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 OF UNITED AGAINST NUCLEAR IRAN AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

United Against Nuclear Iran ("UANI") is a not-for-profit, bipartisan organization, founded and led by former U.S. Ambassadors and prominent Middle East policy experts. UANI works to ensure the economic and diplomatic isolation of the Iranian regime in order to compel the Islamic Republic of Iran ("Iran") to abandon its illegal nuclear weapons program, support for terrorism, and human rights violations. UANI's Advisory Board includes former U.S. Ambassadors, Senators, Cabinet officials, and Governors, as well as high-ranking government officials of U.S.-allied countries. UANI's coalition of members includes human-rights and humanitarian groups, political advocacy and grassroots organizations, and representatives of diverse ethnicities, faith communities, and political and social affiliations—all united in a commitment to neutralize the threat posed by the rogue Iranian state.

UANI has a substantial interest in the outcome of this appeal because the Court's decision could significantly affect the U.S. government's ability to enforce its economic sanctions against corporations (many of them owned by sovereign states) that facilitate prohibited commercial activities that finance Iran's weapons proliferation and terrorism.

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[1] No counsel for a party authored this brief in whole or in part, nor has such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to this brief's preparation or submission. Both parties were given advance notice of this submission and provided their written consent.

SUMMARY OF ARGUMENT

Petitioner, a commercial bank, has been indicted for illegally laundering approximately twenty billion dollars' worth of restricted Iranian funds, at least one billion of which it laundered through the U.S. financial system by concealing the true nature of those illicit funds from the U.S. Treasury Department. Transfer of these dollar-denominated assets was restricted under U.S. law as part of a comprehensive sanctions regime directed against Iran to prevent that U.S.-designated state sponsor of terrorism from accessing funds to finance terrorism (including terrorism against U.S. nationals) and nuclear proliferation.

Notwithstanding petitioner's deliberate commercial use of the U.S. financial system and attendant violations of U.S. sanctions, it now argues that Türkiye's ownership of a majority of its shares makes it a sovereign entity immune from U.S. criminal laws, with impunity to deceive U.S. officials and evade U.S. sanctions.

This is not the law, and to countenance this argument, this Court would have to reject the considered national security and foreign relations determinations made by the political branches. This would be a startling departure from the deference it has long accorded such determinations, tearing a hole in this country's defense against international terrorism and nuclear proliferation.

This Court has consistently recognized that national security issues are within the purview, and indeed a central responsibility, of the Executive Branch, and that its policy determinations in such

matters are entitled to heavy deference. As in *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), where this Court assessed the constitutionality of the Anti-Terrorism Act's material support statute as applied to that respondent/cross-petitioners' proposed activities, "[t]his litigation implicates sensitive and weighty interests of national security and foreign affairs." *Id.* at 33-34.

This Court has also observed that "neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people." *Boumediene v. Bush*, 553 U.S. 723, 797 (2008). The question presented in this case implicates an important discretionary decision the Executive Branch must make in its evaluation of the national interest.

Denying the Executive Branch the ability to criminally prosecute commercial agencies or instrumentalities of a foreign state for illegal conduct facilitated through the United States would limit the U.S. government's options to other measures, some of which may be less effective and some of which may be far more punitive, with troubling domestic and foreign policy implications. In some cases, for example, the Executive Branch might choose to lodge a formal diplomatic protest or issue a démarche to a foreign state. But in other circumstances, without the option of pursuing a criminal prosecution, it might feel the need to designate a commercial entity like petitioner Türkiye Halk Bankasi A.Ş ("Halkbank")—as it did with Iran's Bank Melli—under the appropriate executive order, freezing its assets in the United States and barring it from further access to U.S. dollar-clearing and settlement (an arguably

more draconian measure subject to a much lower legal standard of review).[2] Of course, with Congress's consent, the United States could also formally go to war.

But all of these tools—diplomatic, regulatory, military, and prosecutorial—are primarily and necessarily within the discretion of the Executive Branch (with the exception of those powers vested in Congress by Article I Section 8). The removal of one of those tools from the U.S. government's toolbox may lead to less, rather than more, comity between nations.

Amicus urges the Court to be mindful of the reality that the first two decades of the twenty-first century have been marked by rapid geopolitical and technological changes, and both international and domestic law are struggling and often failing to match the challenges of this era. Transnational crime (including terrorism and narcotics trafficking), cyberattacks, development of lethal biological weapons and the proliferation of nuclear weapons technology are all severe and growing threats to our national security and the security and stability of our allies. Yet as the United States and its adversaries and competitors execute move and countermove across a vast invisible chessboard, eighteenth

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[2] In one extreme instance, the U.S. military ordered an airstrike on an Iraqi bank in Mosul that was holding substantial funds for the foreign terrorist organization ISIS. *See* Jim Miklaszewski and Corky Siemaszko, Millions in ISIS Cash Destroyed in U.S. Airstrike, NBC News (Jan. 11, 2016), https://www.nbcnews.com/storyline/isis-terror/millions-isis-cash-destroyed-u-s-airstrike-n494261.

and nineteenth century paradigms of state sovereignty cannot be grafted onto current realities.

Until the mid-nineteenth century, international law recognized only persons and states. The former were subject to the laws of their own governments but could be subject to the laws of a foreign state when found within that state's territory. States, on the other hand, were subject only to the laws or treaties agreed upon between them. As with much else, these narrow constructs have been forced to give way to an increasingly complex reality. The "commercial activity" exceptions incorporated into the Foreign Sovereign Immunities Act ("FSIA") reflected Congress's recognition nearly 50 years ago that state actors were increasingly engaged in traditionally non-sovereign conduct. "American citizens [we]re increasingly coming into contact with foreign states and entities owned by foreign states," particularly in the commercial sphere. H.R. Rep. No. 1487, 94th Cong., 2d Sess. 6 (1976). That phenomenon began to raise questions about "whether our citizens will have access to the courts in order to resolve ordinary legal disputes" with foreign states and foreign-state owned entities. *Id.*

Since then, a significant body of law has developed to reflect the multiplicity of ways foreign-state owned entities have injected themselves into the marketplace. But new types of disputes and methods of commerce (and subverting commerce) continue to emerge. To take just one example, the Department of Justice announced in 2021 that approximately 80 percent of all economic espionage prosecutions it has brought allege conduct that would benefit the Chinese state. U.S. Dep't of Justice, *Information About*

the Department of Justice's China Initiative and a Compilation of China-Related Prosecutions Since 2018 (Nov. 19, 2021), https://www.justice.gov/archives/nsd/information-about-department-justice-s-china-initiative-and-compilation-china-related.

To be sure, most of these prosecutions have been brought against individual defendants. But in 2018, for example, the Justice Department indicted Fujian Jinhua Integrated Circuit Co Ltd., a state-owned enterprise of the People's Republic of China, on charges that it conspired to steal trade secrets of an American semiconductor company. See Press Release, U.S. Dep't of Justice, *PRC State-Owned Company, Taiwan Company, and Three Individuals Charged With Economic Espionage* (Nov. 1, 2018), https://www.justice.gov/opa/pr/prc-state-owned-company-taiwan-company-and-three-individuals-charged-economic-espionage. This kind of criminal activity straddles the increasingly blurry line between "traditionally non-sovereign conduct" and state action, and the Executive Branch is the branch of government best suited to determine how to calibrate a response to these emerging and varied phenomena.

Amicus takes no position on whether the Court should find that the FSIA applies to criminal cases, but it does urge the Court to recognize that highly sophisticated transnational crime, including trade-based money laundering, commercial espionage, and cyberattacks committed by agents and instrumentalities of foreign states, are encompassed by 18 U.S.C. § 3231's conferral of jurisdiction to United States courts over "all offenses against the laws of the United States."

ARGUMENT

I. THIS COURT MUST DEFER TO THE UNITED STATES' DECISION TO PROSECUTE CRIMES, PARTICULARLY WHERE THEY IMPLICATE OUR NATIONAL SECURITY AND FOREIGN RELATIONS.

Protecting the national security, including from terrorist threats, is one of the chief responsibilities of the political branches. As this Court noted, "the Government's interest in combating terrorism is an urgent objective of the highest order." *Holder*, 561 U.S. at 28. With that interest comes Congress's power to prohibit conduct and the Executive Branch's power to prosecute criminal violations—particularly where our national security is implicated. *See Rostker v. Goldberg*, 453 U.S. 57, 69 n.6 (1981) ("Congress' judgment as to what is necessary to preserve our national security is entitled to great deference.") (internal quotation marks and citation omitted); *Boumediene*, 553 U.S. at 797 ("The law must accord the Executive substantial authority to apprehend and detain those who pose a real danger to our security.").

For example, the decision to detain terrorism suspects and how to do so to prevent acts of terrorism on the United States is a matter for those branches, as this Court previous explained:

> In considering both the procedural and substantive standards used to impose detention to prevent acts of terrorism, proper deference must be accorded to the political branches. Unlike the President and some designated Members of

> Congress, neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people. The law must accord the Executive substantial authority to apprehend and detain those who pose a real danger to our security.

Id. at 796–97 (citing *United States v. Curtiss–Wright Export Corp.*, 299 U.S. 304, 320 (1936)).

That authority is not limited to those who by pulling the trigger or detonating the bomb directly commit acts of terrorism. It also includes those like Halkbank that allegedly evade terrorism-related sanctions against Iran intended to prevent terrorist financing and violence. *See* Resp. Br. at 31 (explaining that Halkbank is "a commercial bank" that "allegedly laundered billions of dollars on behalf of a state sponsor of terrorism").

This Court's analysis in *Holder* of 18 U.S.C. § 2339B, which prohibits knowingly providing material support to a U.S.-designated foreign terrorist organization ("FTO"), is instructive. There, human rights organizations and activists brought a pre-enforcement challenge to § 2339B on the grounds it would prohibit their plan to advocate for two FTOs, "PKK" and "LTTE," in violation of their First Amendment rights. They argued that far from encouraging the FTOs' terrorist violence, they sought to *reduce* the FTOs' reliance on violence as a means of pursuing their goals. The human rights organizations and activists intended to provide the FTOs training on how to "use humanitarian and international law to peacefully resolve disputes,"

"petition various representative bodies such as the United Nations for relief," and "present claims for tsunami-related aid to mediators and international bodies"; they also offered "their legal expertise in negotiating peace agreements between the LTTE and the Sri Lankan government." *Holder*, 561 U.S. at 14-15 (internal quotation marks and citations omitted).

But the United States explained that both Congress and the Executive Branch had determined that such conduct does in fact support violence. "'The experience and analysis of the U.S. government agencies charged with combating terrorism strongly suppor[t]' Congress's finding that all contributions to foreign terrorist organizations further their terrorism." *Id.* at 33 (record citation omitted). The Court noted "the Executive's view" that "'it is highly likely that any material support to these organizations will ultimately inure to the benefit of their criminal, terrorist functions—regardless of whether such support was ostensibly intended to support non-violent, non-terrorist activities.'" *Id.* (record citation omitted). Most importantly, "[t]hat evaluation of the facts by the Executive, like Congress's assessment, is entitled to deference," as "[t]his litigation implicates sensitive and weighty interests of national security and foreign affairs." *Id.* at 33-34.

The same is true here: the Executive's assessment that Halkbank's abuse of the U.S. financial system should be criminally prosecuted is entitled to deference. Ignoring that deference, Halkbank urges a rule that would override the political branches' decisions on how to address these national security and foreign affairs issues. As the United States

explained, "under petitioner's theory, a corporation that is 50.1% owned by a foreign government could engage in rampant criminal misconduct affecting U.S. citizens," from "advancing a foreign adversary's nuclear program, to providing material support to terrorists—while facing no criminal accountability at all." Resp. Br. at 31. And it could do so even as it launders funds *through the U.S. financial system*.

That this case implicates the United States' relations with another sovereign heightens, rather than lessens, the necessity for deference to the Government's determinations of what prosecutions it may bring. Indeed, this Court noted that *not* prosecuting those who assist terrorists could threaten "international cooperation":

> Providing foreign terrorist groups with material support in any form also furthers terrorism by straining the United States' relationships with its allies and undermining cooperative efforts between nations to prevent terrorist attacks. We see no reason to question Congress's finding that "international cooperation is required for an effective response to terrorism, as demonstrated by the numerous multilateral conventions in force providing universal prosecutive jurisdiction over persons involved in a variety of terrorist acts …."

Holder, 561 U.S. at 32 (quoting Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), § 301(a)(5), 110 Stat. 1247, 18 U.S.C. § 2339B statutory note). The Court accepted Congress's determination that § 2339B "furthers this international

effort by prohibiting aid for foreign terrorist groups that harm the United States' partners abroad," including those "with which the United States has vigorously endeavored to maintain close and friendly relations." *Id.* (citations to the record omitted).

Here, Halkbank's alleged illegal support for Iran unquestionably increased risks of terrorist attacks on American allies in the Middle East—and beyond, as demonstrated by Iran's recent supply of deadly "suicide drones" and advisors to Russia to terrorize the Ukrainian people. The Republic of Türkiye objects to the prosecution in its *amicus* brief—but balancing the interests of some United States allies[3] against those of others is not this Court's job. Instead, "Congress and the Executive are uniquely positioned to make principled distinctions between activities that will further terrorist conduct and undermine United States foreign policy, and those that will not." *Id.* at 35. *See also Haig v. Agee*, 453 U.S. 280, 292 (1981) ("Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention" and "'are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.'") (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952)).

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[3] Azerbaijan, Pakistan, and Qatar also filed an *amicus* brief on petitioner's behalf. These are countries with which the United States has had, to put it gently, complicated relationships—and, unlike Türkiye, they are not members of NATO. The delicacy of these relationships underscores the importance of this Court not substituting its judgment for that of the Executive Branch.

As this Court held in an analogous context, a number of considerations are implicated in the decision to make foreign corporations bear the consequences of their misconduct—and these considerations are for the political branches to weigh:

> These and other considerations that must shape and instruct the formulation of principles of international and domestic law are matters that the political branches are in the better position to define and articulate. For these reasons, judicial deference requires that any imposition of corporate liability on foreign corporations for violations of international law must be determined in the first instance by the political branches of the Government.

Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1408 (2018). The deference owed is even greater where the violations are of U.S. criminal law—and especially where those laws relate to protecting national security.

II. THE POLITICAL BRANCHES OF GOVERNMENT HAVE CRIMINALIZED TERRORISM FINANCING AND NUCLEAR WEAPONS PROLIFERATION AND HAVE DESIGNATED AGENCIES AND INSTRUMENTALITIES OF IRAN.

To this day, the U.S. government ranks terrorism and nuclear proliferation as top tier threats to our nation, and thus a primary focus of the efforts of U.S. intelligence, law enforcement, military, and diplomatic communities. The Executive Branch's interest

in countering terrorism and nuclear proliferation is central to its mission to provide for the common defense. It has therefore long been the policy of the United States to disrupt these threats by targeting the financial infrastructure of terrorist organizations and rogue state actors. *See, e.g.*, The White House, *National Security Strategy* (2022), at 29 (describing the "existential threat posed by the proliferation of nuclear weapons" and necessity of "protecting our country … from the full spectrum of terrorism threats that we face in the 21st century. As the threat evolves, so too must our counterterrorism approach."), https://www.whitehouse.gov/wp-content/uploads/2022/10/Biden-Harris-Administrations-National-Security-Strategy-10.2022.pdf.

The United States also prioritizes protecting its financial system from exploitation, which has been essential given that the U.S. dollar is by far the most commonly held reserve currency, making up at least 60% of global foreign exchange reserves. *See* FEDS Notes, Board of Governors of the Federal Reserve System, *The International Role of the U.S. Dollar* (Oct. 6, 2021), https://www.federalreserve.gov/econres/notes/feds-notes/the-international-role-of-the-u-s-dollar-20211006.html.

In pursuit of these aims, the United States has created an interconnected and holistic legislative and regulatory structure comprising federal criminal statutes enacted by Congress, presidential powers established by executive order, and regulations created by agencies like the Treasury and State Departments.

In 1977, the U.S. government enacted the International Emergency Economic Powers Act

("IEEPA"), set forth in Title 50, sections 1701-1706 of the United States Code. IEEPA empowers the President of the United States to impose certain measures, including economic and trade sanctions, embargos, and other actions, in response to unusual and extraordinary threats to the national security, foreign policy, or economy of the United States when the President declares a national emergency with respect to such threats.

Pursuant to the powers authorized by IEEPA and other statutes, the Office of Foreign Assets Control ("OFAC") maintains a list of individuals and entities subject to financial and trade sanctions known as the "Specially Designated Nationals and Blocked Persons List" ("SDN List"). *See* https://home.treasury.gov/policy-issues/financial-sanctions/specially-designated-nationals-and-blocked-persons-list-sdn-human-readable-lists. The SDN List includes persons supporting terrorist activities, international narcotics kingpins, and those engaged in activities related to the proliferation of weapons of mass destruction. Individuals and entities included on the list are collectively called "Specially Designated Nationals" or "SDNs," and they are referred to as having "been designated." Generally, U.S. persons and institutions are prohibited from financial dealings with SDNs. Any property of an SDN in the possession of a U.S. person and any transaction by an SDN with a U.S. person must be "blocked" and held in suspense (i.e., frozen).

U.S. financial institutions use automated systems to screen the text of all incoming and outgoing international wire transfers. These monitoring systems, commonly referred to as "OFAC filters," are

designed to recognize suspicious or prohibited transactions, including inbound and outbound fund transfers involving sanctioned countries and SDNs. These financial institutions have extensive compliance networks to ensure that they do not execute transactions on behalf of any sanctioned country or SDN. If a U.S. financial institution finds that a wire transfer originates from or is intended to benefit an SDN designated under OFAC's non-proliferation of weapons of mass destruction program, the transfer would be blocked, and the funds frozen. In addition, the U.S. correspondent banks providing U.S. dollar-denominated banking services to foreign financial institutions are required to maintain records of all OFAC violations and to file a written report with OFAC within ten days of a violation.

In order to deceive and bypass these OFAC filters, SDNs must falsify, or cause to be falsified, the originator and/or beneficiary information in wire transfer messages. In other words, by omitting or falsifying data regarding their roles as the true originators or beneficiaries, SDNs are able to send and receive wire transfers that would otherwise be blocked by U.S. financial institutions.

The Turkish Banking Association's *amicus* brief laments the need of its members to comply with U.S. anti-money laundering and sanctions laws, arguing that "foreign central banks will have little choice but to comply with U.S. law on money laundering and sanctions and to impose the requirements of U.S. law on the domestic financial institutions they oversee and serve." Brief for the Turkish Red Crescent, the Union of Chambers and Commodity Exchanges of Türkiye, and the Banks Association of Türkiye as

Amici Curiae ("Bank Assoc. Br.") at 3-4. But assuring that foreign banks that use the U.S. financial system comply with such requirements is precisely the point of the criminal laws petitioner allegedly conspired to violate.[4] There is no more quintessential executive function than enforcement of criminal laws enacted by Congress to safeguard national security.

In 1995, President Clinton issued Presidential Decision Directive 39, which governed U.S. counterterrorism policy during the Clinton Administration:

> It is the policy of the United States to deter, defeat and respond vigorously to all terrorist attacks on our territory and against our citizens, or facilities, whether they occur domestically, in international waters or airspace or on foreign territory. The United States regards all such terrorism as a potential threat to national

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[4] *Amici* the Turkish Red Crescent, the Union of Chambers and Commodity Exchanges of Türkiye, and the Banks Association of Türkiye argue, in effect, that "foreign banks and other businesses" (evidently not even just state-owned ones) should enjoy the benefits of using the United States' financial system without accepting any obligation of "apply[ing] U.S. law." Bank Assoc. Br. at 4, 30. *See id.* at 31 (complaining that "[t]he United States broadly criminalizes money laundering"). But the use of "New York's dependable and transparent banking system, the dollar as a stable and fungible currency, and the predictable jurisdictional and commercial law of New York and the United States," *Licci v. Lebanese Canadian Bank, SAL*, 20 N.Y.3d 327, 339, 984 N.E.2d 893, 900 (2012), comes with it the obligation to follow U.S. law and not to threaten American national security or that of its allies.

> security as well *as a criminal act and will apply all appropriate means to combat it*.

Presidential Decision Directive 39, June 21, 1995 (emphasis added). Unclassified (redacted) version, https://irp.fas.org/offdocs/pdd39.htm.

In 1999, the United Nations' General Assembly adopted the International Convention for the Suppression of the Financing of Terrorism; the United States played a leading role in preparing this treaty and has been a party since 2002. International Convention for the Suppression of the Financing of Terrorism, opened for signature Dec. 9, 1999, 2178 U.N.T.S. 197 (entered into force Apr. 10, 2002), https://treaties.un.org/doc/Treaties/1999/12/19991209%2009-59%20AM/Ch_XVIII_11p.pdf.

Article 12 of the Convention requires states to "afford one another the greatest measure of assistance in connection with criminal investigations or criminal or extradition proceedings" regarding prohibited terrorism offenses. Of course, the Convention, like several other expressions of international law in this arena, presupposes that foreign states will not themselves engage in criminal acts prohibited, an assumption that renders the contemplated assistance meaningless where rogue states such as Iran are involved.

In the aftermath of the September 11, 2001, terrorist attacks on the United States, President Bush announced the issuance of Executive Order 13224 on September 24, 2001:

> [W]e will direct every resource at our command to win the war against terrorists: every means of diplomacy, every tool of

> intelligence, every instrument of law enforcement, every financial influence. We will starve the terrorists of funding ....

See Fact Sheet, Dep't of Treasury, *Contributions by the Department of the Treasury to the Financial War on Terrorism*, https://home.treasury.gov/system/files/136/archive-documents/20029101845562911211.pdf.

E.O. 13224 expanded the Executive Branch's authority to freeze assets subject to U.S. jurisdiction and prohibit transactions by U.S. persons with any person or institution designated pursuant to the Executive Order based on their association with terrorists or terrorist organizations. Notably, the U.S. Treasury Department subsequently designated under E.O. 13224 Iranian political subdivisions, including the Islamic Revolutionary Guard Corps–Qods Force and multiple Iranian agencies or instrumentalities, including the state-owned Bank Melli,[5] Bank Saderat[6] and the National Iranian Oil Company ("NIOC").[7]

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[5] *See* Press Release, U.S. Dep't of the Treasury, *U.S. Government Fully Re-Imposes Sanctions on Iranian Regime as Part of Unprecedented U.S. Economic Pressure Campaign* (Nov. 5, 2018), https://home.treasury.gov/news/press-releases/sm541.

[6] *See* Press Release, U.S. Dep't of the Treasury, *Fact Sheet: Designation of Iranian Entities and Individuals for Proliferation Activities and Support for Terrorism* (Oct. 25, 2007), https://home.treasury.gov/news/press-releases/hp644.

[7] *See* Press Release, U.S. Dep't of the Treasury, *Treasury Sanctions Key Actors in Iran's Oil Sector for Supporting Islamic Revolutionary Guard Corps–Qods Force* (Oct. 26, 2020), https://home.treasury.gov/news/press-releases/sm1165.

Congress also enacted the International Money Laundering Abatement and Anti-Terrorist Financing Act, part of the USA PATRIOT Act of 2001, finding that:

> [M]oney launderers subvert legitimate financial mechanisms and banking relationships by using them as protective covering for the movement of criminal proceeds and the financing of crime and terrorism, and, by so doing, can threaten the safety of United States citizens and undermine the integrity of the United States financial institutions.

Pub. L. No. 107-56, § 302(a)(3), 115 Stat. 296 (2001).

Consistent with Congress's determination, the U.N. Security Council adopted UNSCR 1373, which obligates all member states to "[d]eny safe haven to those who finance, plan, support, or commit terrorist acts;" [p]revent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens;" [e]nsure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice;" and "[a]fford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their

possession necessary for the proceedings."[8] S.C. Res. 1373, ¶ 2 (Sept. 28, 2011).

The U.N. Security Council went further in 2019 when it adopted UNSCR 2462, requiring member states to ensure that their laws and regulations make it possible to prosecute and penalize, "as serious criminal offences," the provision or collection of funds, resources and services intended to be used for the benefit of terrorist organizations or individual terrorists. S.C. Res 2462, ¶ 2 (March 28, 2019). Of course, like the International Convention for the Suppression of the Financing of Terrorism, UNSCR 1373 and 2462 each presuppose that foreign states will not themselves engage in the supporting terrorist acts.

On June 28, 2005, President Bush issued Executive Order 13382, entitled "Blocking Property of Weapons of Mass Destruction Proliferators and Their Supporters." This Executive Order generally prohibits access to the U.S. financial system by persons engaged in proliferation activities and their support networks. Pursuant to Executive Order 13382, Title 31, Section 544 of the United States Code prohibits transactions of property and property interests of individuals and entities, and their supporters, engaging in the proliferation of weapons of mass destruction. Specifically, it applies sanctions to those individuals and entities providing direct or

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[8] The U.S. is a party to the United Nations Convention Against Transnational Organized Crime (Nov. 15, 2000), 2225 U.N.T.S. 209, which requires all signatories to provide assistance to one another regarding criminal investigations involving any form of serious crime, defined as a crime punishable by four years or more of imprisonment.

indirect financial, material, or technological support to these prohibited transactions and blocked property. Multiple Iranian agencies or instrumentalities including Bank Melli, Bank Saderat and NIOC have been designated under E.O. 13224 or 13382 or both.

There is no dispute that the Executive Branch can criminally prosecute a senior executive of Halkbank (as it has) for participating in the charged conspiracy. It can designate Halkbank as an SDN under either E.O. 13224 or 13382, permitting authorities to freeze and seize its assets in the U.S. and effectively destroy its ability to operate in the global market by denying it access to U.S. dollar-clearing privileges. It could even theoretically strip Turkey of its sovereign immunity in connection with civil terrorism claims under 28 U.S.C. § 1605A if it designated that country's government as a state sponsor of terrorism, as it has Iran. *See* https://www.state.gov/state-sponsors-of-terrorism/. Yet, according to petitioner, the one thing the U.S. government cannot do is criminally prosecute Halkbank itself because the Judiciary Act of 1789's silence on criminal prosecutions of sovereign entities. This strained theory would divest the Executive of one of its most important tools in providing for the defense of the nation.

III. THERE ARE IMPORTANT DISTINCTIONS BETWEEN A SOVEREIGN AND ITS AGENCIES AND INSTRUMENTALITIES.

Granting a foreign state sovereign immunity is "a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution." *Verlinden B. V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983). But, as even the

FSIA recognizes, that comity is at its lowest when the "foreign state" takes the form of a commercial entity that is simply majority owned by a foreign state—like Halkbank. Commercial entities do not move in rarified diplomatic circles; rather, they participate in the marketplace alongside private individuals and businesses.

Indeed, "[t]he FSIA carefully distinguishes foreign states from their agencies and instrumentalities." *De Csepel v. Republic of Hungary*, 859 F.3d 1094, 1107 (D.C. Cir. 2017). The distinction, as explained in the D.C. Circuit, is between actual governmental functions and mere commercial ones. *See, e.g.*, *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 234 (D.C. Cir. 2003) ("if the core functions of the entity are governmental, it is considered the foreign state itself; if commercial, the entity is an agency or instrumentality of the foreign state"). And as the United States pointed out in its *amicus* brief filed in *De Csepel*, the "the common-sense point" underlying this distinction is that "it is more delicate for a court to exercise jurisdiction over a foreign state than over an agency or instrumentality." Brief for the United States as *Amicus Curiae*, *De Csepel v. Republic of Hungary*, No. 17-1165 (Dec. 4, 2018), at 14.

The FSIA explicitly reinforces this distinction across various provisions, treating foreign states differently from their agencies and instrumentalities and affording states greater protection from suit. For example, FSIA's "takings" exception to immunity establishes a higher bar for jurisdiction over foreign states than over agencies and instrumentalities, as the latter bar does not require the taken property be located or related to commercial activity

in the United States. *See* 28 U.S.C. § 1605(a)(3). *See also* 28 U.S.C. § 1606 (permitting punitive damages against agencies and instrumentalities but not, with certain exceptions, against foreign states); *id.* § 1608 (adopting less exacting service requirements for agencies and instrumentalities than for foreign states); *id.* § 1610(a) (providing greater immunity against execution on the property of foreign states than on the property of agencies and instrumentalities); § 1610(b) (not permitting execution on the assets of one agency or instrumentality of a judgment against another, as they are independent entities and not the state itself).

These "lesser protections the FSIA offers to agencies or instrumentalities of foreign states reflect the significance of its distinction between traditional governmental activities and commercial activities." *Singh ex rel. Singh v. Caribbean Airlines Ltd.*, 798 F.3d 1355, 1359 (11th Cir. 2015). *See also Wye Oak Tech., Inc. v. Republic of Iraq*, 666 F.3d 205, 214 (4th Cir. 2011) ("The distinction [between sovereign and agencies and instrumentalities] has consequences in terms of an entity's rights and responsibilities under the FSIA."); *Connecticut Bank of Com. v. Republic of Congo*, 309 F.3d 240, 253 (5th Cir. 2002), as amended on denial of reh'g (Aug. 29, 2002) ("One of the chief motifs of the FSIA is to limit as much as possible disrupting the 'public acts' or '*jure imperii*' of sovereigns, while restricting their purely commercial activity.") (citing H.R. Rep. 94-1487, at 7).

Indeed, this Court has explained that the FSIA largely codifies the "restrictive" theory of sovereign immunity, under which "immunity is confined to suits involving the foreign sovereign's public acts,

and does not extend to cases arising out of a foreign state's strictly commercial acts." *Verlinden B.V.*, 461 U.S. at 487-88. *See also Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 612 (1992) ("Fortunately, however, the FSIA was not written on a clean slate. As we have noted, the Act (and the commercial exception in particular) largely codifies the so-called 'restrictive' theory of foreign sovereign immunity first endorsed by the State Department in 1952.") (citing *Verlinden*, 461 U.S. at 486-89).

Courts have also recognized the possibility that foreign states may on occasion invoke sovereign immunity for tactical reasons. Thus, when assessing claims of sovereign immunity under the FSIA, "instrumentality status is determined at the time of the filing of the complaint." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 480 (2003). This rule helps prevent sovereigns from starting and ceasing commercial activities as "gamesmanship" and "maneuvering by foreign sovereigns." *TIG Ins. Co. v. Republic of Argentina*, 967 F.3d 778, 785 (D.C. Cir. 2020).

The relative ease with which a foreign state may nationalize commercial entities demonstrates another reason agencies and instrumentalities are not afforded the same scope of immunity as foreign states themselves. A foreign state or political subdivision is not easily created; but a commercial entity may be nationalized—or privatized, such as to provide plausible deniability—as necessary. *See, e.g.*, *Shoham v. Islamic Republic of Iran*, No. 12-cv-508 (RCL), 2017 WL 2399454, at *8 (D.D.C. June 1, 2017) ("In 2009, Iran announced a program to privatize Bank Saderat, but that process has been a

sham because the bank is still controlled by the government.").

Granting commercial entities like Halkbank immunity from prosecution simply because they are—at least at a particular moment—majority owned by a political subdivision of a foreign state does not reflect the important distinctions between foreign sovereigns performing sovereign functions and commercial functions in the global economy.

As the U.S. Government's brief correctly notes, "the gravamen of the counts charging petitioner with bank fraud, conspiring to commit bank fraud, money laundering, and conspiring to commit money laundering is petitioner's facilitation of sanctions violations through transfers of restricted Iranian funds through unwitting U.S. financial institutions." Resp. Br. at 44-45. Transferring—or here, laundering—"Iranian oil and natural gas proceeds," *id.* at 2, is an inherently commercial activity, *id.*, at 47, and because the U.S. financial system was integral to the scheme, *id.* (noting allegations that Halkbank "launder[ed] the proceeds through U.S. banks") the alleged conspiracy clearly "causes a direct effect in the United States," 28 U.S.C. § 1605(a)(2).

IV. THE DRAMATIC RISE IN CORPORATE TRANSNATIONAL CRIMES, STATE-OWNED COMMERCIAL ENTERPRISES, AND VULNERABILITY OF THE U.S. FINANCIAL SYSTEM TO CRIMINAL EXPLOITATION COUNSEL STRONGLY AGAINST WEAKENING THE EXECUTIVE BRANCH'S PROSECUTORIAL POWER.

Holding that a commercial bank that commits crimes in or through the United States is immune from criminal liability so long as a sovereign state owns or purchases the majority of its shares could have significant consequences for the United States' capacity to regulate its financial system and advance the nation's national security interests. The problem is far greater than it likely was when the Judiciary Act was enacted in 1789 for at least three reasons: (1) the range of corporate crimes have expanded greatly to include all manner of modern national security threats like terror financing; (2) the number of state-owned commercial enterprises has dramatically increased, particularly in countries with managed economies; and (3) the size and importance of the U.S. economy has expanded dramatically.

First, the increase in the volume and variety of corporate transnational crimes counsels against narrowing the United States' options for combating crime. As discussed herein, these include a number of criminal statutes deployed to deter and punish terror financing and nuclear weapons proliferation, including those listed in Halkbank's indictment and the material support statutes, 18 U.S.C. §§ 2339A-2339C.

But if petitioner's arguments prevail, what is to stop a foreign commercial bank, majority owned by a political subdivision of a foreign state, from committing other crimes? What would stop such a bank from distributing counterfeit U.S. currency or securities in violation of 18 U.S.C. § 470? Or flooding the United States with counterfeits (18 U.S.C. § 472)? Or opening up a counterfeiting operation across from the National Mint (18 U.S.C. § 474)? Assuming it can shield its employees or is indifferent to their fate, what prevents a foreign commercial operation, even located in the United States, from committing economic espionage (18 U.S.C. § 1831, *et seq.*)? Nothing except, according to petitioner, "war and diplomacy." Pet. Br. at 2.

Second, certain countries—including those that pose a security threat to the United States and its allies—wield large numbers of state-owned commercial enterprises. Perhaps most relevant here is Iran, which owns or controls vast swaths of the Iranian economy—much of it through the Islamic Revolutionary Guards Corps, a designated FTO. According to the U.S. Treasury Department, a handful of state- and IRGC-controlled entities "are said to control more than half of the Iranian economy." Press Release, U.S. Dep't of the Treasury, *Treasury Targets Billion Dollar Foundations Controlled by Iran's Supreme Leader* (Jan. 13, 2021), https://home.treasury.gov/news/press-releases/sm1234.[9] As is evident

[9] UANI maintains "a complete and comprehensive database encompassing all international Iran business and trade activity," which lists *thousands* of businesses that have reportedly done business with Iranian entities, including numerous

from the Halkbank indictment, state-owned Iranian companies are actively engaged in sanctions evasion, including through New York's financial center.

The same is true for other rival states. In Russia, the government controls well over half of the economy. This includes its financial system, and "state-owned banks, particularly Sberbank and VTB Group, dominate the sector." U.S. Dep't of State, *2021 Investment Climate Statements: Russia* (2021), https://www.state.gov/reports/2021-investment-climate-statements/russia/.

The United States recently prosecuted several Russian nationals affiliated with two Russian companies "that operate under the direction of Russian intelligence services to procure advanced electronics and sophisticated testing equipment for Russia's military industrial complex…." Press Release, U.S. Dep't of Justice, *Russian Military and Intelligence Agencies Procurement Network Indicted in Brooklyn Federal Court* (Dec. 13, 2022), https://www.justice.gov/opa/pr/russian-military-and-intelligence-agencies-procurement-network-indicted-brooklyn-federal. The Department of Justice promised—notwithstanding arguments like petitioner's—that it "will continue to vigorously enforce our economic sanctions and export controls against those who enable the Russian government to continue its unjust war in Ukraine." *Id.*

China has "approximately 150,000 wholly-owned" state-owned enterprises, accounting for 30 to

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SDNs. *See* https://www.unitedagainstnucleariran.com/iran-business-registry.

40 percent of its total gross domestic product. Executive Summary, U.S. Dep't of State, *2021 Investment Climate Statements: China* (2021), https://www.state.gov/reports/2021-investment-climate-statements/china/. In 2016, the United States indicted a set of companies it claimed were owned by the government of China for violating the Economic Espionage Act, 18 U.S.C. § 1831. *See In re Pangang Grp., Co.*, 901 F.3d 1046, 1049 (9th Cir. 2018).

Petitioner's theory would immunize state-owned criminal actors at a time when they are proliferating and posing greater and more various threats to our national security and the security of our allies.

Lastly, the U.S. economy has become the largest on Earth, and serves as an important stabilizing force for the world economy. But with that central role comes crime—and the United States' responsibility to police that crime. As the U.S. government's 2022 National Terrorist Financing Risk Assessment notes, "U.S. banks process trillions of dollars of global transactions per day for domestic and foreign customers. The significant volume of funds moved globally each day can allow terrorist-related transactions to blend in with other licit transactions." U.S. Dep't of the Treasury, 2022 National Terrorist Financing Risk Assessment (Feb. 2022), at 15, https://home.treasury.gov/system/files/136/2022-National-Terrorist-Financing-Risk-Assessment.pdf. The U.S. economy and its financial system are vast and hence both vulnerable and attractive to exploitation by criminal actors. It is the responsibility of the Executive Branch to enforce the nation's federal criminal laws regardless of whether the criminals engaging

in illicit activity operate within the structures of a foreign state's agency or instrumentality.

CONCLUSION

The Court should affirm the judgment of the Second Circuit Court of Appeals.

Respectfully submitted,

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