No. 24-1144

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

REPLY BRIEF OF PETITIONER

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The Second Circuit's holding that it was bound to defer conclusively to the Executive's non-immunity determination entrenches a conflict with the Fourth Circuit, violates the separation of powers, and effectively eliminates sovereign immunity in criminal cases. The court's other holding that instrumentalities do not receive the absolute immunity owed their sovereigns breaks with centuries of tradition, creates an unprecedented immunity regime seen nowhere else, and invites state prosecutors to indict our Nation's friends and foes.

On deference, the government offers nothing but misreadings of old cases and overreadings of recent dicta. On absolute immunity, the government fails to marshal any authority supporting the court's novel, gerrymandered immunity regime. The petition should be granted.

I. The Decision Below Exacerbates a Circuit Split Concerning Deference

The Second Circuit conclusively deferred to the Executive's immunity determination and entrenched an acknowledged circuit split. Deeming its prior decision in *Matar v. Dichter*, 563 F.3d 9 (2d Cir. 2009) as "binding here," Pet.App.14a-15a & n.5, the court held that it must "defer to the Executive Branch's determination" that Halkbank "is not entitled to foreign sovereign immunity for charges arising from its commercial, non-governmental activity," Pet.App.10a. That holding squarely conflicts with Fourth Circuit precedent, which holds that Executive determinations regarding "conduct-based immunity" are "not controlling." *Yousuf v. Samantar*, 699 F.3d 763, 773 (4th Cir. 2012).

Courts (including the decision below) and commentators recognize this split. Pet.14-15. The government has acknowledged it in prior Supreme Court briefs. U.S. Br. 20, *Samantar v. Yousuf* (13-1361) (*Yousuf* "conflicts with … *Matar*"); *see* U.S. Br. 21-22, *Ali v. Warfaa* (15-1345) (collecting authorities "recognizing conflict").

The government (at 8-9) argues that the Second Circuit *did not* decide the deference issue in this case. But that conflicts with the following sentence: "[W]e defer to the Executive Branch's determination as to whether a party should be afforded common-law foreign sovereign immunity, and that deference 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. In so holding, the court relied on what it claims is centuries of precedent establishing that immunity "*depend[s] on the consent of the Executive*." Pet.App.12a (emphasis added). Its holding is as clear as

it is broad. And it is irreconcilable with *Yousuf*, which rejected deference for conduct-based immunity. *Yousuf*, 699 F.3d at 773.

The government (at 8-9) claims that, because the Second Circuit also held that it *agreed* with the Executive's position on the scope of common-law immunity, the court did not need to decide whether deference would apply if it disagreed with the Executive. Pet.App.5a. But that does not change the court's precedential holding that it *must* defer to the Executive's views (and that it did so in this case).

The government (at 17-18) next suggests that *Yousuf* does not conflict with the decision below because *Yousuf* involved foreign *official* immunity, not *sovereign* immunity. But at common law, courts do not distinguish between official and sovereign immunity on deference issues. The Second Circuit applied *official* immunity cases below in concluding that deference is required. *See* Pet.App.14a-15a & n.5 (holding that *Matar* was "binding here"). And the Fourth Circuit applied *sovereign* immunity cases in reaching the opposite conclusion in *Yousuf*. 699 F.3d at 770-73 (citing *inter alia Schooner Exchange v. McFaddon*, 11 U.S. 116 (1812) and *Republic of Mexico v. Hoffman*, 324 U.S. 30 (1945)).[1]

Finally, the government (at 17-18) argues there is no conflict because, it says, Halkbank's immunity claim is "status-based," and would be subject to conclusive deference under *Yousuf*. It is twice mistaken. First, the

[1] The government (at 17-18) is right that the Fourth Circuit "distinguished" sovereign and official immunity because—as the government recognizes in the same sentence—sovereign immunity in civil cases is governed by the FSIA. But as the case law reflects, where (as here) no statute applies, there is no distinction between official and sovereign immunity on deference issues.

decision below rested on the *conduct-based* commercial-activities exception, not status-based immunity. Pet.App.5a. The Executive's conduct-based determination here would not have received deference in the Fourth Circuit, period.

Second, the Fourth Circuit grants deference only to a "constitutionally delegated" "formal act of recognition" by the Executive—for example a head of state. *Yousuf*, 699 F.3d at 772. This case involves no such act. The government indisputably recognizes Türkiye and has never denied Halkbank's common-law instrumentality status. *See, e.g.*, S. Ct. Tr. at C.A. App. 201 (Deputy Solicitor General) (recognizing "obvious common law immunity" for "foreign government-owned corporations," like Halkbank, "for their sovereign actions").

That is for good reason. Although the government's brief (at I) describes Halkbank as "a commercial bank," the undisputed evidence establishes that Halkbank is "part of the Turkish state." Türkiye Amicus Br. 1. Halkbank, which was legislatively established in the Turkish Republic's earliest days, is "an affiliate of the Ministry of Treasury and Finance" and is subject to rules that only apply to state entities. Türkiye C.A. Amicus Br. 8, 12-13. And Halkbank serves "numerous purely governmental functions," such as running government programs, administering funds appropriated by the national budget, offering disaster relief, and collecting taxes. *Id.* at 8-12. Neither the decision below nor the government's brief casts doubt on Halkbank's sovereign instrumentality status. The government argues that *despite* Halkbank's status, Halkbank can be prosecuted for *commercial conduct*. The Second Circuit deferred to that conduct-based determination; the Fourth Circuit would not have.

II. The Questions Presented Are Exceptionally Important and Squarely Presented

1. The government's efforts to minimize the importance of the Second Circuit's deference holding go nowhere. *See* Pet.15-19.

First, the government downplays the separation-of-powers concerns raised by the decision below. The government (at 11) justifies deference because this prosecution has "sensitive foreign-affairs implications." Traditionally that is a reason *not* to thrust a dispute before a judge and jury. But anyway, the Framers "assigned the anticipated new federal judiciary a vital foreign affairs role" in discerning international law for the Nation. Martin S. Flaherty, *Restoring the Global Judiciary* 60 (2019). The government's position, by contrast, "relegat[es] courts to the status of potted plants," Pet.App.64a (Gorsuch, J., concurring in part and dissenting in part), and would have courts "abdicate their judicial duty to decide the scope of … immunity," *Upper Skagit Indian Tribe v. Lundgren*, 584 U.S. 554, 574 (2018) (Thomas, J., dissenting) (discussing, *e.g.*, *Ex parte Peru*, 318 U.S. 578 (1943) and *Hoffman*). The decision below thus subverts the original understanding of the separation of powers and permits the Executive to usurp the courts' power to say what the law is.

The government (at 11) also discounts the extreme unfairness conclusive deference creates in criminal cases. The government points to unrelated checks on its power, like grand juries. But the government does not dispute that there is no other area of federal criminal practice where courts defer conclusively to the Executive's views. *See* Pet.17. Courts should never rubber-stamp the Executive's unilateral decision to strip away a criminal defendant's defense.

Lastly, the government (at 21) claims state prosecutions pose no problem because the United States can file a suggestion of immunity. But the government has no response to the precedent casting doubt upon this solution. Pet.18-19. When state criminal actions inevitably follow this one, *see* Pet.17-18, our Nation will have "to answer if a State create[s] difficulties with a foreign power," *United States v. Pink*, 315 U.S. 203, 232 (1942).

2. The court's conclusion that common law denies instrumentalities the same absolute immunity owed their sovereigns is equally and independently worthy of review. Pet.19-23.

This prosecution is unprecedented. Domestically, the government (at 13-14) cites the same handful of cases it always cites as evidence that it applies "criminal jurisdiction" to instrumentalities. But these cases overwhelmingly involve subpoenas (some of which the government lost on immunity grounds), and a few non-prosecution or plea agreements where sovereign-owned corporations *voluntarily waived* immunity, usually to resolve minor allegations. Pet.19-20 & n.5; Halkbank Remand C.A. Br. 28-29; Halkbank Remand C.A. Reply Br. 20-21. None of these cases approves a contested prosecution of any instrumentality.

The only new case is *United States v. United Microelectronics Corp.*, No. 18-cr-465 (N.D. Cal. Feb. 28, 2024), which the government (at 20) cites as proof that it *has* tried an instrumentality. But that corporation (which was acquitted) did not assert immunity—because it was *not* sovereign. In that case, local municipalities indirectly owned the commercial defendant. *United States v. United Microelectronics Corp.*, No. 18-cr-465, ECF No. 441, at 2911-12 (Apr. 7, 2022). But *local* governments and their instrumentalities are not entitled to common-law foreign sovereign immunity. Restatement (Second) of

Foreign Relations Law § 67 (A.L.I. 1965). And indirect ownership would fail to qualify under the FSIA, too. *Dole Food Co. v. Patrickson*, 538 U.S. 468, 477 (2003).

Nor can the government obscure that the decision below defies global consensus. The government entirely ignores the amicus briefs of four co-equal sovereigns and a leading international law scholar, all of which condemn this prosecution as violating international law. *See* Türkiye Amicus Br. 3-11; Pakistan, Azerbaijan, & Qatar Amicus Br. 5-24; Lord Brennan Amicus Br. 6-23. Nor does the government dispute that the decision below could lead other nations to prosecute U.S. agencies and instrumentalities abroad. Pet.23.

Indeed, the government almost entirely ignores international law and custom, which inform federal common law. It downplays France's *Malta Maritime* decision, which held that a state cannot prosecute an instrumentality, dismissing a prosecution of a Maltese, government-owned commercial corporation. Pet.21 (discussing *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.)). The government (at 20) tries to distinguish the case by erroneously arguing the corporation's conduct was not commercial. But as Professor O'Keefe has explained, *Malta Maritime* "concluded that foreign instrumentalities have absolute conduct immunity for acts they undertake *on behalf of* their governments," "*including commercial activity*." O'Keefe Amicus Br. 11-12 (21-1450) (Nov. 21, 2022) (emphases added). Halkbank's alleged conduct qualifies. *Id.* at 17-19.

Finally, the government (at 20) speculates that the absence of criminal trials of instrumentalities abroad may be because many countries "lack corporate criminal liability." But scores of countries *do* recognize corporate

criminal liability, including major economies such as Australia, Brazil, Canada, China, England, France, India, Israel, Japan, Malaysia, Mexico, Pakistan, South Korea, and Switzerland. Law Libr. of Cong., *Corporate Criminal Liability in Selected Jurisdictions*, No. 2024-023701 (2025) (56 of 60 surveyed jurisdictions recognize corporate criminal liability). The government's suggestion that the total absence of criminal trials against corporate instrumentalities is due to anything *other* than the global consensus against prosecuting sovereign entities is wishcasting.

III. The Decision Below Was Erroneous

The Second Circuit erred on both deference and absolute immunity. Pet.24-32.

1. The government (at 10-11) defends deference by citing dicta in inapposite civil cases. But as explained, the government, like the court below, overreads these cases. Pet.24-27. For example, the government's claim that deference began with *Schooner Exchange* 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). "[S]trong deference cases [did not] appear until the 20th century." Pet.App.64a (Gorsuch, J., concurring in part and dissenting in part). And even then, the government overstates the deference afforded, Pet.26-27, which never applied in *criminal* cases, Pet.25 (discussing *In re Investigation of World Arrangements*, 13 F.R.D. 280, 291 (D.D.C. 1952) and *In re Grand Jury Investigation of the Shipping Indus.*, 186 F. Supp. 298, 318-20 (D.D.C. 1960)). The government ignores all this.

Nor does the government effectively respond to this Court's decision in *Berizzi Brothers Co. v. The Pesaro*,

which the government concedes granted immunity over the Executive's objection. 271 U.S. 562, 576 (1926). The government (at 15-16) claims *Berizzi Brothers* has been undermined by *Hoffman*, 324 U.S. 30, and *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 699 (1976). But these non-majority opinions criticized *Berizzi Brothers* for refusing to recognize the nascent commercial-activities exception, not for refusing to defer. *Hoffman*, 324 U.S. at 40-41 (Frankfurter, J., concurring); *Alfred Dunhill*, 425 U.S. at 699-703 (plurality).

2. The Second Circuit's absolute immunity holding flouts common and international law.

The government concedes, and the Second Circuit acknowledged, that states themselves receive *absolute* criminal immunity, *including for commercial conduct*. Pet.App.23a. The Second Circuit's conclusion that the commercial-activities exception nevertheless applies to a state's corporate instrumentalities in criminal cases finds no support in the law or practice of any nation. The government identifies no case in world history that has applied the commercial-activities exception to a criminal prosecution. Equally troubling, the government ignores numerous authorities confirming that the exception is a civil-only concept inapplicable to criminal matters. Pet.7, 28-29; *see also* Halkbank Remand C.A. Br. 19-33.

The government also fails to justify the Second Circuit's novel distinction between the immunity granted sovereigns and their instrumentalities. As the Attorney General and Secretary of State acknowledged during the common-law era, the "traditional rule" is that "agencies and instrumentalities," which could include "a state trading corporation … or a banking activity," are "entitled to the same immunities as the government itself." *Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims and Governmental Rels. of the*

Comm. on the Judiciary, 93rd Cong. 39 (1973). The government ignores such authority.

Instead, the government (at 11-12) cites cases noting that corporations are sometimes considered independent of their owners. *Dole,* 538 U.S. at 474-75; *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 626-27 (1983); *United States v. Amedy*, 24 U.S. 392, 412 (1826). But none of these cases has the faintest thing to do with common-law immunity or the "traditional rule" that sovereigns and instrumentalities receive *the same* immunity.

The government (at 16) also points to the FSIA's codification of the commercial-activities exception in civil cases. But the FSIA *enshrined* the "traditional rule," *see supra*, that sovereigns and corporate instrumentalities receive the same immunity, 28 U.S.C. §§ 1603(a)-(b), 1604. And there is nothing "anomalous," BIO 16, about codifying the civil exception and retaining absolute criminal immunity. Every country that codified the exception expressly limited it to civil cases. Pet.20-21.

Next the government (at 12-13) cites cases, such as *Bank of United States v. Planters' Bank*, holding that if a domestic sovereign gives a state-owned corporation "the capacity to sue and be sued, [the sovereign] voluntarily strips [the corporation] of its sovereign character." 22 U.S. 904, 907 (1824). These cases simply acknowledge that sovereigns can *waive* immunity for corporate instrumentalities. *Id.* But it is well recognized that sue-and-be-sued clauses "constitute[] a waiver of immunity (if at all) *only in the courts of the sovereign*." *Garcia v. Akwesasne Hous. Auth.*, 268 F.3d 76, 86-87 (2d Cir. 2001) (collecting cases). These cases, none of which involve foreign sovereigns, do not suggest a sue-and-be-sued clause waives immunity abroad. *Id.*; *see also* Halkbank Reply Br. 15 (21-1450).

The government (at 13) cites *two* common-law decisions denying immunity to corporations with sovereign ties. But in *Coale v. Societe Co-Op Suisse des Charbons, Basle*, 21 F.2d 180 (S.D.N.Y. 1921), the sovereign neither owned nor controlled the corporation. *Id.* at 181 (company owned by Swiss nationals and government had minority representation on board). And although *Molina v. Comision Reguladora del Mercado de Henequen*, 103 A. 397, 398-99 (N.J. 1918), states in dicta that sovereign corporations should not receive immunity, the case relied on *Planters' Bank*, which, as explained above, is inapposite. The great weight of authority confirms that corporations owned and controlled by sovereigns receive the same immunity owed their sovereigns. Pet.6-7; Halkbank Remand C.A. Br. 22-33.[2]

This Court, again and again, has recognized that domestic "Government-created and -controlled corporations are … part of the Government." *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 397 (1995). Contrary to the government's suggestion (at 15), this Court has explained that such government-owned corporations *share their sovereign's immunity* absent waiver, *Thacker v. TVA*, 587 U.S. 218, 221 (2019), even when engaged in "commercial and business transactions," *see FHA v. Burr*, 309 U.S. 242, 244-45 (1940). The government provides no reason why foreign-sovereign-owned corporations are any less

[2] The government's other authorities are even further afield. It (at 13) points to the British East India Company, but that "private commercial organisation," to which some governmental functions were delegated, was not even government-owned. H.V. Bowen, *The Business of Empire* 1 (2005). And it (at 13) mistakenly cites counsel's argument, not the opinion, in *Nathan v. Virginia*, 1 U.S. 77, 79 (Pa. Ct. C. P. 1781). Counsel's argument is irrelevant anyway; he argued that *diplomats* engaged in off-duty trade could face civil process. *Id.*

part of their governments than U.S.-owned corporations are part of ours.

3. Even if the common-law commercial-activities exception applied in criminal cases, and even if Halkbank's conduct were properly understood as purely commercial (which it was not), the decision below grossly erred by applying that exception to Halkbank's conduct in Türkiye. Pet.30-31. The common-law exception only ever applied to a sovereign's "commercial activity *outside its territory*." Restatement (Second) of Foreign Relations Law § 69 (emphasis added).

The government's only response, in a footnote (at 17 n.1), is that the indictment alleges some connections to the United States, principally that downstream of Halkbank, funds were eventually moved—by others—"through the U.S. financial system." But at common law, the question is where *the sovereign's conduct occurred*. Pet.30-31. Although the FSIA extended the exception to acts having a "direct effect" in the United States, 28 U.S.C. § 1605(a)(2), that inapplicable provision "represent[ed] a major expansion of the traditional territorial basis for jurisdiction," David A. Brittenham, Note, *Foreign Sovereign Immunity and Commercial Activity*, 83 Colum. L. Rev. 1440, 1466 (1983). Therefore, even under the broadest understanding of the common law, Halkbank's conduct in Türkiye remains immune, and the indictment would be dismissed in its entirety. Pet.8, 30-31. The Second Circuit's fundamental error on this issue is reason alone to grant review.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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