

No. 21-1450

In the Supreme Court of the United States

TÜRKIYE HALK BANKASI A.Ş., AKA HALKBANK,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

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

**BRIEF FOR REPUBLIC OF TÜRKIYE
AS AMICUS CURIAE SUPPORTING PETITIONER**

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TABLE OF CONTENTS

| | Page |
|--|------|
| TABLE OF CONTENTS | I |
| TABLE OF AUTHORITIES..... | II |
| INTEREST OF <i>AMICUS CURIAE</i> | 1 |
| SUMMARY OF ARGUMENT..... | 2 |
| ARGUMENT | 3 |
| I. HALKBANK WAS CREATED TO FULFILL A CONSTITUTIONAL MANDATE AND CARRY OUT SOVEREIGN FUNCTIONS..... | 3 |
| II. TÜRKIYE IS HALKBANK'S OWNER AND CONTROLS THE BANK..... | 5 |
| A. Türkiye has always owned Halkbank. | 5 |
| B. Türkiye directs the management of Halkbank..... | 6 |
| III. TÜRKIYE DOES NOT PROSECUTE FOREIGN SOVEREIGNS..... | 7 |
| CONCLUSION | 9 |

II

TABLE OF AUTHORITIES

| | Page |
|---|------|
| Cases | |
| <i>The Schooner Exchange v. McFaddon</i> , 11 U.S. (7 Cranch) 116 (1812) | 8 |
| Constitutional Provisions and Statutes | |
| 28 U.S.C. § 1330 | 7 |
| 28 U.S.C. §§ 1602-1611 | 7 |
| Halkbank and Public Funds Law (Law No. 2284)..... | 3 |
| Turkish Const. Art. 165 | 4 |
| Turkish Const. Art. 166 | 3 |
| Turkish Const. Art. 167 | 3 |
| Turkish Law 5718 on Private International and Procedural Law, art. 49(1), Official Gazette No. 26728 (2007) | 8 |
| Turkish Penal Code, Law No. 5237, art. 20, Official Gazette No. 25611 (2004)..... | 7 |
| United Nations Charter, Art. 2, 59 Stat. 1051, T. S. No. 993 (1945) | 8 |
| Other Authorities | |
| Hazel Fox & Philippa Webb, <i>The Law of State Immunity</i> (3d ed. 2013)..... | 8 |
| HB Articles, art. 19 | 6 |
| Restatement (Third) of Foreign Relations Law of the United States (1987)..... | 8 |

III

Mehmet Sevimli Declaration, *Owens v. Turkiye Halk Bankasi A.S.*, No. 20-cv-2648 (S.D.N.Y. Sept. 24, 2020), Dkt. 63.....4

Statement by Secretary of State Clinton “Regarding Significant Reductions of Iranian Crude Oil Purchases” (June 11, 2012).....6

Dr. Meliksah Yasin Declaration, *Owens v. Turkiye Halk Bankasi A.S.*, No. 20-cv-2648 (S.D.N.Y. Sept. 24, 2020), Dkt. 64.....7

INTEREST OF *AMICUS CURIAE*¹

The Republic of Türkiye is a sovereign state of over 85 million people. Türkiye is a founding member of many international organizations such as the UN, the Council of Europe, Organization for Economic Cooperation and Development (“OECD”), the European Bank for Reconstruction and Development, the Organization for Security and Cooperation in Europe (“OSCE”) and the Organization of Islamic Cooperation (“OIC”). A member of the North Atlantic Treaty Organization (“NATO”) since 1952, Türkiye is also a candidate country for European Union membership with accession negotiations ongoing since 2005.

As the world’s 13th (according to purchasing power parity) and Europe’s 5th largest economy, Türkiye is an active member of the Group of Twenty (“G-20”).

The long-standing Turkish-American alliance within NATO has been a linchpin of the security and stability of the Euro-Atlantic political landscape since World War II. The current regional and global environment has once again highlighted the relevance and importance of relations between Türkiye and the United States. Both countries have overlapping interests and cooperation on many regional and global issues, such as Ukraine, Afghanistan, the Caucasus,

¹ No counsel for a party authored this brief in whole or in part. Nor has 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 given advance notice of this submission and provided their written consent.

counter-terrorism, energy/food security and post-pandemic global economic recovery.

In this regard, Türkiye and the United States have recently launched a Strategic Mechanism to further deepen and strengthen their cooperation in the face of the evolving security environment with manifold challenges.

Türkiye and the United States are also major trade partners. The bilateral trade volume between Türkiye and the U.S. has broken historical records by exceeding \$30 billion in 2022. Furthermore, Türkiye is the sixth largest importer of U.S. liquefied natural gas (“LNG”) in the world.

At present, there are 1,971 U.S. companies in Türkiye with a total investment value of U.S.\$14 billion. Turkish firms’ investments in the U.S. have reached U.S.\$8 billion.

The fact that Halkbank, part and parcel of the state, is subject to a criminal case in the U.S. directly interests the Republic of Türkiye.

SUMMARY OF ARGUMENT

Petitioner Türkiye Halk Bankası Anonim Şirketi (“Halkbank” or the “Bank”) is an integral part of the Turkish state, and Türkiye treats the Bank as an arm of the state, indistinguishable from the government itself. Notably, the United States has never disputed in the courts below that Halkbank is an instrumentality of the Turkish state. The purpose of this brief is to inform this Court on the structure of the relationship between the Republic of Türkiye (“Türkiye”) and Halkbank, demonstrating that Halkbank, since its creation by the state, always has been and is presently owned and controlled by

Türkiye, such that distinguishing between the state and the Bank would be improper.

ARGUMENT

I. HALKBANK WAS CREATED TO FULFILL A CONSTITUTIONAL MANDATE AND CARRY OUT SOVEREIGN FUNCTIONS.

Halkbank was created by the Republic of Türkiye as a public bank in 1933 in order to contribute to economic development in the first years of the Republic through Halkbank and Public Funds Law (Law No. 2284). Halkbank's name, translates to "The People's Bank".

Halkbank was created to transfer resources to shop owners and craftsmen and tradesmen.

Through Articles 166 and 167 of the Turkish Constitution, the Bank operates as a public institution which serves purposes of "ensuring economic, social and cultural development assigned to the state, achieving stable and harmonious rapid development in especially industry and agriculture across the country; tapping and ensuring the efficient use of the country's resources through proper documentation and evaluation; establishing necessary organization for this purpose; and taking the necessary development measures to ensure the healthy and orderly operation of the money, credit, capital, and goods and services markets."

These statements are mentioned in Article 166 of the Turkish constitution: "It is the State's duty to ensure economic, social and cultural development; to achieve stable and harmonious rapid development in especially industry and agriculture across the country; to tap and ensure the efficient use of the

country's resources through documentation and evaluation; to establish the necessary organization for this purpose.”

Thus, state banks were created as tools to realize the economic development assigned to the state by the constitution, to carry out duties and responsibilities so that money and capital markets can run in a healthy and balanced manner. In other words, state banks are public institutions which are created by the State and which serve state purposes.

As Halkbank is a public institution, 87.7% of the shares of which are owned by the Government, it is a state bank that is subject to audit and oversight by the government. *See* Turkish Constitution, Article 165.

As it did in the past, today, the Bank continues to provide loans to shop owners and craftspeople that are backed by the Turkish Treasury and at subsidized rates. In addition to providing routine banking services to its core customers, the Bank also engages in several purely governmental functions. Mehmet Sevimli Declaration at ¶ 8, *Owens v. Turkiye Halk Bankasi A.S.*, No. 20-cv-2648 (S.D.N.Y. Sept. 24, 2020), Dkt. 63. Today, Halkbank is one of the public banks that are designated to collect tax and other receivables of the State.

And Halkbank operates several government programs, including issuing loans to Organized Industrial Zones and Small Industrial Areas using Ministry of Industry and Technology resources.

Numerous executive decisions regarding advantageous use of credit by artisans and craftspeople, as well as by small and medium-sized enterprises were issued over years so that Halkbank

can perform its public duties. Similarly, because Halkbank is a public bank, Halkbank offers financing at reasonable conditions through Presidential Decrees and Council of Ministers in cases of natural disasters and state of emergencies such as the Covid-19 pandemic, acts of terrorism, floods and earthquakes and it performs duties designated to it by the Government.

Consequently, Halkbank is a sovereign instrumentality that has been operating since its establishment to carry out duties and responsibilities assigned to the Republic of Türkiye by the Constitution.

Thus, Halkbank fulfills a constitutionally mandated responsibility of the central Turkish government.

II. TÜRKIYE IS HALKBANK'S OWNER AND CONTROLS THE BANK.

The Republic of Türkiye created Halkbank and continues to own it today. The government also appoints and controls Banks management and directs its activities through the Turkish Ministry of Treasury and Finance, and gives governmental instructions regarding the Bank's activities.

A. Türkiye has always owned Halkbank.

87.7% of Halkbank's capital belongs to the share ownership of the Turkish Wealth Fund, a state institution organ. However, Republic of Türkiye's Ministry of Finance and Treasury holds the representative, administrative, management and control powers of the shares. Thus, the privilege of casting votes during Halkbank's general assembly

meetings is held by the Finance and Treasury Ministry.

Accordingly, Halkbank is an integral part of Türkiye. Halkbank acts in accordance with the state's interests. Besides, the United States do not dispute in the courts below that Türkiye Halk Bankası Anonim Şirketi is an instrumentality of the Turkish state.

As a result of the bilateral agreement between the governments of the United States and the Republic of Türkiye, Türkiye is among the countries that are given exception to do trade with Iran. *See* Statement by Secretary of State Clinton "Regarding Significant Reductions of Iranian Crude Oil Purchases" (June 11, 2012). Under the exceptions granted, it was required that a public bank should facilitate the foreign trade transactions with Iran. The Republic of Türkiye appointed Halkbank, a state bank, for the foreign trade transactions involving Iran. Such transactions could only be facilitated by Halkbank, a state bank. Accordingly, Halkbank's facilitation activities concerning the foreign trade with Iran were not within the context of a commercial activity but purely a governmental one.

B. Türkiye directs the management of Halkbank.

The Government of Türkiye directly controls and manages Halkbank through multiple channels. First, Türkiye determines the Bank's management through its majority ownership of the Bank's shares. Pursuant to its Articles of Association, Halkbank's nine-member Board of Directors is elected by its General Assembly of Shareholders. *See* HB Articles, art. 19.

Türkiye exercises other means of control as well. Various government agencies conduct oversight through state audits that apply only to public entities, and Halkbank is subject to Turkey's state Ombudsman. See Dr. Meliksah Yasin Declaration at ¶¶ 2.5, 2.9, 3.1, *Owens v. Türkiye Halk Bankası A.S.*, No. 20-cv-2648 (S.D.N.Y. Sept. 24, 2020), Dkt. 64 (describing the bank's oversight structure).

Turkish law also permits the President of the Turkish Republic to determine the procedures and principles for Halkbank's structure so long as it remains in public hands. Yasin Decl. ¶ 2.4. Finally, pursuant to Turkish Law No. 4603, the Turkish Ministry of Treasury and Finance are given powers to manage and supervise the Bank. Yasin Decl. ¶ 4.3.

* * *

In sum, the Bank, as a matter of Turkish law, is part and parcel of the Turkish state.

III. TÜRKIYE DOES NOT PROSECUTE FOREIGN SOVEREIGNS.

Turkish law does not permit the criminal prosecution of juridical persons in its courts. Under the Turkish Penal Code, “[c]riminal responsibility is personal” and “[p]enalties shall not be imposed on legal entities.” Turkish Penal Code, Law No. 5237, art. 20, Official Gazette No. 25611 (2004). And certainly, Turkish law does not permit a foreign state to be criminally prosecuted in its courts. In the civil context, while Türkiye does not have a statute analogous in detail to the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-1611, it has codified the restrictive theory of immunity that foreign sovereigns are immune from jurisdiction for

their public or governmental acts. *See* Turkish Law 5718 on Private International and Procedural Law, art. 49(1), Official Gazette No. 26728 (2007). (“A foreign country shall not be granted exemption from jurisdiction in legal disputes arising from private law relations”).”

Nor does Türkiye presume to be subject to criminal prosecution in the courts of any other state, including the United States. Under the principle of sovereign equality, Türkiye expects other states, including the United States, to abide by the bedrock principle of state immunity from criminal prosecution. United Nations Charter, Art. 2, 59 Stat. 1051, T. S. No. 993 (1945) (specifying that the U.N. organization “is based on the principle of the sovereign equality of all its Members”); *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812) (emphasizing the notion of sovereign equality among nations); Hazel Fox & Philippa Webb, *The Law of State Immunity* 92 (3d ed. 2013) (observing that the adoption of the restrictive theory of sovereign immunity internationally “has not been treated as having any relevance in relation to the [a]bsolute [i]mmunity of the foreign State from criminal proceedings.”); Restatement (Third) of Foreign Relations Law of the United States § 461 cmt. a (1987) (a foreign state “would not be prosecuted under normal criminal process”; a state can “give effect to its law by certain nonjudicial measures”); *id.* § 461 cmt. c (a foreign state “is generally not subject to the criminal process of another state”).

The prosecution of Halkbank by a co-equal sovereign is a demeaning move against Türkiye’s dignity. Türkiye does not consent to this jurisdiction.

Besides, in the 200-year history since its foundation the United States, in line with international law precedent, have always stuck to the principle of not criminally prosecuting foreign sovereigns and their instrumentalities.

It is agreed in international law that foreign sovereigns are immune from the jurisdiction of other nations as all sovereigns are of the same value, honor, and equal and independent; in other words, equals do not have authority over each other. Thus, foreign sovereigns are absolutely independent and immune.

CONCLUSION

The Republic of Türkiye respectfully urges the Court to preserve the immunity of Halkbank.

Respectfully submitted,

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