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

REPLY BRIEF FOR PETITIONER

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No federal court has ever presided over the criminal trial of a foreign sovereign. Nor, apparently, has any other country's court. The government tries to change the subject, arguing that this case involves a sovereign-owned bank. But the government did not argue in the district court that Halkbank's instrumentality status mattered and thus forfeited any such argument. In any event, sovereign instrumentalities share their sovereigns' status, and Congress never authorized criminal jurisdiction over sovereigns. And the government identifies no previous criminal trial of a foreign-sovereign instrumentality either. The government wants this case to be the world's first.

Nor does the government's jurisdictional argument (at 10-12)—that 18 U.S.C. § 3231 extends to "all" defendants—distinguish between sovereigns and instrumentalities. In the government's view, "all" means Canada and the Bank of Canada alike.

Section 3231 originated in the Judiciary Act of 1789. The First Congress emphatically did not open fledgling American courts for criminal jurisdiction over sovereigns and their instrumentalities. Congress must speak clearly and specifically to sweep foreign sovereigns within a jurisdictional statute. Thus, *Schooner Exchange v. McFaddon* held that the general grant of admiralty jurisdiction did not apply to sovereign instrumentalities because Congress did not speak clearly. 11 U.S. 116, 146 (1812) (Marshall, C.J.). That clear-statement rule protects against inadvertently upending foreign relations or violating international law. The FSIA removes any doubt: Congress conferred on sovereigns and instrumentalities immunity "from *the* jurisdiction of the courts of the United States," 28 U.S.C. § 1604 (emphasis added), while conferring only *civil* federal-court jurisdiction under carefully delineated circumstances.

The ramifications of the government's position are staggering. The government told this Court in 1812 that any jurisdiction over sovereign instrumentalities would "amount to a judicial declaration of war." *Schooner Exchange*, 11 U.S. at 126 (reporter's summary). As the government has repeatedly represented, haling sovereigns into U.S. courts threatens a vicious cycle of retaliation against the United States. America's many government-owned corporations, including banks (like Halkbank) that engage in private lending, would be obvious targets. When the shoe was on the other foot, the government

pleaded that other countries cannot commence "criminal proceedings" against the United States. Br. 29.

The government's claim (at 31) that an inability to prosecute foreign sovereigns would "significantly impede our national security" strains credulity. Our Nation has survived without putting even one sovereign or instrumentality on trial. History, tradition, and common sense establish that Congress did not intend to initiate an international firestorm, exposing this country to retaliatory prosecutions by Taliban Afghanistan for U.S. drone strikes, Japan for Hiroshima, or Iran for the death of Qasem Soleimani.

Congress has not authorized criminal jurisdiction over sovereigns and instrumentalities. Because Halkbank is "part and parcel of the Turkish state," exercising criminal jurisdiction "is a demeaning move against Türkiye's dignity." Türkiye Br. 7-8.

I. 18 U.S.C. § 3231 Does Not Extend to Foreign Sovereigns

Neither the First Congress nor its successors have greenlit criminal jurisdiction over foreign sovereigns in section 3231 or its antecedents. The district court therefore lacked jurisdiction, contrary to the government's attempt (at 12, 16-33) to recharacterize Halkbank's primary argument as one about common-law immunity. That Halkbank also possesses common-law immunity is an alternative basis for reversal. Br. 43-44.

A. Congress Has Not Granted Criminal Jurisdiction Over Foreign Sovereigns

1. The government (at 14) identifies no relevant differences between modern-day section 3231 and the Judiciary Act of 1789, ch. 20, §§ 9, 11, 1 Stat. 73, 76, 79. The

First Congress could not have imagined federal courts exercising *any* jurisdiction over nonconsenting foreign sovereigns, including their instrumentalities. Br. 15-17. In *Schooner Exchange*, government counsel Alexander Dallas (this Court's first reporter) argued that had Congress intended to give "so important a jurisdiction," "it would certainly have been mentioned and regulated by law." 11 U.S. at 124 (reporter's summary). Yet jurisdiction over foreign sovereigns was not "mentioned in the judiciary acts." *Id.*

Agreeing, this Court required a clear statement before subjecting sovereigns even to admiralty jurisdiction: Congress must act "in a manner not to be misunderstood." *Id.* at 146 (opinion of the Court). Statutes "descriptive of the ordinary jurisdiction of the judicial tribunals" do not suffice. *Id.*; *accord Berizzi Bros. v. S.S. Pesaro*, 271 U.S. 562, 576 (1926). Section 3231 never mentions sovereigns.

The government contends that section 3231's "literal words" reach "all offenses" and "'[a]ll' means 'all,'" so section 3231 applies "irrespective of the defendant's identity." U.S. Br. 10-12 (citation omitted). But the admiralty statute in *Schooner Exchange* similarly reached "all" cases. Br. 22. Clear-statement rules are not "extratextual exceptions." *Contra* U.S. Br. 14. "Part of a fair reading of statutory text is recognizing that 'Congress legislates against the backdrop' of certain unexpressed presumptions." *Bond v. United States*, 572 U.S. 844, 857 (2014) (citation omitted). One such presumption is that statutes do not "embrace the sovereign power or government, unless expressly named or included by necessary implication." *United States v. Greene*, 26 F. Cas. 33, 34 (D. Me. 1827) (Story, J.). The word "person," for example, presumptively "does not include the sovereign." *Will v. Mich.*

Dep't of State Police, 491 U.S. 58, 64 (1989) (citation omitted) (U.S. States); *accord Breard v. Greene*, 523 U.S. 371, 378 (1998) (per curiam) (foreign sovereigns). Section 3231's "all" is such generally applicable language that excludes sovereigns, much like "any" excludes extraterritorial conduct. Br. 20.

The government (at 8, 21-22) argues that *Schooner Exchange* deferred to the Executive. But the Court cited the government only for "the fact" that the *Exchange* was a "public armed ship, in the service of a foreign sovereign, with whom the government of the United States is at peace." 11 U.S. at 147. The Court interpreted the admiralty statute for itself: "[G]eneral statutory provisions … descriptive of the ordinary jurisdiction of the judicial tribunals" do not "subject[] [sovereign] vessels to the ordinary tribunals." *Id.* at 146. Defining federal-court jurisdiction is a "question[] of policy" for "the political branches," *Munaf v. Geren*, 553 U.S. 674, 701 (2008) (citation omitted)—specifically, Congress.

The government (at 15) suggests that the jurisdictional grants in the 1789 Act, including the admiralty provision in *Schooner Exchange*, covered sovereigns, leaving sovereigns to raise immunity only "as a common-law rule governing the exercise of jurisdiction." The government is correct that common-law immunity is a question of "substantive law," U.S. Br. 15 (citation omitted), and *Schooner Exchange* later "came to be regarded as extending virtually absolute immunity to foreign sovereigns," *Kiowa Tribe v. Mfg. Techs.*, 523 U.S. 751, 759 (1998) (citation omitted).

But *Schooner Exchange*'s "specific holding" was "that a federal court lacked *jurisdiction* over" the French ship. *Samantar v. Yousuf*, 560 U.S. 305, 311 (2010) (emphasis added); *accord Kiowa*, 523 U.S. at 759; *Berizzi Bros.*, 271

U.S. at 576. Elsewhere, this Court has noted "the lack of certainty [at the Founding] as to whether the Alien Tort Statute"—enacted alongside the admiralty-jurisdiction statute—"conferred *jurisdiction* in suits against foreign states." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 436 (1989) (emphasis added). Congress must expressly supply jurisdiction over foreign sovereigns, as it occasionally does. Br. 27-28.

The government points to three cases where this Court "exercised jurisdiction over civil cases involving foreign-government-owned instrumentalities." U.S. Br. 13 (citing *La Nereyda*, 21 U.S. 108 (1823); *Santissima Trinidad*, 20 U.S. 283 (1822); *Glass v. Sloop Betsey*, 3 U.S. 6 (1794)). As the word "involving" reveals, none exercised jurisdiction *against* foreign-sovereign instrumentalities. Instead, claimants invoked *in rem* jurisdiction over prizes (like captured vessels or pillaged cargo) seized by foreign ships in violation of international law. The Court acknowledged that "the public ship herself" may remain exempt from jurisdiction. *Santissima Trinidad*, 20 U.S. at 354. The Court held only that "the jurisdiction of our Courts" extended to "the prize property" seized in violation of U.S. neutrality "which [the foreign ship] brings into our ports." *Id.*; *see Divina Pastora*, 17 U.S. 52, 63-64, 66 n.a (1819) (Marshall, C.J.).

The government (at 30) argues that reversal would amount to "unwarranted judicial interference in the conduct of foreign policy" (citation omitted). But *affirmance* would let the Executive usurp Congress' role in setting federal-court jurisdiction and inevitably entangle U.S. courts in foreign policy. U.S. district judges would have to referee *Brady* disputes, motion practice, sentencing, and probation of foreign sovereigns.

2. Other provisions confirm that the First Congress did not grant criminal jurisdiction over foreign sovereigns, including instrumentalities.

The same Judiciary Act that created criminal jurisdiction required this Court alone to hear civil cases against diplomats. Br. 25. The government (at 14) offers the non sequitur that civil cases against *non*-diplomat aliens proceeded in state court. The same Act that zealously limited civil jurisdiction over diplomats did not throw caution to the wind with blanket criminal jurisdiction over foreign sovereigns.

Likewise, the Crimes Act of 1790 criminalized process service on diplomats, Br. 24—a provision the government ignores that reinforces the First Congress' special solicitude for sovereigns. That Act's focus on "persons" and punishments like whipping further confirms that Congress did not contemplate jurisdiction over sovereigns. Br. 23-24. The government (at 14) notes that corporations are "persons" and might have paid fines. But under the government's reading, section 3231 applies to both sovereigns and their instrumentalities.

The FSIA and other statutes expressly covering foreign sovereigns underscore that Congress did not open U.S. courts to criminal jurisdiction over foreign sovereigns and instrumentalities. Br. 27-28. The FSIA aside, *infra* pp. 17-20, it is true but irrelevant that these statutes do not "impliedly repeal" section 3231. U.S. Br. 7, 13-14. These statutes underscore that Congress knows to clearly authorize jurisdiction over foreign sovereigns.

3. Tradition confirms the absence of criminal jurisdiction. The government contends that criminal jurisdiction has existed since 1789 yet identifies no attempted prose-

cution before 1989. Br. 29. Foreign states and their instrumentalities existed well before the 1980s. Government-owned arms manufacturers, postal and telegraph services, and mining operations were common even before 1900. *The Rise and Fall of State-Owned Enterprises in the Western World* 104 (Pier Angelo Toninelli ed., 2000). If our laws have authorized criminal jurisdiction over foreign sovereigns since 1789, surely someone would have noticed.

Despite countless national-security threats, the government previously identified only nine inapt attempts to assert criminal jurisdiction over foreign-sovereign instrumentalities. Br. 29-30. The government's two new examples (at 25-26) are even weaker. In *United States v. Pangang Group*, the court held the defendants were not sovereign instrumentalities. 6 F.4th 946, 954-55 (9th Cir. 2021). In DOJ's settlement with a Brazilian-owned oil company, Brazil waived immunity by entering an agreement that netted Brazil 80% of the recovery. U.S. DOJ, *Petrobras Agrees to Pay More Than $850 Million for FCPA Violations* (Sept. 27, 2018), https://bit.ly/2IrhD7A.

The government (at 23-25) cites other inapt cases. *United States v. Deutsches Kalisyndikat Gesellschaft* was a *civil* antitrust case against a company deemed not "any department of [France's] government." 31 F.2d 199, 203 (S.D.N.Y. 1929). The government (at 23-24) invokes two early prosecutions of foreign *consuls*, whom international law treated like ordinary citizens, not diplomats. 2 Op. Att'y Gen. 725 (1835).

The government (at 23) also suggests *Schooner Exchange* held that *diplomats* faced criminal trial for "crimes." Again, this case is about jurisdiction over sovereigns and their instrumentalities. Regardless, the Court bracketed that question as "foreign to the present

purpose." 11 U.S. at 139. Even then, the Court hypothesized that diplomats might face trial only where crimes "violat[ed] the conditions" of the diplomat's presence. *Id.*

Nor does the government identify *any* example of *any* other nation exercising criminal jurisdiction over sovereigns or instrumentalities. The government (at 27) concedes that international law has always barred criminally trying "states qua states." Doing so would "discard a centuries-old global consensus." Azerbaijan Br. 13; *see* Brennan Br. 5-12; O'Keefe Br. 8-9; Br. 34-37. The government (at 28-29) attributes the lack of instrumentality prosecutions to the lack of corporate liability abroad. But as the government's amici note, "countless" countries impose corporate criminal liability, Feldman Br. 11 (citation omitted), yet none apparently has thought to prosecute a sovereign instrumentality.

4. Extending criminal jurisdiction here risks "a downward spiral" with "sweeping global implications." Azerbaijan Br. 12; Red Crescent Br. 2; Br. 30-32. If the United States opens its courts to sovereign prosecutions, other countries will inevitably follow suit. The government (at 30-31) argues that assessing foreign policy is its bailiwick. But "[t]he Executive is not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue." *Zivotofsky v. Kerry*, 576 U.S. 1, 21 (2015). Congress, not the Executive, controls federal-court jurisdiction. As the government has averred, "Congress would have wanted to avoid" the "damaging consequence" of retaliation that comes from permitting suits against foreign

sovereigns. U.S. Br. 22, *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312 (2017).[1]

Affirmance also invites state and local officials to try their hand. Br. 32. The government (at 31) suggests "such prosecutions could present preemption issues" and the federal government, in its beneficence, "could file a suggestion of immunity if appropriate." But the mere possibility that Florida courts could exercise criminal jurisdiction over Cuba suggests something is wrong with the government's theory.

The government (at 32-33) claims that sometimes "criminal prosecution is the best way to protect national security." But the government failed to identify any other criminal trial of a sovereign or instrumentality. The government has many alternatives. Br. 41-42. As the government's amicus underscores, UANI Br. 3-4, 21, the Executive can seek administrative penalties, expel diplomats, impose secondary sanctions, withhold U.S. aid, or deploy troops—all without judicial sand in the gears.

Take this case, which involves alleged violations of sanctions under the International Emergency Economic Powers Act (allegations Halkbank categorically denies). J.A.4-5. The indictment cites implementing regulations and executive orders 30 times. J.A.5-11, 22, 30. But the government's brief never mentions the Treasury Department's ability to impose fines up to double the transaction

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[1] *Accord, e.g.*, U.S. Br. 29, *Federal Republic of Germany v. Philipp*, 141 S. Ct. 703 (2021); U.S. Br. 25-26, *Republic of Sudan v. Harrison*, 139 S. Ct. 1048 (2019); U.S. Br. 20-21, *Republic of Argentina v. NML Cap.*, 573 U.S. 134 (2014); *Amerada Hess* U.S. Br. 55-56.

amount. 31 C.F.R. pt. 501 app. A., § V.B.2.a.v; *id.* § 560.704. Criminal trial adds only insult.

The government (at 32) fears reversal "might even suggest a bar on the federal government's enforcement of criminal subpoenas on foreign-government-owned entities." But the government can obtain evidence via treaty, as it does with Türkiye. Brennan Br. 12-14. Moreover, in the government's view, even *civil* discovery orders against sovereigns cannot be enforced by contempt in light of "international practice," "reciprocity," and "the dignity of the foreign State." U.S. Br. 14, 17, *FG Hemisphere Assocs. v. Democratic Republic of Congo*, 637 F.3d 373 (D.C. Cir. 2011). The government can turn to Congress if gaps actually exist.

B. Halkbank Is a Sovereign Instrumentality by Any Metric

The government argues that Halkbank, as a government-owned corporation, does not share Türkiye's sovereign status. That contention is forfeited and meritless.

1. In response to Halkbank's motion to dismiss, the government argued that (1) the FSIA does not apply in criminal cases and (2) the Executive can unilaterally abrogate the immunity of the *sovereign*. Mot. to Dismiss Opp. 4-9, D. Ct. Dkt. 659; Br. 9, 22. The government never argued that Halkbank lacks Türkiye's sovereign status, forfeiting any such argument. The court of appeals likewise proceeded on the assumption that Halkbank is sovereign. Pet.App.7a n.8, 23a-24a. This Court should not address the government's forfeited contention.

2. Halkbank is sovereign. The FSIA treats Halkbank as sovereign. 28 U.S.C. § 1603(a)-(b); U.S. Br. 28. The

same is true putting aside the FSIA's definition. Halkbank is "an integral part of the Turkish state," sharing Türkiye's sovereign status. Türkiye Br. 2-3. The Turkish Parliament created Halkbank by statute, and "[t]he Government of Türkiye directly controls and manages Halkbank." Türkiye Br. 3, 6. Consistent with that control, the indictment repeatedly alleges high-level Turkish-government direction of Halkbank's activities, J.A.2, 15-17, 20-22, 25, 27—allegations absent from the government's brief.

Türkiye's government views Halkbank as part of the Turkish state. Halkbank is, in the words of *Schooner Exchange*, "under the immediate and direct command of the sovereign." 11 U.S. at 144. Halkbank is also "in the possession and service" of Türkiye. U.S. Br. 19 (quoting *Republic of Mexico v. Hoffman*, 324 U.S. 30, 34 (1945)). The government does not argue otherwise.

U.S. "corporations are part of the Government." *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 395 (1995). These corporations share their sovereign's status absent waiver, *see Thacker v. TVA*, 139 S. Ct. 1435, 1442 (2019), notwithstanding that they are separate juridical entities whose debts ordinarily are not imputed to the sovereign. *E.g.*, *First Nat'l City Bank v. Banco para el Comercio Exterior de Cuba*, 462 U.S. 611, 624-27 (1983); U.S. Br. 16-17. Government corporations share their sovereign's status even when engaged in "commercial and business transactions." *See FHA v. Burr*, 309 U.S. 242, 244-45 (1940). Sovereign status extends to Federal Land Banks, which, like Halkbank, perform "an important governmental function" loaning money to farmers. *Fed. Land Bank of St. Louis v. Priddy*, 295 U.S. 229, 231 (1935); *see About Banks & Associations*, Farm Credit Admin. (Mar.

9, 2021), https://bit.ly/3Gry9En (71 such banks and associations today). The government has never argued waiver by Türkiye.

3.a. The government (at 17, 28) relies on Halkbank's status as a separate juridical entity performing what the government variably calls "commercial" or "non-sovereign" functions. But the government never argues that these features control under section 3231's text, instead framing this point as a matter of common-law immunity. But again, section 3231 is about criminal jurisdiction, and the government's argument there does not distinguish between sovereigns and instrumentalities. However understood, the government's argument lacks merit.

Tellingly, no country follows the government's test for criminal jurisdiction. If other countries did, dozens of U.S.-owned corporations would be at risk of criminal trial. Many U.S. corporations "do business abroad and engage in international commercial transactions." *First Nat'l* U.S. Br. 27. The Export-Import Bank funds projects overseas and engages in "general banking business." 12 U.S.C. § 635(a)(1). The U.S. International Development Finance Corporation "facilitate[s] the participation of private sector capital and skills in the economic development of less developed countries." 22 U.S.C. § 9612(b); *see* 31 U.S.C. § 9101 (listing 26 categories of U.S.-government corporations). Given "reciprocity and comity, the treatment of foreign government instrumentalities in United States courts can be expected to have a material influence on how foreign states and courts treat [the] United States' government-owned corporations abroad." *First Nat'l* U.S. Br. 27-28.

Sovereigns engage in activities that might look "unorthodox or unnecessary [to] anyone else." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985).

In England, where postal service is privatized, courts might view the U.S. Postal Service as non-sovereign. Conversely, the government (at I, 2, 6, 11-12, 16, 31, 49) sees Halkbank as a "commercial bank." But to Turks, public institutions promoting "economic … development" via "orderly" "money, credit, [and] capital … markets" are constitutionally guaranteed. Turk. Const. arts. 166-167. U.S. courts are no better equipped to judge Türkiye's priorities than British courts are to judge America's. As the government has opined, government-owned corporations performing activities "specifically authorized by" the legislature are necessarily "engaged in a governmental function" even if the activity "could also have been carried out commercially by private entities." *Thacker* TVA Br. 39-40.

Drawing the line at "commercial activities" would import the civil restrictive theory into the criminal context without text or precedent. Other countries adopting the restrictive theory carve out criminal cases, Br. 35-36, which the government (at 29) ignores. The one U.S. criminal subpoena case to grapple with sovereign immunity did not focus on commercial activities, *contra* U.S. Br. 26, but asked whether the British-owned oil company was sued "in [its] public capacity," with heavy weight to the *British* government's views. *In re World Arrangements*, 13 F.R.D. 280, 291 (D.D.C. 1952). The one foreign court to grapple with criminal jurisdiction over a foreign-government instrumentality likewise asked whether the instrumentality was acting in its sovereign capacity, *i.e.*, on behalf of the state. O'Keefe Br. 12-13.

Moreover, the restrictive theory permits liability against states themselves for commercial activities. But international law forbids *criminal* jurisdiction over states

qua states. *Supra* p. 9. No country follows the government's gerrymandered rule, civilly or criminally. The government and its one law-review article (authored by one of its amici) offer no evidence suggesting otherwise. *See* U.S. Br. 28-29.

The government's cases denying immunity (at 17) do not support its rule. None involves criminal prosecutions. Many do not involve foreign states, and instead analyze the *waiver* of immunity by the U.S. government or States. *Bank of the United States v. Planters' Bank of Georgia* held that a bank partially owned by the State of Georgia lacked sovereign immunity because Georgia, "by giving to the Bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character." 22 U.S. 904, 907 (1824). Georgia did not even own a majority of the bank's shares or control the bank. *Lebron*, 513 U.S. at 398-99. *Sloan Shipyards Corp. v. U.S. Shipping Board Emergency Fleet Corp.*, 258 U.S. 549 (1922), and *Gould Coupler Co. v. U.S. Shipping Board Emergency Fleet Corp.*, 261 F. 716 (S.D.N.Y. 1919), both held that a U.S.-owned shipping corporation lacked the government's immunity. Congress made that corporation "capable of being sued," creating "a legal person without immunity." *Id.* at 717. In all three cases, the legislature waived immunity.

The government (at 18) cites two civil cases rejecting immunity for foreign-government-owned corporations: *Coale v. Société Coop. Suisse des Charbons*, 21 F.2d 180 (S.D.N.Y. 1921), and *Molina v. Comision Reguladora del Mercado de Henequen*, 103 A. 397 (N.J. 1918). But as the government's law-review article reveals, lower-court cases were "chaos," granting and denying immunity on identical facts. William C. Hoffman, *The Separate Entity Rule in International Perspective*, 65 Tul. L. Rev. 535, 548 (1991) (cited at U.S. Br. 27, 29). The government (at 18-

19) invokes civil cases against the British East India Company. But that "private commercial organisation," to which some governmental functions were delegated, was not even a government-owned corporation. H.V. Bowen, *The Business of Empire* 1 (2005).[2] At most, the muddled case law illustrates why Congress passed the FSIA.

The government (at 19) also cites passages from *Schooner Exchange*, 11 U.S. at 145, and *United States v. Wilder*, 28 F. Cas. 601, 603 (C.C.D. Mass. 1838), suggesting sovereigns' private property might face civil jurisdiction. *Schooner Exchange* declined to "indicat[e] any opinion on this question." 11 U.S. at 145. To the extent these cases address the issue, they reflect the distinction between jurisdiction over sovereign instrumentalities (not permissible) and *in rem* jurisdiction over sovereign-owned property (sometimes permissible). *Supra* p. 6.

b. Ultimately, the government renders its instrumentality test irrelevant by claiming (at 20-23) the power to abrogate sovereign immunity at will—whether for Türkiye or Halkbank. The government highlights dicta describing common-law sovereign immunity as an Executive-Branch "prerogative" and criticizing *Berizzi Bros.* for not deferring to the Executive. But as the government has noted, "a shift in policy by the executive cannot control the courts." *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 714 (1976) (reproducing Tate Letter); Br. 44. Since *Schooner Exchange*, *supra* p. 5, courts "did not view themselves as bound by the executive's suggestion of immunity." Brunk Br. 18 (citation omitted). Any

[2] The government (at 18) cites a reporter's summary of counsel's argument in *Nathan v. Virginia*, 1 U.S. 77 (Pa. C.P. 1781). Counsel's argument is irrelevant. Counsel opined that *diplomats* engaged in off-duty trade could face judicial process. *Id.* at 79.

other approach would usurp courts' power "to decide cases and controversies properly presented to them." *W.S. Kirkpatrick & Co. v. Env't Tectonics Corp.*, 493 U.S. 400, 409 (1990); Brunk Br. 6-14.

To the extent this Court's cases suggest courts deferred to the Executive's immunity determinations, that dicta emerged only in the late 1930s, and the FSIA supplanted the whole enterprise, rejecting any Executive-Branch involvement in immunity determinations for sovereigns. Brunk Br. 15-16; Br. 35. By the 1930s, Congress had already conferred express *civil* jurisdiction over foreign sovereigns (in 1875). Br. 27-28. And in the admiralty context, deference was limited to factual determinations about whether the defendant *was* a sovereign. Br. 44; Brunk Br. 17-18. Otherwise, those cases make no sense in light of *Schooner Exchange*'s holding that the admiralty-jurisdiction provision does not reach foreign sovereigns.

II. The FSIA Forecloses Criminal Jurisdiction

A. Section 1604 Bars Criminal Jurisdiction

1. Halkbank's FSIA argument is not that section 1604 "implicitly" grants criminal immunity, as the government (at 36) claims. Section 1604's command—that foreign sovereigns "shall be immune from the jurisdiction of the courts of the United States"—is express. "[T]he jurisdiction" means all jurisdiction. The government (at 35-36) argues that because section 1330(a) grants jurisdiction over only civil cases, section 1604's jurisdictional immunity is limited to civil cases. But section 1604 textually sweeps more broadly. The only inference is that Congress meant what it said: section 1604 provides immunity in all cases and sections 1330(a) and 1605 withdraw that immunity only in certain civil cases, consistent with twentieth-century international law. Br. 33-37.

The government argues that section 1604 provides immunity only from jurisdiction "in Title 28," such as the Alien Tort Statute, 28 U.S.C. § 1350, at issue in *Amerada Hess*. U.S. Br. 40 (quoting *Amerada Hess*, 488 U.S. at 437). But the FSIA and *Amerada Hess* reflect a broader proposition—that the FSIA is "the sole basis for obtaining jurisdiction over a foreign state in [federal] courts." 488 U.S. at 434, 439; *see Republic of Austria v. Altmann*, 541 U.S. 677, 699 (2004). Nothing in the FSIA's text or *Amerada Hess*'s reasoning turns on the title in which a jurisdictional statute appears; section 1604 grants immunity from them all.

The government (at 34-35) also points to FSIA provisions that apply only in civil cases. Those provisions prove Halkbank's point. The FSIA provides rules for civil cases only because the FSIA authorizes civil cases only. Br. 37-39. The government (at 36) argues that the FSIA does not "repeal" section 3231. Halkbank argues, however, that section 3231 does not reach foreign sovereigns. *Supra* pp. 3-11. Regardless, this Court has rejected the argument that the FSIA cannot displace other general jurisdictional grants without "an express *pro tanto* repealer" in light of the FSIA's comprehensive nature and section 1604's "express" grant of immunity from jurisdiction. *Amerada Hess*, 488 U.S. at 436-38.

The government (at 37-39) cites legislative history for the proposition that Congress "sought to address exclusively civil cases." That history simply reflects that the FSIA authorizes only civil litigation. Criminally prosecuting sovereigns was as nonexistent in 1976 as today. Br. 39. The government claims that the Executive had "subjected" foreign-government instrumentalities to criminal jurisdiction "on multiple occasions" by 1976. U.S. Br. 39.

By "multiple" the government means *two*, by "subjected" it means *unsuccessfully* subjected, and by "criminal jurisdiction" it means *subpoenas*. *See* Br. 29-30.[3] Congress therefore did not need to "reject executive judgments about immunity in the criminal context" to codify absolute criminal immunity in the FSIA. *Contra* U.S. Br. 39. Congress legislated against—and codified—a world in which no one thought federal courts had criminal jurisdiction over sovereigns or instrumentalities.

2. Limiting FSIA immunity to civil cases bizarrely subjects foreign sovereigns to ordinary criminal procedures despite the FSIA's special civil rules. Br. 37-38. The government's reading also permits criminal jurisdiction for conduct like perjury when Congress barred analogous civil claims, Br. 38-39, which the government ignores.

The government says that the Federal Rules of Criminal Procedure are good enough for sovereigns, and points out that foreign *officials* do not benefit from FSIA procedures. U.S. Br. 41 (citing *Samantar*, 560 U.S. at 324). But the FSIA reflects Congress' considered view that *sovereigns* deserve special respect. If Congress did not want plaintiffs slapping summonses in the hands of embassy doormen, Congress presumably did not want prosecutors doing it either.

The government (at 41) dismisses the gravity of American juries hearing criminal cases against sovereigns, noting that juries hear criminal cases against foreign *officials*. But nondiplomatic officials, like the cash-

[3] In *World Arrangements*, the court rejected the subpoena on foreign-sovereign-immunity grounds. 13 F.R.D. at 291. In *In re Grand Jury Investigation*, the court reserved judgment on the sovereign-immunity defense to a subpoena. 186 F. Supp. 298, 319-20 (D.D.C. 1960).

smuggling legislator in the government's one example (at 41), can face criminal trial only for *unofficial* acts. O'Keefe Br. 6-7. Juries do not pass criminal judgment on officials' *sovereign* acts.

B. The FSIA's Exceptions Are Irrelevant in Criminal Cases

The government's fallback—that the FSIA's commercial-activities exception in section 1605(a)(2) applies to criminal cases under 18 U.S.C. § 3231—is implausible. Congress intended to "codif[y] … international law at the time of the FSIA's enactment." *Permanent Mission of India to the U.N. v. City of New York*, 551 U.S. 193, 199 (2007). The government (at 27) accepts that criminal jurisdiction over states themselves is verboten under international law. But the FSIA gives states and instrumentalities the same immunity. 28 U.S.C. § 1603(a)-(b). If the commercial-activities exception applies criminally to instrumentalities, it must also apply to states. The notion that Congress violated international law by authorizing the exercise of criminal jurisdiction over sovereigns in cases involving commercial activities is inconceivable. Br. 43. Congress in 1976 surely did not authorize criminal trials of Saudi Arabia, Iran, and Kuwait for price-fixing during the 1973 oil embargo.

The government (at 42) highlights that the FSIA's immunity exceptions in section 1605(a) apply "in any case," which the government argues includes criminal cases. But those words refer to "any case" under the FSIA. The only federal cases the FSIA authorizes are nonjury civil actions. The FSIA's civil-only jurisdictional grant, section 1330(a), explicitly cross-references section 1605's exceptions, which the government ignores.

Moreover, most of the FSIA exceptions plainly apply only to civil cases. Br. 42-43. The government (at 43-44) says there is nothing "odd" about some exceptions applying civilly but some applying more broadly to criminal cases. But the question is whether the exceptions as a group apply "in any case" authorized by the FSIA or "in any case" under any jurisdictional grant. Reading the statute "as a whole," U.S. Br. 34 (citation omitted), that almost all exceptions apply to the one kind of case authorized by the FSIA—civil cases—strongly signals that "any case" means "any case" under the FSIA.

The government (at 42) asserts that it would "make[] little sense" for the FSIA to provide broader criminal than civil immunity. But international law affords sovereigns absolute criminal immunity but only restrictive civil immunity. Br. 35-36; *see* U.S. Br. 27. The FSIA sensibly tracks that consensus.

The government (at 43) accuses Halkbank of "tr[ying] to have it both ways" by reading section 1604 to provide criminal and civil immunity, but section 1605 to apply only in civil cases. But sections 1604 and 1605 serve different purposes—one grants immunity, the other restricts it. Br. 40. Immunity waivers, unlike immunity grants, are read narrowly. The government (at 43) concedes the principle, but objects that "any case" is unambiguous. That just repeats the government's meritless textual argument.

III. The Commercial-Activities Exception Does Not Apply Here Anyway

1. This case lacks the commercial-activities exception's required nexus to the United States.

a. The action is not "based upon" Halkbank's conduct "in the United States" under the exception's first two clauses. 28 U.S.C. § 1605(a)(2); Br. 45-46. The indictment

centers on allegations that Halkbank transferred Iranian funds *in Türkiye* to Zarrab's accounts and helped him disguise those transfers. Br. 45-46.

The government (at 45-46) recasts the prosecution's "overarching basis" as "the violation of [U.S.] economic sanctions" with U.S. "injuries." But the relevant question is where "the *conduct* constituting the gravamen of [the] suit … occurred," *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 35 (2015) (emphasis added), not whether U.S. "interests" were harmed, *contra* U.S. Br. 46. That harm presumably always occurs when U.S. laws are violated.

The government (at 45) invokes alleged "misrepresentations to Treasury Department officials." But those alleged misrepresentations are not "the core of the[] suit." *See OBB*, 577 U.S. at 35. In *OBB*, the plaintiff purchased a rail ticket in the United States from an Austrian railroad instrumentality. She argued that the gravamen of her failure-to-warn claim was the instrumentality's failure to warn when she purchased her ticket. This Court rejected that contention, reasoning that the failure to warn was "wrongful" only because it failed to warn of unsafe conditions *in Austria*, where the rest of the alleged conduct occurred. *Id.* *OBB* is on all fours with this case. The indictment's gravamen is Halkbank's alleged activity in Türkiye. The alleged statements to Treasury are wrongful only because Halkbank allegedly misrepresented events *in Türkiye*.

The government (at 45) argues that at a minimum Counts 1 and 2 (conspiracy to defraud the United States and violate sanctions) target U.S. conduct. But those counts have the same problem as the others: their gravamen is transactions in Türkiye, not alleged misrepresentations. *See* J.A.28-30.

b. Nor is the action "based upon" conduct abroad having a "direct effect" in this country. 28 U.S.C. § 1605(a)(2); Br. 46-47. The government (at 48-49) argues that the alleged conduct in Türkiye "plainly" had a direct effect in the United States because 5% of the Iranian funds processed by Halkbank eventually moved through U.S. banks. Although the government's brief (at 3, 45-46, 48-49) claims that Halkbank laundered money through U.S. banks, the indictment does not allege that Halkbank sent one penny of Iranian money through U.S. banks. Br. 8. A *private citizen*, Zarrab, undertook all such transactions *after* buying gold with Iranian funds, moving the gold to Dubai, and then selling the gold in Dubai. Zarrab's transfer of the resulting proceeds through the international banking system, including a small percentage that allegedly passed through U.S. banks, is hardly a "direct effect." For the same reason, those later transactions with U.S. banks cannot create "substantial contact with the United States" for the commercial-activities exception's first two clauses. *Contra* U.S. Br. 48 (quoting 28 U.S.C. § 1603(e)).

The government (at 49) attempts to transplant coconspirator liability to the commercial-activities exception, treating Zarrab's actions in Türkiye and Dubai as Halkbank's. But this suit against Halkbank is "based upon" Halkbank's conduct—not Zarrab's. 28 U.S.C. § 1605(a)(2). Only the conduct of sovereign agents having actual authority can trigger the FSIA's exceptions. *SACE S.p.A. v. Republic of Paraguay*, 243 F. Supp. 3d 21, 35 (D.D.C. 2017) (Jackson, J.) (collecting cases). Coconspirator liability would violate that rule and blow open the FSIA, permitting parties to sue sovereigns on the theory that sovereigns conspired with intervening actors abroad. Lower courts appropriately reject attenuated theories of

"direct effect" that depend on third-party conduct. *E.g.*, *Odhiambo v. Republic of Kenya*, 764 F.3d 31, 41 (D.C. Cir. 2014) (Kavanaugh, J.) (plaintiff/contractual counterparty's intervening actions).

2. Alternatively, this case does not involve *commercial* conduct. Br. 47-48. Halkbank exercised "purely … governmental" functions under a unique intergovernmental program by "facilitat[ing] … foreign trade with Iran." Türkiye Br. 6.

The government (at 47) recasts the alleged conduct as "provision of financial services, facilitation of financial transactions, and communication with financial regulators"—"all activities in which private banks regularly engage." At that level of generality, nearly everything the Federal Reserve does—selling bonds, setting interest rates, clearing transactions—is "plainly commercial." U.S. Br. 47.

Halkbank's acts involved a regulatory scheme in which no private party could participate. Halkbank's administration of Iran's sovereign funds to manage Türkiye's oil imports is not "the *type* of action[] by which a private party engages in trade and traffic or commerce." *Contra* U.S. Br. 47 (quoting *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992)). Halkbank acted as a governmental actor controlling sovereign funds.

CONCLUSION

The court of appeals' judgment should be reversed.

Respectfully submitted,

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JANUARY 6, 2023