IN THE SUPREME COURT OF THE UNITED STATES

No. 18A669

IN RE GRAND JURY SUBPOENA

ON APPLICATION FOR A STAY PENDING THE FILING AND DISPOSITION OF A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNDER SEAL

MEMORANDUM FOR RESPONDENT IN OPPOSITION

The Solicitor General, on behalf of the United States of America, respectfully opposes a stay pending the filing and disposition of applicant's petition for a writ of certiorari. Applicant's central submission is that the Foreign Sovereign Immunities Act of 1976 (FSIA or Act), Pub. L. No. 94-583, 90 Stat. 2891, confers absolute immunity on foreign state-owned enterprises from all criminal proceedings in the United States. Applicant therefore argues that it cannot be held in contempt for failing to comply with a federal grand jury subpoena issued to [redacted] in the United States. This Court has never embraced that contention, and both courts below correctly rejected it. And

applicant can point to no decision from any court that has dismissed an indictment or quashed a grand jury subpoena based on its broad immunity theory. Nor can applicant show that this infrequently arising issue otherwise merits certiorari. Because applicant can show no reasonable probability that this Court would grant review or reverse the judgment below, and because the balance of equities favors letting the underlying grand jury proceedings go forward without further delay, the application for a stay should be denied.

STATEMENT

In [redacted], a federal grand jury sitting in the District of Columbia issued a subpoena to [redacted] (applicant) [redacted]. Applicant refused to comply and moved to quash, arguing in relevant part that, because it is owned by [redacted], the FSIA immunizes it from all criminal process. The district court rejected that and applicant's other challenges to the subpoena, ordered compliance, and -- after the court of appeals dismissed applicant's initial appeal for lack of jurisdiction -- held applicant in civil contempt when it refused to comply. Exs. 8 & 10.[1] On applicant's expedited appeal, the court of appeals affirmed. Ex. 1, at 1-3.

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[1] Applicant has submitted 14 non-consecutively paginated exhibits to its stay application. Citations to the exhibits are to the exhibit and page number (e.g., Ex. 1, at 2). Where materials

1. a. "Foreign sovereign immunity" is not an inherent restriction on judicial authority; rather, it is "a matter of grace and comity" that may be shown to foreign sovereigns. Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 486 (1983). Historically, the grant or denial of immunity was "the case-by-case prerogative of the Executive Branch." Republic of Iraq v. Beaty, 556 U.S. 848, 857 (2009); see Samantar v. Yousuf, 560 U.S. 305, 311-313, 320 (2010). That rule flowed from the Executive's constitutional primacy in conducting foreign affairs. See Republic of Mexico v. Hoffman, 324 U.S. 30, 34-36 (1945); see, e.g., Spacil v. Crowe, 489 F.2d 614, 619 (5th Cir. 1974).

Until 1952, if a foreign state made a request for immunity relating to a private civil action, the Executive generally would ask a court to recognize immunity. Samantar, 560 U.S. at 311-312. In 1952, the Executive Branch announced a new practice for "granting immunity from suit to foreign governments," under which it would grant immunity for foreign "sovereign or public acts," but not "private acts." Letter from Acting Legal Adviser Tate to Acting Attorney General Perlman (1952), reprinted in Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 App. (1976).

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are not included as exhibits to the stay application but were included in the appendix filed in the court of appeals, this memorandum cites that appendix (C.A. App.).

The new policy "proved troublesome." Verlinden, 461 U.S. at 487. Foreign nations "often placed diplomatic pressure on the State Department" to urge immunity in private actions, and "political considerations led to suggestions of immunity in cases where immunity would not have been available" under the new policy. Ibid. Consequently, "private litigant[s]" faced "considerable uncertainty" about whether their ordinary legal disputes would be blocked as a result. H.R. Rep. No. 1487, 94th Cong., 2d Sess. 9 (1976) (1976 House Report).

b. In 1976, Congress passed the FSIA to address those problems. Verlinden, 461 U.S. at 488. Consistent with that purpose, "the Act contains 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." Ibid. The Act confers immunity from the jurisdiction of federal and state courts, subject to existing treaties, 28 U.S.C. 1604, and describes exceptions to that immunity, 28 U.S.C. 1604-1607. The exceptions apply, in pertinent part, where the foreign state has waived immunity, 28 U.S.C. 1605(a)(1), where the action is based on commercial activity with a sufficient connection to the United States, 28 U.S.C. 1605(a)(2), where the action involves certain other commercial, tort, and property disputes, see 28 U.S.C. 1605(a)(3)-(6), (b), and for certain counterclaims, 28 U.S.C. 1607. For "any claim for relief"

where no immunity exists, liability is ordinarily "in the same manner and to the same extent as a private individual under like circumstances," although a "state" (as distinct from "an agency or instrumentality") generally is not "liable for punitive damages." 28 U.S.C. 1606.

The FSIA also contains various procedural mechanisms to implement the immunity framework and facilitate suits. While the Act contemplates that "suits may be brought in either federal or state courts," given "'the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area,'" the Act ensures that cases may proceed in federal court. Verlinden, 461 U.S. at 489 & n.13 (quoting 1976 House Report 32). The Act thus confers jurisdiction over "any nonjury civil action" against a foreign state as to which it "is not entitled to immunity," 28 U.S.C. 1330(a), and provides for removal of "civil action[s]" from state to federal court, 28 U.S.C. 1441(d). Among other things, the Act also defines venue in "civil action[s]," 28 U.S.C. 1391(f), and sets time limits for "an answer or other responsive pleading to the complaint," 28 U.S.C. 1608(d).

2. Applicant is the [redacted]. Ex. 4, at 1 & n.1 (Gov't C.A. Br.). Applicant is owned by [redacted],

C.A. App. 99; Ex. 1, at 1; Ex. 8, at 2.[2] On [redacted] the government served on applicant at [redacted] a grand jury subpoena [redacted]. Ex. 6. The subpoena specified that applicant was to provide all responsive documents, even if located abroad. Ibid. Although the subpoena's return date was [redacted]

On [redacted], applicant moved to quash the subpoena, arguing that it is immune from the jurisdiction of U.S. courts under the FSIA.[3] Ex. 1, at 1; Ex. 8, at 7. The government responded in relevant part that the FSIA does not apply to criminal cases (including grand jury proceedings) and that, even if did, applicant was not entitled to immunity because the Act's commercial-activity exception, 28 U.S.C. 1605(a)(2), was satisfied. Ex. 8, at 9.

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[2] [redacted]

[3] Applicant additionally argued that the subpoena was unreasonable and oppressive under Federal Rule of Criminal Procedure 17(c) because, it asserted, compliance would violate [redacted] Ex. 1, at 1. The courts below rejected that argument, id. at 1, 3, and applicant does not renew it as a basis either for granting a stay or for certiorari.

On [redacted], after briefing and a hearing, the district court denied the motion to quash and ordered applicant to produce the subpoenaed materials by [redacted]. Ex. 7. 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. Id. at 9-13. The court then rejected applicant's suggestion that jurisdiction over a foreign state or instrumentality can exist only under 28 U.S.C. 1330(a). 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. Id. at 10-13. The court determined that the facts in the government's in camera submissions were sufficient to satisfy the commercial-activity exception. Id. at 14-17.

3. Applicant appealed the September 19 order and moved for a stay pending appeal. On the government's motion, the court of appeals dismissed that appeal for lack of jurisdiction, [redacted] Ex. 9 [redacted].

4. On [redacted], the government moved for civil contempt in the district court. Ex. 10, at 1. After a hearing, the court found [redacted] applicant had failed to comply with the court's September 19 order and rejected applicant's other arguments against contempt. Id. at 1-7. The district 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" the district court's order. Id. at 6-7.

5. Applicant appealed the contempt order, and the court of appeals expedited briefing and argument. Four days after argument, on December 18, the court issued a per curiam judgment -- with opinion to follow -- affirming the district court's judgment. Ex. 1.

As had the district court, the court of appeals "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." Ex. 1, at 1. The court instead "assume[d] that immunity extends to the criminal context." Ibid. The court then rejected applicant's contention that 28 U.S.C. 1330(a) -- which confers jurisdiction over civil actions against foreign states -- prevented the district court from exercising jurisdiction under 18 U.S.C. 3231, which confers "jurisdiction * * * of all offenses against the laws of the United States." Ex. 1, at 2. The court observed that Section 1330(a) "grants subject matter jurisdiction" and says "nothing at all about criminal jurisdiction." Ibid. The court noted applicant's heavy reliance on the statement in Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434 (1989), that the FSIA is "the

sole basis for obtaining jurisdiction over a foreign state in our courts." Ex. 1, at 2. The court explained, however, that "the cases where the [Supreme] Court has referred to section 1330(a) as exclusive are all civil actions," and that, "[u]nlike the other bases for civil jurisdiction at issue in Amerada Hess, sections 1330(a) and 3231 'readily could be seen as supplementing one another.'" Ibid. (quoting Amerada Hess, 488 U.S. at 438). Applicant's "contrary reading of the Act," the court observed, "would completely insulate corporations majority-owned by foreign governments from all criminal liability," a result "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." Ibid.

The court of appeals also rejected applicant's "new theory," offered "[a]t oral argument," that Section 3231 "never encompassed foreign sovereign defendants." Ex. 1, at 2. "That position," the court explained, "is flatly at odds" with Section 3231's text. Ibid. The court noted that some "historical sources suggest that foreign sovereigns might have been able to raise an immunity defense in a criminal case," but explained that any such "defense was a creature of the common law" and not based on Section 3231's grant of jurisdiction. Ibid.

The court of appeals agreed further with the district court that, if the Act's jurisdictional immunity rules apply, "the

commercial activity exception is likewise available." Ex. 1, at 1-2. After "a searching inquiry of the government's legal theory and its supporting evidence," the court concluded that the commercial-activity exception applies. Id. at 3; see id. at 2-3 (approving of the necessity of considering ex parte materials in order to preserve "the secrecy of ongoing grand jury proceedings") (citation omitted).

The court of appeals issued the mandate forthwith. Ex. 1, at 3; Ex. 2.

6. On December 20, 2018, applicant moved the court of appeals to [redacted]. On December 21, the court of appeals denied the motion [redacted] Ex. 14, at 1. On December 22, rather than seeking relief in the district court, applicant sought relief in this Court. But see S. Ct. R. 23.3.

ARGUMENT

As applicant acknowledges (Appl. 9), a stay pending the filing and disposition of a petition for a writ of certiorari is warranted only upon a showing of "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction; (2) a fair prospect that a majority of the Court will conclude that the decision below was erroneous; and (3) a likelihood that irreparable harm will

result from the denial of a stay." Indiana State Police Pension Trust v. Chrysler LLC, 556 U.S. 960, 960 (2009) (per curiam) (quoting Conkright v. Frommert, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers)); see Maryland v. King, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers); Conkright, 556 U.S. at 1402 (Ginsburg, J., in chambers) (stating that an "applicant must demonstrate" all three factors). Applicant has not made that showing here.

1. Applicant has not established a reasonable likelihood that this Court will review the court of appeals' per curiam judgment or a fair prospect that this Court would reverse upon review. The court of appeals' narrow holding -- that, if the FSIA applies to criminal cases and one of its exceptions to immunity is satisfied, a district court may exercise jurisdiction under 18 U.S.C. 3231 -- is correct and does not conflict with any decision of this Court. Indeed, applicant does not point to any decision of any court quashing a grand jury subpoena or dismissing an indictment based on applicant's theory that foreign instrumentalities are absolutely immune under the FSIA from federal criminal process. The United States does not hold that view. And no basis exists to attribute that view to Congress, which enacted the FSIA to deal with a wholly separate set of problems that arose exclusively in private civil litigation.

a. The court of appeals correctly held that, assuming the FSIA applies at all in the criminal context, so do its exceptions to immunity, and satisfying one of those exceptions permits a district court to exercise jurisdiction under 18 U.S.C. 3231.

That analysis accords with the text of the FSIA. The statute's immunity provision, 28 U.S.C. 1604, confers immunity "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." Section 1605, in turn, lists the statutory exceptions to immunity. As both courts below explained, those exceptions are categorically applicable "in any case," 28 U.S.C. 1605(a). Ex. 1, at 2; Ex. 8, at 9-10. And while some of those exceptions focus on civil causes of actions that can result in money damages, e.g., 28 U.S.C. 1605(a)(5), the commercial-activity exception in Section 1605(a)(2) has no such textual limitation. Ex. 1, at 2 ("The [FSIA] extends that exception to 'any case' meeting its definition.").

Applicant's only textual argument against the exercise of jurisdiction in criminal cases is that the conferral of jurisdiction in civil cases under 28 U.S.C. 1330(a) implicitly bars the exercise of criminal jurisdiction under 18 U.S.C. 3231. But as the court of appeals explained, "[t]extually speaking, nothing in" Section 1330(a) or any other provision in the FSIA "purports to strip the district courts of criminal jurisdiction."

Ex. 1, at 2. Rather, Section 1330(a) "grants subject-matter jurisdiction over certain 'nonjury civil actions,'" and it says "nothing at all about criminal jurisdiction." Ibid. And it would be particularly anomalous to infer from Section 1330(a)'s grant of jurisdiction an implicit rule of jurisdictional immunity, given that Section 1604 explicitly establishes a rule of immunity with defined exceptions -- including the commercial-activity exception that both courts below found to be satisfied here.

The FSIA's legislative history confirms that Section 1330(a)'s purpose is to grant jurisdiction in certain civil actions, not to implicitly strip courts of criminal jurisdiction. The House Report explains that Section 1330 is intended to ensure that parties can have their cases heard in federal court, 1976 House Report 13, and that Section 1604, which is subject to the commercial-activity exception, is the "only basis" to "claim immunity from the jurisdiction" of federal courts, id. at 17.

Applicant's position would, as the court of appeals recognized, lead to a result that Congress could not have intended -- i.e., "completely insulat[ing] corporations majority-owned by foreign governments from all criminal liability" and criminal process, Ex. 1, at 2, no matter how domestic the conduct or egregious the violation. Banks, airlines, software companies, and similar commercial businesses could wittingly or unwittingly provide a haven for criminal activity and would be shielded against

providing evidence located in the United States of domestic criminal conduct by U.S. citizens. Although applicant declares that result to be "exactly what Congress intended," Appl. 21, it cannot plausibly be maintained 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. Samantar v. Yousuf, 560 U.S. 305, 319 (2010).[4]

b. Applicant's primary arguments (Appl. 2, 4, 8, 10, 13-16, 19) against the court of appeals' conclusion rest not on statutory text or legislative history but on statements in this Court's decisions describing the FSIA's statutory scheme as comprehensive and as the exclusive basis for obtaining jurisdiction over a foreign state. The court of appeals' judgment is fully consistent with the cited decisions, which -- as the court below recognized,

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[4] Applicant suggests that Congress would not have been troubled by barring federal criminal jurisdiction over foreign state-owned enterprises because the President could use tools such as economic sanctions to address foreign instrumentalities "that commit crimes in the United States." Appl. 21. That suggestion overlooks the need to acquire evidence in a criminal case through grand jury subpoenas in order to determine whether a crime has been committed, including potentially by U.S. citizens acting through or in concert with foreign instrumentalities. Employing sanctions to compel the production of evidence would also be of little use where a witness needs a court order to overcome a statutory or contractual non-disclosure obligation because, under applicant's view, no jurisdiction could exist to enter that order.

Ex. 1, at 2 -- addressed specific problems in the context of civil, not criminal, cases.

Applicant principally relies on Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989), a civil action in which the plaintiff sought to avoid the FSIA's immunity rules, including its exceptions, by invoking statutory grants of jurisdiction over civil cases from outside of the FSIA and claiming that the FSIA's jurisdictional immunity framework, 28 U.S.C. 1604-1607, was therefore inapplicable. Id. at 431-433. The Court held that plaintiffs cannot avoid the FSIA entirely by invoking bases of jurisdiction from other statutes. Id. at 434-439. The Court explained that "[Section] 1604 bars federal and state courts from exercising jurisdiction when a foreign state is entitled to immunity," and jurisdiction accordingly "depends on the existence of one of the specified exceptions." Id. at 434-435 (emphasis omitted). Given the "comprehensiveness of the statutory scheme," the Court reasoned that Congress did not need to amend "other grants of subject-matter jurisdiction in Title 28" such as "federal question" jurisdiction. Id. at 437; see id. at 437-439. The Court thus explained that the FSIA is "the sole basis for obtaining jurisdiction over a foreign state," id. at 434, 439, and "turn[ed] to whether any of the exceptions enumerated in the Act apply," id. at 439.

Amerada Hess and applicant's other cited decisions involved civil suits against foreign entities covered by the FSIA, not a criminal matter involving a grand jury subpoena. As the court of appeals recognized (Ex. 1, at 2), those decisions establish that the FSIA treats civil jurisdiction comprehensively. But nothing in Amerada Hess addresses, let alone forecloses, the court of appeals' analysis in this case. Applicant's overreading of Amerada Hess ignores the substantially distinct question that this Court was resolving, as well as the rule "that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used" and "ought not to control the judgment in a subsequent suit when the very point is presented for decision." Cohens v. Virginia, 19 U.S. 264, 399 (1821); accord Illinois v. Lidster, 540 U.S. 419, 424 (2004) ("[G]eneral language in judicial opinions" must be read "as referring in context to circumstances similar to the circumstances then before the Court and not referring to quite different circumstances that the Court was not then considering."); Central Virginia Cmty. Coll. v. Katz, 546 U.S. 356, 363 (2006) (quoting Cohens).

In any event, the language quoted by applicant does not support its argument. Applicant notes (Appl. 10, 12, 13) that Amerada Hess described "the FSIA [as] the sole basis for obtaining jurisdiction over a foreign state." 488 U.S. at 434, 439. But even in the context of the civil action at issue in that case,

Amerada Hess was explaining only that Section "1604 bars federal and state courts from exercising jurisdiction when a foreign state is entitled to immunity" and that "'subject-matter jurisdiction in any such action depends on the existence of one of the specified exceptions to foreign sovereign immunity.'" Id. at 435-436 (quoting Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 493 (1983)). The court of appeals in this case, of course, relied on one of the specified immunity exceptions before upholding jurisdiction. Applicant similarly relies (Appl. 2, 4, 8, 13, 15) on Amerada Hess's statement that "jurisdiction in actions against foreign states is comprehensively treated by * * * section 1330." 488 U.S. at 437 n.5. But that footnote merely quoted from the 1976 House Report and the parallel Senate Report and explained why the FSIA had removed the reference to foreign states from 28 U.S.C. 1332, which provides diversity jurisdiction in civil cases. 488 U.S. at 437 n.5 (explaining that diversity jurisdiction became "superfluous" once the new Section 1330 provided jurisdiction for civil actions against foreign states).

Applicant's quotations (Appl. 10, 13-14, 19-20) from the Court's decisions in Verlinden and Republic of Argentina v. NML Capital, Ltd., 573 U.S. 134 (2014), also do not support its position. Like Amerada Hess, both were private civil suits that did not address jurisdiction over criminal actions. And both describe the FSIA as being comprehensive as to "civil action[s]."

See pp. 19-20, infra. Applicant relies in particular on the Court's observation in Verlinden that, "[i]f one of the specified exceptions to sovereign immunity applies, a federal district court may exercise subject matter jurisdiction under [Section] 1330(a)." 461 U.S. at 489. That observation does not state that jurisdiction can come only from Section 1330(a). The remainder of that sentence and the surrounding sentences make clear that the Court was describing Section 1330's grant of jurisdiction over civil actions and explaining that a statutory exception to immunity is what determines the existence of jurisdiction. See ibid.[5]

Applicant separately relies on the statement in NML Capital that this Court "ha[s] used th[e] term [comprehensive] * * * to describe the Act's sweep." 573 U.S. at 141. That statement followed the Court's observation that the FSIA contains a "'comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state.'" Ibid. (quoting Verlinden, 461 U.S. at 488) (emphasis added). And NML Capital's application of that understanding only reinforces the court of appeals' conclusion here. NML Capital addressed whether the FSIA immunizes a foreign-sovereign judgment debtor from post-judgment discovery of information concerning its extraterritorial

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[5] Applicant also notes (Appl. 12) Verlinden's statement that the FSIA "must be applied by the District Courts in every action against a foreign sovereign." 461 U.S. at 493. But that is what the lower courts here did in assuming the FSIA governed and then applying one of its exceptions.

assets. 573 U.S. at 136. The Court explained that "the Act confers on foreign states two kinds of immunity" -- the immunity from jurisdiction in 28 U.S.C. 1604, and an immunity from attachment of property and execution of judgment, 28 U.S.C. 1609. 573 U.S. at 142. The Court declined to infer an additional immunity under the FSIA without a clear statement to that effect. Id. at 142-145. If anything, that reasoning parallels the court of appeals' refusal to imply a jurisdictional immunity rule in the FSIA beyond that in Section 1604, which is subject to the commercial-activity exception in Section 1605(a)(2).

c. There is an additional reason why this Court is unlikely to review or reverse the court of appeals' judgment. The court of appeals assumed (in favor of applicant) that the FSIA applies to criminal proceedings, but held that the FSIA's commercial-activity exception applied and that applicant therefore was not immune from the issuance of the grand jury subpoena. This Court would need to consider that antecedent question whether the FSIA applies to criminal proceedings to begin with in order to correctly construe the scope and meaning of the FSIA. And applicant has no persuasive argument that the FSIA applies outside the civil context. This Court has repeatedly described the FSIA as addressed to civil actions and has never suggested that it applies in the criminal context. See Verlinden, 461 U.S. at 488 (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") (emphasis added); Republic of Austria v. Altmann, 541 U.S. 677, 691 (2004) (same); NML Capital, 573 U.S. at 141 (same). And the only courts that have addressed that question in criminal prosecutions or grand-jury cases have held that the FSIA does not apply. See United States v. Noriega, 117 F.3d 1206, 1212 (11th Cir. 1997); In re Grand Jury Proceeding Related to M/V Deltuva, 752 F. Supp. 2d 173, 176-180 (D.P.R. 2010); United States v. Hendron, 813 F. Supp. 973, 974-977 (E.D.N.Y 1993); see also Southway v. Central Bank of Nigeria, 198 F.3d 1210, 1214-1215 (10th Cir. 1999) (same in civil RICO case).

Those decisions, as the government has argued, are correct. See Ex. 4, at 12-27 (Gov't C.A. Br.). The FSIA's text, read "as a whole," Samantar, 560 U.S. at 319, and its legislative history evince a singular focus on civil actions, which was the particular problem that Congress faced when it passed the FSIA. See id. 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). Neither statutory text nor background circumstances suggest that Congress intended for the FSIA to displace the federal government's traditional role in deciding whether to prosecute or serve criminal process on a foreign-government-owned business, see id. at 320-

324 -- a step that the government has taken in appropriate cases for decades. See pp. 24-25, infra.

d. Applicant's remaining arguments lack merit.

i. Applicant seeks to infer its rule of absolute immunity by urging that "American courts have always viewed sovereign immunity as an inherent limitation on their jurisdiction," Appl. 17, and that this formed a "backdrop" against which Congress passed the FSIA, Appl. 10. But the cases cited by applicant were all civil actions and support no such rule. Schooner Exchange v. McFaddon, 11 U.S. 116 (1812), involved a public armed ship in service of the sovereign and discussed immunity of the sovereign itself. Id. at 132, 137. And both Schooner Exchange and Berizzi Bros. Co. v. The Pesaro, 271 U.S. 562 (1926), pre-dated the development of the rule that foreign sovereign immunity was "the case-by-case prerogative of the Executive Branch." Republic of Iraq v. Beaty, 556 U.S. 848, 857 (2009); accord Samantar, 560 U.S. at 311-313, 320; Republic of Mexico v. Hoffman, 324 U.S. 30, 34-36 (1945); see also Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 699-703 (1976) (plurality opinion) (describing the rule's development). The statement in Rubin v. Islamic Republic of Iran, 138 S. Ct. 816, 821 (2018), that "foreign states enjoyed absolute immunity from all actions in the United States" (Appl. 17) was preceded by and followed by language acknowledging that this was the Executive Branch's "generally held * * * position" until 1952

when determining immunity, after which the Executive's policy changed "as foreign states became more involved in commercial activity in the United States." 138 S. Ct. at 821. And nothing in Rubin undercuts the federal government's longstanding position that when it elects to serve criminal process on a foreign instrumentality, no immunity question exists.

ii. Applicant also incorrectly declares (Appl. 17, 24-26) that its rule is compelled by international law.

Applicant's sources at most reflect an international consensus against prosecuting states themselves. See Hazel Fox, The Law of State Immunity 91 (3d ed. rev. 2015) (immunity bars applying "criminal law to regulate the public governmental activity of the foreign State"); id. at 91 n.65 (states shielded from claims "related to the exercise of governmental powers"). But no such rule extends to state-owned corporations. See William C. Hoffman, The Separate Entity Rule in International Prospective, 65 Tul. L. Rev. 535, 565-566 (1991); Andrew Dickinson, State Immunity and State-Owned Enterprises, 10 Bus. L. Int'l 97, 125-127 (2009). Applicant repeatedly errs by treating immunity for a foreign state under international law as covering a corporation conducting commercial activity that is majority-owned by a state. International law does not equate the two.

Applicant's citation to the immunity laws of other countries (Appl. 25) only confirms the point. As an initial matter,

consistent with the government's view of the FSIA, the cited laws state that they do not apply to criminal cases.[6] In addition, many of those laws make clear that government-owned corporations are generally not treated as the state for purposes of immunity, except where the corporation is engaging in the "exercise of sovereign authority," State Immunity Act 1978, c. 33, § 14(2) (United Kingdom) -- in other words, they establish a framework roughly analogous to the court of appeals' application of the commercial-activity exception in this case. See ibid.; Foreign States Immunities Act 87 of 1981 §§ 1(2)(i), 15(1) (South Africa); The State Immunity Ordinance No. 6 of 1981 § 15 (Pakistan); State Immunity Act, § 16 (2014 ed.) (Singapore).

iii. Applicant also appears to suggest that separate and apart from the FSIA, 18 U.S.C. 3231 has never conferred jurisdiction over state-owned corporations. See Appl. 3, 17-19. The court of appeals correctly recognized that argument is "flatly at odds with the provision's text," Ex. 1, at 2, which confers "jurisdiction * * * of all offenses against the laws of the United States," 18 U.S.C. 3231. It is also at odds with the pre-FSIA history where courts understood statutory jurisdiction to exist and considered only how to apply pre-FSIA rules of immunity.

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[6] Foreign States Immunities Act 87 of 1981 § 2(3) (South Africa); State Immunity Act, R.S.C. 1985, c. S-18, § 18 (Canada); The State Immunity Ordinance No. 6 of 1981 § 17(2)(b) (Pakistan); State Immunity Act, § 19(2)(b) (2014 ed.) (Singapore); State Immunity Act 1978, c. 33, § 16(4) (United Kingdom).

See, e.g., In re Grand Jury Investigation of Shipping Industry, 186 F. Supp. 298, 318-320 (D.D.C. 1960); In re Investigation of World Arrangements, 13 F.R.D. 280, 288-291 (D.D.C. 1952).[7] And, as discussed, applicant's assertion (Appl. 17) that "American courts have always viewed sovereign immunity as an inherent limitation on their jurisdiction" is incorrect. See pp. 21-22, supra.

iv. Finally, the decision below does not constitute a "sea change" in practice (Appl. 4). To the contrary, applicant's position would have that effect by casting aside decades of practice under which the United States has prosecuted and served criminal process on commercial enterprises that are majority-owned by foreign governments. See, e.g., In re Pangang Grp. Co., 901 F.3d 1046, 1049 (9th Cir. 2018); United States v. Ho, No. 16-cr-

[7] Applicant notes (Appl. 17-18 n.9) that the district court in the 1952 decision ultimately quashed the subpoena and that the district court in the 1960 decision reserved judgment on the state-owned shipping company's immunity claim. But the significance of the courts' analyses is that that they did not automatically dismiss the actions on the ground that criminal matters can never proceed against state-owned corporations, as applicant urges. Those courts instead sought to apply what they understood to be the rule at the time. See Dunhill, 425 U.S. at 699-703 (noting some confusion in the years after Ex parte Peru, 318 U.S. 578 (1943), and Hoffman, 324 U.S. 30, concerning whether the Executive's decision not to confer immunity was conclusive). And in doing so, the courts analyzed whether the state-owned entities were really organs of the state performing sovereign functions. That analysis would have been wholly unnecessary if the companies were absolutely immune from criminal jurisdiction upon showing that they were majority-owned by a foreign country.

46, 2016 WL 5875005, at *6 (E.D. Tenn. Oct. 7, 2016); M/V Deltuva, 752 F. Supp. 2d at 176-180; United States v. Jasin, No. 91-cr-602, 1993 WL 259436, at *1 (E.D. Pa. July 7, 1993); In re Sealed Case, 825 F.2d 494, 495 (D.C. Cir. 1987); In re Grand Jury, 186 F. Supp. at 318-320; World Arrangements, 13 F.R.D. at 288-291; see also, e.g., United States v. Statoil, ASA, No. 1:06-cr-960 (S.D.N.Y. Oct. 13, 2006) (criminal information and deferred prosecution agreement against Norwegian state-owned oil company); "Aer Lingus Pleads Guilty in Iran Arms Shipment," Associated Press (Oct. 7, 1989) (guilty plea of airline then owned by Ireland). This non-exhaustive list of examples -- which the government provided to the court of appeals, Ex. 4, at 19-20 & n.8 (Gov't C.A. Br.) -- refutes applicant's repeated assertion that there was "no such thing as a criminal action against a foreign state" until this case. Appl. 23.

2. Applicant also contends (Appl. 21-24) that this Court is likely to grant review because, it asserts, the courts of appeals are divided over "whether American courts have subject-matter jurisdiction in criminal matters against foreign states." That contention lacks merit. Applicant does not point to any court that has declined to exercise criminal jurisdiction by dismissing an indictment or quashing a subpoena under the FSIA. Nor does applicant show that any other court of appeals has addressed the court of appeals' conclusion that, if the FSIA applies in criminal

cases and one of its exceptions to immunity is satisfied, then jurisdiction exists under 18 U.S.C. 3231. The decision below therefore does not conflict with the decision of another court of appeals, and the rarely arising issue here does not otherwise warrant this Court's intervention.

a. Applicant principally contends (Appl. 2, 22-23) that the court of appeals' judgment conflicts with the Sixth Circuit's decision in Keller v. Central Bank of Nigeria, 277 F.3d 811 (2002). But no conflict exists. Keller was a civil case arising from a fraud carried out by an individual identifying himself as a Nigerian prince. Id. at 814. The plaintiff sought damages from the central bank of Nigeria and several purported bank employees, alleging misrepresentation and fraud torts, and civil-RICO claims based on underlying acts of fraud. Id. at 814-815, 818. In reviewing the civil-RICO allegations, the Sixth Circuit considered whether the alleged "act[s]" -- the asserted fraud -- were "indictable," an element of a civil-RICO suit. Id. at 818 (citing 18 U.S.C. 1961(1)(B), 1962(b)-(d)). The court stated that the FSIA's jurisdictional-immunity provision, 28 U.S.C. 1604, applies to criminal cases, and therefore "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." Id. at 819-820. The court then said that there was no "international agreement regarding criminal jurisdiction over RICO claims or

predicate offenses, and the FSIA does not provide an exception for criminal jurisdiction." Id. at 820. The court accordingly concluded that because the defendant organization and individuals could not be indicted, there was no racketeering activity and the civil suit failed to state a claim. Id. at 820-821.[8]

To the extent that Keller has any bearing outside of the civil RICO context, its core conclusion was that the FSIA applies to criminal cases, 277 F.3d at 819-820, an issue that the court of appeals here declined to address, Ex. 1, at 1-2. Keller's conclusion that the plaintiff failed to state a civil-RICO claim turned in part on its view that the defendants there could not have been indicted for fraud. 277 F.3d at 819-821. But any arguable tension between the court of appeals' decision below and Keller arises from Keller's unexplained statement that while the FSIA's immunity is subject to "an exception listed in 28 U.S.C. §§ 1605-1607," the Act "does not provide an exception for criminal jurisdiction." Id. at 820. Keller is internally inconsistent on that point. Unlike applicant here, which contends that 28 U.S.C. 1330(a) implicitly bars the exercise of jurisdiction in criminal matters and 18 U.S.C. 3231 independently provides no jurisdiction, Keller contemplated that jurisdiction could exist in a criminal

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[8] Keller also held that the FSIA applied to both the bank and its individual employees. 277 F.3d at 815. The latter holding was overruled by Samantar.

case. Thus, Keller repeatedly suggested that a criminal prosecution could proceed if authorized by an "international agreement," 277 F.3d at 820 -- a position that is inconsistent with applicant's argument here. And while Keller also quoted with approval broad language from a district court decision that found a civil-RICO action barred by the FSIA, see id. at 819-820 (quoting Gould, Inc. v. Mitsui Mining & Smelting Co., 750 F. Supp. 838, 844 (N.D. Ohio 1990)), the Sixth Circuit has not confronted a case in which the government proceeded criminally against a foreign instrumentality, or sought to enforce a grand jury subpoena issued to such an instrumentality, and based jurisdiction on 18 U.S.C. 3231.

b. Applicant additionally contends (Appl. 2, 22-23) that the decision below conflicts with Williams v. Shipping Corp. of India, 653 F.2d 875 (4th Cir. 1981), and Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela, 863 F.3d 96 (2d Cir. 2017), which applicant first cited to the court of appeals in a letter of supplemental authority filed after oral argument, Ex. 13. Those were both civil cases and did not address any question passed upon by the court of appeals here. They instead stand for the proposition that in a civil action against a foreign state, the specific and detailed provisions of the FSIA apply.

Williams was a civil action filed in state court. 653 F.2d at 876. The defendant removed the suit to federal court and sought

a non-jury trial, citing the FSIA's removal provision, 28 U.S.C. 1441(d), which states that "[u]pon removal the action shall be tried by the court without jury." 653 F.2d at 876-877, 879. The plaintiff urged that the defendant's removal petition did not cite the FSIA and that the case could be treated as an ordinary diversity suit. Id. at 877. The Fourth Circuit rejected that argument. The court explained that the FSIA was intended "'to provide when and how parties can maintain a lawsuit against a foreign state or its entities,'" id. at 878 (quoting 1976 House Report 6), and that the grant of jurisdiction in 28 U.S.C. 1330(a) and right to remove in 28 U.S.C. 1441(d) were meant to ensure that parties always have the option of having cases heard by federal judges. 653 F.2d at 879. The court additionally explained that "[t]o conform the existing diversity statute with the new 28 U.S.C. 1330," Congress "delete[d] the references to diversity jurisdiction against 'foreign states.'" Id. at 879-880. The court accordingly rejected the plaintiff's argument that his suit could nonetheless proceed as a diversity action. Id. at 880 (quoting 28 U.S.C. 1332(a)(2)). The court said nothing about whether Section 1330 implicitly bars jurisdiction in criminal matters.

Mobil Cerro was a petition to recognize a $1.6 billion arbitral award against Venezuela. 863 F.3d at 109. The creditor filed an ex parte petition under 22 U.S.C. 1650a, which authorizes federal courts to enforce arbitral awards under an international

convention, without specifying what procedures to apply. 863 F.3d at 100-102, 105-109. Deferring in part to the submission of the Department of Justice, id. at 111, 117, the Second Circuit held that the FSIA's grant of subject-matter jurisdiction and procedures for civil actions against foreign states must apply. Id. at 112-125. The court observed that the convention and implementing statute do not "dictate the nature of proceedings," but provide only that they be treated as if they were state court judgments. Id. at 117. "Requiring an enforcement action to comply with the FSIA does not contravene this mandate." Ibid. Mobil Cerro did not suggest that the FSIA's conferral of jurisdiction over civil cases also implicitly bars the exercise of jurisdiction over criminal cases.

c. Even if there were any genuine tension between the decision below and the cases cited by applicant, it would not warrant further review. As noted above, applicant argues that jurisdiction can never exist over foreign-state-owned businesses in criminal matters. But no court has declined to exercise jurisdiction in a criminal prosecution or grand jury proceeding on that basis. See Restatement (Fourth) of Foreign Relations Law of the United States § 451 reporter's note 4 (2018). And even in the circuit that decided the case (Keller) principally relied on by applicant (Appl. 21-23), the United States has not understood government-owned businesses to be immune from criminal prosecution

and process. See, e.g., United States v. Ho, 2016 WL 5875005, at *6 (E.D. Tenn. Oct. 7, 2016) (noting prosecution of Chinese-government-owned power company in the Sixth Circuit).

There is no pressing need for this Court to intervene in the absence of a conflict. The issue raised by applicant has arisen infrequently since the FSIA's enactment in 1976. The number of cases in which the issue could arise is further reduced by this Court's 2010 decision in Samantar, 560 U.S. 305, that the FSIA does not apply in suits against individuals acting in their official capacity. And contrary to applicant's contention (Appl. 4, 24-26), the decision breaks no new ground in the United States' exercise of criminal jurisdiction.

This case would also be a poor vehicle to address the question that applicant seeks to present. As explained above, before addressing how the FSIA's jurisdictional provisions apply to criminal cases, this Court's ordinary practice would require it to consider "the antecedent question" whether the FSIA applies to criminal cases at all. United States v. Grubbs, 547 U.S. 90, 94 & n.1 (2006). But that question was not passed upon by the district court or the court of appeals. Because this Court is a court of "review, not of first view," McWilliams v. Dunn, 137 S. Ct. 1790, 1801 (2017), this case would be a poor vehicle to consider that issue. The compelling interest in conducting grand jury investigations expeditiously, see Cobbledick v. United States, 309

U.S. 323, 325, 327 (1940), likewise counsels against certiorari (and a protracted stay of proceedings) here.

3. Applicant's reliance on equitable factors does not warrant a stay. As an initial matter, the unlikelihood that this Court will grant certiorari and reverse the court of appeals' decision means that a stay is unwarranted irrespective of applicant's claim that it will be irreparably harmed in the absence of a stay (Appl. 26-28) or that the public interest favors one (Appl. 24-26). See Stephen M. Shapiro et al., Supreme Court Practice § 17.13(b), at 903 (10th ed. 2013) (citing cases); see also Indiana State Police Pension Trust, 556 U.S. at 960 (noting that "in a close case it may be appropriate to balance the equities") (quoting Conkright, 556 U.S. at 1402 (Ginsburg, J., in chambers)). No sound reason exists to postpone the effective date of a judgment that this Court is likely to leave undisturbed. See Supreme Court Practice § 17.13(b), at 904; see also Indiana State Police Pension Trust, 556 U.S. at 961 ("A stay is not a matter of right, even if irreparable injury might otherwise result.") (quoting Nken v. Holder, 556 U.S. 418, 433 (2009)).

The balance of equitable considerations in this case would itself counsel against a stay. Applicant urges that absent a stay, it "may" face a monetary contempt sanction. Appl. 3; see id. at 8, 27. "Normally the mere payment of money is not considered irreparable." Philip Morris USA Inc. v. Scott, 561 U.S. 1301,

1304 (2010) (Scalia, J., in chambers). Rather than pointing to monetary sanctions, recalcitrant witnesses typically must rely on the harm of producing the compelled evidence. Witnesses thus often point to their own privacy or privilege interests. But applicant claims no such interest. Applicant asserts in passing (Appl. 26) that compliance with the subpoena would require it to violate foreign law. But the courts below both held that that applicant "has fallen well short" of showing that compliance would violate [redacted]. Ex. 1, at 3; accord Ex. 8, at 18-26. And any risk of liability would be speculative at best, especially where applicant would be acting in response to a U.S. court order following substantial litigation. Indeed, a company owned by a foreign government is least likely to be prosecuted by that government. See Société Nationale Industrielle Aérospatiale v. United States Dist. Court, 482 U.S. 522, 528 n.10, 544 n.29 (1987).

The other harm claimed by applicant is the asserted "indignity" of being subjected to the jurisdiction of U.S. courts. Appl. 3, 8, 26-28. But applicant is a corporation that is owned by a foreign state, not the foreign sovereign itself. And being subject to a court order enforcing a grand jury subpoena to produce documents based on the rejection of applicant's legal arguments by two courts below does not by itself warrant a stay. Applicant's reliance (Appl. 27) on cases requiring depositions, discovery, and trials as burdens of litigation meriting a stay is therefore

misplaced. Cf. Ex. 9, at 1 (rejecting applicant's attempt to appeal the non-final order enforcing the subpoena in this case). And to the extent that applicant believes that it is a dignitary harm to be a witness in a grand jury investigation, any injury is mitigated by the secrecy protections of the grand jury and the sealing of the related judicial proceedings. See Fed. R. Crim. P. 6(e).

Applicant instead seeks to convert its asserted "affront[] to sovereignty" (Appl. 27) into a harm to the United State Government and the public by urging (Appl. 4, 24-26) that the court of appeals' decision will harm "American foreign policy" and "reciprocity." As explained above, applicant's premise is mistaken: consistent with international law, U.S. courts have long exercised jurisdiction over state-owned corporations in criminal cases. These claimed harms are highly speculative and provide no basis for a stay where, as here, the government has for decades declined to treat state-owned businesses as immune from criminal prosecution or process, notwithstanding any potential foreign policy implications.

In any event, the greater harm to the public interest and to the government -- which merge here, see Nken, 556 U.S. at 435 -- would be further delays in providing evidence by a foreign enterprise that claims the protection of United States law in conducting business in this country, yet simultaneously seeks to

avoid the obligation that falls on any business to provide evidence to a grand jury relating to its business operations. See United States v. R. Enterprises, Inc., 498 U.S. 292, 298 (1991) (warning against "delay[ing] and disrupt[ing] grand jury proceedings") (internal quotation marks omitted); Cobbledick, 309 U.S. at 325 ("encouragement of delay is fatal to the vindication of the criminal law").

This matter is now in its [redacted], and applicant's litigation conduct has already resulted in substantial delays. The subpoena in this case was issued on [redacted]. Applicant delayed compliance through [redacted], see Ex. 8, at 2-7; C.A. App. 31, 128, 138; by [redacted], see C.A. App. 3-4, 209; by taking a premature appeal of the district court's denial of the motion to quash, see Ex. 9 (dismissing appeal [redacted]); and by then arguing that [redacted], see Ex. 10, at 3-5 [redacted] The further delay that applicant now seeks is unwarranted.

CONCLUSION

The application for a stay should be denied.

Respectfully submitted.

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