APPENDIX

APPENDIX A

United States Court of Appeals
for the Second Circuit

August Term 2023

(Argued: February 28, 2024 Decided: October 22, 2024)

No. 20-3499

UNITED STATES OF AMERICA,

Appellee,

— v. —

TURKIYE HALK BANKASI A.S., A/K/A HALKBANK,

Defendant-Appellant,

REZA ZARRAB, A/K/A RIZA SARRAF, CAMELIA JAMSHIDY, A/K/A KAMELIA JAMSHIDY, HOSSEIN NAJAFZADEH, MOHAMMAD ZARRAB, A/K/A CAN SARRAF, A/K/A KARTALMSD, MEHMET HAKAN ATILLA, MEHMET ZAFER CAGLAYAN, ABI, SULEYMAN ASLAN, LEVENT BALKAN, ABDULLAH HAPPANI,

Defendants. [*]

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[*] The Clerk of the Court is respectfully directed to amend the caption on this Court's docket to be consistent with the caption on this opinion.

Before: KEARSE, CABRANES, and BIANCO, *Circuit Judges*.

Defendant-Appellant Turkiye Halk Bankasi A.S. ("Halkbank") appeals from the decision and order of the United States District Court for the Southern District of New York (Richard M. Berman, *Judge*), entered on October 1, 2020, denying Halkbank's motion to dismiss the indictment against it on foreign sovereign immunity grounds. This appeal returns to us on remand from the United States Supreme Court.

In 2019, the United States indicted Halkbank, a commercial bank owned by the Republic of Turkey, for conspiring to evade U.S. economic sanctions against Iran. The district court denied Halkbank's motion to dismiss on foreign sovereign immunity grounds under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1602 *et seq.*, and the common law, and this Court affirmed. *See United States v. Turkiye Halk Bankasi A.S.*, 16 F.4th 336 (2d Cir. 2021) ("*Halkbank I*"). The Supreme Court affirmed in part, vacated in part, and remanded the case for further proceedings. *See Turkiye Halk Bankasi A.S. v. United States*, 598 U.S. 264 (2023) ("*Halkbank II*"). In particular, the Supreme Court held that the district court had subject matter jurisdiction over Halkbank's criminal prosecution under 18 U.S.C. § 3231 and that the FSIA does not provide foreign sovereign immunity in criminal cases, but vacated and remanded for full consideration of the common-law immunity arguments raised by the parties.

After careful consideration of the arguments, we hold that common-law foreign sovereign immunity does not protect Halkbank from criminal prosecution based on the

charges in this indictment. Under the common law, as interpreted by the Supreme Court and this Court, we defer to the Executive Branch's determination as to whether a party should be afforded common-law foreign sovereign immunity, and that deference applies regardless of whether the Executive seeks to grant or, as in this case, deny immunity, and also applies equally to criminal and civil cases. We need not decide whether such deference extends to the Executive Branch's determination to deny immunity if that determination is in derogation of the common law because that is not the situation here. More specifically, we find no basis in the common law to conclude that a foreign state-owned corporation is absolutely immune from prosecution by a separate sovereign for alleged criminal conduct related to its commercial activities, and not to governmental functions. Thus, because Halkbank is being prosecuted in the United States for its alleged criminal activity related to its commercial activities as charged in the indictment, we defer to the Executive Branch's determination, through the U.S. Department of Justice, that Halkbank should not be afforded immunity in this case.

Accordingly, we **AFFIRM** the order of the district court and **REMAND** for further proceedings consistent with this opinion.

FOR APPELLEE: MICHAEL D. LOCKARD, Assistant United States Attorney (David W. Denton Jr., Jonathan Rebold, George D. Turner, and Hagan Scotten, Assistant United States Attorneys, *on the brief*), *for* Damian Williams, United States Attorney for the Southern

District of New York, New York, New York.

FOR APPELLANT: JOHN S. WILLIAMS (Robert M. Cary, Simon A. Latcovich, and Eden Schiffmann, *on the brief*), Williams & Connolly LLP, Washington, District of Columbia.

JOSEPH F. BIANCO, *Circuit Judge*:

Defendant-Appellant Turkiye Halk Bankasi A.S. ("Halkbank") appeals from the decision and order of the United States District Court for the Southern District of New York (Richard M. Berman, *Judge*), entered on October 1, 2020, denying Halkbank's motion to dismiss the indictment against it on foreign sovereign immunity grounds. This appeal returns to us on remand from the United States Supreme Court.

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does not provide foreign sovereign immunity in criminal cases, but vacated and remanded for full consideration of the common-law immunity arguments raised by the parties.

After careful consideration of the arguments, we hold that common-law foreign sovereign immunity does not protect Halkbank from criminal prosecution based on the charges in this indictment. Under the common law, as interpreted by the Supreme Court and this Court, we defer to the Executive Branch's determination as to whether a party should be afforded common-law foreign sovereign immunity, and that deference applies regardless of whether the Executive seeks to grant or, as in this case, deny immunity, and also applies equally to criminal and civil cases. We need not decide whether such deference extends to the Executive Branch's determination to deny immunity if that determination is in derogation of the common law because that is not the situation here. More specifically, we find no basis in the common law to conclude that a foreign state-owned corporation is absolutely immune from prosecution by a separate sovereign for alleged criminal conduct related to its commercial activities, and not to governmental functions. Thus, because Halkbank is being prosecuted in the United States for its alleged criminal activity related to its commercial activities as charged in the indictment, we defer to the Executive Branch's determination, through the U.S. Department of Justice, that Halkbank should not be afforded immunity in this case.

Accordingly, we **AFFIRM** the order of the district court and **REMAND** for further proceedings consistent with this opinion.

I. BACKGROUND

Between 2011 and 2013, the United States increased economic sanctions on Iran, targeting proceeds from the sale of Iranian oil and gas and the supply of gold to Iran. *See, e.g.*, National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1245, 125 Stat. 1298, 1647–50 (2011) (codified as amended at 22 U.S.C. § 8513a); Iran Threat Reduction and Syria Human Rights Act of 2012, 22 U.S.C. §§ 8711 *et seq.*; Iran Freedom and Counter-Proliferation Act of 2012, 22 U.S.C. §§ 8801 *et seq.* The sanctions regime subjects foreign financial institutions like Halkbank to penalties for conducting or facilitating significant financial transactions with designated Iranian financial institutions,[1] unless those transactions relate to the provision of humanitarian assistance or to bilateral trade between an exempted foreign country and Iran.[2] *See* 22 U.S.C. § 8513a(d)(1), (2), (4)(D). Any funds owed to Iran as a result of such bilateral trade must be held in an account within that foreign country and may not be repatriated to Iran. *See* 22 U.S.C. § 8513a(d)(4)(D)(ii)(II). Therefore, as relevant here, the proceeds from Iran's sale of oil and gas to Turkey were restricted—they had to be deposited into accounts in Turkey and could only be used for further trade between Iran and Turkey.

In 2019, the United States indicted Halkbank for allegedly participating in a multi-year scheme to evade and

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[1] Designated financial institutions include the Central Bank of Iran and the National Iranian Oil Company. 22 U.S.C. § 8513a(d)(1); Exec. Order No. 13622, 77 Fed. Reg. 45897 (July 30, 2012).

[2] To qualify for the bilateral trade exemption, a foreign financial institution must be located within a foreign country that has significantly reduced its volume of crude oil purchased from Iran. 22 U.S.C. § 8513a(d)(4)(D)(i).

violate this sanctions regime. The indictment alleged that Halkbank, a designated repository of proceeds from Iran's sale of oil and gas to Turkey, used gold exports and fraudulent humanitarian assistance transactions to launder billions of dollars through the global financial system, including the U.S. financial system, in order to provide the Government of Iran, the Central Bank of Iran, and the National Iranian Oil Company access to the otherwise-restricted funds held at Halkbank. The indictment further alleged that, during the course of the conspiracy, senior officers of Halkbank made false statements regarding transactions with Iran to conceal the scheme from the U.S. Department of the Treasury.[3]

Based on the alleged conduct, the indictment charged Halkbank with: (1) conspiracy to defraud the United States, in violation of 18 U.S.C. § 371; (2) conspiracy to violate the International Emergency Economic Powers Act, in violation of 50 U.S.C. § 1705; (3) bank fraud, in violation of 18 U.S.C. § 1344; (4) conspiracy to commit bank fraud, in violation of 18 U.S.C. § 1349; (5) money laundering, in violation of 18 U.S.C. § 1956(a)(2)(A); and (6) conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(h).

Halkbank moved to dismiss the indictment, arguing, *inter alia*, that as an instrumentality of Turkey, it was entitled to absolute immunity from criminal prosecution

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[3] Mehmet Hakan Atilla, Halkbank's former Deputy General Manager for International Banking, was separately charged and convicted, following a jury trial, of offenses arising from this scheme. *See United States v. Atilla*, 966 F.3d 118 (2d Cir. 2020). Reza Zarrab, an Iranian-Turkish businessman and alleged co-conspirator of Halkbank, pleaded guilty to charges that also arose from this scheme. *Halkbank I*, 16 F.4th at 342 n.7.

under the FSIA. Halkbank argued in the alternative that, even if the FSIA did not apply to criminal cases, common-law sovereign immunity barred its prosecution. The district court denied Halkbank's motion to dismiss, reasoning that the FSIA does not afford immunity in criminal proceedings and that, even if it did, the exception for commercial activity would apply. *United States v. Halkbank*, No. 15 Cr. 867 (RMB), 2020 WL 5849512, at *4–5 (S.D.N.Y. Oct. 1, 2020). The district court also rejected Halkbank's common-law argument as unsupported by and inconsistent with the historical approach of deferring to the Executive Branch on the question of foreign sovereign immunity. *Id.* at *6.

Halkbank filed an interlocutory appeal, and this Court affirmed. *Halkbank I*, 16 F.4th at 351. We concluded that the district court had subject matter jurisdiction pursuant to 18 U.S.C. § 3231 and, assuming *arguendo* that the FSIA conferred immunity in criminal cases, that the commercial activity exception would apply to Halkbank. *Id.* at 347–50. We held that the charged conduct qualified as commercial activity under all three categories of 28 U.S.C. § 1605(a)(2), identifying "the gravamen of the suit" as Halkbank's participation in schemes "intended to deceive U.S. regulators and foreign banks in order to launder approximately $1 billion in Iranian oil and gas proceeds through the U.S. financial system" and its misrepresentations to "Treasury officials regarding the nature of these transactions." *Id.* at 348–49 (internal quotation marks and citations omitted). Finally, we held that Halkbank was not immune under the common law, because:

> even assuming that FSIA did not supersede the

> pertinent common law, any foreign sovereign immunity at common law also had an exception for a foreign state's commercial activity, just like FSIA's commercial activity exception . . . . [I]n any event, at common law, sovereign immunity determinations were the prerogative of the Executive Branch; thus, the decision to bring criminal charges would have necessarily manifested the Executive Branch's view that no sovereign immunity existed.

Id. at 351 (footnotes omitted).

The Supreme Court granted certiorari and affirmed in part, vacated in part, and remanded. *See Halkbank II*, 598 U.S. at 281. Specifically, after concluding that the district court had subject matter jurisdiction under 18 U.S.C. § 3231, the Supreme Court held that the FSIA does not provide foreign states and their instrumentalities with immunity from criminal proceedings. *Id.* at 272–73. As to immunity under the common law, the Supreme Court noted that this Court "did not fully consider the various arguments regarding common-law immunity that the parties press[ed] in [the Supreme] Court," nor "address whether and to what extent foreign states and their instrumentalities are differently situated for purposes of common-law immunity in the criminal context." *Id.* at 280. The Supreme Court thus vacated this Court's denial of Halkbank's common-law foreign sovereign immunity and remanded for further consideration. *Id.* at 281.

II. DISCUSSION

The sole issue on remand is whether common-law foreign sovereign immunity protects Halkbank from criminal prosecution. We review such questions of law *de*

novo. *See Matar v. Dichter*, 563 F.3d 9, 12 (2d Cir. 2009); *Rukoro v. Federal Republic of Germany*, 976 F.3d 218, 223 (2d Cir. 2020).

Halkbank argues that the common law affords foreign sovereigns and their instrumentalities absolute immunity from criminal prosecution, regardless of the view of the Executive Branch. On the other hand, the government argues that common-law foreign sovereign immunity does not extend to lawsuits where the Executive determines that such immunity should not be granted. Therefore, according to the government, this Court should defer to the Executive's determination that Halkbank is not entitled to immunity in this criminal prosecution, and, in doing so, "this Court need not decide the degree of deference warranted to an Executive determination that is at odds with a long-recognized form of common-law immunity, because here the lack of historical support for Halkbank's claim supports the Executive's views." Appellee's Br. at 17. More specifically, the government asserts that the common law distinguishes between a foreign state and the corporations it owns, and that state-owned corporations, like Halkbank, do not enjoy absolute immunity from criminal prosecution based on their commercial, non-governmental activities.

As set forth below, we agree with the government and conclude that, under the common law, we defer to the Executive Branch's determination—which may be expressed, as here, by the initiation of a federal criminal prosecution—that a foreign state-owned corporation is not entitled to foreign sovereign immunity for charges arising from its commercial, non-governmental activity because that determination is consistent with the scope of such immunity recognized at common law. Here, such

deference is warranted because the indictment, brought by the Executive through the U.S. Department of Justice, charges Halkbank for alleged criminal activity arising from its commercial activity. Therefore, we need not decide whether such deference would also apply to the Executive's determination regarding foreign sovereign immunity if that determination in a particular case were in derogation of the common law.

A. Common-Law Foreign Sovereign Immunity and Deference to the Executive Branch

Foreign sovereign immunity originally developed as a matter of common law based on principles announced by the Supreme Court in *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812). *See Samantar v. Yousuf*, 560 U.S. 305, 311 (2010). In *Schooner Exchange*, the Supreme Court addressed whether an armed national vessel of France was immune from the jurisdiction of U.S. courts. *See* 11 U.S. at 135–36. Writing for the Court, Chief Justice John Marshall established as a threshold matter that foreign sovereigns have no inherent right to immunity from the jurisdiction of U.S. courts, explaining: "The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself." *Id.* at 136. He then observed, however, that international comity had "given rise to a class of cases in which every sovereign is understood to wa[i]ve the exercise of a part of that complete exclusive territorial jurisdiction."[4] *Id.* at 137. Thus, accepting a

[4] This "class of cases," the Court explained, included: (1) "the exemption of the person of the sovereign from arrest or detention within a foreign territory"; (2) "the immunity which all civilized nations allow to foreign ministers"; and (3) "where [a sovereign] allows the troops of a foreign prince to pass through his dominions." *Id.* at 137–39.

suggestion advanced by the Executive Branch, *see id.* at 134, Chief Justice Marshall held that the French vessel at issue was immune because the United States had "impliedly consented to wa[i]ve its jurisdiction" over "national ships of war, entering the port of a friendly power open for their reception," *id.* at 145–46. The Chief Justice emphasized, though, that "[w]ithout a doubt, the sovereign of the place is capable of destroying this implication . . . . by employing force, or by subjecting such vessels to the ordinary tribunals." *Id.* at 146.

Subsequent cases applying *Schooner Exchange* stressed that the immunity afforded to foreign sovereigns and their instrumentalities depended on the consent of the Executive. *See, e.g.*, *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283, 353 (1822) (explaining that the immunity of foreign public ships "is implied only from the general usage of nations, [and] may be withdrawn upon notice at any time"); *The Divina Pastora*, 17 U.S. (4 Wheat.) 52, 71 n.3 (1819) (explaining that the Executive can still "claim and exercise jurisdiction" over foreign sovereigns by "expressly exert[ing]" that power); *see also Coleman v. Tennessee*, 97 U.S. 509, 516 n.1 (1878) (describing foreign sovereign immunity as an "exemption from the civil and criminal jurisdiction of the place [that] is extended . . . by permission of its government"). Recognizing that foreign sovereign immunity was "a matter of grace and comity on the part of the United States," courts "consistently . . . deferred to the decisions of the political branches—in particular, those of the Executive Branch—on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983) (citing *Ex parte Peru*, 318 U.S. 578, 586–90 (1943);

Republic of Mexico v. Hoffman, 324 U.S. 30, 33–36 (1945)).

For many years, "the Executive Branch followed a policy of requesting immunity in all actions against friendly sovereigns." *Republic of Austria v. Altmann*, 541 U.S. 677, 689 (2004). "Typically, after a plaintiff sought to sue a foreign sovereign in an American court, the Executive Branch, acting through the State Department, filed a suggestion of immunity—case-specific guidance about the foreign sovereign's entitlement to immunity." *Opati v. Republic of Sudan*, 590 U.S. 418, 421 (2020) (internal quotation marks omitted). Courts deferred to the suggestions of the Executive Branch "on the theory that issues of comity and foreign relations 'implicate judgments that the Constitution reserves to the political branches.'" *Beierwaltes v. L'Office Federale De La Culture De La Confederation Suisse*, 999 F.3d 808, 818 (2d Cir. 2021) (alterations adopted) (quoting *Opati*, 590 U.S. at 421). Thus, although "the United States generally granted foreign sovereigns complete immunity from suit," this was a function of the Executive Branch's policy rather than a substantive rule of law. *Verlinden*, 461 U.S. at 486; *cf. Hoffman*, 324 U.S. at 36 ("[I]t is an accepted rule of substantive law governing the exercise of the jurisdiction of the courts that they accept and follow the executive determination [regarding foreign sovereign immunity].").

This policy changed in 1952 when the State Department announced in the Tate Letter that it would begin "to follow the 'restrictive' theory of foreign sovereign immunity in advising courts whether they should take jurisdiction in any given case." *Rubin v. Islamic Republic of Iran*, 583 U.S. 202, 208 (2018). Under the restrictive

theory, "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*, 461 U.S. at 487. As the Supreme Court recognized, however, this "change in State Department policy . . . had little, if any, impact on federal courts' approach to immunity analyses." *Altmann*, 541 U.S. at 690. The Executive Branch continued to bear the "initial responsibility for deciding questions of sovereign immunity," and courts continued to "abide[] by suggestions of immunity from the State Department." *Verlinden*, 461 U.S. at 487 (internal quotation marks omitted). Where there was "no communication" from the Executive concerning immunity in a particular case, the court would "decide for itself whether it [was] the established policy of the State Department to recognize claims of immunity of this type." *Victory Transp. Inc. v. Comisaria Gen. de Abastecimientos y Transportes*, 336 F.2d 354, 358–59 (2d. Cir. 1964); *see also The Navemar*, 303 U.S. 68, 75 (1938) (concluding that, because the Executive "declined to act," the availability of foreign sovereign immunity was an "appropriate subject[] for judicial inquiry").

In 1976, Congress enacted the FSIA to "endorse and codify the restrictive theory of sovereign immunity." *Samantar*, 560 U.S. at 313. Although the FSIA "transfers primary responsibility for immunity determinations from the Executive to the Judicial Branch," *Altmann*, 541 U.S. at 691, "in the common-law context, we [still] defer to the Executive's determination of the scope of immunity," *Matar*, 563 F.3d at 15.[5]

[5] Although Halkbank dismisses as dicta the cases "in which the Supreme Court and this Court broadly describe common-law immunity determinations as Executive prerogative," Reply Br. at 9, "it does not

B. Federal Criminal Prosecution of Halkbank

The government argues that the federal criminal prosecution of Halkbank reflects the Executive's determination that foreign sovereign immunity is not warranted in this case. We agree. A federal grand jury found probable cause to believe that Halkbank violated numerous criminal laws of the United States, and the Executive decided to prosecute those alleged crimes. The indictment is clear that the Government of Turkey owns the majority of Halkbank's shares. Under these circumstances, "we may assume that by electing to bring this prosecution, the Executive has assessed this prosecution's impact on this

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at all follow that we can cavalierly disregard" those descriptions of the deference afforded to the position of the Executive at common law, *United States v. Bell*, 524 F.2d 202, 206 (2d Cir. 1975). We have repeatedly emphasized that, "[e]ven if Supreme Court dicta do not constitute established law, we nonetheless accord deference to such dicta where, as here, no change has occurred in the legal landscape." *Fuld v. Palestine Liberation Org.*, 82 F.4th 74, 100 (2d Cir. 2023); *see also Bell*, 524 F.2d at 206 (noting that Supreme Court dicta "must be given considerable weight"). In any event, this Court held in *Matar* that the defendant was entitled to common-law foreign sovereign immunity "under our traditional rule of deference to such Executive determinations." 563 F.3d at 15. That precedent is binding here. *See Jones v. Coughlin*, 45 F.3d 677, 679 (2d Cir. 1995) (per curiam) ("A decision of a panel of this Court is binding unless and until it is overruled by the Court *en banc* or by the Supreme Court."); *see also Cox v. Department of Justice*, 111 F.4th 198, 209 (2d Cir. 2024). Similarly, although Justice Gorsuch's partial concurrence in *Halkbank II* noted that "whether customary international law survives as a form of federal common law after *Erie* [*R.R. Co. v. Tompkins*, 304 U.S. 64 (1938),] is a matter of considerable debate among scholars," 598 U.S. at 287 (Gorsuch, J., concurring in part and dissenting in part), we continue to consider such law (*i.e.*, federal common law that may derive in part from customary international law) on this issue based on binding precedent from the Supreme Court in *Schooner Exchange* and subsequent cases of this Court.

Nation's relationship with" Turkey and concluded that foreign policy concerns should not bar the action. *Pasquantino v. United States*, 544 U.S. 349, 369 (2005); *see also The Santissima Trinidad*, 20 U.S. at 354 (observing that it would be "strange" if an immunity derived from international comity "should be construed as a license to do wrong to the nation itself"). In other words, the decision to bring federal criminal charges against Halkbank reflects the Executive Branch's determination that Halkbank is not entitled to sovereign immunity for the conduct at issue.[6] *See United States v. Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997) ("[B]y pursuing Noriega's capture and this prosecution, the Executive Branch has manifested its clear sentiment that Noriega should be denied [common-law] head-of-state immunity.").

Having recognized the Executive Branch's position with respect to Halkbank, we now must decide whether that position is entitled to deference in this particular case. *See Matar*, 563 F.3d at 14 (deferring to Executive's suggestion that civil suit be dismissed on immunity grounds); *accord Doe v. De Leon*, 555 F. App'x 84, 85 (2d Cir. 2014) (summary order) (reasoning that the Executive's "submission is dispositive"). Halkbank argues that deference is inappropriate here because the Executive's position is inconsistent with the forms of foreign sovereign immunity recognized at common law. In particular, Halkbank contends that courts may not apply deference

[6] Although Halkbank briefly suggests that the Executive's position in this case is less authoritative because it was expressed by federal prosecutors rather than the State Department, we have held in this context that the "test should naturally be supplied by the Executive's representations, not the technical nature of its appearance." *Sullivan v. State of Sao Paulo*, 122 F.2d 355, 357 (2d Cir. 1941).

to deny (as opposed to extend) foreign sovereign immunity, and, in any event, the position of the Executive cannot abrogate the absolute immunity of foreign state instrumentalities from criminal prosecution.

As set forth below, we find Halkbank's arguments unpersuasive. The deference afforded at common law to the Executive's determination regarding foreign sovereign immunity applies regardless of whether the Executive seeks to grant or, as in this case, deny immunity, and also extends to criminal cases. Moreover, we need not determine the outer limits of the deference afforded in this context because the Executive Branch's position here is consistent with the scope of immunity extended to foreign state-owned corporations at common law. Although certain prior cases extended immunity to state-owned corporations based on their *governmental* conduct, the common law places no independent bar on the prosecution of such corporations for their *commercial* activity. Therefore, where, as here, a foreign state-owned corporation is being prosecuted for its commercial, non-governmental activity, we defer to the Executive Branch's determination that immunity is not warranted in that particular case.

i. Executive Branch's Position that Immunity Should Be Denied in a Criminal Case

As an initial matter, Halkbank's argument that courts may only defer to the Executive's position to apply, rather than deny, foreign sovereign immunity is inconsistent with the Supreme Court's and this Court's precedents. In *Hoffman*, the Supreme Court recognized a "guiding principle" that, in foreign sovereign immunity cases, "courts should not so act as to embarrass the executive arm in its

conduct of foreign affairs." 324 U.S. at 35. The Court indicated that this principle applied regardless of whether the Executive sought to grant or deny immunity:

> It is . . . not for the courts to deny an immunity which our government has seen fit to allow, *or to allow an immunity on new grounds* which the government has not seen fit to recognize. The judicial seizure of the property of a friendly state may be regarded as such an affront to its dignity and may so affect our relations with it, that it is an accepted rule of substantive law governing the exercise of the jurisdiction of the courts that they accept and follow the executive determination that the vessel shall be treated as immune. But recognition by the courts of an immunity upon principles which the political department of government has not sanctioned may be *equally embarrassing* to it in securing the protection of our national interests and their recognition by other nations.

324 U.S. at 35–36 (emphases added) (footnote and citation omitted). We subsequently interpreted this language from *Hoffman* to "mean[] at least that the courts should deny immunity where the State Department has indicated, either directly or indirectly, that immunity need not be accorded." *Victory Transp.*, 336 F.2d at 358 (explaining that it "makes no sense . . . to permit the disregard of legal obligations to avoid embarrassing the State Department if that agency indicates it will not be embarrassed").

Halkbank relies on *Berizzi Brothers Co. v. The Pesaro*, 271 U.S. 562 (1926), for the proposition that courts may apply foreign sovereign immunity over the disagreement of the Executive. In that case, the Supreme Court

held that a merchant ship owned and operated by a foreign government was immune from suit by a private party, *id.* at 576, even though the State Department had expressed to the district court its view that "government-owned merchant vessels or vessels under requisition of governments whose flag they fly employed in commerce should not be regarded as entitled to the immunities accorded public vessels of war," *The Pesaro*, 277 F. 473, 479 n.3 (S.D.N.Y. 1921). Because most cases applying deference involve an Executive determination to extend immunity, Halkbank argues that *Berizzi Brothers* shows that courts do not defer to the Executive's determination to *deny* immunity.

We decline to adopt such a broad reading of *Berizzi Brothers*. To start, the Supreme Court did not reference the State Department's position, and thus did not expressly recognize that it was departing from the Executive's view. *See Hoffman*, 324 U.S. at 35 n.1 (noting that "[t]he propriety of . . . extending the immunity where the political branch of the government had refused to act was not considered" in *Berizzi Brothers*). It is thus not clear that *Berizzi Brothers* can be characterized as a case in which a court declined to defer to the Executive Branch. *See Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."). Moreover, the Supreme Court has questioned the ongoing validity of the *Berizzi Brothers* decision. *See Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 699 (1976) (explaining that "the authority of [*Berizzi Brothers*] has been severely diminished

by later cases"); *see also Hoffman*, 324 U.S. at 39 (Frankfurter, J., concurring) ("If this be an implied recession from the decision in *Berizzi Bros. Co. v. Pesaro*, I heartily welcome it."). Therefore, we conclude that, under the common law, deference applies to the Executive's determination regarding foreign sovereign immunity, even when it involves a denial of such immunity.

Furthermore, contrary to Halkbank's contention, we find nothing in the common law that suggests that the deference afforded to the Executive's determination is limited to civil cases, nor is there any binding or even persuasive case authority supporting such a restriction. Halkbank cites two district court cases for the proposition that courts do not defer to the Executive's position in criminal cases.[7] We disagree. First, in *In re Investigation of World Arrangements*, the district court did not view the issuance of a grand jury subpoena on a corporation controlled by the British government as indicative of the Executive's position that no immunity was warranted; instead, the district court engaged in an independent analysis, recognizing that "[w]here the political branch of the government declines to assert an opinion . . . , the courts may decide for themselves whether all the requisites of immunity exist." 13 F.R.D. 280, 290 (D.D.C. 1952). Similarly, in *In re Grand Jury Investigation of the Shipping Industry*, the district court declined to rule on whether foreign sovereign immunity required it to quash a grand jury subpoena without additional factfinding to

[7] Although the two district court cases upon which Halkbank relies relate to the enforcement of grand jury subpoenas rather than criminal prosecution, the Supreme Court has indicated that grand jury cases are relevant to the foreign sovereign immunity analysis in criminal proceedings overall. *See Halkbank II*, 598 U.S. at 274.

confirm that the Philippine National Lines was engaged in commercial activities, as the State Department had claimed in its statement declining the Philippine Government's request for immunity. 186 F. Supp. 298, 318–20 (D.D.C. 1960). Neither of these cases determined that it was inappropriate to defer to the Executive's position to decline immunity in a criminal case; thus, neither case lends even persuasive authority to that proposition.

Halkbank argues that deference to the Executive's decision to deny immunity is unprecedented, particularly in the criminal context. To be sure, relatively few cases have expressly deferred to the Executive's position that foreign sovereign immunity is not warranted. *But see, e.g.*, *Renchard v. Humphreys & Harding, Inc.*, 381 F. Supp. 382, 385 (D.D.C. 1974) (holding that "the Department of State's suggestion not to grant immunity should be given conclusive effect"); *Amkor Corp. v. Bank of Korea*, 298 F. Supp. 143, 144 (S.D.N.Y. 1969) ("The Department of State's determination that immunity need not be extended is binding on this Court."); *see also Yousuf v. Samantar*, 699 F.3d 763, 772 (4th Cir. 2012) (deferring to Executive Branch's position that the defendant should be denied head-of-state immunity); *Noriega*, 117 F.3d at 1212 (same); *Hoffman*, 324 U.S. at 38 (describing the Executive's 'fail[ure]' to 'recognize immunity' on the facts at issue in that case as 'controlling'). However, this can be explained by the Executive Branch's overwhelming tendency to request the application of foreign sovereign immunity, *see Verlinden*, 461 U.S. at 486, and Halkbank cannot identify a single case where common-law immunity *was* applied to a foreign state-owned entity facing federal criminal charges.

In any event, as Halkbank acknowledges, we have on

numerous occasions recognized that the Executive's "failure or refusal to suggest immunity" is at least "a significant factor to be taken into consideration in determining if the case is one justifying derogation from the normal exercise of the court's jurisdiction." *Heaney v. Gov't of Spain*, 445 F.2d 501, 503 (2d Cir. 1971); *accord Victory Transp.*, 336 F.2d at 360; *see also Yousuf*, 699 F.3d at 773 (holding that the Executive's position on "status-based immunity doctrines such as head-of-state immunity" should be given "absolute deference," while its position on "conduct-based immunity . . . carries substantial weight").[8] If the Executive's failure to suggest immunity is a significant factor, then its active decision to deny immunity is, *a fortiori*, entitled to equal if not greater weight in our analysis.

Thus, having concluded that there is no basis for treating the Executive's decision to deny immunity differently than its position to extend immunity, and that such deference is not restricted to civil cases, we proceed to consider the scope of immunity afforded to foreign state-

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[8] The Fourth Circuit explained that "head-of-state immunity is tied closely to the sovereign immunity of foreign states," and that both forms of immunity aim "to promote comity among nations." *Yousuf*, 699 F.3d at 769 (internal quotation marks and citation omitted). It then concluded that the Executive's "pronouncement as to head-of-state immunity is entitled to absolute deference," given "the Executive's constitutionally delegated powers" to recognize foreign heads of state and "the historical practice of the courts" in deferring to "executive 'suggestions of immunity' for heads of state." *Id.* at 772 (citation omitted). The Fourth Circuit concluded that the Executive's position as to official-act immunity is not controlling, by contrast, because "[s]uch cases do not involve any act of recognition for which the Executive Branch is constitutionally empowered; rather, they simply involve matters about the scope of defendant's official duties." *Id.* at 773.

owned corporations at common law and whether the federal criminal prosecution of Halkbank comports with the substance of that common law.

ii. Immunity of State-Owned Corporations

It is undisputed in this case that the United States would not subject Turkey—a state *qua* state—to criminal prosecution; indeed, the government acknowledges that doing so would be "in derogation of the common law." Appellee's Br. at 34 (internal quotation marks omitted); *see also id.* ("When the Government stated [at oral argument before the Supreme Court] that it 'would not endeavor' to indict a 'state qua state,' it was explaining that indicting a state-owned corporation like Halkbank is a different matter." (quoting App'x at 199)). Halkbank argues that the common law extends absolute immunity from prosecution not only to foreign sovereigns, but also to any entity owned and controlled by a foreign state, including state-owned corporations like Halkbank. We disagree.

Courts applying the common law have long distinguished between the immunity afforded to a foreign state and to the entities that it owns.[9] Most early cases dealt

[9] The parties do not dispute that Halkbank is an "instrumentality of a foreign state" under the FSIA. *Halkbank I*, 16 F.4th at 342 n.8; *see also* 28 U.S.C. § 1603(b)(2) (defining an "instrumentality of a foreign state" as including "any entity" for which "a majority of [its] shares or other ownership interest is owned by a foreign state or political subdivision thereof"). However, Halkbank's status under the FSIA, which the Supreme Court has determined does not apply here, is not instructive in determining its status under the common law. *See* Chimène I. Keitner, *Prosecuting Foreign States*, 61 VA. J. INT'L L. 221, 268–69 (2021) ("Although the FSIA defines 'foreign state' expansively for purposes of that statute, history and practice support differentiating between state-owned corporations and foreign states for immunity purposes under a common law approach.").

with foreign state-owned ships, and courts consistently declined to extend the immunity of the sovereign unless the ship in question was "in the possession and service of the foreign government." *Hoffman*, 324 U.S. at 32–36 (compiling cases); *see also* HAZEL FOX & PHILIPPA WEBB, THE LAW OF STATE IMMUNITY 146 (3d ed. 2015) ("Ownership by a State was not seen of itself to impress the property with a public character; it was its employment in carrying on operations of the government . . . which entitled the ship to immunity" in U.S. courts.). For instance, in *The Navemar*, the Supreme Court denied immunity to a ship owned but not possessed by the Spanish government, reasoning that "actual possession by some act of physical dominion or control in behalf of the Spanish government was needful, or at least some recognition on the part of the ship's officers that they were controlling the vessel and crew in behalf of their government." 303 U.S. at 75–76 (citations omitted); *cf. Berizzi Bros. Co.*, 271 U.S. at 570, 573–74 (extending immunity to a merchant ship owned, possessed, and operated by Italian government). Courts likewise extended immunity to railways that were owned and operated by a foreign government for public purposes because, under those circumstances, the suit was "virtually against the king of a foreign country." *Mason v. Intercolonial Ry. of Can.*, 83 N.E. 876, 876–77 (Mass. 1908); *see also Bradford v. Dir. Gen. of R.Rs. of Mex.*, 278 S.W. 251, 251–52 (Tex. Civ. App. 1925). Indeed, in *Oliver American Trading Co. v. Government of United States of Mexico*, we extended immunity to the National Railways of Mexico, reasoning that a suit against an entity owned and operated by the Mexican government—"just as it operates the Post Office, the Customs Service, or any other branch of the national government"—was "in reality a suit . . . against the Mexican government." 5 F.2d 659,

661 (2d Cir. 1924); *see also id.* at 665 (describing the Mexican government's operation of the railway as "the performance of a fundamental governmental function").

Given the focus on government function, in certain cases involving state-owned corporations, courts declined to extend immunity primarily *because of* the corporations' separate juridical status. *See, e.g.*, *United States v. Deutsches Kalisyndikat Gesellschaft*, 31 F.2d 199, 202 (S.D.N.Y. 1929) (denying immunity to a mining corporation majority-owned by the French government because the "company [is] an entity distinct from its stockholders" and "[p]rivate corporations in which a government has an interest . . . are not departments of government"); *Coale v. Société Co-op. Suisse des Charbons*, 21 F.2d 180, 181 (S.D.N.Y. 1921) ("If the Swiss government chose to do its business by means of the Société, the latter, as a corporate entity, was liable for its corporate obligations."); *Ulen & Co. v. Bank Gospodarstwa Krajowego (Nat'l Econ. Bank)*, 24 N.Y.S.2d 201 (2d Dep't 1940) (denying immunity to a bank majority-owned by the Polish government because it "has all the characteristics of a corporation"); *see also The Beaton Park*, 65 F. Supp. 211, 212 (W.D. Wash. 1946) (denying immunity to a ship whose "commercial operation was not by the Canadian Government itself, but by a corporation operating agent whose capital stock is owned by the Canadian Government"); *but see F. W. Stone Eng'g Co. v. Petroleos Mexicanos of Mex., D. F.*, 352 Pa. 12, 17 (1945) (finding it insignificant that the defendant was a "separate corporation" because the State Department's determination that the corporation was immune was binding).

Accordingly, the few courts that did extend immunity to state-owned corporations emphasized those entities'

performance of governmental functions. *See, e.g.*, *Dunlap v. Banco Cent. Del Ecuador*, 41 N.Y.S.2d 650, 651–52 (Sup. Ct. N.Y. Cnty. 1943) (concluding that immunity may be available to a corporation partly owned by the Ecuadorean government because "it may have acted solely as a part of the Republic of Ecuador, and as its instrumentality in the performance of its governmental function of minting and circulating its fractional money"). Moreover, once the Executive Branch adopted the restrictive theory, the immunity inquiry focused further on whether "the *activity* in question" was a "strictly public or political act" or "more of the character of a private commercial act."[10] *Victory Transp.*, 336 F.2d at 360 (emphasis added).

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[10] The restrictive theory thus had the effect of collapsing the prior analysis of whether a state-owned entity performed public functions generally into whether the conduct in question was a public act. *See, e.g.*, Keitner, *supra*, at 252–53 ("Under the restrictive theory, an entity's status as a foreign [state-owned entity] is less important to determining its potential exemption from domestic jurisdiction than the nature of the conduct at issue in the proceeding . . . . As a matter of international law, the fundamental question under the restrictive theory is whether an entity's conduct is sovereign or non-sovereign in nature."). Although Halkbank argues that the restrictive theory was only incorporated into the common law as to civil cases and "has never applied to criminal cases," Reply Br. at 12–13, the authority upon which it relies for this proposition discusses the "exercise of criminal jurisdiction directly over another State," rather than state-owned entities, FOX & WEBB, *supra*, at 91, and later concludes that "it is to be expected that the application of the restrictive doctrine will permit claims for compensation where a foreign State has committed in the forum State or authorized the commission there of acts of a criminal nature," *id.* at 95. *See also id.* at 94–95 (explaining that the "immunity of the State from criminal proceedings [was treated] as more a matter of substantive incapacity and the inapplicability of the penal code of one State in respect of the acts of another State, rather than attributable to a procedural defect," and that the restrictive doctrine's treatment of "a State which engages in commercial or private law

Few cases address whether, and under what circumstances, foreign state-owned corporations are entitled to common-law immunity in criminal cases; however, those that have addressed the issue have done so in accordance with the principles explained *supra*. For instance, in *In re Investigation of World Arrangements*, the district court quashed a grand jury subpoena served on the Anglo-Iranian Oil Company, a corporation controlled and partly owned by the British government, concluding that the corporation was immune because its "supplying of oil to insure the maintenance and operation of a naval force" was a "fundamental government function," which rendered it "indistinguishable from the Government of Great Britain." 13 F.R.D. at 282, 290–91. Moreover, as noted *supra*, in *In re Grand Jury Investigation of the Shipping Industry*, the district court declined to make any ruling on foreign sovereign immunity, pending a showing by the government that the Philippine National Lines' activities were "substantially, if not entirely, commercial." 186 F. Supp. at 319–20. Halkbank argues that these two district court cases show that corporations owned and controlled by a foreign state are absolutely immune from prosecution under the common law. However, in our view, neither of these cases suggests that the state-owned corporation in question is entitled to *absolute* immunity. Instead, they indicate that state-owned corporations may be immune if engaged in governmental, non-commercial conduct.

This view is consistent with the other criminal cases Halkbank cites, which only support the existence of common-law immunity for sovereigns and their

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matters as on the same footing as any other artificial person or corporation" may "point the way, should occasion so require, to the fashioning of an exception to immunity from criminal proceedings").

instrumentalities for governmental functions. For example, in *Coleman*, the Supreme Court found it "well settled that a foreign army permitted to march through a friendly country, or to be stationed in it, by permission of its government or sovereign, is exempt from the civil and criminal jurisdiction of the place," and held that "an army invading an enemy's country [is likewise] exempt." 97 U.S. at 515–16; *see also Dow v. Johnson*, 100 U.S. 158, 165, 169 (1879) (elaborating on the "doctrine of non-liability to the tribunals of the invaded country for acts of warfare"). Halkbank also points to a decision of France's highest criminal court, which it identifies as the "only national supreme court to squarely reach the criminal immunity of a corporate instrumentality." Reply Br. at 17. However, that case extended Malta's immunity from prosecution to the Malta Maritime Authority *because* the charged conduct involved the defendant's exercise of state authority:

> '[T]he rule of customary international law which bars proceedings against States before the criminal courts of a foreign State extends to organs and entities that constitute emanations of the State, as well as to their agents, by reason of acts which, as on the facts of the present case, relate to the sovereignty of the State concerned.'

Brief for Professor Roger O'Keefe as Amicus Curiae Supporting Defendant-Appellant, at 12 (quoting *Agent judiciaire du Trésor v. Malta Mar. Auth. and Carmel X*, Cour de Cassation [Cass.] [supreme court for judicial matters] crim., Nov. 23, 2004, Bull. crim., No. 04-84.265 (Fr.)); *accord* FOX & WEBB, *supra*, at 94 & n.80. Therefore, these cases do not address the issue of common-law immunity for a state-owned corporation for its commercial

activity, and Halkbank cites no case holding that immunity exists for such activity.[11]

In sum, we conclude that, under the common law, foreign state-owned corporations are not entitled to absolute immunity in all criminal cases. Although prior cases have extended immunity to sovereigns and their instrumentalities based on their governmental conduct, we find that the common law places no independent bar on the prosecution of state-owned corporations for their commercial activity. Thus, when a foreign state-owned corporation is prosecuted for its commercial, non-governmental activity, we defer to the Executive Branch's determination that immunity is not warranted in that particular case.[12]

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[11] Although *Berizzi Brothers* extended immunity to a merchant ship owned and operated by a foreign government, *see* 271 U.S. at 574, the Supreme Court has stated that *Berizzi Brothers* "no longer correctly states the law" with respect to immunity "in cases arising out of purely commercial transactions," *Alfred Dunhill*, 425 U.S. at 703. Nor are we persuaded by Halkbank's assertion that the lack of cases explicitly denying a state-owned corporation's claim of immunity from prosecution bolsters its absolute-immunity argument. *See In re Grand Jury Subpoena*, 912 F.3d 623, 630 (D.C. Cir. 2019) (rejecting the argument that "[t]he lack of reported cases—before and after the [FSIA]—considering criminal process served on sovereign-owned corporations . . . . [implies] that such corporations are universally understood to possess absolute immunity, [because] that notion [is] highly speculative[, and] [a]n equally likely explanation for the absence of cases is that most companies served with subpoenas simply comply without objection").

[12] This is not to foreclose a situation in which the Executive decides that a foreign state-owned corporation *is* entitled to immunity in a criminal case (*e.g.*, one brought by a state or local prosecutor), even if the alleged conduct at issue is arguably commercial in nature. The Executive's position would be entitled to deference in that case. We more narrowly hold here that common-law immunity from criminal prosecution is not afforded to a foreign, state-owned corporation for

iii. Halkbank's Charged Conduct

As we previously held, the charges in the indictment concern Halkbank's commercial activity. *See Halkbank I*, 16 F.4th at 349–50; *see also Halkbank II*, 598 U.S. at 283 (Gorsuch, J., concurring in part and dissenting in part) (concluding that "the indictment sufficiently alleges that Halkbank has engaged in . . . commercial activities"). On remand, Halkbank urges us to reassess our characterization of the charged conduct, arguing that the common law "rejected a strict governmental/commercial distinction," and that "in certain categories of core sovereign concern, commercial acts taken for a governmental purpose remained immune." Reply Br. at 22 (citing *Victory Transp.*, 336 F.2d at 360, and *Heaney*, 445 F.2d at 503–04). The government contends that the commercial activity exception under the FSIA is coextensive with that under the common law because, as the Supreme Court has recognized, "one of the primary purposes of the FSIA was to codify the restrictive theory of sovereign immunity." *Samantar*, 560 U.S. at 319–20. We need not determine the extent to which the FSIA's and common law's standards differ, however, because we conclude that Halkbank's activity charged in the indictment is commercial even if we consider, as Halkbank urges, the purpose of that activity.

In *Victory Transport*, we concluded that the "strictly political or public acts" entitled to immunity were "generally limited" to: (1) "internal administrative acts, such as expulsion of an alien"; (2) "legislative acts, such as nationalization"; (3) "acts concerning the armed forces"; (4)

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its commercial activity when the Executive has determined, through its prosecution, that the corporation should not receive such immunity.

"acts concerning diplomatic activity"; and (5) "public loans." 336 F.2d at 360. We then determined that a contract by a Spanish government agency for the transportation of wheat was not a political or public act because, even if the transaction was made "pursuant to the Surplus Agricultural Commodities Agreement to help feed the people of Spain," it was "conducted through private channels of trade" with the agency "act[ing] much like any private purchaser of wheat." *Id.* at 361. In *Heaney*, by contrast, we concluded that a contract by the Spanish government to have an individual "generate adverse publicity" against the British government in order to advance Spanish interests in Gibraltar was an "'act[] concerning diplomatic activity.'" 445 F.2d at 503–04 (quoting *Victory Transp.*, 336 F.2d at 360); *see also Heaney*, 445 F.2d at 503 n.3 (explaining that "the term 'diplomatic' in *Victory Transport* was obviously intended in the broad sense of the word and was not meant to be limited to the activities of diplomatic missions"). We rejected the argument that "all contracts, regardless of their purpose, should be deemed 'private' or 'commercial' acts," and affirmed that the criteria set forth in *Victory Transport* would govern our inquiry into the purpose of the acts. *Id.* at 504.[13]

Here, Halkbank argues that its alleged conduct constitutes political or public acts under the *Victory*

[13] In the FSIA, Congress enacted its own definition of commercial activity, which was expanded to include contracts made for a public purpose. *See Tex. Trading & Mill. Corp. v. Fed. Rep. of Nigeria*, 647 F.2d 300, 310 n.27 (2d Cir. 1981), *overruled on other grounds by Frontera Res. Azer. Corp. v. State Oil Co. of Azer. Rep.*, 582 F.3d 393 (2d Cir. 2009). However, as set forth below, we conclude that Halkbank's alleged conduct is commercial in nature even when the FSIA definition and cases interpreting that definition are disregarded.

Transport test. In particular, Halkbank argues that the indictment focuses on "internal administrative acts" of the Turkish government because it alleges that Turkey designated Halkbank as the "sole repository of proceeds from the sale of Iranian oil," App'x at 23; that certain government officials "participated in and protected [the alleged] scheme," *id.* at 20; and that the alleged scheme would "benefit the Government of Turkey" by "artificially inflat[ing] Turkey's export statistics, making its economy appear stronger than it in fact was," *id.* at 34. Halkbank further argues that the indictment implicates "acts concerning diplomatic activity" because it includes a charge based on Halkbank's alleged misrepresentations to U.S. Treasury officials regarding its compliance with sanctions against Iran. We disagree.

As we previously determined, the "gravamen" of the indictment is Halkbank's "participation in money laundering and other fraudulent schemes designed to evade U.S. sanctions." *Halkbank I*, 16 F.4th at 350. The indictment alleges that, in connection with the schemes, Halkbank "used money service businesses and front companies" and "participated in several types of illicit transactions for the benefit of Iran." App'x at 19–20; *see also id.* at 32 (alleging that Halkbank conspired to "transfer Iranian oil proceeds . . . to exchange houses and front companies . . . in order for those exchange houses and front companies to buy gold for export from Turkey"); *id.* at 33–34 (describing alleged efforts to "open[] business accounts at HALKBANK . . . in order to extract the Iranian oil proceeds to Dubai through gold exports, using Sarmayeh Exchange and Bank Sarmayeh as intermediaries"). These transactions were conducted via private, commercial banking channels and thus are "far more of the

character of a private commercial act than a public or political act." *See Victory Transp.*, 336 F.2d at 360; *see also Halkbank I*, 16 F.4th at 350 ("[B]ecause those core acts [described in the indictment] constitute an activity that could be, and in fact regularly is, performed by private-sector businesses, those acts are commercial, not sovereign, in nature." (internal quotation marks and citation omitted)).

Allegations that the charged schemes arose from Halkbank's designation as the repository of Iranian oil proceeds and benefitted Turkey's government by making its economy appear stronger do not transform Halkbank's commercial activity into "internal administrative acts," even if certain government officials were involved in the schemes. Halkbank emphasizes that it held the Iranian funds at Turkey's direction, consistent with the bilateral trade exemption under applicable U.S. sanctions laws. *See* 22 U.S.C. § 8513a(d)(4)(D). However, we rejected such an argument in *Victory Transport*, reasoning that the "purchase of wheat pursuant to the Surplus Agricultural Commodities Agreement [between the United States and Spain] to help feed the people of Spain" did not move the otherwise commercial transaction to the "political realm." 336 F.2d at 361. Although that Agreement "permitted purchasers authorized by the Government of Spain to buy various amounts of surplus commodities," *id.* at 356 n.1, such authorization—even to a government agency—did not, in our view, imbue the resulting transactions with public purpose, *see id.* at 361.[14] Halkbank's

[14] The Surplus Agricultural Commodities Agreement was entered into pursuant to the Agricultural Trade Development and Assistance Act, 7 U.S.C. §§ 1691 *et seq.* *See Victory Transp.*, 336 F.2d at 356 & n.1.

argument that its conduct served a public purpose because the charged schemes allegedly increased Turkey's export statistics is likewise unavailing, as it is well established that a motivation to advance the national economy is insufficient to confer immunity to otherwise commercial conduct. *See id.*; *see also Ruggiero v. Compania Peruana de Vapores Inca Capac Yupanqui*, 639 F.2d 872, 878 (2d Cir. 1981) (observing that, by the 1940s, "international usage" had shifted away from considering the advancement of economic welfare to be a public purpose justifying immunity).

In addition, the fact that one of the charges against Halkbank relates to its alleged misrepresentations to U.S. Treasury officials does not mean that the indictment implicates "acts concerning diplomatic activity" of Turkey. Discussions between Halkbank and U.S. Treasury officials regarding sanctions compliance are not "diplomatic," even in the "broad sense of the word." *See Heaney*, 445 F.2d at 503 & n.3. As the indictment alleges, these communications involved Halkbank officials and related to "the bank's potential involvement in Iranian sanctions evasion," App'x at 40, rather than any effort by the sovereign to affect foreign relations, *cf. Heaney*, 445 F.2d at 503.

We therefore conclude that the indictment concerns Halkbank's commercial activity, even if we consider the purpose of the alleged conduct. Because the indictment concerns Halkbank's commercial activity, the Executive's position that Halkbank is not immune from prosecution based on that activity is consistent with the scope of foreign sovereign immunity recognized at common law. Because the Executive's position is consistent with the common law, we defer to that position and conclude that

Halkbank is not immune from prosecution in this case.

Finally, in reaching this holding, we reject the policy arguments cited by Halkbank in advocating a different result. For example, Halkbank argues that, when it comes to disputes with foreign state-owned corporations, the United States should not be able to wield the tool of federal criminal prosecution because foreign states may react negatively to its use, particularly when the Executive's toolbox otherwise contains a "full arsenal of diplomacy, tariffs, investment blocks, visa limits, export controls, the grant or denial of economic assistance, military aid, and sanctions." Appellant's Br. at 56–57. However, "[t]hroughout history, courts have resolved questions of foreign sovereign immunity by deferring to the decisions of the political branches . . . ." *Altmann*, 541 U.S. at 696 (alteration adopted) (internal quotation marks and citation omitted). This approach reflects our recognition that the political branches are, unlike the judiciary, "well situated to consider sensitive foreign policy issues" and "possess significant diplomatic tools and leverage the judiciary lacks." *Munaf v. Geren*, 553 U.S. 674, 702–03 (2008) (internal quotation marks and citation omitted). Indeed, "[t]he determination to grant (or not grant) immunity can have significant implications for this country's relationship with other nations." *Ye v. Zemin*, 383 F.3d 620, 627 (7th Cir. 2004). Thus, the decision to initiate a federal criminal prosecution against a foreign state-owned corporation rather than, for example, impose tariffs or deny military aid is not one for the judiciary to second guess. *See Pasquantino*, 544 U.S. at 369 ("The greater danger, in fact, would lie in our judging this prosecution barred based on . . . foreign policy concerns . . . ,

concerns that we have neither aptitude, facilities nor responsibility to evaluate." (internal quotation marks and citation omitted)); *see also United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936) ("In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation."). "[A]s Chief Justice Marshall explained in the *Schooner Exchange*, 'exemptions from territorial jurisdiction must be derived from the consent of the sovereign of the territory' and are 'rather questions of policy than of law, that they are for diplomatic, rather than legal discussion.'" *Munaf*, 553 U.S. at 701 (alteration adopted) (quoting *Schooner Exchange*, 11 U.S. at 143, 146).

Notwithstanding this broad deference to the political branches on these matters of immunity, we leave for another day whether deference to the Executive in this context should be cabined if, unlike here, the Executive's denial of immunity to a foreign sovereign derogated from the common law—for instance, if the Executive indicted a state *qua* state. Here, the Executive made the decision to bring federal criminal charges against Halkbank for its commercial activity, and, because common-law foreign sovereign immunity imposes no bar on that prosecution, we defer to the Executive's decision not to afford such immunity in this criminal case.

III. CONCLUSION

For the foregoing reasons, we **AFFIRM** the order of the district court and **REMAND** for further proceedings consistent with this opinion.

A True Copy
Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals, Second Circuit
[SEAL]

APPENDIX B

SUPREME COURT OF THE UNITED STATES

Syllabus

TURKIYE HALK BANKASI A. S., AKA HALKBANK *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 21–1450. Argued January 17, 2023—Decided April 19, 2023

The United States indicted Halkbank, a bank owned by the Republic of Turkey, for conspiring to evade U. S. economic sanctions against Iran. Halkbank moved to dismiss the indictment on the ground that as an instrumentality of a foreign state, Halkbank is immune from criminal prosecution under the Foreign Sovereign Immunities Act of 1976. The District Court denied the motion. The Second Circuit affirmed after first determining that the District Court had subject matter jurisdiction over Halkbank's criminal prosecution under 18 U. S. C. §3231. The Second Circuit further held that even assuming the FSIA confers immunity in criminal proceedings, Halkbank's charged conduct fell within the FSIA's exception for commercial activities.

Held:

1. The District Court has jurisdiction under §3231 over this criminal prosecution of Halkbank. Section 3231 grants district courts original jurisdiction of "all offenses against the laws of the United States," and Halkbank does not dispute that §3231's text as written encompasses the charged offenses. Halkbank instead argues that because §3231 does not mention foreign states or their instrumentalities,

§3231 implicitly excludes them. The Court declines to graft such an atextual limitation onto §3231's broad jurisdictional grant. The scattered express references to foreign states and instrumentalities in unrelated U. S. Code provisions to which Halkbank points do not shrink the textual scope of §3231. And the Court's precedents interpreting the Judiciary Act of 1789 do not support Halkbank, as the Court has not interpreted the jurisdictional provisions in the 1789 Act to contain an implicit exclusion for foreign state entities. Pp. 3–5.

2. The FSIA's comprehensive scheme governing claims of immunity in civil actions against foreign states and their instrumentalities does not cover criminal cases. Pp. 5–14.

(a) The doctrine of foreign sovereign immunity originally developed in U. S. courts "as a matter of common law" rather than statute. *Samantar* v. *Yousuf*, 560 U. S. 305, 311. In 1976, Congress enacted the FSIA, which prescribed a "comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state." *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U. S. 480, 488. The text of the FSIA indicates that the statute exclusively addresses civil suits. The first provision grants district courts original jurisdiction over "any nonjury civil action against a foreign state" as to "any claim for relief in personam with respect to which the foreign state is not entitled to immunity." 28 U. S. C. §1330(a). The FSIA then sets forth a carefully calibrated set of procedures and remedies applicable exclusively in civil, not criminal, cases. Further, Congress described the FSIA as defining "the circumstances in which foreign

states are immune from suit," not from criminal investigation or prosecution. 90 Stat. 2891. In stark contrast, the FSIA is silent as to criminal matters, even though at the time of the FSIA's enactment in 1976, the Executive Branch occasionally attempted to subject foreign-government-owned entities to federal criminal investigation. If Halkbank were correct, immunity from criminal prosecution undoubtedly would have surfaced somewhere in the Act's text. Moreover, the FSIA's location in the U. S. Code—Title 28, which mostly concerns civil procedure, rather than Title 18, which addresses crimes and criminal procedure—likewise reinforces the interpretation that the FSIA does not apply to criminal proceedings. Finally, this Court's decision in *Samantar*, in which the Court analyzed the FSIA's "text, purpose, and history" and determined that the FSIA's "comprehensive solution" for suits against foreign states did not extend to suits against individual officials, 560 U. S., at 323, 325, similarly supports the conclusion here that the FSIA's provisions do not extend to the discrete context of criminal proceedings. Pp. 5–9.

(b) In response to all the evidence of the FSIA's exclusively civil scope, Halkbank claims immunity from criminal prosecution based on one sentence in the FSIA, which provides that a "foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter." 28 U. S. C. §1604. Section 1604, however, must be considered in context. Section 1604 works in tandem with §1330(a): Section 1330(a) spells out a universe of civil cases against foreign states over which district courts have

jurisdiction, and §1604 then clarifies how principles of immunity operate within that limited civil universe. Halkbank's interpretation of §1604 is also difficult to square with its view of the exceptions to immunity contained in §1605, which Halkbank insists apply exclusively in civil matters. Halkbank's §1604 argument reduces to the implausible contention that Congress enacted a statute focused entirely on civil actions and then in one provision that does not mention criminal proceedings somehow stripped the Executive Branch of all power to bring domestic criminal prosecutions against instrumentalities of foreign states. Nothing in the FSIA supports that result. Pp. 10–12.

(c) Halkbank's remaining arguments lack merit. While the Court did state in *Argentine Republic* v. *Amerada Hess Shipping Corp.* that the FSIA is the "sole basis for obtaining jurisdiction over a foreign state in federal court," 488 U. S. 428, 439, the Court made clear that the FSIA displaces general "grants of subject-matter jurisdiction in Title 28"—that is, in civil cases against foreign states, *id.*, at 437. Halkbank also warns that if the Court concludes that the FSIA does not apply in the criminal context, courts and the Executive will lack "congressional guidance" as to procedure in criminal cases. But that concern carried no weight in *Samantar*, which likewise deemed the FSIA's various procedures inapplicable to a specific category of cases—there, suits against foreign officials. And in any event, the Federal Rules of Criminal Procedure would govern any federal criminal proceedings. Finally, Halkbank argues that U. S. criminal proceedings against instrumentalities of foreign states would negatively affect national security

and foreign policy. But the Court must interpret the FSIA as written. And if existing principles do not suffice to protect national security and foreign policy interests, Congress and the President may always respond. Pp. 12–14.

3. The Second Circuit did not fully consider various common-law immunity arguments that the parties raise in this Court. The Court vacates the judgment and remands for the Second Circuit to consider those arguments. Pp. 14–16.

16 F. 4th 336, affirmed in part, vacated and remanded in part.

KAVANAUGH, J., delivered the opinion of the Court, in which ROBERTS, C. J., and THOMAS, SOTOMAYOR, KAGAN, BARRETT, and JACKSON, JJ., joined. GORSUCH, J., filed an opinion concurring in part and dissenting in part, in which ALITO, J., joined.

SUPREME COURT OF THE UNITED STATES

No. 21-1450

TURKIYE HALK BANKASI A. S., AKA HALKBANK, PETITIONER *v.* UNITED STATES

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

[April 19, 2023]

JUSTICE KAVANAUGH delivered the opinion of the Court.

The United States indicted Halkbank, a bank owned

by the Republic of Turkey, for conspiring to evade U. S. economic sanctions against Iran. The United States brought the prosecution in the U. S. District Court for the Southern District of New York. Halkbank contends that the indictment should be dismissed because the general federal criminal jurisdiction statute, 18 U. S. C. §3231, does not extend to prosecutions of instrumentalities of foreign states such as Halkbank. Halkbank alternatively argues that the Foreign Sovereign Immunities Act of 1976 provides instrumentalities of foreign states with absolute immunity from criminal prosecution in U. S. courts.

We disagree with Halkbank on both points. We hold that the District Court has jurisdiction under 18 U. S. C. §3231 over the prosecution of Halkbank. We further hold that the Foreign Sovereign Immunities Act does not provide immunity from criminal prosecution. With respect to an additional common-law immunity argument raised by Halkbank, we vacate the judgment of the Court of Appeals and remand.

I

Halkbank is a bank whose shares are majority-owned by the Turkish Wealth Fund, which in turn is part of and owned by the Republic of Turkey. In 2019, the United States indicted Halkbank for a multi-year conspiracy to evade economic sanctions imposed by the United States on Iran. The indictment alleged that Halkbank, with the assistance of high-ranking Turkish government officials, laundered billions of dollars of Iranian oil and gas proceeds through the global financial system, including the U. S. financial system, in violation of U. S. sanctions and numerous federal statutes. The indictment further claimed that Halkbank made false statements to the U. S. Treasury Department in an effort to conceal the scheme.

Two individual defendants, including a former Halkbank executive, have already been convicted in federal court for their roles in the alleged conspiracy. According to the U. S. Government, several other indicted defendants, including Halkbank's former general manager and its former head of foreign operations, remain at large.

Halkbank moved to dismiss the indictment on the ground that an instrumentality of a foreign state such as Halkbank is immune from criminal prosecution under the Foreign Sovereign Immunities Act of 1976, 28 U. S. C. §§1330, 1602 *et seq*. The U. S. District Court for the Southern District of New York denied the motion, reasoning in relevant part that the FSIA "does not appear to grant immunity in criminal proceedings." App. to Pet. for Cert. 25a, 34a.

Halkbank filed an interlocutory appeal, and the U. S. Court of Appeals for the Second Circuit affirmed. 16 F. 4th 336 (2021). The Court of Appeals first determined that the District Court has subject matter jurisdiction over this criminal prosecution under 18 U. S. C. §3231. As to the FSIA, the Court of Appeals assumed without deciding that the FSIA confers immunity in criminal proceedings to foreign states and their instrumentalities, but held that in any event Halkbank's charged conduct fell within the FSIA's exception for commercial activities.

We granted certiorari. 598 U. S. ___ (2022).

II

Halkbank first contends that the District Court lacks jurisdiction over this criminal prosecution.

Section 3231 of Title 18 provides: "The district courts

of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States." Via its sweeping language, §3231 opens federal district courts to the full range of federal prosecutions for violations of federal criminal law. By its terms, §3231 plainly encompasses Halkbank's alleged criminal offenses, which were "against the laws of the United States."

Halkbank cannot and does not dispute that §3231's text as written encompasses the offenses charged in the indictment. Halkbank nonetheless argues that the statute implicitly excludes foreign states and their instrumentalities. In support of that argument, Halkbank identifies certain civil and bankruptcy statutes that expressly refer to actions against foreign states and their instrumentalities. See 28 U. S. C. §§1330(a), 1603(a)–(b); 11 U. S. C. §§101(27), 106(a); Act of Mar. 3, 1875, ch. 137, §1, 18 Stat. 470, as amended, §3, 90 Stat. 2891. Because §3231 refers generically to "all" federal criminal offenses without specifically mentioning foreign states or their instrumentalities, Halkbank reasons that foreign states and their instrumentalities do not fall within §3231's scope.

We decline to graft an atextual limitation onto §3231's broad jurisdictional grant over "all offenses" simply because several unrelated provisions in the U. S. Code happen to expressly reference foreign states and instrumentalities. Those scattered references in distinct contexts do not shrink the textual scope of §3231, which operates "without regard to the identity or status of the defendant." C. Keitner, Prosecuting Foreign States, 61 Va. J. Int'l L. 221, 242 (2021). Nor will we create a new clear-statement rule requiring Congress to "clearly indicat[e] its intent" to include foreign states and their

instrumentalities within §3231's jurisdictional grant. Brief for Petitioner 11.

Halkbank also points to §3231's predecessor: a provision of the Judiciary Act of 1789 granting district courts "cognizance of all crimes and offences that shall be cognizable under the authority of the United States." §9, 1 Stat. 76. In Halkbank's view, other statutory provisions from that same era—including several that referred to suits against foreign actors—suggest that Congress would have expressly referenced foreign states and their instrumentalities if Congress had intended the 1789 provision to reach those entities. And Halkbank says that we should read §3231 like its predecessor provision. The premise is unsupported. The 1789 provision, like §3231 itself, contains no exception for prosecutions of foreign states or their instrumentalities. And this Court has never suggested that the 1789 provision contains an implicit exception. So the 1789 provision does not help Halkbank's argument that we should find an implicit exception in §3231.

Finally, Halkbank invokes a separate provision of the 1789 Judiciary Act granting district courts jurisdiction over "all civil causes of admiralty and maritime jurisdiction." §9, *id.*, at 77. Halkbank asserts that this Court has construed that provision not to confer jurisdiction over foreign state entities. Brief for Petitioner 22, 25 (citing *Schooner Exchange* v. *McFaddon*, 7 Cranch 116 (1812)). It follows, Halkbank says, that the 1789 Act's similar general reference to "all crimes and offences" and its successor §3231's reference to "all offenses" likewise must be interpreted not to reach foreign states and their instrumentalities.

We disagree with Halkbank's reading of our precedents. The case on which Halkbank primarily relies, *Schooner Exchange*, indeed held that a district court lacked "jurisdiction" over a suit claiming ownership of a French warship docked in a Philadelphia port. 7 Cranch, at 146–147. But *Schooner Exchange* did not address statutory subject matter jurisdiction. Instead, as this Court has since explained, *Schooner Exchange* concerned principles of foreign sovereign immunity that "developed as a matter of common law." *Samantar* v. *Yousuf*, 560 U. S. 305, 311 (2010). Contrary to Halkbank's contention, the common-law sovereign immunity recognized in *Schooner Exchange* is a "rule of substantive law governing the exercise of the jurisdiction of the courts," not an exception to a general statutory grant of subject matter jurisdiction. *Republic of Mexico* v. *Hoffman*, 324 U. S. 30, 36 (1945); see also *Ex parte Peru*, 318 U. S. 578, 587–588 (1943).

In sum, the District Court has jurisdiction under 18 U. S. C. §3231 over this criminal prosecution.

III

Relying on the Foreign Sovereign Immunities Act, Halkbank contends that it enjoys immunity from criminal prosecution. We disagree because the Act does not provide foreign states and their instrumentalities with immunity from *criminal* proceedings.

A

The doctrine of foreign sovereign immunity originally developed in U. S. courts "as a matter of common law" rather than by statute. *Samantar* v. *Yousuf*, 560 U. S. 305, 311 (2010). In determining whether to allow suits against foreign sovereigns, however, courts traditionally "deferred to the decisions of the political branches—in

particular, those of the Executive Branch." *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U. S. 480, 486 (1983); see also *Rubin* v. *Islamic Republic of Iran*, 583 U. S. ___, ___ (2018) (slip op., at 4); *Republic of Austria* v. *Altmann*, 541 U. S. 677, 689 (2004).

In 1952, the State Department announced the "restrictive" theory of foreign sovereign immunity, under which immunity was typically afforded in cases involving a foreign state's public acts, but not its strictly commercial acts. *Rubin*, 583 U. S., at ___–___ (slip op., at 4–5). In the ensuing years, the process by which the Executive Branch submitted statements regarding a foreign state's immunity sometimes led to inconsistency, particularly in light of the case-by-case diplomatic pressure that the Executive Branch received from foreign nations. *Verlinden*, 461 U. S., at 487. And when foreign states did not ask the State Department to weigh in, courts were left to render immunity rulings on their own, generally by reference to prior State Department decisions. *Opati* v. *Republic of Sudan*, 590 U. S. ___, ___ (2020) (slip op., at 2); *Verlinden*, 461 U. S., at 487.

In 1976, Congress entered the fray and sought to standardize the judicial process with respect to immunity for foreign sovereign entities in civil cases. Congress passed and President Ford signed the Foreign Sovereign Immunities Act. The FSIA prescribed a "comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state." *Id.*, at 488.

To that end, the FSIA codifies a baseline principle of immunity for foreign states and their instrumentalities. 28 U. S. C. §1604. The FSIA then sets out exceptions to that principle—including, for example, the exception for commercial activities. §§1605–1607.

The FSIA defines a "foreign state" to encompass instrumentalities of a foreign state—including entities that are directly and majority-owned by a foreign state. §§1603(a)–(b); *Dole Food Co.* v. *Patrickson*, 538 U. S. 468, 473–474 (2003). (In this case, the United States does not contest Halkbank's status as an instrumentality of a foreign state for purposes of the FSIA. Brief for United States 28; see also 16 F. 4th, at 342, n. 8.)

Since the FSIA's enactment, this Court has repeatedly stated that the statute applies in "civil" actions. See, *e.g.*, *Cassirer* v. *Thyssen-Bornemisza Collection Foundation*, 596 U. S. ___, ___ (2022) (slip op., at 5); *Republic of Argentina* v. *NML Capital, Ltd.*, 573 U. S. 134, 141 (2014); *Altmann*, 541 U. S., at 691; *Verlinden*, 461 U. S., at 488. Although the Court has not expressly held that the FSIA covers *only* civil matters, the Court has never applied the Act's immunity provisions in a criminal case.

We now hold that the FSIA does not grant immunity to foreign states or their instrumentalities in criminal proceedings. Through the FSIA, Congress enacted a comprehensive scheme governing claims of immunity in civil actions against foreign states and their instrumentalities. That scheme does not cover criminal cases.

1

To begin with, the text of the FSIA indicates that the statute exclusively addresses civil suits against foreign states and their instrumentalities. The first provision of the FSIA grants district courts original jurisdiction over "any nonjury *civil* action against a foreign state" as to "any claim for relief in personam with respect to which the foreign state is not entitled to immunity." 28 U. S. C. §1330(a) (emphasis added); 90 Stat. 2891.

The FSIA then sets forth a carefully calibrated scheme that relates only to civil cases. For instance, the sole FSIA venue provision exclusively addresses venue in a "civil action" against a foreign state. §1391(f). The Act similarly provides for removal to federal court of a "civil action" brought in state court. §1441(d). The Act prescribes detailed rules—including those governing service of "the summons and complaint," §1608(a)(1), along with "an answer or other responsive pleading to the complaint," §1608(d), as well as for any judgment of default, §1608(e)—that relate to civil cases alone. So, too, the Act's provision regarding counterclaims concerns only civil proceedings. §1607. Finally, the Act renders a non-immune foreign state "liable in the same manner and to the same extent as a private individual," except that a foreign state (but not an agency or instrumentality thereof) "shall not be liable for punitive damages." §1606. Each of those terms characterizes civil, not criminal, litigation.

Other parts of the statute underscore the FSIA's exclusively civil focus. Congress codified its finding that authorizing federal courts to determine claims of foreign sovereign immunity "would protect the rights of both foreign states and *litigants* in United States courts." §1602 (emphasis added). The statutory term "litigants" does not ordinarily sweep in governments acting in a prosecutorial capacity. See Black's Law Dictionary 1119 (11th ed. 2019) (defining "litigant" as "A party to a lawsuit; the plaintiff or defendant in a court action"). What is more, Congress described the FSIA as defining "the circumstances in which foreign states are immune *from suit*," not from criminal investigation or prosecution. 90 Stat. 2891 (emphasis added).

In stark contrast to those many provisions concerning

civil actions, the FSIA is silent as to criminal matters. The Act says not a word about criminal proceedings against foreign states or their instrumentalities. If Halkbank were correct that the FSIA immunizes foreign states and their instrumentalities from criminal prosecution, the subject undoubtedly would have surfaced somewhere in the Act's text. Congress typically does not "hide elephants in mouseholes." *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 468 (2001).

Context reinforces text. Although the vast majority of litigation involving foreign states and their instrumentalities at the time of the FSIA's enactment in 1976 was civil, the Executive Branch occasionally attempted to subject foreign-government-owned entities to federal criminal investigation. See *In re Grand Jury Investigation of Shipping Industry*, 186 F. Supp. 298, 318–320 (DC 1960); *In re Investigation of World Arrangements*, 13 F. R. D. 280, 288–291 (DC 1952). Given that history, it becomes even more unlikely that Congress sought to codify foreign sovereign immunity from criminal proceedings without saying a word about such proceedings.

Congress's determination about the FSIA's precise location within the U. S. Code bolsters that inference. Congress expressly decided to house each provision of the FSIA within Title 28, which mostly concerns civil procedure. See 90 Stat. 2891. But the FSIA did not alter Title 18, which addresses crimes and criminal procedure.

Finally, this Court's decision in *Samantar* supports the conclusion that the FSIA does not apply to criminal proceedings. In *Samantar*, we considered whether the FSIA's immunity provisions applied to a suit against an individual foreign official based on actions taken in his official capacity. 560 U. S., at 308. Analyzing the Act's "text,

purpose, and history," the Court determined that the FSIA's "comprehensive solution for suits against states" does not "exten[d] to suits against individual officials." *Id.*, at 323, 325.

As in *Samantar*, we conclude here that the FSIA's provisions concerning suits against foreign states and their instrumentalities do not extend to a discrete context—in this case, criminal proceedings. The Act's "careful calibration" of jurisdiction, procedures, and remedies for civil litigation confirms that Congress did not "cover" criminal proceedings. *Id.*, at 319. Put simply, immunity in criminal proceedings "was not the particular problem to which Congress was responding." *Id.*, at 323.

2

In response to all of that evidence of the FSIA's exclusively civil scope, Halkbank emphasizes a sentence of the FSIA codified at 28 U. S. C. §1604: "Subject to existing international agreements," a "foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter." Halkbank contends that §1604 renders it immune not only from civil suits but also from criminal prosecutions.

In complete isolation, §1604 might be amenable to that reading. But this Court has a "duty to construe statutes, not isolated provisions." *Graham County Soil and Water Conservation Dist.* v. *United States ex rel. Wilson*, 559 U. S. 280, 290 (2010) (internal quotation marks omitted). And the Court must read the words Congress enacted "in their context and with a view to their place in the overall statutory scheme." *Davis* v. *Michigan Dept. of Treasury*, 489 U. S. 803, 809 (1989). When we consider

§1604 alongside its neighboring FSIA provisions, it becomes overwhelmingly evident that §1604 does not grant immunity to foreign states and their instrumentalities in criminal matters.

Section 1330(a) is the place to start. This Court has explained that "Sections 1604 and 1330(a) work in tandem." *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U. S. 428, 434 (1989). Indeed, the public law containing the FSIA begins with §1330 and then later follows with §1604. See 90 Stat. 2891–2892. Recall that §1330(a) confers district-court jurisdiction over "any nonjury civil action against a foreign state" as to "any claim for relief in personam with respect to which the foreign state is not entitled to immunity." Section 1604 then confers immunity on foreign states unless an enumerated statutory exception applies. See §§1605–1607.

Reading the two provisions together (as we must) and sequentially (per Congress's design), the natural inference is that §1604 operates exclusively in civil cases. Section 1330(a) spells out a universe of civil (and only civil) cases against foreign states over which district courts have jurisdiction, and §1604 then clarifies how principles of immunity operate within that limited civil universe.

We thus decline to read §1604's grant of immunity to apply in criminal proceedings—a category of cases beyond the civil actions contemplated in §1330(a), the jurisdictional grant to which §1604 is substantively and sequentially linked. Before making that leap, we would expect to find some express textual indication regarding §1604's purportedly broader-than-civil scope. But none exists.

Moreover, Halkbank's interpretation of §1604 is difficult to square with its interpretation of §1605, an FSIA provision delineating exceptions to the immunity granted in §1604. Halkbank reads §1604 to confer immunity in both civil and criminal cases. But Halkbank then turns around and insists that the exceptions to that immunity specified in §1605—exceptions which, per the statute, apply "in any case"—attach exclusively in civil matters. Brief for Petitioner 43.

In other words, Halkbank sees §1330 as operating only in civil cases, §1604 in both civil and criminal cases, and §1605 only in civil cases. In Halkbank's view, the FSIA's scope awkwardly flip-flops from civil to civil-and-criminal back to civil again in sequential provisions. Congress did not write such a mangled statute. The better and more natural reading is that §§1330, 1604, and 1605 operate in tandem within a single universe of civil matters.

The FSIA's remaining provisions described above—namely, those detailing elaborate procedures and remedies applicable exclusively in civil cases—strongly buttress the conclusion that §1604 "lays down a baseline principle of foreign sovereign immunity from *civil actions*," and from civil actions alone. *Cassirer*, 596 U. S., at ___ (slip op., at 5) (emphasis added). Considering the FSIA "as a whole," there is "nothing to suggest we should read" §1604 to apply to criminal proceedings. *Samantar*, 560 U. S., at 319.

In sum, Halkbank's narrow focus on §1604 misses the forest for the trees (and a single tree at that). Halkbank's §1604 argument reduces to the implausible contention that Congress enacted a statute focused entirely on civil actions and then in one provision that does not mention criminal proceedings somehow stripped the Executive

Branch of all power to bring domestic criminal prosecutions against instrumentalities of foreign states. On Halkbank's view, a purely commercial business that is directly and majority-owned by a foreign state could engage in criminal conduct affecting U. S. citizens and threatening U. S. national security while facing no criminal accountability at all in U. S. courts. Nothing in the FSIA supports that result.

B

Halkbank advances three additional reasons why this Court should read the FSIA to immunize foreign states and their instrumentalities from criminal proceedings. None is persuasive.

First, Halkbank emphasizes this Court's statement in a 1989 case that the FSIA is the "sole basis for obtaining jurisdiction over a foreign state in federal court." *Amerada Hess*, 488 U. S., at 439. But *Amerada Hess* was not a criminal case. Rather, it was a civil case brought under the Alien Tort Statute and under the federal courts' general admiralty and maritime jurisdiction. *Id.*, at 432 (citing 28 U. S. C. §§1333, 1350). This Court has often admonished that "general language in judicial opinions" should be read "as referring in context to circumstances similar to the circumstances then before the Court and not referring to quite different circumstances that the Court was not then considering." *Illinois* v. *Lidster*, 540 U. S. 419, 424 (2004). *Amerada Hess* made clear that the FSIA displaces general "grants of subject-matter jurisdiction in Title 28"—that is, in *civil* cases against foreign states. 488 U. S., at 437 (citing 28 U. S. C. §§1331, 1333, 1335, 1337, 1338). The Court had no occasion to consider the FSIA's implications for Title 18's grant of *criminal* jurisdiction over "all" federal criminal offenses. 18

U. S. C. §3231.

At any rate, *Amerada Hess*'s rationale does not translate to the criminal context. The Court's holding as to the nonapplicability of general civil jurisdictional grants was based on the FSIA's own civil jurisdictional grant and the "comprehensiveness" of the statutory scheme as to civil matters. 488 U. S., at 434–435, and n. 3, 437 (citing 28 U. S. C. §1330(a)). But the FSIA contains no grant of criminal jurisdiction and says nothing about criminal matters—a distinct legal regime housed in an entirely separate title of the U. S. Code. The FSIA did not implicitly repeal or modify 18 U. S. C. §3231's core grant of criminal jurisdiction.

Second, Halkbank warns that courts and the Executive will lack "congressional guidance" as to procedure in criminal cases if we conclude that the FSIA does not apply in the criminal context. Brief for Petitioner 37. But that concern carried no weight in *Samantar*, which likewise deemed the FSIA's various procedures inapplicable to a specific category of cases—there, suits against foreign officials. In any event, the Federal Rules of Criminal Procedure would govern any federal criminal proceedings. And although Halkbank argues that Congress would not have been "indifferent" to criminal jury trials involving instrumentalities of foreign states, *id.*, at 38, juries already resolve similarly sensitive cases against foreign officials after *Samantar*.

Third, Halkbank briefly raises a consequentialist argument. According to Halkbank, if the FSIA does not apply to criminal proceedings, then *state* prosecutors would also be free to commence criminal proceedings against foreign states and their instrumentalities. Halkbank argues that those state prosecutions would raise

foreign policy concerns. But we must interpret the FSIA as written. And the statute simply does not grant immunity to foreign states and their instrumentalities in criminal matters.

In addition, it is not evident that the premise of Halkbank's consequentialist argument is correct. To begin with, Halkbank offers no history of state prosecutors subjecting foreign states or their instrumentalities to criminal jurisdiction. And if such a state prosecution were brought, the United States could file a suggestion of immunity. A decision by a state court to deny foreign sovereign immunity might be reviewable by this Court (a question we do not here address). Moreover, state criminal proceedings involving foreign states or their instrumentalities might be preempted under principles of foreign affairs preemption (another question we do not here address). Cf. *American Ins. Assn.* v. *Garamendi*, 539 U. S. 396 (2003). And if those principles do not apply or do not suffice to protect U. S. national security and foreign policy interests, Congress and the President may always respond by enacting additional legislation.

In short, Halkbank's various FSIA arguments are infused with the notion that U. S. criminal proceedings against instrumentalities of foreign states would negatively affect U. S. national security and foreign policy. But it is not our role to rewrite the FSIA based on purported policy concerns that Congress and the President have not seen fit to recognize. The FSIA does not provide foreign states and their instrumentalities with immunity from criminal proceedings.

IV

Although the FSIA does not immunize Halkbank

from criminal prosecution, Halkbank advances one other plea for immunity. In the context of a civil proceeding, this Court has recognized that a suit not governed by the FSIA "may still be barred by foreign sovereign immunity under the common law." *Samantar* v. *Yousuf*, 560 U. S. 305, 324 (2010). Halkbank maintains that principles of common-law immunity preclude this criminal prosecution even if the FSIA does not. To that end, Halkbank contends that common-law-immunity principles operate differently in criminal cases than in civil cases. See Brief for Petitioner 34–35, 44. And Halkbank argues that the Executive Branch cannot unilaterally abrogate common-law immunity by initiating prosecution. *Id.*, at 44.

The Government disagrees. Reasoning from pre-FSIA history and precedent, the Government asserts that the common law does not provide for foreign sovereign immunity when, as here, the Executive Branch has commenced a federal criminal prosecution of a commercial entity like Halkbank. See Brief for United States 21. In the alternative, the Government contends that any common-law immunity in criminal cases would not extend to commercial activities such as those undertaken by Halkbank. *Id.*, at 16–21.

The Court of Appeals did not fully consider the various arguments regarding common-law immunity that the parties press in this Court. See 16 F. 4th, at 350–351. Nor did the Court of Appeals address whether and to what extent foreign states and their instrumentalities are differently situated for purposes of common-law immunity in the criminal context. We express no view on those issues and leave them for the Court of Appeals to consider on remand. Cf. *Samantar*, 560 U. S., at 325–326.

* * *

With respect to the holding of the Court of Appeals that the District Court has jurisdiction under 18 U. S. C. §3231, we affirm. With respect to the holding of the Court of Appeals that the FSIA does not provide immunity to Halkbank, we affirm on different grounds—namely, that the FSIA does not apply to criminal proceedings. With respect to common-law immunity, we vacate the judgment of the Court of Appeals and remand for the Court of Appeals to consider the parties' common-law arguments in a manner consistent with this opinion.

It is so ordered.

Opinion of GORSUCH, J.

SUPREME COURT OF THE UNITED STATES

No. 21-1450

TURKIYE HALK BANKASI A. S., AKA HALKBANK, PETITIONER *v.* UNITED STATES

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

[April 19, 2023]

JUSTICE GORSUCH, with whom JUSTICE ALITO joins, concurring in part and dissenting in part.

For almost a half century, judges have known where to turn for guidance when deciding whether a foreign sovereign is susceptible to suit in an American court: Congress's directions in the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U. S. C. §1602 *et seq*. Sometimes the FSIA authorizes American courts to hear cases against foreign sovereigns; sometimes the statute

immunizes foreign sovereigns from suit. Today, however, the Court holds that the FSIA's rules apply only in *civil* cases. To decide whether a foreign sovereign is susceptible to *criminal* prosecution, the Court says, federal judges must consult the common law. Respectfully, I disagree. The same statute we routinely use to analyze sovereign immunity in civil cases applies equally in criminal ones.

I

I begin from common ground. Congress has vested federal courts with subject-matter jurisdiction over cases involving "offenses against the laws of the United States." 18 U. S. C. §3231. The Court holds that this statute permits federal courts to hear cases alleging offenses committed by foreign sovereigns. I agree. As the Court explains, §3231's language grants subject-matter jurisdiction in broad terms without regard to the nature of the defendant; nor are we free to "graft an atextual limitation onto" the law that would exempt foreign sovereigns from its reach. *Ante*, at 3. Of course, Türkiye Halk Bankasi (Halkbank) asserts that it is a sovereign entity and, as such, enjoys immunity from prosecution. But that does not change a thing. Generally, questions about sovereign immunity do not go to a court's subject-matter jurisdiction (something a court must consider in every case even if the parties do not). Instead, questions of sovereign immunity usually go to a court's personal jurisdiction over a particular defendant. And as with other personal-jurisdiction defenses, a sovereign may waive its immunity and consent to judicial proceedings if it wishes. See *PennEast Pipeline Co.* v. *New Jersey*, 594 U. S. ___, ___ (2021) (GORSUCH, J., dissenting) (slip op., at 2).

From that common ground, however, I part ways

with the Court. Like the Second Circuit, I would analyze Halkbank's assertion of sovereign immunity under the terms of the FSIA. Start with 28 U. S. C. §1604, which sets forth the FSIA's general immunity rule. It provides in relevant part that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter." Elsewhere, the statute defines a "foreign state" to include an "agency or instrumentality of a foreign state." §1603(a). And the statute defines an "agency or instrumentality" to include any "separate legal person," such as a corporation, that is an "organ" or "subdivision" of a foreign state and majority owned by a foreign state. §1603(b)(1)–(2).

Applying those rules here yields a ready answer. Halkbank is a corporation that is majority-owned by the government of Turkey. 16 F. 4th 336, 349 (CA2 2021). Accordingly, it qualifies as a foreign state entitled to immunity from suit under §1604 unless one of the exceptions provided in §§1605–1607 applies. And, it turns out, one such exception does apply. Section 1605(a)(2) instructs that a foreign sovereign is not entitled to immunity when "the action is based upon" certain "commercial activity" in or affecting the United States. In this case, the indictment sufficiently alleges that Halkbank has engaged in just those kinds of commercial activities. See No. 15 Cr. 867 (SDNY, Oct. 1, 2020), App. to Pet. for Cert. 36a–38a. Of course, this case comes to us on a motion to dismiss the indictment, and the question of immunity may be revisited as the case proceeds. But for now, nothing in the law precludes this suit, just as the Second Circuit held.

That the FSIA tells us all we need to know to resolve the sovereign immunity question in this case can come as

no surprise. This Court has long acknowledged that "the [FSIA] must be applied by the district courts in every action against a foreign sovereign." *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U. S. 480, 493 (1983). As we have put it, "any sort of immunity defense made by a foreign sovereign in an American court must stand on the Act's text. Or it must fall." *Republic of Argentina* v. *NML Capital, Ltd.*, 573 U. S. 134, 141–142 (2014). It's a rule that follows directly from the statutory text because "Congress established [in the FSIA] a comprehensive framework for resolving any claim of sovereign immunity." *Republic of Austria* v. *Altmann*, 541 U. S. 677, 699 (2004).

II

Despite all this, the Court declines to apply the FSIA's directions governing foreign sovereign immunity. It holds that the statute's general immunity rule in §1604 speaks only to *civil* disputes. Any question about a foreign sovereign's immunity from *criminal* prosecution, the Court insists, must therefore be resolved under common-law principles. *Ante*, at 7, 15. In aid of its conclusion, the Court offers three principal arguments. But to my mind, none packs the punch necessary to displace the plain statutory text.

First, the Court points to 28 U. S. C. §1330. That provision grants federal courts subject-matter jurisdiction over civil cases against foreign sovereigns when one of the exceptions provided in §§1605–1607 applies. From this grant of civil jurisdiction, the Court reasons, it is a "natural inference" that §1604's immunity rule must apply only in civil cases. *Ante*, at 11. More naturally, however, it seems to me that any inference from §1330 runs the other way. Section 1330 shows that when Congress wanted to

limit its attention to civil suits, it knew how to do so. Section 1604 contains no similar language restricting its scope to civil disputes. Instead, it speaks far more broadly, holding that a foreign state "shall be immune" unless a statutorily specified exception applies. Normally, when Congress includes limiting language in one section of a law but excludes it from another, we understand the difference in language to convey a difference in meaning (*expressio unius est exclusio alterius*). See, *e.g.*, *Bittner* v. *United States*, 598 U. S. 85, 94 (2023); *Department of Homeland Security* v. *MacLean*, 574 U. S. 383, 391 (2015). The Court's interpretation of the FSIA defies this traditional rule of statutory construction. Today, the Court does to §1604 exactly what it recognizes we may not do to §3231—grafting an atextual limitation onto the law's unambiguous terms (in this instance, adding a "civil"-only restriction).

Second, the Court suggests we should read §1604 as affording immunity only in civil cases because §1605's exceptions apply only in civil cases. *Ante*, at 11. But here both the premise and the conclusion seem to me mistaken. If some of §1605's exceptions apply only in civil cases, others speak more expansively. Take the exception relevant here. The commercial-activities exception found in §1605(a)(2) denies sovereign immunity "*in any case* . . . in which the action is based upon a commercial activity carried on in the United States by the foreign state." (Emphasis added). Nowhere does this exception distinguish between civil and criminal actions. Besides, even if the Court's premise were correct and §1605's exceptions (somehow) applied only in civil actions, what would that prove? It might simply mean that Congress wanted a more generous immunity from criminal proceedings than

civil suits.

Finally, the Court points to the FSIA's provisions regulating the venue and removal of civil actions against foreign sovereigns. *Ante*, at 7–8 (discussing §§1391(f) and 1441(d)). But once more, it seems to me this shows only that Congress knew how to speak specifically to civil suits when it wished to do so. Congress may have had reason to be especially concerned about the venue for civil suits too, given that almost all efforts to hale foreign sovereigns into U. S. courts have involved civil claims. Indeed, the parties and their *amici* struggled to find examples of criminal charges brought against foreign sovereigns either before or after the FSIA's adoption—not only in the United States, but in any country. Compare Brief for United States 25–26 with Reply Brief 7–9. I might be willing to spot the Court that the venue and removal provisions could help illuminate §1604's scope if that statute were ambiguous. But no one suggests that we have anything like that here. Section 1604 is as clear as a bell and we must abide by its direction that foreign sovereigns "shall be immune" absent some express statutory exception.

III

After declaring that the FSIA applies only to civil suits, the Court holds that "the common law" controls the disposition of any claim of foreign sovereign immunity in criminal cases. *Ante*, at 15. Yet rather than decide whether the common law shields Halkbank from this suit, the Court shunts the case back to the Second Circuit to figure that out. All of which leaves litigants and our lower court colleagues with an unenviable task, both in this case and others sure to emerge. Many thorny questions lie down the "common law" path and the Court fails to supply

guidance on how to resolve any of them.

Right out of the gate, lower courts will have to decide between two very different approaches. One option is to defer to the Executive Branch's judgment on whether to grant immunity to a foreign sovereign—an approach sometimes employed by federal courts in the years immediately preceding the FSIA's adoption. The other option is for a court to make the immunity decision looking to customary international law and other sources. Compare Brief for United States 21–26 with Brief for Professor Ingrid (Wuerth) Brunk et al. as *Amici Curiae* 6–25.

Whichever path a court chooses, more questions will follow. The first option—deferring to the Executive—would seem to sound in separation-of-powers concerns. But does this mean that courts should not be involved in making immunity determinations at all? And what about the fact that the strong deference cases didn't appear until the 20th century; were courts acting unconstitutionally before then? If not, should we be concerned that deference to the Executive's immunity decisions risks relegating courts to the status of potted plants, inconsistent with their duty to say what the law is in the cases that come before them? See, *e.g.*, Brief for Professor Ingrid (Wuerth) Brunk et al. as *Amici Curiae* 17–21.

The second option—applying customary international law—comes with its own puzzles. If the briefing before us proves anything, it is that customary international law supplies no easy answer to the question whether a foreign sovereign enjoys immunity from criminal prosecution. Compare Brief for Professor Roger O'Keefe as *Amicus Curiae* 11–16 with Brief for Mark B. Feldman et al. as *Amici Curiae* 12–13. Nor is it even altogether clear on what authority federal courts might

develop and apply customary international law. Article VI of the Constitution does not list customary international law as federal law when it enumerates sources of "the supreme Law of the Land." And Article I vests Congress rather than the Judiciary with the power to "define and punish . . . Offences against the Law of Nations." §8, cl. 10. See *Sosa* v. *Alvarez-Machain*, 542 U. S. 692, 739–742 (2004) (Scalia, J., concurring in part and concurring in judgment); *Jesner* v. *Arab Bank, PLC*, 584 U. S. ___, ___–___ (2018) (GORSUCH, J., concurring in part and concurring in judgment) (slip op., at 4–5); *Nestlé USA, Inc.* v. *Doe*, 593 U. S. ___, ___ (2021) (GORSUCH, J., concurring) (slip op., at 3).

Perhaps Article III incorporated customary international law into federal common law. But since *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), federal courts have largely disclaimed the power to develop federal common law outside of a few reserved areas. See *Sosa*, 542 U. S., at 740–742 (opinion of Scalia, J.). And whether customary international law survives as a form of federal common law after *Erie* is a matter of considerable debate among scholars. Compare C. Bradley & J. Goldsmith, Customary International Law as Federal Common Law: A Critique of the Modern Position, 110 Harv. L. Rev. 815 (1997), with H. Koh, Is International Law Really State Law?, 111 Harv. L. Rev. 1824 (1998). Must lower courts confront this long-running debate to resolve a claim of foreign sovereign immunity in criminal cases? And if there is no federal law at work here that might apply under the Supremacy Clause, only general common-law principles, what constraints remain on *state* prosecutions of foreign sovereigns?

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Today's decision overcomplicates the law for no good reason. In the FSIA, Congress supplied us with simple rules for resolving this case and others like it. Respectfully, I would follow those straightforward directions to the same straightforward conclusion the Second Circuit reached: This case against Halkbank may proceed.

APPENDIX C

In the
United States Court of Appeals
for the Second Circuit

AUGUST TERM 2020

NO. 20-3499-cr

UNITED STATES OF AMERICA,
Appellee,

v.

TURKIYE HALK BANKASI A.S., AKA HALKBANK,
Defendant-Appellant,

REZA ZARRAB, AKA RIZA SARRAF, CAMELIA JAMSHIDY, AKA KAMELIA JAMSHIDY, HOSSEIN NAJAFZADEH, MOHAMMAD ZARRAB, AKA CAN SARRAF, AKA KARTALMSD, MEHMET HAKAN ATILLA, MEHMET ZAFER CAGLAYAN, ABI, SULEYMAN ASLAN, LEVENT BALKAN, ABDULLAH HAPPANI,
Defendants.

Appeal from the United States District Court
for the Southern District of New York

ARGUED: APRIL 12, 2021
DECIDED: OCTOBER 22, 2021

Before: KEARSE, CABRANES, and BIANCO, *Circuit Judges*.

This case presents two questions. First, whether a denial of a motion to dismiss a criminal indictment based on the Foreign Sovereign Immunities Act ("FSIA") is immediately appealable under the collateral order doctrine. Second, whether FSIA confers immunity on foreign sovereigns from criminal prosecutions. We answer the first question in the affirmative. As to the second, we hold that even if we were to assume that FSIA confers immunity in the criminal context, the offense conduct with which Defendant-Appellant Turkiye Halk Bankasi A.S. is charged would fall under the commercial activity exception to FSIA. Accordingly, we **DENY** the Government's motion to dismiss this appeal, and we **AFFIRM** the Decision and Order of the United States District Court for the Southern District of New York (Richard M. Berman, *Judge*).

SIDHARDHA KAMARAJU (Michael D. Lockard, David W. Denton, Jr., Jonathan E. Rebold, Thomas McKay, *on the brief*), Assistant United States Attorneys, *for* Damian Williams, United States Attorney for the Southern District of New York, New York, NY, *for Appellee.*

SIMON A. LATCOVICH (Robert M. Cary, Eden Schiffmann, James W. Kirkpatrick, *on the brief*), Williams & Connolly, LLP,

Washington, D.C., *for Defendant- Appellant*.

JOSÉ A. CABRANES, *Circuit Judge*:

This case presents two questions. First, whether a denial of a motion to dismiss a criminal indictment based on the Foreign Sovereign Immunities Act ("FSIA") is immediately appealable under the collateral order doctrine. Second, whether FSIA confers immunity on foreign sovereigns from criminal prosecutions. We answer the first question in the affirmative. As to the second, we hold that even if we were to assume that FSIA confers immunity in the criminal context, the offense conduct with which Defendant-Appellant Turkiye Halk Bankasi A.S. ("Halkbank") is charged would fall under the commercial activity exception to FSIA. Accordingly, we **DENY** the Government's motion to dismiss this appeal, and we **AFFIRM** the Decision and Order of the United States District Court for the Southern District of New York (Richard M. Berman, *Judge*).

I. BACKGROUND

Halkbank is a commercial bank that is majority-owned by the Government of Turkey.

In 2019 a grand jury returned a Superseding Indictment (the "Indictment") charging Halkbank with participating in a multi-year scheme to launder billions of dollars' worth of Iranian oil and natural gas proceeds in violation of U.S. sanctions against the Government of Iran and Iranian entities and persons. The oil and natural gas proceeds were held in Halkbank accounts on behalf of the

Central Bank of Iran ("CBI"), the National Iranian Oil Company ("NIOC"), and the National Iranian Gas Company ("NIGC").[1]

The Indictment alleged that Halkbank knowingly facilitated certain types of illegal transactions, including: (1) "allowing the proceeds of sales of Iranian oil and gas deposited at Halkbank to be used to buy gold for the benefit of the Government of Iran"; (2) "allowing the proceeds of sales of Iranian oil and gas deposited at Halkbank to be used to buy gold that was not exported to Iran";[2] and (3)

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[1] It is not disputed that the CBI, NIOC, and NIGC were all subject to U.S. sanctions during the charged offense conduct or indictment period.

[2] The National Defense Authorization Act for Fiscal Year 2012 (the "2012 NDAA"), Pub. L. No. 112-81, requires the imposition of sanctions on foreign financial institutions following a determination by the President that the institution has violated certain prohibitions on activities with respect to the Central Bank of Iran or another Iranian financial institution designated under the International Emergency Economic Powers Act ("IEEPA"). *See generally* U.S. Dep't of the Treasury, *Frequently Asked Questions: Iran Sanctions*, available at https://home.treasury.gov/policy-issues/financial-sanctions/faqs/topic/1551 (last accessed August 17, 2021) (FAQs 169-70). Government-owned foreign financial institutions, like Halkbank, are prohibited from engaging in transactions for the sale or purchase of petroleum or petroleum products to or from Iran. *See id* (FAQ 170). Under the terms of the 2012 NDAA, foreign countries could be exempted from sanctions for purchasing Iranian oil so long as they significantly reduced their purchases of such products from Iran, the so-called "significant reduction exception." *See id.* (FAQ 235).

Section 504 of the Iran Threat Reduction and Syria Human Rights Act of 2012, 22 U.S.C. §§ 8711, *et seq.*, ("ITRA") narrowed the significant reduction exception "to (a) exempt from sanctions only transactions that conduct or facilitate bilateral trade in goods or services between the country granted the exception and Iran, and (b) require that funds owed to Iran as a result of the bilateral trade be credited to an account located in the country granted the exception

"facilitating transactions fraudulently designed to appear to be purchases of food and medicine by Iranian customers, in order to appear to fall within the so-called 'humanitarian exception'[3] to certain sanctions against the Government of Iran, when in fact no purchases of food or medicine actually occurred."[4]

Through the charged scheme, Halkbank allegedly transferred approximately $20 billion of otherwise restricted Iranian funds in order to create a "pool of Iranian oil funds . . . held in the names of front companies, which concealed the funds' Iranian nexus."[5] These funds were

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and not be repatriated to Iran," or the "bilateral trade restriction." *See* U.S. Dep't of the Treasury, *Frequently Asked Questions: Iran Sanctions* (FAQs 254-55). Under this provision, as is relevant here, the proceeds of oil sales by Iran to another country, like Turkey, are to be deposited in an escrow account in the purchasing country and may only be used by Iran for further trade with that country (*i.e.*, for trade between Turkey and Iran). *See* 22 U.S.C. § 8513a(d)(4)(D). Subsequently, under the Iran Freedom and Counter-Proliferation Act ("IFCA"), passed as part of the National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, sanctions may apply to foreign financial institutions that conduct or facilitate a transaction for the sale, supply, or transfer of natural gas to or from Iran unless, as with proceeds from Iran's oil sales, any funds owed to Iran as a result of the trade are credited to an account located in the purchasing country. *See* U.S. Dep't of the Treasury, *Frequently Asked Questions: Iran Sanctions* (FAQs 297, 313).

[3] The 2012 NDAA included an exception for transactions for the sale of food, medicine, or medical devices to Iran. *See id.* (FAQ 641) ("Transactions for the sale of agricultural commodities, food, medicine, or medical devices to Iran involving the [CBI] are excepted from the relevant sanctions under section 1245(d)(2) of the NDAA 2012 and sections 561.203 and 561.204 of the Iranian Financial Sanctions Regulations. . . . ").

[4] Indictment ¶ 4.

[5] *Id.* ¶¶ 4, 6.

then used to make international payments on behalf of the Government of Iran and Iranian banks, including at least $1 billion in dollar-denominated transfers that passed through the U.S. financial system in violation of U.S. law.

Further, Halkbank executives, acting within the scope of their employment and for the benefit of Halkbank, are alleged to have concealed the true nature of the transactions Halkbank made on behalf of the Government of Iran from officials at the U.S. Department of the Treasury (the "Treasury").[6] To conceal these transactions, Halkbank officers allegedly conspired with Reza Zarrab, an Iranian-Turkish businessman, and other Turkish and Iranian government officials, some of whom are alleged to have received millions of dollars from the proceeds of the scheme in exchange.[7]

Halkbank was charged in the six-count Indictment with: conspiring to defraud the United States by obstructing the lawful functions of the Treasury, in violation of 18 U.S.C. § 371 (Count One); conspiring to violate or cause

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[6] These executives included: (1) Halkbank's former General Manager, Suleyman Aslan; (2) Halkbank's former Deputy General Manager for International Banking, Mehmet Hakan Atilla, who was responsible for maintaining Halkbank's correspondent banking relationships, including with U.S. correspondent banks, and for maintaining Halkbank's relationships with Iranian banks, including the Central Bank of Iran; and (3) the former head of Halkbank's Foreign Operations Department, Levent Balkan. These individual defendants are not parties to the present appeal; the Government informs us that Aslan and Balkan were charged separately and remain at large, while Atilla was convicted, following a jury trial, of offenses charged separately. *See United States v. Atilla*, 966 F.3d 118 (2d Cir. 2020); Gov't Br. at 4-5 n.2.

[7] Zarrab pleaded guilty to the charges against him in relation to this scheme on October 26, 2017.

violations of licenses, orders, regulations, and prohibitions issued under the International Emergency Economic Powers Act ("IEEPA"), codified at 50 U.S.C. §§ 1701-06 (Count Two); bank fraud, in violation of 18 U.S.C. § 1344 (Count Three); conspiring to commit bank fraud, in violation of 18 U.S.C. § 1349 (Count Four); money laundering, in violation of 18 U.S.C. § 1956(a)(2)(A) (Count Five); and conspiring to commit money laundering, in violation of 18 U.S.C. § 1956(h) (Count Six).

On August 10, 2020, Halkbank moved to dismiss the Indictment, arguing that FSIA renders it immune from criminal prosecution because it is majority-owned by the Turkish Government.[8] Halkbank further argued that FSIA's exceptions to immunity are applicable only in civil cases—not in criminal cases—and that, in any event, even if FSIA's exceptions did apply in the criminal context, the conduct with which Halkbank is charged does not fall within the ambit of FSIA's so-called "commercial activity" exception. Finally, even if FSIA did not bar its prosecution, Halkbank argued that it was nevertheless entitled to immunity from prosecution under the common law.

Following briefing and oral argument, the District Court denied Halkbank's motion in a Decision and Order dated October 1, 2020. The District Court principally concluded that Halkbank was not immune from prosecution because FSIA confers immunity on foreign sovereigns

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[8] The parties do not dispute that Halkbank is an "instrumentality of a foreign state" for purposes of FSIA. *See* Halkbank Br. at 8. Under FSIA, an "instrumentality of a foreign state" includes "any entity" for which "a majority of [its] shares or other ownership interest is owned by a foreign state." 28 U.S.C. § 1603(b)(2). For purposes of this opinion, we use foreign sovereign and foreign state interchangeably.

only in civil proceedings. The District Court went on to conclude that, even assuming *arguendo* that FSIA did confer immunity to foreign sovereigns in criminal proceedings, Halkbank's conduct would fall within FSIA's commercial activity exception. The District Court also rejected Halkbank's contention that it was entitled to immunity from prosecution under the common law, noting that Halkbank failed to cite any support for its claim on this basis. Halkbank timely appealed.

On appeal, Halkbank moved to stay the District Court proceedings pending resolution of this appeal, which the Government opposed. The Government then moved to dismiss Halkbank's appeal, taking the position that the District Court's denial of Halkbank's motion to dismiss the Indictment on the basis of foreign sovereign immunity is not subject to interlocutory review by our Court.

A motions panel of our Court granted Halkbank's motion for a stay and referred the decision on the Government's motion to dismiss to the merits panel.

II. DISCUSSION

A. Appellate Jurisdiction

As a threshold matter, we must consider whether we have jurisdiction over this appeal, which is taken from the District Court's denial of Halkbank's motion to dismiss the Indictment on the basis of foreign sovereign immunity.

The Government challenges our jurisdiction, asserting that the District Court's sovereign immunity determination is neither a final judgment nor an order that qualifies for interlocutory appeal. We do not agree.

While Congress has limited our jurisdiction to "final decisions of the district courts,"[9] we have recognized a narrow exception to the final judgment rule that permits interlocutory appeals from certain "collateral orders." It is well established that, to qualify for interlocutory appeal under the collateral order doctrine, a decision must: (1) "conclusively determine the disputed question"; (2) "resolve an important issue completely separate from the merits of the action"; and (3) "be effectively unreviewable on appeal from a final judgment."[10]

We have "consistently held that [a] threshold [foreign] sovereign-immunity determination is immediately reviewable under the collateral-order doctrine."[11] But, as the Government points out, our holding on this point concerned a sovereign immunity determination in the civil, not criminal, context. Because the Supreme Court has made clear that the collateral order doctrine is to be applied in criminal cases with the "utmost strictness,"[12] the Government argues that a threshold sovereign immunity determination in a criminal case cannot qualify for the collateral order exception to the final judgment rule.

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[9] 28 U.S.C. § 1291.

[10] *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978), *superseded on other grounds by* Fed. R. Civ. P. 23(f).

[11] *Funk v. Belneftekhim*, 861 F.3d 354, 363 (2d Cir. 2017) (first alteration in original) (internal quotation marks omitted).

[12] *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 799 (1989) (internal quotation mars omitted). Indeed, the Supreme Court has recognized just four categories of orders that are immediately appealable in criminal cases: (1) denials of motions to reduce bail; (2) denials of motions to dismiss on double-jeopardy grounds; (3) denials of motions to dismiss under the Speech or Debate Clause, and (4) orders for the forced medication of criminal defendants. *See id.*; *Sell v. United States*, 539 U.S. 166, 176-77 (2003).

It is true that the Supreme Court has "emphasized that one of the principal reasons for . . . strict adherence to the doctrine of finality in criminal cases is that the Sixth Amendment guarantees a speedy trial."[13] Still, that the Supreme Court has not *yet* held that a sovereign immunity determination in a criminal case falls within the collateral order doctrine does not necessarily foreclose that outcome.[14]

Indeed, where, as here, a sovereign immunity determination in the criminal context plainly satisfies the criteria set forth by the Supreme Court in *Coopers & Lybrand*, applied with the "utmost strictness," it qualifies for interlocutory review. First, the District Court's sovereign immunity determination conclusively determined the issue against Halkbank.[15] Second, Halkbank's professed entitlement to immunity is an issue distinct from the merits of the charges at issue.[16] Third, an "appeal from [a] final judgment cannot repair the damage caused to a sovereign that is improperly required to litigate a case."[17] Put another way, "the denial of immunity is effectively unreviewable after final judgment because

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[13] *United States v. MacDonald*, 435 U.S. 850, 861 (1978) (internal quotation marks and alteration omitted).

[14] Our Circuit has also held that commitment orders, *United States v. Magassouba*, 544 F.3d 387, 400 (2d Cir. 2008), and orders allowing the government to try a juvenile as an adult, *United States v. Doe*, 49 F.3d 859, 865 (2d Cir. 1995), are immediately appealable in criminal cases.

[15] *See Funk*, 861 F.3d at 362-63.

[16] *See id.* at 363.

[17] *EM Ltd. v. Banco Central de la Republica Argentina*, 800 F.3d 78, 87 (2d Cir. 2015); *see also Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1317 (2017) (observing that the "basic objective" of foreign sovereign immunity is

defendants must litigate the case to reach judgment and, thus, lose the very immunity from suit to which they claim to be entitled."[18]

In sum, we hold that a threshold sovereign immunity determination is immediately appealable pursuant to the collateral order doctrine—even in a criminal case. Accordingly, we have jurisdiction to review the District Court's sovereign immunity determination.

B. Subject Matter Jurisdiction

On appeal, Halkbank principally contends that the District Court lacks subject matter jurisdiction because it has sovereign immunity from criminal prosecution under § 1604 of FSIA, which grants immunity to foreign sovereigns "from the jurisdiction of the courts of the United States," unless a statutory exception applies.[19]

i. Standard of Review

On appeal, "[w]e review *de novo* a district court's legal determinations regarding its subject matter jurisdiction, such as whether sovereign immunity exists, and its factual determinations for clear error."[20]

ii. The Foreign Sovereign Immunities Act

It is well established that Article III of the United States Constitution grants federal courts jurisdiction to

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"to free a foreign sovereign from *suit*" so that it should be decided "as near to the outset of the case as is reasonably possible" (emphasis in original)).

[18] *Funk*, 861 F.3d at 363.

[19] 28 U.S.C. § 1604.

[20] *Petersen Energía Inversora S.A.U. v. Argentine Republic & YPF S.A.*, 895 F.3d 194, 203 (2d Cir. 2018) (internal quotation marks omitted).

hear claims involving "foreign States."[21] Still, for most of our history, foreign sovereigns enjoyed absolute immunity in U.S. courts as "a matter of grace and comity"[22] in light of the "perfect equality and absolute independence of sovereigns."[23] Accordingly, federal courts "consistently . . . deferred to the decisions of the political branches—in particular, those of the Executive Branch—on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities."[24] In practice, the U.S. Department of State would routinely make requests for immunity in all actions against "friendly sovereigns."[25]

Then, in 1952, the Acting Legal Adviser to the State Department, Jack B. Tate, issued a letter announcing the State Department's adoption of a so-called "restrictive" theory of foreign sovereign immunity.[26] Under this theory, the State Department would take the position that foreign sovereigns were not immune from liability in U.S. courts for acts that are "private or commercial in character (*jure gestionis*)"; rather, foreign sovereigns would only enjoy immunity for their "sovereign or public acts

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[21] U.S. CONST. art III, § 2, cl. 1.

[22] *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983).

[23] *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 137 (1812).

[24] *Verlinden*, 461 U.S. at 486.

[25] *Samantar v. Yousef*, 560 U.S. 305, 312 (2010).

[26] Letter from Jack B. Tate, Acting Legal Adviser, Dep't of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), *reprinted in* 26 Dep't of State Bull. 984–85 (1952) *and in Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 711-15 (1976) (App'x 2 to opinion of White, *J.*).

(*jure imperii*)."[27] The State Department's new position threw immunity determinations for foreign sovereigns into "disarray."[28] Indeed, foreign nations lobbied the State Department for immunity, with the result that "political considerations sometimes led the Department to file suggestions of immunity in cases where immunity would not have been available under the restrictive theory."[29] And, when foreign nations did not request immunity from the State Department, the federal courts were left to "determine whether sovereign immunity existed, generally by reference to prior State Department decisions."[30] As a result, "sovereign immunity determinations were made in two different branches, subject to a variety of factors [that] sometimes include[d] diplomatic considerations" and "the governing standards were neither clear nor uniformly applied."[31]

As discussed in a recent case, the consequent "inconsistent application of sovereign immunity" attracted Congressional notice.[32] In 1976 Congress enacted FSIA to "endorse and codify the [State Department's] restrictive theory of sovereign immunity" and to "transfer

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[27] *Saudi Arabia v. Nelson*, 507 U.S. 349, 359-60 (1993).

[28] *Republic of Austria v. Altmann*, 541 U.S. 677, 690 (2004).

[29] *Id.* (internal quotation marks omitted); *see also* Curtis A. Bradley & Jack L. Goldsmith, *Foreign Sovereign Immunity, Individual Officials, and Human Rights Litigation*, 13 GREEN BAG 2D 9, 19 (2009) ("[T]he pre-FSIA common law regime of executive discretion in determining foreign sovereign immunity" was "characterized by unprincipled conferrals of immunity based on the political preferences of the presidential administration and case-by-case diplomatic pressures.")

[30] *Altmann*, 541 U.S. at 690 (internal quotation marks omitted).

[31] *Id.* at 691 (internal quotation marks omitted).

[32] *Samantar*, 560 U.S. at 313.

primary responsibility for deciding claims of foreign states to immunity from the State Department to the courts."[33] Under § 1604 of FSIA, foreign sovereigns are "immune from the jurisdiction of the courts of the United States,"[34] with certain exceptions, including an exception for the "commercial activity" of a foreign sovereign.[35] FSIA also grants subject matter jurisdiction to federal district courts over "any nonjury civil action against a foreign state . . . to which the foreign state is not entitled to immunity."[36]

iii. FSIA in the Criminal Context

By enacting FSIA, Congress established a comprehensive framework "governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities."[37] By its terms, FSIA plainly confers immunity on foreign sovereigns from civil actions—albeit with certain exceptions.[38] What is less clear, however, is whether Congress also intended for FSIA to confer immunity on instrumentalities of foreign sovereigns in criminal cases.[39]

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[33] *Id.* (internal quotation marks omitted); *see also* 28 U.S.C. § 1602 (setting forth Congressional findings and the purposes of FSIA).

[34] 28 U.S.C. § 1604 ("Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.").

[35] *Id.* § 1605(a)(2).

[36] *Id.* § 1330(a).

[37] *Verlinden*, 461 U.S. at 488.

[38] *See* 28 U.S.C. § 1330(a).

[39] Other circuits to consider FSIA's availability in criminal cases have split. *Compare Southway v. Cent. Bank of Nigeria*, 198 F.3d

Halkbank takes the position that § 1604 of FSIA confers immunity on foreign sovereigns and their instrumentalities from criminal prosecution. In particular, Halkbank argues that § 1604, which confers immunity (with enumerated exceptions) on foreign sovereigns "from the jurisdiction of the courts of the United States," must be read "in tandem"[40] with a separate provision of FSIA, § 1330(a), which grants district courts jurisdiction over "any nonjury *civil* action against a foreign state."[41] Thus, Halkbank urges that, the *absence* of any express grant of criminal jurisdiction over foreign sovereigns in § 1330(a), combined with § 1604's general grant of immunity to foreign sovereigns from the jurisdiction of U.S. courts, necessarily leads to the conclusion that foreign sovereigns and their instrumentalities are immune from criminal prosecution.

As an initial matter, to the extent Halkbank's challenge rests on the idea that FSIA is the sole basis for the District Court's subject matter jurisdiction over this criminal prosecution, that premise is incorrect.[42] It is true that

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1210, 1215 (10th Cir. 1999) (concluding in the context of a civil Racketeer Influenced and Corrupt Organizations Act ("RICO") claim that if Congress intended defendants such as the Republic of Nigeria "to be immune from criminal indictment under the FSIA, Congress should amend the FSIA to expressly so state"), *and United States v. Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997) (same, in a case involving head-of-state immunity*), with Keller v. Cent. Bank of Nigeria*, 277 F.3d 811, 820 (6th Cir. 2002) (considering FSIA in the context of civil RICO, but holding that FSIA does apply to criminal cases).

[40] *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989).

[41] 28 U.S.C. § 1330(a) (emphasis added).

[42] In support of this proposition Halkbank relies on *Amerada Hess*, in which the Supreme Court wrote that "the text and structure

we have held, in the civil context, that "FSIA provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country."[43] But federal district courts have "original jurisdiction, exclusive of the courts of the States, of *all* offenses against the laws of the United States" pursuant to § 3231 of Title 18 of the U.S. Code.[44] As one of our sister circuits recently observed, "[i]t is hard to imagine a clearer textual grant of subject-matter jurisdiction"—"'[a]ll' means 'all.'"[45] Indeed, § 3231 "contains no carve-out" that supports an exemption for federal offenses committed by foreign sovereigns, and "nothing in the [FSIA's] text expressly displaces [§] 3231's jurisdictional grant."[46]

Although Halkbank argues that § 1604's broad grant of sovereign immunity cuts back on § 3231's grant of criminal jurisdiction, that logic is unavailing. Indeed, we agree with our sister circuit that (in an analogy we now understand all too well in this time of global pandemic) "granting a particular class of defendants 'immunity' from jurisdiction has no effect on the scope of the underlying jurisdiction, any more than a vaccine conferring immunity from a virus affects the biological properties of the virus

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of FSIA demonstrate Congress' intention that the FSIA be the sole basis for obtaining jurisdiction over a foreign state in our courts." 488 U.S. at 434. But *Amerada Hess* was a civil case and neither our Court nor the Supreme Court has ever extended this holding to a criminal case.

[43] *Barnet as Tr. of 2012 Saretta Barnet Revocable Tr. v. Ministry of Culture & Sports of the Hellenic Republic*, 961 F.3d 193, 199 (2d Cir. 2020) (internal quotation marks omitted).

[44] 18 U.S.C. § 3231 (emphasis added).

[45] *In re Grand Jury Subpoena*, 912 F.3d 623, 628 (D.C. Cir. 2019).

[46] *Id.*

itself."[47]

We think that the District Court plainly has subject matter jurisdiction over the federal criminal prosecution of Halkbank pursuant to § 3231. However, we need not—and do not—decide whether § 1604 of FSIA confers immunity on foreign sovereigns in the criminal context. As we explain below, even assuming *arguendo* that FSIA confers sovereign immunity in criminal cases, the offense conduct with which Halkbank is charged falls within FSIA's commercial activities exception to sovereign immunity.[48]

iv. FSIA's Commercial Activity Exception to Sovereign Immunity

The Government submits that, even assuming that FSIA confers immunity to foreign sovereigns in criminal cases, Halkbank's charged offense conduct would fall within FSIA's exception to sovereign immunity for commercial activity. We agree.

Section 1605(a)(2) of FSIA, the statute's commercial activity exception, provides that "[a] foreign state shall

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[47] *Id.*

[48] We also note that, although Halkbank takes the position that FSIA's § 1604 confers sovereign immunity in criminal cases, it also takes the position that FSIA's exceptions to sovereign immunity, which are set forth in § 1605, are *not* available in criminal proceedings. Under this reasoning, a foreign sovereign could be liable under FSIA's commercial activity exception in the civil context, but immune from criminal liability for the same commercial conduct. We are skeptical that Congress intended for § 1604's grant of immunity to sweep far more broadly in criminal cases than in civil cases. Further, the text of § 1605 plainly states that FSIA's exceptions to foreign sovereign immunity apply "in *any* case." 28 U.S.C. § 1605(a) (emphasis added). Just as "all" means "all," so must "any" mean "any."

not be immune from the jurisdiction of courts of the United States or of the States in any case" in which the action is based upon (1) "a commercial activity carried on in the United States by the foreign state"; (2) "upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere"; or (3) "upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."[49]

To fall within the commercial activity exception, Halkbank's activities need to qualify for at least one of the categories specified in the three clauses of § 1605(a)(2).

We begin this inquiry by identifying an "act of the foreign sovereign [s]tate" that is "'based upon' the 'particular conduct' that constitutes the 'gravamen' of the suit."[50] Here, the Indictment alleges that Halkbank "participated in the design of fraudulent transactions intended to deceive U.S. regulators and foreign banks" in order to launder approximately $1 billion in Iranian oil and gas proceeds through the U.S. financial system.[51] The Indictment further alleges that Halkbank lied to Treasury officials regarding the nature of these transactions in an effort to hide the scheme and avoid U.S. sanctions. This conduct plainly constitutes the "gravamen" of the charges against Halkbank.

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[49] 28 U.S.C. § 1605(a)(2).

[50] *Petersen Energía*, 895 F.3d at 204 (quoting *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 35 (2015)); *see also Barnet*, 961 F.3d at 200 ("We first must identify [the] predicate act that serves as the basis for plaintiff's claims.") (internal quotation marks omitted).

[51] Indictment ¶¶ 1, 64.

We next consider whether the identified act took place inside or outside the United States, and whether the act constitutes commercial activity within the meaning of FSIA.

FSIA defines "commercial activity" in a circular manner, as meaning "either a regular course of commercial conduct or a particular commercial transaction or act."[52] But FSIA does go on to provide that "[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose."[53] In applying this provision of FSIA, we have held that "*purpose* is the reason why the foreign state engages in the activity and *nature* is the outward form of the conduct that the foreign state performs or agrees to perform."[54] Put another way, "the issue is whether the particular actions that the foreign state performs . . . are the *type* of actions by which a private party engages in trade and traffic or commerce."[55] Whether a foreign state acts in the

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[52] 28 U.S.C. § 1603(d).

[53] *Id.*

[54] *Pablo Star Ltd. v. Welsh Government*, 961 F.3d 555, 561 (2d Cir. 2020) (emphasis added) (other emphases and internal quotation marks omitted).

[55] *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992) (emphasis in original) (internal quotation marks omitted). We note that such commercial activity has "been held to include criminal acts if those actions are ones in which private parties could engage and if they are committed in the course of business or trade, including illegal contracts to steal money, bribery, forgery, and mail, wire, and securities fraud." Restatement (Fourth), The Foreign Relations Law of the United States § 454 rn. 3.

manner of a private party to engage in commercial activity is thus "a question of behavior, not motivation."[56]

Here, Halkbank's alleged offense conduct qualifies as commercial activity under all three categories set forth in § 1605(a)(2).

As to the first two clauses of § 1605(a)(2), Halkbank's activities in the United States—that is, Halkbank's communications with Treasury officials, including communications made in meetings and in conference calls, in furtherance of its efforts to evade U.S. sanctions—qualify under both. Although Halkbank is majority-owned by the Government of Turkey, such communications are plainly the *type* of activity in which banks, including privately owned correspondent banks, routinely engage.[57] Just as in *Pablo Star*, where we observed that "[l]iterally anyone can do"[58] copyright infringement, so, too, can literally any bank violate sanctions. Halkbank's interactions with the Treasury were therefore "commercial activity carried on in the United States" or, in the alternative, "act[s] performed in the United States in connection with a commercial activity . . . elsewhere"—specifically, its banking activities in Turkey on behalf of the Government of Iran.[59]

As to the third clause of § 1605(a)(2), Halkbank's activities outside the United States—Halkbank's participation in schemes to launder Iranian oil and gas proceeds through non-U.S. transactions[60]—also qualify as

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[56] *Nelson*, 507 U.S. at 360.

[57] *Cf. Weltover*, 504 U.S. at 614.

[58] *Pablo Star*, 961 F.3d at 562.

[59] 28 U.S.C. § 1605(a)(2).

[60] These transactions included purchases of gold using Iranian oil

commercial activities for the same reasons. In addition, such activities were Halkbank's "commercial activit[ies] . . . elsewhere" that nevertheless caused a "direct effect" in the United States by causing victim-U.S. financial institutions to take part in laundering over $1 billion through the U.S. financial system in violation of U.S. law.[61]

With respect to the third clause, Halkbank argues that its activities outside the United States were "sovereign, not commercial" because the Government of Turkey has designated Halkbank as its "sole repository of proceeds from the sale of Iranian oil to Turkey's national oil company and gas company," consistent with applicable U.S. laws.[62] But we rejected a similar argument in *Pablo Star*. In that case, we were faced with a copyright dispute over the Welsh Government's use of the likeness of the poet Dylan Thomas in its promotional materials. The Welsh Government urged us to characterize its activities as promoting Welsh culture and tourism pursuant to a statutory mandate—activity that it asserted was distinctly "sovereign" in nature that would qualify for immunity under FSIA.[63] We declined to do so, observing that the Welsh

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and gas proceeds as well as transactions fraudulently disguised as purchases of food and medicine, which would have fallen under a "humanitarian exception" to the U.S. sanctions regime. Indictment ¶ 4.

[61] 28 U.S.C. § 1605(a)(2).

[62] Halkbank Br. at 40-41 (internal quotation marks omitted); *see also supra* note 2, at 5 (explaining that the ITRA amended the 2012 NDAA to require the proceeds of Iranian oil sales between Iran and another country, like Turkey, to be deposited in a specified account in that country to only be used for trade with that country).

[63] *Pablo Star*, 961 F.3d at 562.

government's broad characterization of its activities "conflate[s] the act with its purpose."[64]

Here, Halkbank's broad characterization of its activities as sovereign in nature also "conflates the act with its purpose." The gravamen of the Indictment is not that Halkbank is the Turkish Government's repository for Iranian oil and natural gas proceeds in Turkey, *i.e.*, the *purpose* for which it held these funds. Rather, it is Halkbank's participation in money laundering and other fraudulent schemes designed to evade U.S. sanctions that is the "core action taken by [Halkbank] outside the United States."[65] And because those core acts constitute "an activity that could be, and in fact regularly is, performed by private-sector businesses," those acts are commercial, not sovereign, in nature.[66]

Halkbank also argues that its activities elsewhere did not have a "direct effect" in the United States. That is plainly not the case. We find a direct effect if "an effect simply followed as an immediate consequence of the defendant's activity."[67] That effect "need not be substantial or foreseeable."[68] Again, Halkbank's activities outside the United States led to approximately $1 billion being laundered through the U.S. financial system.

In sum, even assuming *arguendo* that FSIA confers

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[64] *Id.* This reflects a fundamental issue with the *nature-purpose* distinction, which is that its "application may sometimes depend on the level of generality at which the conduct is viewed." *Id.* at 561.

[65] *Barnet*, 961 F.3d at 200 (internal quotation marks omitted).

[66] *Pablo Star*, 961 F.3d at 562.

[67] *Barnet*, 961 F.3d at 199 (internal quotation marks and alteration omitted).

[68] *Peterson Energía*, 895 F.3d at 205.

immunity on the instrumentalities of foreign sovereigns in the criminal context, Halkbank's charged offense conduct would fall within FSIA's commercial activity exception to sovereign immunity.

C. Common Law Immunity

Halkbank argues that even if FSIA does not confer foreign sovereign immunity in criminal cases, it is nevertheless immune from criminal prosecution under common law. We do not agree.

Assuming *arguendo* that FSIA does confer sovereign immunity in criminal cases—a holding we do not reach today—its enactment displaced any pre-existing common-law practice.[69] Further, even assuming that FSIA did not supersede the pertinent common law, any foreign sovereign immunity at common law also had an exception for a foreign state's commercial activity,[70] just like FSIA's commercial activity exception.

Finally, in any event, at common law, sovereign immunity determinations were the prerogative of the Executive Branch; thus, the decision to bring criminal charges would have necessarily manifested the Executive

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[69] *See, e.g., Samantar*, 560 U.S. at 312-13; *Amerada Hess*, 488 U.S. at 435 (recognizing the "general rule that the [FSIA] governs the immunity of foreign states in federal court" (internal quotation marks omitted)).

[70] *See, e.g., Verlinden*, 461 U.S. at 487-88. Under the restrictive view of immunity under customary international law, "states are generally required to afford immunity from jurisdiction to adjudicate to foreign states in respect to claims arising out of government activities . . . but not in respect to claims arising out of activities of a kind carried on by private persons . . . including commercial activities." Restatement (Fourth), The Foreign Relations Law of the United States § 454 cmt. h.

Branch's view that no sovereign immunity existed.[71]

III. CONCLUSION

To summarize, we hold as follows:

(1) We have jurisdiction over the instant appeal pursuant to the collateral order doctrine;

(2) Even assuming FSIA applies in criminal cases—an issue that we need not, and do not, decide today—the commercial activity exception to FSIA would nevertheless apply to Halkbank's charged offense conduct; thus, the District Court did not err in denying Halkbank's motion to dismiss the Indictment; and

(3) Halkbank, an instrumentality of a foreign sovereign, is not entitled to immunity from criminal prosecution at common law.

For the foregoing reasons, we **DENY** the Government's motion to dismiss this appeal, and we **AFFIRM** the District Court's Decision and Order dated October 1, 2020.

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[71] *See Verlinden*, 461 U.S. at 486.

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, –against– HALKBANK Defendants.	15 Cr. 867 (RMB) **DECISION & ORDER**

Having carefully reviewed the record herein, including without limitation: (1) the Halkbank Indictment, dated October 15, 2019; (2) Halkbank's motion to dismiss the Indictment, dated August 10, 2020; (3) the Government's opposition to the motion to dismiss, dated August 31, 2020; (4) Halkbank's reply brief, dated September 8, 2020; (5) the oral argument held on September 18, 2020, and (6) all prior related proceedings, **the Court denies Halkbank's motion to dismiss as follows**:[1]

I. Background

On October 15, 2019, Türkiye Halk Bankasi A.S. ("Halkbank") was charged in a six count Indictment with the following crimes: **Count One** – Conspiracy to Defraud the United States in violation of 18 U.S.C. § 371; **Count Two** – Conspiracy to Violate the International

[1] **Any issues or arguments raised by the parties but not specifically addressed in this Decision and Order have been considered by the Court and rejected.**

Emergency Economic Powers Act ("IEEPA") in violation of 50 U.S.C. § 1705, Executive Orders 12959, 13059, 13224, 13599, 13622, & 13645, and 31 C.F.R. §§ 560.203, 560.204, 560.205, 561.203, 561.204, & 561.205; **Count Three** – Bank Fraud in violation of 18 U.S.C. §§ 1344 and 2; **Count Four** – Conspiracy to Commit Bank Fraud in violation of 18 U.S.C. § 1349; **Count Five** – Money Laundering in violation of 18 U.S.C. §§ 1956(a)(2)(A) and 2; and **Count Six** – Conspiracy to Commit Money Laundering in violation of 18 U.S.C. § 1956(h). See Indictment at 35-41.[2]

According to the Government: "[t]he Indictment alleges that Halkbank participated in transactions designed to extract surreptitiously Iran's oil and gas proceeds held at the bank, so that those funds could be used to make international payments through the U.S. financial system on behalf of Iran while hiding Iran's control of those transactions, and lied to Treasury Department officials in the United States to conceal the scheme and evade applicable sanctions." See Opp. at 10; Indictment at 2-4, 21-26, 34. "The scheme involved fraudulent gold and humanitarian trade transactions run through Halkbank." Opp. at 3. "Through these methods, Halkbank illicitly transferred approximately $20 billion worth of otherwise restricted Iranian funds." Indictment at 3. "As alleged, at least approximately $1 billion was laundered through the U.S. on behalf of the Government of Iran and Iranian entities." Opp. at 3.

One of Halkbank's alleged co-conspirators, Reza Zarrab, a dual citizen of Turkey and Iran, pled guilty before this Court on October 26, 2017 to designing the sanctions

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[2] Halkbank is one of Turkey's largest state-owned banks. See Eric Lipton, U.S. Indicts Turkish Bank on Charges of Evading Iran Sanctions, *New York Times* (Oct. 15, 2019).

evasion scheme. Another of Halkbank's alleged co-conspirators, Mehmet Hakan Atilla, who was the Deputy General Manager of International Banking at Halkbank, was convicted by an S.D.N.Y. jury on January 3, 2018 of conspiracy to defraud the United States; conspiracy to violate the IEEPA and the Iranian Transactions and Sanctions Regulations ("ITSR"); bank fraud; conspiracy to commit bank fraud; and conspiracy to commit money laundering. See May 16, 2018 Judgment. Atilla was sentenced to 32 months imprisonment (and he completed his sentence). Id. On July 20, 2020, the Second Circuit affirmed Atilla's conviction and sentence. See discussion of Second Circuit ruling at pp.5-6 infra.

Prior Related Motions to Dismiss

On July 18, 2016, Zarrab moved to dismiss the March 30, 2016 Indictment against him which charged Zarrab with conspiracy to defraud the United States; conspiracy to violate the IEEPA; conspiracy to commit bank fraud; and conspiracy to commit money laundering. In his motion, Zarrab raised some of the same issues which are raised here. Among other things, Zarrab contended that: the alleged conspiracy to defraud the U.S. Office of Foreign Assets Control ("OFAC") "occurred entirely abroad;" the IEEPA and bank fraud statutes "do[] not apply extraterritorially;" "the indictment fails to allege a conspiracy to commit bank fraud;" and "conspiracy to commit money laundering is an improper duplicative charge [of the IEEPA charge]." See July 18, 2016 Mot. at 4, 25, 33, 35; Aug. 22, 2016 Reply at 11-12, 17. Following briefing, by Decision & Order, dated October 17, 2016, the Court denied Zarrab's motion to dismiss. *See United States v. Zarrab*, 2016 WL 6820737, at *4, 8, 12, 15-16

(S.D.N.Y. Oct. 17, 2016) ("The Indictment alleges a violation of § 371 against Zarrab and his co-conspirators;" "the Indictment alleges a domestic nexus between Zarrab and his co-conspirators' conduct and the United States, i.e. the exportation of services from the United States;" "the Indictment clearly states the elements of a conspiracy to commit bank fraud;" and "Zarrab's argument that the conspiracy to commit money laundering charge 'merges' with the IEEPA [count] . . . is unpersuasive").

On October 9, 2017, Atilla moved to dismiss the September 6, 2017 Indictment against him. Atilla's motion raised some of the same issues which are raised here. In his motion, Atilla contended, among other things, that he "cannot be charged with activity that is exclusively foreign based with no direct U.S. effect;" "there is no allegation linking Atilla with the U.S;" and the IEEPA and ITSR cannot be applied extraterritorially to a foreign national. See Oct. 9, 2017 Mot. at 4, 13, 16. On November 16, 2017, after briefing, the Court denied Atilla's motion to dismiss. See Nov. 16, 2017 Tr. at 12:5-22:7 ("The Second Circuit Court of Appeals has made it abundantly clear that the execution of money transfers from the United States to Iran on behalf of another . . . constitutes the exportation of a service and may be in violation of IEEPA and ITSR." Id. at 19:22-20:1; "the indictment . . . reflects the elements of each count in the indictment and establishes a sufficient nexus between Mr. Atilla and his co-conspirators' conduct and the United States . . . Mr. Atilla is charged with participating in the same conspiracies as eight other defendants, i.e., at its core, circumventing U.S. sanctions against Iran via Halkbank." Id. at 20:24-22:13; "Mr. Atilla is [also] alleged to have . . . lied to U.S. regulators." Id. at 15:18-20).

II. Legal Standard

"[T]he indictment has a strong presumption of validity . . . [and is] only rarely dismissed." *United States v. Cornielle*, 171 F.3d 748, 752 (2d Cir. 1999). "An indictment . . . if valid on its face . . . is enough to call for trial of the charge[s] on the merits." *Costello v. U.S.*, 350 U.S. 359, 409 (1956). "The dismissal of an indictment is an 'extraordinary remedy' reserved only for extremely limited circumstances implicating fundamental rights." *See United States v. De La Pava*, 268 F.3d 157, 165 (2d Cir. 2001). "An indictment need only provide sufficient detail to assure against double jeopardy and state the elements of the offense charged, thereby apprising the defendant of what he must be prepared to meet." *United States v. Tramunti*, 513 F.2d 1087, 1113 (2d Cir. 1975).

There is "a substantial public interest in ensuring that the Government may pursue prosecutions based upon indictments that are legally sufficient." *United States v. Samia*, 2017 WL 980333, at *3 (S.D.N.Y. Mar. 13, 2017); *United States v. Fields*, 592 F.2d 638, 648 (2d Cir. 1978). "In reviewing a motion to dismiss an indictment, the Court must take the allegations of the indictment as true." *See United States v. Avenatti*, 432 F.Supp.3d 354, 360-61 (S.D.N.Y. 2020) (citing *Boyce Motor Lines v. United States*, 342 U.S. 337, 343 n. 16 (1952)); *New York v. Tanella*, 374 F.3d 141, 148 (2d Cir. 2004).

"The standard for the sufficiency of an indictment is not demanding and requires little more than that the indictment track the language of the statute charged and state the time and place (in approximate terms) of the alleged crime." *United States v. Hayes*, 811 Fed. App'x 30, 37 (2d Cir. 2020) (citing *United States v. Balde*, 943 F.3d 73, 89 (2d Cir. 2019)) (internal citations omitted).

"The law of the case [doctrine] . . . expresses the practice of courts generally to refuse to reopen what has been decided." *See Colvin v. Keen*, 900 F.3d 63, 68 (2d Cir. 2018) (internal citations and quotations omitted). "When a court has ruled on an issue, that decision should generally be adhered to by that court in subsequent stages in the same case." *United States v. Uccio*, 950 F.2d 753, 758 (2d Cir. 1991). "The court has discretion to apply the law of the case doctrine, notwithstanding a 'difference in parties,' provided that doing so would be consistent with the court's 'good sense.'" *See S.E.C. v. Penn*, 2020 WL 1272285, at *3 (S.D.N.Y. Mar. 17, 2020). "A late-added party, or a co-party who did not participate in the proceedings that led to the first ruling, might be required to show reasons to doubt the adequacy of the underlying argument or of the ruling itself." See 18B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 4478.5 (2d ed.).

III. Second Circuit Court of Appeals July 20, 2020 Decision in the Atilla Case

On September 18, 2020, at the oral argument of Halkbank's motion to dismiss, both Halkbank and the Government sought to rely upon the Second Circuit's decision in *United States v. Atilla*, 966 F.3d 118 (2d Cir. 2020). According to the defense, "the Second Circuit's opinion in *Atilla* stands for one thing and one thing only . . . evasion of secondary sanctions is not a crime." See Sept. 18, 2020 Tr. at 34:14-16. "Halkbank was indicted on the assumption that the entire $20 billion . . . was unlawful because it violated secondary sanctions, and the Second Circuit said, no, that's not the law." Id. at 35:13-17.

The Government counters that "the *Atilla* decision is a ruling of the Second Circuit with respect to the very

scheme alleged in this [Halkbank's] indictment and is controlling. The Second Circuit [] viewed the . . . allegations underlying the scheme and concluded that [the allegations] support IEEPA conspiracy involving primary sanctions, bank fraud conspiracy, money laundering conspiracy and . . . bank fraud." Id. at 33:14-21. "In affirming Atilla's convictions . . . the Second Circuit . . . necessarily found that the scheme contemplated laundering the money through the U.S. financial system." Id. at 20:23-25; see also Reenat Sinay, "Feds Say 2nd Circ. Ruling Bolsters Halkbank Sanctions Case," *Law360.com* (Sept. 18, 2020).

In the Court's view, the Second Circuit ruling stands for several relevant propositions. First and foremost, the Second Circuit affirmed Atilla's convictions and sentence for conspiracy to defraud the U.S., conspiracy to violate the IEEPA, bank fraud, conspiracy to commit bank fraud, and conspiracy to commit money laundering. *See United States v. Atilla*, 966 F.3d 118 (2d Cir. 2020). Second, the Second Circuit rejected "secondary sanctions liability" under the IEEPA but affirmed Atilla's conviction under the Government's alternate primary sanctions theory that "Atilla conspired to violate the IEEPA by exporting services (including the execution of U.S. dollar transfers) from the United States to Iran in violation of the ITSR [Iranian Transactions and Sanctions Regulations]." *Atilla*, 966 F.3d at 127. Third, the evidence of Atilla's convictions was "overwhelming" and "demonstrated that the purpose of the scheme was to convert Iranian oil proceeds held at Halkbank into a form that could be used to fund international payments on behalf of the Government of Iran." *Id.* at 128-29. "These international payments were

likely to pass through the U.S. financial system" and "senior-level executives at Halkbank knew the particulars of the scheme, including the importance of the international payments and of U.S. dollar transactions." *Id.* at 121-22, 128-29. "Atilla wanted the Iranian transactions to remain obscured by Zarrab because Atilla knew that they violated U.S. sanctions on Iran." *Id.* at 129. Fourth, that "Atilla repeatedly lied to Treasury officials to conceal the sanctions avoidance scheme . . . [and] he was aware that the scheme involved international payments through U.S. banks that were violations of U.S. sanctions." *Id.*[3]

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[3] Among the evidence adduced at Atilla's trial were meetings between and among Atilla and U.S. Treasury officials Adam Szubin, former Director of OFAC, and David Cohen, former U.S. Undersecretary of the Treasury for Terrorism and Financial Intelligence. These meetings took place both in the U.S. and in Turkey. Indeed, some of these meetings took place at the U.S. Department of Treasury in Washington D.C. See Dec. 7, 2017 Tr. at 1082, 1083:17-19; see also Dec. 12, 2017 Tr. at 1413:6-10; 1474:16-17.

A meeting at the U.S. Department of Treasury in Washington D.C. in March 2012 is reflected in the following trial testimony: AUSA Lockard: "On March 14, 2012, where was the meeting held?" Cohen: "In my office at the Treasury Department." AUSA Lockard: "Who were the participants in that meeting?" Cohen: "Mr. Atilla and Mr. Aslan [the former General Manager of Halkbank] . . . the Halkbank executives were in Washington for a meeting." AUSA Lockard: "What were the topics that you discussed with Mr. Atilla and Mr. Aslan at this meeting in March?" Cohen: "[I]ssues relating to Iran sanctions . . . They told us that they . . . were not allowing Iran to acquire gold . . . using the proceeds that Halkbank was holding for Iran from the sale of oil . . . [W]e were assured that . . . they understood that Iran would look to use deceptive practices to evade sanctions and [] that they had mechanisms in place at the bank to ensure that they would detect and prevent Iranian efforts to evade the sanctions." See Dec. 8, 2017 Tr. at 1112:22-1118:7.

At the so-called "pull-aside" meeting in Turkey in February 2013, according to Szubin, Szubin warned Atilla "one-on-one" that: "to the

IV. Halkbank's Motion to Dismiss

Halkbank's motion seeks to dismiss all six counts in the Indictment. Halkbank contends that it is immune from prosecution under the Foreign Sovereign Immunities Act ("FSIA"). See Mot. at 1. Halkbank also contends that the Indictment is barred by the "presumption against extraterritoriality." Id. at 12. Halkbank asserts that the Court lacks personal jurisdiction over Halkbank because of the absence of "minimum contacts" with the United States. Id. at 8. Halkbank also seeks to dismiss Counts One, Three, Four, and Six on particularized individual grounds, including respectively failure to allege a conspiracy to defraud the U.S; failure to allege bank fraud; and failure to allege conspiracy to commit bank fraud. Halkbank claims that Count Six is multiplicitous of Count

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extent he [Atilla] was viewing this as a kind of routine discussion or . . . visit . . . that wasn't the case. This was a very conscious visit to Halkbank, by me, because of concerns that were pretty serious about what was going on at Halkbank. And that we viewed them in sort of a category unto themselves, that I wasn't having this same level of conversation with any other bank." See Dec. 12, 2017 Szubin Testimony Tr. at 1436.

At another meeting at the U.S. Department of Treasury in Washington D.C. in October 2014, Atilla gave assurances to Cohen about Halkbank's relationship with Reza Zarrab: AUSA Lockard: "Directing your attention to early October of 2014, did you meet with anyone from Halkbank at that time?" Cohen: "Mr. Atilla and the new CEO of Halkbank . . . in my office in Washington . . . I wanted to know what Halkbank's involvement with Mr. Zarrab was." AUSA Lockard: "Did Mr. Atilla provide any additional details about Mr. Zarrab's then-current business with the bank?" Cohen: "He [Atilla] mentioned that they had a loan for some properties that Mr. Zarrab owned. My recollection is it was a relatively small relationship . . . I was being assured that everything was okay." See Dec. 8, 2017 Tr. at 1149:19-1152:8.

Two.[4]

Halkbank is Not Immune from Prosecution under the FSIA

Halkbank argues that the Foreign Sovereign Immunities Act (FSIA) "extends [] immunity to any 'instrumentality of a foreign state.'" See Mot. at 1. Immunity presumably extends to Halkbank because it is majority-owned by the Turkish government. Id. The Government counters persuasively that FSIA does not apply in criminal cases and that, even if FSIA did apply, "the statute's 'commercial activities' exception would strip away any immunity." See Opp. at 6-7, 9-14.

The Court concludes that Halkbank is not immune from prosecution. For one thing, FSIA does not appear to grant immunity in criminal proceedings. *See United States v. Hendron*, 813 F.Supp. 973, 975 (E.D.N.Y. 1993); *United States v. Biggs*, 273 Fed. App'x 88, 89 (2d Cir. 2008); Opp. at 6-9; *see also Southway v. Central Bank of Nigeria*, 198 F.3d 1210, 1215 (10th Cir. 1999); *United States v. Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997). In *United States v. Hendron*, the district court undertook a comprehensive analysis of the text and legislative history of FSIA and concluded that FSIA "applies only to civil proceedings." *See Hendron*, 813 F.Supp. at 975. Nothing in the text of FSIA suggests that it applies to criminal proceedings; and the "legislative history . . . gives no hint that Congress was concerned [about] a foreign defendant in a criminal proceeding." *Hendron*, 813 F.Supp. at 976; *see*

[4] Halkbank argues that "sovereign immunity," the absence of "extra-territoriality," and the absence of minimum contacts (each) void Counts One through Six. Halkbank does not appear to be seeking dismissal of Counts Two and Five on any particularized individual grounds.

also In re Grand Jury Proceeding, 752 F.Supp. 2d 173, 179 (D.P.R. 2010). "The basic purpose of the [FSIA] is to give the district courts jurisdiction to hear **civil cases** involving claims against foreign states, and their instrumentalities which have waived their immunity from suit." *Corporacion Venezolana de Fomento v. Vintero Sales Corp.*, 629 F.2d 786, 790 (2d Cir. 1980) (emphasis added); *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488 (1983); *see generally* Robert A. Katzmann, Judging Statutes (Oxford University Press, 2014) pp. 31-32 ("the fundamental task for the judge . . . is to interpret language in light of the statute's purpose(s)").[5]

Even assuming, *arguendo*, that FSIA provided immunity in this criminal case (which it does not), FSIA's commercial activity exceptions would clearly apply and support the Halkbank prosecution. The commercial activity exception provides that "a foreign state will not be immune from suit in any case: (1) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or (2) upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or (3) upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." *See Hanil Bank v. PT. Bank Negara Indonesia (Persero)*, 148 F.3d 127, 130-31 (2d Cir. 1998) (citing 28 U.S.C. § 1605(a)(2)).

The Government points to Halkbank's alleged misrepresentations made to U.S. Treasury officials both in and outside the United States and to Halkbank's use of U.S.

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[5] It should be noted that not all Circuits agree with *Hendron*. *See e.g. Keller v. Central Bank of Nigeria*, 277 F.3d 811 (6th Cir. 2002).

banks to facilitate fraudulent transactions in excess of $1 billion as bases for denying immunity (under the commercial activity exception). See Opp. at 9-12. The Indictment alleges, among other things, that: (a) "Halkbank . . . participated in the design of fraudulent transactions intended to deceive U.S. regulators and foreign banks, and lied to U.S. regulators about Halkbank's involvement;" (b) "Senior officers of Halkbank . . . concealed the true nature of these transactions from officials with the U.S. Department of the Treasury so that Halkbank could supply billions of dollars' worth of services to the Government of Iran without risking being sanctioned by the United States and losing its ability to hold correspondent accounts with U.S. financial institutions;" and (c) "The purpose and effect of the scheme in which Halkbank [] participated was to create a pool of Iranian oil funds in Turkey . . . From there, the funds were used to make international payments on behalf of the Government of Iran and Iranian banks, including transfers in U.S. dollars that passed through the U.S. financial system in violation of U.S. sanctions laws," see Indictment at 1-4, 26, 34. According to the Government, Halkbank has forfeited any purported immunity from prosecution in the U.S. See Opp. at 9-12.

Halkbank's business meetings, conference calls, and other interactions and communications at the U.S. Department of Treasury described in the Indictment fall under the first commercial activity exception. See Opp. at 11 citing *Pablo Star Ltd. v. Welsh Gov't*, 961 F.3d 555 (2d Cir. 2020). They amount to "commercial activity carried on in the United States." 28 U.S.C. § 1605(a)(2). Halkbank's business meetings, conference calls, and other interactions and communications at the U.S. Department

of Treasury also fall under the second commercial activity exception. They amount to "act[s] performed in the United States in connection with a commercial activity elsewhere," including Halkbank's banking activity in Turkey. See Opp. at 10-11; 28 U.S.C. § 1605(a)(2); *see also Devengoechea v. Bolivarian Republic of Venezuela*, 2016 WL 3951279, at *9 (S.D.Fl. Jan. 20, 2016); *Abdulla v. Embassy of Iraq at Washington D.C.*, 2013 WL 4787225, at *7 (E.D.Pa. Sept. 9, 2013).

Halkbank's business meetings, conference calls, and other interactions and communications with the U.S. Department of Treasury (in and outside the U.S.) coupled with its alleged "laundering [of] more than $1 billion through the U.S. financial system in violation of the U.S. embargo on Iran" fall under the third commercial activity exception. They include "acts outside the territory of the United States in connection with a commercial activity elsewhere that [] cause[d] a direct effect in the United States." 28 U.S.C. § 1605(a)(2); see Opp. at 12; see also *Atlantica Holdings v. Sovereign Wealth Fund Samruk-Kazyna JSC*, 813 F.3d 98, 109 (2d Cir. 2016); *Nnaka v. Fed. Republic of Nigeria*, 238 F.Supp.3d 17, 30 (D.D.C. 2017); *Hanil Bank*, 148 F.3d at 131-33. At oral argument on September 18, 2020, the Government persuasively contended that: "[y]ou have a plan by [Halkbank] and Iran, among others, to victimize the United States and its financial institutions, which was successfully completed to the tune of a billion dollars. So, there is no dispute, frankly, that there is a direct effect [in the United States]." See Sept. 18, 2020 Tr. at 29:19-31:9. "While it is true that the bank helped Iran secretly transfer approximately $20 billion-worth in violation of a host of international sanctions . . . the more than $1 billion . . . in other words, 100% of the

U.S. criminal conduct . . . passed through domestic accounts." See Opp. at 19. "An injury knowingly caused in the United States is sufficient to satisfy the direct effect requirement and that's exactly what you have here." See Sept. 18, 2020 Tr. at 31:2-5. "The gravamen of the claim is the conspiracy and the scheme to launder money through the United States. That's what gives rise to criminal liability." Id. at 29:19-31:9; *see also Atlantica*, 813 F.3d at 107.

The Court also rejects Halkbank's claim that it is entitled to immunity under the common law. See Mot. at 1. For one thing, Halkbank cites no support for this argument. Rather, Halkbank unpersuasively relies upon *Samantar v. Yousuf*, a case in which the plaintiff sued an individual foreign official "in his personal capacity." *See Samantar v. Yousuf*, 130 S.Ct. 2278, 2281 (2010); *Tawfik v. al-Sabah*, 2012 WL 3542209, at *2 (S.D.N.Y. Aug. 16, 2012); see also Sept. 18, 2020 Tr. at 27:4-6. Second, at common law, "the granting or denial of . . . foreign sovereign immunity . . . was historically the case-by-case prerogative of the Executive Branch" and courts "deferred to the decisions of . . . the Executive Branch on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities." *See Verlinden*, 103 S.Ct. at 486; *Republic of Iraq v. Beaty*, 556 U.S. 848, 857 (2009); Opp. at 9. By pursuing Halkbank's prosecution, according to the Government, the U.S. Executive Branch "has clearly manifested its clear sentiment that Halkbank should be denied immunity." See Opp. at 9 (quoting *Noriega*, 117 F.3d at 1212).

The Presumption Against Extraterritoriality Does Not Bar the Charges in the Indictment

Halkbank argues that the Indictment should be dismissed because the applicable statutes "do not apply extraterritorially." See Mot. at 12, 14. The Government counters persuasively that "the Indictment involves a domestic, rather than an extraterritorial, application of the IEEPA, the bank fraud statute, the money laundering statute, and § 371." See Opp. at 18.

The Court finds that the presumption against extraterritoriality does not apply. Indeed, "there is a sufficient domestic nexus between the allegations in [the Indictment] to avoid the question of extraterritorial application altogether." *See United States v. Mostafa*, 965 F.Supp.2d 451, 469 (S.D.N.Y. 2013). According to the Government, "the very purpose of the scheme was to launder Iranian oil proceeds through U.S. financial institutions for use to make international payments throughout the world." See Opp. at 18. The alleged scheme involved Halkbank's "concealment of information from, and misrepresentations to, U.S. government departments and officials in this country." See Opp. at 19. And, "at least approximately $1 billion was laundered through the U.S. . . . through domestic accounts." See Opp. at 3, 19; *United States v. Prevezon Holdings, Ltd.*, 251 F.Supp.3d 684 (S.D.N.Y. 2017); *United States v. Buck*, 2017 WL 4174931, at *6-8 (S.D.N.Y. Aug. 28, 2017); *United States v. Hayes*, 99 F. Supp. 3d 409, 422 (S.D.N.Y. 2015).

The Indictment clearly alleges domestic application in that "Halkbank knowingly facilitated the scheme [and] participated in the design of fraudulent transactions intended to deceive U.S. regulators;" "Senior officers of Halkbank . . . acting within the scope of their employment

and for the benefit of Halkbank, concealed the true nature of these transactions from officials with the U.S. Department of Treasury;" "between at least approximately December 2012 and October 2013, more than $900 million in such transactions were conducted by U.S. financial institutions through correspondent accounts held in the United States;" and "Halkbank continued executing the evasion and money laundering scheme until at least in or about March 2016 . . . [and] continued to deceive Treasury officials." See Indictment at 1-3, 26, 34; see also *Force v. Facebook*, 934 F.3d 53, 73 (2d Cir. 2019) ("the case involves a domestic application of the statute . . . the conduct relevant to the statute's focus occurred in the United States, [and] the case involves a permissible domestic application even if other conduct occurred abroad").[6]

The Court has Personal Jurisdiction over Halkbank

Halkbank argues that "to meet the requirements of the Due Process Clause, the Government must establish either (1) that Halkbank has 'continuous and systematic' contacts with the United States . . . or (2) that the conduct giving rise to the alleged crimes 'arises out of' activities by

[6] The Court in Zarrab's proceedings also found that "[t]he enactment and promulgation of the IEEPA and ITSR reflect the United States' interest in protecting and defending itself against, among other things, Iran's sponsorship of international terrorism, Iran's frustration of the Middle East peace process, and Iran's pursuit of weapons of mass destruction, which implicate the national security, foreign policy, and the economy of the United States." *See Zarrab*, 2016 WL 6820737, at *8; *see also United States v. Vilar*, 729 F.3d 62, 73 (2d Cir. 2013) ("the presumption against extraterritoriality does [not] apply . . . in situations where the law at issue is aimed at protecting the right of the government to defend itself"); *Facebook*, 934 F.3d at 73; *United States v. Tajideen*, 319 F.Supp.3d 445, 457 (D.D.C. 2018).

Halkbank in the United States." See Mot. at 9. The Government counters correctly that "[n]either the Supreme Court nor the Second Circuit has ever held that the [] minimum-contacts test must be satisfied for personal jurisdiction in criminal cases." See Opp. at 16; see also *United States v. Halkbank*, 426 F.Supp.3d 23, 35 (S.D.N.Y. 2019) ("While minimum contacts challenges may be appropriate in civil cases, such challenges do not apply in criminal matters . . . Halkbank's reliance upon minimum contacts jurisprudence is simply misplaced.").

The Court clearly has personal jurisdiction over Halkbank. It is axiomatic that where, as here, a District Court has subject matter jurisdiction over the criminal offenses charged, it also has personal jurisdiction over the individuals charged in the indictment. 18 U.S.C. § 3231 ("The district courts of the United States shall have original jurisdiction . . . of all offenses against the laws of the United States"); *United States v. Maruyasu Indus. Co., Ltd.*, 229 F.Supp.3d 659, 670 (S.D. Ohio 2017); Opp. at 15. "A defendant need not acquiesce in or submit to the court's jurisdiction or actually participate in the proceedings in order for the court to have personal jurisdiction over the defendant." *United States v. McLaughlin*, 949 F.3d 780, 781 (2d Cir. 2019).

As noted, the Court has already rejected Halkbank's minimum contacts personal jurisdiction argument by Decision & Order, dated December 5, 2019. "[I]t is improper to make a personal jurisdiction motion based upon the absence of minimum U.S. contacts in a criminal case . . . [S]uch challenges do not apply to criminal matters . . . A federal district court has personal jurisdiction to try any defendant brought before it on a federal indictment charging a violation of federal law." *See United States v.*

Halkbank, 426 F.Supp.3d 23, 35 (S.D.N.Y. 2019) (collecting cases); *see also United States v. Quintieri*, 306 F.3d 1217, 1225 (2d Cir. 2002) ("the law of the case doctrine . . . holds that when a court has ruled on an issue, that decision should generally be adhered to by that court in subsequent stages in the same case").

Even assuming, *arguendo*, that "minimum contacts" were required (which they are not), the Court would likely find that Halkbank purposefully availed itself of the United States banking system as part of its alleged scheme. See Opp. at 16-17. "It should hardly be unforeseeable to a bank that selects and makes use of a particular forum's banking system that it might be subject to the burden of a lawsuit in that forum for wrongs related to, and arising from, that use." *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 732 F.3d 161, 171-73 (2d Cir. 2013); *Nike, Inc. v. Wu*, 349 F.Supp.3d 310, 330 (S.D.N.Y. Sept. 25, 2018) ("the Banks have sufficient minimum contacts . . . as the selection and repeated use of New York's banking system constitutes purposeful availment of the privilege of doing business in New York").

The Court also finds that Halkbank's "acts could be expected to or did produce an effect in the United States" and that the "aim of that activity [was] to cause harm inside the United States or to U.S. citizens or interests." *See United States v. Epskamp*, 832 F.3d 154, 168 (2d Cir. 2016); *Mostafa*, 965 F. Supp. 2d at 459; Opp. at 15-17.

The Indictment Alleges a Conspiracy to Defraud the United States in Count One

Halkbank argues, among other things, that "Count One should be dismissed because the Indictment does not allege a conspiracy to 'defraud' the United States" under

18 U.S.C. § 371. Mot. at 24. The Government counters persuasively that the Indictment adequately alleges a conspiracy under 18 U.S.C. § 371 because it "tracks the language of the statute and states the time and place (in approximate terms) of the alleged crime, which is all that is required to deny a motion to dismiss." Count One "is based on the bank's concealment of information from, and misrepresentations to, U.S. government departments and officials." See Opp. at 1, 17, 19.

The Court finds that the four elements of a § 371 conspiracy to defraud offense are clearly alleged, including: "(1) that the defendant entered into an agreement; (2) to obstruct a lawful function of the Government; (3) by deceitful or dishonest means; and (4) at least one overt act in furtherance of the conspiracy." *See United States v. Ballistrea*, 101 F.3d 827, 832 (2d Cir. 1996). That is, the Indictment alleges that, "[f]rom at least in or about 2012, up to and including in or about 2016, in the Southern District of New York, Turkey, the United Arab Emirates, and elsewhere . . . Halkbank . . . and others known and unknown, knowingly and willfully combined, conspired, confederated, and agreed together and with each other to defraud the United States and an agency thereof, to . . . impede and obstruct the lawful and legitimate governmental functions and operations of the U.S. Department of Treasury in the enforcement of economic sanctions laws and regulations administered by that agency." The Indictment also alleges that: "Throughout the scheme, senior executives from Halkbank [] took steps to prevent U.S. authorities, particularly OFAC [Office of Foreign Assets Control], from detecting the illicit nature of the transfers being conducted through Zarrab's companies;" and "[a]fter continuation of the scheme following Zarrab's

arrest, officials at Halkbank [] continued to deceive Treasury officials about the bank's relationship with Zarrab." See Indictment at 34-35; *United States v. Tochelmann*, 1999 WL 294992, at *2 (S.D.N.Y. May 11, 1999).

In affirming Atilla's conviction, the Court of Appeals held: "Atilla's challenge to his § 371 conviction fails because § 371's defraud clause was properly applied to his case . . . it has been well established that the term 'defraud' in § 371 . . . embraces 'any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of Government.'" *United States v. Atilla*, 966 F.3d 118, 130 (2d Cir. 2020) (internal citations and quotations omitted).

The Indictment Alleges Bank Fraud in Count Three

Halkbank argues that the Indictment "fails to allege a scheme to defraud a U.S. bank." See Mot. at 18. The Government counters persuasively that the Indictment "tracks the language of the bank fraud statute and states the time and place (in approximate terms) of the alleged crime, which is all that is required to deny a motion to dismiss." See Opp. at 21 (internal citations omitted).

The Indictment clearly alleges bank fraud in violation of 18 U.S.C. § 1344 which prohibits "knowingly execut[ing], or attempt[ing] to execute a scheme or artifice (1) to defraud a financial institution; or (2) to obtain any of the money, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations or promises." The Indictment, as noted, states that "[f]rom at least in or about 2012, up to and including in or about 2016, in the Southern District of

New York, Turkey, the United Arab Emirates, and elsewhere . . . Halkbank . . . and others . . . did knowingly execute and attempt to execute a scheme or artifice to defraud a financial institution, the deposits of which were then insured by the Federal Deposit Insurance Corporation . . . and to obtain moneys, funds . . . and other property owned by and under the custody and control of such financial institution, by means of false and fraudulent pretenses, representations, and promises . . . inducing U.S. financial institutions to conduct financial transactions on behalf of and for the benefit of the Government of Iran . . . by deceptive means." Indictment at 38.

The Indictment also provides details of the scheme to defraud U.S. banks, stating that "[t]he purpose and effect of the scheme . . . was to create a pool of Iranian oil funds . . . in the names of front companies, which concealed the funds' Iranian nexus . . . to make international payments on behalf of the Government of Iran . . . that passed through the U.S. financial system;" that "such transactions were conducted by U.S. financial institutions through correspondent accounts held in the United States;" and that "at least approximately $1 billion was laundered through unwitting U.S. financial institutions." Id. at 3-4, 26, 34.

The Indictment Alleges Conspiracy to Commit Bank Fraud in Count Four

Halkbank argues that the Indictment "fails to allege . . . a conspiracy to commit bank fraud." See Mot. at 18. The Government counters persuasively that the Indictment tracks the language of the bank fraud conspiracy statute (18 U.S.C. § 1349) and states the time and place in approximate terms of the alleged crime. See Opp. at 21.

The Court finds that the Indictment clearly alleges a conspiracy to commit bank fraud in violation of 18 U.S.C. § 1349 by stating that "[f]rom at least in or about 2012, up to and including in or about 2016, in the Southern District of New York, Turkey, the United Arab Emirates, and elsewhere . . . Halkbank . . . and others . . . knowingly and willfully combined, conspired, confederated, and agreed together and with each other to commit bank fraud." See Indictment at 38-39. The Indictment "tracks the statutory language and specifies the nature of the criminal activity . . . [sufficient] to withstand a motion to dismiss." *United States v. Citron*, 783 F.2d 307, 314 (2d Cir. 1986).

Halkbank's Contention that Count Six is Multiplicitous is Denied

Halkbank contends that Count Two (conspiracy to violate the IEEPA) and Count Six (conspiracy to commit money laundering) are multiplicitous because "the government details the same scheme consisting of the same transfers of funds, from the same accounts, on the same dates as the basis for the two charges." See Mot. at 22, 24. The Government counters that because Count Two and Count Six are "distinct offenses" the Court should reject the bank's multiplicity argument. The Government also argues that "a pre-trial multiplicity motion is premature." See Opp. at 23-24.

"Courts in this Circuit have routinely denied pre-trial motions to dismiss potentially multiplicitous counts as premature." *See United States v. Medina*, 2014 WL 3057917, at *3 (S.D.N.Y. July 7, 2014) (citing *United States v. Josephberg*, 459 F.3d 350, 355 (2d Cir. 2006)). If the Court were to deal with the issue on the merits at this time, it would likely reject the motion because Count Two and Count Six each "contains an element not contained in

the other" and "one crime could be proven without necessarily establishing the other." *See United States v. Budovsky*, 2015 WL 5602853, at *11 (S.D.N.Y. Sept. 23, 2015); *United States v. Regensberg*, 604 F.Supp.2d 625, 633 (S.D.N.Y. 2009); Opp. at 23-24.

V. Conclusion & Order

Halkbank's motion to dismiss [Dck. # 645] is respectfully denied.

Dated: New York, New York
October 1, 2020

Richard M. Berman
RICHARD M. BERMAN, U.S.D.J.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 6th day of December, two thousand twenty-four.

United States of America,

Appellee,

v.

Turkiye Halk Bankasi A.S., AKA Halkbank,

Defendant - Appellant,

Reza Zarrab, AKA Riza Sarraf, Camelia Jamshidy, AKA Kamelia Jamshidy, Hossein Najafzadeh, Mohammad Zarrab, AKA Can Sarraf, AKA Kartalmsd, Mehmet Hakan Atilla, Mehmet Zafer Caglayan, Abi, Suleyman Aslan, Levent Balkan, Abdullah Happani,

Defendants.

ORDER

Docket No: 20-3499

Appellant, Turkiye Halk Bankasi A.S., AKA Halkbank, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

[SEAL]