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

BRIEF FOR AMICUS CURIAE LORD DANIEL BRENNAN KC IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether U.S. district courts may exercise subject-matter jurisdiction over criminal prosecutions against foreign sovereigns and their instrumentalities under 18 U.S.C. § 3231 and in light of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1441(d),1602–1611.

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INTEREST OF AMICUS CURIAE[1]

Lord Daniel Brennan KC (King's Counsel) is a member of the British House of Lords as well as a practicing barrister in the United Kingdom with a particular interest in public international law. He is the former chairman of the Bar of England and Wales, a member of the American Law Institute, and an associate member of the American Bar Association. Active in both political and legal matters in the United Kingdom and internationally, Lord Brennan is Chairman of the Washington, D.C.-based think tank Global Financial Integrity, a member of the London Court of International Arbitration, and Chairman Emeritus of the Global Governing Board of Caux Round Table on Corporate Social Responsibility. Lord Brennan has an interest in the proper understanding and development of international law and the maintenance of international comity, particularly regarding the United States given the long-established "special relationship" between the United States and Great Britain.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amicus and its counsel made any monetary contribution intended to fund the preparation or submission of this brief. Counsel for both parties were timely notified of amicus's intent to file this brief and have consented to this filing.

SUMMARY OF ARGUMENT

The Second Circuit's decision allowing for the criminal prosecution of foreign sovereigns and their instrumentalities (in U.K. legal parlance, "state entities") in domestic courts is contrary to international law and unsupported by domestic law. It arrogates to the district courts the extraordinary power to sit in judgment over—and impose criminal sentence upon—independent sovereign nations. Moreover, it does so without Congress ever having granted this unprecedented authority.

There is no dispute that the Petitioner here is entitled to the same immunity from domestic prosecution that Turkey itself enjoys. Petitioner is 87.7% owned by the Turkey Wealth Fund, which is part of and owned by Turkey itself. Thus, the Second Circuit's decision holding that the district court had jurisdiction over the criminal prosecution of Petitioner is tantamount to declaring that district courts generally have jurisdiction with respect to any federal criminal prosecution against Turkey or any other sovereign foreign state.

The unilateral assertion of domestic courts' jurisdiction over criminal prosecutions of foreign sovereigns is a break from the settled practice in international law, for which there is no precedent. The reasons for this lack of precedent go to the heart of what it means for a foreign nation to be sovereign. In the international order, sovereign states are understood to stand in equal relation to one another and to possess authority only over their own territories. Thus, the

presumption that a nation is immune from prosecution in the domestic courts of another nation is intrinsic in the very notion of sovereignty. Neither statutes nor the common law creates that immunity; they merely give it effect.

But the assertion of criminal jurisdiction by one nation over another destroys these traditional understandings altogether. It permits one nation to exercise authority over another nation without any warrant in international law or the long-settled understanding of comity between co-equal sovereigns.

No one contends that Turkey has consented to subjecting itself or its instrumentalities to the criminal jurisdiction of the United States district courts. Turkey's opposition to that jurisdiction throughout the pendency of this case proves and emphasizes the point. Nor can consent be found in the treaty between the United States and Turkey governing their relationship with regard to mutual cooperation in criminal matters.

The lack of consent here highlights the practical considerations that also counsel against asserting jurisdiction without, at a minimum, express Congressional authorization. As this Court long ago recognized, enforcing a criminal judgment against a foreign state is beyond the judicial power, leaving enforcement to the traditional tools of foreign relations. But those tools are always available, rendering any criminal prosecution a pointless affront to national dignity and sovereignty that achieves no clear benefit. These considerations, among others, explain why nations

across the globe have codified the international law presumption that nations may not criminally prosecute other nations.

Nothing in the domestic law of the United States indicates any intent to deviate from that broadly accepted norm. Congress has, by the Foreign Sovereign Immunities Act, granted the district courts jurisdiction over foreign nations only in non-jury civil suits, and even then only when statutorily granted immunity does not apply. There is no fair reading of that statute that also grants the district courts jurisdiction to hear this criminal prosecution of a state entity.

The Second Circuit's attempt to locate jurisdictional authority instead in the general grant of criminal jurisdiction should be rejected for several reasons. To start, this Court has rejected the same argument multiple times over the last two hundred years. Next, the Second Circuit's decision would, strangely, require Congress to make a clear statement when regulating *private* conduct in foreign nations—a requirement meant to respect foreign nations' sovereignty—but require no such clear statement when imposing criminal jurisdiction directly over foreign sovereigns. Moreover, the Second Circuit's maximal interpretation of the criminal jurisdiction statute runs directly counter to this Court's cases rejecting the application of vague criminal statutes to matters far removed from their core applications.

To put the point more simply, as this Court has done, Congress does not hide such jurisprudential elephants in statutory mouseholes.

At its root, this is not a difficult case. Domestic law, international law, and the very concept of sovereignty require that the Second Circuit's decision be reversed.

ARGUMENT

A. Asserting jurisdiction to criminally prosecute foreign sovereigns is contrary to settled principles of international law.

There is no precedent for one nation to assert the authority to use its domestic courts to criminally prosecute an independent foreign sovereign. Both the Government and the Second Circuit have failed to identify a single instance in which a sovereign state or its instrumentality—without its consent—was made to face a criminal trial conducted by a foreign sovereign. This absence of precedent should come as no surprise. "Criminal prosecutions of foreign states and associated entities in the courts of other countries typically have long been seen as contrary to international law." John Balzano, *Crimes and the Foreign Sovereign Immunities Act: New Perspectives on an Old Debate*, 38 N.C. J. Int'l L. & Com. Reg. 43, 82 (2012).

1. The United Kingdom's House of Lords has, on a number of occasions, explored the reasons animating the broad international consensus that the courts of one nation may not impose their jurisdiction over other sovereign nations. As Lord Wilberforce explained, it is the "first principle" of sovereign immunity that it arises from the doctrine of "'par in parem' which effectively means that the sovereign or governmental acts of one state are not matters upon which the courts of other states will adjudicate." *Owners of*

Cargo Lately Laden on Board the Playa Larga v Owners of the I Congreso del Partido, [1983] 1 A.C. 244 (U.K.). Thus, as Lord Millett described in another case, immunity "derives from the sovereign nature of the exercise of the state's adjudicative powers and the basic principle of international law that all states are equal." *Holland v. Lampen-Wolfe*, [2001] I.L.Pr. 49 (U.K.).

Importantly, the immunity courts grant foreign states arises from principles and obligations that go beyond the positive law of statutes or the common law. Instead, statutory immunity provisions and their common law antecedents "give effect to the international obligations" that already exist. *Id.* In other words, the underlying international obligations of the country predate and inform the statutory and common law implementation of those obligations.

Under the United Kingdom's jurisprudence, as expressed by Lord Bingham, by recognizing the immunity of foreign states in domestic courts, a court does not decline to "exercise over another state a jurisdiction which it has," but rather acknowledges that "a state has no jurisdiction over another state." *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) and others*, [2006] UKHL 26 (U.K.). The necessary corollary of Lord Bingham's insight is that a "state is not criminally responsible in international or English law, and

therefore cannot be directly impleaded in criminal proceedings." *Id.*[2]

The underlying principle of international law that domestic courts do not have the power to impose criminal judgments on foreign states is significant for the matter here. That principle is antecedent to any statutory or common law implementation impacting foreign states. At a minimum, the existence of this underlying and antecedent principle means that the default regime—especially as to criminal prosecutions—is one of sovereign immunity and that the Government's attempt here to break from that regime should not be accepted without the clearest authorization by Congress. *See* State Immunity Act, 1978, part 1 (United Kingdom) (allowing some exceptions to sovereign immunity in civil matters but clearly stating that the act does not apply to criminal proceedings).

2. The reasons underlying the presumption of sovereign immunity are both practical and compelling. Most fundamentally, a nation exercising criminal jurisdiction over a foreign sovereign offends the idea that states exist as "co-equal sovereign[s]." Balzano, *supra*, at 83. It is the assertion of one country's laws directly over another independent nation. Criminally prosecuting a "co-equal sovereign" is particularly offensive because the "moral condemnation" inherent in

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[2] In a prior case, the Government relied on Lord Bingham's opinion in *Jones* to support the claim that international law "does not recognize the concept of state criminal responsibility." *See* U.S. Statement of Interest 30, *Matar v. Dichter*, No. 05-cv-10270 (S.D.N.Y. Nov. 17, 2006).

criminal prosecutions "denigrates the equality and dignity of the foreign state within the international order." Balzano, *supra*, at 83; *see also* Hazel Fox & Philippa Webb, *The Law of State Immunity* 89 (3d ed. 2013) (noting that the assertion of criminal jurisdiction over foreign states contravenes international law, in part, because it "seeks to make another State subject to penal codes based on moral guilt").

Further, international comity—a traditional driving force in international law—counsels strongly against asserting criminal jurisdiction over foreign sovereigns. Were the United States to assert the jurisdiction of its domestic courts to hear the criminal prosecutions of foreign sovereigns and their instrumentalities, foreign nations would have no reason to refrain from prosecuting the United States and its instrumentalities for conduct deemed offensive to that country's laws or interests. Balzano, *supra*, at 84. Thus, even if the United States were to trust itself to exercise the power of prosecuting foreign nations only in wise and beneficent ways, it would have to ask whether all other nations of the world repose similar confidence in such unilateral determinations or would refrain from engaging in their own unilateral determinations against the interests of the United States. This seems a doubtful proposition, and it is even more doubtful that this Court is the institution best placed in the nation's constitutional scheme to answer it. Absent express Congressional authorization for the federal courts to pursue such prosecutions, this Court should reject the Second Circuit's decision to proceed down such a perilous path without express authorization.

Moreover, serious practical considerations abound, especially when the foreign nation that is the subject of the purported prosecution is recalcitrant. In such an instance, there would be a "general inability of the judicial power to enforce its decisions." *The Schooner Exch. v. McFaddon*, 11 U.S. 116, 146 (1812).

Consider the practical and legal conundrums that would be sure to arise from the attempt to assert domestic judicial power over a foreign sovereign in the Southern District of New York. In contrast to a typical criminal case, the defendant cannot be arrested and compelled to appear before the court. If Turkey refused to participate, would it be considered a fugitive? Would that be true even though Turkey is present in the jurisdiction through its consulate-general in Manhattan? How would the Speedy Trial Act apply to a foreign sovereign present in the district but immune from service? Those are just some of the issues that would arise before the trial even started.

Assume, somehow, that a trial takes place and results in Turkey's conviction. Now what? Obviously, jail time or probation are both off the table, which leaves only a fine or forfeiture judgment. If Turkey refuses to pay any fine because it does not recognize the legitimacy of the prosecution, would the Government allow the sentence to remain unsatisfied? Or would federal marshals seize the consulate building and auction off the property to satisfy the judgment? Would it confiscate gold Turkey may have deposited in the Federal Reserve Bank of New York? By what authority would it take these drastic steps against a foreign nation that is presumed to possess sovereign immunity? And is

the Government truly prepared to set a precedent of seizing foreign consulates and other assets based on domestic criminal prosecutions when the United States maintains consulates and owns assets in nations all over the world?

Because judicial enforcement of a criminal sentence imposed upon a foreign nation is not a realistic possibility, the Government would be left to seek enforcement with all the usual tools of diplomacy and international relations with which it started. But that just begs the question of what purpose the criminal prosecution served in the first place.

The insertion of a dubious criminal prosecution into the delicate gears of international relations serves no purpose at all. As this Court long ago recognized, the wrongs committed by sovereign countries against one another "are rather questions of policy than of law" and, as such, "are for diplomatic, rather than legal discussion." *The Schooner Exch.*, 11 U.S. at 146.

3. The longstanding international rejection of one nation's power to criminally prosecute a foreign sovereign or its instrumentalities is reflected not just in practice, but in statutes around the world. As a leading U.K. treatise has described, "[w]ithout exception, the legislation in common law countries introducing the restrictive approach to immunity in civil proceedings excludes its application to criminal proceedings." Fox & Webb, *supra*, at 90. For example, Australia, Canada, Pakistan, Singapore, South Africa, and the United Kingdom have expressly codified the international law presumption that nations may not

criminally prosecute other nations. *See* Foreign State Immunities Act 1985 (Cth) pt.1, s.3 (Australia) (providing that the proceedings to which the statute applies do "not include a prosecution for an offence or an appeal or other proceeding in the nature of an appeal in relation to such a prosecution"); State Immunity Act, R.S.C. 1985, c. S-18, s. 18 (Canada) ("This Act does not apply to criminal proceedings or proceedings in the nature of criminal proceedings."); The State Immunity Ordinance, No. 6 of 1981 § 17(2)(b) (Pakistan) ("This Ordinance does not apply to … criminal proceedings."); State Immunity Act Pt. II § 19(2) (1985) (Singapore) (expressly stating that its provisions do not apply to criminal proceedings); Foreign States Immunities Act 87 of 1981 § 2(3) (South Africa) ("The provisions of this Act shall not be construed as subjecting any foreign state to the criminal jurisdiction of the courts of the Republic."); State Immunity Act, 1978, c. 33, § 16(4) (United Kingdom) (providing that the statute does not apply to criminal proceedings).

Reflecting this broad international consensus, the United Nations Convention on the Jurisdictional Immunities of States and their Property, which has been adopted by the U.N. General Assembly and is awaiting ratification, similarly limits its application of the restrictive immunity provisions to civil cases. G.A. Res. 59/38 at 4, U.N. Doc. A/RES/59/38 (Dec. 16, 2004) (providing that the Convention does not apply to criminal proceedings). The U.N. Convention reflects the long-standing principle of international law forbidding "the application of the penal code of one State to another State." Fox & Webb, *supra*, at 91.

Thus, at least six nations—spanning five continents—and the United Nations have implemented the fundamental international law principles discussed above by preserving absolute immunity from criminal prosecution and statutorily limiting the restrictive theory to civil cases. In contrast, there does not appear to be a single nation anywhere in the world that has codified the authority of its domestic courts to exercise jurisdiction over criminal prosecutions of foreign states. In short, the position that the Second Circuit adopted in this case finds no support in international practice, customs, or laws.

Where criminal prosecutions of foreign sovereigns and their instrumentalities do harm to the international order and the very concept of sovereignty, and where that harm is not accompanied by any particular benefit, it is no wonder that such prosecutions have long been rejected and are, in fact, unprecedented.

B. The prosecution of an instrumentality of Turkey is not contemplated by the Mutual Legal Assistance Treaty between Turkey and the United States.

Even aside from the broad international consensus against the domestic prosecution of foreign states and state entities, the courts are not writing on a blank slate here. The United States and Turkey have engaged in the traditional modes of diplomacy to craft a treaty defining the relationship between the nations as it relates to criminal matters. *See* Treaty of Extradition and Mutual Assistance in Criminal Matters, U.S.–Turkey, Jan. 1, 1981, 32 U.S.T. 3111. The two

sovereigns entered into the treaty in order to "cooperate more effectively in the repression of crime." *Id.* As with all treaties, the Mutual Assistance Treaty was the result of extensive negotiations between the two nations, followed by consideration and ratification by the United States Senate.

Critically, while the treaty defines (and limits) the conditions under which extradition and mutual legal assistance will be provided by each nation, nothing in it even suggests that either country intended to subject itself to the criminal jurisdiction of the other. To the contrary, the treaty makes clear that each nation need not even provide assistance to the other if it "considers that execution of the request [for assistance] is likely to prejudice its sovereignty." *Id.* at Art. 22(1)(b). And, as noted above, being subject to the criminal jurisdiction of a foreign nation is directly prejudicial to a nation's sovereignty. Balzano, *supra*, at 83.

It is inconceivable that Turkey (or the United States) would expressly limit its assistance rather than face prejudice to its sovereignty while also being willing to suffer the far greater prejudice of being directly subject to the other sovereign's criminal jurisdiction. Thus, exercising such criminal jurisdiction goes far beyond anything contemplated—let alone consented to—by Turkey in its treaty with the United States governing the nations' relationship in criminal matters. Exceeding the bounds of that treaty risks damaging the relationship between the two nations.

Nor would the ramifications be limited to the relationship between the United States and Turkey. The

United States has equivalent treaties with nations across the world. If the United States were to assert the unilateral right to disregard the terms and procedures carefully negotiated in each of those treaties, the United States' partners around the world would have to consider the extent to which they considered themselves bound by those treaties.

Whether the United States could assert the power of its courts to adjudicate criminal prosecutions of foreign states presents many issues impacting foreign relations and settled practice between co-equal sovereigns, all of which are poorly suited to judicial resolution. Absent an exceptionally clear indication from Congress defining the scope of a district courts' jurisdiction in that area, this Court should decline to address those issues itself and should reject the Second Circuit's ill-advised decision that largely brushed them all aside.

C. Domestic law does not grant federal district courts jurisdiction over criminal prosecutions of foreign sovereigns or their instrumentalities.

Given the strong and uniform international understanding that foreign nations cannot use their domestic courts to exercise criminal jurisdiction over other nations, had Congress intended the United States to deviate from that norm, it would have clearly expressed that intent. The search for such an expression of intent here is in vain.

It is axiomatic that the federal courts are "courts of limited jurisdiction" that "possess only that power

authorized by Constitution and statute." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). For that reason, this Court "presume[s] that a cause lies outside this limited jurisdiction" unless the party asserting jurisdiction establishes otherwise. *Id.* Moreover, "the subject-matter jurisdiction of the lower federal courts is determined by Congress 'in the exact degrees and character which to Congress may seem proper for the public good.'" *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 433 (1989) (quoting *Cary v. Curtis,* 44 U.S. (3 How.) 236, 245 (1845)).

1. As relevant to this case, Congress has determined the "exact degree and character" of a district court's jurisdiction over foreign states and their instrumentalities. In the Foreign Sovereign Immunities Act, Congress codified a "careful balance between respecting the immunity historically afforded to foreign sovereigns and holding them accountable, in certain circumstances, for their actions." *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 822 (2018). Out of respect for the balance Congress deemed proper for the public good, this Court has written that the "text and structure of the FSIA demonstrate Congress' intention that the FSIA be the sole basis for obtaining jurisdiction over a foreign state in our courts." *Amerada Hess*, 488 U.S. at 434. Thus, the FSIA "must be applied by the district courts in every action against a foreign sovereign." *Id.* at 434–35 (quoting *Verlinden B.V. v. Central Bank of Nigeria,* 461 U.S. 480, 493, (1983)). Significantly, in accordance with international law, the FSIA "starts from a premise of immunity and then creates 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, pp. 17 (1976)).

To establish the district courts' jurisdiction over criminal prosecutions against foreign sovereigns, the Government must, therefore, overcome two separate presumptions. First, it must overcome the presumption that the district courts lack jurisdiction to begin with. *Kokkonen*, 511 U.S. at 377. Second, it must overcome the presumption that foreign states are immune from suit in the district courts. *Helmerich & Payne*, 137 S. Ct. at 1320. The Government cannot overcome this double presumption against jurisdiction.

2. In crafting exceptions to the general presumption of immunity embodied in 28 U.S.C. § 1604, Congress did not grant the district courts jurisdiction over criminal prosecutions of foreign states. In 28 U.S.C. § 1330(a)—a section entitled "Actions against foreign states"—Congress granted the district courts "original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state" only in cases where immunity elsewhere provided did not apply. By its plain and unmistakable terms, then, the district courts have jurisdiction over foreign states only in some non-jury civil actions. There is no way to read this language and conclude that Congress also intended the district courts to have plenary jurisdiction over the criminal prosecution of foreign states. Neither the statute itself nor its legislative history suggest that Congress intended to make a radical break from international practice by allowing the lower

federal courts to assert criminal jurisdiction over sovereign nations.

Nor does the sanctions regime that Petitioner is accused of violating grant the district courts jurisdiction over alleged violations of that regime. 22 U.S.C. § 8513a; 50 U.S.C. § 1701 *et seq*. Given the strong international and domestic presumptions favoring sovereign immunity, Congress' decision not to empower the district courts to enforce the complex and far-reaching sanctions program must be interpreted as an indication that Congress did not intend the district courts to involve themselves. And for good reason. The district courts are ill-equipped to understand and navigate the broad international consequences inherent in enforcing a worldwide sanctions regime.

3. In response to the absence of any clear grant of jurisdiction in the FSIA or the sanctions regime at issue, the Second Circuit changed the subject. Under the theory that prevailed below, the district courts have jurisdiction under a general grant that bestows jurisdiction on the district courts for "all offenses against the laws of the United States." 18 U.S.C. § 3231. If true, this would be the ultimate example of Congress hiding an elephant in a mousehole. *Cf. Whitman v. Am. Trucking Associations*, 531 U.S. 457, 468 (2001) ("Congress, we have held, does not … hide elephants in mouseholes."). There is good reason to conclude that Congress did no such thing.

To start, this Court already rejected the Second Circuit's position—more than 200 years ago. In the *Schooner Exchange* case, this Court held that a French

armed ship in an American port was "exempt from the jurisdiction" of the United States. *The Schooner Exch.*, 11 U.S. at 147. Chief Justice Marshall reached this conclusion in light of the "perfect equality and absolute independence of sovereigns" and the recognition that the exercise of territorial sovereignty "would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects." *Id.* at 137. And while Chief Justice Marshall recognized that Congress could, conceivably, determine it appropriate to assert the right to exercise such jurisdiction, "until 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." *Id.* at 146. The "general statutory provisions therefore which are descriptive of the ordinary jurisdiction of the judicial tribunals" are insufficient to meet that standard. *Id.*

One hundred years later, this Court revisited and reaffirmed the conclusion that general jurisdictional provisions do not grant the district courts jurisdiction over foreign sovereigns. In *Berizzi Bros. Co. v. The Pesaro*, 271 U.S. 562 (1926), this Court held that a federal district court exercising admiralty jurisdiction did not have authority over a ship owned and possessed by a foreign government. This, even though the statute granting admiralty jurisdiction—like the statute granting jurisdiction over offenses against the laws of the United States—applied to "*all* civil causes of admiralty maritime jurisdiction." *Id.* at 576 (emphasis added). The Second Circuit's simplistic tautology that "all means all" cannot be squared with this Court's ruling in *The Pesaro*.

For the same reason, the Second Circuit's reasoning, if affirmed, would effectively require the conclusion that 18 U.S.C. § 3231 sharply limited or completely overruled *sub silentio* all manner of judicial decisions addressing the sovereign immunity of foreign nations, many international conventions to which the United States is a party detailing the duties of nations between each other, mutual assistance treaties reserving the right to decline assistance in criminal matters when it might impinge on a nation's sovereignty, and settled principles of international law. Rarely has silence been claimed to be so deafening.

For these and similar reasons, this Court has repeatedly recognized that general jurisdictional statutes are insufficient to bestow upon district courts the authority to exercise jurisdiction over sovereign powers, let alone jurisdiction to support a criminal prosecution. And indeed, particularly when considering the authority to criminally prosecute a foreign state, this Court should not read ordinary provisions to grant extraordinary authority. This alone is enough to reverse the Second Circuit's decision.

4. An irony to the Government's position in this case is that the Government generally understands that domestic laws are presumed to apply domestically to domestic subjects. It is a longstanding principle of this Court's jurisprudence that unless Congress clearly expresses an affirmative indication to the contrary, courts are to "presume" that a statute is "primarily concerned with domestic conditions." *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 255 (2010) (quoting *EEOC v. Arabian Am. Oil Co.*, 499

U.S. 244, 248 (1991)). This presumption follows from the "commonsense notion that Congress generally legislates with domestic concerns in mind." *RJR Nabisco, Inc. v. European Cmty.*, 579 U.S. 325, 336 (2016) (quoting *Smith v. United States*, 507 U.S. 197, 204 n.5 (1993)).

The Government articulated these presumptions itself in a recent brief to this Court successfully urging the Court to grant certiorari to decide whether the Lanham Act, 15 U.S.C. § 1051 *et seq.*, applied extraterritorially to the petitioners' foreign sales. Brief for the United States as Amicus Curiae, Petition for Writ of Certiorari, *Arbitron Austria GmbH, et al. v. Hetronic International, Inc.*, No. 21-1043, Sept. 23, 2022. There, the Government spelled out in detail the two-step analysis that courts should undertake to determine whether Congress intended a statute to apply to more than domestic concerns. *Id.* at 9–11. The court asks, first, whether Congress gave a "clear, affirmative indication" that the statute was intended to apply beyond the national borders and, second, whether the statute's focus occurred within the United States. *Id.*

Compare the Government's recognition of the strong presumption against applying statutes extraterritorially to its assertion in this case that a general grant of jurisdiction over offenses against the United States applies to conduct that was not only undertaken primarily overseas, but was undertaken by an instrumentality of an independent foreign state. *See* Brief for the United States in Opposition, Petition for Writ of Certiorari, *Turkiye Halk Bank A.A., aka Halkbank v. United States of America*, No. 21-1450, July

18, 2022, at 5–6. Again, the assertion of authority to entertain the criminal prosecution of a sovereign foreign state is an extraordinary and unprecedented power. But the Government makes no attempt to show a clear, affirmative indication that Congress intended to grant that power in 18 U.S.C. § 3231. Nor does it offer any explanation for why there should be a higher bar to apply a statute to conduct committed *in* a foreign nation than there is for asserting jurisdiction over conduct committed *by* a foreign nation.

5. Finally, the Second Circuit's maximal construction of the statute conveying criminal jurisdiction is contrary to how this Court routinely interprets laws in the criminal domain. This Court has cautioned against construing federal criminal statues to produce "a sweeping expansion of federal criminal jurisdiction." *Kelly v. United States*, 140 S. Ct. 1565, 1574 (2020) (internal quotation marks omitted). Thus, this Court does not read expansively the necessarily general language used to frame criminal statutes, nor does it construe the terms of those statutes to cover all conduct that could conceivably fall within the outermost bounds of the statutory language. *See, e.g.*, *Elonis v. United States*, 575 U.S. 723, 734 (2015) (reading a scienter requirement into a criminal statute that did not specifically include it); *Yates v. United States*, 574 U.S. 528, 532 (2015) (plurality op.) (construing the phrase "tangible object" to exclude fish in accord with apparent Congressional intent to include only those objects used to record or preserve information); *Skilling v. United States*, 561 U.S. 358, 368 (2010) (limiting conduct proscribed by honest-services statute to its core meaning involving bribes or kickbacks). Instead,

this Court has recognized that some degree of restraint—to say nothing of common sense—is appropriate when determining how broad a net Congress intended to cast by a criminal statute.

As those cases show, the Second Circuit's construction of 18 U.S.C. § 3231, extending its grant of jurisdiction to encompass hitherto unknown prosecutions of foreign nations far beyond any reasonable construction of Congressional intent, and regardless of where those offenses occurred or by whom they were committed, runs counter to the more measured approach this Court generally adopts for criminal statutes. This, too, provides a basis to reverse the Second Circuit's ruling.

Of course, there is a difference between a jurisdictional statute and the statutes defining the elements of a criminal offense, but that difference is not one that saves the Second Circuit's interpretation. Overreading the reach of a crime's statutory elements is no more harmful than overreading the scope of parties subject to that statute. In either case, parties who would not be subject to criminal sanction are exposed to criminal jeopardy.

The Second Circuit's decision in this matter is contrary to both international and domestic law. It grants the district courts authority not clearly contemplated by Congress and is contrary to longstanding international practice. Either of these reasons provides ample cause to reverse the Second Circuit's erroneous decision.

CONCLUSION

The Court should reverse the judgment of the Second Circuit, and remand with instructions to dismiss the indictment against Petitioner.

Respectfully submitted,

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