No. 21-1450

IN THE
Supreme Court of the United States

TÜRKIYE HALK BANKASI A.Ş.,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF FOR AMICI CURIAE REPUBLIC OF AZERBAIJAN, ISLAMIC REPUBLIC OF PAKISTAN, AND STATE OF QATAR IN SUPPORT OF PETITIONER

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INTERESTS OF AMICI CURIAE[1]

The Republic of Azerbaijan is a transcontinental country of approximately 10 million people located at the boundary of Eastern Europe and Western Asia. It shares borders with Russia, Iran, Turkey (now known

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici or their counsel made a monetary contribution to this brief's preparation or submission. All parties have consented in writing to the filing of this brief.

as the Republic of Türkiye), Georgia, and Armenia. Azerbaijan regained its independence in 1991 and has maintained close relations with the United States and NATO ever since. Azerbaijani forces risked their lives alongside U.S. and NATO servicemembers in Kosovo from 1999 through 2008, in Iraq from 2003 through 2008, and in Afghanistan from 2002 through 2021.

The Islamic Republic of Pakistan is the world's fifth most populous country, with roughly 230 million people. It maintains a close partnership with the United States, which lists it as a major non-NATO ally. Pakistani-U.S. relations are a significant factor in the United States' policy in the Middle East and South and Central Asia, including the United States' efforts to combat terrorism around the globe. Pakistan is committed to the cause of justice in relations between sovereign states and finds sovereign immunity to be a matter of fundamental importance in diplomatic relations.

The State of Qatar is a nation of more than 2.5 million residents occupying a strategically important location bordering both the Arabian Gulf and the Kingdom of Saudi Arabia. Also considered a major non-NATO ally, Qatar has assisted the United States with military efforts in the region, and hosts the largest U.S. military facility in the Middle East.

Every sovereign nation in the world has an interest in this case, which is not merely about whether the United States may prosecute a particular foreign state-owned entity. Petitioner is majority-owned by the Republic of Türkiye, a key U.S. ally and NATO member. There is no dispute in this case that petitioner is considered a foreign state with the same juridical status as Türkiye itself, and the decision below draws no distinction between petitioner and the

Republic of Türkiye. Accordingly, if the United States can prosecute petitioner as an alleged criminal, then it can also criminally prosecute Türkiye, the amici nations, or any other sovereign foreign nation.

SUMMARY OF ARGUMENT

The court below held that prosecutors may criminally charge and then prosecute any sovereign foreign nation for any alleged crimes, based on a general grant of jurisdiction that does not expressly mention foreign states, much less abrogate their inherent sovereign immunity recognized by this Court more than two hundred years ago. If affirmed, that result would be extraordinary and would make the United States an extreme outlier in the international community. To amici's knowledge, no other country—whether friend or foe of the United States—allows criminal prosecutions of foreign states.

The Second Circuit's rule is not only extremely disruptive of the comity and reciprocity that are the foundation of peaceful world order, but is also wrong as a matter of longstanding U.S. law. As Chief Justice Marshall explained for the Court in *The Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cr.) 116, 146 (1812), jurisdictional statutes should not be interpreted to apply to foreign sovereigns, and thus invite international controversy, in the absence of a clear statement from the legislative branch. Yet the court of appeals did not even purport to find such a statement. Instead, it reached its holding based on a general statutory grant of criminal jurisdiction that was enacted without any regard for the special considerations that apply to foreign sovereigns, and that is in all material respects identical to the jurisdictional provision *Schooner Exchange* held did not authorize suits against foreign sovereigns.

That result not only upsets this Court's long-standing jurisprudence but also the foreign-policy principles it embodies. Affirmance would have enormous negative ramifications, both for the United States and for other countries, by upsetting the delicate diplomatic balance upon which foreign sovereign immunity has always rested. The United States, like other nations, affords foreign nations immunity in its courts not just out of grace or gratuity, but principally because it desires, and should be entitled to, the same deferential treatment in those nations' courts. Thus, if the Second Circuit's determination that petitioner lacks immunity from criminal prosecution is affirmed, other countries—including those hostile to U.S. interests whose courts may not allow for full and fair adjudications—will be emboldened to prosecute the United States and its instrumentalities in like manner. The result will cause a downward spiral of disharmony that will undermine international comity and spur diplomatic recriminations and retaliations. And once that spiral has begun, it will be beyond this Court's—and even Congress's—power to stop. The Court should not authorize such a disruption of basic international norms where Congress never engaged in any legislative consideration of the serious diplomatic issues that would result.

In addition to undermining global comity, the criminal prosecution of sovereigns would encourage biased law enforcement and thus threaten core values the United States has historically promoted around the world. If domestic criminal processes against sovereigns were to become an available tool of international diplomacy, nations would be far more disposed to brand their rivals as criminals than to

impose that same opprobrium on allies. Diplomacy is a job for diplomats, not prosecutors, juries, or courts. By blurring the line between politics and law enforcement and allowing geopolitical concerns to influence prosecutions against other sovereign nations, the decision below could undermine the rule of law on a worldwide scale.

The continuing vitality of foreign sovereign immunity in the domestic criminal sphere is critical to both American and international interests. The decision below not only threatens those interests, but does so based on a fundamental misunderstanding of the law. If the United States is to even consider taking the drastic step of breaching an international law consensus and subjecting other sovereigns to criminal prosecution, such a diplomatically fraught action should be undertaken by Congress after careful debate rather than by this Court applying statutes that contain no express reference to such jurisdiction. But the sole legislative enactment that even arguably applies here confirms that Congress has never taken any such approach. For those reasons, and because the proper resolution of this case is profoundly consequential to the maintenance of international comity and order, the judgment should be reversed.

ARGUMENT

I. CONGRESS HAS NEVER AUTHORIZED CRIMINAL JURISDICTION OVER FOREIGN SOVEREIGNS.

Schooner Exchange, this Court's seminal decision confirming the principle of foreign sovereign immunity more than 200 years ago, held that given the "perfect equality and absolute independence of sovereigns, and this common interest impelling them

to mutual intercourse, and an interchange of good offices with each other," domestic laws must "exempt[] * * * the person of the sovereign from arrest or detention within a foreign territory." 11 U.S. at 137. In that case, U.S. owners of a commercial vessel forcibly seized by France arrested the vessel in Philadelphia under "general statutory provisions * * * descriptive of the ordinary jurisdiction of the judicial tribunals." *Id.* at 117, 146. But this Court held that without a clear statement to the contrary, those general jurisdictional provisions could not be construed to permit the arrest of a foreign sovereign or its property. *Id.* at 146 ("[U]ntil such power be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction, which it would be a breach of faith to exercise.").[2] To provide for jurisdiction over foreign sovereigns, Congress must clearly address that issue "in a manner not to be misunderstood." *Id.*

Nor is this long-established "clear statement" rule limited to suits against foreign sovereigns. The Court employs similar rules in evaluating attempts to assert jurisdiction against other types of sovereign governments. For example, as to the 50 sovereign States, the Court has determined that unless Congress has clearly and unambiguously provided otherwise, a general Federal statutory provision will not be interpreted to apply to State governments. As

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[2] Although the Court's opinion does not cite the specific jurisdictional provision that had been invoked, the only conceivable provision was the portion of Section 9 of the Judiciary Act of 1789 that provided exclusive federal jurisdiction over "all civil causes of admiralty and maritime jurisdiction." Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77.

the Court has held, "[i]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so unmistakably clear in the language of the statute." *Gregory* v. *Ashcroft*, 501 U.S. 452, 460-61 (1991) (internal quotation omitted) (quoting *Will* v. *Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989)). Like the rule for foreign sovereigns, the clear statement rule for States is designed to "assure[] that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Id.* at 461 (quoting *Will*, 491 U.S. at 65). A similar rule applies to the Federal government's relationship to Indian tribes. If a federal statute is to be interpreted to abrogate tribal immunity, the Court's "decisions establish * * * that such a congressional decision must be clear. The baseline position * * * is tribal immunity; and '[t]o abrogate [such] immunity, Congress must unequivocally express that purpose.'" *Michigan* v. *Bay Mills Indian Cmty.*, 572 U.S. 782, 790 (2014) (alterations original) (quoting *C&L Enters., Inc.* v. *Citizen Band Potawatomi Tribe of Okla.*, 532 U.S. 411, 418 (2001)).

The court below did not even purport to find, nor could it have found, any clear statement by Congress authorizing criminal jurisdiction over foreign sovereigns. In the ***civil*** context, that clear statement is found in the Foreign Sovereign Immunities Act ("FSIA"), which provides for federal jurisdiction over "any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under [28 U.S.C. §§ 1605-1607] or under any applicable international agreement." 28 U.S.C. § 1330(a).

Section 1603(a), in turn, defines the term "foreign state" to include instrumentalities of foreign nations, such as petitioner Türkiye Halk Bankasi A.Ş. ("Halkbank"), that are separate entities majority-owned by foreign nations. 28 U.S.C. § 1603(a), (b). As this Court has held, the FSIA is "the ***sole basis*** for obtaining jurisdiction over a foreign state in our courts." *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989) (emphasis added); *see also Samantar* v. *Yousuf,* 560 U.S. 305, 323 (2010) (describing FSIA as "a comprehensive solution for suits against [foreign] states").

Defying that holding, the Second Circuit held that this case against a party designated by Congress as a foreign state was authorized by 18 U.S.C. § 3231 ("section 3231"), the general provision conferring criminal law jurisdiction over "all offenses against the laws of the United States." Pet. App. 16a-17a. The court based that conclusion principally on its observation that the criminal code "contains no carve-out" for "foreign sovereigns." *Id.* at 16a.

But that reasoning is exactly backwards. Under *Schooner Exchange*, a general jurisdictional grant will be presumed not to apply to foreign sovereigns. No "carve-out" is necessary. Instead, such provisions will not be interpreted to apply to foreign sovereigns unless Congress has expressed a clear statement that affirmatively provides for such jurisdiction. Accordingly, just like the similar provision construed in *Schooner Exchange*, section 3231 does not confer jurisdiction over foreign sovereigns because Congress did not clearly express such an intent "in a manner not to be misunderstood." 11 U.S. at 146.

Indeed, section 3231 is indistinguishable from the general jurisdictional provision that *Schooner*

Exchange held did not apply to foreign sovereigns. Although codified in 1948, section 3231's grant of jurisdiction originates in section 9 of the Judiciary Act of 1789, which likewise established jurisdiction over "***all*** crimes and offences that shall be cognizable under the authority of the United States," without any express reference that would apply it to foreign sovereigns. *See* Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76 (emphasis added). And the 1789 provision used similar language to the admiralty jurisdiction provision that appeared in the very same sentence, *see id.* at 77 (jurisdiction over "all civil causes of admiralty and maritime jurisdiction"), which is the provision *Schooner Exchange* held did ***not*** reach foreign sovereigns. *See* 11 U.S. at 146; *supra* note 2. Congressional silence does not imply that foreign sovereigns are included; to the contrary, under *Schooner Exchange*, in the absence of a specific reference, sovereign immunity is the generally applicable rule for sovereigns.

Thus, there was no need for Congress to specifically exclude foreign governments from section 3231, just as there was no need to carve them out from the admiralty provision at issue in *Schooner Exchange*. And when section 3231 was codified in 1948, more than a century of precedent followed *Schooner Exchange* in holding that foreign sovereigns' jurisdictional immunity would continue unless Congress spoke expressly to the contrary. *See*, *e.g.*, *Amerada Hess*, 488 U.S. at 437-38 & n.5 (holding that statutes that do not "expressly provide for suits against foreign states" cannot abrogate sovereign immunity, and rejecting notion that if Congress wishes to exclude foreign sovereigns, it must "amend *pro tanto*" every general jurisdictional grant to

expressly do so); *Berizzi Bros. v. S.S. Pesaro*, 271 U.S. 562, 576 (1926); *L'Invincible*, 14 U.S. (1 Wheat.) 238, 252-53, 257-58 (1816).

When it was decided in 1812, *Schooner Exchange* "extend[ed] virtually absolute immunity to foreign sovereigns." *Samantar*, 560 U.S. at 311. And for nearly 150 years thereafter, "foreign states enjoyed absolute immunity from all actions in the United States," including criminal actions. *Rubin* v. *Islamic Republic of Iran*, 138 S. Ct. 816, 821 (2018); *see also*, *e.g.*, *People* v. *Weiner*, 378 N.Y.S.2d 966, 974 (N.Y. Crim. Ct. 1976) (noting, in criminal case, that sovereign immunity of foreign states "is absolute" and "cannot be questioned or challenged").[3]

The 1789 Act's criminal-jurisdiction provision was codified as section 3231 in 1948, during the period when foreign states and their instrumentalities possessed absolute immunity, before the FSIA and other developments relaxed foreign sovereign immunity in the civil context. *See infra* at 13-14. And it was codified without any consideration of issues pertaining to foreign sovereigns. To the contrary, section 3231 was part of an effort to modernize the criminal code in light of the then-new Federal Rules

[3] Before the FSIA gave foreign sovereigns the ability to litigate all civil actions in federal court, *see* 28 U.S.C. §§ 1330, 1441(d), the pre-existing immunity rule first recognized in *Schooner Exchange* applied in state courts as well as federal courts. *See*, *e.g.*, *Chem. Nat. Res., Inc.* v. *Republic of Venezuela*, 215 A.2d 864, 869 (Pa. 1966). Similarly, because Congress has never abrogated the inherent background immunity of foreign sovereigns from criminal prosecution, foreign sovereigns retain absolute criminal immunity in state courts. *See*, *e.g.*, *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 427, 436-37 (1964) (characterizing federal common-law "act of state doctrine" as "a principle of decision binding on federal and state courts alike").

of Criminal Procedure, "***without making fundamental changes***[.]" H.R. Rep. No. 80-304, at 8 (1947) (emphasis added). The discussion specific to section 3231 focused solely on ensuring that federal criminal jurisdiction remained exclusive. *See* 94 Cong. Rec. 8721 (1948); S. Rep. No. 80-1620, at 4 (June 14, 1948). It reflects no intent to broaden federal jurisdiction; indeed, as noted, section 3231 is no broader than the first iteration enacted in 1789.

Yet according to the Second Circuit, section 3231 was, *sub silentio*, the most consequential foreign sovereign immunity provision in U.S. history, because it would have imposed jurisdiction in all criminal cases against foreign states, without exception and with no discussion of the serious diplomatic repercussions such a dramatic change would have wrought. The rule of *Schooner Exchange* forbids that interpretation. The only statute that expressly grants jurisdiction over foreign sovereigns is the FSIA, which applies only to civil cases and which Congress enacted only after careful consideration and debate over the delicate foreign policy issues that such jurisdiction entails.[4]

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[4] Moreover, under the clear statement rule that applies to cases involving other sovereign governments, *see supra* at 6-7, a federal prosecutor could not employ section 3231 to prosecute a sovereign state government or tribal government for an alleged crime, because that provision does not mention those sorts of entities. It would make no sense if the same provision could be the basis to prosecute a foreign sovereign, which raises just as weighty, if not weightier, policy considerations. Under the rule announced more than two centuries ago in *Schooner Exchange*, the same clear-statement rule applies in the three contexts.

II. ALLOWING CRIMINAL PROSECUTION OF FOREIGN SOVEREIGNS WOULD DISRUPT THE COMITY OF NATIONS

Not only is the clear statement rule well-established, it is also founded on sound principles that the Court should not lightly eradicate. As the Court recognized in *Schooner Exchange*, foreign sovereign immunity is a "very delicate and important" issue even in the civil context. 11 U.S. at 135. That is because "[a]ctions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States." *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 493 (1983). If this Court were to permit the United States to provide criminal jurisdiction over foreign sovereigns, those sensitive and delicate foreign policy issues would be magnified dramatically. Other nations would surely follow suit, raising the specter of a downward spiral where foreign prosecutors would be authorized to criminally prosecute the United States and its instrumentalities, or any other foreign state, which would in turn invite the improper politicization of domestic criminal law enforcement worldwide. And once that cycle of retaliation and recrimination begins, it would be impossible for this Court, or even Congress, to stop it. The Court should not create that diplomatic nightmare where Congress—which carefully debated and delineated civil immunities in the FSIA—never engaged in any similar debate over the dire ramifications of abrogating foreign sovereigns' criminal immunity.

A. Allowing Criminal Prosecution Of Foreign Sovereigns Would Contravene A Long-Accepted Global Consensus.

In addition to flouting this Court's unambiguous precedents, the Second Circuit's interpretation would discard a centuries-old global consensus shared among the community of nations. United States law, international law, and the laws of foreign nations all confirm that imposing criminal liability on sovereign states would be unprecedented and undesirable.

In the 20th century, civil and criminal immunity under U.S. law diverged. For civil cases, the 1952 "Tate Letter," along with the subsequent 1976 adoption of the FSIA, brought about a "restrictive" approach to civil immunity of foreign sovereigns. *See*, *e.g.*, *Republic of Austria* v. *Altmann*, 541 U.S. 677, 690-91 (2004). The Tate Letter, however, was expressly based on the changing law of ***civil*** immunities. *See* Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State (May 19, 1952), *reprinted in* 26 Dept. State Bull. 971, 984-985 (1952). It noted that the State Department's new position relaxing the "classical or absolute theory of sovereign immunity" would be consistent with the U.S. government's actions "in subjecting itself to suit in [its own courts] in both contract and tort and with its long established policy of not claiming immunity in foreign jurisdictions for its merchant vessels." *Id*. In keeping with that logic, the FSIA limited its jurisdictional grant over suits against foreign sovereigns solely to "nonjury ***civil*** action[s]." 28 U.S.C. § 1330(a) (emphasis added). It opened the door to a specific, limited class of actions against foreign sovereigns, leaving the general jurisdictional rule otherwise intact.

Most importantly, these developments "left untouched the position in criminal proceedings." Hazel Fox & Philippa Webb, *The Law of State Immunity* 89 (3d ed. 2013). Accordingly, "[t]he adoption of a restrictive doctrine has not been treated as having any relevance in relation to the [a]bsolute [i]mmunity of the foreign State from criminal proceedings." *Id.* at 92. Nor has Congress ever enacted any law restricting absolute sovereign immunity in the criminal context.

Further, under the logic of the Tate Letter itself, there would be no basis for this Court—without a clear statement by Congress—to abrogate foreign nations' absolute immunity from criminal prosecution. The Tate letter was based on both the evolution of international law and the United States' transition to a restrictive theory for civil cases given the federal government's decision to waive its own civil immunity in certain contract, tort, and admiralty cases. 26 Dep't State Bull. at 984-985. But international law never evolved to discard criminal immunity. Moreover, the United States has never waived or abrogated its immunity from ***criminal*** prosecution, and amici submit that it never would do so.

The distinction between civil and criminal cases is based not only on tradition and common law, but on basic principles of international law. *Cf.* 28 U.S.C. § 1602 (emphasizing United States' adherence to "international law" in foreign sovereign immunity context). As the leading treatise cited above observes, "[t]he exercise of criminal jurisdiction directly over another State * * * contravenes international law in two ways." Fox & Webb, *supra*, at 89. "First, it seeks to make another State subject to penal codes based on moral guilt; and, secondly, it seeks to apply its

criminal law to regulate the public governmental activity of the foreign State." *Id.* Given that subjecting foreign states even to civil suit raises "delicate and important" diplomatic issues, *Schooner Exchange*, 11 U.S. at 135, allowing prosecutors and juries to brand other nations as criminals raises even greater foreign policy concerns.

Reflecting that view, the United Nations' model Convention on sovereign immunity adopts the restrictive theory of immunity only in the ***civil*** context while leaving intact absolute immunity from criminal proceedings. A U.N. resolution adopted the Convention, which contains a restrictive version of civil immunities similar to the FSIA's, but expressly states that the Convention "***does not cover criminal proceedings***." *See* G.A. Res. 59/38, U.N. Doc. A/RES/59/38, at 2 (Dec. 2, 2004) (emphasis added). That position is "in line with the received position of jurists and courts that * * * an independent State cannot be held criminally liable under the * * * law of another State and hence enjoys absolute immunity in respect of criminal proceedings." Fox & Webb, *supra*, at 311. Under international custom and law, "[a] state can be liable under civil law, but it cannot be prosecuted" criminally. Elizabeth Helen Franey, "Immunity from the Criminal Jurisdiction of National Courts," in *Research Handbook on Jurisdiction and Immunities in International Law* 205, 207 (Alexander Orakhelashvili ed., 2015); *see also* Andrew Dickinson, Rae Lindsay & Audley Sheppard, *State Immunity and State-Owned Enterprises* 18 (Dec. 2008) (tinyurl.com/ye2xkznk) ("It is generally accepted that, at least under the present state of customary international law, criminal proceedings cannot be brought in a municipal jurisdiction against a foreign State.").

Given that international consensus, it is unsurprising that the domestic laws of many foreign states also expressly reflect the principle of absolute immunity from criminal process. That has remained true even as many states, mirroring the United States' own practice, have adopted the restrictive view of sovereign immunity in civil cases. To take just a few examples, amicus Pakistan, as well as South Africa, Canada, Singapore, and the U.K., have all expressly limited their statutes adopting the restrictive theory to civil, not criminal, cases. *See*, *e.g.*, The State Immunity Ordinance, No. 6 of 1981, § 17(a)(2)(b) (Pak.); Foreign States Immunities Act 87 of 1981, § 2(3) (S. Afr.) ("The provisions of this Act shall not be construed as subjecting any foreign state to the criminal jurisdiction of the courts of the Republic."); State Immunity Act, R.S.C. 1985, c. S-18, § 18 (Can.) (excluding criminal actions from the scope of restrictive theory); State Immunity Act, ch. 313, § 19(2)(b) (1979) (Sing.) (same); State Immunity Act 1978, c. 33, § 16(4) (U.K.) (same).

As English courts have explained, "[a] state is not criminally responsible in international or [domestic] law, and therefore cannot be directly impleaded in criminal proceedings." *Jones* v. *Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) and others*, [2006] UKHL 26 [31] (U.K.). And "***[w]ithout exception***, the legislation in common law countries introducing the restrictive approach of immunity in civil proceedings excludes its application to criminal proceedings." Fox & Webb, *supra*, at 90 (emphasis added). Amici are aware of ***no*** country—whether an ally or foe of the United States—whose law permits it to criminally prosecute and convict another sovereign nation.

B. Criminal Prosecution Of Foreign Sovereigns Would Prompt Backlash And Foster International Discord.

At the very heart of foreign sovereign immunity is the principle of reciprocity: the United States affords other countries immunity in its courts because it desires the same treatment abroad.[5] "After all, in the law, what is sauce for the goose is normally sauce for the gander." *RJR Nabisco, Inc.* v. *European Cmty.*, 579 U.S. 325, 346-49 (2016) (declining to afford RICO statute extraterritorial effect in light of "international friction" it would cause) (quoting *Heffernan* v. *City of Paterson*, 578 U.S. 266, 272 (2016)). Foreign sovereign immunity is also predicated on the fundamental understanding that disputes between nations should generally be addressed diplomatically through state-to-state negotiations, rather than by courts and juries. As noted in *Schooner Exchange*, "wrongs committed by a sovereign" raise issues that are "rather [ones] of

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[5] *See*, *e.g.*, *Fed. Republic of Germany* v. *Philipp*, 141 S. Ct. 703, 714 (2021) ("We interpret the FSIA as we do other statutes affecting international relations: to avoid, where possible, 'producing friction in our relations with [other] nations and leading some to reciprocate by granting their courts permission to embroil the United States in expensive and difficult litigation.'") (alteration original) (quoting *Bolivarian Republic of Venezuela* v. *Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1322 (2017)); *Helmerich*, 137 S. Ct. at 1322 (objective of FSIA "is to give 'protection from the inconvenience of suit as a gesture of comity[.]'") (quoting *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 479 (2003)); *Lauritzen* v. *Larsen*, 345 U.S. 571, 582 (1953) ("[N]or should we forget that any contact which we hold sufficient to warrant application of ***our*** law to a foreign transaction will logically be as strong a warrant for a foreign country to apply ***its*** law to an American transaction") (emphasis added).

policy than of law," and "are for diplomatic, rather than legal discussion." 11 U.S. at 146.

If affirmed, the decision below would invite just the sort of retaliatory political actions by foreign nations that the foreign sovereign immunity doctrine seeks to avoid. Given the longstanding and universal consensus, noted above, that foreign sovereigns possess immunity from criminal prosecution, a defection from that consensus by a global leader such as the United States will almost certainly prompt other countries to follow with unanticipated and negative results. Just as other countries followed the United States' lead when it enacted the FSIA, *see*, *e.g.*, Mark Feldman, *The United States Foreign Sovereign Immunities Act of 1976 in Perspective: A Founder's View*, 35 Int'l & Comp. L.Q. 302, 303 (1986), the same can be expected in the criminal arena.

Indeed, scholars have noted that some nations have codified the principle of asserting jurisdiction over a foreign sovereign to the same extent that foreign sovereign would assert jurisdiction over them. *See*, *e.g.*, Kurt H. Nadelmann, *Jurisdictionally Improper Fora in Treaties on Recognition of Judgments*, 67 Colum. L. Rev. 995, 999 (1967); G. DeLaume, *Transnational Contracts Applicable Law and Settlement of Disputes* §§ 8.08-8.09 (1975). Accordingly, if this Court affirms the Second Circuit, any such statutes could automatically prompt a reprisal in the guise of reciprocity, allowing foreign nations to criminally prosecute the United States or its agencies or instrumentalities. And other nations would be sure to follow suit, particularly nations hostile to the interests of the United States.

Abandoning the universal norm against criminal prosecution of foreign sovereigns would thus come

with significant costs, both for the United States and for the world order. For the United States, the decision below raises a threat that this Nation's government and its agencies and instrumentalities could be adjudicated as criminals by hostile—or even friendly—foreign powers, based purely on principles of *respondeat superior* or other agency doctrines under those foreign powers' domestic laws. Given the world-wide reach of U.S. government activity, the risk of such retaliatory actions is not merely hypothetical. And for the world order, nations' criminal prosecution of other nations—which would be spurred by an affirmance of the decision below—would constitute a new tool to generate international strife that would not otherwise exist. That problem will be exacerbated by many nations' federal systems, which often allow local prosecutorial officials and courts to bring cases against foreigners under "universal" jurisdictional grants without central government directives. *See*, *e.g.*, María Manuel Márquez Velásquez, *The Argentinian Exercise of Universal Jurisdiction 12 Years After its Opening*, OpinioJuris (Apr. 2, 2022) (https://tinyurl.com/2bh96uju) (documenting reciprocal actions by local Spanish and Argentinian courts). Although such actions have thus far been limited to non-state individual actors, subjecting foreign states to criminal jurisdiction would open a new and uncontrollable judicial battlefront over issues that have historically been resolved diplomatically.

Nor are there any benefits that could outweigh those costs. There is no productive purpose a criminal prosecution of a foreign sovereign, including its instrumentalities, might serve that cannot be accomplished by other, less extraordinary and divisive means. *See* Br. for Petitioner at 41-42. Individual

officials without diplomatic or head-of-state immunity who commit crimes can be prosecuted if within the jurisdiction of the prosecuting state. And foreign states and state-owned entities can be, and often are, subject to a wide-ranging panoply of U.S. diplomatic and statutory sanctions. But such sanctions are authorized and dispensed only after careful consideration both by Congress in enacting the governing statutes and by the Executive in enforcing them. By contrast, endorsing wide-ranging criminal jurisdiction would allow prosecutors and juries to brand any foreign sovereign a criminal felon and exact criminal penalties without any required oversight by political actors.

Once this Court opens that door, it will be impossible to close. If foreign nations reciprocate by subjecting the United States or its agencies or instrumentalities to criminal prosecution, neither this Court nor Congress could stop them or reverse that process. That is a principal reason this Court recognized the doctrine of foreign sovereign immunity so long ago. The United States should abstain from traveling this perilous path, where Congress has never even considered this momentous issue, much less established the rules of the road.

C. Criminal Prosecution Of Foreign Sovereigns Would Politicize Judiciaries And Undermine The Rule Of Law.

The decision below also threatens to undermine the rule of law in countries around the globe. Depoliticization of domestic law is a bedrock value the United States has sought to project around the world. Tools of diplomacy, by contrast, are designed to be used in pursuit of political aims. *See Schooner Exchange*, 11 U.S. at 146. The core question in this

case—whether one nation can employ prosecutors, courts and juries to brand another nation a felon and impose criminal penalties against it—thus has immense implications for the rule of law. If domestic criminal law can be wielded against foreign sovereigns for political reasons, as likely will occur if the norms described above collapse, it will only weaken the world community's ability to keep corrosive political influences out of criminal law.

That result would be unfortunate on a global scale. But it would be particularly anomalous for the United States to bring it about. Few values are more important to the United States, or more closely associated with it, than depoliticization of law. Indeed, this country regularly emphasizes the need for foreign nations to wield (or decline to wield) their domestic criminal law based on political concerns. *See*, *e.g.*, Anthony J. Blinken, Sec'y of State, U.S. Dep't of State, *Political Prisoners in Belarus* (Jan. 27, 2022) (https://tinyurl.com/2p8dsty5); Anthony J. Blinken, Sec'y of State, U.S. Dep't of State, *Holding Accountable Nicaraguan Agents of Repression* (Jan. 10, 2022) (https://tinyurl.com/2phtwpua); U.S. Dep't of State, *2021 Country Reports on Human Rights Practices: Cuba* (Apr. 12, 2022) (https://tinyurl.com/5n7dny6z). By endorsing the view that foreign sovereigns are subject to domestic prosecutorial discretion, the decision below introduces into the criminal context—where they are the most corrosive—the very same "case-by-case diplomatic pressures" and "political considerations" the FSIA was enacted to eliminate. *Verlinden*, 461 U.S. at 488.

There is thus good reason for the longstanding and universal consensus that foreign sovereigns possess immunity from criminal prosecution in foreign courts.

Criminal prosecutions embody the view that the defendants being prosecuted—normally by governments themselves—have committed moral wrongs that warrant punitive action. Such actions against foreign sovereigns or their instrumentalities, even more so than private civil suits, therefore directly implicate the foreign policy and international comity considerations that underlie the doctrine of foreign sovereign immunity, which Congress has carefully regulated by statute. If one sovereign nation is to break with international law to brand another as a criminal, such a momentous act should be taken by political leaders wielding legislative authority, rather than by prosecutors, courts and juries unversed in, and unguided by, the "delicate" and "sensitive" foreign policy considerations such prosecutions necessarily entail. *Schooner Exchange*, 11 U.S. at 135; *Verlinden*, 461 U.S. at 493. This Court should therefore reverse the Second Circuit's judgment, hold that foreign sovereign nations and their instrumentalities cannot be subject to criminal prosecution, and leave it to Congress to debate and decide, after considering all of the many complex foreign policy ramifications, whether the United States should become the first nation to do so.

III. THE FSIA CONFIRMS THAT CRIMINAL JURISDICTION DOES NOT EXTEND TO FOREIGN SOVEREIGNS OR THEIR INSTRUMENTALITIES.

A. The FSIA Confirms That Congress Never Abrogated Foreign Sovereign Immunity In The Criminal Context.

As explained, the error of the Second Circuit's decision is apparent from a straightforward application of the clear statement rule first

announced in *Schooner Exchange*. But the FSIA—which was enacted without any mention of criminal prosecution of sovereigns—confirms the point. There, Congress partially abrogated civil immunity, setting forth limited exceptions to that immunity and taking immense care to ensure that foreign sovereigns would never be exposed to civil jury trials and carefully circumscribing their liability for attachment on judgments. 28 U.S.C. §§ 1330(a), 1610, 1611. Those limitations would be incompatible with a rule that foreign sovereigns were then, and still remain, subject to criminal jury trials and criminal penalties based on the same conduct. It cannot be the case that when Congress barred foreign sovereigns from being subject to jury trials and ordinary attachment proceedings, it nevertheless silently ratified the idea that juries could impose, without limitation, even more intrusive sanctions in criminal prosecutions. *See*, *e.g.*, H.R. Rep. No. 94-1487, at 13 (1976) (explaining that the FSIA's requirement that actions against sovereigns shall be tried "by a court without a jury" was designed to "promote a uniformity in decision where foreign governments are involved"). Such an approach would not only run contrary to established precedent, but would also be destructive of the diplomatic norms that foreign sovereign immunity embodies.

The FSIA's exceptions to immunity further confirm that Congress never altered the centuries of preexisting law under which foreign sovereigns possessed absolute immunity from criminal prosecution. The vast majority of those exceptions have no conceivable application other than in civil cases. [6] Moreover, while the FSIA's "terrorism

[6] *See* 28 U.S.C. § 1605(a)(3), (4) (certain cases involving "rights in property"); *id*. § 1605(a)(5) (certain cases in which

exception" allows for circumscribed non-jury civil liability against a limited number of foreign states—currently just four countries—that the Executive has designated as state sponsors of terrorism, *see* 28 U.S.C. § 1605A, the government's position below would allow prosecutors to prosecute any foreign state or instrumentality for criminal terrorism offenses and allow any court to impose the full panoply of punishment allowed in such cases.

The incongruity is clear. Indeed, the fact that only ***one*** of the FSIA's nine non-consent-based exceptions—the difficult to apply commercial activity exception[7]—could even theoretically be relevant in a criminal case is itself powerful evidence that Congress, consistent with its limited jurisdictional grant in section 1330(a), never intended for the FSIA's exceptions to cover criminal cases.

But the government's reasoning, which the district court adopted, goes even further. The district court held below that section 3231 permits ***all*** criminal prosecutions of foreign sovereigns, without any

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"money damages are sought against a foreign state"); *id.* § 1605(a)(6) (cases to enforce arbitration agreements); *id.* § 1605(b), (c) (certain cases "in admiralty * * * to enforce a maritime lien against a vessel or cargo of the foreign state"); *id.* § 1605(d) (certain cases "brought to foreclose a preferred mortgage"); *id.* § 1605(h) (certain actions involving art works); *id.* § 1605A (certain civil actions for terrorist acts).

[7] *See*, *e.g.*, *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 358-59 (1993) (decrying "commercial activity" exception as "distinguished only by its diffidence," insofar as it "leaves the critical term 'commercial' largely undefined") (quoting *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607, 612 (1992)); *Weltover*, 504 U.S. at 612-14 (discarding as useless FSIA's definition of "commercial," and resorting instead to State Department's pre-FSIA policy).

limitations, including those later enacted for civil cases in the FSIA. *See* Pet. App. 34a-35a. Under that erroneous view, federal prosecutors could charge, and local juries could convict, foreign sovereign nations for ***any*** alleged criminal conduct, regardless of whether the FSIA would permit analogous civil cases. The court of appeals left that ruling in place, although it assumed *arguendo*—without actually determining—that the criminal jurisdiction it endorsed is delimited by the FSIA's civilly-based exceptions. Pet. App. 17a.

For the reasons set forth above, the Court need not decide whether the FSIA's exceptions apply here, because there is no basis for criminal jurisdiction over foreign sovereigns. But a holding that federal criminal prosecutions may proceed subject to the FSIA's exceptions would not only be contrary to law but would provide no comfort to U.S. allies and other foreign sovereigns facing possible domestic prosecutions. The United States would still apparently be the only country in the world to subject foreign sovereigns to criminal prosecutions. Moreover, the FSIA's exceptions to jurisdiction would create serious diplomatic concerns if employed in the criminal context. Indeed, the exceptions have proven very difficult to apply even in the civil context they were intended for. *See supra* note 7.

Accordingly, the fact that the FSIA exceptions are clearly directed only at civil cases is itself powerful evidence that Congress never intended—when it provided general jurisdiction over federal crimes in 1789, when it codified the current version of section 3231 in 1948, or when it enacted the FSIA in 1976—to alter *sub silentio* the immunity from criminal prosecution that foreign nations have possessed since at least *Schooner Exchange*.

B. The Rule Of *Schooner Exchange* Applies To Instrumentalities Of Foreign Governments.

Nor is *Schooner Exchange*'s clear statement rule inapposite because this case involves an instrumentality controlled by a foreign nation rather than the foreign government itself. The Second Circuit made no distinction, nor could the rule it adopted have done so. The court held that section 3231 applies to this case because that statute "'contains no carve-out' that supports an exemption for federal offenses committed by foreign sovereigns." Pet. App. 16a. That holding applies squarely to foreign sovereign nations such as Türkiye (and these amici), as well as their instrumentalities. If affirmed, it will thus subject those nations to wide-ranging criminal prosecution, with all the negative diplomatic and foreign policy ramifications that would entail. *See supra* at 17-22.

Moreover, the FSIA—Congress's only statement on what constitutes a "foreign state"—clearly specifies that instrumentalities such as Halkbank are themselves considered foreign states possessing immunity. *See* U.S.C. § 1603(a), (b). As this Court has noted, the FSIA "codified" the law of foreign sovereign immunity as of its enactment in 1976. *Jam* v. *Int'l Fin. Corp.*, 139 S. Ct. 759, 766 (2019); *see also*, *e.g.*, *Altmann*, 541 U.S. at 691 (quoting *Verlinden*, 461 U.S. at 488). Thus, although the FSIA's immunity exceptions expressly govern only civil cases, the statute's definition of what constitutes a "foreign state" is relevant in determining the scope of *Schooner Exchange*'s rule, since that analysis involves the pre-FSIA legal regime that Congress sought to codify. *Cf. Samantar*, 560 U.S. at 320 (purpose of FSIA was to

"codify[] *state* sovereign immunity") (emphasis in original).

Congress's understanding is also entirely consistent with this Court's pre-FSIA cases. In *Berizzi Bros.*, 271 U.S. at 574, the Court was asked to decide whether *Schooner Exchange*'s absolute immunity rule, which had been announced in a case involving a warship, applied equally to a commercial vessel owned by a foreign government. The Court held the distinction was immaterial:

> We think the principles are applicable alike to all ships held and used by a government for a public purpose, and that when, for the purpose of advancing the trade of its people or providing revenue for its treasury, a government acquires, mans, and operates ships in the carrying trade, they are public ships in the same sense that war ships are. We know of no international usage which regards the maintenance and advancement of the economic welfare of a people in time of peace of any less a public purpose than the maintenance and training of a naval force.

Id.

The Court therefore held that, "in keeping with" the holding of *Schooner Exchange*, the broad language of the Judiciary Act's jurisdictional provisions "must be construed * * * as not intended" to apply to a commercial vessel that is an instrumentality of a foreign country. *Id.* at 576. The Court reached the same conclusion in *Ex Parte Peru*, 318 U.S. 578, 589-90 (1943), which also involved a commercial vessel owned by a foreign government.

As Congress recognized in the FSIA's definitional provision, this case is not materially different.

Türkiye controls Halkbank just as Italy and Peru controlled the commercial vessels in *Berizzi Brothers* and *Ex Parte Peru*. And although the immunity recognized in those cases was later relaxed for ***civil*** cases both before and in the FSIA, *see supra* at 13-14, this Court has never recognized any departure from this rule of absolute immunity for criminal prosecutions. Thus, as in *Berizzi Brothers* and *Ex Parte Peru*, because neither Congress nor Türkiye has ever waived Türkiye's absolute sovereign immunity from criminal prosecution, the general grant of criminal jurisdiction in section 3231—which was enacted with no mention or consideration of the delicate diplomatic concerns involving suits against foreign states—cannot apply to this case.[8]

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[8] Nor is there any international consensus allowing criminal prosecution of foreign instrumentalities like Halkbank. Indeed, outside of the United States, most other nations historically have not allowed criminal prosecutions of ***any*** corporations, whether or not controlled by foreign governments. *See*, *e.g.*, Brandon Garrett, "International Corporate Prosecutions," *in The Oxford Handbook of Criminal Process* 419, 421-22 (Darryl K. Brown, Jenia I. Turner & Bettina Weisser eds., 2019).

CONCLUSION

For the foregoing reasons, and those in petitioner's brief, the Court should reverse the judgment.

Respectfully submitted,

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