No. 21-1450

In the Supreme Court of the United States

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

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether petitioner, a commercial bank, is categorically exempt from criminal prosecution by the United States for violations of numerous federal criminal laws, on the ground that a majority of its shares are owned by the Turkish government.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 16 F.4th 336. The order of the district court (Pet. App. 25a-47a) is not reported in the Federal Supplement but is available at 2020 WL 5849512.

JURISDICTION

The judgment of the court of appeals was entered on October 22, 2021. A petition for rehearing was denied on December 15, 2021 (Pet. App. 48a-49a). On January 31, 2022, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including May 13, 2022, and the petition was filed on that date. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

A grand jury in the United States District Court for the Southern District of New York indicted petitioner on one count of conspiring to obstruct the lawful functions of the U.S. Department of Treasury, in violation of 18 U.S.C. 371; one count of conspiring to violate the International Emergency Economic Powers Act (IEEPA), Pub. L. No. 95-223, Tit. II, 91 Stat. 1626 (50 U.S.C. 1701 *et seq.*), in violation of 50 U.S.C. 1705; one count of bank fraud, in violation of 18 U.S.C. 1344 and 2; one count of conspiring to commit bank fraud, in violation of 18 U.S.C. 1349; one count of money laundering, in violation of 18 U.S.C. 1956(a)(2)(A) and 2; and one count of conspiring to commit money laundering, in violation of 18 U.S.C. 1956(h). Pet. App. 7a; J.A. 28-34. The district court denied petitioner's motion to dismiss the indictment. Pet. App. 25a-47a. Asserting jurisdiction over petitioner's interlocutory appeal, the court of appeals affirmed. *Id.* at 1a-24a.

1. Petitioner is a commercial bank whose shares are majority-owned by the Turkish Wealth Fund, which in turn is part of and owned by the Turkish government. Pet. Br. III; Pet. App. 3a. A federal grand jury has returned an indictment alleging that petitioner participated in the largest-known conspiracy to evade the United States's economic sanctions on Iran: "a multi-year scheme to launder billions of dollars' worth of Iranian oil and natural gas proceeds," including "at least $1 billion in dollar-denominated transfers that passed through the U.S. financial system in violation of U.S. law." Pet. App. 3a, 6a.

The indictment covers a time period during which the Iranian government and numerous Iranian entities were subject to U.S. sanctions under Executive Orders

and regulations issued pursuant to IEEPA and Iran-specific legislation. See Pet. App. 4a-5a & n.2-3. Those sanctions generally prohibited foreign financial institutions from facilitating purchases of Iranian oil and gas products but made certain exceptions where the foreign financial institution held the Iranian proceeds in an account that could not be accessed by Iran except for approved purposes such as bilateral trade and purchasing food. See 22 U.S.C. 8513a(d)(2) and (4)(C)-(D). The indictment alleges that while authorized to hold the proceeds of Iran's oil and gas sales to Türkiye for those limited purposes, petitioner conspired with an Iranian-Turkish businessman, Reza Zarrab, to create avenues for Iran to surreptitiously access the funds. J.A. 11-14.

One scheme alleged in the indictment involved providing Iran with unfettered access to restricted funds through illicit shipments of gold: petitioner transferred Iranian oil and gas proceeds to front companies controlled by Zarrab; those companies converted the proceeds to gold, which they then exported; and the gold was then converted back to cash for Iran's unconstrained use. J.A. 11-21. Another such scheme involved fake food shipments: coached by petitioner's executives, Zarrab's front companies would fabricate invoices purporting to show food sales to Iran; petitioner would transfer Iranian proceeds to those companies to cover the fake debts; and the proceeds would then be available for Iran to use for whatever purposes it chose. J.A. 22-26. Altogether, the alleged schemes freed up approximately $20 billion of restricted Iranian funds. J.A. 3; see Pet. App. 5a.

The indictment further alleged that petitioner helped to launder at least $1 billion of the restricted Iranian funds through the U.S. financial system. J.A. 28;

Pet. App. 6a. And it alleged that petitioner repeatedly lied to Treasury Department officials to conceal the true nature of its transactions—claiming, for example, that the gold transactions involved exclusively private companies and individuals, as opposed to the actual Iranian government entities. J.A. 11-12, 17-21, 27-28.

2. Two defendants—Zarrab, who pleaded guilty, and petitioner's former deputy general manager for international banking—have been convicted for their roles in the schemes. See Pet. App. 26a-27a; *United States* v. *Atilla*, 966 F.3d 118, 122 (2d Cir. 2020). Other indicted defendants—including petitioner's former general manager and former head of foreign operations—remain at large. See Pet. App. 6a n.6.

Petitioner moved to dismiss the charges against it on the theory that it was immune from criminal prosecution under the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1330, 1602 *et seq.*, and the common law. Pet. App. 7a. The district court denied the motion, finding that "[n]othing in the text of FSIA suggests that it applies to criminal proceedings"; that "'the legislative history . . . gives no hint that Congress was concerned about a foreign defendant in a criminal proceeding'"; and that "[e]ven assuming, *arguendo*, that FSIA provided immunity in this criminal case (which it does not), FSIA's commercial activity exception[] would clearly apply and support [petitioner's] prosecution." *Id.* at 34a-35a (brackets and citation omitted); see *id.* at 35a-38a. The court also rejected petitioner's common-law immunity claim because courts at common law deferred to Executive Branch immunity determinations, and "[b]y pursuing [petitioner's] prosecution," the Executive Branch has "manifested its clear sentiment that

[petitioner] should be denied immunity." *Id.* at 38a (internal quotation marks omitted).

3. Accepting jurisdiction over petitioner's interlocutory appeal, the court of appeals affirmed. Pet. App. 1a-24a. It observed that the district court "plainly has subject matter jurisdiction over the federal criminal prosecution" under 18 U.S.C. 3231, Pet. App. 17a, which states that "district courts of the United States shall have original jurisdiction * * * of all offenses against the laws of the United States." 18 U.S.C. 3231. And the court of appeals found no basis for immunity under either the FSIA or the common law.

The court of appeals saw no need to decide whether the "FSIA confers immunity on foreign sovereigns in the criminal context," because "even assuming *arguendo*" that it does, "the offense conduct with which [petitioner] is charged falls within FSIA's commercial activities exception." Pet. App. 17a. The court explained that because the statutory text "plainly states that FSIA's exceptions to foreign sovereign immunity apply 'in *any* case,'" the commercial-activity exception would necessarily be "available in criminal proceedings" even if FSIA immunity applies to those proceedings. *Id.* at 17a n.48 (quoting 28 U.S.C. 1605(a)).

The court of appeals found that petitioner's "offense conduct qualifies as commercial activity under all three [alternative] categories set forth in" the commercial-activity exception, which encompass commercial activity in the United States, acts in the United States in connection with commercial activity abroad, and acts abroad in connection with commercial activity abroad that cause a direct effect in the United States. Pet. App. 20a; see 28 U.S.C. 1605(a)(2). The court observed that

"the 'gravamen' of the charges against" petitioner consists of its participation in schemes to "launder approximately $1 billion in Iranian oil and gas proceeds through the U.S. financial system" and its misrepresentations "to Treasury officials regarding the nature of these transactions." Pet. App. 19a.

The court of appeals also rejected petitioner's argument for "immun[ity] from criminal prosecution under common law." Pet. App. 23a. The court explained that sovereign-immunity determinations at common law "were the prerogative of the Executive Branch," so "the decision to bring criminal charges would have necessarily manifested the Executive Branch's view that no sovereign immunity existed." *Id.* at 24a.

SUMMARY OF ARGUMENT

The Executive Branch has determined that it is in the national interest to prosecute petitioner, a commercial bank majority-owned by Türkiye, for assisting Iran in evading U.S. sanctions. That prosecution—which lies at the heart of the Executive's Article II authority over federal criminal law and foreign policy—should be allowed to proceed. Congress expressly gave district courts jurisdiction over the prosecution, and nothing in the common law or the FSIA immunizes petitioner from facing criminal consequences for violating U.S. law.

I. The district court's jurisdiction over "all offenses against the laws of the United States," 18 U.S.C. 3231, encompasses petitioner's alleged offenses here.

A. Petitioner does not dispute that Section 3231's literal text covers the offenses charged in this case. Petitioner's sole textual argument concerning Section 3231 is that certain civil statutes explicitly reference foreign states and instrumentalities, whereas Section 3231 speaks generally to "all" federal criminal offenses. But

those other statutes do not impliedly repeal Congress's broad grant of criminal jurisdiction. That grant has existed since the Judiciary Act of 1789 (1789 Act), Ch. 20, 1 Stat. 73, which similarly vested federal courts with "cognizance of all crimes and offences that shall be cognizable under the authority of the United States." § 9, 1 Stat. 76; see § 11, 1 Stat. 78-79.

Petitioner does not dispute that the 1789 Act's text would likewise encompass a case like this. Instead, petitioner's argument again rests on unwarranted inferences, including that a "person" must only refer to corporeal individuals, and that other types of "persons" could not even be punished through fines. And petitioner's effort to construe the language of the jurisdictional provision to implicitly incorporate immunity principles as a threshold limitation on federal jurisdiction is misplaced. While foreign sovereign immunity can arise as a substantive rule governing the exercise of jurisdiction, it is not a countertextual exception to the existence of jurisdiction itself.

B. To the extent that petitioner's jurisdictional Section 3231 argument can instead be viewed as a common-law immunity argument, it is unsound. While foreign states qua states have historically been accorded immunity from criminal prosecutions, that immunity has not extended to the commercial activities of foreign-government-owned corporations like petitioner—let alone when the Executive Branch has determined that it should not.

Early British and domestic-law cases illustrate that foreign-government-owned corporations like petitioner have historically lacked immunity for their commercial activities under the common law. See, *e.g.*, *Sloan Shipyards Corp.* v. *United States Shipping Bd. Emergency*

Fleet Corp., 258 U.S. 549, 566 (1922) (explaining that allowing federal-government-owned corporations to share the government's immunity would mark "a very dangerous departure from one of the first principles of our system of law"). That rule finds additional support in early foreign sovereign immunity cases suggesting a distinction between foreign-government-owned vessels used for commercial purposes, as opposed to sovereign purposes.

The common law additionally counsels deference to Executive Branch determinations (like the one here) that immunity should not attach. That history of deference began with *The Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch) 116 (1812), and has continued over the ensuing years. Of particular relevance here, the Court has made clear that just as courts must not "deny an immunity which our government has seen fit to allow," they also must not "allow an immunity on new grounds which the government has not seen fit to recognize." *Republic of Mex.* v. *Hoffman*, 324 U.S. 30, 35 (1945).

Allowing petitioner's novel claim of immunity to vitiate a federal criminal prosecution would be unprecedented. The Executive has the discretion to weigh foreign-policy concerns, and it determined here that the prosecution is in the national interest. Federal prosecutions of foreign officials date back to the Founding era. And as foreign-government-owned commercial entities (like other commercial entities) expanded their operations in the 20th century, the federal government began subjecting them to criminal jurisdiction as well. The Executive's exercise of its foreign-policy and prosecutorial discretion in this case warrants judicial deference.

Petitioner offers no meaningful support for a contrary approach that would altogether foreclose the United States from prosecuting a foreign-government-owned corporation, no matter how egregious its criminal acts. Petitioner's international-law authorities all address prosecutions of foreign states qua states, not foreign-government-owned corporations. And to the extent that policy consequences are relevant, they decisively support allowing this prosecution to proceed. Doing otherwise would jeopardize our national security by permitting corporations that are merely 50.1% owned by a foreign government to engage in rampant criminal conduct affecting U.S. citizens, while facing no criminal consequences.

II. The FSIA does not immunize petitioner from criminal prosecution.

A. The FSIA's text, structure, and history demonstrate that it does not apply to criminal cases. Instead, it "lays down a baseline principle of foreign sovereign immunity from *civil* actions." *Cassirer* v. *Thyssen-Bornemisza Collection Found.*, 142 S. Ct. 1502, 1508 (2022) (emphasis added). The FSIA contains a grant of jurisdiction solely over civil cases, 28 U.S.C. 1330(a), and then sets forth numerous procedural provisions that relate only to civil cases, without any similar provisions for criminal cases. See, *e.g.*, 28 U.S.C. 1391(f) (venue for "civil action[s]"), 1441(d) (removal of "civil action[s]"), 1608(a)(1) (service of "summons and complaint"). Indeed, the FSIA's text does not provide direction for criminal cases at all, and its history suggests an exclusive congressional focus on civil actions.

B. If the FSIA did apply to criminal cases, this prosecution could still proceed under the commercial-activity exception. The FSIA's exceptions apply "in any

case," 28 U.S.C. 1605(a), which would plainly encompass criminal cases brought under Section 3231. Petitioner's selective reading of the FSIA—under which its immunity provision applies to both criminal and civil cases, but its immunity exceptions apply to civil cases alone—lacks textual support and makes little sense.

The conduct described in the indictment falls within the FSIA's commercial-activity exception, 28 U.S.C. 1605(a)(2). The gravamen of the prosecution includes petitioner's participation in fraudulent financial transactions to evade U.S. sanctions, concealment of those transactions through misrepresentations to U.S. government officials, and laundering of restricted funds through the U.S. financial system. That conduct is commercial in nature and has substantial contact with and direct effects in the United States. See 28 U.S.C. 1603(e), 1605(a)(2).

Those domestic consequences are what led the Executive Branch to make the weighty decision to prosecute petitioner. That prosecution is proper and should be allowed to proceed.

ARGUMENT

The decision to prosecute a foreign-government-owned corporation for its violation of federal criminal law lies at the intersection of two core areas of executive authority and discretion: "[w]hether to prosecute," *United States* v. *Batchelder*, 442 U.S. 114, 124 (1979), and "the field of foreign affairs," *First Nat'l City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759, 766 (1972) (plurality opinion). Far from disabling such discretionary judgments, Congress has allowed for them. It has expressly opened federal courts to the criminal prosecution of "*all* offenses against the laws of the United States," 18 U.S.C. 3231 (emphasis added), irrespective

of the defendant's identity. And it has not withdrawn that jurisdiction in the FSIA, which directs its immunity provisions only to civil suits and expressly exempts commercial activities—an exemption that itself codified preexisting executive policy.

Petitioner errs in likening this case—the prosecution of a commercial bank for laundering funds through the United States, in violation of federal sanctions, and then lying about it to the federal government—to the direct prosecution of an enemy government itself during wartime. Even as the Executive Branch has avoided prosecuting foreign states qua states, its practices have included asserting criminal jurisdiction over foreign-government-owned commercial entities when such prosecutions are determined to be warranted in the interests of the United States. Such prosecutions are well within executive discretion, in accord with the common law and international law, and in no way barred by statute. This Court should reject petitioner's effort to altogether foreclose those prosecutions. Instead, the Court should, like Congress, abstain from interfering in the Executive Branch's weighty, but deliberate, decision to require petitioner to account for its United States-connected commercial activities, in violation of United States criminal law, in a court of the United States.

I. THE DISTRICT COURT'S JURISDICTION OVER "ALL OFFENSES AGAINST THE LAWS OF THE UNITED STATES" ENCOMPASSES THE OFFENSES ALLEGED HERE

Under 18 U.S.C. 3231, the "district courts of the United States shall have original jurisdiction * * * of all offenses against the laws of the United States." As

the court of appeals recognized, Pet. App. 17a, that language plainly encompasses petitioner's alleged offenses; indeed, that issue was not even disputed below. Nor does petitioner dispute the obvious textual applicability of that provision even now. Instead, petitioner relies principally on an asserted background principle of immunity for foreign states. But general jurisdictional grants like Section 3231 do not implicitly incorporate common-law foreign sovereign immunity principles. And even if they did, petitioner is not a foreign state; it is a commercial bank. Regardless of its ownership, it would not be treated as the state itself for purposes of common-law immunity.

A. Nothing In The Current Or Prior Versions Of 18 U.S.C. 3231 Excepts Petitioner's Alleged Offenses From Criminal Jurisdiction

In any matter of statutory interpretation, the "inquiry begins with the statutory text." *National Ass'n of Mfrs.* v. *Department of Def.*, 138 S. Ct. 617, 631 (2018) (citation omitted). Where the statute's "plain language" is "'unambiguous,'" the "'inquiry * * * ends there as well.'" *Ibid.* (citation omitted). That is the case here: Section 3231 confers jurisdiction over "all offenses against the laws of the United States," and the indictment clearly alleges "offenses against the laws of the United States." "'All' means 'all.'" *In re Grand Jury Subpoena*, 912 F.3d 623, 628 (D.C. Cir. 2019) (per curiam); see *Webster's New International Dictionary of the English Language* 67 (2d ed. 1947) ("The whole of"); *Funk & Wagnalls New Standard Dictionary of the English Language* 73 (1946) ("wholly; entirely").

1. Petitioner does not dispute that the literal words of the statute encompass the offenses charged in this case. Instead, petitioner's discussion of Section 3231's

text is limited solely to the observation (Br. 27-28) that Congress has explicitly referenced the permissibility of actions against foreign states and instrumentalities in certain civil and bankruptcy contexts. See 28 U.S.C. 1330(a); 11 U.S.C. 101(27), 106(a); Removal of Causes Act, ch. 137, § 1, 18 Stat. 470. But such references cannot be viewed as a prerequisite to jurisdiction against foreign-government-owned instrumentalities; indeed, federal courts exercised jurisdiction over civil cases involving foreign-government-owned instrumentalities long before those statutes were enacted. See, *e.g.*, *La Nereyda*, 21 U.S. (8 Wheat.) 108, 168-174 (1823); *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283, 353-355 (1822); *Glass* v. *The Sloop Betsey*, 3 U.S. (3 Dall.) 6, 9 (1794).

One of the statutes that petitioner cites is the FSIA, which was enacted in 1976 to largely codify preexisting practices in civil cases and does not address criminal jurisdiction. See Part II, *infra* (explaining why petitioner's independent subsidiary arguments based on the FSIA lack merit). Another statute that petitioner cites was enacted in 1978 and includes foreign states and instrumentalities in an omnibus definition of "governmental unit" for purposes of proceedings that occur principally in Article I bankruptcy courts. 11 U.S.C. 101(27); see Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 101(21), 92 Stat. 2552. And a third statute conferred diversity jurisdiction, in addition to any admiralty or federal-question jurisdiction, over civil suits "between citizens of a State and foreign states, citizens, or subjects." Removal of Causes Act, § 1, 18 Stat. 470. Congress's enactment of those statutes says nothing about the comprehensive scope of Article III courts' jurisdiction over "all" federal criminal offenses, which

they have possessed throughout the Nation's history. See *Morton* v. *Mancari*, 417 U.S. 535, 549 (1974) ("[R]epeals by implication are not favored.") (citation omitted).

2. The Judiciary Act of 1789 vested the federal courts with "cognizance of all crimes and offences that shall be cognizable under the authority of the United States"—*i.e.*, all crimes in violation of federal law. § 9, 1 Stat. 76; see § 11, 1 Stat. 78-79. The 1789 Act's text is no more amenable than the current text to petitioner's extratextual exceptions, and petitioner does not directly engage with it. Instead, as with the current statute, petitioner attempts to draw atextual inferences from other statutory provisions. Those inferences are no more warranted in the 1789 Act than they are in the present-day federal code.

Petitioner notes (Br. 25) that the 1789 Act granted this Court exclusive original jurisdiction over "suits or proceedings against ambassadors, or other public ministers." § 13, 1 Stat. 80. But that clause simply qualified federal courts' generally *non*-exclusive jurisdiction over suits between citizens and noncitizens of a State. See *ibid.* Moving away from the 1789 Act, petitioner observes (Br. 23-24) that The Crimes Act of 1790, ch. 9, §§ 1-32, 1 Stat. 112-119, refers to "persons" and establishes certain "punishments" that could not be applied to foreign sovereigns. But under the law at the time (like the law today), corporate entities were "deemed persons" under both civil and criminal statutes. *United States* v. *Amedy*, 24 U.S. (11 Wheat.) 392, 412 (1826); see *Cook Cnty.* v. *United States ex rel. Chandler*, 538 U.S. 119, 125-127 (2003). And although corporations could not be jailed or corporally punished, they could be fined. See The Crimes Act of 1790, § 15, 1 Stat. 115

(fines for falsifying court records); § 17, 1 Stat. 116 (fines for receiving stolen goods).

3. Petitioner's only other arguably textual point is its contention (Br. 25) that certain grants of civil jurisdiction "did not cover foreign sovereigns." But while foreign sovereigns could assert foreign sovereign immunity as a common-law rule governing the exercise of jurisdiction, immunity was not a countertextual exception to statutory grants of jurisdiction.

Congress can, if it chooses, expressly divest district courts of jurisdiction in cases where the defendant successfully invokes foreign sovereign immunity, as it has done with civil cases under the FSIA. See 28 U.S.C. 1330(a), 1604. But an assertion of foreign sovereign immunity under the common law invokes a "rule of *substantive law* governing the *exercise* of * * * jurisdiction." *Republic of Mex.* v. *Hoffman*, 324 U.S. 30, 36 (1945) (emphasis added); see also, *e.g.*, *Ex parte Republic of Peru*, 318 U.S. 578, 588 (1943) (considering whether "jurisdiction which the court had already acquired * * * should have been relinquished in conformity to an overriding principle of substantive law").

Indeed, were it otherwise, the long and undisputed tradition of deferring to executive judgments about entitlements to immunity, see, *e.g.*, *Samantar* v. *Yousuf*, 560 U.S. 305, 311 (2010), would have made little sense. Viewing that practice as an exception to statutory subject-matter jurisdiction would suggest that Congress implicitly surrendered its exclusive authority to define federal-court jurisdiction, see, *e.g.*, *Lockerty* v. *Phillips*, 319 U.S. 182, 187-188 (1943), to executive control. Nothing suggests that it took that extraordinary step.

B. No Extratextual Principle Precludes U.S. Courts From Exercising Statutory Jurisdiction Over Foreign-Government-Owned Corporations' Violations Of U.S. Criminal Law

To the extent that petitioner's Section 3231 argument, which is framed in jurisdictional terms, can be construed as a common-law immunity argument, it is unsound. Under the common law of foreign sovereign immunity, commercial entities like petitioner generally lack immunity, and the federal government has sometimes decided to prosecute them. Courts, in turn, have deferred to Executive Branch determinations—like the one here—that immunity should not attach.

1. Foreign-government-owned corporations lack immunity for their commercial activities

Petitioner asserts (Br. 17) that Congress could not have plausibly intended to authorize criminal jurisdiction over "foreign sovereigns." See Pet. Br. 15 (Congress "did not silently authorize federal courts to exercise criminal jurisdiction against Britain, France, or Spain"). But this case does not involve the prosecution of a sovereign government. It involves the prosecution of a commercial bank whose shares are majority-owned by the "Turkish Wealth Fund," which in turn "is part of and owned by the Turkish State." Pet. Br. III. Nothing precludes the prosecution of such a commercial entity.

a. As this Court has explained, "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." *First Nat'l City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 626-627 (1983). At common law, corporations were "deemed persons" subject to legal liability. *Amedy*, 24 U.S. (11

Wheat.) at 412. And the baseline rule of corporate liability was not materially different when a sovereign government owned or controlled the relevant corporation. Even though the government itself generally possessed immunity from suit, the government-owned entity generally lacked immunity, at least where the suit arose from its commercial activities.

In the domestic context, this Court has long recognized that a commercial enterprise owned or controlled by a sovereign generally lacks immunity from suit. As Chief Justice Marshall explained for the Court, "[i]t is, we think, a sound principle, that when a government becomes a partner in any trading company, it devests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen." *Bank of the United States* v. *Planters' Bank of Georgia*, 22 U.S. (9 Wheat.) 904, 907 (1824). An opinion for the Court by Justice Holmes similarly rejected the "notion" that a government-owned corporation would "share the immunity of the sovereign from suit," calling it "a very dangerous departure from one of the first principles of our system of law." *Sloan Shipyards Corp.* v. *United States Shipping Bd. Emergency Fleet Corp.*, 258 U.S. 549, 566 (1922). Judge Learned Hand similarly observed "that, in entering upon industrial and commercial ventures, the governmental agencies used should, whenever it can fairly be drawn from the statutes, be subject to the same liabilities and to the same tribunals as other persons or corporations similarly employed." *Gould Coupler Co.* v. *U.S. Shipping Bd. Emergency Fleet Corp.*, 261 F. 716, 718 (S.D.N.Y. 1919).

Courts have long applied that principle, including to foreign-government-owned corporations. See, *e.g.*,

Coale v. *Société Coop. Suisse des Charbons*, 21 F.2d 180, 181 (S.D.N.Y. 1921) (denying immunity to a corporation created, owned, and partially controlled by Swiss government); *Molina* v. *Comision Reguladora del Mercado de Henequen*, 103 A. 397, 398-399 (N.J. 1918) (denying immunity to corporate "governmental agency of the state of Yucatan" and noting "that no authority can be found in the books for the proposition that foreign corporations which happen to be governmental agencies are immune from judicial process"); see also *Nathan* v. *Virginia*, 1 U.S. (1 Dall.) 77 (Ct. Com. Pl. of Pa. 1781) ("[B]y engaging in trade, [a sovereign agent] may so far divest himself of his public character, as to subject the[] goods to attachment.").

That principle accords with the British rule that had applied to the East India Company, which functioned largely as an instrumentality of the British government. See Ingrid Wuerth, *The Due Process and Other Constitutional Rights of Foreign Nations*, 88 Fordham L. Rev. 633, 687 (2019). While the East India Company received immunity for its sovereign acts like treaty-making, see *Nabob of the Carnatic* v. *East India Company*, (1793) 30 Eng. Rep. 521, 523 (Ch.), it received no immunity for its commercial acts, see *Moodalay* v. *Morton*, (1785) 28 Eng. Rep. 1245, 1246 (Ch.). As the English Court of Chancery explained, if the company "enter[s] into bonds in India, the sums secured may be recovered" because "as a private Company, [it] ha[s] entered into a private contract, to which [it] must be liable." *Ibid.* (emphasis added); see *The Swift*, (1813) 1 Dod. 320, 339 (articulating similar rule); *The Case of Thomas Skinner, Merchant* v. *The East-India Company*, (1666) 6 State Trials 710, 724 (H.L.) (awarding damages against East India Company); Danny Abir,

Foreign Sovereign Immunities Act: The Right to a Jury Trial in Suits Against Foreign Government-Owned Corporations, 32 Stan. J. Int'l L. 159, 178-179 (1996).

b. Petitioner attempts (Br. 17-18) to draw a contrary principle from *The Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch) 116 (1812), which recognized the sovereign immunity of "national ships of war, entering the port of a friendly power open for their reception." *Id.* at 145. But the Court in that case emphasized the "manifest distinction" between a government's public property (there, a military ship) and "the private property of the person who happens to be a prince." *Ibid.* Although the Court declined to definitively resolve the question, it observed that a "prince, by acquiring private property in a foreign country, * * * may be considered as so far laying down the prince, and assuming the character of a private individual." *Schooner Exchange*, 11 U.S. (7 Cranch) at 145. As Justice Story later emphasized when riding circuit, while immunity "might well apply to property like public ships of war, held by the sovereign jure coronae," it would not necessarily "be applicable to the common property of the sovereign of a commercial character, or engaged in the common business of commerce." *United States* v. *Wilder*, 28 F. Cas. 601, 603 (C.C.D. Mass. 1838).

Accordingly, following *Schooner Exchange*, federal courts recognized immunity for certain governmental ships—namely, "a vessel in the possession and service of a friendly foreign government." *Hoffman*, 324 U.S. at 34. And as petitioner notes (Br. 19), this Court's decision in *L'Invincible*, 14 U.S. (1 Wheat.) 238 (1816), treated the military actions of privateers—who were

"not less a part of the efficient national force, set in action for the purpose of subduing an enemy"—in the same manner as the actions of another nation's formal navy. *Id.* at 252. But "the overwhelming weight of authority" drew a "distinction between possession and title," *Hoffman*, 324 U.S. at 38, that precluded immunity for a vessel "not in the possession and public service of [a] government" and allowed it to be held liable, *id.* at 34. This Court has thus quoted approvingly a description of one of its 19th-century decisions, *The Davis*, 77 U.S. (10 Wall.) 15 (1870), as establishing that a proper assertion of immunity required that a vessel "be devoted to the public use and must be employed in carrying on the operations of the government.'" *Hoffman*, 324 U.S. at 37 (quoting *The Fidelity*, 8 F. Cas. 1189, 1191 (S.D.N.Y. 1879)).

Petitioner highlights (Br. 19-20) the one case, *Berizzi Bros. Co.* v. *Steamship Pesaro*, 271 U.S. 562 (1926), in which this Court "allowed the immunity, for the first time, to a *merchant* vessel owned by a foreign government and in its possession and service," *Hoffman*, 324 U.S. at 35 n.1 (emphasis added). But the Court later recognized that decision as a poorly reasoned aberration, in which "[t]he propriety of * * * extending the immunity" in the absence of an endorsement from the Executive Branch "was not considered." *Ibid.* In recognizing that, at the least, the Executive Branch's refusal of immunity should have made a difference, the Court necessarily rejected the proposition that *Berrizi Brothers* stood for any bedrock principle of law that the judgment of the Executive Branch could not overcome. See *id.* at 39-40 (Frankfurter, J., concurring) ("heartily welcom[ing]" the Court's "implied recession from the

decision in *Berizzi Bros.*," which rested on "considerations [that] have steadily lost whatever validity they may then have had"); *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 699 (1976) (plurality opinion) (observing that *Berizzi Brothers* was "severely diminished by later cases").

2. The common law does not recognize foreign sovereign immunity where the Executive Branch determines that immunity is unwarranted

The Executive Branch has made just such a judgment that immunity is unwarranted here by deciding to prosecute petitioner for U.S. crimes. Foreign sovereign immunity is "a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution." *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 486 (1983). And out of respect for the separation of powers, courts have "traditionally deferred to the decisions of the political branches . . . on whether to take jurisdiction over actions against foreign sovereigns." *Rubin* v. *Islamic Republic of Iran*, 138 S. Ct. 816, 821 (2018) (citation and internal quotation marks omitted). Petitioner's requested extension of immunity in this case—where the federal government is the very party seeking to bring a commercial entity to justice—would be unprecedented, unwarranted, and unsound.

a. The history of deference to Executive Branch immunity determinations dates at least as far back as *Schooner Exchange*, where the Court "accept[ed] a suggestion from the Executive Branch" to extend immunity to a foreign-government-owned vessel. *Opati* v. *Republic of Sudan*, 140 S. Ct. 1601, 1605 (2020). In so doing, *Schooner Exchange* recognized that the "implication," 11 U.S. (7 Cranch) at 146, of immunity for foreign states

on which petitioner relies (Br. 17-18) applies only where "the sovereign power has impliedly consented to wa[i]ve its jurisdiction"—and not where it has "destroy[ed] this implication" by "subjecting [the foreign sovereign] to the ordinary tribunals." 11 U.S. (7 Cranch) at 146. "[A]s Chief Justice Marshall explained in the *Schooner Exchange,* 'exemptions from territorial jurisdiction . . . must be derived from the consent of the sovereign of the territory' and are 'rather questions of policy than of law, that they are for diplomatic, rather than legal discussion.'" *Munaf* v. *Geren*, 553 U.S. 674, 701 (2008) (quoting *Schooner Exchange*, 11 U.S. (7 Cranch) at 143, 146).

Deference to the Executive Branch continued in the ensuing years. See *Bank Markazi* v. *Peterson*, 578 U.S. 212, 235 (2016) (describing the practice). Over the years preceding the FSIA, "the granting or denial" of foreign sovereign immunity was "the case-by-case prerogative of the Executive Branch." *Republic of Iraq* v. *Beaty*, 556 U.S. 848, 857 (2009). In civil suits against foreign-government-owned instrumentalities such as "seized vessels," the "diplomatic representative of the sovereign could request a 'suggestion of immunity' from the State Department," to which the court would defer. *Samantar*, 560 U.S. at 311. "[I]n the absence of recognition of the immunity by the Department of State, a district court had authority to decide for itself whether all the requisites for such immunity existed." *Ibid.* (citation and internal quotation marks omitted). But even in exercising that authority, a court still followed the Executive's lead, inquiring "whether the ground of immunity is one which it is the established policy of the State Department to recognize." *Id.* at 312 (citation and internal quotation marks omitted).

The Court has also made clear that just as courts must not "deny an immunity which our government has seen fit to allow," they also must not "allow an immunity on new grounds which the government has not seen fit to recognize." *Hoffman*, 324 U.S. at 35. As the Court has explained, "recognition by the courts of an immunity upon principles which the political department of government has not sanctioned may be equally embarrassing to it in securing the protection of our national interests and their recognition by other nations." *Id.* at 36.

b. Nothing could embarrass the Executive Branch more than a judge-made principle that would vitiate a federal criminal prosecution. By "electing to bring [a] prosecution, the Executive has" had the opportunity to "assess[] th[e] prosecution's impact on this Nation's relationship with" other countries, *Pasquantino* v. *United States*, 544 U.S. 349, 369 (2005), and to determine that the prosecution is in the national interest. See, *e.g.*, *United States* v. *Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997), cert. denied, 523 U.S. 1060 (1998). The Executive Branch, which "possess[es] significant diplomatic tools and leverage the judiciary lacks," is better positioned than courts to make that determination. *Munaf*, 553 U.S. at 703 (citation omitted).

In accord with that separation of powers, Chief Justice Marshall observed in *Schooner Exchange* that a foreign official's "crimes" may "render him amenable to the local jurisdiction" if they "violat[e] the conditions under which he was received as the representative of a foreign sovereign." 11 U.S. (7 Cranch) at 139. That observation is reflected in the Founding-era federal government's criminal prosecutions of non-diplomatic foreign officials in certain cases. See Chimène I. Keitner,

The Forgotten History of Foreign Official Immunity, 87 N.Y.U. L. Rev. 704, 710 n.23 (2012). In 1794, for instance, the United States prosecuted the consul from the Republic of Genoa for extortion, and the circuit court held "that the offence was indictable, and that the defendant was not privileged from prosecution in virtue of his consular appointment." *United States* v. *Ravara*, 27 F. Cas. 714, 715 (C.C.D. Pa. 1794). The same year, the United States prosecuted the Chancellor of the French Consulate at Boston on a charge of arming a privateer. See Letter from Edmund Randolph, Sec'y of State, to Christopher Gore, Att'y of the U.S. for the Mass. Dist. (May 21, 1794), in *American State Papers: Foreign Relations Vol. VI* at 60 (1998).

The 20th century saw a dramatic expansion in the activities of foreign-government-owned entities, such as corporations, particularly after World War I. See *First Nat'l City Bank*, 462 U.S. at 624; Theodore R. Giuttari, *The American Law of Sovereign Immunity: An Analysis of Legal Interpretation* 63 (1970). During that same time period, the government found it necessary to increase its prosecutions of private domestic corporations. See *New York Cent. & Hudson River R.R.* v. *United States*, 212 U.S. 481, 494-495 (1909); William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 52 Vand. L. Rev. 1343, 1356 (1999). Similar federal proceedings against corporations partly or wholly owned by a foreign government, while appropriately rare given the weighty concerns that may attach to them, were commenced as well, with courts almost invariably allowing them.

In *United States* v. *Deutsches Kalisyndikat Gesellschaft*, 31 F.2d 199 (S.D.N.Y. 1929), for instance, the United States sought injunctive relief, under a statute

providing for criminal and civil penalties, against a corporation that was majority-owned and controlled by the French government. *Id.* at 200. France argued that immunity should attach because the suit was "in effect, a suit against the Republic of France." *Ibid.* In response, the State Department informed the court that "it has long been the view of the Department of State that agencies of foreign governments engaged in ordinary commercial transactions in the United States enjoy no privileges or immunities not appertaining to other foreign corporations, agencies, or individuals doing business here, and that they should conform to the laws of this country." *Ibid.* The court accordingly held that "[n]either principle nor precedent requires that th[e] immunity, which, as a matter of comity, is extended to a foreign sovereign and his ambassador, should be extended to a foreign corporation merely because some of its stock is held by a foreign state, or because it is carrying on a commercial pursuit, which the foreign government regards governmental." *Id.* at 203.

The scope of actions brought by the federal government has included criminal actions. For at least the past 70 years, the federal government has been applying federal criminal jurisdiction (often through subpoenas) to foreign-government-owned corporations. See *In re Investigation of World Arrangements*, 13 F.R.D. 280, 288-291 (D.D.C. 1952); *In re Grand Jury Investigation of the Shipping Industry*, 186 F. Supp. 298, 318-320 (D.D.C. 1960); *In re Sealed Case*, 825 F.2d 494, 495 (D.C. Cir.) (per curiam), cert. denied, 484 U.S. 963 (1987); *United States* v. *Eireann*, 89-cr-647, D. Ct. Doc. 12 (S.D. Fla. Oct. 6, 1989); *United States* v. *Jasin*, No. 91-cr-602, 1993 WL 259436, at *1 (E.D. Pa. July 7, 1993); *United States* v. *Statoil, ASA*, 06-cr-960, D. Ct. Doc. 2

(S.D.N.Y. Oct. 13, 2006); *In re Grand Jury Proceeding Related to M/V Deltuva*, 752 F. Supp. 2d 173, 176-180 (D.P.R. 2010); *United States* v. *Ho*, No. 16-cr-46, 2016 WL 5875005, at *6 (E.D. Tenn. Oct. 7, 2016); *In re Grand Jury Subpoena*, 912 F.3d at 626; *In re Pangang Grp., Co.*, 901 F.3d 1046, 1049 (9th Cir. 2018); see also Press Release, Office of Public Affairs, U.S. Dep't of Justice, *Petróleo Brasileiro S.A. - Petrobras Agrees to Pay More Than $850 Million for FCPA Violations* (Sept. 27, 2018), https://www.justice.gov/opa/pr/petr-leo-brasileiro-sa-petrobras-agrees-pay-more-850-million-fcpa-violations.

A court granted immunity in only one of those cases, see Pet. Br. 29-30—but it did so on the ground that the foreign entity there was engaging in "a fundamental government function serving a public purpose," not a "commercial venture." *In re Investigation of World Arrangements*, 13 F.R.D. at 290-291. Petitioner notes (Br. 30) that in some of the other cases, the entities "waived immunity through pleas or non-prosecution agreement." But those agreements do not suggest that the entities had immunity to begin with—let alone that the district courts lacked jurisdiction.

3. Petitioner's proposed rule lacks meaningful support

Particularly given that the common law permitted non-diplomatic foreign officials to be prosecuted and foreign-government-owned commercial entities to be sued, there is no basis to infer a "categorical bar to criminal proceedings against foreign state-owned enterprises." Chimène I. Keitner, *Prosecuting Foreign States*, 61 Va. J. Int'l L. 221, 226 (2021). And petitioner cites no authority suggesting such a bar.

a. All of the authorities that petitioner cites (Br. 16, 35-36) in direct support of such a bar address prosecutions of foreign states qua states. See Hazel Fox & Philippa Webb, *The Law of State Immunity* 91 (3d ed. 2015) (addressing "[t]he exercise of criminal jurisdiction directly over another State"); Elizabeth Helen Franey, *Immunity from the Criminal Jurisdiction of National Courts*, *in Research Handbook on Jurisdiction and Immunities in International Law* 207 (Alexander Orakhelashvili ed., 2015) ("A state * * * cannot be prosecuted."); Restatement (Third) Foreign Relations Law of the United States § 461 cmt. c (1987) ("A state itself is generally not subject to the criminal process of another state."); see also U.S. Statement of Interest at 30, *Matar* v. *Dichter*, 05-cv-10270 (S.D.N.Y. Nov. 17, 2006) (noting that the government has "not recognize[d] the concept of *state* criminal responsibility") (emphasis added). Petitioner, however, is a foreign-government-owned commercial entity, not a foreign state.

Petitioner attempts to equate itself with a foreign state by noting (Br. 32-33, 39) that, because a majority of its shares are owned "by a foreign state," it qualifies as an "agency or instrumentality of a foreign state" *under the FSIA*. 28 U.S.C. 1603(b)(2); see Pet. App. 7a n.8. But the FSIA's definition, enacted in 1976, differs from the common-law understanding of immunity for foreign-government-owned commercial enterprises. See William C. Hoffman, *The Separate Entity Rule in International Perspective: Should State Ownership of Corporate Shares Confer Sovereign Status for Immunity Purposes?*, 65 Tul. L. Rev. 535, 546 (1991) (explaining that under the common law, "[c]ommercial corpora-

tions generally, whether wholly or partly owned or controlled by a foreign state, were presumptively not immune"); *Wheaton's Elements of International Law* 32 (5th ed. 1916).

The FSIA definition is therefore not controlling in the context of petitioner's principal argument that Section 3231 inherently forecloses criminal prosecution of a foreign-government-owned corporation for its criminal acts. Accordingly, although the government has not "contest[ed] [petitioner's] status as a foreign sovereign" for FSIA purposes, Pet. Br. 22, it emphasized in the court of appeals that for criminal-law purposes, while it has treated "foreign *states* as absolutely immune from prosecution, it does not accord the same treatment to separate juridical entities"—like petitioner—"performing non-sovereign functions." Gov't C.A. Br. 31-32.

b. International law, like domestic common law, erects "no categorical bar to criminal proceedings" against foreign-government-owned commercial entities like petitioner. Keitner, 61 Va. J. Int'l L. at 226. Petitioner's amici cite only one foreign decision in support of such a categorical rule, Amicus Br. of Professor Roger O'Keefe 12, but that decision granted immunity to the "Malta Maritime Authority" not for commercial acts but instead for acts "relat[ing] to the sovereignty of the State concerned," *ibid.* (quoting *Agent judiciare du Trésor* v. *Malta Maritime Authority and Carmel X*, Cour de cassation [Cass.] [supreme court for judicial matters] crim., Nov. 23, 2004, Bull. crim., No. 04-84.265 (Fr.)). To the extent that prosecutions of foreign-government-owned commercial entities have occurred infrequently in other nations, that likely stems from the fact that "[m]ost countries in Europe and the world lack corporate criminal liability generally and only recently

have enacted a handful of specific corporate crime statutes," Brandon L. Garrett, *Globalized Corporate Prosecutions*, 97 Va. L. Rev. 1775, 1778 (2011)—not from any international-law principle.

Indeed, in the civil context, other nations generally follow the same practice as the United States and do not accord immunity to foreign-government-owned entities for their commercial activities. See *Alfred Dunhill*, 425 U.S. at 701-702 (noting that the United States's policy of "declining to extend sovereign immunity to the commercial dealings of foreign governments * * * has been accepted by a large and increasing number of foreign states in the international community") (plurality opinion); *id.* at 702 n.15 (citing authorities). For example, the United Kingdom's State Immunity Act provides immunity to foreign-government-owned entities only when the case arises from conduct "in the exercise of sovereign authority," as opposed to commercial conduct. State Immunity Act 1978, c. 33, § 14. The United Kingdom's framework "has been followed elsewhere," including Pakistan, Singapore, and South Africa. Hoffman, 554; see *id.* at 554 n.94 (citing statutes); *id.* at 554-565 (analyzing case law and statutes from Switzerland, Germany, France, and Belgium). Those practices likewise counsel against the rule that petitioner and its amici urge here.

c. Petitioner's reliance (Br. 20-21) on cases invoking the presumption against extraterritorial application of domestic statutes is misconceived. In the context of a criminal prosecution, the extraterritoriality inquiry is a question of the territorial scope of the substantive criminal law that the defendant was charged with violating—not a question of whether jurisdiction exists under Section 3231. See, *e.g.*, *United States* v. *Bowman*, 260

U.S. 94, 98-100 (1922); *United States* v. *Palmer*, 16 U.S. (3 Wheat.) 610, 631 (1818). Accordingly, while petitioner's motion to dismiss the indictment included an extraterritoriality argument, it contended only that the presumption against exterritoriality barred application of the substantive criminal-law statutes invoked in the indictment—not that it barred application of Section 3231. See Pet. App. 39a-40a. And petitioner has not renewed those contentions in this Court.

On a more fundamental level, the animating principle that petitioner ascribes to the extraterritoriality and other cases that it cites (Br. 20-21)—avoidance of "international discord," *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U.S. 108, 116 (2013) (citation omitted)—counsels against the rule that it urges. When initiating and pursuing a criminal prosecution in the name of the United States, the Executive Branch is able to exercise its "discretion * * * in managing foreign affairs." *Ibid.* (citation omitted). It is petitioner's own position—which seeks a novel common-law rule in the context of international relations—that invites "the danger of unwarranted judicial interference in the conduct of foreign policy." *Ibid.*

d. Petitioner's reliance (Br. 30) on "policy consequences" as support for its position is likewise undermined by the Executive Branch's own prerogative to consider matters like reciprocity when deciding to bring a prosecution like this. As this Court has repeatedly recognized, the Executive Branch is best positioned to assess and weigh such considerations. See, *e.g.*, *Bank Markazi*, 578 U.S. at 235; *Munaf*, 553 U.S. at 701-703.

Petitioner's approach would allow for a judicial override of the Executive Branch's constitutionally rooted authority and discretion over prosecutorial and foreign-

policy decisionmaking. See *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996); *Chicago & S. Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 109 (1948). And to the extent that petitioner invokes (Br. 32) the specter of criminal prosecutions by state or local authorities, as opposed to prosecutions by the federal government with due regard for its principal role in foreign affairs, such prosecutions could present preemption issues that are not applicable here. See *American Ins. Ass'n* v. *Garamendi*, 539 U.S. 396, 414-420 (2003). Moreover, the federal government could file a suggestion of immunity if appropriate in such a case. Petitioner provides no examples of any state or local prosecutions that have been brought, or even attempted, under current immunity principles. And any necessary clarification of the law to preclude those prosecutions would in no way require ending federal prosecutions as well.

e. To the extent that policy consequences are a consideration, they strongly support maintaining the status quo. Doing otherwise would, among other things, significantly impede our national security: under petitioner's theory, a corporation that is 50.1% owned by a foreign government could engage in rampant criminal misconduct affecting U.S. citizens—from stealing trade secrets, to hacking computer systems, to advancing a foreign adversary's nuclear program, to providing material support to terrorists—while facing no criminal accountability at all. See Wuerth, 641 (citing real-world examples of such misconduct). This case is a prime illustration: a commercial bank allegedly laundered billions of dollars on behalf of a state sponsor of terrorism, and yet would face no criminal consequences if this Court adopted petitioner's position.

Contrary to petitioner's suggestion (Br. 29, 41-42), the relative rarity of criminal cases involving foreign-government-owned entities indicates only the careful exercise of prosecutorial discretion—not that the power to bring such prosecutions lacks importance. The existence of that power serves to deter criminal conduct. And in cases where criminal conduct has occurred, prosecuting the entity itself will sometimes—though not always—be the best or only way to ensure accountability, because individual officers are often difficult to locate or extradite. Here, for instance, the government indicted two executives of petitioner who remain at large.

If adopted, petitioner's theory might even suggest a bar on the federal government's enforcement of criminal subpoenas on foreign-government-owned entities. Although petitioner acknowledges (Br. 29) that such subpoena enforcement involves a "lesser dignitary harm," endorsement of the arguments underlying petitioner's approach could "signal to even non-sovereign criminals that if they act through [a foreign-government-owned] enterprise, the records might well be immune from criminal subpoenas." *In re Grand Jury Subpoena*, 912 F.3d at 630. In turn, the federal government could be deprived of information critical to criminal investigations.

Petitioner insists (Br. 2) that the federal government does not need to subject foreign-government-owned entities to criminal jurisdiction because it can rely on "war and diplomacy" instead. In this case, however, the United States could not persuade NATO-ally Türkiye to take appropriate action against petitioner for its alleged misconduct. Diplomacy is even less likely to work with non-ally nations. Accordingly, in this case and others, the Executive Branch has sometimes determined

that criminal prosecution is the best way to protect national security.

II. THE FSIA DOES NOT IMMUNIZE PETITIONER FROM CRIMINAL PROSECUTION

Because 18 U.S.C. 3231 provides jurisdiction over this case and no common-law immunity applies, petitioner could prevail in this Court only if it were entitled to invoke foreign sovereign immunity under the FSIA. See Pet. Br. 32-48. It is not. The FSIA does not apply to criminal prosecutions at all. And even if it did, this case would fall within the FSIA's commercial-activity exception.

A. The FSIA Does Not Apply To Criminal Cases

The FSIA is "a comprehensive set of legal standards governing claims of immunity in every *civil action* against a foreign state or its political subdivisions, agencies, or instrumentalities." *Verlinden*, 461 U.S. at 488 (emphasis added); accord, *e.g.*, *Republic of Argentina* v. *NML Capital, Ltd.*, 573 U.S. 134, 141 (2014) (same). The FSIA "lays down a baseline principle of foreign sovereign immunity from civil actions" and then "lists a series of exceptions from that principle." *Cassirer* v. *Thyssen-Bornemisza Collection Found.*, 142 S. Ct. 1502, 1508 (2022). The Court has never suggested that the FSIA has any bearing in the criminal context. And the FSIA's text, structure, and history make clear that it does not.

1. The FSIA's text, structure, and history demonstrate that it exclusively addresses civil actions

In *Samantar*, this Court considered the FSIA's "text," "history," and "purpose" and concluded that its "comprehensive solution for suits against states" does not "extend[] to suits against individual officials," in

which common-law principles continue to govern. 560 U.S. at 313, 325. A similar analysis here illustrates that the FSIA's "comprehensive solution" for civil suits against foreign states and their instrumentalities, *id.* at 323—the entire issue at which the Act is directed—does not extend to federal criminal prosecutions.

a. The FSIA's text is directed at civil suits

The FSIA's text, which this Court considers "as a whole," *Samantar*, 560 U.S. at 319, is itself dispositive in demonstrating that the Act is exclusively civil in its scope and application.

i. The Act contains a grant of jurisdiction for district courts over "any nonjury *civil* action * * * as to any claim for relief in personam with respect to which a foreign state is not entitled to immunity." 28 U.S.C. 1330(a) (emphasis added). It provides that such jurisdiction attaches "without regard to amount in controversy," *ibid.*—a requirement that arises in civil, not criminal cases. The Act mentions federal criminal prosecutions only once, and in so doing recognizes that such prosecutions will occur ancillary to cases under the Act. See 28 U.S.C. 1605(g) (requiring courts to stay discovery requests in terrorism-related cases under the FSIA when the Attorney General certifies that the request "would significantly interfere with a criminal investigation or prosecution"). And the Act sets forth a reticulated procedural scheme that relates to only civil cases, without any similar procedural provisions for criminal cases.

For example, the FSIA's sole venue provision addresses "civil action[s]." 28 U.S.C. 1391(f). The Act also authorizes removal of "[a]ny civil action brought in a State court against a foreign state" but does not speak

to removal of criminal cases. 28 U.S.C. 1441(d). Similarly, the Act establishes rules applicable to service on foreign states of "the summons and complaint," 28 U.S.C. 1608(a)(1), and rules applicable to the foreign state's "answer or other responsive pleading to the complaint," 28 U.S.C. 1608(d), but contains no comparable rules for criminal matters. And the Act provides that in cases where no immunity exists, "the foreign state shall be liable in the same manner and to the same extent as a private individual," except that foreign states (but not agencies or instrumentalities) "shall not be liable for punitive damages." 28 U.S.C. 1606. "Liability" is typically a civil term and punitive damages are a civil remedy.

ii. The FSIA's "careful calibration" of civil jurisdiction, procedure, and remedies—and the complete absence of any similar framework governing criminal prosecutions—shows that "Congress did not mean to cover" criminal prosecutions at all. *Samantar*, 560 U.S. at 319. Petitioner's contrary argument (Br. 33-34) focuses on the FSIA's immunity provision, Section 1604, which states that "[s]ubject to existing international agreements," a "foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607." 28 U.S.C. 1604. But although Section 1604 does not expressly limit itself to civil cases, "[c]ourts have a duty to construe statutes, not isolated provisions." *Graham Cnty. Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 559 U.S. 280, 290 (2010) (citation and internal quotation marks omitted).

Construed in light of the FSIA as a whole, Section 1604 "lays down a baseline principle of foreign sovereign immunity from *civil* actions." *Cassirer*, 142 S. Ct. at 1508 (emphasis added). Section 1604 is designed to

"work in tandem" with Section 1330(a)'s "confer[ral of] jurisdiction on district courts," *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989), which is limited to civil actions. Even petitioner itself, in arguing that application of FSIA immunity to criminal cases should come without the express exceptions to such immunity in Section 1605, recognizes that other FSIA provisions "must be read in connection with section 1330(a)'s conferral of *civil* jurisdiction." Pet. Br. 42 (emphasis added). Congress would not have enacted a statute otherwise exclusively directed at civil cases and then inserted one provision implicitly stripping the Executive Branch of the power to bring, and the Judiciary of the power to hear, criminal cases against foreign entities.

Federal courts presumptively have the jurisdiction granted to them by statute—here, jurisdiction over "all offenses against the laws of the United States." 18 U.S.C. 3231. And the "Attorney General and United States Attorneys retain broad discretion to enforce the Nation's criminal laws." *Armstrong*, 517 U.S. at 464 (citation and internal quotation marks omitted). "They have this latitude because they are designated by statute as the President's delegates to help him discharge his constitutional responsibility to 'take Care that the Laws be faithfully executed.'" *Ibid.* (quoting U.S. Const. Art. II, § 3). This Court should not read the FSIA—which is silent on criminal matters—to both repeal a portion of Section 3231 and infringe on the Executive Branch's core "constitutional function" of determining whether and when to initiate criminal prosecutions. *Id.* at 465; see *Morton*, 417 U.S. at 549; *United States* v. *Fokker Servs. B.V.*, 818 F.3d 733, 742 (D.C. Cir. 2016).

b. The FSIA was not designed to address criminal cases

The FSIA's background, history, and purpose confirm that Congress intended no such result. See *Samantar*, 560 U.S. at 316 n.9, 319 n.12, 320-325 (conducting a similar analysis). Instead, the Act's provisions were designed to address only civil cases. The "Act and its legislative history do not say a single word about possible criminal proceedings." *In re Grand Jury Subpoena*, 912 F.3d at 630 (citation omitted). "To the contrary, the relevant reports and hearings suggest Congress was focused, laser-like, on the headaches born of private plaintiffs' civil actions against foreign states." *Ibid.*

i. Leading up to the FSIA, "American citizens [we]re increasingly coming into contact with foreign states and entities owned by foreign states," particularly in the commercial sphere. H.R. Rep. No. 1487, 94th Cong., 2d Sess. 6 (1976) (1976 House Report). That increased contact spawned questions about "whether our citizens will have access to the courts in order to resolve ordinary legal disputes"—which would of course be civil disputes—with foreign states and foreign-state-owned entities. *Ibid.*

Because the maintenance of such suits was subject to "the case-by-case prerogative of the Executive Branch," *Beaty*, 556 U.S. at 857, "[f]rom the standpoint of the private litigant, considerable uncertainty" existed about how "his legal dispute with a foreign state" would be decided, 1976 House Report 9. Among other things, private civil lawsuits against foreign states sometimes prompted those states to "place[] diplomatic pressure on the State Department in seeking immunity." *Verlinden*, 461 U.S. at 487; see 1976 House Report

6-9. To address that uncertainty, the Executive Branch itself proposed a bill to govern "[h]ow, and under what circumstances * * * private persons [can] maintain a lawsuit against a foreign government or against a commercial enterprise owned by a foreign government." *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 24 (1976) (1976 Hearings).

In its proposal, the Executive Branch emphasized the need to "legislate comprehensively regarding the competence of American courts to adjudicate disputes between private parties and foreign states" relating to "activities which are of a private law nature." 1976 Hearings 29 (Department of Justice). The House Report similarly stated that the "purpose" of the resulting statute was "to provide when and how parties can maintain a lawsuit against a foreign state or its entities in the courts of the United States." 1976 House Report 6. And the House Report stressed the need for "comprehensive provisions" to "inform parties when they can have recourse to the courts to assert a legal claim against a foreign state." *Id.* at 7.

Thus, the history, like the text, speaks in exclusively civil-litigation terms and shows that Congress sought to address exclusively civil cases. The House Report repeatedly referenced "plaintiffs," "suits," "litigants," and "liability." 1976 House Report 6-8, 12. And in discussing the FSIA's immunity provision specifically, the House Report referenced "the plaintiff" and "the plaintiff's claim." *Id.* at 17. Immunity in criminal matters "simply was not the particular problem to which Congress was responding." *Samantar*, 560 U.S. at 323.

ii. Petitioner contends (Br. 41) that Congress's focus on "civil litigation against sovereigns reflects the fact that criminal litigation against sovereigns was inconceivable in 1976." But by 1976, the Executive Branch had subjected foreign-government-owned entities to criminal jurisdiction on multiple occasions, see pp. 25-26, *supra*, and surely Congress would have mentioned any concerns that would lead it to altogether preclude the Executive from continuing to do so.

Congress particularly would have made such mention in the context of a statute that had its genesis in an executive proposal and that tracked executive policy. For instance, as this Court has recognized, the FSIA "codif[ies] the restrictive theory of sovereign immunity" previously adopted by the State Department. *Samantar*, 560 U.S. at 313. Under that theory, immunity attaches to a foreign state's "sovereign acts," but not to its "commercial acts." *Jam* v. *International Fin. Corp.*, 139 S. Ct. 759, 766 (2019); see Letter from Jack B. Tate, Acting Legal Adviser, Dep't of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), 26 Dep't of State Bull. 984 (1952).

It would be highly anomalous for Congress to codify executive judgments about when foreign sovereign immunity is appropriate, but reject executive judgments about immunity in the criminal context without saying a word on that topic. Indeed, "Congress' silence in this regard can be likened to the dog that did not bark." *Chisom* v. *Roemer*, 501 U.S. 380, 396 n.23 (1991) (citing A. Doyle, Silver Blaze, in *The Complete Sherlock Holmes* 335 (1927)).

2. Neither precedent nor policy supports petitioner's reading of the FSIA as implicitly barring federal prosecutions of foreign-government-owned corporations

To the extent that petitioner contends that this Court has already implicitly decided, or that policy considerations suggest that it should decide, this issue in its favor, that contention is unsound.

a. Petitioner's reliance (Br. 34) on the Court's decision in *Amerada Hess* is misplaced. There, the plaintiffs filed a civil suit against Argentina under general grants of civil jurisdiction, including the Alien Tort Statute, 28 U.S.C. 1350, and the admiralty and maritime jurisdiction provision, 28 U.S.C. 1333. See *Amerada Hess*, 488 U.S. at 432. This Court held that the plaintiffs could not invoke such general grants of civil jurisdiction "in Title 28" to sue a foreign state and thereby evade "the comprehensiveness of the statutory scheme in the FSIA." *Id.* at 437.

Nothing suggests that *Amerada Hess* considered, much less addressed or resolved, the FSIA question here. Instead, it simply recognized that the FSIA displaces the general grants of *civil* jurisdiction "in Title 28" in cases involving foreign states, 488 U.S. at 437—the precise type of jurisdiction that the FSIA comprehensively addresses. *Amerada Hess* does not imply that the FSIA displaces the grant of criminal jurisdiction in Section 3231, which is not even "in Title 28," *ibid.*—and, unlike the FSIA, specifically addresses jurisdiction over criminal cases. Thus, "even the briefest peek under the hood of *Amerada Hess* shows that the Supreme Court's reasons for finding section 1330(a) to be the exclusive basis for jurisdiction in the civil context

have no place in criminal matters." *In re Grand Jury Subpoena*, 912 F.3d at 629.

b. Petitioner asserts (Br. 37) that if the FSIA does not apply in the criminal context, "courts and the Executive" will be "muddling along without congressional guidance." But the same objection could have been made in *Samantar*, where the Court held that the FSIA does not apply to foreign official immunity claims, thereby leaving such claims to be resolved "under the common law," 560 U.S. at 324 —that is, "without congressional guidance," Pet. Br. 37.

Moreover, petitioner acknowledges (Br. 38) that the Federal Rules of Criminal Procedure will govern criminal cases if the FSIA does not. Although petitioner emphasizes (Br. 37-38) differences between the Federal Rules and the FSIA's procedural rules, that is simply more evidence that the FSIA does not address criminal prosecutions.

In any event, petitioner does not identify any genuine practical problems in applying the Federal Rules. Petitioner's primary complaint is that juries may resolve criminal cases against foreign-government-owned entities. But petitioner disregards that, consistent with *Samantar*, juries already resolve criminal cases against foreign officials. See, *e.g.*, *United States* v. *Nsue*, 14-cr-312 (E.D. Va. Apr. 17, 2015). And petitioner offers no basis for why the Rules would be appropriate for foreign officials but not for foreign-government-owned corporations.

B. If The FSIA Applies To Criminal Cases, This Prosecution Can Proceed Under The Commercial-Activity Exception

Even if the FSIA applies to criminal cases, petitioner would still lack immunity here. As the court of appeals

properly recognized, see Pet. App. 18a-24a, this case would fall within the FSIA's commercial-activity exception. Petitioner's suggestion that the FSIA implicitly grants much broader immunity in criminal cases than it does in the civil cases that it comprehensively addresses is unsound.

1. The commercial-activity exception applies in "any case" in which the FSIA itself applies and the exception's terms are met

Where it applies, the FSIA only confers immunity "except as provided in sections 1605 to 1607." 28 U.S.C. 1604. Section 1605, in turn, provides "[g]eneral exceptions to the jurisdictional immunity of a foreign state." 28 U.S.C. 1605 (emphasis omitted). And it expressly specifies that those exceptions to immunity apply "in any case." 28 U.S.C. 1605(a). The "word 'any' naturally carries 'an expansive meaning.'" *SAS Inst. Inc.* v. *Iancu*, 138 S. Ct. 1348, 1354 (2018) (citation omitted). To the extent that the FSIA applies to criminal cases, such cases would be plainly encompassed by the term "any case" in the Act's immunity exceptions.

In petitioner's view (Br. 42-43), the FSIA's immunity grant applies to both criminal and civil cases, but its immunity exceptions apply to civil cases alone. At bottom, petitioner's position would mean that the immunity of a foreign-government-owned entity "sweep[s] far more broadly" in criminal prosecutions brought by the United States than in civil actions brought by private parties based on "the same commercial conduct." Pet. App. 17a n.48. As the court of appeals recognized, that interpretation makes little sense. *Ibid.* And petitioner's selective reading of Sections 1604 and 1605 lacks support from any principle of textual analysis.

Petitioner asserts (Br. 40) that Section 1605's exceptions "should be read narrowly" because they operate as sovereign-immunity waivers. But that interpretive principle, which has primarily arisen in the domestic context, would apply only where the sovereign-immunity waiver is ambiguous, see, *e.g.*, *United States* v. *Williams*, 514 U.S. 527, 531 (1995)—which the term "any case" is not. And while petitioner would (for the purpose of the FSIA's exceptions, if not its broader scope) read Section 1605 in tandem with Section 1330(a)'s grant of civil jurisdiction, see Pet. Br. 42-43, petitioner offers no basis for assuming that when Congress said "in any case," it actually meant "in any case under Section 1330(a)."

Petitioner again tries to have it both ways—FSIA immunity, but broader than what the FSIA itself confers—when it observes (Br. 43) that some Section 1605 immunity exceptions could be invoked in only civil cases. See 28 U.S.C. 1605(a)(5) (referring to certain cases "in which money damages are sought against a foreign state for personal injury or death"). But that is more evidence that the FSIA does not address criminal cases at all—not evidence that it confers blanket immunity, without any exception, from any criminal prosecution.

Petitioner's argument is also inherently unsound, as certain exceptions, while not designed for criminal cases, would naturally be understood to include them were they covered by the FSIA. In particular, the commercial-activity exception—the only exception at issue here—applies "in any case * * * in which the action is based upon a commercial activity" with certain domestic connections. 28 U.S.C. 1605(a)(2). There is nothing "odd," Pet. Br. 43, about a framework in which

certain exceptions can be triggered in a broader set of cases than others. Indeed, that result would follow even from petitioner's reading: Section 1605(a)(6), for example, can be triggered only in cases involving arbitration—not in every civil case. See 28 U.S.C. 1605(a)(6).

2. The prosecution here would fall within the commercial-activity exception

As the court of appeals recognized (Pet. App. 18a-24a), the conduct described in the indictment would fit within the commercial-activity exception. The commercial-activity exception provides that "[a] foreign state shall not be immune from the jurisdiction of courts of the United States * * * in any case * * * in which the action is based upon" (1) "a commercial activity carried on in the United States by the foreign state"; (2) "an act performed in the United States in connection with a commercial activity of the foreign state elsewhere"; or (3) "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. 1605(a)(2). The conduct alleged in the indictment involves all three types of acts.

a. Application of the commercial-activity exception starts with identifying "the particular conduct that constitutes the gravamen" of the action. *OBB Personenverkehr AG* v. *Sachs*, 577 U.S. 27, 35 (2015) (internal quotation marks omitted). Here, the gravamen of the counts charging petitioner with conspiring to defraud the United States and conspiring to violate IEEPA is petitioner's participation in fraudulent financial transactions designed to evade U.S. sanctions against Iran, which it concealed through misrepresentations to Treasury Department officials. See J.A. 3, 11-12, 22-30; Pet. App. 19a. And the gravamen of the counts charging

petitioner with bank fraud, conspiring to commit bank fraud, money laundering, and conspiring to commit money laundering is petitioner's facilitation of sanctions violations through transfers of restricted Iranian funds through unwitting U.S. financial institutions. See J.A. 3, 17, 28, 30-34.

Petitioner maintains (Br. 46) that the gravamen of the prosecution is limited solely to petitioner's illicit transactions in Türkiye, and excludes its misrepresentations to Treasury Department officials. But petitioner does not dispute that the gravamen of a case can include multiple aspects of intertwined activities, particularly when one of them is the violation of economic sanctions imposed by the United States—the overarching basis for the prosecution here. See Pet. App. 19a. All of the counts center on financial transactions, in violation of U.S. sanctions, that involved the U.S. government and U.S. institutions. Petitioner's attempt to sever its misrepresentations to Treasury Department officials from the case's core cannot be squared with the indictment, which devotes pages to those misrepresentations. See J.A. 5, 17-18, 20-21, 27-28.

At the very least, the gravamen of Counts 1 and 2 encompasses the misrepresentations. See, *e.g.*, *Rodriguez* v. *Pan Am. Health Org.*, 29 F.4th 706, 714 (D.C. Cir. 2022) ("considering the 'gravamen' on a claim-by-claim basis"). Count 1 charges petitioner with "obstruct[ing] the lawful and legitimate governmental functions and operations of the U.S. Department of the Treasury," J.A. 29, while Count 2 charges petitioner with "evad[ing] and avoid[ing]" U.S. sanctions, including those implemented through Treasury Department regulations, J.A. 30.

Petitioner inaptly analogizes (Br. 46) this case to *OBB Personenverkehr AG* v. *Sachs*, in which the Court found that "the conduct constituting the gravamen of [the] suit plainly occurred abroad," 577 U.S. at 35. As petitioner acknowledges (Br. 46), the U.S.-based conduct there would not have been "wrongful" without the conduct abroad. *Sachs*, 577 U.S. at 35. Here, in contrast, violating U.S. sanctions, laundering the proceeds through U.S. banks, and making material misrepresentations to U.S. government officials are wrongful acts regardless of where they occur.

Moreover, in *Sachs*, the relevant "injuries [were] suffered in Austria." 577 U.S. at 35. Here, in contrast, petitioner caused injuries in the United States by freeing up funds for uses inimical to the interests of the United States and its citizens, deceiving U.S. government officials, and "causing victim-U.S. financial institutions to take part in laundering over $1 billion through the U.S. financial system in violation of U.S. law." Pet. App. 21a.

b. Once the gravamen is identified, the next question is whether the relevant conduct is "commercial" in nature. 28 U.S.C. 1605(a)(2); see, *e.g.*, *Merlini* v. *Canada*, 926 F.3d 21, 28 (1st Cir. 2019) ("After a court identifies the particular conduct by the foreign state on which the plaintiff's claim is 'based,' the next step in the inquiry requires a court to determine whether that conduct qualifies as 'commercial activity.'") (citation omitted), cert. denied, 140 S. Ct. 2804 (2020). "The commercial character of an activity [is] determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. 1603(d). And "the issue is whether the particular actions that the foreign state performs * * * are

the *type* of actions by which a private party engages in trade and traffic or commerce." *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607, 614 (1992) (citation and internal quotation marks omitted).

Under that test, petitioner's conduct here was plainly commercial. This prosecution is based on petitioner's provision of financial services, facilitation of financial transactions, and communication with financial regulators. See, *e.g.*, J.A. 14-15, 18, 23, 27. Those are all activities in which private banks regularly engage. Petitioner asserts (Br. 48) that it only "had Iranian money in the first place" because the Turkish government designated petitioner as Türkiye's "repository for Iranian assets." But the underlying reason why petitioner held Iranian assets does not change the commercial "'nature'" of "the particular actions" that petitioner subsequently took with those assets. *Weltover, Inc.*, 504 U.S. at 614 (citation omitted); see Pet. App. 22a. And the grant of a government license does not inherently imbue the licensed activities with a sovereign character. See *Petersen Energía Inversora S.A.U.* v. *Argentine Republic*, 895 F.3d 194, 207 (2d Cir. 2018) (activity was "commercial" even though it was "triggered by [a] sovereign act"), cert. denied, 139 S. Ct. 2741 (2019).

Petitioner also asserts (Br. 47) that its activities were "sovereign, not commercial" because it purportedly conducted them in order "to boost Türkiye's exports statistics" and to "administer[]" a "U.S.-approved program to provide Iranian oil and gas to the Turkish people." But that assertion again disregards "that the commercial character of an act is to be determined by reference to its 'nature' rather than its 'purpose.'" *Weltover, Inc.*, 504 U.S. at 614 (quoting 28 U.S.C. 1603(d)). Because petitioner's conduct was "in the manner of a

private player" operating in "a market," not "as regulator of [that] market," *ibid.*, it is immaterial whether petitioner engaged in that conduct for the purported purpose of assisting the Turkish government.

c. Finally, the commercial conduct that is the gravamen of the indictment falls within the scope of activity covered by the commercial-activity exception. See, *e.g.*, *Devengoechea* v. *Bolivarian Republic of Venez.*, 889 F.3d 1213, 1224 (11th Cir. 2018). Indeed, each of the exception's three alternatives applies to the conduct in this case.

The counts charging petitioner with conspiring to defraud the United States and conspiring to violate IEEPA are based "upon an act performed in the United States," 28 U.S.C. 1605(a)(2)—misrepresentations to Treasury Department officials "in meetings and in conference calls," Pet. App. 20a, see, *e.g.*, J.A. 27-28—in connection with commercial activity in Türkiye. Alternatively, those counts are "based upon a commercial activity carried on in the United States," 28 U.S.C. 1605(a)(2), because petitioner's evasion of U.S. sanctions and deception of U.S. officials "ha[d] substantial contact with the United States," 28 U.S.C. 1603(e). Similarly, petitioner's laundering of approximately $1 billion through unwitting U.S. banks—at the core of the bank-fraud and money-laundering counts—had "substantial contact with the United States" as well. *Ibid.*; see *Rodriguez*, 29 F.4th at 716-717 (explaining that "a financial crime in the U.S." involving "moving money" through U.S. bank accounts "constituted 'commercial activity carried on in the United States'").

All of the counts additionally fit the commercial-activity exception's third alternative because petitioner's fraudulent transactions in Türkiye were "act[s] outside

the territory of the United States in connection with a commercial activity of the foreign state elsewhere" that "cause[d] a direct effect in the United States." 28 U.S.C. 1605(a)(2). Specifically, petitioner's schemes defrauded the U.S. government, violated U.S. sanctions, and channeled approximately $1 billion in restricted funds through the U.S. financial system. See J.A. 28-34. That charged conduct plainly had a "direct effect" in this country. Pet. App. 22a.

Petitioner asserts that Zarrab's actions were "intervening events" that preclude any "direct effect." Br. 47 (citation omitted). But Zarrab was petitioner's co-conspirator, so his acts were not intervening events, but instead acts chargeable to petitioner as if petitioner itself had engaged in them. See, *e.g.*, *Salinas* v. *United States*, 522 U.S. 52, 64 (1997). In any event, it would not matter that Zarrab's acts were deemed an additional cause of the direct effect in the United States. The statute does not require that the defendant be the *sole* cause of a "direct effect in the United States." 28 U.S.C. 1605(a)(2). It simply requires that the defendant's "act cause[] a direct effect in the United States." *Ibid.*

It is precisely because petitioner's alleged acts caused such effects in multiple ways that the United States has made the weighty decision to prosecute a commercial bank whose shares are majority-owned by a foreign government. That prosecution is proper under Section 3231 and in no way barred by the FSIA. It should be allowed to proceed.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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