying what relief the plaintiff asks for." *Compare* Opp. 12. The omission betrays the weakness of the Special Counsel's argument.

("A sanctions order is not a claim for relief."); *see also Nogess v. Poydras Ctr., L.L.C.*, 728 F. App'x 303, 305 (5th Cir. 2018) (*per curiam*) (motion for sanctions is not a "claim[] for relief in this suit"); *Heffington v. Saline*, 863 F.2d 48, at *1 (6th Cir. 1988) (table) ("A request for costs, fees or sanctions is not a claim within the meaning of Fed. R. Civ. P. 54(b)."); *Mulay Plastics, Inc. v. Grand T. W. R. Co.*, 742 F.2d 369, 371 (7th Cir. 1984) (sanctions order did not dispose of "claim for relief" because it did not resolve "a substantive claim"); *Sohal v. City of Merced Police Dep't*, No. 09-cv-0160, 2009 U.S. Dist. LEXIS 54414, at *21–22 (C.D. Cal. June 25, 2009) (distingishing a "claim for relief" from a "mo[tion] for "sanctions"); *Buemi v. Kerckhoff*, 359 S.W.3d 16, 21–24 (Mo. 2011) (motion for sanctions does not involve a claim for relief); *Spring Creek Living Ctr. Ltd. P'ship v. Sarrett*, 883 S.W.2d 820, 821 (Ark. 1994) (*per curiam*) ("[M]otions requesting sanctions under Ark. R. Civ. P. 11 . . . do not constitute 'claims for relief. . . .'"). The Special Counsel's contempt motion is not a claim, and neither was [redacted] motion to quash or the parties' briefing or oral argument on that motion.

The word "claim" appears in § 1610 ten times and means the same thing in each case: a civil claim for relief. *See Powerex Corp. v. Reliant Energy Servs.*, 551 U.S. 224, 232 (2007) ("A standard principle of statutory construction provides that identical words and phrases within the same statute should normally be given the same meaning."); *id.* ("That maxim is doubly appropriate" when Congress added the word or phrase in different sections "at the same time."); *see also* 28 U.S.C. §§ 1610(a)(2), (a)(5), (a)(7), (b)(2), (b)(3), (f)(1)(A), (f)(2)(A). For instance, under § 1610(a)(5), a foreign agency or instrumentality's property is not immune from execution or attachment if "the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees *under a policy of automobile or other liability or casualty insurance covering the claim* which merged into

the judgment." (emphasis added). "Claim" in § 1610(a)(5) obviously means only a civil claim for relief, not a contempt motion or order, for insurance policies do not cover contempt proceedings in the civil or criminal context (let alone under "liability or casualty" provisions).

Take another example. Under § 1610(b)(3), a foreign agency's or instrumentality's property is not immune from execution or attachment if "the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605A of this chapter or section 1605(a)(7) of this chapter (as such section was in effect on January 27, 2008), regardless of whether the property is or was involved in the act upon which the claim is based." We know that "claim" in § 1610(b)(3) means a civil claim for relief because § 1605A's exception to jurisdictional immunity is confined to "cases" in "which money damages are sought" (28 U.S.C. § 1605A) and the now-repealed § 1605(a)(7) was likewise confined to claims for money damages. *See Republic of Iraq v. Beaty*, 556 U.S. 848, 851 (2009).

Likewise, in every other place in § 1610—including in § 1610(b)(2)—"claim" means civil claim for relief. There is no "claim" in this litigation, so § 1610(b)(2) does not apply. *Compare* 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) (interpreting "claim" in § 1610(a)(2) and explaining that "an order imposing monetary sanctions for contempt of court does not involve a claim based upon commercial activity as required by § 1610(a)(2)").

Applying the plain meaning of the word "claim," the Fifth Circuit and the U.S. Government have both recognized that, for purposes of § 1610's immunity exceptions, a contempt order does not involve a "claim." *See Af-Cap Inc. v. Republic of Congo*, 462 F.3d 417, 428 (5th Cir. 2006) (explaining that monetary sanctions are not included in the exceptions to execution and attachment immunity); *see also* U.S. Amicus Br. 7, *Af-Cap*, No. 05-51168 (describing how the FSIA's

"legislative history further demonstrates that the FSIA does not permit enforcement of monetary contempt sanctions against a foreign state"). That is the statute's plain meaning, and that plain meaning tracks longstanding international law on the enforceability of contempt orders, which Congress codified by enacting the FSIA *without* a property-immunity exception for contempt orders. *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. 94-1487, at 14, *reprinted in* 1976 U.S.C.C.A.N. 6604 (the FSIA "incorporates standards recognized under international law"). To our knowledge, no country that has codified sovereign-immunity principles has allowed its courts to enforce contempt orders against a foreign state or its agencies or instrumentalities. *See, e.g.*, State Immunity Act 1978, c. 33, § 13 (U.K.) ("No penalty by way of committal or fine shall be imposed in respect of any failure or refusal by or on behalf of a State to disclose or produce any document or other information for the purposes of proceedings to which it is a party."); State Immunity Act, R.S.C. 1985, c. S-13.1 (Canada) ("No penalty or fine may be imposed by a court against a foreign state" for its failure to produce documents or other information to the court); Foreign States Immunities Act of 1985 (Australia), No. 196, § 34 ("A penalty by way of fine or committal shall not be imposed in relation to a failure by a foreign State or by a person on behalf of a foreign State to comply with an order made against the foreign State by a court."); *see also* European Convention on State Immunity, (E.T.S. No. 074), Explanatory Report, Point 70 (barring a court from imposing monetary sanctions on a foreign state for refusal "to comply with a court order to produce evidence (contempt of court)"); United Nations Convention on Jurisdictional Immunities of States and Their Properties, Art. 24(1) ("Any failure or refusal by a State to comply with an order of a court of another State enjoining it to perform or refrain from performing a

specific act . . . shall entail no consequence other than those which may result from such conduct in relation to the merits of the case. In particular, no fine or penalty shall be imposed on the State by reason of such failure or refusal.").

The Special Counsel tries to avoid the plain meaning of "claim" by distinguishing the contempt sanctions here from contempt orders "collateral" to an underlying claim. *See* Opp. 16 ("[T]he very claim that would yield any future judgment to be enforced is one for which [redacted] has been held 'not immune by virtue of' the commercial-activity exception."). That is a contrived distinction if there ever was one. The Court held [redacted] in contempt for violating a court order, not for engaging in commercial activity. *See* Dkt. 30 at 6 (October 5, 2018 contempt order). The contempt order bears no relation to any of the jurisdictional provisions that § 1610(b)(2) incorporates by reference, so the contempt order could never abrogate [redacted] immunity from attachment and execution.[4]

**2. The Special Counsel's argument conflicts with the U.S. Government's longstanding position that a contempt sanction against a foreign state is categorically unenforceable.**

In its motion, [redacted] identified four recent cases in which the United States Government intervened as *amicus curiae* to argue that a federal court had no authority to enter contempt sanctions against a foreign state. Mot. 10. In response, the Special Counsel suggests that those

[4] The Special Counsel argues that [redacted] "does not contend that any of the further exceptions in 28 U.S.C. § 1611 could apply to its property." Opp. 15 n.7. That is because [redacted] is seeking a declaration that this Court can *never* enforce the contempt sanction regardless of the specific property that the Special Counsel moves against. If the Special Counsel tries to enforce the contempt sanction against particular [redacted] property, [redacted] will raise any applicable arguments under § 1611 at that time.

arguments do not govern here because those cases involved the foreign state itself, not an agency or instrumentality. Opp. 2. There are at least two problems with that argument.[5]

First, the word "claim" in § 1610's various subparts means the same thing, so the Government did not argue in those cases and never would have argued that "claim" means one thing for the "foreign state itself" and another for the foreign state's agencies and instrumentalities.

Second, in any case, the Government did not in those cases draw the contrived distinction that the Special Counsel peddles here. In each case, the Government argued that contempt sanctions are categorically off-limits against a foreign state (which [redacted] is). *See* U.S. Amicus Br. 18, *SerVaas Inc. v. Mills*, No. 14-385, 2014 WL 4656925, at *18 (2d Cir. Sept. 9, 2014) ("Absent a foreign state's waiver of immunity from execution of an order imposing monetary sanctions, such an order does not fall within any statutory exception to immunity from execution."); U.S. Amicus Brief 7, *FG Hemisphere*, 2010 WL 4569107, at *7 (same); U.S. Amicus Br. 4, *Af-Cap*, No. 05-51168 ("Regardless of whether the FSIA might arguably permit a district court to use its equitable powers to order monetary contempt sanctions against a foreign state, the statute does not permit enforcement of such an order."); U.S. Amicus Br. 19, *Af-Cap*, No. 05-

[5] Congress did not vest the Executive Branch with interpretive authority over the FSIA, so no Executive Branch interpretation of the statute is entitled to *Chevron* deference. *See Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 740–41 (1996) (deference applies only if "Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency"). That is truer still when a prosecutor interprets a statute in a manner that would give him authority to prosecute. *See United States v. Castleman*, 572 U.S. 157, 182 (2014) (Scalia, J., concurring) ("And in any event, the Department of Justice thankfully receives no deference in our interpretation of the criminal laws whose claimed violation the Department of Justice prosecutes."). And it is truer still for the Special Counsel's never-before-adopted interpretation announced for the first time in this litigation. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) ("An unexplained inconsistency in agency policy is a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.") (internal quotations and alterations omitted).

51168 (referring to Executive Branch's identical argument in *Belize Telecom Ltd. v. Gov't of Belize*, No. 05-12641 (11th Cir. Sept. 2, 2005)). None of the Government's amicus briefs said that contempt sanctions against foreign states are categorically off-limits unless the foreign state is an agency or instrumentality. If the Government had wanted to leave itself an escape hatch for cases involving foreign agencies or instrumentalities, it would have said so.

In all events, the comity and reciprocity concerns that the Government identified in those earlier cases apply with greater force here. As the Government explained in those cases, neither international law nor international practice more broadly allows one state to enforce a contempt order against another, so any effort by American courts to do so will provoke reciprocal treatment for the United States abroad. *See, e.g.*, U.S. Amicus Br. 12, *Af-Cap*, No. 05-51168 ("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"). An order enforcing contempt sanctions against a foreign instrumentality would guarantee identical treatment of American instrumentalities abroad.

The Special Counsel's arguments about enforceability are unprecedented. He has cited no example of the Government's supporting contempt sanctions against a foreign state or its agencies or instrumentalities. *See* Opp. 15–17. This Court should reject his departure from § 1610's plain text, international law, and Government practice.

**B. The FSIA's property-immunity provision applies to criminal proceedings.**

The Special Counsel knows that the FSIA forecloses enforcement of any contempt sanction against [redacted], so he once again asks this Court to jettison the statute by holding that § 1609 does not apply to criminal proceedings. Opp. 17–21. That argument flies in the face of § 1609's plain text, which admits of no exception for criminal proceedings. 28 U.S.C. § 1609 ("Subject to existing international agreements to which the United States is a party at the time of enactment of

this Act 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."). It also conflicts with the Supreme Court's teachings that the FSIA's immunity provisions (including § 1609) govern *every* case against a foreign state.

If there were any question on that score, § 1609 answers it: "[T]he property in the United States of a foreign state *shall be immune* from attachment and execution except as provided in sections 1610 and 1611 of this chapter" and "[s]ubject to existing international agreements to which the United States is a party." 28 U.S.C. § 1609 (emphasis added). That provision does not carve out criminal matters from its reach. In fact, the provision does not mention "matters," "actions," or "claims" at all. That is because Congress intended for property immunity to attach regardless of context. "Shall" means shall. The analysis should start and stop there.

The Special Counsel starts from the false premise that Congress did not intend the FSIA to serve as the exclusive enforcement regime in actions against foreign states. The FSIA's text and Supreme Court and D.C. Circuit precedent refute that premise. The Supreme Court has explained that § 1609 "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 (emphasis added). And the statute, the Supreme Court has told us, is the exclusive means of enforcing a judgment against a foreign state: "[A]ny sort of immunity defense made by a foreign sovereign in an American court must stand on the Act's text. Or it must fall." *Republic of Argentina v. NML Capital, Ltd.*, 573 U.S. 134, 141–42 (2014); *see also Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493 (1983) ("The [FSIA] must be applied by the district courts in *every action* against a foreign sovereign.") (emphasis added). Lower courts have agreed that the FSIA sets out a comprehensive regime for property immunity just as it does for jurisdictional immunity. *See Af-Cap*, 462 F.3d at

428 (FSIA's property-immunity exceptions "provide[] the sole, comprehensive scheme for enforcing judgments against foreign sovereigns"); *see also FG Hemisphere Assocs. v. Democratic Republic of Congo*, 447 F.3d 835, 843 (D.C. Cir. 2006) ("Under the FSIA the property of a foreign state is immune from execution subject to certain exceptions . . . .").

The Special Counsel's argument that the "FSIA's background, purpose, and legislative history confirm that its immunity provisions were designed to address civil cases" (Opp. 18) again ignores the Supreme Court's repeated teachings that the FSIA's scheme is "comprehensive." *Argentine Republic v. Amerada Hess*, 488 U.S. 428, 437, 437 (1989); *see also NML Capital*, 573 U.S. at 141 ("We have used th[e] term [comprehensive] often and advisedly to describe the Act's sweep."); *Samantar v. Yousuf*, 560 U.S. 305, 323 (2010) (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"). The Supreme Court's holdings to that effect track the statute's legislative history. *Amerada Hess*, 488 U.S. at 437 n.5 (quoting H.R. Rep. No. 94-1487 in describing the FSIA's immunity provisions as "comprehensive"). Congress and the Supreme Court meant *comprehensively* when using the term "comprehensively."

Any other conclusion would conflict with international law's longstanding rule barring criminal jurisdiction over a foreign state.[6] *See, e.g.*, Hazel Fox & Philippa Webb, *The Law of State*

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[6] The Special Counsel's description of *Samantar v. Yousuf*, 560 U.S. 305, 323 (2010), is misleading in the extreme. The Special Counsel argues that it is not plausible "that Congress and the Executive Branch—which drafted the FSIA, would have adopted" an enforcement-immunity rule for criminal cases "'without so much as a whisper' to that effect in the Act's extensive legislative history, *see Samantar v. Yousuf*, 560 U.S. 305, 319 (2010)." But *Samantar* addressed whether a natural person qualified as a "foreign state" in the first place, not whether Congress intended the FSIA's immunity provisions to apply in all cases. *Id.* at 325–26. *Samantar*'s observation about

*Immunity* 94 (3d ed. 2013) (2003) ("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."); *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."); *see also* Federal Judicial Center, *The Foreign Sovereign Immunities Act: A Guide for Judges*, International Litigation Guide at 1 n.2 (2013) ("reference to 'civil actions' does not suggest . . . that states or their agencies or instrumentalities can be subject to criminal proceedings in U.S. courts; nothing in the text or legislative history supports such a conclusion"). That is true generally speaking—American courts lack subject-matter jurisdiction in criminal proceedings against foreign states—and is true particularly when it comes to immunity from attachment and execution.[7] "Prior to the enactment of the FSIA, the United States gave absolute immunity to

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legislative history cannot override § 1609's plain terms granting property immunity to foreign states in both criminal and civil proceedings.

The Special Counsel's citations to *Pasquantino v. United States*, 544 U.S. 349, 369 (2005) and *United States v. Sinovel Wind Grp.*, 794 F.3d 787, 792 (7th Cir. 2015) are just as misleading: Neither case dealt with "initiat[ing] a federal criminal matter against a foreign sovereign" or "collecting a judgment" from one. *Cf.* Opp. 20. *Sinovel* involved a foreign corporation minority-owned by a foreign state that did not qualify for immunity under the FSIA. 794 F.3d at 791 (explaining that the foreign corporation did not qualify for FSIA immunity because the statute "does not recognize any special rights for foreign-government ownership of less than a majority of the shares (or their equivalent)"). *Pasquantino* had to do with the Executive's competence to determine whether the individual defendants violated a foreign state's laws. 544 U.S. at 369.

[7] In its opinion, the D.C. Circuit suggested in passing that it is "unsettled" whether foreign agencies and instrumentalities enjoy immunity from criminal proceedings now or in the pre-FSIA world. Op. 10. That is wrong on at least two levels. First, through § 1603, Congress chose to treat foreign agencies and instrumentalities as the foreign state itself. It was not for the D.C. Circuit to second-guess that choice. Second, the supposed uncertainty is a fiction. *See, e.g.*, *In re Investigation of World Arrangements*, 13 F.R.D. 280, 291 (D.D.C. 1952) (collecting cases treating sovereign-owned corporations as the sovereign itself). Although the D.C. Circuit acknowledged "the lack of reported cases—before and after the [FSIA]—considering criminal process served on sovereign-

foreign sovereigns from the execution of judgments." *Autotech Techs. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 749 (7th Cir. 2007); *see also Conn. Bank of Commerce*, 309 F.3d at 255–56 (property immunity raises more delicate issues than even jurisdictional immunity). Congress carried that broad immunity over into the FSIA.

In broadly immunizing foreign states' property from execution or attachment, Congress tracked longstanding international law. *See* 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); *see also Autotech Techs.*, 499 F.3d at 750 ("[t]he FSIA codified this [absolute immunity] practice by establishing a general principle of immunity for foreign sovereigns from execution of judgments"). If Congress had wanted to immunize a foreign state's property "except when the property relates to a judgment in a criminal proceeding," it would have said just that.

The Special Counsel's contrary argument makes no sense. According to the Special Counsel, Congress left absolute immunity generally intact in the civil context but silently abrogated that rule in criminal proceedings. Opp. 17–21. Nothing in the statutory text, legislative history, or international law supports that argument. And the Supreme Court has already rejected

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owned corporations" (Op. 10), it did not draw the straightforward conclusion that the absence of reported cases reflects the absence of subject-matter jurisdiction. No, the court instead speculated that "[a]n equally likely explanation for the absence of cases is that most companies served with subpoenas simply comply without objection." *Id.* There is no evidence—*none*— supporting the D.C. Circuit's speculation on that score. On the contrary, in the lone pre-FSIA case that the D.C. Circuit cited, a corporation owned by the British Government successfully challenged a grand jury subpoena on sovereign-immunity grounds. *See World Arrangements*, 13 F.R.D. at 291 ("[T]he corporation, Anglo-Iranian Oil Company, is indistinguishable from the Government of Great Britain.").

the notion that Congress would ever silently enact "a blanket abrogation of attachment and execution immunity." *See Rubin*, 138 S. Ct. at 825 ("Out of respect for the delicate balance that Congress struck in enacting the FSIA, we decline to read into the statute a blanket abrogation of attachment and execution immunity for § 1605A judgment holders absent a clearer indication of Congress' intent.").

The Special Counsel contends that the Executive Branch's briefs in those other cases were agnostic about the issues presented here (Opp. 15–17), but that is wrong for many reasons—not least because the Executive Branch in those cases did not draw the contrived distinctions that the Special Counsel draws. The Special Counsel also ignores that the comity and reciprocity concerns that the Executive Branch featured in those briefs are heightened in the criminal context. *See* Mot. 9–11 (quoting amicus briefs); *see also* Fox & Webb, *The Law of State Immunity* 91–92 (criminal proceedings raise more sensitive diplomatic concerns than civil proceedings).

* * *

As the D.C. Circuit has recognized, "[t]he FSIA is a rather unusual statute that explicitly contemplates that a court may have jurisdiction over an action against a foreign state and yet be unable to enforce its judgment unless the foreign state holds certain kinds of property subject to execution. Otherwise a plaintiff must rely on the government's diplomatic efforts, or a foreign sovereign's generosity, to satisfy a judgment." *FG Hemisphere*, 637 F.3d at 377; *see also De Letelier v. Republic of Chile*, 748 F.2d 790, 798–99 (2d Cir. 1984) (rejecting argument that Congress could not have intended, through the FSIA, "to create a right without a remedy"). That is the case here. The Court's contempt order is unenforceable.

## CONCLUSION

This Court should hold that [redacted] property is absolutely immune from execution or attachment, that the Court cannot enforce its contempt order or any other sanction (monetary or non-monetary) against [redacted] and that the Special Counsel cannot execute against or attach any of [redacted] property to satisfy the Court's October 5, 2018 contempt order.

Respectfully submitted on January 22, 2019.

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FILED UNDER SEAL

## CERTIFICATE OF SERVICE

I certify that today I served this **Reply in Support of Motion for a Declaration** by email on the following:

Robert S. Mueller III, Special Counsel
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Respectfully submitted on January 22, 2019.

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# ECF No. 66

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

| | |
|---|---|
| IN RE GRAND JURY SUBPOENA NO. 7409 | Case No. 18-gj-0041<br><br>**UNDER SEAL**<br>UNDER LCrR 6.1 |

**[redacted] STATUS REPORT CONCERNING PROPOSED REDACTIONS TO THIS COURT'S DOCKET**

In accordance with this Court's January 23, 2019 minute order, [redacted] and the Special Counsel exchanged proposed redactions to this Court's docket. The parties disagree on the extent of redactions, so they are submitting separate proposals. [redacted] has attached its proposal as Exhibit A.

Many of the Special Counsel's proposed redactions are not appropriate.[1] For instance, there is no reason to redact Mr. Boone's or Mr. Kang's name. In its January 15 order, the Court authorized [redacted] lawyers to identify themselves to the public as counsel for the subpoena recipient. *See* Order at 5 ("Only [redacted] supplemental proposal meets the needs of this case."); *id.* ("the government's proposal would preclude [redacted] counsel from publicly commenting on a fact that, for all intents and purposes, is already known: that [redacted] counsel represents the subpoena recipient in this case"); [redacted] Supplemental Proposed Order ("the Court orders that Alston & Bird can confirm that it represents the subpoenaed witness (designated as either 'Corporation A' or 'Country A')"); *see also* Tr. 16 (Jan. 10, 2019) (this Court ruling at January 10

[1] For this report, [redacted] assumes that the Special Counsel's as-filed proposal reflects the same proposed redactions as the Special Counsel's draft. In addition, the docket sheet (with draft redactions) that the Special Counsel sent to [redacted] is different in several respects than the one that Ms. Gumiel sent to the parties on January 24, 2019, when the Court granted [redacted] to release the docket. [redacted] sees no mention on the docket of the Special Counsel's separately moving this Court to release the docket sheet.

hearing that Alston's lawyers could publicly disclose that they "are representing the . . . foreign corporation that's referred to"). Consistent with that order, both [redacted] and the Solicitor General have confirmed to members of the public that Alston represents the subpoena recipient. For example, [redacted] lawyers have spoken with people outside the firm about potential *amicus* filings supporting [redacted] pending petition for a writ of certiorari, confirming Alston's representation.[2] And on January 17, 2019, [redacted] filed with the Supreme Court a supplemental brief—with the names of its counsel unredacted—supporting its petition for a writ of certiorari. That brief should post on the public docket any day. The day before filing that brief, Alston forwarded to the Special Counsel a courtesy copy of the filing (again, with no redactions to [redacted] lawyers' names). The Special Counsel did not respond to Alston's email. On top of that, in a January 25 email, the Solicitor General served a copy of a redacted Supreme Court filing by email on both Mr. Boone and counsel for the Reporters Committee for Freedom of the Press, which is moving to unseal certain appellate filings. The Solicitor General copied both lawyers on the same email, confirming to the Reporters Committee's counsel—and thus the public—that Mr. Boone represents the subpoena recipient. Given those disclosures and this Court's order, there is no basis for redacting Mr. Boone's and Mr. Kang's names from the docket.

As important, the First Amendment precludes the Special Counsel's attempts to redact [redacted] lawyers' names. The Supreme Court has recognized that the invocation of grand jury interests is not a "talisman" that dissolves First Amendment protections. *See, e.g.*, *Butterworth v.*

[2] Consistent with this Court's order, Alston did not disclose anything about its client's identity or any matter occurring before a grand jury.

*Smith*, 494 U.S. 624, 630 (1990). The Special Counsel does not get to pick and choose when the First Amendment applies and when it doesn't.[3]

In a January 23 court of appeals brief, the Special Counsel tried to collaterally attack this Court's January 15 order by asking the D.C. Circuit to force [redacted] lawyers to redact their names from a brief before filing it publicly.[4] *See* Special Counsel's Opposition to Country A's Motion for Leave to File Response not Under Seal (attached as Ex. B). [redacted]

[redacted]

There is also no basis for redacting the Special Counsel's lawyers' names. Nor is there any basis for this Court to redact *in toto* every entry on its docket after a December 18, 2018 entry—

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[3] To that point, it is ironic that the Special Counsel has argued against [redacted] lawyers' publicly [redacted] when just ten days ago, the Special Counsel publicly dispelled media speculation about certain aspects of his investigation. *See* Devlin Barrett et al., *In a Rare Move, Mueller's Office Denies BuzzFeed Report that Trump Told Cohen to Lie About Moscow Project*, Wash. Post (Jan. 18, 2019), https://www.washingtonpost.com/world/national-security/2019/01/18/b9c40d34-1b85-11e9-8813-cb9dec761e73_story.html?utm_term=.3c1fc3bcd2c7.

[4] [redacted] brief is two sentences long (not including a footnote) and contains no sealed material.

[redacted]

which is the approach that the Special Counsel took in his draft proposal.[6] [redacted] sees no reason for redacting docket entries that could never reveal a grand jury matter. Public access to a docket is the presumption, not the exception.

Respectfully submitted on January 28, 2019.

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[6] By [redacted] count, there are thirty docket entries after the December 18 entry.

**CERTIFICATE OF SERVICE**

I certify that today I served this **Status Report** by email on the following:

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Zainab Ahmad, Senior Assistant Special Counsel
U.S. Department of Justice
Special Counsel
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Respectfully submitted on January 28, 2019.

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*Counsel for* [redacted]

# EXHIBIT A

# ECF No. 67

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**



| | |
|---|---|
| **IN RE GRAND JURY SUBPOENA NO. 7409** | No. 18-gj-041 |
| | **Under Seal** |

**GOVERNMENT'S RESPONSE TO COURT'S JANUARY 23, 2019 MINUTE ORDER**

The United States of America, by Special Counsel Robert S. Mueller, III, files this brief in response to the Court's January 23, 2019 Minute Order asking the parties to submit a joint status report about whether, "in light of information made available through the Supreme Court's and the D.C. Circuit's docket, and a pending request by a media organization," the docket in this matter can be unsealed and, if so, proposing redactions to be made prior to any unsealing. While the parties agree that the docket sheet can be partially unsealed and that the identity of the witness should remain under seal, they are unable to agree on additional proposed redactions, and thus each side intends to submit separate proposals to the Court.

The government's proposal, attached hereto as Exhibit A, seeks to redact information whose disclosure the government believes would reveal a matter occurring before the grand jury and would materially harm the grand jury's investigation. The information falls into two principal categories: (1) the identity of the subpoena recipient, mentioned above; and (2) the identities of government and witness counsel.

The government believes that identifying the subpoena recipient or counsel on the public record could materially harm the grand jury's investigation. Because the Special Counsel's Office, unlike other prosecuting components within the U.S. Department of Justice, operates pursuant to a limited investigative scope, revelation of its involvement in this matter would tend to reveal a matter occurring before the grand jury. And were the fact that [redacted] was the

entity in receipt of the instant grand jury subpoena made public, it would tend to reveal to [redacted] (As noted at the status conference held in this matter on January 10, 2019, Tr. at 8, the government can expand on the basis for this concern in an *ex parte*, *in camera* setting, should the Court so request.)

The government seeks to keep the identity of [redacted] counsel sealed from the public record because of the risk that public identification of the attorneys representing the subpoenaed entity in this matter would tend to reveal the identity of the entity itself. As the D.C. Circuit's decisions redacting the identity of attorneys in sealed cases reflects, *see, e.g.*, *In re Sealed Case*, 146 F.3d 881, 882 (D.C. Cir. 1998); *In re Sealed Case*, 107 F.3d 46, 47 (D.C. Cir. 1997); *In re Sealed Case*, 676 F.2d 793, 797 (D.C. Cir. 1982), revealing an attorney's identity in a public filing can lead in certain instances to potentially credible inferences about a witness's identity or other sensitive information. To be sure, certain anonymized facts about the witness have been revealed in the D.C. Circuit's opinion and judgment and will be disclosed in the redacted version of this Court's memorandum opinion that may be released—*e.g.*, the witness is a foreign-state-owned entity, with an office in the United States; it claimed that production of records would violate foreign law; its sovereign owner has a regulatory body positioned to opine on that non-disclosure issue. But the government believes that many entities may fit that description. [redacted]

[redacted] the government believes that doing so would result in media speculation that [redacted] is the witness or inclusion o[redacted]on a list of possible witnesses, which would pose a material risk to the grand jury's ongoing investigation [redacted] That risk is heightened by the widespread media reporting (also not confirmed on the public record) that the investigation is being conducted by the Special Counsel, whose area of investigation is, again, more limited than that of other federal prosecutors.

The government recognizes that the Court, in its January 15, 2019 opinion, stated that counsel could not be precluded from "publicly commenting on a fact that, for all intents and purposes, is already known," and then identified Alston & Bird's representation of the subpoena recipient in this case as such a fact. Op. at 5. The government respectfully submits, however, that Alston & Bird's representation of the witness is not actually publicly known.

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[1] *E.g.*, Robert Barnes et al., "Supreme Court rules against mystery corporation from 'Country A' fighting subpoena in Mueller investigation," Wash. Post. Jan. 8, 2019), https://www.washingtonpost.com/politics/courts_law/supreme-court-rulesagainst-mystery-corporation-from-country-a-fighting-subpoena-in-muellerinvestigation/2019/01/08/a39b61ac-0d1a-11e9-84fc-d58c33d6c8c7 story.html.

Alston & Bird has never been publicly identified as the law firm representing the subpoena recipient in this matter. To be sure, an attorney for the firm did confirm, according to CNN, that he represented a "country," and another attorney has noted in his website biography that he represents numerous individuals connected to the Special Counsel's investigation. Relying on this information, CNN concluded, in the article cited in note 1 *supra* and on page 2 of the Court's January 15 opinion, that Alston & Bird was "involved" in the instant subpoena litigation, but that it was "not clear whether they represent the company, the country's regulators or another interested party." Subsequent media reporting has not narrowed the category of potential roles that the firm may play in this litigation.[2]

An unconfirmed press story is insufficient to make a non-public fact about a grand jury investigation known to the public. And here, the relevant news story expressly stated that Alston & Bird's role in the case is not known. Revealing that information on the district court docket sheet, for the first time on the public record, thus poses a risk of jeopardizing the grand jury's investigation. The government would be unable to alleviate those harms if they occur; once the proverbial cat is "out of the bag," there would be no "effective way of recapturing it," *Judicial Watch, Inc. v. Department of Justice*, 432 F.3d 366, 369 (2005) (D.C. Cir. 2005) (discussing appealability of disclosure order).

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[2] *E.g.*, https:/ / thehill.com/ regulation/ court-battles/ 424601-cnn-law-firm-thatrepresented-russian-interests-part-of-mystery; https: / /www.cnbc.com/ 2019/01/09 /lawyers-defending-company-over-subpoena-in-possible-mueller-probe.html.

## CONCLUSION

For the foregoing reasons, the government respectfully requests that the Court partially unseal the docket sheet in this case and adopt the redactions proposed in Exhibit A, which the government respectfully submits keep from the public record information whose revelation would tend to materially harm the grand jury's investigation.

Respectfully submitted,

ROBERT S. MUELLER, III
Special Counsel

Dated: January 28, 2019

By: */s/ Zainab Ahmad*

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**CERTIFICATE OF SERVICE**

I, Zainab Ahmad, certify that I caused to be served a copy of the foregoing by electronic means on counsel of record for movant [redacted] on January 28, 2019.

/s/

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*Attorney for the United States of America*

# EXHIBIT A

# ECF No. 68

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

| | |
|---|---|
| **IN RE GRAND JURY SUBPOENA NO. 7409** | No. 18-gj-041<br>**Under Seal** |

**GOVERNMENT'S RESPONSE TO COURT'S JANUARY 28, 2019 MINUTE ORDER**

The United States of America, by Special Counsel Robert S. Mueller, III, files this brief in response to the Court's January 28, 2019 Minute Order asking the government to address the impact of the Solicitor General's inadvertent email disclosure of Alston & Bird's identity on the question of what aspects of the docket sheet in this matter should be unsealed. As explained below, and in the brief the government submitted to the Court of Appeals in this matter yesterday (attached hereto), the government respectfully submits that the inadvertent disclosure does not affect the quantum of information that is part of the public record and thus that counsel's identity should remain sealed on the district court docket.

On January 25, 2019, the Solicitor General's Office sent an email to counsel for [redacted] and counsel for the Reporters Committee for Freedom of the Press serving the government's response in the Supreme Court to the Reporters Committee's motion to intervene. The inclusion of both counsel on the same service email was inadvertent. To the government's knowledge, that information has, as of this submission, not been further published in the media or made part of the official record in any court, including the Supreme Court. For example, the Reporters Committee publicly filed a supplemental brief with the Court of Appeals yesterday whose certificate of service did not identify counsel. Similarly, the Reporters Committee's certificate of service for its reply in support of its motion to intervene in the Supreme Court stated "[b]ecause petitioner's counsel's identity is not public, this Certificate does not list the address or email used" for service. Reply

Br. *In re Grand Jury Subpoena,* Nos. 18A669, 18M93 & 18-948 (S. Ct. filed Jan. 28, 2019). In addition, neither the Court of Appeals' public docket nor the Supreme Court's public docket identify counsel. Thus, for the same reasons discussed in the government's brief in this matter filed on January 28, 2019, the government respectfully requests counsel's identity in this matter remain sealed.

Respectfully submitted,

ROBERT S. MUELLER, III
Special Counsel

Dated: January 29, 2019

By: */s/ Zainab Ahmad*

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# Attachment A

[ORAL ARGUMENT HELD DECEMBER 14, 2018]

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

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No. 18-3071

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IN RE: GRAND JURY SUBPOENA

**FILED UNDER SEAL**

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 18-gj-0041-BAH

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**GOVERNMENT'S RESPONSE TO SUPPLEMENTAL REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE PUBLIC RESPONSE TO MOTION TO UNSEAL**

The government respectfully responds to the supplement filed by [redacted] in this matter. [redacted] has called the Court's attention to an email that the Solicitor General's Office sent to counsel for [redacted] and counsel for the Reporters Committee for Freedom of the Press serving the government's response in the Supreme Court to the Reporters Committee's motion to intervene. The inclusion of both counsel on the same service email was inadvertent. The government continues to regard the identity of [redacted] counsel as sealed. To the government's knowledge, that information has, as of this submission, not been further published in the media. Nor has the Supreme Court placed the identity of counsel on its public docket. Given those facts, and absent

further developments, the government submits that [redacted] motion should be denied.

Respectfully submitted,

ROBERT S. MUELLER, III
Special Counsel

Dated: January 28, 2019

/s/ Michael Dreeben
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## CERTIFICATE OF COMPLIANCE

I certify pursuant to Fed. R. App. P. 32(g) that this motion contains 137 words, and therefore complies with the type-volume limitation of Fed. R. App. P. 27(d)(2). This motion has been prepared in 14-point Garamond, a proportionally spaced typeface.

/s/
Michael R. Dreeben

## CERTIFICATE OF SERVICE

I certify that I have caused a copy of the foregoing to be served on counsel for the witness by electronic mail. Because the docket remains sealed, the government understands that the filing should not be served on the non-party movant.

/s/
Michael R. Dreeben

## CERTIFICATE OF SERVICE

I, Zainab Ahmad, certify that I caused to be served a copy of the foregoing by electronic means on counsel of record for movant [redacted] on January 29, 2019.

/s/

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*Attorney for the United States of America*

# ECF No. 69

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

| | |
|---|---|
| IN RE GRAND JURY SUBPOENA NO. 7409 | Case No. 18-gj-0041<br><br>**UNDER SEAL**<br>UNDER LCrR 6.1 |

[redacted] **RESPONSE TO THE SPECIAL COUNSEL'S PROPOSED DOCKET REDACTIONS**

In asking this Court to redact [redacted] lawyers' names from the public docket, the Special Counsel ignores reality. He ignores the First Amendment. He ignores that this Court has authorized [redacted] lawyers to confirm publicly that they represent Country A. He ignores that [redacted] lawyers have already spoken with people outside Alston & Bird about potential *amicus curiae* briefs supporting [redacted] pending petition for certiorari. He ignores that [redacted] has filed a supplemental brief with the Supreme Court that does not redact [redacted] lawyers' names and that the Solicitor General has not objected to that filing. He ignores that the Solicitor General has already revealed to the Reporters Committee for Freedom of the Press that Mr. Boone represents Country A.[1]

[1] The Reporters Committee filed a brief with the D.C. Circuit on January 28, 2019 confirming that it knows that Mr. Boone represents Country A. *See* Ex. A at 2–3 ("[T]he government has revealed Petitioner's counsel's name (and law firm) to counsel for the Reporters Committee. Specifically, when the government served by email its response to the Reporters Committee's Supreme Court Motion to Intervene, the government cc'd Petitioner's attorney. Rather than objecting to this revelation, Petitioner's counsel responded to the full email group and acknowledged receipt. Based on these emails, counsel for the Reporters Committee now knows the name of the law firm and counsel representing Petitioner despite the over-redacted Petition and the over-redacted proceedings in this Court. The parties plainly do not believe that there is a compelling reason under Federal Rule of Criminal Procedure 6(e) or otherwise to keep secret the identity of Petitioner's counsel, having revealed it to a non-party public interest group whose mission includes ensuring public access to and public dissemination of information. This disclosure alone warrants unsealing") (emphasis added). The same day, the Reporters Committee served a Supreme Court filing by email on Mr. Boone, again confirming that it knows that Mr. Boone represents Country A. *See* Ex. B.

Respectfully submitted on January 29, 2019.

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**CERTIFICATE OF SERVICE**

I certify that today I served this **Response** by email on the following:

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Respectfully submitted on January 29, 2019.

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*Counsel for* [redacted]

# EXHIBIT A

**ARGUED DECEMBER 14, 2018**

**NO. 18-3071**

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

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IN RE GRAND JURY SUBPOENA

---

Appeal from the United States District Court for the District of Columbia
No. 1:18-mj-0041

---

# STATEMENT OF THE STATUS OF RELATED MATTERS

---

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*Counsel for Movant Reporters Committee for Freedom of the Press*

## STATEMENT OF THE STATUS OF RELATED MATTERS

On January 9, 2019, the Reporters Committee for Freedom of the Press (the "Reporters Committee") filed in this Court a Motion to Unseal. On that same day, the Reporters Committee moved to intervene in proceedings relating to this matter in the Supreme Court so that it could file a Motion to Unseal those proceedings as well. On January 25, 2019, the government filed in the Supreme Court an opposition to the Reporters Committee's Motion to Intervene. *See* Ex. A (Government's Opp'n to Mot. to Intervene, *In re Grand Jury Subpoena*, Nos. 18A669, 18M93, 18-948 (S. Ct. Jan. 25, 2019)). Neither party has opposed the Reporters Committee's motion in this Court, *see* Fed. R. App. P. 27(a)(3)(A) (setting 10-day time limit to respond to motion). The Reporters Committee respectfully submits this Statement of the Status of Related Matters.

In its response filed in the Supreme Court, the government stated that it believes that this Court should "address in the first instance movant's request for unsealing of the underlying record" and that this Court "would be better situated [than the Supreme Court] to address what additional documents, if any, should be unsealed and what redactions are *necessary* to protect against disclosure of matters occurring before a grand jury." Ex. A at 3 (emphasis added). Although the government appears to dispute in the Supreme Court that the public's right of access applies to this appeal, Ex. A at 2, no party has advanced a similar argument

in this Court, *see* Fed. R. App. P. Rule 27(a)(3)(A).[1] Consistent with the government's request that this Court resolve the Reporters Committee's motion before the Supreme Court does, this Court should grant the unopposed Motion to Unseal and direct the parties to file as soon as possible public versions of the briefs, the record, and the oral argument transcript in this appeal, making only those redactions narrowly tailored to support the compelling interest of preserving the secrecy of a matter occurring before a grand jury.

Any redactions the parties propose should be rigorously scrutinized, particularly given the parties' longstanding penchant for over-sealing—one that has continued even in the most recent filings before the Supreme Court. For instance, the public version of the Petition for a Writ of Certiorari filed in this case inexplicably redacts the names of the law firm and attorney(s) representing Petitioner. Ex. B. Notwithstanding that redaction, the government has revealed Petitioner's counsel's name (and law firm) to counsel for the Reporters Committee. Specifically, when the government served by email its response to the Reporters Committee's Supreme Court Motion to Intervene, the government cc'd Petitioner's

[1] The Reporters Committee acknowledges that the parties have filed several documents since it moved to unseal. *See* Dkt. Entries dated Jan. 16, 17, 22 , 23, 25. No party has served these filings on the Reporters Committee, nor have any of these filings been made public. Based on the docket's coding system, none of these filings appears to respond to the Reporters Committee's motion.

attorney. Rather than objecting to this revelation, Petitioner's counsel responded to the full email group and acknowledged receipt. Based on these emails, counsel for the Reporters Committee now knows the name of the law firm and counsel representing Petitioner despite the over-redacted Petition and the over-redacted proceedings in this Court. The parties plainly do not believe that there is a compelling reason under Federal Rule of Criminal Procedure 6(e) or otherwise to keep secret the identity of Petitioner's counsel, having revealed it to a non-party public interest group whose mission includes ensuring public access to and public dissemination of information. This disclosure alone warrants unsealing. *See In re Motions of Dow Jones & Co.*, 142 F.3d 496, 505 (D.C. Cir. 1998) (noting that where "attorney decided to reveal" name of "person subpoenaed to appear before the grand jury," such information was "no longer a secret").

Moreover, no party has explained publicly why the disclosure of Petitioner's own identity to the public would harm the secrecy of a matter occurring before a grand jury—particularly where contempt sanctions have been imposed by the district court and affirmed by this Court. Nor is the government likely to offer such an explanation unless this Court recognizes that the public has a constitutional and common law right of access that applies to this appeal—a right that neither party has disputed in this Court but one the government has denied exists in the Supreme Court, Ex. A at 2. As the Reporters Committee explained, there is a

longstanding history in this country that contempt proceedings and appellate proceedings are open to public access. *See* Mot. to Unseal at Arg. Pt. I.A-I.B. The parties therefore must justify why redacting the name of the company now held in contempt is narrowly tailored to protect the secrecy of a matter occurring before a grand jury—or any other compelling governmental interest, Mot. to Unseal at Arg. Pt. I.C—just as they must justify any other redactions they propose.

This Court should grant the Reporters Committee's Motion to Unseal and direct the parties to file public versions of the briefs, record, and oral argument transcript in this appeal such that the only redactions allowed are those narrowly tailored to support a compelling governmental interest.

January 28, 2019

Respectfully submitted,

/s/ Theodore J. Boutrous

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Facsimile: 202.795.9310

*Counsel for Movant Reporters Committee for Freedom of the Press*

## CERTIFICATE OF COMPLIANCE

1. This Statement of the Status of Related Matters complies with the type-volume limitation of Federal Rules of Appellate Procedure 27(d) because it contains 871 words, excluding the parts of the motion exempted by Federal Rule of Appellate Procedure 32(f); and

2. This Statement of the Status of Related Matters complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

January 28, 2019

/s/ Theodore J. Boutrous

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 28th day of January, 2019, I caused the foregoing Statement of the Status of Related Matters to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the Court's CM/ECF system. I further certify that four copies of this Statement were filed with the clerk, pursuant to Circuit Rule 27(b), by hand delivery to the clerk, pursuant to Circuit Rule 25(d). Because the parties and their counsel are not currently public, we are unable to effect service of the Statement of the Status of Related Matters on the parties.

January 28, 2019

/s/ Theodore J. Boutrous
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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, the Reporters Committee for Freedom of the Press certifies that it is an unincorporated association of reporters and editors with no parent corporation and no stock.

January 28, 2019

/s/ Theodore J. Boutrous

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## CERTIFICATE OF PARTIES

Because the identity of the parties is not public, the Reporters Committee for Freedom of the Press is not able to provide a certificate of parties, intervenors, and amici who have appeared before the district court and are in this court, pursuant to Circuit Rules 27(a)(4) and 28(a)(1)(A).

Date January 28, 2019

/s/ Theodore J. Boutrous
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# EXHIBIT B

**Deneen, Lee**

| | |
|---|---|
| **From:** | Boone, Brian |
| **Sent:** | Monday, January 28, 2019 6:40 PM |
| **To:** | Crain, Lee R.; SUPREMECTBRIEFS@USDOJ.GOV; Judith.L.Reardon-Bridges@usdoj.gov; Charlene.W.Goodwin@usdoj.gov |
| **Cc:** | Boutrous Jr., Theodore J. |
| **Subject:** | RE: In Re: Grand Jury Subpoena Nos. 18A699 & 18-948 |

Received. Thank you.

Brian
704.444.1106

**From:** Crain, Lee R. [mailto:LCrain@gibsondunn.com]
**Sent:** Monday, January 28, 2019 6:24 PM
**To:** SUPREMECTBRIEFS@USDOJ.GOV; Boone, Brian <Brian.Boone@alston.com>; Judith.L.Reardon-Bridges@usdoj.gov; Charlene.W.Goodwin@usdoj.gov
**Cc:** Boutrous Jr., Theodore J. <TBoutrous@gibsondunn.com>
**Subject:** In Re: Grand Jury Subpoena Nos. 18A699 & 18-948

Counsel:

Attached please find a PDF version of the Reply in Support of the Motion to Intervene, filed today, January 28, 2019. Hard copies have been sent via first-class mail to counsel.

**Lee Crain**

GIBSON DUNN

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# ECF No. 70

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

| | |
|---|---|
| **IN RE GRAND JURY SUBPOENA NO. 7409** | No. 18-gj-041<br>**Under Seal** |

**GOVERNMENT'S REQUEST FOR CLARIFICATION OF THE COURT'S JANUARY 15, 2019 MEMORANDUM AND ORDER**

The United States of America, by Special Counsel Robert S. Mueller, III, files this request for clarification of the Court's January 15, 2019 Memorandum and Order. *See* Doc. 57 (under seal). The D.C. Circuit and the Supreme Court are both determining whether to reveal on their public dockets the names of the attorneys representing the witness. In view of questions about this Court's January 15 order and this Court's familiarity with the issues, the government respectfully requests that this Court clarify whether its January 15, 2019 order unsealed the identities of the witness's counsel.

1. On January 15, this Court ordered [redacted] counsel not to comment publicly "on the identity of the recipient of the grand jury subpoena in this case beyond the public information about the matter reflected in the public versions of the decisions of the D.C. Circuit." Doc. 57, at 10. The opinion stated that a recent media report "identified [redacted] counsel as representing the publicly unknown subpoena recipient," *id.* at 2, and further stated that the court would not "preclude [redacted] counsel from publicly commenting on a fact that, for all intents and purposes, is already known: tha[redacted] counsel represents the subpoena recipient in this case," *id.* at 5. As the Court is aware, the government believes that these statements appear to have rested on an

understanding of the relevant press story that the government had not had a chance to address. While the story tied the attorneys to this case, it explained that "[i]t is not clear" whether these attorneys "represent the company, the country's regulators or another interested party."*

On January 23, the government opposed [redacted] motion to make an unsealed filing on the D.C. Circuit docket that would reveal the names of the attorneys representing the witness. The government argued that revealing their identities in a public filing could lead to [redacted] and harm the grand jury's investigation. The government noted this Court's statements in its January 15 Order, and the facts that the government had not had a chance to present to this Court. The government solely discussed whether the names of [redacted] attorneys should be shielded on the public docket—a common practice to avoid widespread publicity that can lead to potentially credible inferences about a witness's identity or other sensitive information. *See, e.g.*, *In re Sealed Case*, 146 F.3d 881, 882 (D.C. Cir. 1998); *In re Sealed Case*, 107 F.3d 46, 47 (D.C. Cir. 1997); *In re Sealed Case*, 676 F.2d 793, 797 (D.C. Cir. 1982). The government made no argument about what statements the witness's attorneys could make in other settings.

2. In a sealed order entered on January 29, 2019 and attached hereto as Exhibit A, the D.C. Circuit stated that this Court's January 15 Order "does not expressly give counsel" for the witness "permission to identify themselves." The D.C. Circuit noted the contrary reading presented by counsel for the witness, and stated that "[t]he parties remain free to seek clarification from the district court."

* K. Polantz & L. Robinson, "Law firm that represented Russian interests part of mystery Mueller subpoena case," https://www.cnn.com/2019/01/09/politics/russian-interests-law-firm mueller/index.html.

In light of the D.C. Circuit's order, and given that the witness's counsel is now litigating in both the D.C. Circuit and the Supreme Court its authority to identify counsel on the public docket, the government respectfully requests that the Court clarify its January 15 Order. The government has previously acknowledged the language in that Order and the accompanying Memorandum. *See* Gov't Resp. to Jan. 23, 2019 Minute Order at 3 (filed Jan. 28, 2019). But the government has also explained (1) why, in its view, that language rested on a misapprehension about the state of the information in the public record regarding counsel's representation of the witness; and (2) how publicly identifying counsel at this stage tends to materially harm the grand jury's investigation. *Id.* at 3-5. The government therefore respectfully requests that this Court clarify, at the earliest possible date, whether its January 15, 2019 order unsealed the identities of the witness's counsel.

Respectfully submitted,

ROBERT S. MUELLER, III
Special Counsel

Dated: January 30, 2019

By: */s/ Zainab Ahmad*

Zainab Ahmad
Scott A.C. Meisler
Adam C. Jed
Special Counsel's Office
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, D.C. 20530
Telephone: (202) 616-0800

## CERTIFICATE OF SERVICE

I, Zainab Ahmad, certify that I caused to be served a copy of the foregoing by electronic means on counsel of record for movant [redacted] on January 28, 2019.

/s/

Zainab Ahmad
U.S. Department of Justice
Special Counsel's Office
950 Pennsylvania Avenue NW
Washington, D.C. 20530
Telephone: (202) 616-0800

*Attorney for the United States of America*

# EXHIBIT A

**UNDER SEAL**

# United States Court of Appeals

**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**No. 18-3071** **September Term, 2018**

**1:18-gj-00041-BAH**

**Filed On:** January 29, 2019

In re: Grand Jury Subpoena,

**BEFORE:** Tatel and Griffith, Circuit Judges; Williams, Senior Circuit Judge

## O R D E R

In its motion for leave to file a public response to the Reporter's Committee's motion to unseal, the Corporation represents that the district court "ruled that [Country A's counsel] can publicly confirm that it represents" the Corporation. Motion 1. The operative language of the district court's January 15 order says that the Corporation's "counsel shall refrain from making any public statement or statement to the press that comments on the identity of the recipient of the grand jury subpoena in this case beyond the public information about the matter reflected in the public versions of the decisions of the D.C. Circuit." Order 10. The order does not expressly give counsel permission to identify themselves. In support of its reading of the district court's order, the Corporation cites a transcript of the district court's January 10 hearing, *see* Reply 2 n.1, but that transcript is not in the record before this court. In light of the foregoing, it is

**ORDERED**, on the court's own motion, that the parties supplement the record with a transcript (or, if that is impractical, an audio recording) of any relevant district court hearings, including the January 10 hearing. Additionally, the parties are authorized to file supplemental briefs not to exceed five pages addressing whether, under the district court's currently operative orders, counsel for the Corporation is barred from identifying themselves. The parties remain free to seek clarification from the district court. All supplemental materials must be hand-delivered to the court by 3:00 p.m., Tuesday, February 5, 2019.

**Per Curiam**

**FOR THE COURT:**
Mark J. Langer, Clerk

BY: /s/
Amy Yacisin
Deputy Clerk

# EXHIBIT B

No. 18-948

IN THE SUPREME COURT OF THE UNITED STATES

COUNTRY A,

*Applicant,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

# COUNTRY A'S EMERGENCY APPLICATION UNDER SUPREME COURT RULE 22 FOR AN ORDER DIRECTING THE CLERK TO PUBLICLY FILE COUNTRY A'S SUPPLEMENTAL BRIEF SUPPORTING ITS PETITION FOR CERTIORARI

**FILED UNDER SEAL**

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

BRIAN D. BOONE
*Counsel of Record*
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brian.boone@alston.com

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## TABLE OF AUTHORITIES

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

The Clerk's Office suggested that Country A's counsel file this application asking Your Honor to direct the Clerk's Office to file on the public docket Country A's supplemental brief supporting its petition for a writ of certiorari.[1] The Clerk's Office has withheld the supplemental brief from the public docket because it has counsel of record's name on it.

On January 4, 2019, Country A filed both a redacted and an unredacted petition for certiorari. Country A simultaneously moved this Court to file the unredacted version under seal. A few weeks later, on January 22, the Court granted Country A's sealing motion and posted the redacted version on the public docket, under Case No. 18-948.

In the meantime, on January 8, the D.C. Circuit issued a new opinion in the matter, so on January 17, Country A filed an unredacted supplemental brief addressing that new opinion. The supplemental brief contains no sealed material, so Country A included no redactions. Even so, the Clerk's Office has not posted the supplemental brief to the public docket because it is concerned that the brief does not redact the names of Country A's lawyers. That delay—now in its tenth day—is undermining Country A's efforts to attract *amicus curiae* briefs supporting its certiorari petition.[2]

This Court should direct the Clerk's Office to post Country A's supplemental brief on the public docket immediately. *Amicus* issues aside, Country A's lawyers

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[1] We refer to Petitioner as "Country A." Country A is a wholly-owned agency or instrumentality of a foreign state, so it qualifies as a foreign state under the Foreign Sovereign Immunities Act.

[2] Country A's counsel also filed a letter consenting to *amicus* briefs supporting either or neither party on January 25 (*see* Ex. A), but the Clerk's Office has not included Country A's lawyer's name on the public docket entry.

have a First Amendment right to tell the public that they represent Country A. Indeed, on January 15, the District Court authorized Country A's lawyers to identify themselves to the public as counsel for the subpoena recipient. *See* Ex. B at 5 (January 15, 2019 order) ("the government's proposal would preclude [Country A's] counsel from publicly commenting on a fact that, for all intents and purposes, is already known: that [Country A's] counsel represents the subpoena recipient in this case").

The Government has not appealed that order, but it did collaterally attack the order in the D.C. Circuit on January 23 by asking that court to forbid Country A from publicly filing a two-sentence brief that does not redact Country A's lawyers' names and that contains no sealed material.[3] Country A has explained to the D.C. Circuit all the reasons why that argument is wrong—not least that it ignores Country A's lawyers' First Amendment rights, brushes aside the District Court's order, ignores that Country A's lawyers have already confirmed to people outside the firm that they represent the undisclosed subpoena recipient, and ignores that the Solicitor General has revealed to the Reporters Committee for Freedom of the Press that Mr. Boone is Country A's counsel of record. Although the issue has been ripe for the D.C. Circuit's review for a week, the court has not ruled on the question.

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[3] In that short brief, Country A responds to the Reporters Committee for Freedom of the Press's unsealing motion. Country A originally planned to file that response on the D.C. Circuit's public docket, but before Country A could do that, the D.C. Circuit asked Country A to file a motion for leave to file the response publicly. On January 16, Country A filed that motion even though the District Court's January 15 order authorized Country A's lawyers to confirm publicly that they represent Country A.

The Government opposed Country A's motion for leave on January 23. The Government recognized that the District Court ruled that Country A's lawyers can confirm to the public that they represent Country A, but the Government nonetheless argued that the lawyers' names should be redacted from the proposed D.C. Circuit brief because those names (according to the Government) might reveal a grand jury matter.

Time is running out for potential *amici* to contact Country A's counsel about supporting Country A's petition. Your Honor should end the prior restraint that has been in place for the last ten days and should direct the Clerk's Office to file Country A's supplemental brief on the public docket. In doing so, Your Honor would also spare Country A and the Government from wasting additional time and resources on a sideshow of the Government's making.

## REASONS FOR GRANTING THE APPLICATION

Country A's January 17 supplemental brief contains no sealed material. Based on conversations with this Court's Clerk's Office, Country A understands that the Clerk's Office has not yet docketed the brief because it includes the signature blocks for Mr. Boone (Country A's counsel of record) and Mr. Kang (another of Country A's lawyers at Alston & Bird) and the Government is arguing before the D.C. Circuit that those names should be sealed. There are at least three reasons why those names should not be redacted from Country A's supplemental brief or any other filing going forward: (1) Mr. Boone and Mr. Kang have a First Amendment right to confirm their representation of "Country A," (2) the District Court has authorized that disclosure, and (3) both Country A's counsel and the Solicitor General have revealed to the public that Mr. Boone is counsel of record for Country A.

### I. THE FIRST AMENDMENT PROTECTS COUNTRY A'S LAWYERS' RIGHTS TO REVEAL THEIR NAMES.

The Clerk's Office's refusal to docket the supplemental brief constitutes an impermissible prior restraint on speech. There is no basis for redacting Country A's lawyers' names from any filing in any court. In its D.C. Circuit briefing, the Government did not cite a single case in which a court held that disclosing a lawyer's name would reveal a matter occurring before a grand jury. And as this Court has recognized, the invocation of grand jury interests is not a "talisman" that dissolves

First Amendment protections. *See, e.g.*, *Butterworth v. Smith*, 494 U.S. 624, 630 (1990).

The days are long past when courts could hold judicial proceedings in absolute secrecy. *See In re Oliver*, 333 U.S. 257, 268–69 (1948) ("The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French monarchy's abuse of the *lettre de cachet*. All of these institutions obviously symbolized a menace to liberty."). So are the days when courts could enter gag orders prohibiting parties and their lawyers from saying anything to anyone: "[P]rior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). Consistent with the heavy presumption against prior restraints, Federal Rule of Criminal Procedure 6 does not impose any secrecy requirement on a grand jury witness (*see* Fed. R. Crim. P. 6(e)(2)), and D.C. District Court Rule 57.7(2) allows a grand jury witness's counsel to speak publicly about a number of different things, including "to inform the public that the investigation is underway," "to describe the general scope of the investigation," and "to warn the public of any dangers." Nothing in Rule 6 or the D.C. District Court Rules prohibits Country A's lawyers from telling the world that they represent "Country A."

In its D.C. Circuit briefing, the Government expressed its purported concern that [redacted] to speculate that Country A is the subpoena recipient. That concern is unfounded, for at least four reasons: [redacted] (2) Alston represents hundreds (if not thousands) of clients, so confirming its involvement would not tell the public anything about Country A's

identity; (3) Alston (like most firms) has many engagements for which no information is available to the public, [redacted] and (4) [redacted]

The Government also suggested in its D.C. Circuit briefing that Country A's lawyers have changed their tune because they previously filed a petition for certiorari with this Court that redacted the lawyers' names. That is misleading. Country A proposed those redactions to its petition for certiorari because it wanted to file its petition as soon as possible and knew that the Government would slow down the process if Country A did not redact its counsel's names. Country A has never believed that grand-jury secrecy required those redactions. Besides that, Country A filed its petition before the District Court's January 15 order and a CNN article identifying Country A's lawyers as counsel for Country A. *Cf.* Katelyn Polantz & Laura Robinson, *Law Firm that Represented Russian Interests Part of Mystery Mueller Subpoena Case*, CNN (Jan. 9, 2019), https://www.cnn.com/2019/01/09/politics/russian-interests-law-firm-mueller/index.html.

In any case, even if Country A's lawyers had changed their minds about whether to redact their names from public briefs, the First Amendment guarantees them that right. "[F]reedom of speech includes both the right to speak freely and the right to refrain from speaking at all." *Janus v. Am. Fed'n of State, Cty., and Mun. Employees Council 31*, 138 S. Ct. 2448, 2463 (2018); *see also Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995) ("[O]ne important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say."); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) ("The right to speak and the right to refrain from speaking are complementary components of the broader concept of individual freedom of mind.").

As important, the Government has never objected in this Court to the Court's filing Country A's supplemental brief with Mr. Boone's and Mr. Kang's names unredacted. The Government has had ample opportunity to do so. On January 16, the day before filing the supplemental brief, Country A forwarded to the Government a courtesy copy of the filing (with no redactions to Country A's lawyers' names). The Government did not respond to that email. Nor has the Government filed any motion with this Court arguing that the Court should withhold the supplemental brief from the public docket.

## II. THE DISTRICT COURT HAS AUTHORIZED COUNTRY A'S LAWYERS TO CONFIRM PUBLICLY THAT THEY REPRESENT COUNTRY A.

Acknowledging Country A's and its lawyers' First Amendment rights, the District Court has authorized Country A's lawyers to identify themselves to the public as counsel for the subpoena recipient. *See* Ex. B at 5 ("Only [Country A's] supplemental proposal meets the needs of this case."); *id.* ("the government's proposal would preclude [Country A's] counsel from publicly commenting on a fact that, for all intents and purposes, is already known: that [Country A's] counsel represents the subpoena recipient in this case"); *see also* Country A's Supplemental Proposed Order ("the Court orders that Alston & Bird can confirm that it represents the subpoenaed witness (designated as either 'Corporation A' or 'Country A')"). That written order followed the District Court's oral ruling on January 10 along the same lines.

The Government never appealed that order. In its D.C. Circuit brief opposing Country A's motion for leave to file a two-sentence brief publicly, the Government nonetheless argued that Country A's lawyers' names should be redacted from that brief.

## III. COUNTRY A'S LAWYERS AND THE SOLICITOR GENERAL HAVE CONFIRMED TO MEMBERS OF THE PUBLIC THAT THE LAWYERS REPRESENT COUNTRY A.

This Court should also grant Country A's requested relief because in the time since the District Court's order, both the Solicitor General and Country A have revealed to members of the public that Mr. Boone represents Country A. Country A's lawyers have spoken with people outside the firm about potential *amicus* filings supporting Country A's pending petition for a writ of certiorari.[4] And in a January 25 email, the Solicitor General served a copy of a redacted Supreme Court filing by email on both Mr. Boone and counsel for the Reporters Committee for Freedom of the Press, which is moving to unseal certain filings in this Court. *See* Ex. C at 1 (January 25, 2019 email). The Solicitor General copied both lawyers on the same email, confirming to the Reporters Committee's counsel—and thus the public—that Mr. Boone represents the subpoena recipient. And on January 28, the Reporters Committee filed a brief in the D.C. Circuit confirming its knowledge of Country A's lawyers' identity:

> [T]he government has revealed Petitioner's counsel's name (and law firm) to counsel for the Reporters Committee. Specifically, when the government served by email its response to the Reporters Committee's Supreme Court Motion to Intervene, the government cc'd Petitioner's attorney. Rather than objecting to this revelation, Petitioner's counsel responded to the full email group and acknowledged receipt. Based on these emails, counsel for the Reporters Committee now knows the name of the law firm and counsel representing Petitioner despite the over-redacted Petition and the over-redacted proceedings in this Court. The parties plainly do not believe that there is a compelling reason under Federal Rule of Criminal Procedure 6(e) or otherwise to keep secret the identity of Petitioner's counsel, having revealed it to a non-party public interest group whose mission includes ensuring public access to and public dissemination of information. This disclosure alone warrants unsealing.

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[4] Consistent with the District Court's order, the lawyers did not disclose anything about their client's identity or any matter occurring before a grand jury.

Ex. D at 2–3. The Reporters Committee filed a similar brief in this Court and served it by email on Mr. Boone. *See* Ex. E at 1 (January 28, 2019 service email). Given those disclosures and the District Court's order, there is no basis for this Court's withholding Country A's supplemental brief from the public docket.

* * *

Seven days have passed since this Court docketed Country A's public petition for certiorari. Until the Clerk's Office posts Country A's supplemental brief to the public docket, potential *amicus curiae*—other than the people that Country A's lawyers have spoken to—will not know whom to contact for purposes of exploring potential certiorari-stage *amicus* briefs. Time is of the essence.

## CONCLUSION

Posting Country A's supplemental brief to the public docket would reveal no matter occurring before a grand jury. The Court should direct the clerk to docket Country A's brief immediately.

Respectfully submitted on January 29, 2019.

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*Counsel for Country A*

# ECF No. 71

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**



| | |
|---|---|
| IN RE GRAND JURY SUBPOENA NO. 7409 | Case No. 18-gj-0041<br><br>**UNDER SEAL**<br>UNDER LCrR 6.1 |

**COUNTRY A'S RESPONSE TO**
**THE SPECIAL COUNSEL'S MOTION FOR CLARIFICATION**

Four points in response to the Special Counsel's motion for clarification:

1. The Special Counsel agrees that this Court authorized Alston and Bird to publicly confirm its representation of Country A. Mot. 1, 3.

2. This Court's January 15, 2019 order is not ambiguous, and the Court was not mistaken about the facts.

3. Alston & Bird's lawyers' names do not bear on grand-jury secrecy. But Alston's lawyers have a First Amendment right to publicly confirm their representation of Country A.

4. On January 30, 2019, a Buzzfeed reporter left Mr. Boone a voicemail explaining that Ted Boutrous (counsel for the Reporters Committee for Freedom of the Press) told the Buzzfeed reporter that Mr. Boone represents Country A.

Respectfully submitted on January 30, 2019.

**ALSTON & BIRD LLP**

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## CERTIFICATE OF SERVICE

I certify that today I served this **Response** by email on the following:

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

Respectfully submitted on January 30, 2019.

**ALSTON & BIRD LLP**

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*Counsel for Country A*

# ECF No. 73

# EXHIBIT A

BuzzFeed News REPORTING TO YOU

POLITICS

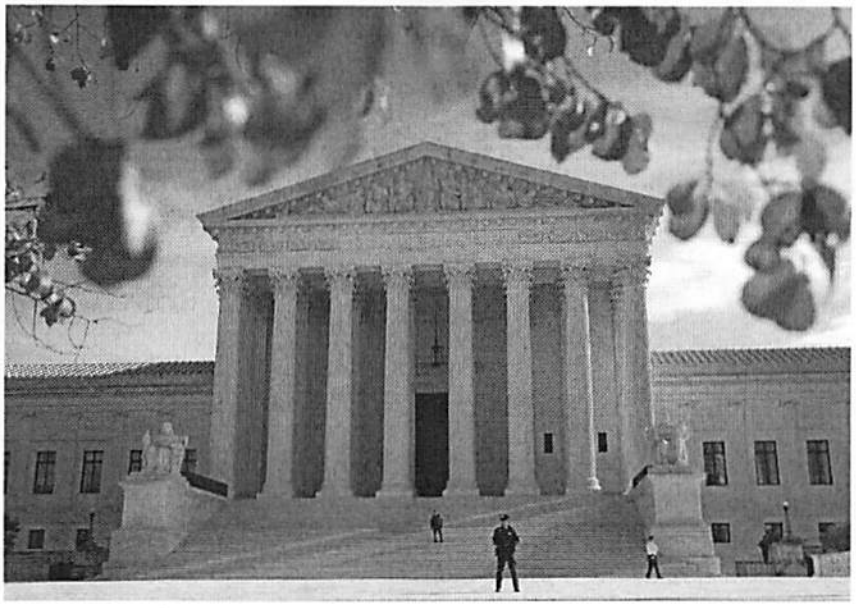
# We Now Know The Law Firm Representing The Mystery Foreign-Owned Company That Is Fighting A Grand Jury Subpoena

The company, represented by the law firm Alston & Bird, has received significant attention due to its reported connection to special counsel Robert Mueller's investigation.

**Chris Geidner**
BuzzFeed News Reporter

Reporting From **Washington, DC**

Posted on January 30, 2019, at 4:20 p.m. ET



*Mark Wilson / Getty Images*

WASHINGTON — The law firm Alston & Bird is representing the mystery company owned by a foreign country that is fighting a grand jury subpoena at the Supreme Court, a lawyer involved in the proceedings confirmed to BuzzFeed News on Wednesday.

The Reporters Committee for Freedom of the Press is seeking to intervene at the Supreme Court to have the filings in the dispute — which has received significant attention due to its reported connection to special counsel Robert Mueller's investigation — unsealed.

A lawyer for the committee, Gibson Dunn partner Theodore Boutrous Jr., told BuzzFeed News that Alston & Bird partner Brian Boone is representing the foreign country–owned company at the Supreme Court. The company has resisted a subpoena for information sought by a grand jury in

DC and faces a contempt order as a result of its refusal to comply that would include daily accrual of fines.

A spokesperson for the special counsel's office declined to comment, and a spokesperson for the Justice Department did not immediately respond to a request for comment. Neither Boone nor a spokesperson for Alston & Bird immediately responded to requests for comment.

Earlier this month, CNN reported that Alston & Bird was involved in the case — noting that Boone and another Alston & Bird partner, Ted Kang, had appeared for multiple hearings opposite lawyers for Mueller's office at federal district court. At the time, CNN reported, "It is not clear whether [the Alston & Bird lawyers] represent the company, the country's regulators or another interested party."

In a brief filed by lawyers for the committee Monday, however, the committee stated that "the government has revealed Petitioner's counsel's name (and law firm) to counsel for the Reporters Committee." The information was revealed to the committee's lawyers when the government "cc'd Petitioner's attorney" on its response to the committee's motion to intervene at the Supreme Court. "Rather than objecting to this revelation, Petitioner's counsel responded to the full email group and acknowledged receipt," the committee's lawyers detailed in Monday's filing.

After being asked about the filing Monday, Boutrous provided a statement to BuzzFeed News on Wednesday, detailing those circumstances and noting, "Petitioner's counsel did not object to the government's disclosure originally, and neither party has suggested to us in their emails or otherwise that we need to keep counsel's identity a secret. Nor has any party responded, let alone objected, to what we said in our brief, confirming that we know the name of Petitioner's counsel. After we filed our reply brief in the Supreme Court, we served the brief on both parties, and neither party said anything about keeping counsel's name confidential. In fact, Petitioner's counsel even responded to us, confirming receipt of our papers.

"Given these circumstances, we believe that there are no restrictions on us and that it is appropriate for us to confirm that, based on the events described above, the identity of Petitioner's counsel in the Supreme Court is Brian Boone of Alston & Bird."

Boone has previously represented the Republican National Committee and US Chamber of Commerce in litigation, according to his firm biography.

He also represented three former attorneys general — including former attorney general Bill Barr, now President Donald Trump's nominee to be attorney general — in a 2009 brief at the Supreme Court relating to the Foreign Sovereign Immunities Act.

That law, which relates to how and when foreign countries can be forced into proceedings in US courts, is front and center in the grand jury subpoena dispute.

Chris Geidner is a Supreme Court correspondent for BuzzFeed News and is based in Washington, DC.

Contact Chris Geidner at chris.geidner@buzzfeed.com.

Got a confidential tip? Submit it here.

# EXHIBIT B

# Law firm that represented Russian interests confirmed to be involved in mystery Mueller case

By Katelyn Polantz and Caroline Kelly, CNN

Updated 6:24 PM ET, Wed January 30, 2019

Source: CNN

Mystery company fighting Mueller: New details emerge 01:11

**Washington (CNN)** — The defendant in the mystery grand jury subpoena challenge related to the Mueller investigation is being represented by the law firm Alston & Bird, a firm that has previously represented Russian entities, a lawyer working to unseal the case confirmed Wednesday.

Ted Boutrous, the lawyer for the Reporters Committee, confirmed CNN's prior reporting that Alston & Bird represents the foreign government-owned company facing scrutiny from special counsel Robert Mueller.

That subpoena case is now before the Supreme Court, and Boutrous' team is attempting to get parts of it unsealed.

Boutrous said in a statement that the government revealed Alston & Bird's identity during legal proceedings, and that they "did not object to the government's disclosure originally, and neither party has suggested to us in their emails or otherwise that we need to keep counsel's identity a secret."

"Given these circumstances, we believe that there are no restrictions on us and that it is appropriate for us to confirm that, based on the events described above, the identity of Petitioner's counsel in the Supreme Court is Brian Boone of Alston & Bird," he added.

**Related Article:** Law firm that represented Russian interests part of mystery Mueller subpoena case

Court documents show that the foreign government-owned company is still fighting the subpoena for information needed in a criminal proceeding from last summer.

The Supreme Court hasn't yet agreed to consider the mystery company's request to challenge the subpoena itself. The court agreed Wednesday to review requests related to the case, including whether to entertain Boutrous' effort to intervene in the case, behind closed doors on February 15.

CNN previously saw a team from Alston & Bird attend a sealed court hearing related to the case opposite several prosecutors from Mueller's office.

The firm has represented Russian interests in the past, including working for a Russian oligarch and a contractor of the Russian government. Boone lists among his prior clients the Republican National Committee regarding public records litigation.

# ECF No. 74

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

**IN RE GRAND JURY SUBPOENA NO. 7409**

No. 18-gj-041

**Under Seal**

**GOVERNMENT'S SUPPLEMENT REGARDING REQUEST FOR CLARIFICATION**

The United States of America, by Special Counsel Robert S. Mueller, III, files this supplement regarding its request for clarification of the Court's January 15 Order. On January 30, 2019, this Court ordered that Alston & Bird may identify itself as representing the subpoena recipient in this case but stayed that order "pending an order from either the D.C. Circuit or the Supreme Court that permits Alston & Bird to identify itself publicly as representing the subpoena recipient, or until either the D.C. Circuit or Supreme Court makes public any court filing in which Alston & Bird is identified as representing the grand jury subpoena recipient." Doc. 72, at 7-8 (under seal). That same day, a media outlet publicly reported on the internet that Alston & Bird represents the witness.* Given these developments, the government no longer objects to the Court's filing a public docket sheet that identifies counsel. The government has similarly indicated to the D.C. Circuit, in a filing today (attached), that it withdraws its objection to the identification of counsel on that court's docket.

[redacted]

* Chris Geidner, *We Now Know The Law Firm Representing The Mystery Foreign-Owned Company That Is Fighting A Grand Jury Subpoena*, BuzzFeed (Jan. 30, 2019), available at https://www.buzzfeednews.com/article/chrisgeidner/mystery-company-law-firm.

[redacted]

Additionally, in light of both the fact that certain counsel's identity will now be public on the docket and the recent round of media reporting regarding the Special Counsel's involvement in this litigation, combined with the form of the redaction on the district court docket sheet unsealed yesterday – which revealed that a prosecuting component other than a U.S. Attorney's Office and a unit within DOJ's Criminal Division is involved (because none of those offices is located at 950 Pennsylvania Avenue) – the government no longer believes that sealing the identity of the prosecutors on the docket sheet is necessary to protect grand jury information.

Accordingly, the government respectfully submits that the names of all counsel involved in this matter can be identified on the public docket sheet.

Respectfully submitted,

ROBERT S. MUELLER, III
Special Counsel

Dated: January 31, 2019

By: */s/ Zainab Ahmad*

Zainab Ahmad
Scott A.C. Meisler
Adam C. Jed
Special Counsel's Office
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, D.C. 20530
Telephone: (202) 616-0800

# Attachment A

[ORAL ARGUMENT HELD DECEMBER 14, 2018]

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

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No. 18-3071

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IN RE: GRAND JURY SUBPOENA

**FILED UNDER SEAL**

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 18-gj-0041-BAH

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# GOVERNMENT'S SUPPLEMENTAL RESPONSE TO MOTION FOR LEAVE TO FILE PUBLIC RESPONSE TO MOTION TO UNSEAL

In light of recent developments bearing on the witness's motion for leave to file a public response to the motion to unseal—specifically, the district court's clarification of its order and a media report identifying the witness's counsel—the government withdraws its opposition to the witness's motion.

Following this Court's January 29, 2019 order, the government sought clarification from the district court on whether its January 15 order unsealed the identities of the witness's counsel. App. A. On January 30, the district court filed a memorandum and order stating that the witness's attorneys "may publicly confirm that Alston & Bird represents the recipient of the grand jury subpoena at issue in this case,"

but stayed that order "pending an order from either the D.C. Circuit or the Supreme Court that permits Alston & Bird to identify itself publicly as representing the subpoena recipient, or until either the D.C. Circuit or Supreme Court makes public any court filing in which Alston & Bird is identified as representing the grand jury subpoena recipient." App. B, at 7-8. That same day, a media outlet publicly reported on the internet that Alston & Bird represents the witness.[*] Given these developments, the government respectfully withdraws its opposition to the public filing of the witness's January 16 response to January 9 motion of the Reporters Committee for Freedom of the Press.

Respectfully submitted,

ROBERT S. MUELLER, III
Special Counsel

Dated: January 31, 2019

/s/ Michael Dreeben
Michael R. Dreeben
Zainab Ahmad
Scott A.C. Meisler
Adam C. Jed
Special Counsel's Office
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, D.C. 20530
Telephone: (202) 616-0800

[*] Chris Geidner, *We Now Know The Law Firm Representing The Mystery Foreign-Owned Company That Is Fighting A Grand Jury Subpoena*, BuzzFeed (Jan. 30, 2019), available at https://www.buzzfeednews.com/article/chrisgeidner/mystery-company-law-firm.

## CERTIFICATE OF COMPLIANCE

I certify pursuant to Fed. R. App. P. 32(g) that this motion contains 254 words, and therefore complies with the type-volume limitation of Fed. R. App. P. 27(d)(2). This motion has been prepared in 14-point Garamond, a proportionally spaced typeface.

/s/
Michael R. Dreeben

## CERTIFICATE OF SERVICE

I certify that I have caused a copy of the foregoing to be served on counsel for the witness by electronic mail. Because the docket remains sealed, the government understands that the filing should not be served on the non-party movant.

/s/
Michael R. Dreeben

# APPENDIX A

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

**IN RE GRAND JURY SUBPOENA NO. 7409**

No. 18-gj-041

**Under Seal**

**GOVERNMENT'S REQUEST FOR CLARIFICATION OF THE COURT'S JANUARY 15, 2019 MEMORANDUM AND ORDER**

The United States of America, by Special Counsel Robert S. Mueller, III, files this request for clarification of the Court's January 15, 2019 Memorandum and Order. *See* Doc. 57 (under seal). The D.C. Circuit and the Supreme Court are both determining whether to reveal on their public dockets the names of the attorneys representing the witness. In view of questions about this Court's January 15 order and this Court's familiarity with the issues, the government respectfully requests that this Court clarify whether its January 15, 2019 order unsealed the identities of the witness's counsel.

1. On January 15, this Court ordered [redacted] counsel not to comment publicly "on the identity of the recipient of the grand jury subpoena in this case beyond the public information about the matter reflected in the public versions of the decisions of the D.C. Circuit." Doc. 57, at 10. The opinion stated that a recent media report "identified [redacted] counsel as representing the publicly unknown subpoena recipient," *id.* at 2, and further stated that the court would not "preclude [redacted] counsel from publicly commenting on a fact that, for all intents and purposes, is already known: that [redacted] counsel represents the subpoena recipient in this case," *id.* at 5. As the Court is aware, the government believes that these statements appear to have rested on an

understanding of the relevant press story that the government had not had a chance to address. While the story tied the attorneys to this case, it explained that "[i]t is not clear" whether these attorneys "represent the company, the country's [redacted] or another interested party."*

On January 23, the government opposed [redacted] motion to make an unsealed filing on the D.C. Circuit docket that would reveal the names of the attorneys representing the witness. The government argued that revealing their identities in a public filing could [redacted] and harm the grand jury's investigation. The government noted this Court's statements in its January 15 Order, and the facts that the government had not had a chance to present to this Court. The government solely discussed whether the names of [redacted] attorneys should be shielded on the public docket—a common practice to avoid widespread publicity that can lead to potentially credible inferences about a witness's identity or other sensitive information. *See, e.g.*, *In re Sealed Case*, 146 F.3d 881, 882 (D.C. Cir. 1998); *In re Sealed Case*, 107 F.3d 46, 47 (D.C. Cir. 1997); *In re Sealed Case*, 676 F.2d 793, 797 (D.C. Cir. 1982). The government made no argument about what statements the witness's attorneys could make in other settings.

2. In a sealed order entered on January 29, 2019 and attached hereto as Exhibit A, the D.C. Circuit stated that this Court's January 15 Order "does not expressly give counsel" for the witness "permission to identify themselves." The D.C. Circuit noted the contrary reading presented by counsel for the witness, and stated that "[t]he parties remain free to seek clarification from the district court."

* K. Polantz & L. Robinson, "Law firm that represented Russian interests part of mystery Mueller subpoena case," https://www.cnn.com/2019/01/09/politics/russian-interests-law-firm mueller/index.html.

In light of the D.C. Circuit's order, and given that the witness's counsel is now litigating in both the D.C. Circuit and the Supreme Court its authority to identify counsel on the public docket, the government respectfully requests that the Court clarify its January 15 Order. The government has previously acknowledged the language in that Order and the accompanying Memorandum. *See* Gov't Resp. to Jan. 23, 2019 Minute Order at 3 (filed Jan. 28, 2019). But the government has also explained (1) why, in its view, that language rested on a misapprehension about the state of the information in the public record regarding counsel's representation of the witness; and (2) how publicly identifying counsel at this stage tends to materially harm the grand jury's investigation. *Id.* at 3-5. The government therefore respectfully requests that this Court clarify, at the earliest possible date, whether its January 15, 2019 order unsealed the identities of the witness's counsel.

Respectfully submitted,

ROBERT S. MUELLER, III
Special Counsel

Dated: January 30, 2019

By: */s/ Zainab Ahmad*

Zainab Ahmad
Scott A.C. Meisler
Adam C. Jed
Special Counsel's Office
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, D.C. 20530
Telephone: (202) 616-0800

## CERTIFICATE OF SERVICE

I, Zainab Ahmad, certify that I caused to be served a copy of the foregoing by electronic means on counsel of record for movant [redacted] on January 28, 2019.

/s/

Zainab Ahmad
U.S. Department of Justice
Special Counsel's Office
950 Pennsylvania Avenue NW
Washington, D.C. 20530
Telephone: (202) 616-0800

*Attorney for the United States of America*

# EXHIBIT A

**UNDER SEAL**

# United States Court of Appeals

**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

---

**No. 18-3071** **September Term, 2018**

**1:18-gj-00041-BAH**

**Filed On:** January 29, 2019

In re: Grand Jury Subpoena,

**BEFORE:** Tatel and Griffith, Circuit Judges; Williams, Senior Circuit Judge

## O R D E R

In its motion for leave to file a public response to the Reporter's Committee's motion to unseal, the Corporation represents that the district court "ruled that [Country A's counsel] can publicly confirm that it represents" the Corporation. Motion 1. The operative language of the district court's January 15 order says that the Corporation's "counsel shall refrain from making any public statement or statement to the press that comments on the identity of the recipient of the grand jury subpoena in this case beyond the public information about the matter reflected in the public versions of the decisions of the D.C. Circuit." Order 10. The order does not expressly give counsel permission to identify themselves. In support of its reading of the district court's order, the Corporation cites a transcript of the district court's January 10 hearing, *see* Reply 2 n.1, but that transcript is not in the record before this court. In light of the foregoing, it is

**ORDERED**, on the court's own motion, that the parties supplement the record with a transcript (or, if that is impractical, an audio recording) of any relevant district court hearings, including the January 10 hearing. Additionally, the parties are authorized to file supplemental briefs not to exceed five pages addressing whether, under the district court's currently operative orders, counsel for the Corporation is barred from identifying themselves. The parties remain free to seek clarification from the district court. All supplemental materials must be hand-delivered to the court by 3:00 p.m., Tuesday, February 5, 2019.

**Per Curiam**

**FOR THE COURT:**
Mark J. Langer, Clerk

BY: /s/
Amy Yacisin
Deputy Clerk

# EXHIBIT B

No. 18-948

IN THE SUPREME COURT OF THE UNITED STATES

COUNTRY A,

*Applicant,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

# COUNTRY A'S EMERGENCY APPLICATION UNDER SUPREME COURT RULE 22 FOR AN ORDER DIRECTING THE CLERK TO PUBLICLY FILE COUNTRY A'S SUPPLEMENTAL BRIEF SUPPORTING ITS PETITION FOR CERTIORARI

**FILED UNDER SEAL**

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

BRIAN D. BOONE
*Counsel of Record*
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(704) 444-1000
brian.boone@alston.com

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## TABLE OF AUTHORITIES

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

The Clerk's Office suggested that Country A's counsel file this application asking Your Honor to direct the Clerk's Office to file on the public docket Country A's supplemental brief supporting its petition for a writ of certiorari.[1] The Clerk's Office has withheld the supplemental brief from the public docket because it has counsel of record's name on it.

On January 4, 2019, Country A filed both a redacted and an unredacted petition for certiorari. Country A simultaneously moved this Court to file the unredacted version under seal. A few weeks later, on January 22, the Court granted Country A's sealing motion and posted the redacted version on the public docket, under Case No. 18-948.

In the meantime, on January 8, the D.C. Circuit issued a new opinion in the matter, so on January 17, Country A filed an unredacted supplemental brief addressing that new opinion. The supplemental brief contains no sealed material, so Country A included no redactions. Even so, the Clerk's Office has not posted the supplemental brief to the public docket because it is concerned that the brief does not redact the names of Country A's lawyers. That delay—now in its tenth day—is undermining Country A's efforts to attract *amicus curiae* briefs supporting its certiorari petition.[2]

This Court should direct the Clerk's Office to post Country A's supplemental brief on the public docket immediately. *Amicus* issues aside, Country A's lawyers

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[1] We refer to Petitioner as "Country A." Country A is a wholly-owned agency or instrumentality of a foreign state, so it qualifies as a foreign state under the Foreign Sovereign Immunities Act.

[2] Country A's counsel also filed a letter consenting to *amicus* briefs supporting either or neither party on January 25 (*see* Ex. A), but the Clerk's Office has not included Country A's lawyer's name on the public docket entry.

have a First Amendment right to tell the public that they represent Country A. Indeed, on January 15, the District Court authorized Country A's lawyers to identify themselves to the public as counsel for the subpoena recipient. *See* Ex. B at 5 (January 15, 2019 order) ("the government's proposal would preclude [Country A's] counsel from publicly commenting on a fact that, for all intents and purposes, is already known: that [Country A's] counsel represents the subpoena recipient in this case").

The Government has not appealed that order, but it did collaterally attack the order in the D.C. Circuit on January 23 by asking that court to forbid Country A from publicly filing a two-sentence brief that does not redact Country A's lawyers' names and that contains no sealed material.[3] Country A has explained to the D.C. Circuit all the reasons why that argument is wrong—not least that it ignores Country A's lawyers' First Amendment rights, brushes aside the District Court's order, ignores that Country A's lawyers have already confirmed to people outside the firm that they represent the undisclosed subpoena recipient, and ignores that the Solicitor General has revealed to the Reporters Committee for Freedom of the Press that Mr. Boone is Country A's counsel of record. Although the issue has been ripe for the D.C. Circuit's review for a week, the court has not ruled on the question.

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[3] In that short brief, Country A responds to the Reporters Committee for Freedom of the Press's unsealing motion. Country A originally planned to file that response on the D.C. Circuit's public docket, but before Country A could do that, the D.C. Circuit asked Country A to file a motion for leave to file the response publicly. On January 16, Country A filed that motion even though the District Court's January 15 order authorized Country A's lawyers to confirm publicly that they represent Country A.

The Government opposed Country A's motion for leave on January 23. The Government recognized that the District Court ruled that Country A's lawyers can confirm to the public that they represent Country A, but the Government nonetheless argued that the lawyers' names should be redacted from the proposed D.C. Circuit brief because those names (according to the Government) might reveal a grand jury matter.

Time is running out for potential *amici* to contact Country A's counsel about supporting Country A's petition. Your Honor should end the prior restraint that has been in place for the last ten days and should direct the Clerk's Office to file Country A's supplemental brief on the public docket. In doing so, Your Honor would also spare Country A and the Government from wasting additional time and resources on a sideshow of the Government's making.

## REASONS FOR GRANTING THE APPLICATION

Country A's January 17 supplemental brief contains no sealed material. Based on conversations with this Court's Clerk's Office, Country A understands that the Clerk's Office has not yet docketed the brief because it includes the signature blocks for Mr. Boone (Country A's counsel of record) and Mr. Kang (another of Country A's lawyers at Alston & Bird) and the Government is arguing before the D.C. Circuit that those names should be sealed. There are at least three reasons why those names should not be redacted from Country A's supplemental brief or any other filing going forward: (1) Mr. Boone and Mr. Kang have a First Amendment right to confirm their representation of "Country A," (2) the District Court has authorized that disclosure, and (3) both Country A's counsel and the Solicitor General have revealed to the public that Mr. Boone is counsel of record for Country A.

### I. THE FIRST AMENDMENT PROTECTS COUNTRY A'S LAWYERS' RIGHTS TO REVEAL THEIR NAMES.

The Clerk's Office's refusal to docket the supplemental brief constitutes an impermissible prior restraint on speech. There is no basis for redacting Country A's lawyers' names from any filing in any court. In its D.C. Circuit briefing, the Government did not cite a single case in which a court held that disclosing a lawyer's name would reveal a matter occurring before a grand jury. And as this Court has recognized, the invocation of grand jury interests is not a "talisman" that dissolves

First Amendment protections. *See, e.g.*, *Butterworth v. Smith*, 494 U.S. 624, 630 (1990).

The days are long past when courts could hold judicial proceedings in absolute secrecy. *See In re Oliver*, 333 U.S. 257, 268–69 (1948) ("The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French monarchy's abuse of the *lettre de cachet*. All of these institutions obviously symbolized a menace to liberty."). So are the days when courts could enter gag orders prohibiting parties and their lawyers from saying anything to anyone: "[P]rior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). Consistent with the heavy presumption against prior restraints, Federal Rule of Criminal Procedure 6 does not impose any secrecy requirement on a grand jury witness (*see* Fed. R. Crim. P. 6(e)(2)), and D.C. District Court Rule 57.7(2) allows a grand jury witness's counsel to speak publicly about a number of different things, including "to inform the public that the investigation is underway," "to describe the general scope of the investigation," and "to warn the public of any dangers." Nothing in Rule 6 or the D.C. District Court Rules prohibits Country A's lawyers from telling the world that they represent "Country A."

In its D.C. Circuit briefing, the Government expressed its purported concern [redacted] to speculate that Country A is the subpoena recipient. That concern is unfounded, for at least four reasons: [redacted] (2) Alston represents hundreds (if not thousands) of clients, so confirming its involvement would not tell the public anything about Country A's

identity; (3) Alston (like most firms) has many engagements for which no information is available to the public, [redacted]

The Government also suggested in its D.C. Circuit briefing that Country A's lawyers have changed their tune because they previously filed a petition for certiorari with this Court that redacted the lawyers' names. That is misleading. Country A proposed those redactions to its petition for certiorari because it wanted to file its petition as soon as possible and knew that the Government would slow down the process if Country A did not redact its counsel's names. Country A has never believed that grand-jury secrecy required those redactions. Besides that, Country A filed its petition before the District Court's January 15 order and a CNN article identifying Country A's lawyers as counsel for Country A. *Cf.* Katelyn Polantz & Laura Robinson, *Law Firm that Represented Russian Interests Part of Mystery Mueller Subpoena Case*, CNN (Jan. 9, 2019), https://www.cnn.com/2019/01/09/politics/russian-interests-law-firm-mueller/index.html.

In any case, even if Country A's lawyers had changed their minds about whether to redact their names from public briefs, the First Amendment guarantees them that right. "[F]reedom of speech includes both the right to speak freely and the right to refrain from speaking at all." *Janus v. Am. Fed'n of State, Cty., and Mun. Employees Council 31*, 138 S. Ct. 2448, 2463 (2018); *see also Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995) ("[O]ne important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say."); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) ("The right to speak and the right to refrain from speaking are complementary components of the broader concept of individual freedom of mind.").

As important, the Government has never objected in this Court to the Court's filing Country A's supplemental brief with Mr. Boone's and Mr. Kang's names unredacted. The Government has had ample opportunity to do so. On January 16, the day before filing the supplemental brief, Country A forwarded to the Government a courtesy copy of the filing (with no redactions to Country A's lawyers' names). The Government did not respond to that email. Nor has the Government filed any motion with this Court arguing that the Court should withhold the supplemental brief from the public docket.

## II. THE DISTRICT COURT HAS AUTHORIZED COUNTRY A'S LAWYERS TO CONFIRM PUBLICLY THAT THEY REPRESENT COUNTRY A.

Acknowledging Country A's and its lawyers' First Amendment rights, the District Court has authorized Country A's lawyers to identify themselves to the public as counsel for the subpoena recipient. *See* Ex. B at 5 ("Only [Country A's] supplemental proposal meets the needs of this case."); *id.* ("the government's proposal would preclude [Country A's] counsel from publicly commenting on a fact that, for all intents and purposes, is already known: that [Country A's] counsel represents the subpoena recipient in this case"); *see also* Country A's Supplemental Proposed Order ("the Court orders that Alston & Bird can confirm that it represents the subpoenaed witness (designated as either 'Corporation A' or 'Country A')"). That written order followed the District Court's oral ruling on January 10 along the same lines.

The Government never appealed that order. In its D.C. Circuit brief opposing Country A's motion for leave to file a two-sentence brief publicly, the Government nonetheless argued that Country A's lawyers' names should be redacted from that brief.

## III. COUNTRY A'S LAWYERS AND THE SOLICITOR GENERAL HAVE CONFIRMED TO MEMBERS OF THE PUBLIC THAT THE LAWYERS REPRESENT COUNTRY A.

This Court should also grant Country A's requested relief because in the time since the District Court's order, both the Solicitor General and Country A have revealed to members of the public that Mr. Boone represents Country A. Country A's lawyers have spoken with people outside the firm about potential *amicus* filings supporting Country A's pending petition for a writ of certiorari.[4] And in a January 25 email, the Solicitor General served a copy of a redacted Supreme Court filing by email on both Mr. Boone and counsel for the Reporters Committee for Freedom of the Press, which is moving to unseal certain filings in this Court. *See* Ex. C at 1 (January 25, 2019 email). The Solicitor General copied both lawyers on the same email, confirming to the Reporters Committee's counsel—and thus the public—that Mr. Boone represents the subpoena recipient. And on January 28, the Reporters Committee filed a brief in the D.C. Circuit confirming its knowledge of Country A's lawyers' identity:

> [T]he government has revealed Petitioner's counsel's name (and law firm) to counsel for the Reporters Committee. Specifically, when the government served by email its response to the Reporters Committee's Supreme Court Motion to Intervene, the government cc'd Petitioner's attorney. Rather than objecting to this revelation, Petitioner's counsel responded to the full email group and acknowledged receipt. Based on these emails, counsel for the Reporters Committee now knows the name of the law firm and counsel representing Petitioner despite the over-redacted Petition and the over-redacted proceedings in this Court. The parties plainly do not believe that there is a compelling reason under Federal Rule of Criminal Procedure 6(e) or otherwise to keep secret the identity of Petitioner's counsel, having revealed it to a non-party public interest group whose mission includes ensuring public access to and public dissemination of information. This disclosure alone warrants unsealing.

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[4] Consistent with the District Court's order, the lawyers did not disclose anything about their client's identity or any matter occurring before a grand jury.

Ex. D at 2–3. The Reporters Committee filed a similar brief in this Court and served it by email on Mr. Boone. *See* Ex. E at 1 (January 28, 2019 service email). Given those disclosures and the District Court's order, there is no basis for this Court's withholding Country A's supplemental brief from the public docket.

* * *

Seven days have passed since this Court docketed Country A's public petition for certiorari. Until the Clerk's Office posts Country A's supplemental brief to the public docket, potential *amicus curiae*—other than the people that Country A's lawyers have spoken to—will not know whom to contact for purposes of exploring potential certiorari-stage *amicus* briefs. Time is of the essence.

## CONCLUSION

Posting Country A's supplemental brief to the public docket would reveal no matter occurring before a grand jury. The Court should direct the clerk to docket Country A's brief immediately.

Respectfully submitted on January 29, 2019.

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# APPENDIX B

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

| | |
|---|---|
| *In re* GRAND JURY SUBPOENA NO. 7409 | Grand Jury Action No. 18-41 (BAH)<br>Chief Judge Beryl A. Howell<br>**Filed Under Seal** |

**MEMORANDUM AND ORDER**

This case, which began with a motion to quash a grand jury subpoena, has moved quickly from this Court, to the D.C. Circuit, and to the Supreme Court, attracting public interest along the way. *See* Mem. & Order (Jan. 15, 2019) at 2, ECF No. 57 (citing media coverage). The D.C. Circuit and the Supreme Court have provided limited public access to their respective dockets, while shielding from public view the content of what has been docketed. *See In re Grand Jury Subpoena*, No. 18-3071 (D.C. Cir.); *In re Grand Jury Subpoena*, No. 18-948 (U.S.). In light of those courts having made their respective dockets public to some extent, as well as media inquiries directed at this Court, the parties were asked to file a joint status report addressing whether a copy of the docket sheet in this matter may be unsealed to any extent, and, if so, to propose necessary redactions. Min. Order (Jan. 23, 2019).

Although the parties were unable to submit a joint report, each responded to the Court's order. *See* Witness's Status Report, ECF No. 66; Gov't's Status Report, ECF No. 67. The reports demonstrate that neither side objects to limited unsealing to the public of the docket, and the parties' proposed redactions mostly align. *See* Gov't's Status Report at 1 ("[T]he parties agree that the docket sheet can be partially unsealed and that the identity of the witness should remain under seal."). [REDACTED].

[REDACTED].[1] [REDACTED].

At the moment, all three levels of the federal judiciary have been asked to consider, or are considering, some version of this issue. [REDACTED]. This Court, however, already has ruled on what public statements the witness's counsel may make.

The Court ruled about what public comments Alston & Bird—the witness's counsel—may make about this case during an impromptu status conference, held at the government's request, without any advance notice of the issues to be addressed at the conference. *See* Gov't's Ltr. (Jan. 8, 2019), ECF No. 44 (requesting status conference). [REDACTED].

[REDACTED].

[REDACTED].

[REDACTED].

At Alston & Bird's request, the Court authorized the parties to submit proposed written orders. [REDACTED].

Upon consideration of the competing proposals, and consistent with the oral ruling, the Court's written Order instructed Alston & Bird not to comment on any publicly-unknown facts. *See* Mem. & Order (Jan. 15, 2019) at 5 (refusing to enter the government's proposed order because that order "would preclude [REDACTED] counsel from publicly commenting [REDACTED]. Thus, the written Order read: "[REDACTED] counsel shall refrain from making any public statement or statement to [REDACTED] beyond the public information about the matter reflected in the public versions of the decisions of the D.C. Circuit, unless otherwise ordered by a court." *Id.* at 10.

[REDACTED].

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[1] [REDACTED]

[REDACTED].[2] [REDACTED].

[REDACTED].

[REDACTED].

For the foregoing reasons, it is hereby

**ORDERED** that Alston & Bird may not make any public comment that this case pertains to [REDACTED]; and it is further

**ORDERED** that this Court's order permitting Alston & Bird to [REDACTED] is **STAYED** pending an order from either the D.C. Circuit or the Supreme Court that [REDACTED]; and it is further

**ORDERED** that a copy of the docket sheet for Grand Jury Action No. 18-41 will be released with redactions that are agreed upon by the parties and consistent with this Order.

**SO ORDERED**.

DATE: January 30, 2019

Beryl A. Howell
Chief Judge

[2] [REDACTED]

# ECF No. 78

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

| | |
|---|---|
| **IN RE GRAND JURY SUBPOENA NO. 7409** | No. 18-gj-041<br>**Under Seal** |

**GOVERNMENT'S NOTICE REGARDING RECENTLY OBTAINED INFORMATION**

The United States of America, by Special Counsel Robert S. Mueller, III, hereby provides

[redacted]

[redacted], and may file related motions in the near future. Because the information may relate directly to issues the Court has considered in this litigation, the government did not want to delay providing the information to the Court so that the Court may act on in any manner it sees fit. Should the Court wish further briefing from the parties, the government is prepared to provide any additional information or clarification the Court may require.

Respectfully submitted,

ROBERT S. MUELLER, III
Special Counsel

Dated: February 1, 2019

By: */s/ Zainab Ahmad*

Zainab Ahmad
Scott A.C. Meisler
Adam C. Jed
Special Counsel's Office
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# Exhibit 1

**Highlighting Added by Special Counsel's Office**

# Exhibit 2

**Highlighting Added by Special Counsel's Office**

# Exhibit 3

**Highlighting Added by Special Counsel's Office**

# Exhibit 4

**Highlighting Added by Special Counsel's Office**

# ECF No. 79

FILED UNDER SEAL



**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

| | |
|---|---|
| IN RE GRAND JURY SUBPOENA NO. 7409 | Grand Jury Action No. 18-gj-0041 (BAH)<br>Chief Judge Beryl A. Howell<br>**FILED UNDER SEAL**<br>UNDER LCrR 6.1 |

**[redacted] RESPONSE TO THE SPECIAL COUNSEL'S NOTICE REGARDING RECENTLY OBTAINED INFORMATION AND THE COURT'S FEBRUARY 4, 2019 SHOW-CAUSE ORDER**

The Special Counsel's Notice Regarding Recently Obtained Information—[redacted]—changes nothing. On its face, [redacted]. The Consent has no bearing on subject-matter jurisdiction, for a party cannot consent to or waive arguments about subject-matter jurisdiction. [redacted] jurisdictional argument—that statutes outside 28 U.S.C. § 1330(a) can never provide subject-matter jurisdiction in a case against a foreign state—is untouched by the Consent.

[redacted]. The Consent is anything but. Neither the Consent nor any of

[redacted]

***

[redacted] has done nothing wrong. It certainly has done nothing warranting this Court's doubling unenforceable fines retroactively. [redacted] (which it could not do absent a clear and unequivocal waiver). This Court should not punish [redacted] for failing to anticipate specious arguments. Doubling the contempt fines would work a manifest injustice.

## I. [redacted] HAS NOT CONSENTED TO (AND COULD NEVER CONSENT TO) SUBJECT-MATTER JURISDICTION UNDER 18 U.S.C. § 3231 OR ANY OTHER STATUTE.

Since the beginning of this case, [redacted] has argued that statutes outside of 28 U.S.C. § 1330(a) can never supply subject-matter jurisdiction in a case against a foreign state and that the FSIA's exceptions to jurisdictional immunity—which include § 1605(a)(1)'s waiver provision—apply only in cases for which § 1330(a) supplies subject-matter jurisdiction. [redacted] is irrelevant to that argument because a party can never consent to subject-matter

[1] Even a waiver of jurisdictional immunity would not be enough. There still would be no subject-matter jurisdiction because this is not a nonjury civil action involving a claim for relief. *See* 28 U.S.C. § 1330(a).

jurisdiction. As important, the Consent does not clearly and unequivocally [redacted]

[redacted] It says nothing about immunity [redacted]

1. [redacted] **could never consent to subject-matter jurisdiction under 18 U.S.C. § 3231 or any other statute.**

[redacted] could never consent to or waive subject-matter jurisdiction. "[P]arties by consent cannot confer on federal courts subject-matter jurisdiction." *Comm. Futures Trading Co. v. Schor*, 478 U.S. 833, 850 (1986); *see also Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) ("[N]o action of the parties can confer subject-matter jurisdiction upon a federal court. Thus, the consent of the parties is irrelevant."); *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1176 (D.C. Cir. 1994) ("[S]ubject matter jurisdiction cannot be created by consent, waiver, or even estoppel.") (citation omitted); *Letelier v. Republic of Chile*, 488 F. Supp. 665, 667 (D.D.C. 1980) ("[I]t is firmly established that subject matter jurisdiction cannot be conferred upon a court by consent of the parties involved, whether that consent is by affirmation

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[2] The Consent reads as follows:

[redacted]

or acquiescence of the defendants."). Subject-matter jurisdiction exists only where Congress creates it. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 433 (1989).

For cases involving foreign states, Congress has limited subject-matter jurisdiction to certain nonjury civil actions. *See* 28 U.S.C. § 1330(a). 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." *Amerada Hess*, 488 U.S. at 434. Federal courts can exercise subject-matter jurisdiction under § 1330(a) only if one of §§ 1605–1607's exceptions (including waiver) applies.[3] *Id.* at 443 (explaining that "the FSIA provides the sole basis for obtaining jurisdiction over a foreign state").

[redacted] understands that this Court and the D.C. Circuit have disagreed with [redacted] arguments on that score. But those holdings do not change the reality that even if [redacted] had wanted to consent to criminal subject-matter jurisdiction [redacted], it could not have done so.

**2. In any event, the Consent is not a clear and unequivocal waiver of sovereign immunity in this criminal proceeding.**

Subject-matter jurisdiction aside, the Consent does not qualify as a clear and unequivocal waiver of sovereign immunity. Under § 1605(a)(1), a foreign state is not entitled to jurisdictional immunity if it "has waived its immunity either explicitly or by implication." When a party relies on express waiver under § 1605(a)(1)—which is what the Special Counsel is hinting at—he must prove that the foreign state waived its jurisdictional immunity "clearly and unambiguously." *World Wide Minerals*, 296 F.3d at 1162 (holding that foreign state waived its sovereign immunity when

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[3] [redacted] continues to press that argument in its petition for a writ of certiorari. *See* Pet. at ii (Question Presented: "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?").

contracts' waiver clauses expressly referred to "sovereign immunity" and the FSIA, but that the foreign state did not waive immunity for other claims unrelated to those contracts); *see also Maritime Int'l Nominees Establishment v. Republic of Guinea*, 693 F.2d 1094, 1100 n.10 (D.C. Cir. 1982) (waiver of sovereign immunity under § 1605(a)(1) must be "specific and explicit"); *Drexel Burnham Lambert Grp., Inc. v. Committee of Receivers*, 12 F.3d 317, 325 (2d Cir. 1993), *cert. denied*, 511 U.S. 1069 (1995) ("any waiver must . . . be 'unmistakable' and 'unambiguous'").

The Consent does not mention sovereign immunity or waiver, let alone waiver of immunity from criminal proceedings. Dkt. 78-1 (Ex. 1) at 6. *See Amerada Hess*, 488 U.S. at 442–43 ("Nor do we see how a foreign state can waive its immunity under § 1605(a)(1) by signing an international agreement that *contains no mention of a waiver of immunity to suit in United States courts* or even the availability of a cause of action in the United States") (emphasis added). Nor do [redacted]. Dkt. 78-3 (Ex. 3) at 7. Those documents do not qualify as an express waiver of [redacted] jurisdictional immunity under § 1605(a)(1) or of its execution immunity under § 1610(b)(1). *See also World Wide Minerals*, 296 F.3d at 1162 ("In general, explicit waivers of sovereign immunity are narrowly construed 'in favor of the sovereign' and not enlarged 'beyond what the language requires'") (quoting *Library of Cong. v. Shaw*, 478 U.S. 310, 318 (1986)).

None of those documents qualifies as an implicit waiver either. "Federal courts have been virtually unanimous in holding that the implied waiver provision of Section 1605(a)(1) must be construed narrowly." *Shapiro v. Republic of Bolivia*, 930 F.2d 1013, 1017 (2d Cir. 1991) (collecting cases). There is no implied waiver "unless the foreign state reveals its intent to waive its immunity by: (1) agreeing to arbitration in another country, (2) agreeing that the law of a particular country should govern a contract, or (3) filing a responsive pleading in an action without

raising the defense of sovereign immunity." *Calzadilla v. Banco Latino Int'l*, 413 F.3d 1285, 1287 (11th Cir. 2005); *see also Eaglet Corp. v. Banco Cent. de Nicaragua*, 839 F. Supp. 232, 234 (S.D.N.Y. 1993) (finding no implicit waiver absent "language clearly evincing the parties' intent to waive immunity"). The Consent does not fit within the traditional bases for implicit waiver. And courts have been "loath to broaden the scope of the implied waiver provision," so they "rarely have found that an action that does not fit one of the above three examples constitutes an implicit waiver." *Aquamar S.A. v. Del Monte Fresh Produce N.A.*, 179 F.3d 1279, 1291 n.24 (11th Cir. 1999).

The Consent is [redacted], not subject-matter jurisdiction or sovereign immunity in this criminal context. We know that both because a party cannot consent to subject-matter jurisdiction (*Insurance Corporation of Ireland*, 456 U.S. at 702) and because the Consent [redacted].

## II. [redacted] HAS NEVER WAIVED ITS OR ITS PROPERTY'S ABSOLUTE IMMUNITY FROM ENFORCEMENT OF CONTEMPT SANCTIONS (MONETARY OR NON-MONETARY).

The Special Counsel's new documents also do not transform unenforceable contempt sanctions into enforceable ones. Even if the documents could be construed as waiving [redacted] jurisdictional immunity—they cannot—that would not qualify as a waiver of [redacted] property

immunity. "'[A] waiver of immunity from suit does not imply a waiver of immunity from attachment of property,' and vice versa." *Walters v. Indus. & Commercial Bank of China, Ltd.*, 651 F.3d 280, 295 (2d Cir. 2011) (quoting Restatement (Third) of Foreign Relations Law of the United States § 456(1)(b)); *see also id.* (holding that plaintiffs "identif[ied] no basis in law to conclude that any of China's U.S.-directed conduct should be deemed a waiver of execution immunity, as distinct from jurisdictional immunity"); *Ministry of Def. & Support for Armed Forces of Islamic Republic of Iran v. Cubic Def. Sys., Inc.*, 385 F.3d 1206, 1219 (9th Cir. 2004), *vacated on other grounds*, 546 U.S. 450 (2006) (foreign state's "waiver of jurisdictional immunity did not also constitute a waiver of its immunity from having its property attached").[4]

Nothing in the filed information suggests that [redacted], but the Special Counsel's highlighted language does not mention [redacted]. The Special Counsel is inviting the Court to conclude that when [redacted] it expressly forfeited all the immunity [redacted] without even a whisper to that effect. With

[4] International law follows the same principles. *See* Hazel Fox & Philippa Webb, *The Law of State Immunity* 391 (3d ed. 2013) ("It is generally well established that a separate waiver is required for immunity from execution than that given in relation to adjudication"). The Vienna Convention similarly provides that "[w]aiver from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgment, for which a separate waiver shall be necessary." 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. 32. And a United Nations Convention provides that "[w]here consent to the measures of constraint is required under Articles 18 and 19, consent to the exercise of jurisdiction under article 7 shall not imply consent to the taking of measures of constraint." United Nations Convention on Jurisdictional Immunities of States and their Properties, at art. 20.

immunity waivers, the law demands more than speculation from silence. *See id.*; *see also World Wide Minerals*, 296 F.3d at 1162 ("A foreign sovereign will not be found to have waived its immunity unless it has clearly and unambiguously done so.").

The Court should also reject any other argument that the Special Counsel makes about the [redacted]

That exception requires a claim, but there is no claim here. *Cf.* 28 U.S.C. § 1610(b)(2) ("the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2), (3), or (5) or 1605(b) of this chapter"). In suggesting otherwise, the Court reasoned in its January 24 opinion that "[i]f the government eventually obtains a judgment and then an order, pursuant to 28 U.S.C. § 1610(c), authorizing the attachment or execution of certain property, the government has a claim, reflected in the judgment, [redacted], but has not paid, fines under the civil Contempt Order, as well as a claim demanding satisfaction of the money judgment through a writ of execution or attachment." Dkt. 65 at 16. That reasoning is unprecedented and wrong and would cause the exception to swallow the background rule of immunity. By the Court's logic, a party who has no claim (and thus no argument that § 1610(b)(2)'s exception applies) could sue a foreign state, get an ancillary order awarding monetary sanctions, and then manufacture a claim for purposes of § 1610(b)(2) by moving for an order of execution under § 1610(c). That would turn § 1610(b)(2) into a superhighway for plaintiffs who would otherwise have no recourse against immune property; to our knowledge, no court has read § 1610(b)(2) in the same way as the Court. Section 1610(b)(2)'s "claim" limitation requires proof of a claim *before* a party moves for an execution order under § 1610(c).

This Court also reasoned that [redacted]

("The Contempt Order, of course, is derivative of the Production Order, to which [redacted] has no immunity because of 28 U.S.C. § 1605(a)(2)."). But the Court's conclusion that § 1605(a)(2) applies does not mean that § 1610(b)(2) abrogates [redacted], 651 F.3d at 295 ("[A] waiver of immunity from suit does not imply a waiver of immunity from attachment of property, and vice versa."). Section 1605(a)(2) does not use the word "claim." Section 1610(b)(2) does. If the Court were correct that a property-immunity exception applies anytime a jurisdictional-immunity exception does, then there would have been no need for Congress to enact a separate statute governing a foreign state's property's immunity.

Neither this Court nor the Special Counsel has cited a case in which a court approved a party's manipulating the FSIA's enforcement regime in the way that the Court suggested in its opinion, much less doing so to sustain sanctions against a foreign state. In fact, the cases go the other way. The Court ignored all [redacted] cited cases holding that neither sanctions motions nor sanctions orders involve "claims for relief." *See* Dkt. 59 at 9–10 (citing *SEC v. Faulkner*, No. 3:16-CV-1735-D, 2018 U.S. Dist. LEXIS 184550, at *6 (N.D. Tex. Oct. 29, 2018) ("A sanctions order is not a claim for relief."); *Nogess v. Poydras Ctr., L.L.C.*, 728 F. App'x 303, 305 (5th Cir. 2018) (*per curiam*) (motion for sanctions is not a "claim[] for relief in this suit"); *Heffington v. Saline*, 863 F.2d 48, at *1 (6th Cir. 1988) (table) ("A request for costs, fees or sanctions is not a claim within the meaning of Fed. R. Civ. P. 54(b)."); *Mulay Plastics, Inc. v. Grand T. W. R. Co.*, 742 F.2d 369, 371 (7th Cir. 1984) (sanctions order did not dispose of "claim for relief" because it did not resolve "a substantive claim"); *Sohal v. City of Merced Police Dep't*, No. 09-cv-0160, 2009

U.S. Dist. LEXIS 54414, at *21–22 (C.D. Cal. June 25, 2009) (distingishing a "claim for relief" from a "mo[tion] for "sanctions"); *Buemi v. Kerckhoff*, 359 S.W.3d 16, 21–24 (Mo. 2011) (motion for sanctions does not involve a claim for relief); *Spring Creek Living Ctr. Ltd. P'ship v. Sarrett*, 883 S.W.2d 820, 821 (Ark. 1994) (*per curiam*) ("[M]otions requesting sanctions under Ark. R. Civ. P. 11 . . . do not constitute 'claims for relief. . . .'")). There is no way to distinguish those holdings.[5]

## III. THERE IS NO BASIS FOR DOUBLING THE CONTEMPT FINES, MUCH LESS DOING SO ON A *NUNC PRO TUNC* BASIS.

There is no basis for doubling the contempt fines because [redacted] do not affect [redacted]. In its February 4 minute order, the Court suggested that [redacted] That isn't true. [redacted] has never waived its immunity and has done nothing wrong. It was not incumbent on [redacted] or its lawyers to search through [redacted] that could never waive subject-matter jurisdiction and say nothing about immunity on the chance that the Special Counsel might argue that [redacted] constituted a waiver of subject-matter jurisdiction and FSIA immunity.

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[5] The Government's *amicus* briefs in other cases also do not support the distinctions that the Court drew. According to the Court, all those briefs involved foreign states (as opposed to foreign states' agencies or instrumentalities), and none of them "relied on a textual argument about the meaning of 'claim.'" Dkt. 65 at 17–18. But the Government in those cases never said or suggested that the FSIA forbids enforcement of contempt sanctions unless the sanctions relate to a foreign state's agency or instrumentality. Besides that, the Government's arguments about international law, comity, and reciprocity apply with just as much force to foreign agencies and instrumentalities. And to our knowledge, the Government has never before this case supported the Court's suggestion that one of § 1610's exceptions can abrogate a foreign instrumentality's property's immunity from enforcement of contempt sanctions.

In any event, the filed [redacted], so nothing stopped the Special Counsel from presenting those documents earlier in the case.[6]

## CONCLUSION

[redacted] could never waive subject-matter jurisdiction. It has never waived its FSIA immunities. There is no basis for this Court's escalating unenforceable sanctions against [redacted], a foreign state.

Respectfully submitted on February 6, 2019.

**ALSTON & BIRD LLP**

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[redacted]

FILED UNDER SEAL

## CERTIFICATE OF SERVICE

I certify that today I served this **Response to the Special Counsel's Notice Regarding Recently Obtained Information and the District Court's Show-Cause Order** by email on the following:

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

Respectfully submitted on February 6, 2019.

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[redacted]

# ECF No. 80

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

| | |
|---|---|
| **IN RE GRAND JURY SUBPOENA NO. 7409** | No. 18-gj-041<br><br>**Under Seal** |

**GOVERNMENT'S RESPONSE TO COURT'S FEBRUARY 4 MINUTE ORDER**

The United States of America, by Special Counsel Robert S. Mueller, III, files this response to [redacted] February 6, 2019 response to this Court's February 4 order to show cause. The government believes that the recently discovered documents waive any immunity from jurisdiction to which [redacted] is entitled under the Foreign Sovereign Immunities Act (FSIA or Act), thereby rendering the extensive litigation regarding the commercial activity exception that has proceeded in this Court and the court of appeals on that subject unnecessary. As for the contempt sanctions, [redacted] claims to have produced all responsive records as of today, and the government is reviewing those records.[1] If the records are not complete, [redacted] prior conduct may be relevant in determining what prospective sanction will be necessary to compel compliance. But any impropriety should not affect already-accrued contempt sanctions, which were imposed not as punishment but as means of inducing compliance with [redacted] legal obligations and the Court's orders. Were the Court to conclude that [redacted] or its attorneys were not forthcoming about material documents, the Court could choose to impose separate appropriate sanctions, distinct from the civil contempt sanctions it imposed in this case on October 5, 2018, to address that issue.

[1] The government is not currently confident that [redacted] has fully complied with the subpoena and thus respectfully submits that, per the terms of the Court's Minute Order, the hearing tomorrow should proceed as scheduled. The government will be prepared to provide an update to the Court at that time regarding its views on whether [redacted] has complied with the subpoena.

## DISCUSSION

### A. [redacted] Consent [redacted] Satisfies An Exception to Immunity From Jurisdiction Under the FSIA

Under the Court's assumption that the Foreign Sovereign Immunities Act applies to criminal cases, an action against [redacted] to enforce the subpoena requires both a valid grant of subject matter jurisdiction and an applicable exception to the Act's immunity from that jurisdiction. *In re Grand Jury Subpoena*, 912 F.3d 623, 627 (D.C. Cir. 2019) (per curiam). [redacted] is correct (Resp. 3-4), that it could not consent to a court's exercise of subject matter jurisdiction if Congress never provided for jurisdiction in the first place. *See Ege v. U.S. Dep't of Homeland Sec.*, 784 F.3d 791, 793 (D.C. Cir. 2015). [redacted] consent [redacted], Ex. 1, at 6, therefore has no bearing on [redacted] argument—which was raised in a single sentence in [redacted] reply brief before this Court, Reply Supporting Mot. to Quash 4 (Aug. 31, 2018) (Doc. 8), and clarified only at the hearing on the motion to quash—that the grant of jurisdiction in 28 U.S.C. § 1330(a) over civil actions implicitly bars the exercise of jurisdiction over criminal matters.[2] [redacted] consent [redacted] however, is relevant to whether the FSIA's immunity from subject matter jurisdiction applied here, which was one of the principal issues litigated before this Court on [redacted] motion to quash.

1. Where it applies, the FSIA confers immunity from the jurisdiction of federal and state courts, subject to existing treaties and statutory exceptions to that immunity. 28 U.S.C. § 1604; *see* 28 U.S.C. §§ 1605-1607. These exceptions include the commercial-activity exception, 28 U.S.C. § 1605(a)(2), which this Court and the court of appeals carefully applied here. *See* Memorandum Opinion 14-17 (Sept. 19, 2018) (Doc. 19); *In re Grand Jury Subpoena*, 912 F.3d at

[2] Citations to exhibits are referring to the exhibits attached to the Government's Notice Regarding Recently Obtained Information (Feb. 1, 2019).

631-633 (explaining that because *ex parte* evidence was necessary, the court of appeals put the burden on the government and "conduct[ed] a searching inquiry of the government's evidence and legal theories as a substitute for the adversarial process"); *id.* at 634-637 (Williams, J., concurring in part and concurring in the judgment).[3]

The FSIA also provides, however, that "[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver." 28 U.S.C. § 1605(a)(1). [redacted] consent [redacted] waives the FSIA's immunity from jurisdiction. [redacted] filed a "Consent [redacted] Ex. 1, at 5-6 (capitalization omitted). That document stated that [redacted] *Id.* at 6.

The only limitation on that consent [redacted]

[redacted]

[redacted] The subpoena, the action to enforce the subpoena, and this Court's related orders are [redacted] As the government has previously argued, [redacted]

[redacted] constrained interpretation of the scope of its consent [redacted], combined with its arguments that it is absolutely immune from criminal process and that United States courts lack subject matter jurisdiction over criminal proceedings involving it, would suggest that [redacted]

[redacted] is not assisted by the principle that an express waiver of immunity from jurisdiction is limited to its terms. *See, e.g.*, *World Wide Materials, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1162-1163 (D.C. Cir. 2002). The terms of the waiver here are explicit and clear. The waiver is not limited to specific types of disputes, such as disputes over performance on a particular contract. The waiver is not limited to matters [redacted]. It is difficult to see how it could have been written more broadly to acknowledge [redacted]

2. [redacted] contends (Resp. 1, 4-6) that its [redacted] and is not sufficiently clear to constitute a waiver of immunity from subject matter jurisdiction under Section 1605(a)(1). That contention misreads [redacted], which, by its terms, is a "Consent [redacted]," Ex. 1, at 6 (capitalization omitted). [redacted] *Id.* [redacted]

[4] In view of this [redacted], [redacted] and the attorneys who assist it [redacted] should have been aware that [redacted] had consented [redacted] Resp. 10.

[redacted] has offered no reason to believe that its waiver would not meet [redacted] argues (Resp. 6) that language in the consent [redacted]

[redacted] is correct that "[a] foreign sovereign will not be found to have waived its immunity unless it has clearly and unambiguously done so." *World Wide Minerals*, 296 F.3d at 1662. And explicit waivers should not be "enlarged beyond what the language requires." *Id.* (quotation marks omitted). But the language here is clear and consents [redacted] A waiver of immunity does not require particular magic words, as [redacted] suggests, *see* Resp. 5. [redacted] only support is its citation to *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), which held that two international agreements did not constitute express waivers. *Id.* at 442-443. The Court there was addressing whether the Geneva Convention on the High Seas and the Pan American Maritime Neutrality Convention, which "only set forth substantive rules of conduct and state that compensation shall be paid for certain wrongs," constitute waivers. *Id.* at 442-443. These treaties are far afield from [redacted]. *See* Ex. 1, at 6.

[redacted] additionally suggests (Resp. 5) that criminal proceedings would require a separate or more specific waiver. But if the FSIA applies to criminal proceedings, then a broad

consent [redacted] should not have to categorize the forms of jurisdiction to which the party is consenting. Here, [redacted] Anything less would stymie enforcement of the [redacted] and thus would likely not have been sufficient to convince [redacted]

In any event, the FSIA provides for waiver "either explicitly *or by implication*." 28 U.S.C. § 1605(a)(1) (emphasis added). An "implied waiver depends upon the foreign government's having at some point indicated its amenability to suit." *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1174 (D.C. Cir. 1994). Even if an explicit waiver under the FSIA required more than [redacted] provided—it does not—[redacted]. The "implication," 28 U.S.C. § 1605(a)(1), of consenting [redacted] for these purposes is that [redacted] waived any waivable bar to jurisdiction, such as an immunity from subject matter jurisdiction under the FSIA.

[redacted] observes that courts have identified common scenarios that constitute waiver by implication, such as "(1) agreeing to arbitration in another country, (2) agreeing that the law of a particular country should govern a contract, or (3) filing a responsive pleading in an action without raising the defense of sovereign immunity." Resp. 5-6 (quoting *Calzadilla v. Banco Latino Internacional*, 413 F.3d 1285, 1287 (11th Cir. 2005)). But the Eleventh Circuit did not say, as [redacted]

[redacted] suggests, that "[t]here is no implied waiver 'unless the foreign state reveals its intent to waive its immunity'" in one of those three ways. Resp. 5 (quoting *Calzadilla*, 413 F.3d at 1287). That court instead said that the implied waiver provision "*generally does not apply* unless the foreign state reveals its intent to waive its immunity" in such a fashion. *Calzadilla*, 413 F.3d at 1287 (emphasis added). If anything, these "traditional bases for implicit waiver" (Resp. 6) underscore that a waiver occurred here. Agreements to arbitration, application of foreign law to a contract, or filing a response without asserting immunity are far less [redacted][5]

**B. [redacted] Conduct May Be Relevant To Any Prospective Adjustment of Contempt Sanctions**

The Court additionally directed briefing on whether, in light of [redacted] failure to bring [redacted] "Consent [redacted]" to the Court's attention, the contempt sanctions should be increased and "enforced *nunc pro tunc*." If, moving forward, [redacted] continues to disobey the Court's order to comply with the subpoena, any prior conduct by [redacted] may be relevant in determining what prospective sanction will be necessary to compel compliance. But any impropriety should have no bearing on the already-accrued contempt sanctions.

This Court's October 5, 2018 contempt order, for which sanctions began accruing on January 15, *see* Jan. 15, 2019 Order 7-8 (Doc. 57), fit within the "traditional" category of civil

[redacted]

contempt constituting "per diem fines to coerce compliance with affirmative court orders." *Nat'l Organization for Women v. Operation Rescue*, 37 F.3d 646, 658-662 (D.C. Cir. 1994); *see Int'l Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, 828-829 (1994); *see also* Contempt Order 6-7 (Doc. 30) (assessing "a fine of $50,000 per day . . . until such time as [redacted] is willing to complete production of the subpoenaed records") (footnote omitted). The contempt order is civil in nature because it "is designed to be coercive" and "meant to induce a party to comply with a court order, while criminal contempt is meant to punish the party for disobeying the order or engaging in other misconduct relating to the court's processes." 1 Sara Sun Beale et al., Grand Jury Law and Practice § 11:14 (2d ed. Dec. 2018 Rev.); *see Bagwell*, 512 U.S. at 828-829; *Shillitani v. United States*, 384 U.S. 364, 371-372 (1966).

The government respectfully suggests that any "failure" by [redacted] or its attorneys "to be forthcoming with the Court" should not bear on the magnitude of the civil contempt sanctions *nunc pro tunc*. Feb. 4, 2019 Minute Order. "Those sanctions that are designed to coerce compliance are by their very nature 'conditional' sanctions; they only operate if and when the person found in contempt violates the order in the future." *In re Magwood*, 785 F.2d 1077, 1082 (D.C. Cir. 1986); *see Bagwell*, 512 U.S. at 829; *Shillitani*, 384 U.S. at 371-372; *United States v. Stevens*, 663 F.3d 1270, 1274 (D.C. Cir. 2011). Any increase in past sanctions would not be conditional. *See Magwood*, 785 F.2d at 1082; *see also Barry v. United States*, 865 F.2d 1317, 1324 (D.C. Cir. 1989). [redacted] would no longer be in a position where it "can avoid paying the fine simply by performing the affirmative act required by the court's order." *Hicks v. Feiock*, 485 U.S. 624, 632 (1988); *see id.* at 633; *Bagwell*, 512 U.S. at 829; *Evans v. Williams*, 206 F.3d 1292, 1295 (D.C. Cir. 2000).

If the Court ultimately concludes that [redacted] or its attorneys failed in their obligations to the Court and to the adversarial process, the Court has other means at its disposal to address that concern. The Court could potentially issue a distinct civil contempt sanction to compensate for substantial, unnecessary time spent litigating the application of the commercial-activity exception. *See generally Bagwell*, 512 U.S. at 829 (civil contempt can be used to compensate); *Operation Rescue*, 37 F.3d at 659 (same); *Magwood*, 785 F.2d at 1082-1083 (same). And the Court has inherent power to issue appropriate sanctions "for conduct which abuses the judicial process." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44-45 (1991); *see id.* at 45-46; *Shepherd v. Am. Broad. Companies, Inc.*, 62 F.3d 1469, 1475 (D.C. Cir. 1995). "This power is distinct from the contempt power." *Manez v. Bridgestone Firestone N. Am. Tire, LLC*, 533 F.3d 578, 591 (7th Cir. 2008). The government takes no position at this time on whether any such steps are appropriate. The government asks, however, that such steps be distinct from the civil contempt sanctions entered to compel compliance with the grand jury subpoena.

## CONCLUSION

For the foregoing reasons, the government respectfully requests that the Court find that [redacted] has waived any immunity to which it is entitled under the FSIA.

Respectfully submitted,

ROBERT S. MUELLER, III
Special Counsel

Dated: February 7, 2019

By: */s/ Zainab Ahmad*

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# ECF No. 81

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

**IN RE GRAND JURY SUBPOENA NO. 7409**

No. 18-gj-041

**Under Seal**

**GOVERNMENT'S SUPPLEMENTAL RESPONSE TO FEBRUARY 4 MINUTE ORDER**

The United States of America, by Special Counsel Robert S. Mueller, III, files this supplemental response to this Court's February 4 order to show cause. In its response dated February 7, 2019, the government informed the Court that the witness had produced records that it claims are the entirety of the records sought by the subpoena, and that the government is currently evaluating whether in fact that is the case.* Because the issue of whether this production constitutes compliance with the subpoena, and whether contempt should thus be purged, may be raised at today's status conference, the government is attaching for the Court's consideration the cover letters accompanying the witness's production, which state that the production is made "voluntarily," "in the exercise of [redacted] sovereign discretion," and do not assert that the production represents compliance with this Court's order.

Respectfully submitted,
ROBERT S. MUELLER, III
Special Counsel

Dated: February 8, 2019

By: */s/ Zainab Ahmad*

Zainab Ahmad
Scott A.C. Meisler
Adam C. Jed
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* The government remains not currently confident that the documents provided by [redacted]

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February 4, 2019

**CONFIDENTIAL**
**FOIA EXEMPTION REQUESTED**
**BY EMAIL**

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

Re: Voluntary production [redacted]

Dear Ms. Ahmad:

As you know, [redacted]s to argue before the Supreme Court that it is absolutely immune from criminal process in the United States, that American courts have no subject matter jurisdiction over criminal proceedings involvi [redacted]nd that the Foreign Sovereign Immunity Act's exceptions to jurisdictional immunity are civil in nature and could never abrogate [redacted] sovereign immunity in a criminal proceeding. [redacted] also continues to argue that it is absolutely immune from any efforts to enforce contempt sanctions (monetary or otherwise) against it.

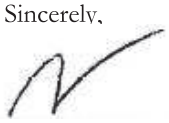
Without waiving those arguments -whether in this case or future litigation- [redacted] has determined in the exercise of its sovereign discretion to voluntarily provide the enclosed records.[1]

[redacted]

[1] This production includes translated documents [redacted] provides those documents for convenience only. The translated documents are not [redacted]

We have uploaded the records to a secure and encrypted FTP. Someone from our law firm will send you the login credentials by separate email. Please let me know if you have any trouble accessing the documents.

Sincerely,



Brian D. Boone

cc: Karl Geercken, Ted Kang, Lee Deneen

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February 7, 2019

**CONFIDENTIAL**
**FOIA EXEMPTION REQUESTED**
**BY EMAIL**

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

Re: Voluntary production [redacted]

Dear Ms. Ahmad:

As you know, [redacted] continues to argue before the Supreme Court that it is absolutely immune from criminal process in the United States, that American courts have no subject-matter jurisdiction over criminal proceedings involving [redacted], and that the Foreign Sovereign Immunity Act's exceptions to jurisdictional immunity are civil in nature and could never abrogate [redacted] sovereign immunity in a criminal proceeding. [redacted] also continues to argue that it is absolutely immune from any efforts to enforce contempt sanctions (monetary or otherwise) against it.

Without waiving those arguments—whether in this case or future litigation—[redacted] has determined in the exercise of its sovereign discretion to voluntarily provide the additional enclosed records.[1]

[redacted]

[1] This production includes translated documents. [redacted] provides those documents for convenience only. The translated documents are not [redacted]

We have uploaded the records to a secure and encrypted FTP. Someone from our law firm will send you the login credentials by separate email. Please let me know if you have any trouble accessing the documents.

Sincerely,

Brian D. Boone

cc: Karl Geercken, Ted Kang, Lee Deneen

# ECF No. 82

FILED UNDER SEAL



**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

| | |
|---|---|
| IN RE GRAND JURY SUBPOENA NO. 7409 | Grand Jury Action No. 18-gj-0041 (BAH)<br>Chief Judge Beryl A. Howell<br>**FILED UNDER SEAL**<br>UNDER LCrR 6.1 |

**[redacted] SUPPLEMENT TO ITS RESPONSE TO THE SPECIAL COUNSEL'S NOTICE REGARDING RECENTLY OBTAINED INFORMATION**

In his response, the Special Counsel suggests that the Court "could choose to impose separate appropriate sanctions" against "[redacted] or its attorneys" if the Court concludes that they "were not forthcoming about material documents."[1] Response at 1. There is no basis for any sanctions, let alone new separate sanctions. Neither [redacted] nor its attorneys have failed to be forthcoming about [redacted]. [redacted] had no reason to know that the Special Counsel would use a [redacted] waived its sovereign immunity in this criminal proceeding.[2] And [redacted] lawyers had never seen that consent [redacted] or the other filed documents until the Special Counsel filed them last Friday.

The Special Counsel also concedes that the filed documents have no bearing on subject-matter jurisdiction.

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[1] The Special Counsel also "takes no position at this time on whether any such [sanctions] are appropriate." Response at 10.

[2] [redacted]

Respectfully submitted on February 8, 2019.

**ALSTON & BIRD LLP**

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[redacted]

FILED UNDER SEAL

**CERTIFICATE OF SERVICE**

I certify that today I served this **Supplement** by email on the following:

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

Respectfully submitted on February 8, 2019.

**ALSTON & BIRD LLP**

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[redacted]

# ECF No. 84

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

| | |
|---|---|
| **IN RE GRAND JURY SUBPOENA NO. 7409** | No. 18-gj-041<br>**Under Seal** |

**GOVERNMENT'S STATUS REPORT AND MOTION FOR EVIDENTIARY HEARING ON WHETHER WITNESS HAS COMPLIED WITH THE SUBPOENA**

The United States of America, by Special Counsel Robert S. Mueller, III, files this motion seeking an evidentiary hearing on the question of whether the witness has substantially complied with the subpoena and purged itself of contempt. The witness has produced documents to the government that its attorneys have stated are all of the documents in the witness's possession that are responsive to the subpoena.[1] Based on the witness's request at the February 8 status conference that contempt sanctions be held in abeyance as a result of this production, the government understands the witness's position to be that if it has produced all responsive records, contempt should be purged. For the reasons stated below, the government respectfully submits that an evidentiary hearing is required to determine whether that is the case. The government further requests that the Court order the witness to produce a [redacted] with firsthand knowledge about the process by which the records were located to testify at that hearing regarding the identification and compilation of materials responsive to the subpoena.

[1] The witness has not claimed to have actually complied with the subpoena or the Court's order, stating only that it made the voluntary decision, in an exercise of "sovereign discretion," to provide responsive documents to the government.

## BACKGROUND

On July 12, 2018, the government served a grand jury subpoena on [redacted]. After various delays and extensive litigation with which the Court is intimately familiar, including the accrual of over $1 million in civil contempt fines and the discovery of a [redacted] consent [redacted] and represented to the Court that, in its view, production was now complete. The government agreed that contempt sanctions should be held in abeyance pending resolution of the question of whether the witness had in fact produced all responsive documents. By minute order dated February 8, 2019, the Court directed that the sanctions would be held in abeyance pending further consideration of this submission by the government.

On February 11, 2019, at the government's request, [redacted] provided a custodial declaration from [redacted] and transcriptions of [redacted] on various documents in the records (but not all of the transcriptions the government had requested). The declaration, attached hereto as Exhibit A, is made by [redacted], who does not state that he is qualified as a result of his position to make the declaration.[2] In addition,

[2] The government included a custodian of records declaration with the subpoena when it was served. Exhibit B at 6. [redacted] declaration makes certain changes to that version, including deleting the description of the signatory as either a custodian of records or an individual qualified as a result of his or her position with the business to make the declaration.

the declaration does not identify the records that are its subject, referring to them only as "the records provided herewith." Ex. A. The declaration is signed February 10, 2019, and thus post-dates [redacted].[3] *Id.*

Previously, in December 2018, [redacted] counsel has stated that the additional materials were discovered [redacted] In addition, [redacted]

[redacted]

[4] In connection with [redacted]

[5] The witness's counsel later informed the government that there were [redacted], but nonetheless maintained [redacted]

## DISCUSSION

An evidentiary hearing is necessary to resolve outstanding questions of material fact regarding the completeness and authenticity of the records produced by the witness before the Court concludes that the witness has purged contempt. At the status conference on February 8, 2019, the witness's counsel stated that it had provided all responsive documents and thus that the contempt sanctions should no longer accrue. As the party seeking to demonstrate substantial compliance with the subpoena, it is [redacted] who bears the burden of proof at this stage of the contempt proceedings. *See Food Lion, Inc., v. United Food & Commercial Workers Int'l Union, AFL-CIO-CLC*, 103 F.3d 1007, 1017 (D.C. Cir. 1997) ("burden of proving good faith and substantial compliance is on the party asserting the defense").

For the reasons articulated here and in the government's *ex parte* submission, substantial questions exist about the completeness and authenticity of the records produced by [redacted] *See Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook Railroad Co.*, 380 F.2d 570, 581 (D.C. Cir. 1967) ("genuine issue of fact regarding compliance" with court order required hearing to resolve). First, the question of [redacted] A witness with personal knowledge about that process should be required to testify about the procedures employed to resolve the question of whether those procedures were sufficient to identify all responsive records. *See generally Food Lion*, 103 F.3d at 1019 (noting "neglectful management practices," such as defective file indexing systems, does not "excuse compliance with a subpoena").

[redacted]

The custodial declaration provided by [redacted] does not suffice to address the government's concerns regarding the process by which the records were located and compiled. The declaration does not claim that [redacted] has produced all responsive records.[7] In addition, the declaration does not even identify the records to which it refers; it contains no reference to the subpoena, to the [redacted], or to the dates and Bates

[6] The subpoena expressly calls for the production [redacted] Ex. B at 5.

[7] The proposed declaration attached to the subpoena, Ex. B at 6, did not contain such a representation because it was designed to prove admissibility of the records pursuant to Fed. R. Evid. 803(6), rather than to prove that [redacted] had in fact produced all responsive records. Because this is a contempt proceeding, however, and because the government has reasons to doubt whether [redacted] has produced all responsive records, an assurance to that effect is necessary in this case. *Cf.* Fed. R. Evid. 803(6)(E) (providing that when a proponent seeks to admit records pursuant to custodial declaration, they will not be admitted if the opponent shows "that the source of the information or the method or circumstances of preparation indicate a lack of trustworthiness").

ranges of those productions, referring instead only to "the records produced herewith." Ex. A. Finally, the subpoena was served on [redacted] does not claim to be a custodian of records or [redacted] with sufficient and appropriate knowledge to make the declaration. While [redacted] counsel has indicated that [redacted] may be willing to provide an updated declaration, *see supra* note 3, at this stage the declaration does not address, much less resolve, the question of whether [redacted] has substantially complied with the subpoena.

The Court should hold an evidentiary hearing to resolve the question of whether the witness has produced all records responsive to the subpoena. *See Brotherhood of Locomotive Firemen & Enginemen*, 380 F.2d at 581. There is no evidence in the record regarding what steps the witness took to compile the subpoenaed records, and there is reason to believe—[redacted]—that those procedures may have been inadequate.

The Court should further order that [redacted] who has personal knowledge of the procedures [redacted] undertook to identify all responsive records to testify at that hearing. *See* Fed. R. Evid. 901(a), (b)(1) (providing one means by which proponent of evidence can authenticate it is by "testimony of a witness with knowledge" that "an item is what it claimed to be" (capitalization omitted)). As noted *supra*, [redacted] bears the burden of proof at this stage of the contempt proceedings regarding whether it has undertaken all reasonable steps to comply with the subpoena.

## CONCLUSION

For the foregoing reasons, as well as those provided in the government's *ex parte* supplement, the government respectfully requests that the Court schedule an evidentiary hearing on the question of whether the witness has substantially complied with the subpoena and thereby purged itself of contempt, and that the Court order the witness to produce a [redacted] with personal knowledge about the identification and compilation of records responsive to the subpoena to testify at that hearing.

Respectfully submitted,

ROBERT S. MUELLER, III
Special Counsel

Dated: February 12, 2019

By: */s/ Zainab Ahmad*

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# EXHIBIT A

# EXHIBIT B

# EXHIBIT C

# ECF No. 87

FILED UNDER SEAL



**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

| | |
|---|---|
| IN RE GRAND JURY SUBPOENA NO. 7409 | Grand Jury Action No. 18-gj-0041 (BAH)<br>Chief Judge Beryl A. Howell<br>**FILED UNDER SEAL** UNDER LCrR 6.1 |

**[redacted] OPPOSITION TO THE GOVERNMENT'S STATUS REPORT AND MOTION FOR EVIDENTIARY HEARING AND TO THE GOVERNMENT'S MOTION FOR LEAVE TO FILE AN *EX PARTE* SUPPLEMENT**

At every turn, the Special Counsel has taken the most aggressive position imaginable. *Compare Berger v. United States*, 297 U.S. 78, 88 (1935) (prosecutor "may strike hard blows" but is "not at liberty to strike foul ones"); Robert H. Jackson, *The Federal Prosecutor*, 31 J. Am. Inst. Crim. L. & Criminology 3, 6 (1941) (a "good prosecutor" demonstrates "sensitiveness to fair play and sportsmanship"). His latest filing continues the trend.

The Special Counsel knows that [redacted] has gone to great lengths to find and voluntarily produce documents responsive to the subpoena. The governing standard is reasonableness, not perfection. *See, e.g.*, *Gucci Am. v. Bank of China*, 768 F.3d 122, 142 (2d Cir. 2014) (party moving for contempt must prove that "the contemnor has not diligently attempted to comply in a reasonable manner."). [redacted] searches were more than reasonable; they were exhaustive. Beyond that, [redacted] has shown its good faith by giving the Special Counsel hundreds of pages of courtesy English translations (which the subpoena does not require) and by producing certain documents outside the subpoena's timeframe (at the Special Counsel's request).

Yet despite all that, the Special Counsel feigns uncertainty about whether [redacted] has (by its view) provided all information that would be responsive to the subpoena. A prosecutor can, of

course, always take that position—no matter how exhaustive the subpoena recipient's efforts—and it is no surprise that the Special Counsel does so here. He also presumes that the normal rules governing subpoena responses—rules that require reasonable efforts, not the exactitude of an Elon Musk algorithm—don't apply to his subpoenas. They do. And [redacted] voluntary productions satisfy those standards.

Ignoring [redacted] repeated assurances that its voluntary productions represent all the information that it found that would be responsive to the subpoena, the Special Counsel speculates that [redacted] *might* not have conducted a reasonable search for responsive documents and that other documents *might* exist. That speculation is no basis for an evidentiary hearing. The Special Counsel has no facts backing up that speculation—and no *ex parte* filing will change that. If the Special Counsel has in mind certain documents that he believes that [redacted] should have voluntarily produced, then he should tell [redacted] not demand an evidentiary hearing.

The Special Counsel's primary argument about the possible inadequacy of [redacted] searches is that [redacted] production [redacted]. They don't suggest a defect in [redacted] review process. The Special Counsel must know that even the best search sometimes misses a document. Again, the standard is reasonableness, not perfection.

The Special Counsel also questions why [redacted] production does not include certain documents related to [redacted] (*see* Mot. 5), but as [redacted] has told its attorneys and those attorneys have told the Special Counsel, no other responsive documents exist. The Special Counsel's Americanized expectations [redacted] do not change the fact that [redacted]

[redacted] voluntarily produced all responsive information. "Lack of evidence showing that a producing party is in fact in possession of a document is grounds to deny a motion to compel." *Harris v. Koenig*, 271 F.R.D. 356, 371 (D.D.C. 2010) (citation omitted); *see also id.* (denying "motion to compel what does not exist").

The Special Counsel's other purported concerns with [redacted] production are part of the same smokescreen. The Special Counsel faults [redacted] custodial declaration for not referring to the produced documents' bates ranges and for not saying that the declarant is qualified to give the declaration, but as the Special Counsel knew when he filed his motion, [redacted] planned to fix both issues by providing an updated declaration and in fact did so on February 13. The Special Counsel also criticizes [redacted] for not providing (by February 12) "all of the transcriptions the government had requested" (Mot. 2), but the subpoena does not require [redacted] to provide translations of responsive documents. [redacted] voluntarily created unofficial translations as a gesture of good faith, not because it had to. The Special Counsel's argument about translations is more proof that no good deed goes unpunished. In any case, the Special Counsel knew when he filed his motion that [redacted] was working on those additional translations, and [redacted] provided them on February 13.

* * *

And then there is the matter of the Special Counsel's proposed *ex parte* filing, the fourth such filing in this case. Enough is enough. The American legal system depends on the adversarial process, not on a prosecutor's whispering secrets into the Court's ear while brandishing grand-jury secrecy as a weapon. The Court should deny the Special Counsel leave to file its *ex parte* supplement. At the very least, if that supplement points to facts suggesting that [redacted] has not

located all responsive documents, then the Special Counsel should tell [redacted] as much. By [redacted] view, it has voluntarily produced all responsive documents. It is hiding nothing.

## BACKGROUND

Even while maintaining that American courts have no subject-matter jurisdiction over this criminal proceeding and that [redacted] is immune from American criminal process, [redacted] has assiduously searched for, collected, and reviewed documents that would otherwise be responsive to the subpoena.[1] After receiving the subpoena, [redacted] to ensure that it collected all relevant documents. [redacted] members searched [redacted]. Those searches turned up several hundred pages of responsive documents.

In December 2018, [redacted]. In the following weeks, [redacted] revisited its search protocols to ensure that it had captured all responsive documents. As part of that effort, [redacted]

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[1] [redacted] continues to press its jurisdictional and immunity arguments before the Supreme Court. Its voluntary productions do not moot those arguments; it continues to suffer various concrete injuries, including injury to its sovereign dignity, flowing from this Court's contempt order and the previously accrued sanctions. *See In re Papandreou*, 139 F.3d 247, 251 (D.C. Cir. 1998) ("A contempt order offends diplomatic niceties even if it is ultimately set aside on appeal.").

[redacted].

[redacted]

About six weeks later, [redacted] told the Special Counsel that it would voluntarily turn over (on a staggered basis) all documents that would otherwise be responsive to the subpoena. On February 4, [redacted] provided 656 pages of documents relating to [redacted]. Hundreds of those pages were courtesy English translations.

Three days later, on February 7, [redacted] provided almost 300 pages of additional documents relating to [redacted] That production also included dozens of pages of courtesy English translations.

That same week, the Special Counsel asked [redacted] attorneys to compare [redacted]

[redacted]

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[3] As [redacted] lawyers have told the Special Counsel, [redacted].

[redacted]

[redacted]. Many of the remaining eight pages contain either empty blanks or data that is similar to (if not identical to) data that [redacted] had already produced.

That was not the end of the Special Counsel's demands. On February 8, he asked [redacted] to provide English translations of certain [redacted] in the translated documents and to provide a custodial declaration. [redacted] sent him the declaration on the next business day (February 11). The Special Counsel then asked [redacted] to revise the declaration to include language about the declarant's qualifications and to specifically refer to bates ranges of produced documents. [redacted] sent him that updated declaration on February 13. It also provided updated translations of the [redacted] on the same day.

In the meantime, on February 12, the Special Counsel moved this Court to require a [redacted] to testify at an evidentiary hearing and for leave to file an *ex parte* supplement.

## ARGUMENT

The Special Counsel's new motions epitomize prosecutorial overreach. This Court should not countenance his scorched-earth tactics.

[redacted] has conducted two comprehensive searches of its records. It has voluntarily produced all documents that are otherwise responsive to the subpoena. It has represented to the Special Counsel (through its lawyers) that it has no more responsive documents. And it has

provided explanations for why it [redacted]. There is no basis for this Court's compelling a [redacted] to travel [redacted] to the District of Columbia to participate in the Special Counsel's fishing expedition.

Nor should this Court allow the Special Counsel to file yet another *ex parte* supplement. If the Special Counsel believes that responsive documents exist in places where [redacted] has not looked, then he should say so.

**A. [redacted] HAS CONDUCTED A GOOD FAITH, COMPREHENSIVE SEARCH FOR ALL RESPONSIVE DOCUMENTS.**

[redacted] has searched comprehensively for all responsive documents. It formed a [redacted] even retraced its steps after [redacted], to make sure that nothing fell through the cracks. What more could the Special Counsel want?

None of the Special Counsel's three arguments calls into question the adequacy of [redacted] searches or the completeness of its production. For starters, the Special Counsel is wrong that [redacted] discovery of [redacted] casts doubt on [redacted] searches' adequacy.[5] It shows the opposite. [redacted] found the new documents after interviewing [redacted]

[5] It is also disappointing that the Special Counsel is using [redacted] good-faith efforts [redacted] *against* [redacted]

[redacted]

There is nothing unusual about a party's finding new documents through additional searches. It happens all the time. [redacted] finding several new documents before producing a single document to the Special Counsel raises no doubts about the completeness of [redacted] production and does not justify an evidentiary hearing.

Nor does the Special Counsel's ponderings about whether any unproduced documents associated with the [redacted] might exist. Mot. 5. The Special Counsel thinks [redacted]

1. In all events, the Special Counsel's guesswork about what documents might exist relies on Americanized expectations about [redacted][7] [redacted] has represented time and again that it has provided all

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[redacted]

documents that would otherwise be responsive to the subpoena. The Special Counsel points to no facts suggesting that other documents exist. And the cases are legion that speculation like the Special Counsel's is not enough to justify further discovery, let alone an evidentiary hearing. *See Barnes v. District of Columbia*, 289 F.R.D. 1, 25 (D.D.C. 2012) (citation omitted) ("To find that a production is incomplete, the Court requires more than a mere theoretical possibility that more documents exist . . . to justify additional discovery.") (internal citation omitted); *Harris*, 271 F.R.D. at 371 ("Plaintiffs keep seeking these documents, which SSBT keeps claiming do not exist. Lack of evidence showing that a producing party is in fact in possession of a document is grounds to deny a motion to compel. The motion to compel what does not exist must be denied.") (citation omitted); *Alexander v. FBI*, 194 F.R.D. 305, 311 (D.D.C. 2000) ("[S]uspicion is insufficient to support their motion to compel. Plaintiffs must demonstrate that the documents they seek to compel do, in fact, exist and are being unlawfully withheld."); *Evans v. Atwood*, 177 F.R.D. 1, 9 (D.D.C. 1997) ("the supposition that [documents] must [exist] is an inadequate basis to compel their production").

The Special Counsel's argument about [redacted] custodial declaration—that the declaration does not sufficiently authenticate the produced documents (Mot. 5–6)—betrays the weakness of his position. [redacted] first declaration (produced on February 11) was sufficient for authentication purposes, but in any event, [redacted] provided an updated declaration on February 13 that refers to produced documents by bates range and that specifically describes the

[redacted]

declarant [redacted] as being "qualified as a result of my position with the business named below to make this declaration." Ex. 2. [redacted] has authenticated its records.

[redacted] has gone to great lengths to show its good faith. After months of searching, [redacted] has provided every document that would otherwise be responsive to the subpoena. It has given the Special Counsel hundreds of pages of courtesy English translations, which cost [redacted] substantial time and resources. It has even provided certain non-responsive documents [redacted] [redacted] has nothing to hide. This Court should put an end to the Special Counsel's overreaching.

**B. REQUIRING A [redacted] TO TRAVEL [redacted] WOULD BE UNREASONABLE AND OPPRESSIVE.**

The Special Counsel cites no case holding that a party must attend an evidentiary hearing after representing that it has produced all responsive documents—much less a case requiring a party to travel from another country for that hearing. For good reason: Requiring a [redacted] to travel [redacted] to affirm the completeness of [redacted] productions would be unduly burdensome and oppressive given [redacted] representations about the extent of its production. *See* Fed. R. Crim. P. 17(c)(2); *see also Caudle v. District of Columbia*, 263 F.R.D. 29, 38–39 (D.D.C. 2009) (in motion-to-compel context, declining to require defendant to "provide a sworn list of responsive documents that Defendant cannot locate or that no longer exist" after defendant "indicated that it conducted a good faith search but was unable to locate any additional responsive documents"); *Franks v. Delaware*, 438 U.S. 154, 171 (1978) (holding that in search-and-seizure context, "[t]o mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine").

The Special Counsel's lone case from 1967 is not to the contrary. *See Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook Railroad Co.*, 380 F.2d 570, 581 (D.C. Cir. 1967). In a parenthetical, the Special Counsel cites that case for the proposition that a "'genuine issue of fact regarding compliance' with court order required [a] hearing to resolve." Mot. 4. That characterization is misleading (and that is being charitable). In the cited excerpt, the appellate court said only that the alleged contemnor was entitled to a "hearing on th[e] issue" of whether it had complied with the district court's order before the court entered a judgment levying the fine. *Id.* The district court had not given the contemnor an opportunity for a hearing even though the contemnor wanted one. The D.C. Circuit never suggested that in a case involving document productions, a court can require an alleged contemnor to attend an evidentiary hearing after it provided all responsive documents and represented that its production is complete.

### C. THE COURT SHOULD DENY THE SPECIAL COUNSEL'S MOTION FOR LEAVE TO FILE AN *EX PARTE* SUPPLEMENT.

The Court should also deny the Special Counsel's motion for leave to file yet another *ex parte* supplement. That would be the fourth such filing in this case (and the third in this court). If the supplement contains any facts—as opposed to speculation—suggesting that [redacted] production is not complete, then the Special Counsel should share those facts with [redacted] [redacted] believes that it has voluntarily produced all responsive documents, but if it has inadvertently missed something, it wants to know that. If the point of the Special Counsel's proposed *ex parte* filing is to show what [redacted] has not but should have produced, then why not just tell [redacted] Cloaking every little thing in secrecy is not the norm in American courts.

## CONCLUSION

The Court should deny the Special Counsel's motion to hold an evidentiary hearing and deny his motion for leave to file another *ex parte* supplement.

Respectfully submitted on February 14, 2019.

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[redacted]

FILED UNDER SEAL

**CERTIFICATE OF SERVICE**

I certify that today I served this **Response** by email on the following:

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[redacted]

# EXHIBIT 1

# EXHIBIT 2