No. 24-1144

IN THE

Supreme Court of the United States

TÜRKIYE HALK BANKASI A.Ş.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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

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INTERESTS OF AMICI CURIAE[1]

The Islamic Republic of Pakistan is the world's fifth most populous country, with roughly 230 million people. It maintains a close partnership with the

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici or their counsel made a monetary contribution to this brief's preparation or submission. Pursuant to Supreme Court Rule 37.2, counsel of record for all parties received timely notice of the intention to file this brief.

United States, which lists it as a major non-NATO ally. Pakistani-U.S. relations are a significant factor in the United States' policy in the Middle East and South and Central Asia, including the United States' efforts to combat terrorism around the globe. Pakistan is committed to the cause of justice in relations between sovereign states and finds sovereign immunity to be a matter of fundamental importance in diplomatic relations.

The Republic of Azerbaijan is a transcontinental country of approximately 10 million people located at the boundary of Eastern Europe and Western Asia. It shares borders with Russia, Iran, the Republic of Türkiye, Georgia, and Armenia. Azerbaijan regained its independence in 1991 and has maintained close relations with the United States and NATO ever since. Azerbaijani forces risked their lives alongside U.S. and NATO servicemembers in Kosovo from 1999 through 2008, in Iraq from 2003 through 2008, and in Afghanistan from 2002 through 2021.

The State of Qatar is a nation of more than 2.5 million residents occupying a strategically important location bordering both the Arabian Gulf and the Kingdom of Saudi Arabia. The United States and Qatar have developed historically close ties built on more than 50 years of close cooperation on key political, commercial, social, and security objectives. Also considered a major non-NATO ally, Qatar assists the United States with numerous important military and diplomatic efforts both in the region and abroad, and hosts the largest U.S. military facility in the Middle East, from which counter-terror operations have been launched over the years, including against ISIS.

Every sovereign nation has an interest in this case. Petitioner ("Halkbank") is completely controlled by

the Republic of Türkiye, a key U.S. ally and NATO member. All parties to this case, the Second Circuit, and amici agree that under both U.S. common law and customary international law, Türkiye possesses absolute foreign sovereign immunity against all criminal prosecution, regardless of the underlying allegations. Yet the Second Circuit—contravening centuries of this Court's precedents and a universal international-law consensus—held that Halkbank does not share Türkiye's conceded immunity and may be criminally prosecuted for the conduct alleged in this case even though Türkiye cannot be. Pet. App. 31a. Just as troubling, the Second Circuit held that in every criminal prosecution of a foreign sovereign instrumentality courts must "defer to the Executive Branch's determination as to whether [the] party should be afforded common-law foreign sovereign immunity." *Id.*

To amici's knowledge, the Second Circuit is the first court in world history to hold that an instrumentality of a foreign sovereign lacks immunity from criminal prosecution. Such a momentous decision warrants review by this country's highest Court. If allowed to stand, the Second Circuit's decision would encourage what the doctrine of foreign sovereign immunity was intended to avoid: a perilous disruption of international comity where nations will seek to employ punitive criminal law—rather than traditional foreign policy tools—to resolve their differences.

SUMMARY OF ARGUMENT

Over 200 years ago, this Court confirmed that foreign sovereign nations possessed absolute common-law immunity from all actions in U.S. courts. While that immunity was later relaxed in ***civil*** cases, no statute or precedent ever abrogated or lessened

foreign sovereigns' absolute immunity from ***criminal*** prosecution, in this country or any other. Thus, the parties to this case, the Second Circuit, and amici all agree that Türkiye cannot be criminally prosecuted for the acts alleged in this case. Yet the Second Circuit held that petitioner, a state instrumentality controlled by Türkiye, does not share Türkiye's sovereign immunity. That decision—apparently unprecedented in world history—is manifestly wrong. Absent contrary legislation, a sovereign instrumentality shares the same foreign sovereign immunity as the foreign state that controls it. Thus, because Türkiye is indisputably immune from criminal prosecution, so is petitioner.

The Second Circuit's holding not only upsets longstanding sovereign immunity jurisprudence but also the foreign-policy principles it embodies. Left standing, that holding would destabilize the delicate diplomatic balance upon which foreign sovereign immunity rests. The United States, like other nations, affords foreign instrumentalities immunity in its courts not just out of grace or gratuity, but principally because it desires, and deserves, the same treatment in those nations' courts. Thus, if foreign sovereign instrumentalities lack immunity from U.S. criminal prosecution, other countries—including those hostile to U.S. interests whose courts may not allow full and fair adjudications—will be emboldened to prosecute United States instrumentalities. The result will be a downward spiral of retaliation that will undermine international comity. And once that spiral has begun, even Congress could not stop it.

The continuing vitality of foreign sovereign immunity from criminal prosecution is critical to both American and international interests. If the United

States is to even consider taking the drastic step of breaching an international law consensus and subjecting other sovereign instrumentalities to criminal prosecution, that step should be taken by Congress, not courts. Particularly given the Second Circuit's independently erroneous holding that courts must defer to Executive decisions as to the nature and scope of common law foreign sovereign immunity—even when the Executive is itself the charging party—such criminal prosecutions would encourage biased law enforcement, thereby threatening core values that the United States promotes globally. This Court's review is warranted before the United States threatens the rule of law worldwide by rendering criminal prosecution of sovereign instrumentalities an available tool of foreign policy.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONTRADICTS CENTURIES OF THIS COURT'S PRECEDENT AND A UNIVERSAL INTERNATIONAL LAW CONSENSUS.

A. It Is Undisputed That Foreign States Retain Absolute Sovereign Immunity Against Criminal Prosecution.

The Court previously held in this case that the existence and scope of petitioner's immunity is governed by the common-law doctrine of foreign sovereign immunity rather than the Foreign Sovereign Immunities Act ("FSIA"). *See Türkiye Halk Bankasi A.S.* v. *United States*, 598 U.S. 264 (2023) ("*Halkbank*"). Both parties to this case and the Second Circuit agree that under the common-law doctrine—which accords with a universal international law consensus—the Republic of Türkiye

possesses absolute immunity from any criminal prosecution, including for the actions alleged in this case. *See* Pet. 3, 5; Pet. App. 23a.

Amici agree as well. More than two centuries ago, in *The Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch) 116 (1812), this Court held that given the "perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other," federal common law "exempt[s] * * * the person of the sovereign from arrest or detention within a foreign territory." *Id.* at 137. Unless the legal authority to arrest or detain a foreign sovereign is expressed "in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction, which it would be a breach of faith to exercise." *Id.* at 146. Thus, to permit any judicial action over a foreign sovereign, the law must provide for it "in a manner not to be misunderstood." *See id.*

Courts called this "absolute" immunity. *See Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983); *see also Federal Republic of Germany* v. *Philipp*, 592 U.S. 169, 182 (2021) ("Under the absolute or classical theory of sovereign immunity, foreign sovereigns are categorically immune from suit."). For nearly 150 years after *Schooner Exchange*, as the U.S. government itself recognized, "foreign states enjoyed absolute immunity from ***all actions*** in the United States." *Rubin* v. *Islamic Republic of Iran*, 583 U.S. 202, 208 (2018) (emphasis added). "All" means all, including criminal prosecutions. *See, e.g.*, *People* v. *Weiner*, 378 N.Y.S.2d 966, 974 (N.Y. Crim. Ct. 1976) (noting, in criminal case, that sovereign immunity of

foreign states "is absolute" and "cannot be questioned or challenged").

Absolute immunity was relaxed in ***civil*** cases through the "restrictive theory" of sovereign immunity first encouraged in the 1952 "Tate Letter" and later codified in the 1976 FSIA. *See* Pet. App. 13a-14a. But these civil law developments "left untouched the position in criminal proceedings." Hazel Fox & Philippa Webb, The Law of State Immunity 89 (3d ed. 2013). Congress never enacted any law restricting absolute, ***criminal*** sovereign immunity.

Nor do any of the rationales for relaxing civil law immunity apply to criminal prosecutions. The Tate Letter followed the evolution of international law and the United States' decision to waive its own civil immunity in certain contract, tort, and admiralty cases. *See* Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), *reprinted in* 26 Dep't St. Bull. 984, 984-85 (1952). But international law never similarly evolved to discard criminal immunity. Nor has the United States ever waived or abrogated its immunity from criminal prosecution, which amici submit it never would do.

International law is the same. As the leading treatise observes, "[t]he exercise of criminal jurisdiction directly over another State * * * contravenes international law in two ways." Fox & Webb, *supra*, at 89. "First, it seeks to make another State subject to penal codes based on moral guilt; and, secondly, it seeks to apply its criminal law to regulate the public governmental activity of the foreign State." *Id.* Given that subjecting foreign states even to civil suit raises "delicate and important" diplomatic issues, *Schooner Exchange*, 11 U.S. at 135, allowing federal

and state prosecutors and juries to brand other nations as criminals raises even greater foreign policy and international comity concerns.

The United Nations' model Convention on sovereign immunity likewise adopts the restrictive theory of immunity only in the ***civil*** context while leaving intact absolute immunity from criminal proceedings. Pet. 21. That position is "in line with the received position of jurists and courts that * * * an independent State cannot be held criminally liable under the * * * law of another State and hence enjoys absolute immunity in respect of criminal proceedings." Fox & Webb, *supra*, at 311. Under international custom and law, "[a] state can be liable under civil law, but it cannot be prosecuted" criminally. Elizabeth Helen Franey, *Immunity from the Criminal Jurisdiction of National Courts*, *in* Research Handbook on Jurisdiction and Immunities in International Law 205, 207 (Alexander Orakhelashvili ed., 2015); *see also* Andrew Dickinson et al., *State Immunity and State-Owned Enterprises*, Clifford Chance 18 (Dec. 2008) (tinyurl.com/ye2xkznk) ("It is generally accepted that, * * * under the present state of customary international law, criminal proceedings cannot be brought in a municipal jurisdiction against a foreign State.").

Given that international consensus, it is unsurprising that the domestic laws of many foreign states are consistent with absolute immunity from criminal process, even as most countries, like the United States, have adopted the restrictive view of civil immunity. For example, amicus Pakistan, as well as numerous other countries, have all expressly limited their statutes adopting the restrictive theory to civil, not criminal, cases. *See* Pet. 21; *see also Jones*

v. *Ministry of Interior of the Kingdom of Saudi Arabia*, [2006] UKHL 26, [31], [2007] 1 AC 270 (appeal taken from Eng.). Amici are aware of ***no*** country—whether friend or foe of the United States—whose law permits it to criminally prosecute and convict another sovereign nation. *See* Fox & Webb, *supra*, at 90 ("Without exception, the legislation in common law countries introducing the restrictive approach of immunity in civil proceedings excludes its application to criminal proceedings.").

B. The Second Circuit Wrongly Became The First Known Court In World History To Allow Criminal Prosecution Of A Foreign State Instrumentality.

The Second Circuit failed to recognize, however, that the sovereign immunity of foreign states—including both Türkiye and the United States—has always extended to state-controlled instrumentalities such as petitioner. Thus, because foreign sovereigns undisputedly retain their absolute immunity from criminal prosecution, so do the instrumentalities they control and own. Indeed, to amici's knowledge, the Second Circuit is the first court in the world ever to hold that an agency or instrumentality wholly controlled by a foreign state lacks immunity from criminal prosecution.[2] This decision is wrong and

[2] The government, however, may still prosecute foreign ***individuals*** who lack personal immunities like diplomatic or head-of-state immunity. Thus, the United States has successfully prosecuted individuals for acts alleged in this very case. Moreover, cases have addressed whether criminal subpoenas can be enforced against objecting foreign sovereigns—a far less grave affront to international comity than a prosecution like this one. But even there, a state-owned instrumentality has been afforded common-law sovereign immunity. *Cf. In re Investigation of World Arrangements*, 13 F.R.D. 280, 291 (D.D.C. 1952).

manifestly disrupts international comity. Given that, as the Second Circuit, the United States, and amici all agree, the weighty foreign policy concerns underlying foreign sovereign immunity preclude any criminal prosecution against Türkiye for the acts alleged in this case, those concerns apply equally to the same acts when taken by an entity that Türkiye wholly controls and effectively owns.

That understanding also underlies this Court's pre-FSIA cases. In *Berizzi Bros. Co.* v. *The Pesaro*, 271 U.S. 562 (1926), the Court decided whether *Schooner Exchange*'s absolute immunity rule, first announced in a warship case, applied equally to a commercial vessel owned by a foreign government. The Court held the distinction was immaterial:

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

Id. at 574 (emphasis added).

The Court therefore held that, "in keeping with" *Schooner Exchange*, immunity would be accorded to a commercial vessel that is an instrumentality of a foreign country. *Id.* at 576. The Court, adopting a government suggestion, held the same in *Ex parte Republic of Peru*, 318 U.S. 578, 589-90 (1943). And

Section 66 of the pre-FSIA Restatement (Second) of Foreign Relations Law (Am. L. Inst. 1965), likewise recognized that "[t]he immunity of a foreign state * * * extends to * * * a corporation created under its laws and exercising functions comparable to those of an agency of the state." *Id.* § 66(g).[3]

Halkbank thus possesses Türkiye's immunity from criminal prosecution. Türkiye controls Halkbank just as Italy and Peru controlled the commercial vessels in *Berizzi Bros.* and *Peru*. And although the immunity recognized in those cases was later relaxed for ***civil*** cases both before and in the FSIA, no court or legislation ever recognized any departure from the rule of absolute immunity for ***criminal*** prosecutions of foreign instrumentalities. As in those cases, because neither Congress nor Türkiye has ever waived Türkiye's absolute sovereign immunity, the absolute immunity recognized in *Schooner Exchange* continues to apply. In the words of *Schooner Exchange*, Halkbank—just like the vessels at issue there and in *Berizzi Bros.* and *Peru*—is "under the immediate and direct command of the sovereign." 11 U.S. at 144. Thus, before the FSIA, lower courts regularly extended sovereign immunity to instrumentalities of foreign governments.[4]

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[3] The indictment below shows the United States' belief that high-level officials of Türkiye control Halkbank's actions. *See* 2d Cir. Appx. at 20, 37-38, 43-44, 51-52. These allegations would make Halkbank's actions attributable to Türkiye as a matter of public international law. *See* G.A. Res. 56/83, annex, Responsibility of States for Internationally Wrongful Acts, art. 8 (Dec. 12, 2001).

[4] *See, e.g.*, *Arango* v. *Guzman Travel Advisors*, 761 F.2d 1527, 1534 (11th Cir. 1985) (describing pre-FSIA practice); *The*

That is also the rule for civil cases under the FSIA, which contains Congress's only statement on what constitutes a "foreign state" for purposes of foreign sovereign immunity. *See* 28 U.S.C. § 1603(a), (b). Under that definition, instrumentalities like Halkbank are themselves foreign states possessing immunity. *Id.* The FSIA "codified" the law of foreign sovereign immunity as of 1976. *Jam* v. *Int'l Fin. Corp.*, 586 U.S. 199, 204 (2019); *see also, e.g.*, *Republic of Austria* v. *Altmann*, 541 U.S. 677, 691 (2004) (citing *Verlinden*, 461 U.S. at 488). Thus, although its exceptions govern only civil cases, the FSIA's definition of what constitutes a "foreign state" is relevant to the scope of *Schooner Exchange*'s rule—which still applies in criminal cases—since that analysis involves the pre-FSIA legal regime Congress intended to codify. *Cf. Samantar* v. *Yousuf*, 560 U.S. 305, 320 (2010) (FSIA's purpose was to "codify[] ***state*** sovereign immunity") (emphasis added). The FSIA carried forward the common-law rule that instrumentalities have their sovereigns' immunity.

Moreover, the FSIA's civil provisions further confirm that foreign instrumentalities should continue to possess absolute immunity from criminal prosecution. In the FSIA, Congress took immense care to ensure that foreign states—expressly including instrumentalities like Halkbank—would never face civil jury trials, and it carefully circumscribed their attachment liability. 28 U.S.C. §§ 1330(a), 1610, 1611. Those limitations are incompatible with a rule that foreign sovereign instrumentalities have always been subject to criminal jury trials and criminal penalties based on the same conduct.

Roseric, 254 F. 154, 159 (D.N.J. 1918); *Mason* v. *Intercolonial Ry. of Canada*, 83 N.E. 876, 877 (Mass. 1908).

Thus, while not governing here, *Halkbank*, 598 U.S. at 274-75, the FSIA confirms that foreign agencies and instrumentalities still retain their common-law absolute immunity from criminal prosecution.

Moreover, U.S. courts apply the same sovereign immunity rule for the federal Government's own instrumentalities. Corporations owned or controlled by the United States "are part of the Government," *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 395-99 (1995), and share the Government's immunity absent waiver, *see Thacker* v. *Tenn. Valley Auth.*, 587 U.S. 218, 225-26 (2019). It would be contradictory and hypocritical for U.S. law to afford corporate instrumentalities of foreign states, like Halkbank, less immunity in U.S. courts than it affords the United States' own, similar instrumentalities.

Finally, unlike with civil immunities, no international consensus allows criminal prosecution of foreign instrumentalities like Halkbank. Indeed, outside the United States, most nations historically have disallowed criminal prosecutions of ***any*** corporations. *See, e.g.*, Brandon Garrett, *International Corporate Prosecutions*, *in* The Oxford Handbook of Criminal Process 419, 421-22 (Darryl K. Brown, Jenia I. Turner & Bettina Weisser eds., 2019); V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 Harv. L. Rev. 1477, 1490-91 (1996). And in the only foreign decision of which amici are aware that considered the criminal-law immunity of a foreign state's agency or instrumentality, the court held that such entities are entitled to the same immunity as the state itself. France's highest criminal court held that the Malta Maritime Authority, a state corporation of Malta, was immune from French criminal court jurisdiction. The

Court reasoned that "the international custom which opposes the prosecution of States before the criminal courts of a foreign State extends to organs and entities which constitute the emanation of the State, as well as to their agents, for acts which, as in this case, fall within the sovereignty of the State concerned." *Agent judiciare du Trésor* v. *Malta Maritime Authority and Carmel X*, Cour de cassation [Cass.] [supreme court for judicial matters] crim., Nov. 23, 2004, Bull. crim., No. 04-84.265 (Fr.).[5]

Accordingly, an instrumentality of a foreign state such as Halkbank is entitled to the same immunity as the state itself. And because Türkiye is entitled to absolute immunity from criminal prosecution, so is Halkbank. Under absolute immunity, as distinguished from the restrictive theory that governs civil cases, it is immaterial whether an instrumentality is engaging in a commercial activity. *See, e.g.*, *Berizzi Bros.*, 271 U.S. at 574 (noting that vessel was "in the carrying trade"). Although civil immunity evolved to include a commercial activity exception, absolute

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[5] The original French is "la coutume internationale qui s'oppose à la poursuite des Etats devant les juridictions pénales d'un Etat étranger s'étend aux organes et entités qui constituent l'émanation de l'Etat ainsi qu'à leurs agents en raison d'actes qui, comme en l'espèce, relèvent de la souveraineté de l'Etat concerné." *Agent judiciare du Trésor*, No. 04-84.265. The English was obtained via Google Translate (translate.google.com/). The Second Circuit mistakenly viewed this decision as irrelevant on the ground that the acts at issue related to the "sovereignty" of Malta. Pet. App. 28a-29a. But as the French Court noted, Malta's sovereignty was necessarily implicated even though the Malta Maritime Authority had delegated the actions at issue to a private Italian company. *See Agent judiciare du Trésor*, No. 04-84.265 (original French reads "la Malta Maritime Authority a délégué ces opérations de contrôle technique à une société de droit privé italien").

immunity still prevails in the criminal context. What matters is the governmental control over the entity at issue, not the nature of the acts alleged. Given that Türkiye cannot be criminally prosecuted for the acts alleged in this case, the United States cannot avoid that immunity by charging an entity Türkiye wholly controls, as doing so would implicate all the important foreign policy concerns underlying that immunity.

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

Foreign sovereign immunity is a "very delicate and important" issue even in the civil context. *Schooner Exchange*, 11 U.S. at 135. That is because "[a]ctions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States." *Verlinden*, 461 U.S. at 493. If the United States can criminally prosecute foreign sovereign instrumentalities, those sensitive and delicate issues would be magnified. Other nations would follow suit, causing a downward spiral where foreign prosecutors could criminally prosecute United States instrumentalities, or those of any other foreign state. And once that cycle of retaliation begins, not even Congress could stop it.

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

Foreign sovereign immunity is based on reciprocity: the United States affords other countries immunity in its courts because it desires the same treatment

abroad.[6] "After all, in the law, what is sauce for the goose is normally sauce for the gander." *RJR Nabisco, Inc.* v. *European Cmty.*, 579 U.S. 325, 349 (2016) (citation omitted). Thus, "[t]o grant * * * sovereign entities an immunity from suit in our courts both recognizes the absolute independence of every sovereign authority and helps to induce each nation state, as a matter of international comity, to respect the independence and dignity of every other, including our own." *Bolivarian Republic of Venezuela* v. *Helmerich & Payne Int'l Drilling Co.*, 581 U.S. 170, 179 (2017) (cleaned up; citations omitted). Foreign sovereign immunity is also predicated on the understanding that disputes between nations should generally be addressed diplomatically through state-to-state negotiations, rather than by courts and juries. As noted in *Schooner Exchange*, "wrongs committed by a sovereign" raise issues that are "rather [ones] of policy than of law," and "are for diplomatic, rather than legal discussion." 11 U.S. at 146.

The Second Circuit's first-in-the-world abrogation of a foreign sovereign instrumentality's criminal immunity, if allowed to stand, would invite the sort of retaliatory political actions by foreign nations that the doctrine of foreign sovereign immunity seeks to avoid. Given the longstanding, universal consensus that foreign sovereign instrumentalities are immune from criminal prosecution, a defection from that consensus by a global leader like the United States could prompt other countries to follow, with unanticipated and

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[6] *See, e.g.*, *Philipp*, 592 U.S. at 184; *Lauritzen* v. *Larsen*, 345 U.S. 571, 582 (1953) ("[N]or should we forget that any contact which we hold sufficient to warrant application of our law to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction").

negative results. Just as other countries followed the United States' lead when it enacted the FSIA's restrictive civil immunity, *see, e.g.*, Mark B. Feldman, *The United States Foreign Sovereign Immunities Act of 1976 in Perspective: A Founder's View*, 35 Int'l & Compar. L.Q. 302, 303 (1986), the same can be expected in the criminal arena.

Indeed, scholars have noted that some nations codified the principle of asserting jurisdiction over a foreign sovereign to the same extent that foreign sovereign would assert jurisdiction over them. *See, e.g.*, Kurt H. Nadelmann, *Jurisdictionally Improper Fora in Treaties on Recognition of Judgments: The Common Market Draft*, 67 Colum. L. Rev. 995, 999 (1967); Georges R. DeLaume, Transnational Contracts Applicable Law and Settlement of Disputes §§ 8.08-8.09 (1975). Accordingly, if the Second Circuit's decision is allowed to stand, any such statutes could automatically prompt a reprisal in the guise of reciprocity, allowing foreign nations to criminally prosecute instrumentalities of the United States. And other nations would likely follow suit, particularly those hostile to United States interests.

Abandoning the universal norm against criminal prosecution of foreign sovereign instrumentalities would thus engender significant costs. Such a decision raises a threat that U.S. agencies and instrumentalities could be adjudicated as criminals by hostile—or even friendly—foreign powers. Given the worldwide reach of U.S. government activity, the risk of such retaliatory actions is not merely hypothetical. And nations' criminal prosecution of other nation's instrumentalities—which would be spurred by the decision below—would constitute a new tool to generate international strife.

That problem, moreover, is exacerbated by our federal system, which allows state and local prosecutors autonomy in criminal prosecution decisions. *See* Pet. 17-19. Under the Second Circuit's decision that foreign sovereign instrumentalities lack common-law immunity from criminal prosecution, state and local prosecutors—not just federal ones—could bring such actions, raising grave foreign policy concerns. Before the FSIA allowed foreign sovereigns to litigate all civil (but ***not*** criminal) actions in federal court, *see* 28 U.S.C. §§ 1330, 1441(d), *Schooner Exchange*'s absolute immunity rule applied in both state and federal courts. *See, e.g.*, *Chem. Nat. Res., Inc.* v. *Republic of Venezuela*, 215 A.2d 864, 869-70 (Pa. 1966). And because that absolute immunity was never abrogated in criminal cases, foreign sovereigns retain absolute criminal immunity in state courts under federal common law. *Cf. Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 427-28, 436-37 (1964) (federal common-law "act of state doctrine" is "a principle of decision binding on federal and state courts alike"). But under the Second Circuit's erroneous decision, that common-law immunity from state prosecution disappears for foreign sovereign instrumentalities, replaced only by the highly uncertain and dubious prospect (1) that the Executive branch would exercise its discretion to recognize immunity and (2) that such a determination would somehow bind state and local prosecutors. *See* Pet. 18-19. Moreover, the decision would embolden local officials in other countries with federal systems, who could see themselves free to indict U.S. instrumentalities for any manner of perceived local injustices.

Nor would any benefits outweigh those costs. There is no purpose criminal prosecution of a foreign

instrumentality might serve that cannot be accomplished by less extraordinary and divisive means. Individual officials without diplomatic or head-of-state immunity who commit crimes (outside of their official capacity) can be prosecuted if within the jurisdiction of the prosecuting state. *Supra* note 2. And foreign state-controlled entities can be, and often are, subject to a panoply of U.S. diplomatic and statutory sanctions. But such sanctions are authorized and dispensed only after careful consideration both by Congress in enacting the governing statutes and by the Executive in enforcing them. By contrast, endorsing wide-ranging criminal jurisdiction would allow both federal and state prosecutors and juries to brand any foreign sovereign instrumentality a criminal felon and exact criminal penalties without any required oversight by political actors.

Once this door is opened, it cannot be closed. If foreign nations reciprocate by prosecuting United States instrumentalities, even Congress cannot reverse that process. That is a principal reason this Court recognized the doctrine of foreign sovereign immunity so long ago. The Court should grant review and abstain from traveling this perilous path, where Congress has never even considered this momentous issue, much less established the rules of the road.

B. Criminal Prosecution Of Foreign Sovereign Instrumentalities Would Politicize Judiciaries And Undermine The Rule Of Law.

The decision below also threatens to undermine the rule of law around the globe. Depoliticization of domestic law is a bedrock value the United States has espoused internationally. Tools of foreign relations, by contrast, are designed for political aims. *See*

Schooner Exchange, 11 U.S. at 146. Whether one nation can employ prosecutors, courts and juries to brand another nation's instrumentalities as felons and impose criminal penalties against them thus has immense implications. If domestic criminal law can be wielded against foreign sovereign instrumentalities for political reasons, it will only encourage the use of criminal law for geopolitical purposes.

That result would be unfortunate. And it would be particularly anomalous for the United States to bring it about. The United States has long stressed the need to depoliticize law throughout the world. This country regularly emphasizes that foreign nations should not wield domestic criminal law based on political concerns. *See, e.g.*, U.S. Mission to the Org. for Sec. & Coop. in Europe, On Political Prisoners in Belarus (Jan. 27, 2023) (tinyurl.com/23m4kys2); U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., 2021 Country Reports on Human Rights Practices: Cuba (Apr. 12, 2022) (tinyurl.com/3yfjbr5m) Subjecting foreign sovereign instrumentalities to domestic prosecutorial discretion would introduce into the criminal context—where they are the most corrosive—the "case-by-case diplomatic pressures" and "political considerations" that the law on sovereign immunity has sought to eliminate. *Verlinden*, 461 U.S. at 487-88.

Criminal prosecutions embody the view that the defendants being prosecuted—normally by governments—have committed moral wrongs that warrant punitive action. Such actions against foreign sovereign instrumentalities, even more so than private civil suits, therefore directly implicate the foreign policy and international comity considerations that underlie foreign sovereign immunity, which

Congress has carefully regulated by statute for civil cases. If the United States is to break with international law to brand another nation's instrumentality a criminal, such a momentous act should be taken by political leaders wielding legislative authority, rather than by prosecutors, courts, and juries unversed in, and unguided by, the "delicate" and "sensitive" foreign policy considerations such prosecutions entail. *Schooner Exchange*, 11 U.S. at 135; *Verlinden*, 461 U.S. at 493. This Court should therefore grant review, hold that foreign sovereign nations and their instrumentalities cannot be subject to criminal prosecution, and leave it to Congress to debate and decide, after considering the foreign policy ramifications, whether the United States should become the first nation to do so.

This threat to the rule of law is made even worse by the Second Circuit's holding that in prosecutions of foreign sovereign instrumentalities courts must "defer to the Executive Branch's determination as to whether [the] party should be afforded common-law foreign sovereign immunity." Pet. App. 5a. As the petition explains, this holding is further reason to grant review. "It is emphatically the province and duty ***of the judicial department*** to say what the law is." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (emphasis added). Thus, courts, not the Executive, decide what the common law is. And while this Court can consider the persuasive effect of the Government's position in appropriate cases involving foreign sovereigns—where the Government is not itself a party—it remains courts' duty to declare the law. The Court should not abdicate that duty by allowing the law to be determined by Executive fiat. That is particularly true with foreign sovereign

immunity, where the boundless discretion the Second Circuit conferred on the Executive would leave foreign sovereigns without any ability to know what the "law" is until they are prosecuted. If allowed to stand, this rule would contravene this Court's dictate that any exceptions to immunity must be clearly expressed "in a manner not to be misunderstood." *Schooner Exchange*, 11 U.S. at 146.

The Government has long made its views on foreign sovereign immunity known to courts. But those views have generally been styled and treated as "suggestions," not legal dictates. For example, in *Schooner Exchange*, the Executive "suggest[ed]" the vessel should be released. *See* 11 U.S. at 118-19. Chief Justice Marshall did not reflexively adopt this suggestion, instead announcing the governing common-law principle and applying it to the facts. Only thereafter did the Court note that its decision was supported by the Executive's view. *Id.* at 147. And in *Berizzi Bros.*, the Executive stated that a merchant ship should ***not*** have immunity, *see The Pesaro*, 277 F. 473, 479 n.3 (S.D.N.Y. 1921), but this Court held otherwise, *see Berizzi Bros.*, 271 U.S. at 576. Thus, on questions related to foreign sovereign immunity, "the courts respect, but do not automatically follow, the views of the Executive Branch." *Yousuf* v. *Samantar*, 699 F.3d 763, 773 (4th Cir. 2012). *See also* Tate Letter, 26 Dep't St. Bull. at 985 (noting that "a shift in policy by the executive cannot control the courts").[7]

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[7] For certain other doctrines, however, the Constitution entrusts decisions to the Executive. For example, the Executive will be afforded conclusive deference on recognizing head-of-state or diplomatic immunity, based on the Constitution's delegation to the President of the power to "receive Ambassadors and other

And while pre-FSIA courts sometimes deferred to Executive views that sovereign immunity ***should*** be recognized in civil cases, *see, e.g.*, *Peru*, 318 U.S. at 589, amici are aware of no case where this Court ever deferred to an Executive suggestion that immunity ***should not*** be recognized.[8] A court may reasonably be concerned by an Executive decision that proceeding with a civil case would undermine the Executive's foreign policy. But no similar concern is raised by prosecutors' self-serving declaration that a party they are already prosecuting lacks common-law immunity.

The Second Circuit's abdication of the rule of law in favor of Executive fiat, if allowed to stand, would further corrode the international comity at the heart of foreign sovereign immunity. The rulers of other countries, particularly those whose interests are antithetical to those of the United States, could seize upon the Second Circuit's deference holding to bypass their own courts and strip the criminal-law immunity of U.S. governmental instrumentalities by dictatorial fiat in cases where their governments are the prosecuting parties. This result would only further

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public Ministers," U.S. Const. art. II, § 3. *See Yousuf*, 699 F.3d at 772. This case involves no such doctrines.

[8] The statement in *Republic of Mexico* v. *Hoffman*, 324 U.S. 30, 35 (1945), that "[i]t 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," was pure dicta because in *Hoffman*, the Executive "took no position" on immunity. *Id.* at 31-32. And *Hoffman*'s dicta states only that courts should not allow immunity on "new grounds" the government has not recognized. *Id.* at 35. Halkbank's absolute immunity is not a "new ground"; rather, the law has mandated it for more than two centuries.

undermine the unbiased rule of law that the United States has long sought to promote abroad.

CONCLUSION

For the foregoing reasons, and those in the petition, the Court should grant certiorari and reverse the judgment below.

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