No.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether U.S. district courts may exercise subject-matter jurisdiction over criminal prosecutions against foreign sovereigns and their instrumentalities under 18 U.S.C. § 3231 and in light of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1441(d), 1602-1611.

PARTIES TO THE PROCEEDING

Petitioner Türkiye Halk Bankasi A.Ş., was a defendant in the district court and the appellant in the Second Circuit. Respondent United States of America was the plaintiff in the district court and the appellee in the Second Circuit.

CORPORATE DISCLOSURE STATEMENT

Petitioner Türkiye Halk Bankasi A.Ş. is 75% owned by the non-party Turkish Wealth Fund, which is part of and owned by the Turkish State. No publicly held corporation owns 10% or more of the stock of non-party Turkish Wealth Fund.

STATEMENT OF RELATED PROCEEDINGS

There are no proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case under Supreme Court Rule 14.1(b)(iii) except as follows:

- *United States v. Halkbank*, No. 20-3499, 2d Cir. (Oct. 22, 2021) (affirming denial of motion to dismiss based on sovereign immunity).
- *In re Türkiye Halk Bankasi A.Ş.*, No. 20-3008, 2d Cir. (Dec. 23, 2020) (denying mandamus relief regarding recusal).
- *United States v. Atilla*, No. 18-1589, 2d Cir. (July 20, 2020) (affirming conviction of Mehmet Hakan Atilla).
- *In re Türkiye Halk Bankasi A.Ş.*, No. 19-4203, 2d Cir. (Feb. 21, 2020) (denying mandamus relief relating to personal jurisdiction).
- *United States v. Halkbank*, No. 15-Cr.-867, S.D.N.Y. (Oct. 1, 2020) (denying motion to dismiss based on sovereign immunity).
- *United States v. Zarrab*, No. 15-Cr.-867, S.D.N.Y. (prosecutions of several individuals and Halkbank via separate indictments).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases:

Page

Cases—continued:

Constitution, Statutes, and Regulations:

Page

Statutes and Regulations—continued:

Other Authorities:

Page

Other Authorities—continued:

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Petitioner Türkiye Halk Bankasi A.Ş. (Halkbank) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-24a, is reported and available at 16 F.4th 336 (2d Cir. 2021). The opinion of the United States District Court for the Southern District of New York denying petitioner's motion to dismiss, Pet. App. 25a-47a, is unreported and available at 2020 WL 5849512 (S.D.N.Y. Oct. 1, 2020).

JURISDICTION

The judgment of the court of appeals was entered on October 22, 2021. Pet. App. 2a. The petition for rehearing

or rehearing en banc was denied on December 15, 2021. Pet. App. 48a-49a. On January 31, 2022, Justice Sotomayor extended the time to file a petition for certiorari until May 13, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 3231 and the Foreign Sovereign Immunities Act (28 U.S.C. §§ 1330, 1441(d), 1602-1611) are set forth in the appendix. Pet. App. 50a-80a.

STATEMENT

This case presents a question worthy of this Court's attention: can the federal government indict, and then a court sentence, the Republic of Turkey, a key U.S. ally on NATO's frontlines? It would be surprising and unprecedented if the answer to that question were yes. Here, the subject of the prosecution is Halkbank, a bank majority owned by Turkey. The government has not disputed that Halkbank is Turkey for jurisdictional purposes. Pet. App. 7a n.8; *see* 28 U.S.C. § 1603(a)-(b). So, without this Court's intervention, the decision below green lights future indictments of any sovereign state.

Absent any circuit split, the issue is cert-worthy. But there is more. In the criminal subpoena and civil Racketeer Influenced and Corrupt Organizations (RICO) Act contexts, the courts are split as to whether federal district courts have criminal jurisdiction over foreign sovereigns. The decision below has raised the split to an issue of paramount significance, because this case involves the brazen attempt by the federal government to indict and criminally prosecute a sovereign.

In the Sixth Circuit, foreign sovereigns enjoy their traditional absolute immunity from criminal jurisdiction. That court recognizes that the Foreign Sovereign Im-

munities Act (FSIA) offers the exclusive road for asserting U.S. jurisdiction over foreign states. But the FSIA contains only one grant of subject-matter jurisdiction—a provision for certain *civil* cases. 28 U.S.C. § 1330(a). The FSIA does not supply criminal jurisdiction, so criminal jurisdiction over foreign sovereigns does not exist. In the Second, Tenth, and D.C. Circuits, though, federal prosecutors can indict foreign states and their instrumentalities. Those courts rely on the general criminal jurisdictional statute, 18 U.S.C. § 3231, with the Second and D.C. Circuits noting that if the FSIA is applicable in criminal cases, there is no immunity if the commercial activities exception applies.

That split is outcome-determinative in this case. If Halkbank had been indicted in the Sixth Circuit, the trial court would have dismissed the indictment for lack of subject-matter jurisdiction. Instead, the decision below sets the stage for a first-of-its-kind criminal trial of a foreign sovereign in U.S. courts.

U.S. allies should not have to parse circuit splits to know whether they can be charged with crimes in this country. Sovereign immunity depends on international comity and respect. But division in the lower courts now means that foreign sovereigns can be indicted in New York and Hartford, but not Detroit or Cincinnati.

The decision below also diverges from this Court's precedents regarding the applicability of general jurisdictional statutes to foreign sovereigns. For more than two centuries, the law has been that to grant subject-matter jurisdiction over foreign states, Congress must speak clearly "in a manner not to be misunderstood." *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 146 (1812) (Marshall, C.J.). The Second Circuit nevertheless held that district courts have jurisdiction in criminal

cases against sovereigns by pointing to the general criminal jurisdictional statute, which never mentions foreign states or instrumentalities. The only statute to unmistakably grant jurisdiction over foreign sovereigns—the FSIA—explicitly limits its jurisdictional grant to civil cases while reaffirming broad immunity.

Criminal jurisdiction raises the sovereign-immunity stakes even further. No one likes being called a criminal, sovereign nations least of all. If U.S. courts can convict foreign states, the United States risks retaliatory actions around the world. U.S. sovereignty over our own courts allows our government to take that significant step—but only if Congress says so unmistakably. Because Congress has not, this Court should intervene and reverse the decision below.

A. Legal Background

Originally, "foreign states enjoyed absolute immunity from all actions in the United States." *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 821 (2018). Although the principle was rarely tested, sovereign immunity was understood to bar criminal prosecution—i.e., to include protection from "arrest [and] detention." *Schooner Exchange*, 11 U.S. at 137.

Historically, sovereign immunity "deriv[ed] from standards of public morality, fair dealing, reciprocal self-interest, and respect for the power and dignity of the foreign sovereign." *Nat'l City Bank of N.Y. v. Republic of China*, 348 U.S. 356, 362 (1955). Given the "exclusive and absolute" power of the United States over its own courts, jurisdiction over foreign sovereigns is possible. *Schooner Exchange*, 11 U.S. at 136. But based on the strong background norm against haling sovereigns into court, this Court imposed a clear rule: To subject foreign sovereigns to U.S. jurisdiction, Congress had to speak "in a manner

not to be misunderstood." *Id.* at 146. Simply describing the "ordinary jurisdiction of the judicial tribunals" would not suffice. *Id.*

Thus, for more than 150 years of our Republic, foreign sovereigns were granted absolute immunity from jurisdiction in U.S. courts. In the twentieth century, as sovereigns engaged more in global commerce, other countries began adopting "the 'restrictive theory' of sovereign immunity," under which countries could sometimes be sued civilly when acting as a private party. *Permanent Mission of India to the U.N. v. City of New York*, 551 U.S. 193, 199 (2007) (citation omitted); *see Jam v. Int'l Fin. Corp.*, 139 S. Ct. 759, 766 (2019). The United States transitioned towards that approach in 1952 as the State Department began recommending against immunity in cases involving "strictly commercial acts." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 487 (1983). But that "proved troublesome" in practice as "political considerations" skewed State Department recommendations. *Id.*

So in 1976, Congress stepped in, deciding "to deal comprehensively with the subject of foreign sovereign immunity in the FSIA." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 438 (1989). The FSIA defines a "foreign state" to include a company majority owned by a foreign state. 28 U.S.C. § 1603(a)-(b). By default, foreign states "shall be immune from the jurisdiction of the courts of the United States and of the States." *Id.* § 1604. But in line with the restrictive theory of sovereign immunity, Congress created a new grant of subject-matter jurisdiction for "any nonjury civil action against a foreign state" where "the foreign state is not entitled to immunity either under sections 1605-1607" or certain international agreements. *Id.* § 1330(a).

Sections 1605 to 1607, as promised, list out certain exceptions to sovereign immunity where U.S. courts can exercise their section 1330 jurisdiction. Among those, the commercial activities exception permits jurisdiction where "the action is based" on one of three things: (1) "commercial activity . . . in the United States," (2) "an act performed in the United States in connection with" commercial activity abroad, or (3) "an act outside" the United States in connection with commercial activity that "causes a direct effect in the United States." *Id.* § 1605(a)(2). All three require the court to examine the "bas[is]" for the "action." *Id.* And only the third—the direct-effects prong—covers acts abroad.

B. Factual and Procedural History

1. Halkbank is a bank headquartered in Istanbul and owned and controlled by the Republic of Turkey. C.A. App. 19, 22. The Turkish legislature created the bank by statute, and it operates various government programs using public funds. *See* Company Profile, Halkbank, https://tinyurl.com/ynkr8ym; CEO's Message, Halkbank, https://tinyurl.com/68cz3wr3. The bank has no U.S. branches or offices. The U.S. government agrees that Halkbank is an agency or instrumentality of Turkey, and therefore falls within the FSIA's definition of "foreign state." Pet. App. 7a n.8.

This case arises from the U.S. sanctions regime targeting Iran between 2012 and 2016. That regime allowed U.S. allies that had long relied on Iranian oil and gas to continue purchasing those commodities if they complied with certain conditions. Among those, the allies were required to deposit Iran's oil and gas proceeds in a bank under their jurisdiction and limit Iran's use of the deposited proceeds to certain purposes, such as bilateral trade or humanitarian relief. Pet. App. 4a-5a & n.2. Throughout the period, the Turkish government designated Halkbank

to serve as the sole repository of Iranian oil and gas proceeds. *See* Pet. App. 4a, 22a.

The government alleges that in 2012, Turkish-Iranian businessman Reza Zarrab hatched a scheme to divert these funds at Halkbank to uses not permitted by U.S. sanctions. C.A. App. 33-34; *see* C.A. App. 20-21. According to the government, Zarrab approached Turkey's Minister of Economy—Halkbank's governor—who in turn "directed that the ... scheme should be conducted through Halkbank." C.A. App. 37; *see* C.A. App. 34. The government claims that senior "Turkish government officials" at various times directed Halkbank to continue and accelerate the scheme. C.A. App. 37, 43, 45; *see* C.A. App. 49, 51.

At Zarrab's direction, Halkbank employees allegedly helped Zarrab transfer funds *within Halkbank* from Iranian accounts to accounts belonging to Zarrab or his front companies. *See* Pet. App. 5a-6a; C.A. App. 32-34, 36-37. Zarrab then transferred the money out of Halkbank to "exchange houses and front companies" in Turkey. C.A. App. 32. Zarrab used the funds to purchase gold in Turkey, which was then transported to Dubai. *See* Pet. App. 4a; C.A. App. 32-33. Once in Dubai, the gold "could be converted into cash or currency and remitted to Iran or used to conduct international financial transfers on behalf of Iranian persons and entities." C.A. App. 32; *see* C.A. App. 21-22, 33-34. When regulations no longer allowed the purchase of gold, Zarrab implemented a similar scheme designed to take advantage of exempt humanitarian trade. *See* C.A. App. 45-50. At bottom, the government alleges that the scheme's purpose was to "create a pool of Iranian oil funds in Turkey and the United Arab Emirates" that could be used for Iran's benefit. C.A. App. 21-22. The government alleges that Zarrab ultimately

passed 5% of the funds through U.S. accounts, usually en route to other countries. C.A. App. 21, 44, 52.

Halkbank and its employees are not alleged to have participated in any of the transfers after the funds left the bank, including any of the transfers to the United States. Former Halkbank executives are accused of conspiring to conceal the scheme from the U.S. Treasury Department by making misrepresentations to Treasury officials. *See* C.A. App. 52-54.

2. In 2017, Zarrab pleaded guilty and turned government witness. *See* C.A. App. 104. The government indicted three former Halkbank executives, one of whom stood trial and was convicted. Pet. App. 6a n.6; *see United States v. Atilla*, 966 F.3d 118, 133 (2d Cir. 2020).

The government then set its sights on Halkbank. In October 2019, federal prosecutors in the Southern District of New York obtained a six-count indictment against Halkbank. Pet. App. 7a, 25a-26a. Halkbank moved to dismiss, invoking sovereign immunity. Halkbank argued that, as a sovereign instrumentality of Turkey, no statute provides criminal jurisdiction over it. Halkbank alternatively argued that if the FSIA's exceptions to immunity apply to criminal cases, no exception authorizes jurisdiction here.

The district court denied the motion to dismiss. Pet. App. 25a. The court asserted that sovereign immunity only applies in civil cases, and thus that foreign sovereigns stand like private persons in criminal cases, with no immunity under either the FSIA or the common law. Pet. App. 34a, 38a-39a. In the alternative, the court held that the FSIA's commercial activities exception would overcome any immunity in this case. Pet. App. 35a-38a.

3. The Second Circuit affirmed, after first holding that the issue of criminal jurisdiction was immediately appealable. Pet. App. 8a-11a, 24a. On the merits, the court first held that subject-matter jurisdiction existed under 18 U.S.C. § 3231's general grant of jurisdiction for "all offenses against the laws of the United States." *See* Pet. App. 16a (emphasis omitted) (quoting 18 U.S.C. § 3231). The court acknowledged this Court's holding in *Amerada Hess* that "the text and structure of the 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 in a footnote, the court dismissed that decision on the ground that *Amerada Hess* was "a civil case." Pet. App. 16a n.42.

Second, the court held that if foreign states are entitled to sovereign immunity from criminal jurisdiction, the FSIA's exceptions limit that immunity. Pet. App. 17a-23a. The court focused on the commercial activities exception, and held that all three prongs of that exception were met. For the first two prongs—which require U.S. acts—the court treated the basis of the indictment as "Halkbank's communications with Treasury officials." Pet. App. 20a. The court concluded that those acts were either "commercial activity . . . in the United States" or U.S. acts connected to overseas commercial activity. 28 U.S.C. § 1605(a)(2); *see* Pet. App. 20a-21a. For the third prong, the court focused on Zarrab's broader money-laundering scheme. The court held that Halkbank's actions (all of which occurred in Turkey) had direct effects in the United States because they "led to" funds clearing the U.S. financial system. Pet. App. 23a; *see* Pet. App. 21a.

Third, the court held that foreign states lack criminal immunity under the common law. In three sentences, the court stated that common law had a commercial activity exception coextensive with the FSIA's and, in any event,

the Executive Branch had an absolute "prerogative" to strip sovereign immunity. Pet. App. 23a-24a.

The Second Circuit subsequently denied rehearing or rehearing en banc. Pet. App. 48a-49a. That court has stayed its mandate pending disposition of this petition for a writ of certiorari. C.A. Dkt. No. 116.

REASONS FOR GRANTING THE PETITION

The Second Circuit's decision adds to a growing and acknowledged circuit conflict over federal district courts' criminal jurisdiction over foreign sovereigns. For the first time, however, the split will lead to a criminal trial of a foreign sovereign in U.S. courts. Federal prosecutors in Manhattan now have license to pursue friends and foes across the globe. That result violates bedrock norms of international law and two centuries of Supreme Court precedent. Only this Court's immediate intervention can provide the consistency and clarity on which American allies depend.

I. The Decision Below Deepens an Entrenched Circuit Split and Conflicts with This Court's Decisions

The circuits are split 3-1 on whether district courts have criminal jurisdiction over foreign sovereigns. That sharp conflict, acknowledged by courts and scholars alike, warrants this Court's intervention. Although the split originally arose in the context of grand jury subpoenas and civil RICO claims, the Second Circuit's holding has upped the ante by squarely presenting the issue of whether foreign sovereigns can be criminally indicted, tried, and sentenced.

1.a. On one side, the Sixth Circuit correctly recognizes that federal courts lack criminal jurisdiction over foreign sovereigns, full stop. "[T]he FSIA is the only method of obtaining jurisdiction over foreign sovereigns." *Keller v. Cent. Bank of Nigeria*, 277 F.3d 811, 819 (6th Cir.

2002) (citation omitted), *abrogated on other grounds by Samantar v. Yousuf*, 560 U.S. 305 (2010). Because section 1330(a), the FSIA's jurisdictional provision, "refers only to civil, and not criminal, actions," the court concluded that "there is no criminal jurisdiction" over foreign sovereigns. *Id.* at 819-20 (citation omitted).

Keller arose in the civil RICO context, but the legal question was the same as the one raised here: Are foreign sovereign instrumentalities subject to criminal prosecution? The question arose because the RICO statute defines "racketeering activity" to include acts "indictable" under several federal statutes. 18 U.S.C. § 1961(1)(B). The foreign instrumentality defendants argued that they had not committed racketeering. In their view, the acts alleged were not "indictable" because "there [was] no criminal jurisdiction over them." *Keller*, 277 F.3d at 819. The Sixth Circuit agreed. Relying on this Court's decision in *Amerada Hess*, the court held that the FSIA sets "the sole basis for obtaining jurisdiction over a foreign state in our courts." *Id.* (quoting *Gould, Inc. v. Mitsui Mining & Smelting Co., Ltd.*, 750 F. Supp. 838, 844 (N.D. Ohio 1990) (quoting *Amerada Hess*, 488 U.S. at 434)). Because the FSIA's jurisdictional grant only reaches civil cases, "there was no criminal jurisdiction" over the foreign instrumentalities. *Id.* at 820.

b. Three other circuits, including the Second Circuit in the decision below, take the opposite view.

Start with the Tenth Circuit. In a similar civil RICO case to *Keller* featuring one of the same defendants, that court rejected the argument that "foreign states, their agencies, and instrumentalities are immune from criminal indictment" and thus "not 'indictable.'" *Southway v. Cent. Bank of Nigeria*, 198 F.3d 1210, 1214 (10th Cir. 1999). Although recognizing that the FSIA only provides jurisdic-

tion over civil actions, the Tenth Circuit refused to recognize "foreign sovereign immunity in the criminal context." *Id.* In the court's view, if Congress wanted sovereigns to be immune, Congress "should amend the FSIA to expressly so state." *Id.* at 1215. In other words, the Tenth Circuit treats jurisdiction over foreign sovereigns as the rule, not the exception. The Sixth Circuit, by contrast, applies "the opposite presumption," which accords with historical practice. *Keller*, 277 F.3d at 819.

The D.C. Circuit reaches the same bottom line as the Tenth. Although reserving judgment on whether foreign sovereigns are always subject to criminal jurisdiction, the D.C. Circuit has held that foreign sovereigns are at least subject to criminal jurisdiction where one of the FSIA's exceptions applies. *In re Grand Jury Subpoena*, 912 F.3d 623, 627 (D.C. Cir.) (per curiam), *cert. denied*, 139 S. Ct. 1378 (2019). Like the panel here, the D.C. Circuit reasoned that this Court's holding that the FSIA "is 'the sole basis for obtaining jurisdiction over a foreign state in our courts'" does not apply "to . . . criminal proceeding[s]." *Id.* at 628-29 (quoting *Amerada Hess*, 488 U.S. at 434). Thus, the panel asserted jurisdiction under the general criminal-jurisdiction statute, 18 U.S.C. § 3231.

In the decision below, the Second Circuit, quoting liberally from *In re Grand Jury*, adopted the same approach as the D.C. Circuit. Pet. App. 15a-18a. So long as the foreign sovereign is subject to an exception to immunity under the FSIA, a criminal prosecution against a sovereign can proceed in a district court in the Second Circuit.

c. This split is well recognized. As scholars and courts note, the circuits are divided on whether the "FSIA grants immunity from criminal prosecution to foreign states" in our courts. Restatement (Fourth) of Foreign Relations Law § 451 n.4 (Am. Law Inst. 2018); *accord*, *e.g.*, *United States v. Campa*, 529 F.3d 980, 1000-01 (11th Cir. 2008);

Megan Q. Liu, Note, *The Scope of Sovereign Criminal Immunity*, 60 Colum. J. Transnat'l L. 276, 299-302 (2021); Stephen J. Schultze, Note, *Hacking Immunity*, 53 Am. Crim. L. Rev. 861, 864 (2016).

The Second Circuit below recognized this split on the "FSIA's availability in criminal cases." Pet. App. 15a n.39; *accord In re Grand Jury*, 912 F.3d at 627. But the court disclaimed taking sides because the district court had jurisdiction under the general criminal-jurisdiction statute, 18 U.S.C. § 3231, and, if the FSIA applied, the FSIA's commercial activities exception, 28 U.S.C. § 1605(a)(2), would provide an exception to immunity. Pet. App. 17a.

That complicated dodge only underscores how important the split has become. The courts of appeals are now divided on whether foreign sovereigns can be indicted. In the Sixth Circuit, foreign sovereigns and their instrumentalities are "not indictable." *Keller*, 277 F.3d at 821. Indeed, in *Keller*, the court recognized that the FSIA's commercial activities exception applied to the allegations before it, but still rejected criminal jurisdiction. *Id.* at 818, 821. Sovereigns are thus absolutely immune from criminal prosecution in that circuit. But in the Second Circuit, there can now be no doubt that foreign sovereigns and their instrumentalities *are* "indictable." The Second Circuit's holding that it could exercise criminal jurisdiction over a foreign sovereign—via a non-FSIA statute (18 U.S.C. § 3231) and possibly in combination with the FSIA's commercial activities exception—conflicts with the Sixth Circuit's rule.

2. The Second Circuit's dramatic unleashing of federal criminal jurisdiction on foreign states also conflicts with this Court's decisions.

Federal courts, as courts of limited jurisdiction, can only hear "subjects encompassed within a statutory grant

of jurisdiction." *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701 (1982). No statute authorizes criminal jurisdiction over foreign sovereigns.

The FSIA certainly does not. That Act contains only one affirmative grant of subject-matter jurisdiction. And that provision by its plain text reaches only "nonjury *civil* action[s] against a foreign state." 28 U.S.C. § 1330(a) (emphasis added).

The Second Circuit below thus looked to 18 U.S.C. § 3231, which provides jurisdiction "of all offenses against the laws of the United States." Pet. App. 16a. Because section 3231 "contains no carve-out" for "federal offenses committed by foreign sovereigns," the court reasoned that the statute confers jurisdiction here. Pet. App. 16a (quoting *In re Grand Jury*, 912 F.3d at 628).

Such oversimplified logic turns on its head a centuries-old rule of statutory interpretation: General jurisdictional grants presumptively exclude foreign sovereigns. As Chief Justice Marshall put it, "[G]eneral statutory provisions . . . which are descriptive of the ordinary jurisdiction of the judicial tribunals . . . ought not . . . to be so construed as to give them jurisdiction" over foreign sovereigns. *Schooner Exchange*, 11 U.S. at 146.

In *Schooner Exchange*, this Court considered whether district courts had admiralty jurisdiction over foreign-sovereign warships under a statute granting jurisdiction over "all civil causes of admiralty and maritime jurisdiction." Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77 (1789); *see Schooner Exchange*, 11 U.S. at 120-21. Chief Justice Marshall answered with a resounding no. Although that "general statutory" language might be read to reach foreign sovereigns, Congress had to speak "in a manner not to be misunderstood" if it wanted to subject foreign states to jurisdiction. 11 U.S. at 146.

This Court reaffirmed *Schooner Exchange* more than a century later in *Berizzi Brothers v. The Pesaro*, 271 U.S. 562 (1926). In that case, the Court confronted an action involving a "merchant ship[] owned and operated by a [foreign] government." *Id.* at 576. As in *Schooner Exchange*, a general statute gave district courts jurisdiction over "all civil causes of admiralty and maritime jurisdiction." *Id.* (citation omitted). But again, this Court, citing *Schooner Exchange*, held that that general grant was "not intended to include" jurisdiction over immune foreign sovereigns. *Id.*

The Second Circuit's decision runs afoul of these decisions. Section 3231 plainly does not speak to jurisdiction over foreign sovereigns any more than the general admiralty statute did.

II. The Question Presented Is Exceptionally Important and Squarely Presented

1. Whether the United States can prosecute foreign nations is plainly important. The decision below authorizes the first ever criminal trial of a foreign sovereign. That indictment violates international law and breaks with the law and practice of America's allies. From the beginning of this Court's sovereign-immunity jurisprudence, the Court has recognized that sovereign immunity is a "very delicate and important" issue. *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 sovereign dignity is implicated by private, commercial disputes, then criminal prosecution takes foreign-policy concerns to new heights. There is a "stigma inherent" in any criminal sanction. *Breed v. Jones*, 421 U.S. 519, 529 (1975). The stigma is especially severe when applied to a

foreign government. And the stigma serves no other function given that entities cannot go to jail. In a criminal case against a foreign sovereign, the main sanction will always be criminal fines or restrictions on business. The Executive Branch has ways far less offensive to sovereign dignity to achieve those same ends, including through diplomatic pressure, modifying aid packages, trade negotiations, sanctions, and, if necessary, even military action. *E.g.*, 31 C.F.R. § 535.701 (2022) (civil penalties for Iran sanctions through Office of Foreign Assets Control).

Indeed, under the Second Circuit's reasoning, state or local prosecutors could tar a foreign state as a criminal just as easily as a federal prosecutor. If foreign states lack sovereign immunity from criminal prosecution, then any locality could assert jurisdiction. The Manhattan District Attorney could accuse Russian intelligence agencies of selling data to U.S. political campaigns. Or the Texas Attorney General's Office could indict the Mexican Transportation Ministry for bussing migrants to the U.S. border. Local officials playing global statesmen would risk profound damage to international comity.

That this case comes from New York makes prompt resolution all the more important. Criminal venue lies in the "district wherein the crime shall have been committed." U.S. Const. amend. VI. Given the huge share of U.S. dollar financial transactions that clear through New York, the government will almost always be able to allege venue in the Second Circuit. And given that the Second Circuit now treats allegations that conduct abroad "led to" U.S. financial transactions as sufficient to strip sovereign immunity, Pet. App. 23a, conduct by sovereigns the world over could support criminal jurisdiction in Manhattan.

2. The starkly different approach to criminal jurisdiction taken by the rest of the world heightens the foreign-policy risks. As a matter of customary international law,

"[a] state can be liable under civil law, but it cannot be prosecuted." Elizabeth Helen Franey, "Immunity from the Criminal Jurisdiction of National Courts," *in Research Handbook on Jurisdiction and Immunities in International Law* 205, 207 (2015). Accordingly, when other common-law countries opened the door to limited waivers of sovereign immunity in civil cases, they explicitly carved out "criminal proceedings." Hazel Fox & Philippa Webb, *The Law of State Immunity* 92 & nn.67-68 (3d ed. 2013).

Until the decision here, the United States was considered part of this international consensus. *Id.* at 244 ("like most countries, the [United States] does not 'prosecute' states"). Indeed, this Court has noted that the FSIA was meant to codify "international law at the time of the FSIA's enactment." *Permanent Mission of India*, 551 U.S. at 199. In its briefing below, the United States purported to offer a smattering of prior cases involving criminal prosecutions of or criminal process served on foreign-government-owned businesses. C.A. Br. 32. But in the only case actually involving a criminal prosecution, the government *disputed* and the Ninth Circuit agreed that the defendants were not in fact foreign instrumentalities. *United States v. Pangang Grp. Co.*, 6 F.4th 946, 954, 960 (9th Cir. 2021). And in the criminal-process cases the government cited, the defendants generally did not contest jurisdiction, thereby waiving sovereign immunity, *see United States v. Statoil, ASA*, No. 06-cr-960 (S.D.N.Y. Nov. 23, 2009), ECF No. 6, or as in another case, actually prevailed on sovereign immunity grounds, *In re Investigation of World Arrangements*, 13 F.R.D. 280, 291 (D.D.C. 1952). Prosecuting an acknowledged foreign sovereign is unprecedented.

It is also perilous. In sovereign immunity, as in international law generally, "what is sauce for the goose is nor-

mally sauce for the gander." *RJR Nabisco, Inc. v. European Cmty.*, 579 U.S. 325, 349 (2016) (citation omitted). Many nations "base their sovereign immunity decisions on reciprocity." *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 841 (D.C. Cir. 1984). If foreign sovereigns can be prosecuted in U.S. courts, it will only be a matter of time before U.S. instrumentalities face the same—say, Russia indicting the Federal Reserve for financial crimes. *See* Federal Law on Jurisdictional Immunities art. 4 (2015) (Russ.) (basing sovereign immunity on reciprocity). Courts should not lightly presume that Congress intended to set off a global circle of recrimination and prosecution without explicit direction.

3. This case cleanly presents the question presented. The government indicted Halkbank as an instrumentality of a foreign sovereign. C.A. App. 19. And, as the Second Circuit noted, the government has never "dispute[d] that Halkbank is an 'instrumentality of a foreign state' for purposes of FSIA." Pet. App. 7a n.8 (citation omitted). Halkbank moved to dismiss the indictment and the Second Circuit heard an interlocutory appeal on just this issue. Holding that the district court lacked subject-matter jurisdiction would conclusively resolve the case and end the proceedings below.

This case presents none of the vehicle problems that accompanied *In re Grand Jury*. 912 F.3d 623. There, an undisclosed foreign state sought review of the D.C. Circuit's decision asserting criminal jurisdiction to issue a grand jury subpoena. But that petitioner failed to raise the *Schooner Exchange* argument that jurisdictional provisions presumptively exclude foreign sovereigns until oral argument in the court of appeals. *Id.* at 631. Here, Halkbank's briefing has preserved the full range of arguments based on the FSIA and common law. C.A. Br. 24-50.

In re Grand Jury also presented basic practical problems to this Court's resolution. Numerous filings were made under seal, and the D.C. Circuit had to close an entire floor of the courthouse to hear argument. *See* Robert Barnes et al., *Supreme Court Rules Against Mystery Corporation from 'Country A' Fighting Subpoena in Mueller Investigation*, Wash. Post (Jan. 8, 2019), https://tinyurl.com/4vtxcdna. This case has none of that. This Court should seize the opportunity to resolve this extremely important question in a publicly-filed case that presents the heightened sovereignty interests of a direct criminal prosecution.

III. The Decision Below Is Wrong

The Second Circuit's decision is manifestly incorrect.

1. As explained above in part I.2, the plain text of the FSIA indicates that it provides jurisdiction only in civil cases. *See* 28 U.S.C. § 1330(a) (providing jurisdiction only for "nonjury civil action[s]"). Nor does 18 U.S.C. § 3231 right the ship given that general jurisdictional grants presumptively exclude foreign sovereigns. As Chief Justice Marshall held, such "ordinary" jurisdictional statutes should not "be so construed as to give them jurisdiction in a case." *Schooner Exchange*, 11 U.S. at 146; *see Berizzi Bros.*, 271 U.S. at 576.

The Second Circuit's decision conflicts with these precedents. As relevant in the *Schooner Exchange*, the Judiciary Act of 1789 authorized jurisdiction over "all" admiralty actions. Judiciary Act § 9, 1 Stat. at 77. That would have made foreign government ships subject to U.S. jurisdiction, but *Schooner Exchange* held otherwise. The Second Circuit's holding in this case is the opposite of Chief Justice Marshall's opinion in *Schooner Exchange*.

2. The FSIA carried forward the settled rule of those cases that general jurisdictional grants exclude foreign

sovereigns. The FSIA reaffirms that foreign states are ordinarily "immune from the jurisdiction of the courts of the United States and of the States." 28 U.S.C. § 1604. But the FSIA provides a limited grant of subject-matter jurisdiction for "any nonjury civil action against a foreign state . . . with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement." *Id.* § 1330(a). Sections 1605 to 1607 then enumerate the limited situations where section 1330(a)'s jurisdictional grant applies, including the commercial activity exception the government invoked here. *Id.* § 1605(a)(2).

Because section 1330(a) by its plain terms only covers civil, not criminal actions, the FSIA does not extend general jurisdictional provisions like 18 U.S.C. § 3231 to foreign sovereigns. To the contrary, the FSIA reaffirms the default rule that foreign sovereigns are immune unless and until Congress says otherwise. *Id.* § 1604.

In accordance with the "comprehensiveness of the statutory scheme in the FSIA," this Court has held that the FSIA is "the sole basis for obtaining jurisdiction over a foreign state in our courts." *Amerada Hess*, 488 U.S. at 434, 437. *Amerada Hess* thus rejected the argument that plaintiffs could sue a foreign state under the Alien Tort Statute (ATS) instead of the FSIA. Although the ATS confers jurisdiction over "any civil action by an alien for a tort only," the FSIA's "comprehensive[]" scheme is the "sole basis" for jurisdiction. *Id.* at 436, 438-39 (quoting 28 U.S.C. § 1350).

The Second Circuit did not address *Schooner Exchange* or *Berizzi Brothers*. In a footnote, the court cursorily distinguished *Amerada Hess* as "a civil case." Pet. App. 16a n.42. But the *Amerada Hess* decision did not depend on the case being a civil dispute. And this Court could not have been clearer as to its "sole basis" language.

It stated three separate times that the FSIA is the "sole basis for obtaining jurisdiction over a foreign state." 488 U.S. at 434, 439, 443. Indeed, the concurring opinion also agreed that "the FSIA provides the sole basis for obtaining jurisdiction over a foreign state in federal court." *Id.* at 443 (Blackmun, J., concurring). A pronouncement by this Court made four times in a single decision should not be lightly cast aside, especially when it is consistent with 200-year old precedent in the area. *See Schooner Exchange*, 11 U.S. at 146.

3. In line with that precedent, foreign states have enjoyed absolute immunity from criminal prosecution for centuries in this country. In *Schooner Exchange*, the Court expressed that sovereign immunity included protection from "arrest [and] detention." *Id.* at 137. In this regard, U.S. common law practice was consistent with international law, which has long forbidden "the application of the penal code of one State to another State." Fox & Webb, *supra*, at 91; *see supra* pp.16-18.

The Second Circuit dismissed the relevance of that practice in three unreasoned sentences. First, the court asserted that the FSIA "displaced any pre-existing common-law practice" limiting criminal jurisdiction. Pet. App. 23a. As explained, however, the FSIA only provides jurisdiction over a limited set of civil cases. The FSIA reaffirmed the common-law status quo of no criminal jurisdiction.

Second, the Second Circuit asserted that the "common law also had an exception for a foreign state's commercial activity." Pet. App. 23a. But the court's only citations speak to the limited waiver of sovereign immunity for commercial activity in the civil context that the FSIA then codified. Again, there is zero history of criminally prosecuting foreign states.

Third, and most troublingly, the court asserted that sovereign immunity was historically "the prerogative of the Executive Branch," so the decision to prosecute itself can strip sovereign immunity. Pet. App. 24a. But the Executive has never enjoyed unchecked authority over sovereign immunity. Although this Court's precedents "encourage deference to the political branches on sensitive questions of foreign affairs," "they do not suggest that courts can abdicate their judicial duty to decide the scope of . . . immunity." *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649, 1662 (2018) (Thomas, J., dissenting). Indeed, in *Berizzi Brothers*, this Court granted sovereign immunity over the Executive Branch's objection. 271 U.S. at 576; *see The Pesaro*, 277 F. 473, 479 n.3 (S.D.N.Y. 1921). "During the nineteenth and early twentieth centuries, both state and federal courts generally made immunity determinations by relying in part on customary international law," and although they "deferred to the executive on some questions, such as the existence of the government in question" they "did not view themselves as bound by the executive's suggestion of immunity." Ingrid Wuerth, *Foreign Official Immunity Determinations in U.S. Courts: The Case Against the State Department*, 51 Va. J. Int'l L. 915, 924-25 (2011).

4. The Second Circuit compounded its other errors by misapplying and significantly expanding the FSIA's commercial activities exception. Pet. App. 18a-23a. To be sure, this case should not even involve the FSIA's exceptions. But absent this Court's intervention, the Second Circuit's decision will be binding precedent, subjecting sovereigns in both civil and criminal matters to expanded jurisdiction under the FSIA's exceptions. This Court's resolution of the absolute immunity issue in petitioner's favor would have the salutary effect of also vacating the Second Circuit's otherwise precedential explanation of

the FSIA commercial activity exception before it is applied to other sovereigns.

The commercial activities exception limits sovereign immunity in three circumstances: (1) when "the action is based upon a commercial activity carried on in the United States;" (2) when the action is based upon an act in the United States connected to commercial activity elsewhere; or (3) when the action is based upon commercial activity elsewhere that "causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2).

The first two prongs require that the "action" be "based upon" U.S. activity. To determine the "basis" for the action, this Court looks to "the gravamen of the complaint," i.e., "the core of [the] suit." *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 33-35 (2015) (citation omitted). Courts do not conduct "an exhaustive claim-by-claim, element-by-element analysis" to determine whether *any* relevant act occurred in the United States. *Id.* at 34.

The Second Circuit identified "the 'gravamen' of the suit" as "the design of fraudulent transactions . . . to deceive U.S. regulators and foreign banks." Pet. App. 18a-19a (citation omitted). But that alleged activity occurred in Turkey and cannot support jurisdiction under the first two prongs. The court added that the indictment "further alleges that Halkbank lied to Treasury officials"—conduct that allegedly occurred in the United States. Pet. App. 19a. The Second Circuit thus erred because a suit cannot have two "cores." Either the gravamen of this case is fraudulent bank transfers in Turkey or misrepresentations in the United States. Given existing Supreme Court precedent, the government cannot have it both ways with two distinct gravamen literally half a world apart. *See OBB Personenverkehr*, 577 U.S. at 35. Notably, this Court has never decided a case in which the "gravamen"

test is claimed to be satisfied by distinct gravamen in different locations. *See id.* at 36 n.2.

The commercial activity exception's third prong allows jurisdiction for extraterritorial acts that "cause[d] a direct effect in the United States." 28 U.S.C. § 1605(a)(2). The Second Circuit erred again when it blew past that requirement by finding direct effects where Halkbank's activities allegedly "led to" financial transfers via the U.S. financial system. Pet. App. 23a.

The FSIA does not ask where the defendant's actions "led," but whether the effect was "direct." To be "direct" an effect must "follow[] as an immediate consequence of the defendant's activity." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992) (cleaned up). If there are "intervening events," the effect is not direct, and the Second Circuit's holding markedly splits from other circuits that have made clear the intervening acts of third parties spoil any claimed direct effect. *Odhiambo v. Republic of Kenya*, 764 F.3d 31, 41 (D.C. Cir. 2014) (Kavanaugh, J.); *see, e.g.*, *Frank v. Commonwealth of Antigua & Barbuda*, 842 F.3d 362, 370 (5th Cir. 2016) (schemer's "criminal activity served as an intervening act interrupting the causal chain"); *United World Trade, Inc. v. Mangyshlakneft Oil Prod. Ass'n*, 33 F.3d 1232, 1238 (10th Cir. 1994) (fact that transactions touched U.S. banks could not "be considered an 'immediate consequence of the defendant's activity' under any common sense reading of that phrase" (quoting *Weltover*, 504 U.S. at 618)); Restatement (Fourth), *supra*, § 454 n.8 (stating "[a]n effect is not 'direct' if there is an intervening act that causes the effect in the United States," and citing *Frank*).

Here, the alleged unlawful commercial activity was a scheme to transfer Iranian assets from accounts at Halkbank to "create a pool of Iranian oil funds in Turkey and the United Arab Emirates." C.A. App. 21. The only effect

on the United States was the flow of 5% of that money via the United States after a third party (Zarrab) injected the money into the "international financial" system. C.A. App. 32, 52. That intervening event—a third party's subsequent transfers—makes any effect on the United States by Halkbank indirect at best.

* * *

From start to finish, the Second Circuit misapplied basic principles of statutory construction and sovereign immunity. The result is the first ever prosecution of a foreign sovereign in U.S. courts—an unprecedented action that deepens an existing circuit split over district courts' criminal jurisdiction. This Court's immediate intervention is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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