No. 21-1450

# In the Supreme Court of the United States

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

*v.*

UNITED STATES OF AMERICA,
RESPONDENT.

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

## REPLY BRIEF FOR PETITIONER

LISA BLATT
*Counsel of Record*
ROBERT M. CARY
JOHN S. WILLIAMS
SIMON A. LATCOVICH
EDEN SCHIFFMANN
JAMES W. KIRKPATRICK
WILLIAMS & CONNOLLY LLP
*680 Maine Avenue, S.W.*
*Washington, DC 20024*
*(202) 434-5000*
*lblatt@wc.com*

**TABLE OF CONTENTS**

Page

**TABLE OF AUTHORITIES**

Page

Cases:

Page

Statutes:



Other Authorities:

# In the Supreme Court of the United States

No. 21-1450

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

*v.*

UNITED STATES OF AMERICA,
RESPONDENT.

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

## REPLY BRIEF FOR PETITIONER

The decision below greenlit our Nation's first criminal trial of a foreign sovereign. It is without precedent anywhere in the world; does violence to longstanding principles of international law; threatens the comity between nations; and almost invites local or provincial prosecutors to make mischief in the foreign policy of our country. And of particular importance here, the decision below conflicts with centuries of this Court's precedent and deepens a circuit split.

The government all but answers that the federal court of appeals on one side of the circuit split did not know what it was saying when it held that sovereigns have criminal immunity; decisions by this Court do not mean

what they say; history does not count; foreign policy and international law do not count; and the sky would fall if its "toolkit" for pursuing criminal conduct did not include the power to indict foreign sovereign nations and their instrumentalities.

The government is wrong, and misguidedly invokes executive prerogative to assert subject-matter jurisdiction that Congress has never provided, in violation of this Court's precedents and clear international law. Without correction the consequences of the decision below will extend past this Nation's courts, and beyond the government's control.

The Court should grant review.

## I. The Decision Below Deepens an Entrenched Circuit Split and Conflicts with This Court's Decisions

1. The Sixth Circuit has squarely and correctly held that district courts lack criminal subject-matter jurisdiction over foreign sovereigns and their instrumentalities. *Keller v. Cent. Bank of Nigeria*, 277 F.3d 811, 819-20 (6th Cir. 2002), *abrogated on other grounds by Samantar v. Yousuf*, 560 U.S. 305 (2010). The Tenth Circuit, D.C. Circuit, and now the Second Circuit have rejected that position, each holding that district courts can exercise criminal jurisdiction over foreign sovereigns and their instrumentalities. This is a clear split, recognized by courts and commentators. Pet. 10-13.

The government disputes the split by noting (at 15-16) that *Keller* was a civil RICO case. But a court's holding consists of "not only the result but also those portions of the opinion necessary to that result." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996). The government concedes that the question in *Keller* was whether "the defendants could . . . be indicted"—because that determined

whether RICO applied. BIO 16. The Sixth Circuit concluded foreign sovereigns cannot be indicted, because "there [is] *no criminal jurisdiction*" over them under the FSIA and the FSIA is "the *only method of obtaining jurisdiction* over foreign sovereigns." *Keller*, 277 F.3d at 819-20 (emphasis added) (citations omitted). Accordingly, contrary to the D.C. Circuit's statement in *In re Grand Jury Subpoena*, 912 F.3d 623, 631 (D.C. Cir.) (per curiam), *cert. denied*, 139 S. Ct. 1378 (2019), the Sixth Circuit necessarily rejected that any other statute, such as § 3231, provided criminal jurisdiction over a foreign sovereign or instrumentality.

The government next argues there is no split because *Keller*, in dicta, held open the possibility that "international agreement[s]" could provide criminal jurisdiction. BIO 16 (quoting *Keller*, 277 F.3d at 820). The Sixth Circuit was simply acknowledging the FSIA's saving clause, which provides that the FSIA does not supersede "existing international agreements to which the United States is a party at the time of [the FSIA's] enactment." 28 U.S.C. § 1604. More important is that there are no agreements contemplating domestic criminal jurisdiction over foreign sovereigns, which underscores the international consensus that such jurisdiction violates international law.

The Sixth Circuit considered a situation exactly analogous to the one here: allegations that a foreign sovereign's instrumentality engaged in conduct falling within the commercial-activities exception. *Keller*, 277 F.3d at 818, 821; Pet. App. 23a. The Sixth Circuit held there was no criminal jurisdiction; the Second Circuit held there was. *Keller*, 277 F.3d at 819-20; Pet. App. 17a. The split could not be clearer.

2. The decision below also conflicts with this Court's foundational sovereign-immunity holding that a general

grant of jurisdiction does not apply to sovereigns or their instrumentalities. *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 146 (1812) (Marshall, C.J.). If Congress wishes to establish jurisdiction over foreign sovereigns, it must do so "in a manner not to be misunderstood." *Id.*; *see* Pet. 13-15. This Court has applied that principle to sovereigns' commercial instrumentalities as well. *Berizzi Bros. v. The Pesaro*, 271 U.S. 562, 576 (1926) (merchant ship owned by sovereign). The Second Circuit's holding that § 3231—a general grant of jurisdiction—provides jurisdiction over foreign sovereigns conflicts with these precedents.

The government fails to grapple with *Schooner Exchange* or *Berizzi Brothers*, responding principally with a footnote claiming that Halkbank did not adequately preserve the argument. BIO 13 n.*. That is baseless. Halkbank's opening brief below explained that sovereigns enjoyed absolute criminal immunity at common law, that only Congress could change that status quo, and that § 3231 did not do so. C.A. Br. 35-36 & n.6, 46-50. And in reply, Halkbank quoted the same case it cites here for the same proposition: "that 'general statutory provisions' setting out courts' subject-matter jurisdiction did not encompass immune sovereigns unless they did so 'in a manner not to be misunderstood.'" C.A. Reply Br. 31 (quoting *Schooner Exchange*, 11 U.S. at 145-46). Halkbank raised this position at oral argument as well, citing *Schooner Exchange* for the proposition that Halkbank is not subject to district court jurisdiction "unless and until Congress unmistakably provides jurisdiction . . . and it has not done so here." C.A. Oral Arg. 40:41-42:50; *see also* C.A. Pet. for Reh'g 11 (making argument again). Halkbank clearly preserved its common-law argument, including application of *Schooner Exchange*.

The government cannot seriously dispute that the decision below contravenes this Court's precedents. That alone counsels strongly in favor of review.

## II. The Question Presented Is Exceptionally Important and Squarely Presented

1. Whether the United States can prosecute foreign sovereigns is plainly important. Pet. 15-18. The decision below permits for the first time a criminal trial of a foreign sovereign claiming immunity. The government's attempts to minimize the import of that decision cannot be squared with history or the law.

The government attempts to turn this case's unprecedented nature into a weakness, arguing that sovereign immunity from criminal prosecution "has arisen infrequently." BIO 17. But that is the point. The government has not identified a criminal trial of any foreign sovereign or instrumentality in this country or *anywhere in the world, ever*. The government can find only nine cases where it even attempted to assert criminal process of any kind against a sovereign instrumentality. BIO 13-14. Five involved grand jury subpoenas—not prosecutions, which raise affronts to sovereign dignity different in degree and kind. (And, in one subpoena case, the instrumentality successfully asserted sovereign immunity. *In re Investigation of World Arrangements*, 13 F.R.D. 280, 291 (D.D.C. 1952).)[1] In three others, instrumentalities *waived*

[1] Citing these cases, the government suggests that only "organs of the state performing sovereign functions" received immunity at common law. BIO 14. That overstates the common law. As the Attorney General and Secretary of State wrote to Congress prior to the FSIA's passage, the "traditional rule" of foreign sovereign immunity "was that . . . agencies and instrumentalities of a foreign government were entitled to the same immunities as the government itself *especially* if they engaged in clearly governmental activities." *Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims*

immunity to settle disputes through pleas or non-prosecution agreements. *United States v. Statoil, ASA*, No. 06-cr-960, ECF No. 6 (S.D.N.Y. Nov. 23, 2009); *United States v. Aerlinte Eireann*, 89-cr-647, ECF No. 12 (S.D. Fla. Oct. 6, 1989); *see United States v. Jasin*, No. 91-cr-602, 1993 WL 259436, at *1 (E.D. Pa. July 7, 1993). And, in the ninth, *United States v. Ho*, No. 16-cr-46 (E.D. Tenn.), the asserted foreign instrumentality has not appeared in the case's six-year history.

Accordingly, the government's hand-wringing about the consequences of maintaining sovereign criminal immunity is greatly exaggerated. BIO 10-11. The government has never tried an instrumentality and has brought charges only four times. Instead, the government can—and historically does—rely on other tools to address supposed wrongdoing. The government can prosecute individuals, as it has in this case. Pet. 8. The government also can use civil actions, injunctions, forfeiture, and asset freezes against sovereign instrumentalities. The government can sanction instrumentalities, locking them out of the global economy. As the government's brief shows, the United States did not bring a single criminal charge against a sovereign instrumentality for 200 years, and the sky did not fall.

By contrast, the consequences of abandoning sovereign immunity in criminal cases hardly require restatement. As the sovereign amici explain, subjecting a foreign sovereign to criminal trial "discards a centuries-old global consensus shared among the community of nations." Sovereigns' Amicus Br. 6. That step would prompt backlash and reciprocal actions by foreign governments against the

---

*and Govt'l Relations of the H. Comm. on the Judiciary*, 93d Cong., 1st Sess. (1973) at 39 (emphasis added). Regardless, Halkbank meets any common-law standard and the government has never disputed that Halkbank is the equivalent of the Republic of Turkey.

United States and other sovereigns, sowing discord without "any benefits that could outweigh those costs." Sovereigns' Amicus Br. 10-12.

2. The government disputes that the result below contravenes international law. Although it concedes that there is "an international consensus against prosecuting foreign states themselves," BIO 14; *see also* Pet. 16-17; Sovereigns' Amicus Br. 7-10, the government insists (wrongly) that international law includes no such bar on prosecuting sovereign instrumentalities. The first problem with its position is that the decision below, at the government's urging, allows prosecutions of "foreign states themselves." BIO 14; *see* Pet. 16; Pet. App. 7a n.8, 15a-18a. The government seeks to avoid that problem, even attempting to write sovereigns out of the question presented. *Compare* BIO I, *with* Pet. I. But the Second Circuit's decision and the government's reasoning are clear: both provide no bar to prosecuting foreign states as well as instrumentalities.

The deeper problem with the government's position is that it is drawing a distinction between sovereigns and instrumentalities that international law does not draw. The principle that sovereign instrumentalities receive the immunity of the sovereign government is foundational, and reflected in United Nations instruments, allies' foreign immunity statutes, and the Restatement. *E.g.*, U.N. Convention on Jurisdictional Immunities of States and Their Property art. 2(1) (2004) ("State" includes "agencies or instrumentalities"); State Immunity Act, (1978), c. 33, § 14(2) (U.K.) ("separate entit[ies]" also "immune from the jurisdiction of the courts" in same circumstances as government); Restatement (Third) of the Foreign Relations Law of the United States § 451 (Am. Law Inst. 1987) ("Under international law, a state or state instrumentality

is immune from the jurisdiction of the courts of another state . . . .").

It is also reflected in the FSIA itself, one of the "purposes" of which was the "codification of international law at the time of the FSIA's enactment." *Permanent Mission of India to the U.N. v. City of New York*, 551 U.S. 193, 199 (2007). The FSIA defines a "foreign state" to "include[ ]" its instrumentalities—corporate or otherwise. 28 U.S.C. § 1603(a). The only pre-FSIA case to resolve the issue rejected the distinction the government makes today, expressly holding that prosecuting "Anglo-Iranian Oil Co., Ltd." "would in reality be to charge and find the British Government guilty." *World Arrangements*, 13 F.R.D. at 291. The government's dichotomy between sovereigns and instrumentalities is a false one.

3. This case is the ideal vehicle to resolve whether district courts have criminal jurisdiction over foreign sovereigns. Unlike *In re Grand Jury*—an expedited subpoena-enforcement proceeding conducted under seal—this case raises the issue of sovereign criminal immunity in the context of a prosecution, and addresses immunity under both the FSIA and this Court's decisions in *Schooner Exchange*, 11 U.S. 116, and *Berizzi Brothers*, 271 U.S. 562.

The government tries to complicate the case by noting (at 9) that the Second Circuit "assumed without deciding" that the FSIA applies in criminal cases. But the court could only avoid deciding whether the FSIA applies because, contrary to *Schooner Exchange*, it erroneously found jurisdiction under a general jurisdictional statute, § 3231.

The government also half-heartedly asserts (at 18-19) that this case raises "serious doubts" regarding appellate

jurisdiction. But this Court has established beyond dispute that threshold denials of immunity-from-suit are immediately appealable. *See, e.g.*, *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) (qualified immunity); *Helstoski v. Meanor*, 442 U.S. 500, 506 (1979) (Speech or Debate Clause immunity); *Abney v. United States*, 431 U.S. 651, 659-60 (1977) (double jeopardy). An "appeal from final judgment cannot repair the damage caused to a sovereign that is improperly required to litigate a case." Pet. App. 10a-11a. Every court to consider the question has applied the collateral-order doctrine to foreign sovereign immunity, *e.g.*, *Funk v. Belneftekhim*, 861 F.3d 354, 363 (2d Cir. 2017), including in criminal cases, *United States v. Pangang Grp. Co.*, 6 F.4th 946, 952-53 (9th Cir. 2021); Pet. App. 9a-11a.

**III. The Decision Below Is Wrong**

The Second Circuit erred in holding that district courts have criminal jurisdiction over foreign sovereigns and their instrumentalities. Pet. 19-25.[2]

1. The government argues that § 3231's grant of jurisdiction "of all offenses against the laws of the United States" gives the district court criminal jurisdiction over offenses committed by foreign sovereigns. BIO 5-6. But the government avoids this Court's cases holding that such general grants of jurisdiction do not apply to foreign sovereigns or their instrumentalities. *Schooner Exchange*, 11 U.S. at 146; *Berizzi Bros.*, 271 U.S. at 576; *see supra* pp. 3-4.

[2] The government does not dispute Halkbank's argument that the decision below impermissibly expanded the commercial-activities exception. Pet. 22-25. This Court's resolution of the absolute-immunity issue "would have the salutary effect of also vacating the Second Circuit's otherwise precedential" error. Pet. 22-23.

2. The absence of an applicable grant of subject-matter jurisdiction resolves this case without reference to the FSIA. But the FSIA's text and structure confirm that sovereigns and their instrumentalities are absolutely immune from criminal jurisdiction. Pet. 19-21. The government's contrary arguments are meritless.

First, the government argues (at 6-9) that the FSIA is a solely civil statute, noting that many of its provisions apply only to civil proceedings. But Congress drafted the FSIA to mirror the common law, "start[ing] from a premise of immunity and then creat[ing] exceptions to the general principle." *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1320 (2017) (quoting H.R. Rep. No. 94-1487, at 17 (1976)). The FSIA thus created broad immunity from *all* "the jurisdiction of the courts of the United States," 28 U.S.C. § 1604, and then withdrew that immunity for "civil action[s]" that fall within enumerated exceptions, *id.* § 1330(a); *see id.* §§ 1605-07. The resulting scheme—absolute criminal immunity and restrictive civil immunity—precisely tracks the common and international law Congress sought to codify. Pet. 16-17. There are no criminal procedural provisions because the FSIA did not authorize criminal jurisdiction.

The Court has already endorsed that the FSIA provides for jurisdiction only in defined categories of civil actions and forecloses invocation of general jurisdictional statutes. In *Argentine Republic v. Amerada Hess Shipping Corp.*, this Court held that § 1330(a) is "the sole basis for obtaining jurisdiction over a foreign state in federal court," and that parties cannot rely on "other grants of subject-matter jurisdiction," whether or not an immunity exception is met. 488 U.S. 428, 437, 439 (1989). Accordingly, *Amerada Hess* forbids what the Second Circuit did, which is to consider whether the FSIA's exceptions apply

based on jurisdiction found somewhere else in the U.S. Code. The government argues that because *Amerada Hess* "was a civil action," its holding that § 1330(a) is the "sole basis for obtaining jurisdiction over a foreign state" does not address criminal jurisdiction. BIO 11-13. But nothing in *Amerada Hess* turned on a civil/criminal distinction. Pet. 20-21.

3. Without a convincing statutory argument, the government makes a series of misguided policy arguments for why the FSIA could not possibly have codified absolute criminal immunity. First, the government complains (at 8) that absolute immunity "displace[s] the Executive Branch's traditional role in deciding whether to criminally prosecute a foreign-government-owned business." But this shoots at the wrong target. The question presented is whether Congress has enacted criminal subject-matter jurisdiction over foreign sovereigns—not the scope of Executive charging discretion. As for the supposed "traditional role," the government does not identify a single example in which it even attempted to prosecute a foreign-government-owned business prior to the FSIA's passage. *Supra* pp. 5-6 (discussing cases cited at BIO 13-14).

Second, the government argues that it "makes little sense" for foreign sovereign immunity to "sweep[] far more broadly in criminal prosecutions . . . than in civil actions." BIO 10 (cleaned up). Actually, broader criminal immunity *is* the standard under international and common law. Pet. 16-17. And absolute criminal immunity and restrictive civil immunity is the regime for diplomatic immunity. Dep't of State, *Diplomatic & Consular Immunity: Guidance for Law Enforcement & Judicial Authorities* 7-8 (Aug. 2018).

Third, the government claims (at 10-11) that absolute criminal immunity would have "gutted the government's crime-fighting toolkit" by barring criminal prosecution.

But the government can point to only three criminal settlements and one company that has not entered an appearance. More importantly, the government has equally potent civil, diplomatic, sanction-related, and military remedies at its disposal. *Supra* p. 6.

* * *

What the government cannot dispute is that a Second Circuit decision allowing the criminal prosecution of sovereigns and their instrumentalities for financial crimes will profoundly affect the international understanding of sovereign immunity. Before American courts take such a bold step, this Court should review whether that step is correct.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

LISA BLATT
*Counsel of Record*
ROBERT M. CARY
JOHN S. WILLIAMS
SIMON A. LATCOVICH
EDEN SCHIFFMANN
JAMES W. KIRKPATRICK
WILLIAMS & CONNOLLY LLP
*680 Maine Avenue, S.W.*
*Washington, DC 20024*
*(202) 434-5000*
*lblatt@wc.com*

AUGUST 2, 2022