No. 21-1450

In the Supreme Court of the United States

TURKIYE HALK BANKASI A.S., AKA HALKBANK,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
KENNETH A. POLITE, JR.
MATTHEW G. OLSEN
Assistant Attorneys General
PAUL T. CRANE
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1330, 1602 *et seq.*, confers blanket immunity on foreign-state-owned enterprises from all criminal proceedings in the United States.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes:

Statutes—Continued: Page

Miscellaneous:

Miscellaneous—Continued: Page

In the Supreme Court of the United States

No. 21-1450

TURKIYE HALK BANKASI A.S., AKA HALKBANK,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 16 F.4th 336. The order of the district court (Pet. App. 25a-47a) is not reported in the Federal Supplement but is available at 2020 WL 5849512.

JURISDICTION

The judgment of the court of appeals was entered on October 22, 2021. A petition for rehearing was denied on December 15, 2021 (Pet. App. 48a). On January 31, 2022, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including May 13, 2022, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A grand jury in the United States District Court for the Southern District of New York indicted petitioner for conspiring to obstruct the lawful functions of the U.S. Department of Treasury, in violation of 18 U.S.C. 371; conspiring to violate the International Emergency Economic Powers Act (IEEPA), Pub. L. No. 95-223, 91 Stat. 1626 (50 U.S.C. 1701 *et seq.*), in violation of 50 U.S.C. 1705; bank fraud, in violation of 18 U.S.C. 1344; conspiring to commit bank fraud, in violation of 18 U.S.C. 1349; money laundering, in violation of 18 U.S.C. 1956(a)(2)(A); and conspiring to commit money laundering, in violation of 18 U.S.C. 1956(h). Pet. App. 7a. The district court denied petitioner's motion to dismiss the indictment. *Id.* at 25a-47a. Asserting jurisdiction over petitioner's interlocutory appeal, the court of appeals affirmed. *Id.* at 1a-24a.

1. Petitioner "is a commercial bank that is majority-owned by the Government of Turkey" that was indicted petitioner for allegedly participating in the largest-known scheme to evade the United States' economic sanctions on Iran: "a multi-year scheme to launder billions of dollars' worth of Iranian oil and natural gas proceeds," including "at least $1 billion in dollar-denominated transfers that passed through the U.S. financial system in violation of U.S. law." Pet. App. 3a, 6a.

The indictment alleges that, among other "illegal transactions," petitioner "'allow[ed] the proceeds of sales of Iranian oil and gas deposited [with petitioner] to be used to buy gold for the benefit of the Government of Iran'"; allowed "'the proceeds of sales of Iranian oil and gas deposited [with petitioner] to be used to buy gold that was not exported to Iran'"; and "'facilitat[ed] transactions fraudulently designed to appear to be

purchases of food and medicine by Iranian customers, in order to appear to fall within the so-called "humanitarian exception" to certain sanctions against the Government of Iran, when in fact no purchases of food or medicine actually occurred.'" Pet. App. 4a-5a (citation and footnote omitted); see *id.* at 4a n.2 (further explaining the alleged sanctions violations). And petitioner's "executives, acting within the scope of their employment and for the benefit of" petitioner, "are alleged to have concealed the true nature of the transactions [petitioner] made on behalf of the Government of Iran from officials at the U.S. Department of the Treasury." *Id.* at 6a; see *id.* at 6a n.6.

2. A federal grand jury charged petitioner with conspiring to obstruct the lawful functions of the U.S. Department of Treasury, in violation of 18 U.S.C. 371; conspiring to violate the IEEPA, in violation of 50 U.S.C. 1705; bank fraud, in violation of 18 U.S.C. 1344; conspiring to commit bank fraud, in violation of 18 U.S.C. 1349; money laundering, in violation of 18 U.S.C. 1956(a)(2)(A), and conspiring to commit money laundering, in violation of 18 U.S.C. 1956(h). Pet. App. 7a.

Petitioner moved to dismiss the indictment, arguing among other things that it was immune from prosecution under the Foreign Sovereign Immunities Act of 1976 (FSIA or Act), 28 U.S.C. 1330, 1602 *et seq.* Pet. App. 33a. The district court denied the motion. *Id.* at 33a-37a. The court observed, as an initial matter, that the "FSIA does not appear to grant immunity in criminal proceedings." *Id.* at 34a. The court found "[n]othing in the text of [the] FSIA" to "suggest[] that it applies to criminal proceedings," and explained that "the 'legislative history . . . gives no hint that Congress was concerned [about] a foreign defendant in a criminal

proceeding.'" *Id.* at 34a-35a (citation omitted; third set of brackets in original).

The district court added that, "[e]ven assuming, *arguendo*, that" the "FSIA provided immunity in this criminal case (which it does not)," the "FSIA's commercial activity exceptions would clearly apply and support [petitioner's] prosecution." Pet. App. 35a; see *id.* at 35a-38a (finding that petitioner's business activities independently satisfied each of the three alternative commercial activity categories in 28 U.S.C. 1605(a)(2)).

3. Petitioner filed an interlocutory appeal, and the court of appeals affirmed. Pet. App. 1a-24a.

As an threshold matter, the court of appeals concluded that it had appellate jurisdiction, notwithstanding the government's contention that the district court's "sovereign immunity determination is neither a final judgment nor an order that qualifies for interlocutory appeal." Pet. App. 9a; see Gov't C.A. Br. 11-15. Even though it recognized that this Court's decisions apply the collateral-order doctrine with "the 'utmost strictness'" in criminal cases, Pet. App. 9a (citation omitted), the court of appeals concluded that "a threshold sovereign immunity determination is immediately appealable pursuant to the collateral order doctrine—even in a criminal case," *id.* at 11a.

The court of appeals recognized, however, that petitioner was not immune from criminal prosecution. The court explained that the district court "plainly has subject matter jurisdiction over the federal criminal prosecution," Pet. App. 17a, pursuant to 18 U.S.C. 3231, which states that "district courts of the United States shall have original jurisdiction * * * of all offenses against the laws of the United States." The court then assumed without deciding that the FSIA "confers

sovereign immunity in criminal cases," but found—like the district court—that petitioner was not entitled to such immunity because the "conduct with which [petitioner] is charged falls within FSIA's commercial activities exception to sovereign immunity." Pet. App. 17a; see *id.* at 18a-23a.

The court of appeals rejected petitioner's assertion that the FSIA's exceptions to sovereign immunity are inapplicable in criminal cases. Pet. App. 17a n.48. The court was "skeptical that Congress intended for [the FSIA's] grant of immunity," assuming that it applies at all, "to sweep far more broadly in criminal cases than in civil cases." *Ibid.* And the court observed that, in any event, the exceptions explicitly apply "'in *any* case.'" *Ibid.* (quoting 28 U.S.C. 1605(a)).

ARGUMENT

The court of appeals correctly recognized that the district court has jurisdiction over this criminal prosecution pursuant to 18 U.S.C. 3231, and that the FSIA—if it applies at all—does not confer the absolute immunity that petitioner asserts (Pet. 19-25). Contrary to petitioner's contention (Pet. 10-15), the decision does not conflict with any decision of this Court or another court of appeals. The Court recently denied another petition for a writ of certiorari asserting the same position and presenting the same question. *In Re Grand Jury Subpoena*, 139 S. Ct. 1378 (2019) (No. 18-948). Denial of a writ of certiorari is similarly warranted here; if anything, this case is an even less appropriate vehicle for considering the question in light of serious doubts on the threshold issue of appellate jurisdiction.

1. Under 18 U.S.C. 3231, the "district courts of the United States shall have original jurisdiction * * * of all offenses against the laws of the United States."

Petitioner is charged with numerous "offenses against laws of the United States." *Ibid.*; see pp. 2-3, *supra*. "It is hard to imagine a clearer textual grant of subject-matter jurisdiction," *In re Grand Jury Subpoena*, 912 F.3d 623, 628 (D.C. Cir. 2019) (per curiam), and it applies directly to this case, see Pet. App. 16a. Petitioner's contrary contention (Pet. 19-25) that the prosecution is nevertheless barred by foreign sovereign immunity is flawed for multiple reasons.

a. Petitioner principally relies (Pet. 19-25) on the FSIA, which provides that "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" the Act or an "applicable international agreement." 28 U.S.C. 1330(a). As its text states, the FSIA applies to "civil action[s]," not criminal prosecutions. *Ibid.*; see Pet. App. 34a-35a.

This Court has repeatedly described the FSIA as addressed to "civil action[s]," and has never suggested that it applies in the criminal context. *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 488 (1983); see, *e.g.*, *Republic of Argentina* v. *NML Capital, Ltd.*, 573 U.S. 134, 141 (2014) (same); *Republic of Austria* v. *Altmann*, 541 U.S. 677, 691 (2004) (same). And the only federal courts that have addressed the question in criminal prosecutions or grand-jury cases have recognized that the FSIA does not apply. See *United States* v. *Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997), cert. denied, 523 U.S. 1060 (1998); *United States* v. *Pangang Grp. Co.*, No. 11-cr-573, 2022 WL 580790, at *9-*12 (N.D. Cal. Feb. 25, 2022); *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).

The FSIA's text, which this Court reads "as a whole," *Samantar* v. *Yousuf*, 560 U.S. 305, 319 (2010), confirms that the Act is exclusively civil in its scope and application. As noted, the Act begins by conferring jurisdiction on district courts over "any nonjury *civil* action * * * as to any claim for relief in personam with respect to which a foreign state is not entitled to immunity," 28 U.S.C. 1330(a) (emphasis added), and provides that such jurisdiction attaches "without regard to amount in controversy," *ibid.*—a requirement that arises in civil, not criminal cases. Accordingly, the Act's procedures for asserting immunity or other jurisdictional limits likewise address only civil actions. See 28 U.S.C 1441(d) (removal of "[a]ny civil action"); 28 U.S.C. 1608(d) (deadline for serving "an answer or other responsive pleading to the complaint"). The Act's other procedural provisions likewise uniformly focus on civil actions. See, *e.g.*, 28 U.S.C. 1391(f) (venue); 28 U.S.C. 1608(a) and (b) (service rules). And the statutory findings and declaration of purpose refer to the "rights of both foreign states and litigants," without reference to governments or prosecutors that conduct criminal proceedings. 28 U.S.C. 1602.

The FSIA's background, purpose, and legislative history further reinforce that its immunity provisions were designed to address only civil cases. See *Samantar*, 560 U.S. at 316 n.9, 319 n.12, 320-325 (conducting a similar analysis). "[T]he 'Act and its legislative history do not say a single word about possible criminal proceedings." *In re Grand Jury Subpoena*, 912 F.3d at 630 (citation omitted). "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." *Ibid.*

The Act was passed to address problems that arose exclusively in civil actions—namely, suits by private litigants thrusting case-specific requests for immunity on the Executive Branch, resulting in inconsistent immunity determinations and uncertainty for litigants. See H.R. Rep. No. 1487, 94th Cong., 2d Sess. 6-9 (1976) (1976 House Report); *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearing Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary on H.R. 11315*, 94th Cong., 2d Sess. 24-27, 31-35, 60 (1976) (1976 Hearings); see also *Verlinden*, 461 U.S. at 487-488 (discussing impetus for the Act). The Executive Branch accordingly 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." 1976 Hearings 24 (State Department); accord *id.* at 29 (Justice Department). The House Report, in turn, likewise emphasized 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," 1976 House Report 7, and repeatedly referred to "plaintiffs," "suit[s]," "litigants," and "liability," *id.* at 6-8, 12—all terms that are indicative of civil actions.

No text or history suggests that Congress intended the FSIA to displace the Executive Branch's traditional role in deciding whether to criminally prosecute a foreign-government-owned business—a step that the government has taken in appropriate cases for decades. See pp. 13-14, *infra* (collecting examples). The FSIA

was not enacted or designed with any eye toward criminal matters, and it should not be extended to that context. The United States, not a private party, controls whether to initiate a federal criminal matter against a foreign-government-owned commercial enterprise. See *Pasquantino* v. *United States*, 544 U.S. 349, 369 (2005); see also *United States* v. *Sinovel Wind Grp. Co.*, 794 F.3d 787, 792 (7th Cir. 2015). Immunity in such criminal matters "simply was not the particular problem to which Congress was responding." *Samantar*, 560 U.S. at 323 (holding FSIA inapplicable to suits against foreign government officials in their official capacity).

b. In any event, this case does not present the question whether the FSIA applies in criminal cases because the court of appeals assumed without deciding that it does, Pet. App. 17a, and correctly recognized that—even making that assumption—the FSIA's commercial-activity exception, 28 U.S.C. 1605(a)(2), deprives petitioner of immunity, Pet. App. 18a-23a.

Where the FSIA applies, its only affirmative grant of immunity from suit is in 28 U.S.C. 1604, which confers immunity "from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607." Section 1605, in turn, lists the statutory exceptions to immunity that are categorically applicable "in any case." 28 U.S.C. 1605(a). Some of the exceptions focus on civil causes of actions that can result in money damages. *E.g.*, 28 U.S.C. 1605(a)(5). But the commercial-activity exception in Section 1605(a)(2) has no such textual limitation. See Pet. App. 17a n.48.

As a result, petitioner cannot rely on Section 1604 for its view that FSIA immunity bars criminal jurisdiction without exceptions. Petitioner's only textual argument against allowing a criminal prosecution where an FSIA

exception is satisfied is its assertion that the grant of civil jurisdiction under 28 U.S.C. 1330(a) implicitly bars the exercise of criminal jurisdiction. But "nothing in the Act's text expressly displaces [S]ection 3231's jurisdictional grant." *In re Grand Jury Subpoena*, 912 F.3d at 628. Instead, Section 1330(a) "by its terms merely *confers* jurisdiction." *Ibid.*; see Pet. App. 16a-17a.

The FSIA's legislative history provides no meaningful support for the sweeping negative implication that petitioner would draw from Section 1330. To the contrary, it 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 comes with the exceptions) is the "only basis" on which a foreign state may "claim immunity from the jurisdiction" of federal courts, *id.* at 17. Petitioner's position—that the FSIA applies to criminal cases, but that its exceptions do not—would mean that the immunity of a foreign-sovereign-owned business "sweep[s] far more broadly" in criminal prosecutions brought by the United States than in civil actions brought by private parties based on "the same commercial conduct." Pet. App. 17a n.48. As the court below recognized, that interpretation makes little sense. *Ibid.*

Even more troublingly, petitioner's position would mean that "purely commercial enterprise[s] operating within the United States," if majority-owned by a foreign government, could "flagrantly violate criminal laws" and ignore criminal process, no matter how domestic the conduct or egregious the violation. *In re Grand Jury Subpoena*, 912 F.3d at 629-630. Banks,

airlines, software companies, and similar commercial businesses could thus engage in or provide a haven for criminal activity, and would be shielded against providing evidence even of domestic criminal conduct by U.S. citizens. See *ibid.* It cannot plausibly be maintained that Congress and the Executive Branch—which drafted the FSIA—would have "so dramatically gutted the government's crime-fighting toolkit," *id.* at 630, "without so much as a whisper" to that effect in the Act's extensive legislative history, *Samantar*, 560 U.S. at 319.

Petitioner's primary counterarguments (Pet. 19-21) rest not on statutory text or history but on statements in this Court's decisions describing the FSIA as comprehensive and as the exclusive basis for obtaining jurisdiction over a foreign state. The cited decisions, however, addressed specific problems in the context of civil, not criminal, cases—and in any event recognized that jurisdiction exists when an FSIA exception is satisfied, as the courts below found here. The case on which petitioner relies most heavily (Pet. 20-21)—*Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989)—is a clear example.

Amerada Hess was a civil action in which the plaintiff sought to avoid the FSIA's immunity rules by invoking statutory grants of jurisdiction over civil cases from outside of the FSIA and claiming that the FSIA's jurisdictional-immunity framework, see 28 U.S.C. 1604-1607, was therefore inapplicable. 488 U.S. at 431-433. This Court held that private plaintiffs cannot avoid the FSIA by invoking bases of jurisdiction from other statutes. *Id.* at 434-439. Observing that Section 1604 "bars federal and state courts from exercising jurisdiction when a foreign state is entitled to immunity," and that jurisdiction accordingly "'depends on the existence of

one of the specified exceptions,'" the Court reasoned that the "comprehensiveness of the statutory scheme" obviated a specific need to amend "other grants of subject-matter jurisdiction in Title 28" such as "federal question" jurisdiction. *Id.* at 434-435, 437 (citation and emphasis omitted). And having thus found that the FSIA is "the sole basis for obtaining jurisdiction over a foreign state," the Court "turn[ed] to whether any of the exceptions enumerated in the Act apply." *Id.* at 439.

As the court of appeals recognized, *Amerada Hess* involved a civil suit against a foreign entity covered by the FSIA, not a criminal matter. Pet. App. 16a n.42. While that decision (and others) establish that the FSIA treats civil jurisdiction comprehensively, nothing in *Amerada Hess* addresses, let alone forecloses, the court of appeals' decision in this case. See *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."); *In re Grand Jury Subpoena*, 912 F.3d at 630-631 (refusing to "read case law with the same textual exactitude that [a court] would bring to bear on an Act of Congress," and explaining that "section 3231 and the Act can coexist peacefully"). And in any event, the language quoted by petitioner does not support its position in this case.

Petitioner notes (Pet. 20-21) 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 in that case, *Amerada Hess* explained only that Section 1604 bars "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 434-435 (emphasis altered; citation omitted), which would include those found here. Pet. App. 18a-23a. *The Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch) 116 (1812), is inapposite. Among other things, that case involved immunity of a sovereign's warship, not its commercial activity, see *id.* at 135, 137, and it did not equate foreign-owned companies with foreign states as such for purposes of any general interpretive principle.*

Petitioner is mistaken in suggesting (Pet. 13) that the decision below constitutes a "dramatic unleashing of federal criminal jurisdiction on foreign states" or otherwise signal any sea change in American practice. To the contrary, the United States has prosecuted and served criminal process on commercial enterprises that are majority-owned by foreign governments in appropriate cases for decades. See, *e.g.*, *In re Grand Jury Subpoena*, 912 F.3d at 626; *United States* v. *Ho*, No. 16-cr-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.

---

* In addition, contrary to petitioner's suggestion (Pet. 18), it did not adequately present below an argument that "jurisdictional provisions presumptively exclude foreign sovereigns." Petitioner's opening brief in the court of appeals merely cited *Schooner Exchange* for the proposition that "[a]s early as 1812, the Supreme Court recognized that the common law afforded foreign sovereigns immunity from the jurisdiction of U.S. courts" in civil and criminal matters. Pet. C.A. Br. 3; cf. Pet. C.A. Reply Br. 31 (making a closer version of the current argument). The court of appeals accordingly did not directly address petitioner's current *Schooner Exchange* argument. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (explaining that this is a Court "of review, not of first view").

Cir.) (per curiam), cert. denied, 484 U.S. 963 (1987); *In re Grand Jury Investigation of Shipping Indus.*, 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); see also, *e.g.*, *United States* v. *Statoil, ASA*, 06-cr-960 Doc. No. 2 and Docket entry (S.D.N.Y. Oct. 13, 2006) (criminal information and deferred prosecution agreement against Norwegian state-owned oil company); *United States* v. *Aerlinte Eireann*, 89-cr-647 Docket entry No. 12 (S.D. Fla. Oct. 6, 1989) (guilty plea of airline then owned by Ireland).

Petitioner notes (Pet. 17) that, in some of those cases, the defendants either waived sovereign immunity or prevailed on a sovereign-immunity defense asserted over the government's objection. But that does not alter the central point that the Executive Branch has long maintained that state-owned enterprises do not enjoy blanket immunity from criminal prosecution or process. Contrary to the blanket approach petitioner espouses, the courts in those cases did not automatically dismiss the actions on the ground that criminal matters can never proceed against state-owned corporations. Rather, they analyzed whether the state-owned entities were organs of the state performing sovereign functions —an analysis that would have been unnecessary if a showing that the companies were majority-owned by a foreign government automatically entitled them to absolute immunity from criminal jurisdiction.

Nor is petitioner correct in asserting (Pet. 10, 16-17) that such prosecutions violate international-law norms. Petitioner's sources at most reflect an international consensus against prosecuting foreign states themselves—as opposed to corporate entities that are majority-owned by a foreign sovereign, particularly when those entities

are engaged in commercial capacity. See Hazel Fox, *The Law of State Immunity* 89 (3d ed. 2013) (immunity bars applying "criminal law to regulate the public governmental activity of the foreign State"); *id.* at 89 n.64 (states shielded from claims "related to the exercise of governmental powers"); see also William C. Hoffman, *The Separate Entity Rule in International Perspective: Should State Ownership of Corporate Shares Confer Sovereign Status for Immunity Purposes?*, 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).

2. Petitioner errs in contending (Pet. 10-13) that the courts of appeals are divided over whether American courts can exercise subject-matter jurisdiction over foreign states or instrumentalities in criminal cases. Petitioner does not point to any court that has actually declined to exercise criminal jurisdiction by dismissing an indictment under the FSIA. The only other court of appeals to address the question of criminal jurisdiction over a majority-foreign-owned corporation if the FSIA applies in criminal cases and the commercial-activity exception to immunity is satisfied reached the same result. See *In re Grand Jury Subpoena*, 912 F.3d at 626; cf. *Southway* v. *Central Bank of Nigeria*, 198 F.3d 1210, 1214 (10th Cir. 1999) (declining to resolve whether the FSIA applies to federal criminal prosecutions, but calling that proposed position "questionable"). The decision below therefore does not conflict with the decision of another court of appeals, and the potential resolution of such a conflict cannot provide a basis to support this Court's intervention.

Petitioner principally contends (Pet. 10-13) that the court of appeals' decision conflicts with the Sixth

Circuit's decision in *Keller* v. *Central Bank of Nigeria*, 277 F.3d 811 (2002). That contention is mistaken. *Keller* was a civil suit against the central bank of Nigeria and several purported bank employees, arising from a fraud perpetrated by a self-identified Nigerian prince. *Id.* at 814-815, 818. In reviewing civil allegations of violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1964(c), the court considered whether the alleged "act[s]"—which described the asserted fraud—were "indictable," an element of civil-RICO claims. *Keller*, 277 F.3d 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 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." *Keller*, 277 F.3d at 820. The court then said that there was no applicable "international agreement" and that "the FSIA does not provide an exception for criminal jurisdiction." *Ibid.* And the court concluded that, because the defendants could not be indicted, the civil-RICO suit failed to state a claim. *Id.* at 820-821.

Contrary to petitioner's suggestion (Pet. 10), *Keller* should not be read to mean that, as a categorical matter, "federal courts lack criminal jurisdiction over foreign sovereigns, full stop." Rather, *Keller* contemplated that jurisdiction *could* exist in criminal cases, repeatedly indicating that a criminal prosecution could proceed if authorized by an "international agreement," 277 F.3d at 820—a position that is inconsistent with petitioner's argument here. While *Keller* also quoted broad language from a district court decision that found a civil-RICO action barred by the FSIA on the theory that criminal

jurisdiction was unavailable, see *id.* at 819-820, *Keller*'s conclusion that the FSIA would not bar jurisdiction if there were an "international agreement stating otherwise," *id.* at 820, shows that *Keller* did not fully embrace that broad language. Accordingly, as the D.C. Circuit has explained, the Sixth Circuit has not confronted a case in which the government brought criminal proceedings and based jurisdiction on 18 U.S.C. 3231, and it therefore "has yet to squarely address whether that provision can support jurisdiction consistent with the Act." *In re Grand Jury Subpoena*, 912 F.3d at 631. If "confronted with the same issue" faced here, "the Sixth Circuit would be free to reach the same conclusion" as the court below—"that Section 3231 can be invoked in conjunction with the [FSIA]." *Ibid.*

Even if genuine tension existed between the decision below and *Keller*, any such tension would not warrant further review. Petitioner 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 *Keller*, the United States has not understood foreign-government-owned businesses to be immune from criminal prosecution and process. See, *e.g.*, *Ho*, 2016 WL 5875005, at *6 (noting prosecution of Chinese-government-owned power company in the Sixth Circuit).

No pressing need exists for this Court to intervene in the absence of a conflict. The issue raised by petitioner 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* v. *Yousuf*, *supra*, that the FSIA does not apply in suits against foreign government officials acting in their official capacity. And contrary to petitioner's contentions (Pet. 15-19), the decision below neither breaks new ground in the United States' exercise of criminal jurisdiction nor creates foreign-policy concerns given the Executive Branch's control over the initiation of a federal prosecution. This Court recently declined to review the same question presented, see *In Re Grand Jury Subpoena*, 139 S. Ct. at 1378, and nothing now counsels in favor of a different disposition.

3. If anything, this case would be a less attractive vehicle to address the question presented, because it involves a threshold question of interlocutory appellate jurisdiction on which serious doubts exist.

As relevant here, courts of appeals have jurisdiction over "final decisions of the district courts." 28 U.S.C. 1291. "In a criminal case," that final-judgment rule typically "prohibits appellate review until conviction and imposition of sentence." *Flanagan* v. *United States*, 465 U.S. 259, 263 (1984). But petitioner here did not appeal such a judgment; instead, petitioner appealed the denial of a motion to dismiss. As the government explained in more detail below (Gov't C.A. Br. 11-15), the "especially compelling" reasons for enforcing the final-judgment rule "in the administration of criminal justice" preclude an exercise of jurisdiction over that appeal. *Cobbledick* v. *United States*, 309 U.S. 323, 325 (1940); see, *e.g.*, *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263, 265 (1982) (per curiam) (explaining that the policy against "piecemeal appellate review of trial court decisions which do not terminate the litigation" is "strongest in the field of criminal law"); *In re Grand Jury Subpoena*, 912 F.3d at 626 (noting that a

similar appeal was "dismissed for lack of appellate jurisdiction").

The court of appeals acknowledged that the final-judgment rule applies with "the 'utmost strictness'" in criminal cases, Pet. App. 9a (citation omitted), and that a denial of a motion to dismiss on foreign-sovereign-immunity grounds is not among the "four categories of orders that are immediately appealable in criminal cases" under this Court's precedents, *id.* at 9a n.12 (citing *Midland Asphalt Corp.* v. *United States*, 489 U.S. 794, 799 (1989)); see *id.* at 10a. But the court of appeals nevertheless took the view that, under this Court's reasoning in *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463 (1978)—a civil case—the district court's denial of petitioner's motion to dismiss the criminal indictment was immediately appealable. Pet. App. 10a-11a. The need to resolve that serious threshold jurisdictional question counsels against granting review. Denying the petition, moreover, would not preclude petitioner from seeking this Court's review of the sovereign-immunity question if an adverse final judgment were ultimately entered. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
KENNETH A. POLITE, JR.
MATTHEW G. OLSEN
Assistant Attorneys General
PAUL T. CRANE
Attorney

JULY 2022