No. 24-1144

IN THE

Supreme Court of the United States

TURKIYE HALK BANKASI A.S., AKA HALKBANK,

Petitioner,

v.

UNITED STATES,

Respondent.

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

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

JOHN MOORE
Counsel of Record
ELIZABETH WOLSTEIN
SCHLAM STONE & DOLAN LLP
26 Broadway
New York, NY 10004
(212) 344-5400
jmoore@schlamstone.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTEREST OF AMICUS CURIAE[1]

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

---

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

SUMMARY OF ARGUMENT

This case goes to the heart of how the United States court system will treat the long-recognized right of sovereign nations and their instrumentalities to be immune from criminal prosecution in the domestic courts of another nation. The Second Circuit essentially abrogated that immunity, rendering such immunity a favor to be granted or withheld by the Executive's discretion alone. But that is not the common law as it has long been recognized around the world. The Second Circuit's ruling was in error and should be reversed.

The Second Circuit's ruling broke new legal ground in a variety of troubling ways when it approved the first criminal trial of a sovereign instrumentality in the world. At bottom, the court determined that, under the common law, an instrumentality of a foreign state engaged in purportedly commercial activity has no entitlement to sovereign immunity from criminal prosecution beyond what the United States Executive Branch chooses to bestow. In doing so, the court reduced sovereign immunity to little more than the Executive's own prosecutorial discretion. But none of this is supported by the common law. To the contrary, the common law previously recognized in this country and around the world requires a different conclusion.

International and common law principles make clear that the Second Circuit reached the wrong result here. Those principles undisputedly grant foreign sovereigns immunity from criminal prosecution in the domestic courts of another nation. But, disregarded by

the Second Circuit, the common law extends the same measure of immunity when a foreign sovereign acts through an instrumentality, even if that instrumentality takes the form of a separate legal entity, such as a corporation. Thus, an arm of the state, like the Bank here, is subject to the same immunities as the state itself under the common law. In holding that the Bank was nonetheless subject to criminal prosecution in the Southern District of New York, the Second Circuit abandoned these well-settled principles of international law.

The Bank is undisputedly a sovereign instrumentality of Turkey created by the Turkish national legislature, affiliated with the Turkish Ministry of Treasury and Finance, and overseen by the Minister. The early Turkish Republic created the Bank to modernize the nation's economy and provide credit to small businesses, artisans, and shopkeepers. This remains central to the Bank's mission. The Bank continues to serve numerous governmental functions, including collecting taxes, managing state funds, administering government programs, offering relief during natural disasters, and distributing social welfare.

The Second Circuit's decision approving the Executive's efforts to prosecute the Bank rejects principles that underpin the very concept of sovereignty. The immunity from criminal prosecution the common law has historically afforded foreign nations and their instrumentalities is grounded in practical and compelling reasons that go to the heart of what it means for a foreign nation to be sovereign. In the international order, sovereign nations are understood to stand in equal

relation to one another and to possess authority only over their own territories.

Thus, the presumption that a nation is immune from prosecution in the domestic courts of another nation is intrinsic in the very notion of sovereignty. The assertion of criminal jurisdiction by one nation over another destroys these traditional understandings altogether. It permits one nation to exercise authority over another nation without any warrant in the long-settled understanding of comity between co-equal sovereigns or that nation's consent.

That lack of consent here underscores the practical considerations that also counsel in favor of affording immunity to instrumentalities of foreign nations to the same extent as to the nation itself. As this Court long ago recognized, attempting to enforce a criminal judgment against a recalcitrant foreign state and its instrumentalities would result in a "general inability of the judicial power to enforce its decisions." *The Schooner Exch. v. McFaddon*, 11 U.S. 116, 146 (1812). Thus, any remedies for a purported criminal violation would be left to the traditional tools of foreign relations. But those tools are always available, rendering any criminal prosecution a pointless affront to national dignity and sovereignty that achieves no clear benefit. These considerations, among others, explain why nations across the globe have accepted the international law presumption that nations may not criminally prosecute other nations or their instrumentalities.

If allowed to stand, the Second Circuit's decision breaks with international law as defined by the customs of nations throughout history. The Second Circuit includes New York City, a major financial center where many U.S. dollar transactions are cleared. The Circuit's decision thus opens the door to the prosecution of sovereign instrumentalities for conduct within their own territory, so long as that conduct has some relationship at some point to allegedly commercial activity. This is a remarkably broad grant of power.

The Second Circuit's decision breaks with the expectations of other nations and international law. Authorities are unanimous that it is a generally accepted principle of international law that sovereigns cannot criminally prosecute each other. The same body of law also confirms that the commercial-activities exception to sovereign immunity, or "restrictive theory," that arose in civil cases does not apply in the criminal context. Finally, international law recognizes that agencies and instrumentalities of a sovereign that are controlled and directed by sovereigns receive the same immunity as the sovereign itself. The current prosecution appears to be the first time in the world in which any sovereign has criminally tried any other sovereign *or a sovereign instrumentality* in its own domestic courts.

In granting this authority to the Executive, the Second Circuit has departed from global consensus, without guidance from Congress, and in disregard of the serious consequences likely to result from its ruling. This Court's review is urgently needed to correct the lower court's serious misstep and reassert the

proper common law understanding of foreign sovereign immunity. This Court should grant certiorari here and reverse the Second Circuit's erroneous order.

REASONS FOR GRANTING CERTIORARI

A. The prosecution the Second Circuit blessed here is contrary to long-settled principles of international common law.

When determining whether the common law grants immunity from criminal prosecution to the instrumentalities of foreign nations, it is significant that there is no precedent for one nation to assert the authority to use its domestic courts to engage in such prosecutions. Neither the Government nor the Second Circuit has identified a single instance in which the instrumentality of a sovereign state was made to face a criminal trial conducted by another nation without its consent. In allowing the criminal prosecution to proceed here, the Second Circuit purported to identify a common law rule for which there is no precedent.

1. Broadly accepted principles of international law—the "law of nations"—are among the foundations of the common law. As described by Sir William Blackstone, in the United Kingdom, "The law of nations ... is here adopted in its full extent by the common law, and is held to be a part of the law of the land." *Blackstone's Commentaries*, 15th ed. (1809), Book IV, Ch. 5, p. 67. And as Lord Denning opined, "the rules of international law are incorporated into English law automatically and considered to be part of English law

unless they are in conflict with an Act of Parliament." *Trendtex Trading Corp. v. Central Bank of Nigeria*, [1977] Q.B. 529, 553–54 (U.K.). Likewise, this Court has long sought to ensure that the federal common law of foreign sovereign immunity in the United States reflects and incorporates the immunity granted by the law of nations and is consistent with "the usages and received obligations of the civilized world." *See, e.g.*, *The Schooner Exch.*, 11 U.S. at 137.

"The doctrine of sovereign immunity constitutes one of the older doctrines of public international law." John O'Brien, *International Law* at 294 (2001). The United Kingdom's House of Lords has, on a number of occasions, explored the reasons animating the broad international consensus that the courts of one nation may not impose their judicial authority over other sovereign nations. As Lord Wilberforce explained, it is the "first principle" of sovereign immunity that it arises from the doctrine of "'par in parem' which effectively means that the sovereign or governmental acts of one state are not matters upon which the courts of other states will adjudicate." *Owners of Cargo Lately Laden on Board the Playa Larga v Owners of the I Congreso del Partido*, [1983] 1 A.C. 244 (U.K.).

Thus, as Lord Millett described in another case, immunity "derives from the sovereign nature of the exercise of the state's adjudicative powers and the basic principle of international law that all states are equal." *Holland v. Lampen-Wolfe*, [2001] I.L.Pr. 49 (U.K.). Subjecting one nation to the judicial processes of another violates the "absolute independence of

every superior authority." *In the Parlement Belge*, L. R. 5 P. D. 197, 207–08 (1880) (U.K.).

Because the immunity from criminal prosecution that courts grant foreign states arises from principles and obligations of international law that stand apart from the positive law of statutes or the common law, the contours of the immunity must accord with the underlying principles of international law. The common law, in turn, must "give effect to the international obligations" that already exist and even predate the common law. *Holland*, [2001] I.L.Pr. 49. "To determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (*opinio juris*)." U.N. G.A. Res. 73/203, *Identification of customary international law*, 73d Session (Dec. 20, 2018). Whether those elements have been satisfied requires examining general and widespread state practices (including both actions and inaction); legislative, administrative, and judicial conduct; treaties; resolutions of international organizations; and the decisions of international courts and tribunals. *See id.*

None of these sources of international law supports the Second Circuit's ruling here. And indeed, the criminal prosecution the Government seeks to undertake offends both the requirements of general practice and acceptance as law (*opinio juris*).

Under the United Kingdom's jurisprudence, as expressed by Lord Bingham, by recognizing the immunity of foreign states in domestic courts, a court does not decline to "exercise over another state a jurisdiction

which it has," but rather acknowledges that "a state has no jurisdiction over another state." *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) and others*, [2006] UKHL 26 (U.K.). The necessary corollary of Lord Bingham's insight is that a "state is not criminally responsible in international or English law, and therefore cannot be directly impleaded in criminal proceedings." *Id.*[2] This conclusion flows from the fact that "[c]riminal prosecutions of foreign states and associated entities in the courts of other countries typically have long been seen as contrary to international law." John Balzano, *Crimes and the Foreign Sovereign Immunities Act: New Perspectives on an Old Debate*, 38 N.C. J. Int'l L. & Com. Reg. 43, 82 (2012).

Fundamentally, a nation exercising criminal jurisdiction over a foreign sovereign offends the idea that states exist as "co-equal sovereign[s]." Balzano, *supra*, at 83. It is the assertion of one country's laws directly over another independent nation. Criminally prosecuting a "co-equal sovereign" is particularly offensive because the "moral condemnation" inherent in criminal prosecutions "denigrates the equality and dignity of the foreign state within the international order." Balzano, *supra*, at 83; *see also* Hazel Fox & Philippa Webb, *The Law of State Immunity* 89 (3d ed. 2013) (noting that the assertion of criminal jurisdiction over

---

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

foreign states contravenes international law, in part, because it "seeks to make another State subject to penal codes based on moral guilt").

Thus, under traditional principles of international law, and domestic common law, foreign sovereigns were absolutely exempt from judicial process. *In the Parlement Belge*, L. R. 5 P. D. at 205. (Although there is a trend away from this absolute rule in modern times, that shift is limited to the civil context and is not relevant to the discussion here, as will be explained below.) "An equal exemption from interference by any process of any Court of some property of every sovereign is admitted to be a part of the law of nations." *Id.* Thus, "the public property of every state, being destined to public uses, cannot with reason be submitted to the jurisdiction of the Courts of such state, because such jurisdiction if exercised, must divert the public property from its destined public uses." *Id.* at 210.

This Court values and respects the views of other sovereigns on immunity law, and the Court generally attempts to align foreign sovereign immunity law with international norms followed by other nations. Indeed, the Court has recognized that foreign sovereign immunity is among the "basic principles of international law long followed both in the United States and elsewhere." *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 581 U.S. 170, 179 (2017). Recognizing foreign sovereign immunity serves to "induce each nation state, as a matter of international comity, to respect the independence and dignity of every other, including our own." *Id.* (cleaned up).

2. The immunity granted to foreign nations and their property under the common law applies even when a nation acts through a separate legal entity such as a corporation. As described by Lord Denning, "[a] foreign department of state ought not to lose its immunity simply because it conducts some of its activities by means of a separate legal entity." *Trendtex Trading Corp.*, [1977] Q.B. at 559; *see also Baccus Srl v. Servicio Nacional del Trigo*, [1957] 1 Q.B. 438 (U.K.) (defendants were entitled to immunity as a department of Spanish government notwithstanding their corporate status as a separate legal personality). As Lord Parker described, there is "no ground for thinking that the mere constitution of a body as a legal personality with the right to make contracts and to sue and be sued is wholly inconsistent with it remaining and being a department of State." *Baccus Srl*, [1957] 1 Q.B. at 472.

Whether a particular instrumentality is a separate corporate entity or formal governmental ministry is "purely a matter of governmental machinery" that has no effect in itself on the application of sovereign immunity. *Baccus Srl*, [1957] 1 Q.B. at 466 (Jenkins L.J.). Thus, the corporate instrumentalities of foreign nations are entitled under the common law to the same immunities that apply to the nations themselves.

The Government and the Second Circuit acknowledged that the common law has adopted the consensus among nations that sovereign immunity applies absolutely to the criminal prosecution of one nation by another nation (Appx. 23a). But the Second Circuit

ignored that the same immunity applies not only to nations, but to the instrumentalities of those nations, even when those instrumentalities are independent legal entities. This was an error of law that requires correction.

Here, there is no dispute that the Bank is an instrumentality of Turkey. Indeed, Turkey expressly said so in its briefing when this matter was last before this Court. *See* Brief for Republic of Turkiye as Amicus Curiae Supporting Petitioner, *Turkiye Halk Bankasi A.S., aka Halkbank v. United States of America*, 143 S.Ct. 940 (2023) (No. 21-1450). The brief describes Halkbank as "an integral part of the Turkish state" and explains that "Turkiye treats the Bank as an arm of the state, indistinguishable from the government itself." *Id.* at 2. The Bank was created to meet the nation's constitutionally mandated obligations, is largely owned and controlled by the Government, operates several government programs, and even collects taxes and other receivables on the nation's behalf. *Id.* at 3–7. Thus, under common law principles granting immunity to the instrumentalities of foreign sovereigns, the Bank should be immune from the criminal prosecution the Government seeks to undertake here, notwithstanding the Second Circuit's contrary decision.

3. The move in the latter half of the 20th century away from the absolute immunity afforded sovereigns under the traditional common law view toward a restrictive view that permits suits for a nation's commercial activities provides no reason to alter the traditional common law. The restrictive view arose in the context of and has been applied exclusively to civil

suits. There remains no precedent for the criminal prosecution of a nation's instrumentalities—even those engaged in purportedly commercial activities—in the courts of a foreign nation.

As a leading U.K. treatise has described, "[w]ithout exception, the legislation in common law countries introducing the restrictive approach to immunity in civil proceedings excludes its application to criminal proceedings." Fox & Webb, *supra*, at 90. For example, Australia, Canada, Pakistan, Singapore, South Africa, and the United Kingdom have expressly cabined the restrictive theory's scope to civil proceedings. *See* Foreign State Immunities Act 1985 (Cth) pt.1, s.3 (Australia) (providing that the proceedings to which the statute applies do "not include a prosecution for an offence or an appeal or other proceeding in the nature of an appeal in relation to such a prosecution"); State Immunity Act, R.S.C. 1985, c. S-18, s. 18 (Canada) ("This Act does not apply to criminal proceedings or proceedings in the nature of criminal proceedings."); The State Immunity Ordinance, No. 6 of 1981 § 17(2)(b) (Pakistan) ("This Ordinance does not apply to … criminal proceedings."); State Immunity Act Pt. II § 19(2) (1985) (Singapore) (expressly stating that its provisions do not apply to criminal proceedings); Foreign States Immunities Act 87 of 1981 § 2(3) (South Africa) ("The provisions of this Act shall not be construed as subjecting any foreign state to the criminal jurisdiction of the courts of the Republic."); State Immunity Act, 1978, c. 33, § 16(4) (United Kingdom) (providing that the statute does not apply to criminal proceedings).

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

Thus, at least six nations—spanning five continents—and the United Nations have implemented the traditional international law principles discussed above by preserving absolute immunity from criminal prosecution and statutorily limiting the restrictive theory to civil cases. In contrast, there does not appear to be a single nation anywhere in the world that has codified the authority of its domestic courts to exercise jurisdiction over criminal prosecutions of foreign states or instrumentalities.

The United States is no exception. The State Department announced in 1952 that it was embracing the restrictive theory of sovereign immunity, but after decades of inconsistent application, "Congress entered the fray and sought to standardize the judicial process with respect to immunity for foreign sovereign entities" by enacting the Foreign Sovereign Immunities Act (FSIA) and codifying the restrictive theory "in civil cases." *Turkiye Halk Bankasi A.S. v. United States*, 143 S.Ct. 940, 946 (2023). As this Court held when this

case was last before it, the FSIA "exclusively addresses civil suits," "relates only to civil cases," and has an "exclusively civil focus." *Id.* at 947. Thus, in accord with all the nations listed above, the United States has codified its embrace of the restrictive theory of sovereign immunity only in the civil context, leaving criminal prosecutions to be controlled by traditional common law immunities.

The fact that common law nations have adopted statutes to deviate from the traditional common law regarding sovereign immunity in civil cases reflects those nations' understanding that legislation is needed to restrict the common law of immunity. The Second Circuit blessed the Government's right to criminally prosecute the instrumentalities of foreign nations without Congress ever authorizing such prosecutions. Given that nations, including the United States, have codified in statute the precise contours of sovereign immunity in civil cases, it would be anomalous to conclude that the potential for far-more-serious criminal liability can be left to ad hoc determinations by line prosecutors across the country, with no legislative guidance on the scope of the abrogation of common law.

Reflecting an appropriate caution, on multiple occasions, this Court has declined to extend the power of federal courts in derogation of the common law immunities granted to sovereigns and their instrumentalities without a clear mandate from Congress for doing so. *See Berizzi Bros. Co. v. S.S. Pesaro*, 271 U.S. 562 (1926); *The Schooner Exch.*, 11 U.S. at 146. As a

matter of U.S. common law, these cases should dictate the outcome here.

4. In any event, neither the Government nor the Second Circuit has identified an instance in which a nation *or* its instrumentalities were tried in the courts of a foreign nation without its consent. The absence of criminal trials of foreign nations and their instrumentalities in domestic courts reflects the understanding that both nations and their instrumentalities are immune from such prosecutions under settled principles of international law.

The Second Circuit's conclusion that common law sovereign immunity for foreign instrumentalities engaged in allegedly commercial activities exists only at the discretion of the Executive upends the very idea of immunity (Appx. 5a, 10a–11a, 15a, 29a). Unlike in civil proceedings brought by private parties, every federal prosecution will be brought by the Executive itself. Implicit in bringing those criminal charges, according to the Government, is the Executive's decision that sovereign immunity does not apply. The Government and the Second Circuit candidly recognize this fact (Appx. 15a). But if that is true, then in every case in which sovereign immunity from criminal prosecution might apply, that immunity has already been unilaterally cancelled. An immunity from criminal charges that is automatically cancelled by the filing of criminal charges is no immunity at all. What the Second Circuit has described is not sovereign immunity, but prosecutorial discretion.

Further reflecting the ad hoc nature of what immunity would look like under the Second Circuit's decision, the court reserved the Executive's authority to *grant* sovereign immunity to a foreign instrumentality "even if the alleged conduct at issue is arguably commercial in nature" (Appx. 29a n.12). The court was clearly—and correctly—concerned about opening the floodgates to local prosecutions of the instrumentalities of foreign sovereigns. But its solution—granting the Executive the power to bestow immunity in some cases involving commercial activity while withholding immunity in others—will produce the same uncertainty that characterized its immunity practices before the passage of the FSIA. Yet under the court's ruling, the instrumentalities of foreign states are entitled to immunity if, and only if, the Executive says so. Such a conclusion represents a sharp break with the law of nations that has always been understood to inform the common law.

The degree of judicial deference to the Executive indicated by the Second Circuit's decision is neither a product of international law nor proper under the common law or U.S. statutes. It is particularly inappropriate given the serious policy concerns implicated by this unwarranted deviation from the well-established international common law surrounding foreign sovereign immunity.

B. The serious policy concerns necessarily implicated by the Second Circuit's order merit this Court's review.

The Second Circuit's decision implicates serious policy concerns and merits this Court's review.

1. The well-established common law precluding the criminal prosecution of foreign states and their instrumentalities is grounded in practical and compelling reasons. To start, international comity—a traditional driving force in international law—counsels strongly against asserting criminal jurisdiction over foreign sovereigns and their instrumentalities. Were the United States to assert the jurisdiction of its domestic courts to hear the criminal prosecutions of foreign instrumentalities, foreign nations would have no reason to refrain from prosecuting its instrumentalities for conduct deemed offensive to that country's laws or interests. Balzano, *supra*, at 84. Thus, even if the United States were to trust itself to exercise this power only in wise and beneficent ways, it would have to ask whether the criminal indictments of the United States and its instrumentalities that other nations deem wise would be consistent with the interests of the United States.

The wisdom of the traditional common law understanding is made particularly clear when considering the serious practical considerations that are sure to arise, especially when a foreign nation whose instrumentality is the subject of a prosecution is recalcitrant. In such an instance, there would be a "general

inability of the judicial power to enforce its decisions." *The Schooner Exch.*, 11 U.S. at 146.

Consider the practical and legal conundrums that would be sure to arise from the attempt to assert domestic judicial power in the Southern District of New York over the instrumentality of an uncooperative foreign sovereign. For instance, could the Government obtain a criminal forfeiture against an instrumentality that implicated the financial interests and property of a foreign nation that had not taken part in the underlying criminal conduct or had participated only in its sovereign capacity? When, as is the case here, the instrumentality collects taxes and other receivables of the State, does the Government assert the power to seize another nation's tax collections? And when, as is also the case here, the instrumentality directly administers government programs, is the Government willing to seize assets that were earmarked for those programs and potentially disrupt a foreign nation's ability to execute its own domestic policies? Because the FSIA does not apply, what are the legal standards for attachment and seizure?

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

The insertion of a criminal prosecution into the delicate gears of international relations serves no

purpose at all. As the Supreme Court long ago recognized, the wrongs committed by sovereign countries against one another "are rather questions of policy than of law" and, as such, "are for diplomatic, rather than legal discussion." *The Schooner Exch.*, 11 U.S. at 146.

2. Even passing over the practical difficulties laid out above, diverging from the common law here to permit the criminal prosecution of foreign instrumentalities risks casting doubt on the express agreements that currently define the relationships among nations. After all, the courts are not writing on a blank slate. The United States and Turkey have engaged in the traditional modes of diplomacy to craft a treaty defining the relationship between the nations as it relates to criminal matters. *See* Treaty of Extradition and Mutual Assistance in Criminal Matters, U.S.–Turkey, Jan. 1, 1981, 32 U.S.T. 3111. The two sovereigns entered into the treaty in order to "cooperate more effectively in the repression of crime." *Id.* As with all treaties, the Mutual Assistance Treaty was the result of extensive negotiations between the two nations, followed by consideration and ratification by the United States Senate.

Critically, while the treaty defines the conditions under which extradition and mutual legal assistance will be provided by each nation, nothing in it suggests that either country intended to subject itself or its instrumentalities to the criminal jurisdiction of the other. To the contrary, the treaty makes clear that each nation need not even provide assistance to the other if it "considers that execution of the request [for

assistance] is likely to prejudice its sovereignty." *Id.* at Art. 22(1)(b). Of course, being subject to the criminal jurisdiction of a foreign nation is directly prejudicial to a nation's sovereignty. Balzano, *supra*, at 83.

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

Nor would the ramifications be limited to the relationship between the United States and Turkey. The United States has equivalent treaties with nations across the world. Sidestepping the terms and procedures negotiated in each of those treaties would upend the United States' relations with its foreign partners around the world.

These concerns are exacerbated by the fact that nothing in the Second Circuit's order limits the ability to bring criminal charges against a foreign state's instrumentality to conduct that occurred in the United States. Even the most restrictive view of common law foreign sovereign immunity in civil cases has never encompassed legal action against conduct undertaken within the sovereign's own borders. And indeed, the

indictment in this case reflects that the Bank's conduct in question occurred overwhelmingly within Turkey. Among the many breaks with international common law embodied by the Second Circuit's decision, this may be the most far-reaching. Such a holding—if permitted to stand—makes the reach of American law unlimited, contrary to the principles of comity and consent among co-equal sovereigns that the common law has long recognized and upheld.

The Government's contention that it can take the unprecedented step of criminally prosecuting an instrumentality of a foreign nation will affect foreign relations and disrupt settled practice between co-equal sovereigns on the world stage. The common law does not recognize such a result. Because the Second Circuit ruled otherwise, this Court should grant certiorari in the matter and reverse.

CONCLUSION

This Court should grant the petition for certiorari and reverse the Second Circuit's order.

Respectfully submitted,

JOHN MOORE
Counsel of Record
ELIZABETH WOLSTEIN
SCHLAM STONE & DOLAN LLP
26 Broadway
New York, NY 10004
(212) 344-5400
jmoore@schlamstone.com

Counsel for Amicus Curiae