No.

In the Supreme Court of the United States

TÜRKIYE HALK BANKASI A.Ş.,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

No court in history has ever criminally tried the instrumentality of another co-equal sovereign—even in cases involving commercial conduct. And Congress has never seen fit to abrogate the immunities owed instrumentalities at common law to allow for that result. This Court confirmed as much when it previously heard this case and held that the Foreign Sovereign Immunities Act (FSIA), which created exceptions to sovereign immunity, "does not apply to"—and does not limit common-law immunity in—"criminal proceedings." Pet.App.58a.

The Court remanded the case to the Second Circuit to consider in full Halkbank's common-law sovereign immunity arguments. The Second Circuit then held it was required by Second Circuit civil precedents to "defer to the Executive Branch's determination as to whether a party should be afforded common-law foreign sovereign immunity." Pet.App.3a. It also held that the Executive's determination was "consistent" with the common law of immunity, despite permitting a result—the criminal trial of a foreign sovereign instrumentality—unheard of in world history. Pet.App.5a, 10a. The questions presented are:

1. Whether courts are bound to defer conclusively to the Executive's common-law foreign sovereign immunity determinations in criminal cases.

2. Whether prosecutors may, consistent with the common law of foreign sovereign immunity, criminally prosecute foreign sovereign instrumentalities, including for conduct occurring within their sovereign's territory.

PARTIES TO THE PROCEEDING

Petitioner Türkiye Halk Bankasi A.Ş., was a defendant in the district court and the appellant in the Second Circuit.

Respondent United States of America was the plaintiff in the district court and the appellee in the Second Circuit.

CORPORATE DISCLOSURE STATEMENT

Petitioner Türkiye Halk Bankasi A.Ş. is 91.49% owned by the non-party Turkish Wealth Fund, which is part of and owned by the Turkish State. No publicly held corporation owns 10% or more of the stock of non-party Turkish Wealth Fund, which has no stock.

STATEMENT OF RELATED PROCEEDINGS

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

- *Türkiye Halk Bankasi A.Ş. v. United States*, No. 21-1450, S. Ct. (Apr. 19, 2023) (affirming in part and vacating and remanding in part denial of motion to dismiss based on sovereign immunity).
- *United States v. Türkiye Halk Bankasi A.Ş.*, No. 20-3499, 2d Cir. (Oct. 22, 2024) (opinion on remand affirming denial of motion to dismiss based on sovereign immunity).
- *United States v. Halkbank*, No. 20-3499, 2d Cir. (Oct. 22, 2021) (original panel opinion affirming denial of motion to dismiss based on sovereign immunity).
- *In re Türkiye Halk Bankasi A.Ş.*, No. 20-3008, 2d Cir. (Dec. 23, 2020) (denying mandamus relief regarding recusal).
- *United States v. Atilla*, No. 18-1589, 2d Cir. (July 20, 2020) (affirming conviction of Mehmet Hakan Atilla).
- *In re Türkiye Halk Bankasi A.Ş.*, No. 19-4203, 2d Cir. (Feb. 21, 2020) (denying mandamus relief relating to personal jurisdiction).
- *United States v. Halkbank*, No. 15-Cr.-867, S.D.N.Y. (Oct. 1, 2020) (denying motion to dismiss based on sovereign immunity).
- *United States v. Zarrab*, No. 15-Cr.-867, S.D.N.Y. (prosecutions of several individuals and Halkbank via separate indictments).

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

PRIOR OPINIONS BELOW AND IN THIS COURT

This Court's prior opinion in this case, Pet.App.37a-66a, is reported and available at 598 U.S. 264 (2023). The opinion of the court of appeals on remand, Pet.App.1a-36a, is reported and available at 120 F.4th 41 (2d Cir. 2024).

The first panel opinion in this case, Pet.App.67a-90a, is reported and available at 16 F.4th 336 (2d Cir. 2021). The opinion of the United States District Court for the

Southern District of New York denying petitioner's motion to dismiss, Pet.App.91a-113a, is unreported and available at 2020 WL 5849512 (S.D.N.Y. Oct. 1, 2020).

JURISDICTION

The judgment of the court of appeals on remand was entered on October 22, 2024. Pet.App.1a. The petition for rehearing or rehearing en banc was denied on December 6, 2024. Pet.App.114a-15a. On January 29, 2025, Justice Sotomayor extended the time to file a petition for certiorari until May 5, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

There are no statutory provisions involved in this appeal.

STATEMENT

This criminal case returns to this Court following a remand to the Second Circuit to reconsider Halkbank's common-law sovereign immunity arguments. In *Türkiye Halk Bankasi A.Ş. v. United States*, 598 U.S. 264 (2023), this Court held that the Foreign Sovereign Immunities Act (FSIA), which codified the "restrictive theory" of sovereign immunity, including the commercial-activities exception, "does not apply to criminal proceedings." Pet.App.58a. Observing that the court of appeals "did not fully consider the various arguments regarding common-law immunity that the parties press in this Court," this Court then remanded for the Second Circuit to do so. Pet.App.57a.

On remand, the Second Circuit held it was bound by circuit-level civil-immunity precedents to defer conclusively to the Executive's "determination as to whether a party should" receive criminal immunity. Pet.App.5a.

The court also held that the Executive's determination here was "consistent" with the immunities afforded instrumentalities at common law, again based on cases applying immunity (including the commercial-activities exception) in civil cases. Pet.App.5a, 10a. This case therefore once again raises two profound questions worthy of review: Are courts bound to defer conclusively to the Executive's foreign sovereign immunity determinations in criminal cases? And may prosecutors bring criminal charges against foreign sovereign instrumentalities, including for conduct undertaken in the sovereign's own territory?

Fundamental separation-of-powers principles resolve the first question: The courts, not the Executive, say what the law is, as the courts did for the first 150 years of foreign sovereign immunity jurisprudence. That principle applies with special force in the criminal context, where the government is a necessary litigant and therefore should not also be a lawmaker. Deferring to the Executive on sovereign immunity in criminal cases would mean there is no sovereign immunity in criminal cases.

Precedent, history, and tradition resolve the second question: The government may not criminally try a foreign sovereign instrumentality. All agree that states *qua* states are entitled to absolute criminal immunity, including for commercial conduct. And it is a foundational principle of common-law foreign sovereign immunity that the immunities owed sovereigns extend to their instrumentalities in equal measure. Instrumentalities are therefore, like their sovereigns, entitled to absolute immunity at common law—most certainly for conduct occurring in their own sovereign territory where their jurisdiction "is necessarily exclusive and absolute." *The Schooner Exch. v. McFaddon*, 11 U.S. 116, 136 (1812).

The Second Circuit, however, reached the opposite conclusion as to each question, holding that it had to defer to the Executive's decision to indict Halkbank—an undisputed sovereign instrumentality—for conduct occurring in Türkiye at the direction of the Turkish state.

No nation anywhere in the world has ever criminally tried a foreign sovereign instrumentality. The decision below thus authorizes the first criminal trial of a foreign sovereign instrumentality in world history. This Court's review is warranted to determine whether this unprecedented result is consistent with our law.

Both aspects of the Second Circuit's ruling merit review. First, the court's deference holding entrenches and expands a clear split with the Fourth Circuit. That court, relying on the same historical authorities and precedents as the Second Circuit, rejected deference to Executive immunity determinations when those determinations, like here, are based on the defendant's conduct—such as participation in commercial activity. *Yousuf v. Samantar*, 699 F.3d 763, 773 (4th Cir. 2012). That court held that deference to the Executive in such cases is without "constitutional basis." *Id.* The Second Circuit's contrary conclusion, extending deference across the board, "sound[s] in" what a prior opinion in this case acknowledged as "separation-of-powers concerns," Pet.App.64a (Gorsuch, J., concurring in part and dissenting in part), and goes beyond the deference this Court has afforded even in civil cases, *Berizzi Bros. Co. v. The Pesaro*, 271 U.S. 562, 574 (1926) (recognizing immunity notwithstanding Executive's suggestion of non-immunity). The courts of appeals have therefore split on the question raised by a prior opinion in this case: whether "deference to the Executive's immunity decisions risks relegating courts to the status of potted plants, inconsistent with their duty to say

what the law is in the cases that come before them?" Pet.App.64a (Gorsuch, J., concurring in part and dissenting in part).

Second, the court of appeals' holding that instrumentalities are not entitled to absolute criminal immunity at common law merits review in its own right. The government conceded before this Court that sovereign states themselves have absolute criminal immunity and that prosecuting a foreign state for any crime—even one arising from commercial conduct—would be a "derogation of … common law immunity." S. Ct. Tr. at C.A. App. 207, 216-17, 220 (Deputy Solicitor General). And at common law—in both the domestic and foreign sovereign immunity contexts—instrumentalities have always received the same immunities owed their sovereigns. The Second Circuit here offered no principled reason to depart from this well-settled framework. And it did not consider at all that the government, in contravention of centuries of authority, seeks to criminalize a sovereign's conduct occurring *in Türkiye* where the Turkish Republic's jurisdiction is plenary. Absent clear action by Congress abrogating common-law immunity, no sovereign instrumentality should be haled into court to answer criminal charges for conduct that occurred within its own sovereign territory.

The Second Circuit's approval of the first criminal trial of a foreign sovereign instrumentality in world history is a monumental departure from common-law practice and international norms that will "produc[e] friction in our relations with [other] nations" and "lead[] some to reciprocate by granting their courts permission to embroil the United States in expensive and difficult litigation." *Republic of Hungary v. Simon*, 145 S. Ct. 480, 494 (2025) (citation omitted). And of particular concern, it

will lead to prosecutions of foreign sovereign instrumentalities at the state level. This Court should intervene once and for all before no "constraints remain on state prosecutions of foreign sovereigns." Pet.App.65a (Gorsuch, J., concurring in part and dissenting in part). And it should reverse the judgment below before other nations feel empowered to depart from centuries of international practice as the Second Circuit did below.

A. Legal Background

The absolute immunity owed sovereign states in the criminal context is as old as the Nation itself. At the Founding, "foreign states enjoyed absolute immunity from *all* actions in the United States." *Rubin v. Islamic Republic of Iran*, 583 U.S. 202, 208 (2018) (emphasis added). That immunity extended to criminal cases, *Dow v. Johnson*, 100 U.S. 158, 165 (1879); *see Coleman v. Tennessee*, 97 U.S. 509, 515, 516 n.1 (1878), meaning that sovereign entities were immune from "arrest [and] detention," *Schooner Exch.*, 11 U.S. at 137. In line with these standards, for centuries this Nation never brought criminal charges against a foreign sovereign.

Or sovereign instrumentalities. The common law of sovereign immunity in this country originates with cases brought against the instrumentalities of sovereigns, most commonly foreign vessels. *See id.*; *see, e.g.*, *L'Invincible*, 14 U.S. 238, 252-53 (1816) (extending immunity to a private armed vessel acting under sovereign commission); *The Pizarro*, 19 F. Cas. 786, 790 (S.D.N.Y. 1852). As the twentieth century saw a rise in commercial conduct by sovereign entities, courts around the world, including in the United States, began to recognize certain limited exceptions to immunity from civil liability for commercial acts. *See Permanent Mission of India to the U.N. v. City of New York*, 551 U.S. 193, 199 (2007). A critical point in

this evolution, in the United States and abroad, was the State Department's issuance of the Tate Letter. *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 711 (1976); app. 2 (Tate Letter).

But the so-called commercial-activities exception "left untouched" the absolute immunity owed to both sovereigns and instrumentalities in criminal cases. Hazel Fox & Philippa Webb, *The Law of State Immunity* 91 (3d ed. 2015). For that reason, sovereign instrumentalities during this period continued to receive criminal immunity at common law even for commercial conduct. *See In re Investigation of World Arrangements*, 13 F.R.D. 280, 291 (D.D.C. 1952) (oil company minority-owned but controlled by British government immune from criminal process). To this day, no sovereign instrumentality has ever been subjected to criminal trial in this country.

B. Factual Background

No one disputes Halkbank is a sovereign instrumentality. It is a Turkish state bank based in Istanbul that was created by the Turkish legislature and operates under complete government control. It has no branches or employees in the United States. Within Türkiye, it serves many government functions, including managing government development and social welfare programs, providing natural disaster relief, and collecting taxes. Halkbank C.A. Br. 5-7; Türkiye C.A. Br. 7-14.

This case concerns the U.S. sanctions regime targeting Iran leading up to the 2016 Iranian Nuclear Deal, officially known as the Joint Comprehensive Plan of Action. *See* Pet.App.6a. That regime permitted nations that had relied on Iranian oil and gas, including Türkiye, to continue purchasing Iranian oil and gas without risking

U.S. sanctions. *See* C.A. App. 26-27. To do so, these nations were required to deposit Iran's oil and gas proceeds in a local bank and limit Iran's use of the proceeds to certain purposes that evolved over time, including the purchase of gold for export to Iran; the purchase of food and humanitarian goods; and bilateral trade. *See* Pet.App.6a. The Turkish government directed Halkbank to serve as the country's "designated repository of proceeds from Iran's sale of oil and gas to Turkey." Pet.App.7a.

According to the indictment, Iranian oil and gas proceeds during this period were deposited into accounts at Halkbank in Türkiye. C.A. App. 20. A Turkish-Iranian businessman named Reza Zarrab then gained access to those funds and transferred the Iranian oil and gas proceeds out of Halkbank. *See* C.A. App. 20-22, 32-33. The government alleges that a handful of former bank officials were instructed to assist Zarrab in gaining access to the funds. C.A. App. 20, 35, 43-45, 49, 51-52. The indictment does not allege that any Iranian oil and gas funds were transferred from Halkbank to the United States. After the funds left Halkbank in either Euros or Turkish Lira, the involvement of the former Halkbank officials ended. *See* C.A. App. 32-33, 44.[1] According to the allegations in the indictment, the funds eventually made their way to Dubai, C.A. App. 32-33, where, after several more transactions, approximately 5% of the funds are alleged to have passed through U.S. correspondent accounts, C.A. App. 21, 52; *see also* C.A. App. 32-33, 44. Halkbank had nothing to do with those U.S. transactions.

[1] Turkish authorities have investigated the conduct of the former bank officials under Turkish law and concluded that prosecution was not warranted.

C. Procedural History

1. In 2016, Zarrab was arrested by U.S. authorities in Miami. C.A. App. 51-52. A year later, he pleaded guilty and turned state's evidence. *See* Pet.App.72a n.7. The government indicted three former Halkbank executives, one of whom stood trial and was convicted. Pet.App.72a n.6; *see United States v. Atilla*, 966 F.3d 118, 133 (2d Cir. 2020).

In 2019, the government unsealed a six-count indictment against Halkbank that accused the bank of participating in a scheme or conspiracy to export U.S. financial services to Iran because approximately 5% of the Iranian oil and gas proceeds allegedly passed through U.S. banks long after the money left Halkbank. *See* C.A. App. 19-21, 52-59. In August 2020, Halkbank moved to dismiss the indictment on sovereign immunity grounds, which the district court denied. The court held that Halkbank was not entitled to immunity under the FSIA or at common law. Pet.App.100a-04a.

Halkbank appealed the court's order to the Second Circuit, which affirmed the judgment in October 2021. Pet.App.67a-68a. The court held that even if the FSIA applied in criminal cases, the FSIA's commercial-activities exception would also apply, and Halkbank's conduct would fall within that exception. Pet.App.43a, 83a-89a. The court also dismissed Halkbank's common-law arguments, reasoning that the common law had a commercial-activity exception coextensive with the FSIA's and, regardless, the Executive had an absolute "prerogative" to strip sovereign immunity. Pet.App.89a-90a.

On October 3, 2022, this Court granted Halkbank's petition for a writ of certiorari to review the Second Circuit's judgment. Then, in April 2023, this Court affirmed

in part and vacated and remanded in part. Pet.App.42a. The Court affirmed the Second Circuit's judgment on the FSIA, although with different reasoning. Rather than holding that the FSIA's commercial-activities exception applies in criminal cases, this Court held that the FSIA has no application in criminal cases at all. *Id.* With respect to Halkbank's common-law arguments, however, this Court concluded that the Second Circuit had not "fully consider[ed] the various arguments regarding common-law immunity that the parties press in this Court." Pet.App.57a. It therefore vacated and remanded the case to the Second Circuit to reconsider the parties' common-law arguments. Pet.App.58a.

2. On October 22, 2024, following additional briefing and oral argument, the Second Circuit again held that Halkbank was not entitled to common-law immunity. Based on existing circuit-level precedents involving the immunities owed foreign officials in civil cases, the court held it was required to "defer to the Executive Branch's determination as to whether a party should be afforded common-law foreign sovereign immunity" in this criminal case. Pet.App.5a, 15a-23a. Deference, the court reasoned, "applies regardless of whether the Executive seeks to grant or, as in this case, deny immunity, and also applies equally to criminal and civil cases." Pet.App.5a. The court acknowledged that this holding conflicted with Fourth Circuit precedent—namely, *Yousuf v. Samantar*—which held that Executive determinations regarding the immunity of particular conduct are "not controlling." Pet.App.22a n.8.

In spite of the fact that it could cite no common-law case where a sovereign instrumentality was subject to a criminal trial, the Second Circuit also concluded that the Executive's decision to indict here was "consistent with

the scope of immunity extended to foreign state-owned corporations at common law." Pet.App.17a. It read the common-law civil cases to distinguish between the immunities "afforded to a foreign state and to the entities that it owns." Pet.App.23a-26a. Based on its reading of these cases, it held that the commercial-activities exception, though inapplicable at common law to foreign sovereigns themselves in criminal cases, would apply to sovereign-owned corporations in criminal cases. Pet.App.23a, 29a.[2]

On November 4, 2024, Halkbank timely moved for panel and en banc rehearing, which was denied on December 6, 2024. Pet.App.114a-15a. With the government's consent, the Second Circuit stayed its mandate pending the disposition of this petition. C.A. Dkt. No. 243.

REASONS FOR GRANTING THE PETITION

This Court's remand order directed the Second Circuit to reconsider Halkbank's common-law arguments. In response, the Second Circuit once again approved the first criminal trial of a foreign sovereign instrumentality in world history, this time based on circuit-level civil precedents it described as "binding." Pet.App.15a n.5. The Second Circuit's conclusive deference holding entrenches an acknowledged circuit split on the scope of deference and runs contrary to the separation of powers. The court of appeals' second holding, that sovereign instrumentalities do not receive the absolute criminal immunity of their

[2] The Second Circuit left open the possibility that the Executive could grant criminal immunity to a foreign sovereign instrumentality even in cases based on commercial activity. Pet.App.29a n.12. And because it held that the Executive's determination was consistent with the common law, it did not reach the degree of deference due the Executive when its determinations conflict with common law. Pet.App.17a.

sovereigns, parts ways with the uniform practice of nations, creates an unprecedented immunity distinction between sovereigns and their instrumentalities, and will set into motion state prosecutions of foreign instrumentalities and reciprocal action against U.S. instrumentalities abroad. This Court's considered judgment should be brought to bear on both issues before a sovereign instrumentality is subjected to criminal trial in our Nation's courts.

I. The Decision Below Exacerbates a Circuit Split with Respect to Executive Deference

The decision below entrenched and exacerbated an acknowledged circuit split on whether courts are bound by Executive immunity determinations—a split the Second Circuit extended into the criminal realm for the first time through the decision below.

The Fourth Circuit correctly held in *Yousuf v. Samantar* that courts' deference to Executive immunity determinations is narrowly circumscribed to when the Executive is exercising its exclusive authority, such as in recognizing foreign sovereigns. 699 F.3d at 773. The Executive's views on whether an acknowledged sovereign is entitled to immunity for particular conduct are "not controlling." *Id.* Reviewing the same authorities the Second Circuit considered here, the Fourth Circuit found no "constitutional basis" to afford the Executive deference in such circumstances. *Id.*

Yousuf arose in a remarkably similar posture as this case. After this Court held that the FSIA was silent on foreign-official immunity, it remanded the case back to the Fourth Circuit to consider whether the former foreign-official defendant was immune at common law. *Samantar v. Yousuf*, 560 U.S. 305, 324 (2010). On remand, in spite of

existing circuit-level civil precedents that spoke of broad deference to the Executive, *see, e.g.*, *Rich v. Naviera Vacuba S.A.*, 295 F.2d 24, 26 (4th Cir. 1961), the Fourth Circuit surveyed anew the Executive's role with respect to immunity determinations in pre-FSIA era cases. In light of the Executive's power to recognize ambassadors, the Fourth Circuit held that for head-of-state immunity—which involves "a formal act of recognition"—the Executive's immunity determinations were entitled to absolute deference. *Yousuf*, 699 F.3d at 772 (citation omitted). In contrast, the court found no "constitutional basis" to afford the Executive conclusive deference with respect to other types of immunity. *Id.* at 773. When applying a conduct-based test that considers whether the defendant is immune for certain acts, "[t]he State Department's determination[s] … [are] not controlling." *Id.*

The Second Circuit here reached the opposite conclusion. It held that even when the question before the court concerns whether an instrumentality is entitled to immunity for particular conduct, the Executive's immunity determinations are entitled to conclusive deference. Pet.App.17a. Its decision, the court said, was controlled by circuit-level precedents it viewed as "binding" that have applied a "traditional rule of deference to such Executive determinations" in civil cases. Pet.App.15a (quoting *Matar v. Dichter*, 563 F.3d 9, 15 (2d Cir. 2009)). The court also relied on dicta from pre-FSIA cases that spoke broadly of deference to the Executive while in fact applying that deference in tightly limited contexts. *See, e.g.*, *Republic of Mexico v. Hoffman*, 324 U.S. 30, 33-36 (1945).[3]

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[3] Prior to the FSIA's enactment, three other courts of appeals had adopted a rule of conclusively deferring to the Executive outside the recognition-power context. *Se. Leasing Corp. v. Stern Dragger Belogorsk*, 493 F.2d 1223, 1224 (1st Cir. 1974); *Spacil v. Crowe*, 489 F.2d

Other circuits have reserved on the question. On April 28 of this year, the Ninth Circuit affirmed a decision allowing a prosecution to proceed against four companies indirectly owned by the People's Republic of China based on allegations that the companies had stolen trade secrets from DuPont. *United States v. Pangang Grp. Co.*, 2025 WL 1215487, at *14 (9th Cir. Apr. 28, 2025). But the court there concluded the companies were not sovereign entities *without* deference to the Executive, *id.* at *7-14, before noting that a tradition of deference to the Executive's views "reinforce[d]" its conclusion, *id.* at *15. The court declined to conclude whether courts must defer conclusively to the Executive. *Id.* at *14-15.[4]

The split between the Second and Fourth Circuits is well-recognized. The Second Circuit in this case acknowledged *Yousuf*'s holding rejecting conclusive deference in cases involving conduct-based immunity. Pet.App.22a n.8. Before the Second Circuit retrenched the split in the decision below, that court and others had previously commented on the split. *E.g.*, *Rosenberg v. Pasha*, 577 F. App'x 22, 23 (2d Cir. 2014); *Ben-Haim v. Edri*, 183 A.3d 252, 258 (N.J. Super. Ct. App. Div. 2018). Scholars had as well. *See* William S. Dodge, *International Comity in American Law*, 115 Colum. L. Rev. 2071, 2135-36 (2015); *see also* Luke Ryan, *Against Conduct-Based Immunity*

614, 617 (5th Cir. 1974); *Rich*, 295 F.2d at 26. All three decisions were abrogated by the FSIA. The Fourth Circuit in *Samantar* declined to readopt its prior precedent and rejected a conclusive-deference rule, as explained above. The other two circuits have not yet confronted the question.

[4] The Ninth Circuit had previously reserved on the question of conclusive deference to the Executive, *Doğan v. Barak*, 932 F.3d 888, 893 (9th Cir. 2019), as has the D.C. Circuit, *Manoharan v. Rajapaksa*, 711 F.3d 178, 180 n* (D.C. Cir. 2013) (declining to decide whether deference is owed to the Executive's determination of *non*-immunity).

for Torture Victim Protection Act Defendants, 23 Barry L. Rev. 1, 23 (2017); Christopher D. Totten, *The Adjudication of Foreign Official Immunity Determinations in the United States Post-*Samantar*: A Circuit Split and Its Implication*, 26 Duke J. Compar. & Int'l L. 517, 541 (2016). This acknowledged split—which the decision below only worsened by extending it for the first time into the criminal realm where the Executive is necessarily a party—merits this Court's review.

II. The Questions Presented Are Exceptionally Important and Squarely Presented

Even without a circuit split on deference, review would still be appropriate. Both the Second Circuit's deference holding and the court's conclusion that the common law permits criminal prosecution of foreign sovereign instrumentalities squarely present exceptionally important issues worthy of review.

1. Conclusive deference to the Executive in a criminal case implicates core doctrines that are fundamental to our system of government. Even in the civil context, absolute deference "relegat[es] courts to the status of potted plants," which alone presents constitutional concerns worthy of this Court's review. *See* Pet.App.64a (Gorsuch, J., concurring in part and dissenting in part). But those concerns are elevated in the criminal context. Halkbank's prosecutor should not also be Halkbank's judge. Conclusive deference flouts the separation of powers upon which our government is based and presents obvious fairness and federalism concerns.

Start with the "separation-of-powers concerns." *Id.* (Gorsuch, J., concurring in part and dissenting in part). The harm done to the "separation-of-powers principles inherent in the Constitution's structure" when the

Executive is permitted "to develop … the common law of immunity and to apply it to particular cases"—tasks that are "fundamentally judicial"—is apparent to jurists and scholars alike. Brunk & Dodge C.A.2 Amicus Br. at 5-6. The Executive's views regarding issues relating to foreign affairs are entitled to respect, to be sure. *Yousuf*, 699 F.3d at 773. But it is entirely antithetical to our system of divided government for courts to "abdicate their judicial duty to decide the scope of … immunity" in the cases that come before them. *Upper Skagit Indian Tribe v. Lundgren*, 584 U.S. 554, 574 (2018) (Thomas, J., dissenting). As this Court succinctly put it just last Term, "concentrat[ing] the roles of prosecutor, judge, and jury in the hands of the Executive … is the very opposite of the separation of powers that the Constitution demands." *SEC v. Jarkesy*, 603 U.S. 109, 140 (2024).

Conclusive deference also usurps powers delegated to Congress. The customary international law of foreign sovereign immunity is part of the law that courts have traditionally interpreted and applied. *See United States v. Smith*, 18 U.S. 153, 160 (1820) ("[T]he law of nations … may be ascertained by consulting … the general usage and practice of nations …."); Restatement (Third) of Foreign Relations Law § 102(2) (Am. L. Inst. 1987). And, in our system of government, whether (if at all) it is appropriate to part ways with that law "is proper for the consideration of the legislature, not of the executive or judiciary." *Brown v. United States*, 12 U.S. 110, 129 (1814). In international law, the general and customary practice of nations is to exempt sovereigns and instrumentalities from criminal prosecution. *See infra* pp.20-22. That practice is the very definition of customary international law. And yet here, the Second Circuit's deference holding affords the Executive plenary authority to abrogate the law of criminal sovereign immunity. That result cannot be

squared with the "basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another." *Loving v. United States*, 517 U.S. 748, 757 (1996).

Nor does it accord with basic fairness principles to defer conclusively to the Executive in a criminal case. In no other area of federal criminal practice are the Executive's views afforded conclusive deference. That is because the government is necessarily a party to those proceedings and it violates fundamental principles of equal justice for a court to defer conclusively to one litigant over another on any contested issue. The Second Circuit here claimed it could find no "binding or even persuasive case authority supporting" the view that deference is limited to civil cases. Pet.App.20a. But the reason to limit conclusive deference to civil cases is obvious: Criminal cases carry unique considerations that make Executive deference improper. *See Abramski v. United States*, 573 U.S. 169, 191 (2014). And regardless, in our "fair-minded system of justice[,] … courts were never intended to serve as rubber stamps." *Pernell v. Southall Realty*, 416 U.S. 363, 385 (1974).

Lastly, the Second Circuit's holding that sovereign instrumentalities lack absolute immunity raises the specter of state or local prosecutors following the example set by the U.S. Attorney's Office and indicting other sovereign entities. States have already initiated innovative civil suits that seek to punish sovereign instrumentalities. Earlier this year, Missouri secured a default judgment in excess of $24 billion against nine sovereign Chinese defendants for purportedly hoarding personal protective equipment during the COVID-19 pandemic. *See Missouri ex rel. Bailey v. People's Republic of China*, 2025 WL 746202, at *1 (E.D. Mo. Mar. 7, 2025). A similar case is also being

litigated in Mississippi. *See Mississippi ex rel. Fitch v. People's Republic of China*, 2024 WL 897846, at *1 (S.D. Miss. Mar. 1, 2024). The Second Circuit's decision here provides a roadmap for state and local prosecutors to up the ante even further by indicting instrumentalities in state and local courts.

The Second Circuit suggested that the Executive could forestall such problems by granting those instrumentalities immunity. Pet.App.29a n.12. But the Second Circuit cited no case law to support that conclusion, and for good reason: That is not how "our federal system" works. *Younger v. Harris*, 401 U.S. 37, 53 (1971). The Executive Branch cannot "reach[] deep into the heart of the State's police powers [to] compel[] state courts to" dismiss a state court prosecution. *Medellín v. Texas*, 552 U.S. 491, 532 (2008); *see People v. McLeod*, 1 Hill 377, 432-33 (N.Y. Sup. Ct. 1841) (refusing to dismiss prosecution despite the Executive's support for immunity, non-prosecution, and diplomatic resolution to case). There is no obvious constitutional basis for the Executive to enjoin future hypothetical prosecutions, be they the Manhattan District Attorney's indicting the Russian intelligence service or the Texas Attorney General's indicting the Mexican Transportation Ministry for busing migrants to the U.S. border.

The Second Circuit's suggestion to the contrary offers cold comfort to those who are (rightly) concerned that the decision below will inevitably permit state and local prosecutors unchecked power to indict the instrumentalities of co-equal sovereigns. And even if the Executive could enjoin a state-level prosecution, "granting excessive deference to the [E]xecutive" will "infuse a degree of arbitrariness into prosecutions that could harm international comity and degrade the credibility of the

United States's criminal jurisdiction." Kate Yoon et al., Features Essay, *On the Legality of Prosecuting State-Owned Enterprises:* Halkbank v. United States, Yale J. Int'l L. Online 1, 17 (2024). For these reasons, the Second Circuit's deference holding alone raises "important questions about the balance of powers in our constitutional structure" that merit this Court's review. *Hamdan v. Rumsfeld*, 548 U.S. 557, 567 (2006).

2. The Second Circuit's additional conclusion that "common-law foreign sovereign immunity poses no bar" on prosecuting sovereign instrumentalities at least for their commercial conduct, Pet.App.37a, is an equally important issue, as this Court's decision to grant Halkbank's first petition for a writ of certiorari suggests. The Second Circuit's conclusion that instrumentalities are not entitled to absolute criminal immunity is unprecedented at home and abroad, it implicates sensitive issues of foreign affairs, and it opens the door to the prosecution of U.S. instrumentalities across the globe.

This case is a historical outlier at home. The United States has *never* subjected another co-equal sovereign to criminal trial. The same holds true for foreign sovereign instrumentalities.[5] This pattern is no accident: "[U]nder

[5] In this case's more-than-five-year history, the government has never once cited a case anywhere in the world where a sovereign instrumentality has been subject to criminal trial. Most of its authorities involved grand jury subpoenas, not prosecutions—and in some, the instrumentalities successfully invoked criminal sovereign immunity. *E.g.*, *In re Investigation of World Arrangements*, 13 F.R.D. at 291. To be sure, the Ninth Circuit recently permitted a prosecution to move forward that involved a sovereign immunity issue, but there the court held that—unlike this case—the defendant entities were *not instrumentalities* of a foreign sovereign. *Pangang Grp.*, 2025 WL 1215487, at *14. The handful of other U.S. prosecutions identified by

the common law in 1791," "a suit against a foreign government *or* an instrumentality thereof … could not be maintained at all." *Ruggiero v. Compania Peruana de Vapores "Inca Capac Yupanqui"*, 639 F.2d 872, 879 (2d Cir. 1981) (Friendly, J.) (emphasis added). Although Congress modified that regime for civil cases in 1976 when it passed the FSIA, neither that statute nor any other statute or international law development has altered the immunities owed sovereigns or their instrumentalities in criminal cases. The Second Circuit's decision to approve of the first criminal trial of a foreign sovereign instrumentality in our Nation's history breaks with an unbroken tradition.

It also breaks with the uniform practice of other nations. International authorities speak with one voice regarding the impermissibility of criminal actions against co-equal sovereigns. As an English scholar has noted, "[a] state … cannot be prosecuted." Elizabeth Helen Franey, "Immunity from the Criminal Jurisdiction of National Courts," *in Research Handbook on Jurisdiction and Immunities in International Law* 205, 207 (Alexander Orakhelashvili ed., 2015). That is, as a leading House of Lords opinion has noted, foreign sovereigns are "not criminally responsible in international … law, and therefore cannot be directly impleaded in criminal proceedings." *Jones v. Saudi Arabia* [2006] UKHL 26 [31] (appeal taken from Eng.) (op. of Bingham, L.).

No doubt for this reason, common-law countries that have adopted a commercial-activities exception in civil

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the government involved agreed resolutions, usually to minor, regulatory violations in which the instrumentalities did not raise, or affirmatively waived immunity. *E.g.*, *United States v. Jasin*, 1993 WL 259436, at *1 (E.D. Pa. July 7, 1993); *United States v. Aerlinte Eireann*, No. 89-cr-647 (S.D. Fla. Oct. 6, 1989), Dkt. No. 12.

cases have always limited its application to the civil context. Fox & Webb, *supra*, at 91-92. South Africa's statute codifying the commercial-activities exception, for instance, states in no uncertain terms that it "shall not be construed as subjecting any foreign state to … criminal jurisdiction." Foreign States Immunities Act 87 of 1981, § 2(3) (S. Afr.). The statutory regimes in other countries follow a similar pattern. *See* State Immunity Act 1978, c. 33, § 16(4) (UK); State Immunity Act, R.S.C. 1985, c. S-18, § 18 (Can.); Foreign States Immunity Law 5769-2008, § 2 (Isr.); State Immunity Ordinance, No. 6 of 1981, § 17(2)(b) (Pak.); State Immunity Act 19 of 1979, ch. 313, § 19(2)(b) (Sing.). And the U.N. Convention on Jurisdictional Immunities of States and Their Property, which (although not in force) "authoritative[ly]" reflects international immunity law, Fox & Webb, *supra*, at 2, adopts a commercial-activities exception but "does not cover criminal proceedings," G.A. Res. 59/38, ¶ 2 (Dec. 2, 2004).

Against this backdrop, it is no surprise that France's highest appellate court has squarely held that a state cannot prosecute an instrumentality of another co-equal sovereign. In *Agent judiciare du Trésor v. Malta Maritime Authority and Carmel X*, France's highest criminal court upheld a corporate instrumentality's sovereign immunity and ordered an indictment dismissed. Cour de cassation [Cass.] [supreme court for judicial matters] crim., Nov. 23, 2004, Bull. Crim., No. 04-84.265 (Fr.). Specifically, the court of last resort held that the Malta Maritime Authority—an independent state corporation operating Maltese ports—could not be prosecuted because "the rule of customary international law which bars proceedings against States before the criminal courts of a

foreign State extends to organs and entities that constitute emanations of the State." *Id.*[6]

The Second Circuit's decision here is entirely out of step with these authorities even though sovereign immunity jurisprudence generally aims to "conform[] with international law." *Simon*, 145 S. Ct. at 497-98 (interpreting immunity exception to conform with international law). Alignment between our law and the law of other nations is especially important in this context because the immunities owed sovereigns even in civil cases implicate "very delicate and important" issues. *Schooner Exch.*, 11 U.S. at 135. These cases routinely appear on this Court's docket because they so often "raise sensitive issues concerning the foreign relations of the United States." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493 (1983). Indeed, as early as 1812, our government cautioned this Court that the exercise of jurisdiction over foreign sovereign instrumentalities even in some civil cases could amount "to a judicial declaration of war." *Schooner Exch.*, 11 U.S. at 126 (summary). The concerns here are only heightened because this case arises in the criminal context, where the "dignity" interests are exponentially greater. *Id.* at 137.

The real possibility that "foreign states, in response [to the decision below], will subject the United States abroad to 'retaliatory or reciprocal actions' in their courts" also counsels strongly in favor of review. *Simon*, 145 S. Ct. at 495 (citation omitted). As noted, the Second Circuit's decision was unprecedented both at home and

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[6] The court's opinion is available only in French, but Prof. Roger O'Keefe of Bocconi University, Milan provided a translation of the relevant language in his amicus brief before this Court during Halkbank's first appeal. O'Keefe Amicus Br. at 12 & n.7. For the Court's convenience, Halkbank quotes the O'Keefe translation.

abroad, but if left uncorrected, it will surely not be the last to bless the indictment of the instrumentality of another co-equal sovereign. U.S. foreign policy is not a simple matter to be left in the hands of state and federal prosecutors.

The decision exposes U.S. agencies and instrumentalities (including the U.S. Navy, the Central Intelligence Agency, the U.S. Export Import Bank, the Development Finance Corporation, and countless others) to possible criminal prosecution abroad. And even if that were not the case (it is), it is only a matter of time before other sovereigns begin to target their diplomatic adversaries with criminal prosecution. The Second Circuit's decision, after all, not only authorizes the U.S. Attorney's Office in Manhattan to prosecute Halkbank, but it also provides a roadmap for India to indict Pakistan's instrumentalities and vice versa. *See RJR Nabisco, Inc. v. Eur. Cmty.*, 579 U.S. 325, 349 (2016).

3. This case also presents an ideal vehicle to address both the Second Circuit's deference holding and its conclusion that instrumentalities are not entitled to absolute immunity. Both questions are cleanly presented. This case was remanded to the Second Circuit for that court to reconsider one question: whether Halkbank was entitled to immunity at common law. The Second Circuit has now answered that question the same way it did before, in a published opinion following additional argument and briefing. Its decision squarely held that courts owe conclusive deference to the Executive's immunity determinations in both civil and criminal cases regardless of whether the Executive affords or withholds immunity. Therefore, nothing prevents this Court from definitively resolving both of the questions presented here. It should do so now before the decision below is used as a roadmap

for other prosecutions against sovereign instrumentalities at home and abroad.

III. The Decision Below Is Wrong

This case was remanded to the Second Circuit to reconsider in full Halkbank's common-law arguments, but on remand the Second Circuit arrived at the same result as before based once again on distinguishable civil cases. Both its deference and instrumentality-immunity holdings remain incorrect.

1. The Second Circuit based its deference holding not only on its interpretation of circuit precedent but also on a misreading of civil immunity precedents from this Court, which have never required anything like the broad deference the Second Circuit endorsed. Conclusive deference, the Second Circuit reasoned, reaches as far back as *Schooner Exchange*, where Chief Justice Marshall "accept[ed] a suggestion [of immunity] advanced by the Executive Branch." Pet.App.11a-12a. "Subsequent cases applying *Schooner Exchange* [thereafter] stressed" that immunity "depended on the consent of the Executive." Pet.App.12a.

But the notion that this Court's precedents dictate conclusive deference is belied by the Fourth Circuit's decision in *Yousuf*, which considered the same case law and rejected that view, 699 F.3d at 770, as well as decisions by other courts of appeals that have expressly reserved as to the question, *Doğan*, 932 F.3d at 893; *Manoharan*, 711 F.3d at 180 n.*. These cases rightly cast doubt on the suggestion that any of this Court's prior precedents would require lower courts to "abdicate their judicial duty to decide the scope of … immunity" in the cases that come before them. *Upper Skagit*, 584 U.S. at 574 (Thomas, J.,

dissenting). As does the remand order in this case. A remand would have been unnecessary if conclusive deference were so well established. After all, the same authorities cited and relied upon by the Second Circuit in its first opinion were cited by the government before this Court during prior proceedings. This Court nevertheless ordered a remand—a result that would have been unnecessary if precedent provided the clear answers the Second Circuit claimed.

A plain reading of the case law also fails to support the Second Circuit's deference holding. As a leading academic has made clear, deference to the Executive is "inconsistent with *Schooner Exchange* itself." Ingrid (Wuerth) Brunk, *Foreign Official Immunity Determinations in U.S. Courts: The Case Against the State Department*, 51 Va. J. Int'l L. 915, 926 (2011). Without question, Chief Justice Marshall considered the Executive's views. But he did so only after defining foreign sovereign immunity as "a principle of public law" and independently "appl[ying it] to the case at bar." *Schooner Exch.*, 11 U.S. at 145-47.

Nor did subsequent cases applying *Schooner Exchange* feel compelled to defer conclusively to the Executive. Most notably, in *Berizzi Brothers*, this Court afforded the foreign instrumentality defendant immunity notwithstanding the State Department's suggestion of non-immunity. 271 U.S. at 576; *The Pesaro*, 277 F. 473, 479 n.3 (S.D.N.Y. 1921). And in the only two common-law decisions to address the immunities owed to instrumentalities in the criminal context, neither deferred conclusively to the Executive's position. *See In re Grand Jury Investigation of the Shipping Indus.*, 186 F. Supp. 298, 318-20 (D.D.C. 1960); *In re Investigation of World Arrangements*, 13 F.R.D. at 291.

Indeed, the Framers drafted the Constitution to "assign[] the anticipated new federal judiciary a vital foreign affairs role" in interpreting both treaties and the law of nations. Martin S. Flaherty, *Restoring the Global Judiciary: Why the Supreme Court Should Rule in U.S. Foreign Affairs* 60-61 (2019). The judiciary's obligation to interpret that law, and the Supreme Court's power to enforce it through the Supremacy Clause, was the key to "ensur[ing] that the United States would at last live up [to] its international commitments." *Id.* at 61. In fact, over one hundred years passed before "any justice hint[ed] at the idea of deference." *Id.* at 202; *cf.* The Federalist No. 22 (Alexander Hamilton) (noting that treaties "must, like all other laws, be ascertained by judicial determinations").

As these authorities show, "the Executive Branch's assumption of the role of primary decision-maker on various foreign sovereign immunity matters is of a more recent vintage." *Yousuf*, 699 F.3d at 770. "Strong deference cases" began to appear in "the 20th century," Pet.App.64a (Gorsuch, J., concurring in part and dissenting in part), but even then the deference owed in civil cases was never as plenary as the Second Circuit suggested.

In *Hoffman*, for example, this Court noted that it is "not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity *on new grounds* which the government has not seen fit to recognize." 324 U.S. at 35 (emphasis added). But even by its plain language, *Hoffman*'s dicta only precludes lower courts from recognizing "immunity on *new grounds*" which had not been previously recognized. *Id.* (emphasis added). Neither *Hoffman* nor any other case requires courts to ignore at the behest of the U.S. government

longstanding immunity rules, such as the absolute immunity owed sovereigns and instrumentalities in criminal cases. *See supra* pp.19-23.

Nor does any case require lower courts to defer conclusively to the Executive, as the Fourth Circuit correctly recognized in *Yousuf*. The Second Circuit's contrary holding "dangerously displaces the judiciary's role" to decide the scope of common-law immunity and "risk[s] the possibility of inconsistent applications of sovereign immunity in the future." *Foreign Sovereign Immunities Act of 1976—Sovereign Immunity*—Türkiye Halk Bankasi A.Ş. v. United States, 137 Harv. L. Rev. 420, 424 (2023). It also goes well beyond the deference acknowledged in civil cases and, in so doing, trenches upon the separation of powers as it was understood at the Founding and in the centuries since. *See supra* pp.25-26.

2. The Second Circuit likewise erred in concluding for the first time in history that the immunities owed sovereigns in criminal cases do not apply in equal measure to their instrumentalities. This unprecedented result finds no support in domestic or international case law.

At common law, sovereigns and their instrumentalities enjoyed absolute immunity from criminal prosecution. *See Dow*, 100 U.S. at 165; *Coleman*, 97 U.S. at 516 n.1; *Schooner Exch.*, 11 U.S. at 137 (sovereign entities free from "arrest [and] detention").

As sovereign entities began engaging in commerce throughout the world, courts also recognized that "[t]he same immunity [owed sovereigns] extended" to "commercial entities owned by foreign governments." *Arango v. Guzman Travel Advisors*, 761 F.2d 1527, 1534 (11th Cir. 1985). In *Berizzi Brothers*, this Court extended absolute immunity to an instrumentality despite an Executive

Branch suggestion of non-immunity because "merchant ships owned and operated by a foreign government have the same immunity that war ships have." 271 U.S. at 576. State courts applied the same reasoning as *Berizzi Brothers* to afford immunity to other types of commercial entities. In *Mason v. Intercolonial Railway of Canada*, the Supreme Judicial Court of Massachusetts extended immunity to a railway because the suit was "virtually against the king of a foreign country." 83 N.E. 876, 876-77 (Mass. 1908). Corporate entities, too, received the immunities owed their sovereigns at common law. *See, e.g.*, *F. W. Stone Eng'g Co. v. Petroleos Mexicanos of Mex., D. F.*, 42 A.2d 57, 59 (Pa. 1945); *Dunlap v. Banco Cent. Del Ecuador*, 41 N.Y.S.2d 650, 652 (Sup. Ct. 1943).

Eventually, however, commentators (and some courts) expressed hesitation about immunity for commercial activities by sovereign entities in the civil context. *See Permanent Mission of India*, 551 U.S. at 199. This change in customary international law applied only in civil cases, and it *preserved* the rule that sovereigns and their instrumentalities received the same immunity. *See* Fox & Webb, *supra*, at 91. Sovereign instrumentalities thus continued to receive criminal immunity even for commercial acts. *See In re Investigation of World Arrangements*, 13 F.R.D. at 291.

When Congress codified the commercial-activities exception regime in civil cases by enacting the FSIA, the equivalence of an instrumentality with the sovereign state became a matter of statutory definition: A "foreign state" "includes" not only states *qua* states, but "an agency or instrumentality of a foreign state" as well. 28 U.S.C. § 1603(a). The statute's commercial-activities exception thus applies to both states and instrumentalities in equal measure. *See id.* § 1605(a)(2).

This pattern makes complete sense, for when an instrumentality acts under the ownership and control of a foreign state, it *is* a foreign state for immunity purposes. Just like domestic instrumentalities, foreign corporate instrumentalities are "part of the Government." *Biden v. Nebraska*, 600 U.S. 477, 492 (2023). They are entitled to the same treatment because the dignity interests that are at stake when a co-equal sovereign indicts a central bank are just as significant as when the sovereign itself is indicted.

The Second Circuit here, though, departed from this commonsense principle and instead held that even though foreign states are entitled to absolute immunity, their instrumentalities are not. In short, the court "create[d] a chimera of [immunity] by stitching together elements taken from" plainly distinguishable civil cases. *Thompson v. Clark*, 596 U.S. 36, 49 (2022) (Alito, J., dissenting).

That result is out of step with domestic authorities, *see supra* pp.27-28, and it is out of step with domestic practice, where the U.S. government indicts individuals associated with sovereign instrumentalities, *see, e.g.*, *United States v. Esquenazi*, 752 F.3d 912, 919 n.3 (11th Cir. 2014) (discussing charges involving Haiti Teleco employees); *United States v. Nunez-Arias*, 2021 WL 1537323, at *1 (S.D. Tex. Apr. 19, 2021) (similar; Petróleos de Venezuela, S.A.), but has never criminally tried a sovereign instrumentality. Nor can it be squared with foreign immunity authorities, which have held that "the rule of customary international law which bars proceedings against States before the criminal courts of a foreign State extends to organs and entities that constitute emanations of the State." *Malta Maritime Authority*, No. 04-84.265 (Fr.). The Second Circuit's aberrant result should give this Court considerable pause as to its correctness.

3. Finally, the Second Circuit magnified each of these errors by holding that Halkbank was not entitled to absolute criminal immunity even for conduct that occurred at the direction of the Turkish state *in Türkiye*. To be sure, the case law affords sovereigns and their instrumentalities absolute criminal immunity at common law regardless of where the underlying conduct occurred. *See supra* pp.19-23. But at a minimum, *even if* the common-law commercial-activities exception applied, Halkbank *still* would be entitled to immunity for conduct that occurred *in Türkiye*. The Second Circuit erred in holding otherwise.

Common-law authorities reaching back to *Schooner Exchange* have consistently recognized that "[t]he jurisdiction of the nation *within its own territory* is necessarily exclusive and absolute." *Schooner Exch.*, 11 U.S. at 136 (emphasis added). Limits are placed on a sovereign's plenary authority when the sovereign "enters [another's] territory." *Id.* at 137. And in civil cases, the commercial-activities exception at common law abrogates immunity when a sovereign or its instrumentality engages in "commercial activity *outside its territory*," *i.e.* in the territory of another sovereign. Restatement (Second) of Foreign Relations Law § 69 (Am. L. Inst. 1965) (emphasis added). But a co-equal sovereign is simply without power to dictate what another co-equal sovereign may do within its own sovereign territory. That is, "[a] state cannot punish an offence against its municipal laws committed within the territory of another state." Henry Wheaton, *Elements of International Law* 158 (1836).

The Second Circuit here failed to apply this limitation. Halkbank's alleged conspiring, bank-transfer activity, and cooperation with Zarrab occurred *in Türkiye*. *See supra* pp.7-8. And much of Zarrab's alleged unlawful activity occurred *in the United Arab Emirates*, specifically Dubai.

The Second Circuit's decision here failed to consider the dignity interests of either sovereign.

Under common-law precedents, Halkbank is entitled to immunity for conduct occurring *in Türkiye* even if the civil commercial-activities exception applied to this criminal case. This Court's precedents rightly instruct lower courts to proceed with caution when their judgments will "impose the sovereign will of the United States onto conduct occurring within the territorial jurisdiction of another sovereign." *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 121 (2013). The Second Circuit here entirely failed to heed that instruction when it concluded that a Turkish instrumentality can be indicted for conduct that occurred *in Türkiye*.

* * *

In sum, this case is unprecedented in more ways than one. For the first time in U.S. history, a U.S. court has, in a criminal case, deferred conclusively to the Executive's determination that an instrumentality is not entitled to immunity—a result that raises grave constitutional questions and, if left unchecked, will lead to the first ever criminal trial of an instrumentality of another co-equal sovereign. That result should not stand.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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