20-3499

To Be Argued By:
SIDHARDHA KAMARAJU

United States Court of Appeals
FOR THE SECOND CIRCUIT
Docket No. 20-3499

UNITED STATES OF AMERICA,

Appellee,

—v.—

TURKIYE HALK BANKASI, A.S., also known as Halkbank,

Defendant-Appellant,

(*Caption continued on inside cover*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Türkiye Halk Bankasi, A.Ş. ("Halkbank") appeals from a decision and order entered on October 1, 2020, in the United States District Court for the Southern

District of New York by the Honorable Richard M. Berman, United States District Judge, denying Halkbank's motion to dismiss the charges against it.

Superseding Indictment S6 15 Cr. 867 (RMB) (the "Indictment") was filed on October 15, 2019, in six counts. Count One charges Halkbank with conspiring to obstruct the lawful functions of the U.S. Department of the Treasury ("Treasury"), in violation of 18 U.S.C. § 371. Count Two charges Halkbank with conspiring to violate the International Emergency Economic Powers Act ("IEEPA"), in violation of 50 U.S.C. § 1705. Count Three charges Halkbank with bank fraud, in violation of 18 U.S.C. § 1344. Count Four charges Halkbank with conspiring to commit bank fraud, in violation of 18 U.S.C. § 1349. Count Five charges Halkbank with money laundering, in violation of 18 U.S.C. § 1956(a)(2)(A). Count Six charges Halkbank with conspiring to commit money laundering, in violation of 18 U.S.C. § 1956(h).

On August 10, 2020, Halkbank moved to dismiss the Indictment based on, *inter alia*, the Foreign Sovereign Immunities Act ("FSIA" or the "Act"), 28 U.S.C. §§ 1330 & 1602-11. On October 1, 2020, Judge Berman denied the motion in a written opinion and order, which Halkbank challenges in this interlocutory appeal.

Statement of Facts

The charges against Halkbank arise out of its alleged participation in the largest known scheme to evade Iranian financial sanctions—a scheme to launder billions of dollars' worth of Iranian oil proceeds

held at Halkbank and deceive both Treasury and U.S. financial institutions.

A. The Indictment

Halkbank is a commercial bank that is majority owned by the Government of Turkey. (Ind. ¶ 1).[1] As alleged, Halkbank participated in a years-long scheme to violate the United States' economic sanctions on Iran. (*Id.*).

During the charged offense period, Halkbank held accounts for the Central Bank of Iran ("CBI") and Iran's government-owned petroleum company, the National Iranian Oil Company ("NIOC"). Halkbank participated in several types of illicit transactions for the benefit of Iran, aimed at creating a pool of hidden Iranian funds in Turkey and the United Arab Emirates in the names of front companies. From there, the funds were used to make international payments on behalf of the Government of Iran and Iranian banks, including transfers in U.S. dollars that passed through the

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[1] "Br." refers to Halkbank's brief on appeal; "A." refers to the appendix filed with that brief; "Ind." refers to the Indictment, which is contained in the appendix; "SA" refers to the special appendix filed with Halkbank's brief; "Dkt." refers to an entry on the district court's docket for this case; and "No. __ App. Dkt." refers to an entry on this Court's docket for the designated case number. Unless otherwise noted, case text quotations omit all internal citations, quotation marks and alterations.

U.S. financial system in violation of U.S. sanctions laws. (*Id.* ¶¶ 1-6).

Halkbank was central to the scheme, because the bank held the proceeds of Iran's sale of oil and gas to Turkey's state-owned energy companies in accounts for the CBI, NIOC, and the National Iranian Gas Company ("NIGC"), all of which were sanctioned by the United States at the time. (*Id.* ¶¶ 3, 8). Due to U.S. sanctions against Iran and the anti-money laundering policies of U.S. banks, Iran was constrained in how it could use the funds, and, in particular, could not use them to make international payments through the U.S. financial system. (*Id.* ¶¶ 3, 8-24).

As a result, Halkbank executives worked with Reza Zarrab, a Turkish businessman and gold trader, corrupt Turkish government officials, and Iranian government and bank officials to devise a scheme through which Iran could surreptitiously access its oil proceeds freely, without scrutiny from the international community. (*Id.* ¶¶ 2, 5, 7).[2] The scheme involved, among

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[2] The Halkbank executives included Halkbank's former General Manager (its chief executive), Suleyman Aslan; its former Head of Foreign Operations, Levent Balkan; and its former Deputy General Manager for International Banking, Mehmet Hakan Atilla. Aslan and Balkan were charged in an underlying indictment and remain fugitives. Atilla was convicted, following a jury trial, of offenses charged in an underlying indictment; his conviction and sentence were upheld by this Court. *United States v. Atilla*, 966 F.3d

other things, fraudulent gold and humanitarian trade transactions run through Halkbank and Zarrab's companies. (*Id.* ¶¶ 4, 25-65).

The purpose of this scheme was to evade the sanctions' restrictions on Iranian access to oil and gas proceeds at Halkbank and create an enormous, anonymous slush fund for Iran. Because the funds would not nominally be attributable to Iran, the Government of Iran could direct the funds anywhere across the globe free of the effect of sanctions, including through the U.S. financial system. (*Id.* ¶¶ 6, 34-35). At least approximately $1 billion was laundered through the U.S. on behalf of the Government of Iran and Iranian entities. (*Id.* ¶¶ 48, 64). At the same time, by disguising these transactions as being exempt from U.S. sanctions and lying to Treasury officials, Halkbank ensured the continuity of this profitable business, while also avoiding itself being sanctioned by the United States and losing its ability to transact with U.S. banks. (*Id.* ¶¶ 4-5, 15-21).

1. The Gold Method

One method Halkbank and its co-conspirators used was a scheme involving purported gold shipments. Halkbank conspired with Zarrab and its Iranian government and banking clients to transfer Iranian oil proceeds to exchange houses and front companies controlled by Zarrab so that the money could be converted into gold, exported from Turkey, and converted back

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118 (2d Cir. 2020). Zarrab pled guilty to crimes arising out of his participation in the scheme.

into cash or currency to be used for international financial transfers on behalf of Iranian persons and entities. (Ind. ¶¶ 26, 28). These gold transactions on behalf of the Government of Iran and Iranian banks, if revealed to Treasury, exposed Halkbank to sanctions under Executive Order 13622 and the Iranian Freedom and Counterproliferation Act ("IFCA"), 22 U.S.C. § 8804(a)(1)(A) (2013). (*See* Ind. ¶¶ 26-27). After the gold was exported to the U.A.E., Zarrab's companies often repurchased the gold in U.S.-dollar transactions in order to reimport it to Turkey so that it could be used in the scheme again, resulting in more than $900 million in transactions through the U.S. financial system. (*Id.* ¶ 48).

Halkbank and its co-conspirators converted billions of dollars' worth of Iran's oil proceeds into gold so that it could be moved to the U.A.E. In 2011, the year before the scheme began, Turkey reported exporting approximately $55 million in gold to Iran. In 2012, after the gold scheme was implemented, Turkey reported exporting approximately $6.5 billion in gold to Iran. Similarly, Turkey's reported exports of gold to the U.A.E. rose from approximately $280 million in 2011 to approximately $4.6 billion in 2012. The funds laundered from Halkbank through Zarrab and his companies were responsible for the vast majority of this increase. (*Id.* ¶ 31).

2. The Fake Food Method

As sanctions against the supply of gold and currency to Iran broadened, Halkbank instructed Zarrab to start a new laundering method using fake

shipments of humanitarian goods to Iran. (Ind. ¶¶ 50-52). Under U.S. sanctions in effect at the time, Halkbank was subject to sanctions if it permitted Iranian oil funds to be used for any purpose other than buying Turkish goods for import to Iran, or buying food, agricultural products, and medicine. (*Id.* ¶¶ 18, 50). Zarrab's companies created false documentation purporting to show purchases and shipments of food from the U.A.E. to Iran, in order to justify transfers of Iranian oil proceeds to Zarrab's companies as representing the purported purchase funds. (*Id.* ¶¶ 50, 54).

Halkbank coached Zarrab on how to doctor the records to protect Halkbank from detection and sanction. This included correcting obvious errors such as mismatches between stated food quantities and maximum capacities of imaginary vessels, as well as obvious falsehoods about the country-of-origin of the imaginary food. (*Id.* ¶¶ 54-56). If Zarrab could not provide a document—such as bills of lading, because they are a traceable record—then Halkbank altered its typical compliance requirements to excuse those records from Zarrab's transactions. (*Id.* ¶ 54).

3. Halkbank's Lies to Treasury to Protect the Scheme

Halkbank's senior-most officials, including Aslan and Atilla, repeatedly lied to senior Treasury officials in order to protect the scheme and itself. Among other things, Halkbank lied about its compliance and due diligence efforts, lied about the identities of the gold buyers, lied about purportedly ending its role in facilitating gold sales to Iran, and lied about the scope of its

relationship with Zarrab. (*See, e.g.*, Ind. ¶¶ 4-5, 40, 42-43, 45-46, 63; *see also Atilla*, 966 F.3d at 129 (Halkbank officials also "repeatedly lied to Treasury officials to conceal the sanctions avoidance scheme")).

B. Halkbank's Failure to Appear and Mandamus Petitions

After it was indicted, Halkbank did not appear in response to two summonses served on the bank, putting itself in contempt of the summonses. (Dkt. 566, 571, 572). Counsel for Halkbank eventually sought to enter a "special appearance" for purposes of moving to recuse the presiding District Judge and to dismiss the Indictment for purported lack of personal jurisdiction, but without Halkbank being required to answer the charges if its motion to dismiss were denied. (Dkt. 570, 577). The District Court denied the request and scheduled a hearing for Halkbank to show cause why contempt sanctions should not be imposed for its failure to appear. (Dkt. 581, 582).

Halkbank filed a petition for mandamus, asking this Court to direct the District Court to permit counsel to enter a special appearance, and sought a stay of all further proceedings pending determination of its petition. (No. 19-4203 App. Dkt. 1, 20). On February 21, 2020, this Court denied the petition and stay motion. (No. 19-4203 App. Dkt. 52).

On July 14, 2020, Halkbank filed a motion to recuse the presiding District Judge (Dkt. 637, 638), which the District Court denied (Dkt. 648).

Halkbank filed another petition for mandamus, this time asking this Court to direct the District Judge

to recuse himself, as well as a motion to stay the district court proceedings. (No. 20-3008 App. Dkt. 1, 23). This Court denied the motion for a stay on September 17, 2020 and the petition for mandamus on December 23, 2020. (No. 20-3008 App. Dkt. 30, 39).

C. Halkbank's Motion to Dismiss

On August 10, 2020, Halkbank moved to dismiss the Indictment, contending, *inter alia*, that because the bank is majority owned by Turkey, the Foreign Sovereign Immunities Act renders it absolutely immune from criminal prosecution. (Dkt. 645, 646). Halkbank urged that the FSIA's exceptions to immunity do not extend to criminal prosecutions at all and that, if they do, the FSIA's "commercial activity" exception is not satisfied here. Halkbank additionally argued, in the alternative, that the common law of foreign sovereign immunity bars the prosecution.

After receiving briefing from the Government and hearing lengthy oral argument, the District Court denied Halkbank's motion in a written opinion and order. (SA 1-16). The District Court held that the "FSIA does not appear to grant immunity in criminal proceedings," finding that "[n]othing in the text of FSIA suggests that it applies to criminal proceedings; and the legislative history gives no hint that Congress was concerned [about] a foreign defendant in a criminal proceeding." (SA 7-8).

The District Court also held that, even if the FSIA did apply, its "commercial activity exceptions would clearly apply and support the Halkbank prosecution." (SA 8). With respect to the first two clauses of the

commercial activity exception, the District Court found that Halkbank's misrepresentations directed to Treasury in the United States (including in phone calls and emails sent to the United States and in-person meetings in the United States) constituted both "commercial activity carried on in the United States" and "act[s] performed in the United States in connection with a commercial activity elsewhere." (SA 9). With respect to the third clause, Halkbank's knowing participation in a scheme to cause financial transactions occurring in the United States constituted "acts outside the territory of the United States in connection with a commercial activity elsewhere that caused a direct effect in the United States." (SA 9). Thus, Halkbank's claimed immunity was independently defeated by each of the three clauses of the commercial activity exception. (SA 8-10).

The District Court also rejected Halkbank's claim that it is entitled to immunity under the common law, finding that "at common law, the granting or denial of foreign sovereign immunity was historically the case-by-case prerogative of the Executive Branch" and, here, "the U.S. Executive Branch has clearly manifested its clear sentiment that Halkbank should be denied immunity." (SA 10).

D. This Appeal

Halkbank filed a notice of appeal on October 9, 2020 and later sought a stay of the district court proceedings pending resolution of this appeal. (No. 20-3499 App. Dkt. 1, 13). The Government opposed the motion for a stay and moved to dismiss Halkbank's

appeal for lack of jurisdiction; the Government alternatively sought expedited consideration of this appeal so that it could be resolved prior to jury selection, which had been scheduled for April 29, 2021. (No. 20-3499 App. Dkt. 28, 29).

On December 23, 2020, this Court entered an order granting the motion to stay the district court proceedings and deferring decision on the Government's motion to dismiss to the merits panel. (No. 20-3499 App. Dkt. 49). This Court then issued an expedited scheduling order providing that briefing would be fully submitted no later than March 17, 2021. (No. 20-3499 App. Dkt. 50).

Before the stay was issued, the District Court had scheduled trial for May 3, 2021. (Dkt. 686). After this Court issued the stay, Halkbank sought to vacate all pretrial, trial and related deadlines in the District Court. (Dkt. 698). In response to this request, the District Court issued a memo endorsement stating that it was "aware of the stay" and that "[n]o action by the District Court is called for or appropriate at this time." (Dkt. 699).

ARGUMENT

POINT I

The Court Should Dismiss This Appeal for Lack of Jurisdiction

Congress has expressly limited the jurisdiction of Courts of Appeals to "final decisions of the district courts." 28 U.S.C. § 1291. "This final judgment rule

requires that a party must ordinarily raise all claims of error in a single appeal following final judgment on the merits." *Flanagan v. United States*, 465 U.S. 259, 263 (1984). "In a criminal case the rule prohibits appellate review until conviction and imposition of sentence." *Id.* A limited exception permits immediate appeal from certain collateral orders. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). To fall within the "small class" of decisions that constitute immediately appealable collateral orders, the decision must "(1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment." *Van Cauwenberghe v. Biard*, 486 U.S. 517, 522 (1988).

As the Supreme Court has "long held," the "policy of Congress embodied in this statute is inimical to piecemeal appellate review of trial court decisions which do not terminate the litigation, and . . . this policy is at its strongest in the field of criminal law." *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 265 (1982). The "especially compelling reasons" for enforcing the final-judgment rule "in the administration of criminal justice," *Cobbledick v. United States*, 309 U.S. 323, 325 (1940), include the interests of the criminal justice system in the efficient prosecution of cases, the need to protect the community, and the community's moral interests in swiftly bringing culpable parties to justice, *see Flanagan*, 465 U.S. at 264-65; *see also United States v. Culbertson*, 598 F.3d 40, 46 (2d Cir. 2010) (recognizing that "undue litigiousness and leaden-footed administration of justice, the common consequences of piecemeal appellate review,

are particularly damaging to the conduct of criminal cases").

Halkbank's appeal does not fall within the highly limited exceptions to the final-judgment rule in criminal cases. Because the final-judgment rule is "interpreted ... with the utmost strictness in criminal cases," the Supreme Court has recognized only four exceptions in criminal cases: denials of motions to reduce bail, to dismiss on double jeopardy grounds, or to dismiss under the Speech or Debate Clause, *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 799 (1989); and orders for the forced medication of a defendant, *Sell v. United States*, 539 U.S. 166, 176-77 (2003). *See also Will v. Hallock*, 546 U.S. 345, 350 (2006) (Supreme Court "has been asked many times to expand the 'small class' of collaterally appealable orders," but has "instead kept it narrow and selective in its membership"). Halkbank raises none of these four recognized grounds, so its appeal is governed by the ordinary rule that "challenges to jurisdiction may be fully vindicated on appeal from a final judgment, and for this reason courts have rejected interlocutory appeals of orders in criminal cases denying dismissal on grounds of subject matter jurisdiction and personal jurisdiction." *United States v. Levy*, 947 F.2d 1032, 1034 (2d Cir. 1991).

Halkbank argues that the District Court's denial of its motion to dismiss falls within the collateral-order exception because, in civil cases, the denial of a motion to dismiss based on FSIA immunity is immediately appealable. (Br. 21-22). Halkbank ignores that the collateral-order doctrine applies differently in criminal than in civil cases. Indeed, the only known decision

regarding an interlocutory appeal from the denial of FSIA immunity in a criminal case—there, the denial of a motion to quash a grand jury subpoena—resulted in dismissal. *See In re Grand Jury Subpoena*, No. 18-3068 (D.C. Cir. Oct. 3, 2018). Though the dismissal order was filed under seal, the docket entry reflects that the dismissal was for lack of jurisdiction under 28 U.S.C. § 1291, and the court subsequently described the dismissal as one "for lack of appellate jurisdiction" despite the defendant's "argu[ment] that it is immune under" the FSIA. *In re Grand Jury Subpoena*, 912 F.3d 623, 626 (D.C. Cir. 2019). Accordingly, it is plain that the D.C. Circuit held that the collateral-order doctrine did not provide appellate jurisdiction.

Halkbank argues that its attempt to invoke the FSIA is a claim of "immunity from suit" which "loses much of its value if it is not granted at the outset of litigation." (Br. 22). As the Supreme Court has held, "claims of a 'right not to be tried' " are to be viewed "with skepticism, if not a jaundiced eye," because "virtually every right that could be enforced appropriately by pretrial dismissal might loosely be described as conferring a 'right not to stand trial.' " *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 873 (1994). Such claims must be based "upon an *explicit* statutory or constitutional guarantee that trial will not occur." *Midland Asphalt*, 489 U.S. at 801 (emphasis added).

Here, the FSIA provides no "explicit statutory . . . guarantee that trial will not occur." (*See* Point II.A-B, *infra*). Saying as much does not "conflat[e] the merits of Halkbank's immunity claim with this Court's power to hear it." (Br. 24). This Court regularly examines the

statute that gives rise to the defendant's claimed right not to be tried in order to determine whether it contains the requisite explicit guarantee that trial will not occur. *See, e.g.*, *United States v. Macchia*, 41 F.3d 35, 38 (2d Cir. 1994) (transactional immunity statute providing that "no such [immunized] witness shall be prosecuted" does not qualify) (citing *Heike v. United States*, 217 U.S. 423, 426 (1910)); *United States v. Weiss*, 7 F.3d 1088, 1090 (2d Cir. 1993) (statute providing that "no person shall be prosecuted, tried, or punished" on an untimely indictment does not qualify). Because the FSIA contains no such explicit guarantee that trial will not occur, this interlocutory appeal should be dismissed.

POINT II

Halkbank Is Not Immune From Prosecution

Halkbank asks this Court to endorse the view that, 35 years ago, Congress deprived the Executive Branch of its ability to enforce our nation's criminal laws in our own courts against a company owned by a foreign government, and that it did so by enacting a statute that makes no mention of criminal cases at all. In the alternative, Halkbank argues that foreign state-owned companies have "absolute immunity" from prosecution based on common law. Either way, the upshot of Halkbank's argument is that such companies have complete license to violate the criminal laws of the United States without fear of prosecution. Thus, in this case, the United States cannot prosecute a bank that lied to U.S. government agencies, victimized U.S. banks, and undermined the U.S. embargo on one of the world's

foremost state sponsors of terrorism by laundering approximately $1 billion through the U.S. financial system on behalf of Iran.

Halkbank's dramatic contentions, which routinely conflate the historical treatment of foreign states and foreign state-owned entities, are meritless. The District Court has jurisdiction to preside over this criminal prosecution under 18 U.S.C. § 3231, and nothing in the FSIA—a statute applicable only to civil actions and completely silent as to criminal prosecutions—displaces that jurisdiction or confers immunity from it. (*See* Point II.A, *infra*). Moreover, even if the FSIA applies to criminal prosecutions, then so does the "commercial activity" exception contained therein, which would strip Halkbank of any immunity it might otherwise enjoy. (*See* Point II.B, *infra*). Finally, the common law does not shield Halkbank from this prosecution. (*See* Point II.C, *infra*).

For these reasons, the District Court was correct to deny Halkbank's motion to dismiss the Indictment. (SA 7-10). This Court reviews the District Court's legal conclusions *de novo*. *United States v. Yousef*, 327 F.3d 56, 137 (2d Cir. 2003).

A. The FSIA Does Not Bar This Prosecution

The Supreme Court has repeatedly described the FSIA as addressed to civil actions and has never suggested that it applies in the criminal context. *See, e.g.*, *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488 (1983) (the FSIA "provides 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") (emphasis added); *Republic of Argentina v. NML Capital, Ltd.*, 573 U.S. 134, 141 (2014); *Republic of Austria v. Altmann*, 541 U.S. 677, 691 (2004). This Court has stated that the FSIA only applies in civil cases, albeit in a summary order. *See United States v. Biggs*, 273 F. App'x 88, 89 (2d Cir. 2008) ("Because [the defendant] is not a 'foreign state' and this is not a civil action, FSIA has no application here."). And the only courts that have decided the question in criminal cases have held that the FSIA does not apply to criminal proceedings. *See In re Grand Jury Proceeding Related to M/V Deltuva*, 752 F. Supp. 2d 173, 176-80 (D. P.R. 2010) (FSIA does not apply in criminal cases); *United States v. Hendron*, 813 F. Supp. 973, 974-77 (E.D.N.Y. 1993) (same); *see also United States v. Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997) (stating as much in case involving head of state immunity). *But cf. Keller v. Central Bank of Nigeria*, 277 F.3d 811, 820 (6th Cir. 2002) (reaching opposite conclusion in civil RICO case), *abrogated on other grounds by Samantar v. Yousuf*, 560 U.S. 305 (2010). The District Court correctly found that the FSIA does not bar this prosecution.

1. The District Court Has Jurisdiction Under 18 U.S.C. § 3231

Federal courts have "original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States." 18 U.S.C. § 3231. Under Section 3231, the district court has subject-matter jurisdiction when an indictment—like the Indictment here—properly alleges a violation of a federal criminal

statute. *See, e.g.*, *United States v. McLaughlin*, 949 F.3d 780, 781 (2d Cir. 2019).

As the D.C. Circuit recently observed, "[i]t is hard to imagine a clearer textual grant of subject-matter jurisdiction." *In re Grand Jury Subpoena*, 912 F.3d 623, 628 (D.C. Cir. 2019). Critically, Section 3231 "contains no carve-out" precluding its application to criminal matters involving foreign states, and "nothing in the [FSIA's] text expressly displaces section 3231's jurisdictional grant." *Id.*

Halkbank attempts to locate such a carve-out in a provision of the FSIA which states that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States," subject to certain international agreements and exceptions in the FSIA. 28 U.S.C. § 1604. But "granting a particular class of defendants 'immunity' from jurisdiction has no effect on the scope of the underlying jurisdiction, any more than a vaccine conferring immunity from a virus affects the biological properties of the virus itself." *Grand Jury Subpoena*, 912 F.3d at 628. Moreover, as Halkbank recognizes (Br. 25), Section 1604 works "in tandem" with 28 U.S.C. § 1330(a), the provision of the FSIA which confers subject-matter jurisdiction over certain "nonjury civil action[s]" against foreign states. *See Grand Jury Subpoena*, 912 F.3d at 628-29. Thus, the broad language of Section 1604 is no help to Halkbank, because it confers "immunity" only insofar as

Section 1330(a) is the source of the court's subject-matter jurisdiction. *Id.*[3]

That Section 1604 only confers immunity in civil cases brought under Section 1330(a) is illustrated by the text, structure, and history of the FSIA, all of which indicate that the FSIA only applies to *civil* actions. (*See* Point II.A.2-3, *infra*). With that context, it is clear that the language of Section 1604 has no application in a criminal case such as this one.

2. The FSIA's Text and Structure Indicate That It Governs Only Civil Actions

The FSIA's text and structure make clear that it governs only civil actions and does not confer immunity from criminal prosecution.

The FSIA's text, read "as a whole," *Samantar*, 560 U.S. at 319, confirms the FSIA's singular focus on civil cases. The FSIA begins by conferring jurisdiction over "any nonjury civil action" against a foreign state as to which it is "not entitled to immunity" under the FSIA's

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[3] The D.C. Circuit correctly rejected the notion that Section 1330(a) "silently . . . revoke[s] jurisdiction over any case not falling within its terms, including any criminal proceeding." *Grand Jury Subpoena*, 912 F.3d at 628. The D.C. Circuit assumed, without deciding, that Section 1604 of the FSIA applied to criminal prosecutions, but nevertheless rejected the argument that the FSIA displaced Section 3231, as well as the argument that the FSIA's exceptions do not apply in criminal cases. *Id.* at 627-32.

immunity provisions or international agreements. FSIA § 2 (codified at 28 U.S.C. § 1330(a)). The FSIA then defines that previously referenced jurisdictional immunity. FSIA § 4 (codified at 28 U.S.C. §§ 1604-07)). And, as noted, Section 1604 "work[s] in tandem" with the FSIA's conferral of jurisdiction over "*civil* action[s]" against a foreign state. *Grand Jury Subpoena*, 912 F.3d at 629.

The FSIA's procedures for asserting immunity or other jurisdictional limits address only civil actions. The FSIA authorizes removal of "[a]ny *civil action* brought in a State court against a foreign state," 28 U.S.C. § 1441(d) (emphasis added), a mechanism that ensures that a "defendant may ask a federal court to make the relevant sovereign immunity determination," *Dole Food Co. v. Patrickson*, 538 U.S. 468, 481 (2003) (Breyer, J., concurring in part and dissenting in part). In so doing, "Congress deliberately sought to channel cases against foreign sovereigns away from the state courts and into federal courts, thereby reducing the potential for a multiplicity of conflicting results among the courts of the 50 states." *Verlinden*, 461 U.S. at 497. That removal provision makes no mention of criminal cases. Such an omission would yield a striking anomaly if the FSIA applied to criminal matters, because it would mean a state prosecution against a foreign sovereign, unlike a state civil action, could not be removed, thus thwarting Congress's intention to provide a federal forum for immunity claims and to foster uniform application of the FSIA. This removal provision's limitation to civil actions is particularly instructive when compared to the neighboring provision authorizing removal of "any civil action *or criminal*

prosecution" against the United States and federal officers. 28 U.S.C. § 1442(a) (emphasis added). Congress clearly knows how to authorize removal of criminal prosecutions, and its failure to do so in the FSIA is strong evidence that the FSIA simply does not apply in criminal cases.

The FSIA also includes a "panoply" of other provisions "that are consistent only with an application to civil cases and not to criminal proceedings." *Hendron*, 813 F. Supp. at 974-75. For example, the sole provision governing venue only addresses "civil action[s]." 28 U.S.C. § 1391(f). The statutory findings and declaration of purpose refer to the "rights of both foreign states and litigants," without reference to government agencies or prosecutors that conduct criminal proceedings. 28 U.S.C. § 1602. The FSIA provides that where no immunity exists, the defendant is "liable"—a term that suggests civil actions—"in the same manner and to the same extent as a private individual," with special rules for "punitive damages," a civil remedy. 28 U.S.C. § 1606. The FSIA also addresses immunity for counterclaims—a civil device. 28 U.S.C. § 1607. And the FSIA refers to service of "the summons and complaint," the means of commencing civil actions, while the provision regarding how to respond "[i]n any action" sets deadlines for serving "an answer or other responsive pleading to the complaint," devices from civil actions. 28 U.S.C. § 1608(a), (d). Had Congress intended for the FSIA to apply to criminal prosecutions and confer immunity on foreign sovereigns, one would have expected it to make *some* mention of the process by which such sovereigns could respond to such

proceedings, if only to file a motion to dismiss. *See Samantar*, 560 U.S. at 318-19. But no such mention exists.

"The [FSIA's] careful calibration of remedies among the listed types of defendants suggests that Congress did not mean to cover other types of defendants never mentioned in the text." *Id.* at 319. Indeed, the Supreme Court has emphasized that it would not further Congress's purpose to confer immunity in circumstances where the FSIA contains not "so much as a word spelling out how and when" such immunity applies. *Id.* at 322. So too here.

3. The FSIA's History and Purpose Indicate That It Governs Only Civil Actions

The FSIA's exclusive focus on civil actions is not surprising in light of the history that preceded its passage and the purpose of the statute. In sum, "the relevant reports and hearings suggest Congress was focused, laser-like, on the headaches born of private plaintiffs' civil actions against foreign states." *Grand Jury Subpoena*, 912 F.3d at 630.

The FSIA was enacted, against the backdrop of Executive Branch authority over foreign sovereign immunity, in order to address a set of problems arising in civil suits against foreign sovereigns. Granting foreign sovereigns immunity from the jurisdiction of U.S. courts was historically "a matter of grace and comity," *Verlinden,* 461 U.S. at 486, which was committed to "the case-by-case prerogative of the Executive Branch," *Republic of Iraq v. Beaty,* 556 U.S. 848, 857 (2009). The Executive Branch's discretion in this area

flows from its constitutional primacy in conducting foreign affairs. *See, e.g.*, *Republic of Mexico v. Hoffman,* 324 U.S. 30, 34-36 (1945).

Prior to 1952, upon a request from a foreign state, the Executive Branch would intercede in a civil suit filed by a private litigant and request that the court recognize the foreign sovereign's immunity claim. *See Samantar,* 560 U.S. at 311-312. In 1952, however, the Executive Branch announced that it was adopting the "restrictive" view of foreign sovereign immunity, pursuant to which the Executive Branch would only "gran[t] immunity from suit to foreign governments" when the challenged acts were "sovereign or public acts," but not "private acts." Letter from Acting Legal Adviser Tate to Acting Attorney General Perlman (1952) (the "Tate Letter"); *see Verlinden*, 461 U.S. at 487.

The Executive Branch's new policy, however, soon gave way to mischief as "foreign nations often placed diplomatic pressure on the State Department" to urge immunity in private actions, and "political considerations led to suggestions of immunity in cases where immunity would not have been available under the restrictive theory." *Verlinden,* 461 U.S. at 487. Amid increasing interactions between Americans and foreign sovereigns, the Executive received an ever-increasing volume of requests for immunity and was becoming "embroiled" in "pending case[s]" when other countries "thrust the issue upon [it]." Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearing on H.R. 11315 Before the Subcomm. on Admin. Law & Governmental Relations of the H. Comm. on the Judiciary,

94th Cong., 2d Sess. 60 (1976) (the "1976 Hearings"). As a result, "private litigant[s]" faced "considerable uncertainty" about whether their ordinary legal disputes would be blocked "on the basis of nonlegal considerations through the foreign government's intercession with the Department of State." H.R. Rep. No. 94-1487, at 9 (1976) (the "1976 Report"); *see also Verlinden*, 461 U.S. at 487; 1976 Hearings 24-27 (State Department); *id*. at 31-35 (Justice Department).

To address these problems, the Executive Branch 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." 1976 Hearings 24 (State Department); *see id*. at 29 (describing 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") (Justice Department); *see also* Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the H. Comm. on the Judiciary, 93d Cong. 14-15 (1973) (statement accompanying original Executive Branch proposal). The bill was intended to "facilitate and depoliticize litigation against foreign states and to minimize irritations in foreign relations arising out of such litigation." 1976 Hearings 28-29 (quoting transmittal of bill from Executive to Congress). And it was intended to ensure that "American citizens are not deprived of normal legal redress against foreign states" that "act as a private party would." *Id*. at 24 (State Department); *see id*. at 31 ("private parties with claims

against foreign states arising out of their commercial or private-law activities should not be denied their day in court") (Justice Department). These drafters clearly understood the FSIA's provisions as governing civil actions.

As reflected in the committee reports, members of Congress shared that understanding. The House Report described the FSIA's purpose as "to provide when and how parties can maintain a lawsuit against a foreign state or its entities in the courts of the United States and to provide when a foreign state is entitled to sovereign immunity." 1976 Report 6. The House Report noted 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, and repeatedly referred to "plaintiffs," "suit(s)," "litigants," and "liability," *id.* at 6-8, 12. Indeed, the specific discussion of Section 1604, which confers immunity, spoke of "the plaintiff" and "the plaintiff's claim." *Id.* at 17. In sum, the legislative history contains "no indication" that Congress understood the statute "to govern criminal actions." *M/V Deltuva*, 752 F. Supp. 2d at 179.

Thus, immunity in criminal matters "simply was not the particular problem to which Congress was responding." *Samantar*, 560 U.S. at 323. Moreover, the considerations that moved Congress to enact the FSIA do not arise in criminal cases. The need for private litigants to have a predictable and uniform legal regime in suits against foreign sovereigns has no counterpart in criminal cases. And because the Executive controls whether to initiate a federal criminal matter against a

foreign state-owned entity, it can weigh the diplomatic risks against the law enforcement benefits. *See Pasquantino v. United States*, 544 U.S. 349, 369 (2005) ("[B]y electing to bring this prosecution, the Executive has assessed this prosecution's impact on this Nation's relationship with [a foreign state]."). It strains credulity that the political branches would have extinguished that discretion "without so much as a whisper" to that effect in the FSIA's legislative history. *Samantar*, 560 U.S. at 319.

In light of this history and purpose, which is consistent with the text and structure of the FSIA, this Court should not construe the FSIA to confer upon foreign state-owned entities "absolute immunity" from criminal prosecution. *See United States v. Al Kassar*, 660 F.3d 108, 125 (2d Cir. 2011) (courts "interpret statutes to give effect to congressional purpose").

4. Halkbank's Contrary Arguments Lack Merit

Halkbank claims that the FSIA's text "establishes that foreign states are immune from criminal jurisdiction." (Br. 25). This argument requires reading Section 1604 in isolation, contrary to the Supreme Court's admonition that the statute must be read "as a whole." *Samantar*, 560 U.S. at 319. As noted, Section 1604 operates "in tandem" with a grant of subject-matter jurisdiction, found in Section 1330(a), which applies only to *civil* actions. (*See* Point II.A.1, *supra*). Section 1604 is one provision of an Act, the text and structure of which are entirely focused on civil actions and the history and purpose of which demonstrates its uniquely

civil focus. (*See* Point II.A.2-3, *supra*). And Halkbank's argument for "absolute immunity" extending to foreign state-owned entities is particularly hard to reconcile with the treatment of such entities at common law. (*See* pp. 30-33 & n.4, *infra*).

Halkbank's argument relies on the statement, first appearing in *Argentine Republic v. Amerada Hess Shipping Corp.*, that the FSIA is "the sole basis for obtaining jurisdiction over a foreign state in our courts." 488 U.S. 428, 434 (1989). (*See* Br. 27-28 (quoting this and similar statements from subsequent opinions in civil cases)). But "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." *Grand Jury Subpoena*, 912 F.3d at 629; *see also Samantar*, 560 U.S. at 314 (stating that the FSIA, "*if it applies*, is the sole basis for obtaining jurisdiction over a foreign state in federal court") (emphasis added).

Amerada Hess was a civil case in which the Court rejected the plaintiffs' attempt to circumvent FSIA's grant of immunity by invoking the Alien Tort Statute, 28 U.S.C. § 1350; the Court found that basing jurisdiction on that statute or any "other grant of subject-matter jurisdiction *in Title 28*" would conflict with Congress's choice to deal comprehensively with the subject of foreign sovereign immunity in the FSIA. 488 U.S. at 437-38 (emphasis added); *see also Mobil Cerro Negro, Limited v. Bolivarian Republic of Venezuela*, 863 F.3d 96, 115 (2d Cir. 2017) (FSIA impliedly repealed 22 U.S.C. § 1650a with respect to enforcement of

arbitration awards against foreign sovereigns). "General language in judicial opinions" should be read "as referring in context to circumstances similar to the circumstances then before the Court and not referring to quite different circumstances that the Court was not then considering." *Illinois v. Lidster*, 540 U.S. 419, 424 (2004). In both *Amerada Hess* and *Mobil*, the conflicting statutes provided for *civil* jurisdiction against foreign sovereigns, and thus were "irreconcilable" with the FSIA's "*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). Section 3231—which pertains only to criminal prosecutions—does not create the same "irreconcilable" difference, and thus there is no basis to find that the FSIA repealed Section 3231 by implication. *See Morton v. Mancari*, 417 U.S. 535, 550 (1974) (stating the "cardinal rule that repeals by implication are not favored" and can only be found in the absence of some affirmative showing of an intention to repeal where "the earlier and later statutes are irreconcilable"). Nor do Section 3231 and Section 1604 contain such "positive repugnancy" that this Court could infer in the latter a legislative intent to displace the former. *United States v. Jackson*, 805 F.2d 457, 460 (2d Cir. 1986).

The out-of-circuit cases cited by Halkbank are unpersuasive. (*See* Br. 26 & n.3). These cases involve civil RICO claims, not criminal prosecutions, and thus do not address the applicability of Section 3231. *See Keller*, 277 F.3d at 820 (finding that civil RICO claim against foreign state could not proceed because "the

FSIA grants immunity to foreign sovereigns from criminal prosecution"); *Dale v. Colagiovanni*, 337 F. Supp. 2d 825, 842-43 (S.D. Miss. 2004) (same), *rev'd on other grounds*, 443 F.3d 425 (5th Cir. 2006); *Gould, Inc. v. Mitsui Mining & Smelting Co.*, 750 F. Supp. 838, 843-44 (N.D. Ohio 1990) (same). These cases also rely on the same isolated reading of Section 1604 and out-of-context statements addressed above, failing to account for the text, structure, and history of the FSIA, as the better-reasoned authorities that have reached the opposite result do. *See, e.g.*, *Hendron*, 813 F. Supp. at 974-77 (FSIA does not apply to criminal cases); *M/V Deltuva*, 752 F. Supp. 2d at 178-80 (same); *see also Grand Jury Subpoena*, 912 F.3d at 625-33 (rejecting argument that FSIA stripped district court of jurisdiction over criminal cases, while assuming without deciding that FSIA can apply in a criminal case). Furthermore, *Keller* is no longer good law on its conclusion that the FSIA provided civil immunity to individual officials of a foreign state. *See Samantar*, 560 U.S. at 310 n.4. And the manner in which *Samantar* abrogated *Keller* is telling: although the text of the FSIA could be read consistently with *Keller*'s view on individual foreign officials, the Supreme Court determined from the FSIA's history, purpose, structure, and text read "as a whole" that extending coverage to scenarios "never mentioned in the text" was incorrect. *Id.* at 319-26; *see also Southway v. Central Bank of Nigeria*, 198 F.3d 1210, 1215 (10th Cir. 1999) ("If Congress intended defendants . . . to be immune from criminal indictment under the FSIA, Congress should amend the FSIA to expressly so state.").

Halkbank's reliance on "common law, historical practice, the practice of other nations, and international law" is unavailing. (Br. 29-32). Much of this argument consists of generalized assertions about the "absolute" immunity of foreign states, failing to recognize a key distinction between foreign *states* and foreign state-owned *entities*. The authorities cited by Halkbank refer only to the former: *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 821 (2018) refers to the immunity of "foreign states"; and the British treatise so frequently invoked by Halkbank similarly refers at most to a consensus against prosecuting foreign states themselves, *see* Hazel Fox, *The Law of State Immunity* 91 (3d ed. 2013) (immunity bars applying "criminal law to regulate the public governmental activity of the foreign State"); *id.* at 91 n.65 (states shielded from claims "related to the exercise of governmental powers").

Contrary to Halkbank's assertions, "[a]lthough foreign states themselves are not generally subject to prosecution in domestic courts, there is no categorical bar to criminal proceedings against foreign state-owned enterprises in either domestic or international law." Chimene Keitner, *Prosecuting Foreign States*, Va. J. Int'l Law Vol. 61, No. 2 (2021) at 6; *see also id.* 25-34 (collecting authorities). "[I]t 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 governing such transactions." *United States v.*

Deutsches Kalisyndikat Gesellschaft, 31 F.2d 199, 200 (S.D.N.Y. 1929).[4]

Thus, while the FSIA generally treats foreign states and instrumentalities alike and determines immunity for both based on the conduct at issue, *see* 28 U.S.C. § 1603(a); *Verlinden*, 461 U.S. at 487, in criminal cases the Executive has long considered the nature of the entity as well as the underlying conduct. While the Executive treats foreign *states* as absolutely immune from prosecution, it does not accord the same treatment to separate juridical entities performing

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[4] The fact that, as Halkbank notes (Br. 30), other nations have enacted immunity statutes that explicitly apply to criminal prosecutions undercuts, rather than supports, the bank's argument. If, as Halkbank claims, the principle of absolute foreign sovereign immunity from criminal prosecution was so self-evident as to be an inherent part of the FSIA, then other countries—which Halkbank claims share that understanding—would have no need to explicitly include references to criminal liability in their immunity statutes. Halkbank also ignores that many of those same laws make clear that foreign state-owned entities are generally not treated as the state for purposes of immunity, except where they are engaging "in the exercise of sovereign authority." State Immunity Act 1978, c. 33, § 14(2) (United Kingdom); *see also* Foreign State Immunities Act of 1981 §§ 1(2)(i), 15(1) (South Africa); The State Immunity Ordinance No. 6 of 1981 § 15 (Pakistan); State Immunity Act, Ch. 313, Pt. 3, § 16 (rev 2014 ed.) (Singapore).

non-sovereign functions, such as state-owned corporations. As a result, both before the FSIA's passage and since, the United States has criminally prosecuted and served criminal process on commercial enterprises that are majority-owned by foreign governments. *See, e.g.*, *In re Pangang Grp., Co.*, 901 F.3d 1046, 1049 (9th Cir. 2018);[5] *M/V Deltuva*, 752 F. Supp. 2d at 176-80; *In re Sealed Case*, 825 F.2d 494, 495 (D.C. Cir. 1987); *In re Grand Jury Investigation of Shipping Industry*, 186 F. Supp. 298, 318-20 (D.D.C. 1960); *In re Investigation of World Arrangements*, 13 F.R.D. 280, 288-92 (D.D.C. 1952). That includes the criminal prosecution of a company that successfully claimed immunity under the FSIA when sued civilly. *Compare United States v. Statoil, ASA*, No. 06-cr-960 (S.D.N.Y. Oct. 13, 2006) (Norwegian state-owned company charged in criminal information), *with In re N. Sea Brent Crude Oil Futures Litig.*, 2016 WL 1271063, at *1 (S.D.N.Y. Mar. 29, 2016) (same company obtains dismissal of civil suit based on immunity under FSIA). Under Halkbank's reading, the Executive has been violating the FSIA's immunity provision for decades (and common and international law for even longer).

In sum, because the common law was at best "unsettled" in 1976 as to "criminal immunities for a

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[5] Pangang Group has taken an interlocutory appeal from the district court's denial of its motion to dismiss based on sovereign immunity. The appeal is pending before the Ninth Circuit. *See United States v. Pangang Grp., Co.*, No. 19-10306 (argued Oct. 15, 2020).

corporation owned by a foreign state," it is "hard[ ] to swallow" the assertion that Congress silently codified an *absolute* immunity for such entities in the FSIA. *Grand Jury Subpoena*, 912 F.3d at 630.

That assertion is even harder to swallow given that, more generally, "the granting or denial of [foreign sovereign] immunity was historically the case-by-case prerogative of the Executive Branch." *Beaty*, 556 U.S. at 857; *see also Verlinden*, 461 U.S. at 486 (foreign sovereign immunity is historically a "matter of grace and comity"). While the FSIA standardized this practice in civil litigation, the Act's text and history do not reflect a similar intent with respect to criminal cases. (*See* Point II.A.2-3, *supra*). Courts do not lightly read statutes to displace such common-law principles, *see, e.g.*, *United States v. Texas*, 507 U.S. 529, 534 (1993), so if Congress had intended to do so in the criminal context, "one would expect that answer to show up clearly in the Act's text." *Grand Jury Subpoena*, 912 F.3d at 630; *see also Samantar*, 560 U.S. at 319 (rejecting argument that FSIA conferred immunity on foreign officials "without so much as a whisper from Congress on the subject"); *Whitman v. American Trucking Assocs.*, 531 U.S. 457, 468 (2001) (Congress does not "hide elephants in mouseholes").

Halkbank's one-size-fits-all approach to foreign sovereign immunity in the criminal context would also lead to results that Congress could not possibly have intended. Many national security prosecutions target, among other things, conduct on behalf of foreign nations just as easily committed by state-owned entities as by individuals. Yet under the bank's interpretation,

the United States could not prosecute a state-owned company involved in, for example, evading U.S. sanctions; committing espionage; laundering the proceeds of terrorism and narcotics-trafficking through the U.S. financial system; or illegally hacking U.S. government computer systems to steal classified information. What is more, Halkbank's reading contemplates that the United States could not even issue grand jury subpoenas to such entities, even to gather evidence of domestic criminal conduct by individuals, including U.S. citizens. Thus, a foreign state-owned company "could flagrantly violate criminal laws and the U.S. government would be powerless to respond save through diplomatic pressure." *Grand Jury Subpoena*, 912 F.3d at 630; *see also United States v. Fokker Servs. B.V.*, 818 F.3d 733, 742 (D.C. Cir. 2016) ("settled principles counsel against interpreting statutes" to "impinge" on prosecutorial discretion).[6]

The D.C. Circuit was right to "doubt very much that Congress so dramatically gutted the

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[6] Halkbank quotes from the Restatement (Third) of Foreign Relations Law of the United States (1987) to suggest that only "nonjudicial measures" are available to enforce the criminal laws of this nation against a foreign state (Br. 31), but again it ignores the distinction between states and state-owned entities. And the updated Restatement (Fourth) of Foreign Relations Law of the United States notes that, "[t]o date, no reported court decision has dismissed an indictment or otherwise suppressed a criminal prosecution based on immunity conferred by the FSIA." § 451 n. 4.

government's crime-fighting toolkit." *Grand Jury Subpoena*, 912 F.3d at 630. Put differently, it is inconceivable that Congress, in enacting legislation focused on problems arising from private disputes with foreign sovereigns, purported to silently abdicate the Executive Branch's ability to respond to criminal activity by foreign state-owned entities with criminal prosecution.

B. Even if the FSIA Did Apply to Criminal Prosecutions, Halkbank Would Not Be Immune

If the FSIA applies to criminal prosecutions, then the "commercial activity" exception contained therein must also apply. (Point II.B.1, *infra*). As the District Court correctly found (SA 8-10), the conduct alleged in the Indictment independently satisfies each of the three clauses of this exception. (Point II.B.2, *infra*).

1. If the FSIA Applies to Criminal Prosecutions, the "Commercial Activity" Exception Applies Also

As noted, the FSIA provides that "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 of this chapter." 28 U.S.C. § 1604. As relevant here, the "commercial activity" and other exceptions set forth in Section 1605 apply "in any case." 28 U.S.C. § 1605(a). That language is decisive. If the FSIA applies in criminal cases at all, then criminal cases are clearly included among the "any" cases to which Section 1605's exceptions may apply. *Grand*

Jury Subpoena, 912 F.3d at 632. Halkbank's arguments to the contrary are meritless.

Halkbank argues that because the FSIA's subject-matter jurisdiction provision, Section 1330(a), grants jurisdiction in "nonjury civil action[s]" and not criminal prosecutions, the Act's exceptions could never apply. (Br. 34-35). Relatedly, Halkbank again relies on statements from civil cases describing Section 1330(a) as the sole source of subject-matter jurisdiction under the FSIA. (Br. 35). But the legislative history makes clear that Section 1604, not Section 1330(a), is the "only basis upon which a foreign state could claim immunity." 1976 Report 17. In any event, these arguments simply repackage Halkbank's meritless argument that the FSIA displaces other applicable statutory grants of subject-matter jurisdiction, such as, in this case, Section 3231. Because Section 3231 is the proper source of the district court's jurisdiction over criminal prosecutions, Halkbank's argument misses the mark. (*See* Point II.A, *supra*).

Halkbank next argues that the text of the FSIA's exceptions does not support application to a criminal prosecution because, by their terms, most of them apply to civil cases. (Br. 36-37). While the exceptions do use terminology common to civil cases, that is simply evidence that the FSIA does not apply *at all* in criminal cases. (*See* Point II.A.2, *supra*). It does not suggest, as Halkbank would have it, that the FSIA prohibits all criminal actions against a foreign sovereign or its agents, without even recognizing the same exceptions

that apply in the civil context.[7] And, as noted, Section 1605's exceptions apply "in any case."

Halkbank's reading of the statute is a bold attempt to have it both ways. Section 1604 provides immunity from "the jurisdiction of the courts of the United States." In parallel language, Section 1605 provides that a foreign state shall *not* be immune "from the jurisdiction of the court of the United States" in "any case" that meets one of the enumerated exceptions. Yet as Halkbank would have it, the former reference to the jurisdiction of the courts of the United States refers to *both* civil and criminal cases, while the latter use of the same language (accompanied by the phrase "any case," no less) means *only* civil cases. That makes no sense. *See Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 479 (1992) (describing "the basic canon of statutory construction that identical terms within an Act bear the same meaning"). And, in any event, assuming the premise that the FSIA applies in criminal cases, neither Section 1605 more generally nor the relevant

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[7] Halkbank's argument that it would be strange if the commercial activity exception applied in criminal cases but not, for example, the terrorism exception is similarly unpersuasive (Br. 36), as it simply highlights another reason why this Court should adopt the far simpler reading that the FSIA should be read not to apply in criminal cases *at all*. In any event, because the terrorism exception was added decades after the FSIA was enacted, it affords no reliable "basis for inferring the intent of an earlier Congress." *Texas*, 507 U.S. at 535 n.4.

exception in this case, Section 1605(a)(2), specifically contains any language limiting its application to civil actions. These exceptions apply "in any case."

Finally, Halkbank repeats its distorted reading of common and international law—again relying principally on a British scholarly text—to urge that the exceptions must be read to apply only to civil cases. (*See* Br. 37-38). But as previously discussed, prior to the FSIA, foreign sovereigns did not enjoy immunity from the jurisdiction of U.S. courts as a matter of right, but rather as a matter of grace and comity to be determined by the Executive Branch. *See, e.g.*, *Verlinden,* 461 U.S. at 486; *Beaty*, 556 U.S. at 857. And foreign state-owned entities were not entitled to the same treatment as foreign states under common law or international law. (*See* pp. 30-33 & n.4, *supra*). The FSIA "[f]or the most part" codified the restrictive theory of sovereign immunity in civil cases and replaced Executive prerogative with a fixed system of immunity and exceptions to that immunity. *Verlinden*, 461 U.S. at 488. If that system extends to the criminal sphere, there is no reason to think that Congress would have conferred an "absolute immunity" that did not exist at common law upon foreign state-owned entities, without including the exceptions to any immunity that would apply if such entities were sued civilly. *See, e.g.*, Keitner, *supra*, at 31-32 (noting that under restrictive theory "an entity's status as a foreign SOE is less important to determining its potential exemption from domestic jurisdiction than the nature of the conduct at issue in the proceeding").

In sum, the commercial activity exception in Section 1605(a)(2) does not exclude criminal actions, and there is no basis to read that limitation into it.

2. The Indictment's Allegations Satisfy All Three Clauses of the "Commercial Activity" Exception

The FSIA 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; or [2] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [3] upon 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). As defined in the FSIA, "commercial activity" means "either a regular course of commercial conduct or a particular commercial transaction or act." 28 U.S.C. § 1603(d). "The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." *Id.*; *see also Pablo Star Ltd. v. Welsh Gov't*, 961 F.3d 555, 560 (2d Cir. 2020) ("[P]urpose is the *reason* why the foreign state engages in the activity and nature is the *outward form* of the conduct that the foreign

state performs or agrees to perform."). A foreign sovereign engages in "commercial activity" when "it exercises only those powers that can also be exercised by private citizens, as distinct from those powers peculiar to sovereigns." *Petersen Energía Inversora S.A.U. v. Argentine Republic*, 895 F.3d 194, 205 (2d Cir. 2018).

Analysis of the commercial activity exception starts with "identifying the particular conduct on which [the] action is 'based' for purposes of the FSIA." *Saudi Arabia v. Nelson*, 507 U.S. 349, 356 (1993). That in turn requires identifying "the particular conduct that constitutes the gravamen of the suit." *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 35 (2015).

The Indictment alleges that Halkbank agreed to and did facilitate transactions designed to extract surreptitiously Iran's oil and gas proceeds held at the bank, so that those funds could be used to make international payments through the U.S. financial system on behalf of Iran while hiding Iran's control of those transactions. It further alleges that Halkbank lied to Treasury officials in the United States to conceal the scheme and evade applicable sanctions. (*See* Ind. ¶¶ 4-6, 40-49, 63, 64). The charges in the Indictment are "based" on these allegations because, "if proven" along with the requisite *mens rea*, *Nelson*, 507 U.S. at 361, they are just as adequate to establish the guilt of Halkbank as they were to establish the guilt of one of its executives. *See Atilla*, 966 F.3d at 128-29 (evidence proved that Halkbank executives were involved in a scheme to launder Iranian oil proceeds through the U.S. financial system on behalf of Iran, and took steps to conceal that scheme from U.S. officials).

The first two clauses of Section 1605(a)(2) apply to the domestic aspects of Halkbank's participation in the scheme—namely, the misrepresentations made to Treasury officials during meetings, conference calls, and other communications in the United States to facilitate ongoing sanctions evasion. (*See, e.g.*, Ind. ¶¶ 5, 26, 42, 45, 63).

Halkbank is an international bank that offers, among other things, correspondent banking services through financial institutions in the United States. Dealing with U.S. government agencies responsible for monitoring such relationships is plainly part of the bank's business; it is, in fact, one of the ways in which the bank maintained its ability to conduct that business. (*See* Ind. ¶ 5). Accordingly, communications with the Treasury Department about U.S. sanctions applicable to the bank's business are plainly "the *type* of actions by which a private party [*i.e.*, an international bank] engages in trade and traffic or commerce." *Pablo Star Ltd.*, 961 F.3d at 561 (emphasis in original); *see also Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992) ("[W]hen a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are 'commercial' within the meaning of the FSIA."). The fact that U.S. officials were the intended audience for Halkbank's misrepresentations, and that Halkbank made these misrepresentations to protect its correspondent banking relationships with U.S. banks, which it used to route hundreds of millions of dollars through the U.S. financial system, demonstrates that Halkbank's conduct had "substantial contact" with the United States. 28 U.S.C. § 1603(e) (defining the term

"commercial activity carried on in the United States by a foreign state"); *see*, *e.g.*, *Pablo Star Ltd.*, 961 F.3d at 566 (Welsh government's distribution of marketing materials in New York demonstrated "substantial contact" under FSIA).

Accordingly, Halkbank's contact with Treasury was "commercial activity carried on in the United States by [Halkbank]," as required for the first clause of Section 1605(a)(2) to apply. And even if Halkbank's communications with Treasury were not "commercial activity" for purposes of the first clause, they were nevertheless "act[s] performed in the United States in connection with a commercial activity of [Halkbank] elsewhere," *i.e.*, its banking activity in Turkey, under the second clause.

Halkbank's principal objection to the application of the first two clauses is its contention that the "gravamen" or "core" of the alleged scheme consists of acts that occurred abroad, and cannot be said to include Halkbank's interactions in the United States with Treasury. (Br. 39-40, 44-45). The District Court correctly concluded otherwise. (SA 8-10). Halkbank is specifically charged in Count One with defrauding U.S. government agencies responsible for administering U.S. sanctions, in Count Two with violating the sanctions regime administered by those agencies, and in Counts Three through Six with laundering approximately $1 billion through U.S. banks in violation of that sanctions regime. The Indictment is replete with allegations focused on Halkbank's conduct in the United States or targeting U.S. officials. (*See, e.g.*, Ind. ¶¶ 5, 26, 42, 45, 63, 64). Halkbank's attempt to

mischaracterize the core of the Government's case is unpersuasive.

In addition, the third clause of Section 1605(a)(2) applies to the international aspects of Halkbank's conduct—specifically, knowingly designing the fraudulent gold and food schemes and processing transactions in furtherance of those schemes. (*See* Ind. ¶¶ 4-6, 32-35, 46-49, 50-58). Halkbank cannot seriously dispute that the Indictment's core allegations include conduct abroad, and providing banking services and executing payment instructions are plainly "commercial activity . . . outside this country." *Weltover, Inc.*, 504 U.S. at 614. Furthermore, Halkbank's acts caused a "direct effect" in this country: Its conduct was a necessary step in a scheme that victimized U.S. financial institutions and the U.S. government by laundering more than $1 billion through the U.S. financial system in violation of the U.S. embargo on Iran. *See, e.g.*, *Atlantica Holdings v. Sovereign Wealth Fund Samruk-Kazyna JSC*, 813 F.3d 98, 110-11 (2d Cir. 2016) ("direct effect" requirement satisfied where defendant encouraged involvement of U.S. victims and the United States was the "locus of the fraud").

Halkbank raises two principal objections to the application of the third clause. First, Halkbank claims that its conduct was "sovereign, not commercial." (Br. 40-41). But the "core" of the Government's case is not simply that Halkbank is the Turkish government's designated financial institution responsible for receiving and holding Iranian oil sale proceeds in Turkey. Rather, the core allegations are that Halkbank devised a scheme to use those oil proceeds to fund financial

transactions through U.S. banks on behalf of Iran in violation of U.S. sanctions and banking laws, and lied to U.S. government agencies to conceal the scheme. The bank's acts in furtherance of that scheme—honoring payment instructions and interacting with government agencies—are part of any institutional bank's business. The Turkish government's designation of Halkbank as the repository for Iranian oil proceeds resulting from oil transactions between Iran and Turkey is merely an antecedent "sovereign" act for the financial transactions and interactions that followed, not the basis of the charges. *See Petersen Energía*, 895 F.3d at 205 (subsequent commercial activity was not sovereign simply because it was "triggered by its sovereign act").

Halkbank's claim that it was administering U.S. sanctions laws does not convert its conduct into sovereign activity. (*See* Br. 41-42). U.S. sanctions laws apply equally to private and state-owned foreign banks, and thus complying with such sanctions is not "peculiar to sovereigns." *Petersen Energía*, 895 F.3d at 205. Nor do the cases on which Halkbank relies support its contention, as in each case the conduct that formed the basis of the plaintiff's suit was an act that only a government could perform. *See Barnet v. Ministry of Culture*, 961 F.3d 193, 201-02 (2d Cir. 2020) ("outward form" of Greece's "activity" was "the enactment and enforcement of laws declaring the figurine to be state property"; "no private party could nationalize historical artifacts and regulate the export and ownership of those nationalized artifacts"); *Anglo-Iberia Underwriting Mgmt. v. P.T. Jamsostek*, 600 F.3d 171, 177-78 (2d Cir. 2010) (state-owned health insurer provided

services "as the default health insurer under Indonesia's national social security program" and thus its activities did "not equate to those of an independent actor in the private marketplace"). In contrast, a private bank can act on wire instructions or consult with Treasury. And the fact that those acts were undertaken to effectuate Turkey's trade policy with Iran is irrelevant, because that goes to "purpose" of these acts, not their "nature." *Pablo Star Ltd.*, 961 F.3d at 560. Halkbank's conduct was "commercial activity."

Halkbank next argues that its conduct—which led to approximately $1 billion being illegally funneled through the U.S. financial system—did not have a "direct effect" in the United States. (Br. 42-44). This argument fares no better. The Government has charged Halkbank with conspiring to and participating in schemes to defraud the United States, to violate U.S. sanctions against exporting goods and services from the United States, to defraud financial institutions in the United States, and to launder illegal funds through the U.S. financial system. Put simply, the United States was the ultimate scene of the crime, and, accordingly, the bank's conduct had a "direct effect" in this country. *See Atlantica Holdings*, 813 F.3d at 110-11.

Halkbank states that "only five percent" of Iran's illicit oil proceeds transited through the U.S. financial system (Br. 43), but fails to note that this constitutes approximately $1 billion that was laundered on behalf of one of this country's most significant adversaries and the world's foremost state sponsors of terrorism. Affording such a foe with $1 billion in U.S. currency to

which it would not otherwise have access can hardly be dismissed as insubstantial. Moreover, Halkbank attempts to elide the fact that it is only this $1 billion that could form the basis for the bulk of the U.S. criminal charges; funds passing through European banks only would not satisfy the IEEPA, bank fraud, and money laundering statutes charged in the Indictment. What Halkbank attempts to dismiss as a paltry "five percent" of the total Iranian slush fund is 100% of the funds that could serve as the "gravamen" of the Government's claims.

Regardless, as Halkbank acknowledges (Br. 43), the "direct effect" test does not turn on the "substantiality" of the impact in the United States, but rather the "immediacy" of that impact. *Virtual Countries, Inc. v. Republic of South Africa*, 300 F.3d 230, 236 (2d Cir. 2002). Halkbank attempts to divorce itself from these illegal transactions by describing them as "a result of others' acts—not Halkbank's." (Br. 43). But the "others" are Halkbank's co-conspirators, such as Zarrab. (*See* Ind. ¶ 26). As a result, any actions taken by Zarrab or the bank's other co-conspirators—such as conducting illegal transactions passing through U.S. banks—are chargeable to Halkbank as if the bank itself engaged in those transactions. *See, e.g.*, *United States v. Russo*, 302 F.3d 37, 45 (2d Cir. 2002) (law deems co-conspirators to be one another's agents); *United States v. Amrep Corp.*, 560 F.2d 539, 545 (2d Cir. 1977) (defendant liable for acts of co-conspirators within scope of agreement). Thus, unlike in *Virtual Countries*, 300 F.3d at 237, upon which Halkbank relies, innocent, independent intervening actors are not

the cause of the impact in the United States. Halkbank's coconspirators are.

In sum, even if the FSIA applies in this case, each of the three clauses of Section 1605(a)(2) would independently deprive Halkbank of any immunity it would otherwise enjoy.

C. The Common Law Does Not Bar This Prosecution

The common law does not confer immunity on Halkbank, either.[8] As the Supreme Court has explained, "[t]he doctrine of foreign sovereign immunity developed as a matter of common law long before the FSIA was enacted in 1976." *Samantar*, 560 U.S. at 311. Under that body of common law precedents, deference to the Executive Branch's determination regarding foreign sovereign immunity is binding. *Id.* at 311-12.

In *Ex Parte Republic of Peru*, for example, the Supreme Court held that "the judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an

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[8] Halkbank appears to argue that it is entitled to common-law immunity only to the extent the FSIA does not apply. (Br. 46). If the FSIA does apply in criminal cases, then it likely supersedes the common-law regime. *See Samantar*, 560 U.S. at 313, 325. But, in that case, Halkbank would not be entitled to immunity because of the FSIA's commercial activity exception. (*See* Point II.B, *supra*).

antagonistic jurisdiction." 318 U.S. 578, 588 (1943) (quoting *United States v. Lee*, 106 U.S. 196, 209 (1882)). Similarly, in *Hoffman*, the Supreme Court instructed that it is "not for 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; *see also Compania Espanola de Navegacion Maritima, S.A. v. The Navemar*, 303 U.S. 68, 74 (1938). The Executive Branch's authority to make such determinations flows from its constitutional responsibility for conducting the Nation's foreign relations. *See, e.g.*, *Ex Parte Peru*, 318 U.S. at 589; *Hoffman*, 324 U.S. at 34; *Lee*, 106 U.S. at 209; *National City Bank v. Republic of China*, 348 U.S. 356, 360-61 (1955).

In bringing this prosecution, the Executive Branch has determined that Halkbank should not be granted immunity from criminal prosecution for the alleged conduct. As the District Court correctly found (SA 10), that determination is "conclusive." *Ex Parte Peru*, 318 U.S. at 589; *see also Noriega*, 117 F.3d at 1212 ("The Executive Branch has not merely refrained from taking a position on this matter; to the contrary, by pursuing Noriega's capture and this prosecution, the Executive Branch has manifested its clear sentiment that Noriega should be denied head-of-state immunity. Noriega has cited no authority that would empower a court to grant head-of-state immunity under these circumstances."); *Matar v. Dichter*, 563 F.3d 9, 14 (2d Cir. 2009) (deferring to Executive's determination of immunity under common law).

Halkbank attempts to distinguish this authority by suggesting that the rationale for deference to the Executive is somehow unique to the civil context, "for example, in determining the content of international norms, the state of relations between the United States and the foreign sovereign, whether the suit involved the sovereign's strictly commercial acts, or whether the suit at bar implicated a foreign sovereign at all." (Br. 47). But these considerations are not materially different in the criminal context. It remains the responsibility and prerogative of the Executive Branch to make a case-by-case determination of issues that implicate the Nation's foreign affairs: "[B]y electing to bring this prosecution, the Executive has assessed this prosecution's impact on this Nation's relationship with [a foreign state]." *Pasquantino*, 544 U.S. at 369; *see also United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) (recognizing that the Executive is "the sole organ of the federal government in the field of international relations").

Halkbank again claims that "[f]oreign states" enjoy an "absolute immunity from criminal jurisdiction at common law," and further contends that the courts need not "allow[ ] the Executive to unilaterally *abrogate* the common law." (Br. 46, 48). Whatever the merit of the latter proposition, Halkbank has not established the former, because it again fails to acknowledge that whatever the common-law immunity of foreign *states* from criminal prosecution, there is considerable precedent concerning the lack of such absolute immunity for foreign state-owned entities. (*See* pp. 30-33 & n.4, *supra*). There is therefore no concern that the "Executive's action clearly violates the common law." (Br. 49-

50). As such, it is not for this Court to "allow an immunity on new grounds which the government has not seen fit to recognize." *Hoffman*, 324 U.S. at 35.

CONCLUSION

Halkbank's appeal should be dismissed or, in the alternative, the District Court's order denying Halkbank's motion to dismiss the Indictment should be affirmed.

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March 3, 2021

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of the Federal Rules of Appellate Procedure and this Court's Local Rules. As measured by the word processing system used to prepare this brief, there are 12,078 words in this brief.

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