No. 21-1450

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 REPUBLIC OF AZERBAIJAN AND ISLAMIC REPUBLIC OF PAKISTAN IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES:

TABLE OF AUTHORITIES—Continued

U.S. AND FOREIGN STATUTES:

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITIES:

TABLE OF AUTHORITIES—Continued

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INTERESTS OF AMICI CURIAE AND SUMMARY OF ARGUMENT[1]

The Republic of Azerbaijan is a transcontinental country of approximately 10 million people located at the boundary of Eastern Europe and Western Asia. It

[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. Both parties were timely notified more than 10 days in advance of amici's intent to file this brief and have consented to its filing.

shares borders with Russia, Iran, Turkey (now known as 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 Islamic Republic of Pakistan is the world's fifth most populous country, with roughly 230 million people. It maintains a close partnership with the 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.

Every sovereign nation in the world has an interest in this case, which is not merely about whether the United States may prosecute a particular foreign state-owned entity. Petitioner is majority-owned by the Republic of Türkiye, a key U.S. ally and NATO member. There is no dispute in this case that petitioner is considered a foreign state with the same juridical status as Türkiye itself. *Cf.* 28 U.S.C. § 1603(a)-(b). Indeed, the decision below draws no distinction between petitioner and the Republic of Türkiye. Accordingly, if the United States can prosecute petitioner as an alleged criminal, then it can also criminally prosecute Türkiye, amici Azerbaijan and Pakistan, or any other sovereign state.

That result would be unprecedented in world history and make the United States an extreme outlier in the international community. It would also have enormous negative ramifications, both for the United States and for other countries, by upsetting the delicate diplomatic balance upon which foreign sovereign immunity has always rested. The United States, like other nations, affords foreign nations immunity in its courts not just out of grace or gratuity, but because it desires the same treatment in those nations' courts. [2] Thus, if the Second Circuit's determination that petitioner lacks immunity from criminal prosecution is allowed to stand, other countries—including those hostile to U.S. interests whose courts may not allow for full and fair adjudications—will be emboldened to prosecute the United States and its instrumentalities in like manner. The result will be a downward spiral of disharmony that will undermine international comity and spur serious diplomatic recriminations and retaliations. And once that spiral has begun, it will likely be beyond this Court's—and perhaps even Congress's—power to stop. If such a disruption of basic international norms is to be undertaken, it

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[2] *See*, *e.g.*, *Fed. Republic of Germany* v. *Philipp*, 141 S. Ct. 703, 714 (2021) ("We interpret the FSIA as we do other statutes affecting international relations: to avoid, where possible, 'producing friction in our relations with [other] nations and leading some to reciprocate by granting their courts permission to embroil the United States in expensive and difficult litigation.'") (citation omitted); *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") (emphasis added).

should be by Congress, not the courts, after full legislative consideration of the serious diplomatic issues that would result.

In addition to undermining global comity, the criminal prosecution of sovereigns would encourage biased law enforcement and thus threaten core values the United States has historically promoted around the world. If domestic criminal processes were to become a tool of international diplomacy, nations would be far more disposed to brand their rivals as criminals than to impose that same opprobrium on allies. Of course, political favoritism is unavoidable in international affairs, but that is a political and diplomatic arena, not a legal one. *See Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch) 116, 146 (1812) (Marshall, C.J.) (explaining that "wrongs committed by a sovereign" raise issues that are "rather [ones] of policy than of law," and "are for diplomatic, rather than legal discussion"). And the same favoritism that is commonplace in that political arena is toxic in the context of domestic prosecutorial decision making, as the United States government has long recognized. By blurring the line between politics and law enforcement and allowing geopolitical concerns to influence prosecutions against other sovereign nations, the decision below could undermine the rule of law on a worldwide scale.

For those reasons and others, the continuing vitality of sovereign immunity in the domestic criminal sphere is critical to both American and international interests. The decision below not only threatens those interests, but does so based on a fundamental misunderstanding of the law. As this Court has made clear for two centuries, statutes should not be interpreted to abrogate sovereign immunity, or invite

"international controversy," in the absence of a clear statement from the legislative branch. *Schooner Exchange*, 11 U.S. at 146; *RJR Nabisco, Inc.* v. *European Cmty.*, 579 U.S. 325, 348 (2016). Yet the court of appeals did not even purport to find such a statement. Instead, it reached its conclusion based on a general statutory grant of criminal jurisdiction whose text and history confirm that it was enacted without any regard for the special considerations that apply uniquely to foreign sovereigns.

If the United States is to even consider taking the drastic step of becoming the first nation to assert the authority to subject other sovereign nations to criminal prosecution, such a diplomatically fraught action should be undertaken by Congress after careful debate rather than by unelected judges interpreting statutes that contain no express reference to such jurisdiction. And at a bare minimum, the question the petition presents—which, as the Second Circuit observed, has divided the lower courts, *see* Pet. App. 15a n.39—is one that should be decided by this Nation's highest court. For those reasons, and because the question presented is profoundly consequential to the maintenance of international comity and order, the petition should be granted and the judgment should be reversed.

REASONS FOR GRANTING CERTIORARI

I. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT.

As this Court has long recognized, foreign sovereign immunity is a "very delicate and important" issue even in the civil context. *Schooner Exchange*, 11 U.S. at 135. It is predicated on the "perfect equality and absolute independence of sovereigns, and th[e]

common interest impelling them to mutual intercourse, and an interchange of good offices with each other." *Id.* at 137. The criminal context raises the stakes far higher. By holding that the United States may criminally prosecute coequal sovereign nations, the decision below endorses a new and unprecedented source of international conflict, portends a cycle of retaliation that this Court, and likely Congress, could never end, and invites the improper politicization of domestic criminal law enforcement worldwide. Such a momentous—and demonstrably erroneous—decision warrants this Court's review.

A. Criminal Prosecution Of Foreign Sovereigns Would Contravene A Long-Accepted Global Consensus.

The decision below discards a centuries-old global consensus shared among the community of nations. United States law, international law, and the laws of foreign sovereigns all confirm that imposing criminal liability on sovereign states would be unprecedented.

As early as *Schooner Exchange*, this Court recognized that the "person of the sovereign" is exempt "from arrest or detention within a foreign territory." 11 U.S. at 137. For over 200 years, that decision has been understood to have "extend[ed] virtually absolute immunity to foreign sovereigns." *Samantar* v. *Yousuf*, 560 U.S. 305, 311 (2010). Indeed, for 150 years after *Schooner Exchange*, "foreign states enjoyed absolute immunity from all actions in the United States," including criminal actions. *Rubin* v. *Islamic Republic of Iran*, 138 S. Ct. 816, 821 (2018); *see also*, *e.g.*, *People* v. *Weiner*, 378 N.Y.S.2d 966, 974 (N.Y. Crim. Ct. 1976).

During the 20th century, civil and criminal immunity under U.S. law diverged. For civil cases, the 1952 "Tate Letter" and 1976 adoption of the Foreign Sovereign Immunities Act ("FSIA") brought about a "restrictive" approach to civil immunity of foreign sovereigns. *See*, *e.g.*, *Republic of Austria* v. *Altmann*, 541 U.S. 677, 690 (2004). The Tate Letter, however, was expressly based on the changing law of ***civil*** immunities. *See* Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dept. of State (May 19, 1952), *reprinted in* 26 Dept. State Bull. 984-985 (1952) (noting that State Department's new position would be consistent with U.S. government's actions "in subjecting itself to suit in [its own courts] in both contract and tort and with its long established policy of not claiming immunity in foreign jurisdictions for its merchant vessels"). Thus, the FSIA, which sought to "codify" the Tate Letter's recognition of the restrictive theory, *Permanent Mission of India to the United Nations* v. *City of New York*, 551 U.S. 193, 199 (2007), limited its jurisdictional grant over suits against foreign sovereigns solely to "nonjury ***civil*** action[s]." 28 U.S.C. § 1330(a) (emphasis added).

Given the Tate Letter and the FSIA's express limitations to civil cases, those "[d]evelopments * * * in relation to civil proceedings from an absolute to a restrictive doctrine of State immunity left untouched the position in criminal proceedings." Hazel Fox & Philippa Webb, *The Law of State Immunity* 89 (3d ed. 2013). Accordingly, "[t]he adoption of a restrictive doctrine has not been treated as having any relevance in relation to the [a]bsolute [i]mmunity of the foreign State from criminal proceedings." *Id.* at 92. Nor has Congress ever enacted any law restricting absolute sovereign immunity in the criminal context. *See infra*

at 14-21; *see also*, *e.g.*, *Weiner*, 378 N.Y.S.2d at 974 (foreign sovereigns enjoy "unlimited," "absolute" immunity from criminal proceedings).

The distinction between civil and criminal cases is based not only on tradition and common law, but on basic principles of international law. *Cf.* 28 U.S.C. § 1602 (emphasizing United States' adherence to "international law" in foreign sovereign immunity context). As the leading treatise cited above 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 prosecutors and juries to brand other nations as criminals would surely raise even greater concerns.

Reflecting that view, the United Nations' model convention adopts the restrictive theory of immunity in the ***civil*** context while leaving intact absolute immunity from criminal proceedings. *See* G.A. Res. 59/38, U.N. Doc. A/RES/59/38, at 2 (Dec. 2, 2004). 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. Put simply, 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).

Given that international consensus, it is unsurprising that the domestic laws of many foreign states also expressly reflect the principle of absolute immunity from criminal process. That has remained true even as many states, mirroring the United States' own practice, have adopted the restrictive view of sovereign immunity in civil cases. To take just a few examples, amicus Pakistan, as well as South Africa, Canada, Singapore, and the U.K., have all codified the principle of absolute immunity in criminal matters. *See*, *e.g.*, The State Immunity Ordinance, No. 6 of 1981 (Pak.); Foreign States Immunities Act 87 of 1981 § 2(3) (S. Afr.) ("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, R.S.C. 1985, c. S-18 (Can.) (no criminal jurisdiction over foreign states); State Immunity Act, ch. 313, § 19(2)(b) (1979) (Sing.) (same); State Immunity Act, (1978), c. 33, § 16(4) (U.K.) (same). As English courts have explained, "[a] state is not criminally responsible in international or [domestic] law, and therefore cannot be directly impleaded in criminal proceedings." *Jones* v. *Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) and others*, [2006] UKHL 26 [31] (U.K.). And "***[w]ithout exception***, the legislation in common law countries introducing the restrictive approach of immunity in civil proceedings excludes its application to criminal proceedings." Fox & Webb, *supra*, at 90 (emphasis added). Amici are aware of ***no*** country—whether an ally or foe of the

United States—whose law permits it to criminally prosecute and convict another sovereign nation.

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

The decision below flouts that worldwide consensus. And because foreign sovereign immunity is defined by norms and reciprocity, if this Court does not intervene now, that defection from the international consensus by a global leader such as the United States will almost certainly prompt other countries to follow. Indeed, as the petition explains, the likely effect of the decision below will be to "set off a global circle of recrimination and prosecution." Pet. 18.

As explained above, foreign sovereign immunity, like much of foreign affairs, is based on reciprocity—the expectation that governments will generally accord a foreign state the same treatment that state affords them. *See*, *e.g.*, *supra* note 2; *Bolivarian Republic of Venezuela* v. *Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1322 (2017) ("FSIA's objective is to give 'protection from the inconvenience of suit as a gesture of comity[.]'") (quoting *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 479 (2003)); *Garb* v. *Republic of Poland*, 440 F.3d 579, 585 (2d Cir. 2006) (observing that the United States grants other nations immunity in its courts because it wishes to receive the same treatment abroad). "After all, in the law, what is sauce for the goose is normally sauce for the gander." *RJR Nabisco*, 579 U.S. at 346-47 (declining to afford RICO statute extraterritorial effect in light of "international friction" it would cause) (quoting *Heffernan* v. *City of Paterson*, 578 U.S. 266, 272 (2016)). Some nations have even 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 Nadelmann, *Jurisdictionally Improper Fora in Treaties on Recognition of Judgments*, 67 Colum. L. Rev. 995, 999 (1967); G. DeLaume, *Transnational Contracts Applicable Law and Settlement of Disputes* §§ 8.08-8.09 (1975). If the Second Circuit's decision is allowed to stand, any such statutes could automatically prompt a reprisal, allowing foreign nations to criminally prosecute the United States or its agencies or instrumentalities. And other nations would be sure to follow suit.

Abandoning the universal norm against criminal prosecution of foreign sovereigns would thus come with significant costs, both for the United States and for the world order. With respect to the United States, the decision below raises a threat that this Nation's government and its agencies and instrumentalities could be adjudicated as criminals by hostile—or even friendly—foreign powers, based purely on principles of *respondeat superior* or other agency doctrines under those foreign powers' domestic laws. Given the worldwide reach of the U.S. government, such retaliatory actions are hardly hypothetical. And nations' criminal prosecution of other nations—spurred by the decision below—would constitute a new tool to generate international strife that would not otherwise exist. That problem will be exacerbated by many nations' federal systems, which often allow local prosecutorial officials and courts to bring cases against foreigners under "universal" jurisdictional grants without central government directives. *See*, *e.g.*, María Manuel Márquez Velásquez, *The Argentinian Exercise of Universal Jurisdiction 12 Years After its Opening*, OpinioJuris (Apr. 2, 2022)

(https://tinyurl.com/2bh96uju) (documenting reciprocal actions by local Spanish and Argentinian courts). Although such actions have thus far been limited to non-state individual actors, the abrogation of foreign states' criminal immunity would open a new and uncontrollable judicial battlefront over issues that have historically been resolved diplomatically.

Nor are there any benefits that could outweigh those costs. As the petition explains, there is no productive purpose a criminal prosecution of a foreign sovereign might serve that cannot be accomplished by other, less extraordinary and divisive means. Individuals without diplomatic or head-of-state immunity who commit crimes on behalf of foreign sovereigns can be prosecuted if within the jurisdiction of the prosecuting state. And foreign states and state-owned entities can be, and often are, subject to a wide-ranging panoply of U.S. diplomatic and other statutory sanctions. Pet. 16. 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, the wide-ranging criminal jurisdiction the court of appeals endorsed would allow unelected local prosecutors and juries to brand any foreign sovereign a criminal felon and exact criminal penalties without any required oversight by political actors.[3]

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[3] The court of appeals assumed *arguendo*—but did not actually purport to determine—that the criminal jurisdiction it endorsed is delimited by the FSIA's civilly-based exceptions. Pet. App. 17a. Almost none of those exceptions has any conceivable application to criminal cases, further confirming, together with the FSIA's jurisdictional limitation to civil cases and its general bar on jury trials and punitive damages, that the statute was never intended to apply outside the civil context. *See infra* at 19-21 & n.6. But even if the court of appeals had actually resolved

C. Criminal Prosecution Of Sovereigns Would Politicize Law Enforcement And Undermine The Rule Of Law.

The decision below also threatens to undermine the rule of law in countries around the globe. Depoliticization of domestic law is a bedrock value the United States has sought to project around the world. Tools of diplomacy, by contrast, are designed to be used in pursuit of political aims. *See Schooner Exchange*, 11 U.S. at 146. The core question in this case—whether one nation can employ prosecutors, courts and juries to brand another nation a felon and impose criminal penalties against it—thus has immense implications for the rule of law. If domestic criminal law can be wielded against foreign sovereigns for political reasons, as likely will occur if the norms described above collapse, it will only weaken the world community's ability to keep corrosive political influences out of criminal law.

That result would be unfortunate on a global scale. But it would be particularly anomalous for the United

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that issue, it would provide no comfort to U.S. allies and other foreign sovereigns facing possible domestic prosecutions. The United States would still be the only country in the world to abrogate foreign sovereign immunity from criminal prosecutions. Moreover, the notorious opacity of the FSIA's exceptions to jurisdiction would create extraordinary diplomatic concerns if employed in the criminal context. Indeed, the exceptions have proven exceedingly difficult to apply even in the civil context they were intended for. *See*, *e.g.*, *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 358-59 (1993) (decrying "commercial activity" exception as "distinguished only by its diffidence," insofar as it "leaves the critical term 'commercial' largely undefined") (quotation omitted); *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607, 612-14 (1992) (discarding as useless the FSIA's definition of "commercial," and resorting instead to State Department's pre-FSIA policy).

States to bring it about. Few values are more important to the United States, or more closely associated with it, than depoliticization of law. Indeed, this country routinely chastises foreign nations and leaders for wielding (or declining to wield) their domestic criminal law based on political concerns. *See*, *e.g.*, U.S. Dep't of State, *Political Prisoners in Belarus* (Jan. 27, 2022) (https://tinyurl.com/2p8dsty5); U.S. Dep't of State, *Holding Accountable Nicaraguan Agents of Repression* (Jan. 10, 2022) (https://tinyurl.com/2phtwpua); U.S. Dep't of State, *2021 Country Reports on Human Rights Practices: Cuba* (Apr. 12, 2022) (https://tinyurl.com/5n7dny6z). By endorsing the view that foreign sovereigns are subject to domestic prosecutorial discretion, the decision below introduces into the criminal context—where they are the most corrosive—the very same "case-by-case diplomatic pressures" and "political considerations," *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 488 (1983), that the FSIA was enacted to eliminate.

II. CONGRESS HAS NEVER WITHDRAWN THE IMMUNITY OF FOREIGN SOVEREIGNS FROM CRIMINAL PROSECUTION.

A. The Decision Below Contravenes The Clear Statement Rule This Court Established More Than 200 Years Ago.

In its seminal decision confirming the principle of foreign sovereign immunity more than 200 years ago, this Court made clear that to withdraw foreign sovereign immunity, Congress must speak clearly to the issue "in a manner not to be misunderstood." *Schooner Exchange*, 11 U.S. at 146. "[G]eneral statutory provisions" that do not speak specifically to

sovereign immunity do not abrogate that immunity. *Id.*

This long-established "clear statement" rule is not limited to suits against foreign sovereigns, but instead applies whenever a federal statute is sought to be applied to another sovereign government. Thus, the Court applies the same rule to the relationship between the Federal government and the 50 sovereign United States. Unless Congress has clearly and unambiguously provided otherwise, a general Federal statutory provision will not be interpreted to apply to State governments. *See Clear Statement Rules, Federalism, and Congressional Regulation of States*, 107 Harv. L. Rev. 1959, 1959 (1994). As the Court has held, "[i]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so ***unmistakably clear*** in the language of the statute." *Gregory* v. *Ashcroft*, 501 U.S. 452, 460-61 (1991) (emphasis added; internal quotation omitted) (quoting *Will* v. *Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989)); *compare Schooner Exchange*, 11 U.S. at 146 (in foreign-state context, Congress must speak "in a manner not to be misunderstood"). Like the rule as to foreign sovereign immunity, the clear statement rule in the state-federal relations context is designed to "assure[] that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.'" *Gregory*, 501 U.S. at 460-61 (quoting *Will*, 491 U.S. at 65).

A similar rule applies to the Federal government's relationship to Indian tribes. If a federal statute is to be interpreted to abrogate tribal immunity, the Court's "decisions establish * * * that such a congressional decision must be clear. The baseline

position * * * is tribal immunity; and "[t]o abrogate [such] immunity, Congress must 'unequivocally' express that purpose." *Michigan* v. *Bay Mills Indian Cmty.*, 572 U.S. 782, 790 (2014) (citations omitted).

Under these settled rules, a federal prosecutor could not employ the general grant of criminal jurisdiction, 18 U.S.C. § 3231 ("section 3231"), to prosecute a sovereign state government or tribal government for an alleged crime, because that provision does not mention those sorts of entities. It would make no sense if the same provision could be the basis to prosecute a foreign sovereign. Under the rule announced more than two centuries ago in *Schooner Exchange*, the same clear-statement rule applies in the two contexts. And the only federal statute that expressly grants jurisdiction over foreign sovereigns—section 2(a) of the FSIA—expressly confers jurisdiction only over "nonjury civil action[s]." 28 U.S.C. § 1330(a). As this Court has held, the FSIA is "the ***sole basis*** for obtaining jurisdiction over a foreign state in our courts." *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989) (emphasis added); *see also Samantar*, 560 U.S. 305 at 323 (describing FSIA as "a comprehensive solution for suits against [foreign] states").

The court below nevertheless held that section 3231 confers jurisdiction over cases against foreign sovereigns. Pet. App. 16a-17a. The court based that conclusion principally on its observation that the criminal code "contains no carve-out" for "foreign sovereigns." *Id.* at 16a. But that reasoning is exactly backwards. Section 3231, which became law in 1948, was enacted against the backdrop of a roughly 150-year-old rule providing that general jurisdictional provisions that do not mention foreign sovereigns will

not be interpreted to include them. *Schooner Exchange*, 11 U.S. at 146. Indeed, the criminal-jurisdiction provision contained in the Judiciary Act of 1789 was materially indistinguishable from the modern section 3231, insofar as the 1789 Act established jurisdiction over "***all*** crimes and offences that shall be cognizable under the authority of the United States," without any express carve-out. *See* Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73 (1789) (emphasis added); *compare* 18 U.S.C. § 3231 (jurisdiction over "all offenses against the laws of the United States"). In turn, that 1789 provision was identical to the admiralty-jurisdiction provision that appeared in the very same sentence, *see* Judiciary Act, ch. 20, § 9 (jurisdiction over "all civil causes of admiralty and maritime jurisdiction"), which is the exact provision *Schooner Exchange* held did ***not*** reach foreign sovereigns. *See* 11 U.S. at 146.

Put differently, the general provision at issue here is indistinguishable from the 1789 criminal-jurisdiction provision, which is itself indistinguishable from the provision at issue in *Schooner Exchange*. Thus, there was no need for Congress to specifically carve out foreign governments from the new statute, because more than a century of precedent interpreting materially identical provisions confirmed that their immunity would continue by operation of law unless ***expressly*** abrogated. *See id.*; *see also Amerada Hess*, 488 U.S. at 437-38 & n.5 (holding that statutes that do not "expressly provide for suits against foreign states" cannot abrogate sovereign immunity, and rejecting notion that if Congress wishes to exclude foreign sovereigns, it must "amend *pro tanto*" every general jurisdictional grant to specifically and expressly do so).

In addition to flouting this Court's unambiguous precedents, the interpretation the court of appeals adopted is nonsensical as a matter of history. As explained, section 3231 was adopted years before both the FSIA and the Tate Letter, when absolute immunity in criminal matters had never even been questioned. And that provision was enacted without any consideration of issues pertaining to foreign sovereigns. Section 3231 was adopted as part of an amendment designed to modernize the criminal code in light of the then-new Federal Rules of Criminal Procedure, "***without making fundamental changes***[.]" H.R. Rep. No. 80-304, at 8 (Apr. 24, 1947) (emphasis added). The discussion specific to section 3231 focused solely on ensuring that federal criminal jurisdiction remained exclusive. *See* 94 Cong. Rec. 8721 (June 18, 1948); S. Rep. No. 80-1620, at 4 (June 14, 1948). It reflects no intent to broaden that jurisdiction; indeed, as noted, it is no broader than the first iteration enacted more than 150 years earlier. Yet the Second Circuit's interpretation would render section 3231 the most consequential foreign sovereign immunity provision in U.S. history, because it would have eliminated immunity in criminal matters entirely and without exception, even before the Tate Letter precipitated a far more modest restriction on immunity in civil cases.

B. The FSIA's Text, Structure, And History Confirm That Congress Never Abrogated Sovereign Immunity In The Criminal Context.

As explained, the error of the Second Circuit's decision is apparent from the text and history of section 3231 and the clear statement rule first announced in *Schooner Exchange*. But the FSIA—

which was enacted nearly three decades after section 3231, and without any mention of criminal prosecution of sovereigns—confirms the point. In the FSIA, Congress partially abrogated civil immunity, setting forth limited exceptions to that immunity and taking immense care to ensure that foreign sovereigns would never be exposed to civil jury trials, 28 U.S.C. § 1330(a), or, with one very limited, later-enacted exception, the possibility of punitive damages, *id.* § 1606.[4] Those limitations would have been nonsensical if, as the decision below posits, foreign sovereigns were at the time, and still remain, subject to criminal jury trials and criminal penalties based on the very same conduct. It cannot be the case that when Congress barred foreign sovereigns from being subject to jury trials or punitive damages, it nevertheless silently ratified the idea that juries could impose even more intrusive punitive sanctions in criminal prosecutions. *See*, *e.g.*, H.R. Rep. 94-1487, at 13 (Sept. 9, 1976) (explaining that FSIA's requirement that actions against sovereigns shall be tried "by a court without a jury" was designed to "promote a uniformity in decision where foreign governments are involved"). Such an approach would not only have been nonsensical, but gravely destructive of the diplomatic norms that foreign sovereign immunity embodies.

The FSIA's exceptions to immunity further confirm that Congress never altered the centuries of pre-existing law under which foreign sovereigns possessed

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[4] The FSIA's "terrorism exception" allows for circumscribed non-jury civil liability, and punitive damages, in terrorism cases involving a limited number of foreign states—currently just four countries—that the Executive has designated as state sponsors of terrorism. *See* 28 U.S.C. § 1605A.

absolute immunity from criminal prosecution.[5] The vast majority of those exceptions have no conceivable application other than in civil cases.[6] Indeed, the fact that only ***one*** of the FSIA's nine non-consent-based exceptions—the notoriously opaque commercial activity exception, *see supra* note 3—could even theoretically be relevant in a criminal case is itself powerful evidence that Congress, consistent with its limited jurisdictional grant in section 1330(a), never intended for the FSIA to cover criminal cases.[7] As

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[5] Adopting the United States' position, the district court in this case held that section 3231 abrogates ***all*** immunity of foreign sovereigns from criminal prosecution, without any exceptions, including those later enacted for civil cases in the FSIA. *See* Pet. App. 34a-35a. Under that view, local federal prosecutors could charge, and local juries could convict, foreign sovereign nations for ***any*** alleged criminal conduct, regardless of whether the FSIA would permit analogous civil cases. For example, prosecutors could bring criminal terrorism charges against foreign nations, free from the significant constraints the FSIA imposes on analogous civil cases. *See supra* note 4. The Second Circuit declined to decide whether that interpretation was correct, *see* Pet. App. 17a, thereby leaving prosecutors free to charge foreign sovereigns based on alleged criminal activity for which the sovereign would be immune from civil liability under the FSIA. That unfettered license to prosecute foreign nations is yet another reason for this Court to grant review.

[6] *See* 28 U.S.C. § 1605(a)(3), (a)(4) (certain cases involving "rights in property"); *id.* § 1605(a)(5) (certain cases in which "money damages are sought against a foreign state"); *id.* § 1605(a)(6) (cases to enforce arbitration agreements); *id.* 1605(b), (c) (certain cases "in admiralty * * * to enforce a maritime lien against a vessel or cargo of the foreign state"); *id.* 1605(d) (certain cases "brought to foreclose a preferred mortgage"); *id.* 1605(h) (certain actions involving art works); *supra* note 4 (terrorism exception of 28 U.S.C. § 1605A).

[7] Under 28 U.S.C. § 1605(a)(1), a foreign state also lacks immunity where it has expressly waived that immunity. That

this Court has repeatedly observed, the FSIA was enacted to "codif[y]" the existing law of immunity, *Altmann*, 541 U.S. 691 (quoting *Verlinden*, 461 U.S. at 488); *see also* 28 U.S.C. § 1602, not to alter it. Accordingly, the fact that the FSIA and its exceptions are clearly directed only at civil cases is itself powerful evidence that Congress never intended—either in 1948 (when it enacted the current version of section 3231) or in 1976 (when it enacted the FSIA)—to alter *sub silentio* the immunity from criminal prosecution that foreign nations have possessed since at least *Schooner Exchange*.

"Actions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States." *Verlinden*, 461 U.S. at 493. ***Criminal*** actions raise especially sensitive concerns, and courts should not reach out to assert jurisdiction without any indication that Congress ever intended to confer it.

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provision, while potentially applicable to criminal cases, is based on consent and therefore does not implicate the diplomatic or reciprocity concerns underlying foreign sovereign immunity.

CONCLUSION

The Court should grant the petition for certiorari and reverse the judgment.

Respectfully submitted,

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