20-3499

In the United States Court of Appeals for the Second Circuit

UNITED STATES OF AMERICA,
APPELLEE,

v.

REZA ZARRAB, AKA RIZA SARRAF, CAMELIA JAMSHIDY, AKA KAMELIA JAMSHIDY, HOSSEIN NAJAFZADEH, MOHAMMAD ZARRAB, AKA CAN SARRAF, AKA KARTALMSD, MEHMET HAKAN ATILLA, MEHMET ZAFER CAGLAYAN, ABI, SULEYMAN ASLAN, LEVENT BALKAN, ABDULLAH HAPPANI,
DEFENDANTS,

TURKIYE HALK BANKASI A.S., AKA HALKBANK,
DEFENDANT–APPELLANT.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, NO. 1:15-CR-867-10 (THE HONORABLE RICHARD M. BERMAN, J.)

BRIEF OF DEFENDANT–APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, counsel for the undersigned certifies as follows: Appellant Türkiye Halk Bankasi A.Ş. is 75% owned by the non-party Turkish Wealth Fund, which is part of and owned by the Turkish State. No publicly held corporation owns 10% or more of the stock of non-party Turkish Wealth Fund.

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INTRODUCTION

At common law, foreign sovereigns are absolutely immune from criminal jurisdiction. And they are subject to civil jurisdiction only in actions arising from their private or commercial acts. Congress codified that regime when it enacted the Foreign Sovereign Immunities Act (FSIA): The statute's immunity provision broadly grants foreign states presumptive immunity from "the jurisdiction of the courts of the United States and of the States." 28 U.S.C. § 1604. And the statute's jurisdictional provision gives the district courts power only over "civil action[s]" that satisfy certain limited exceptions to immunity. *Id.* § 1330(a).

Without citing, quoting, or discussing these provisions, the district court erroneously held that the FSIA deprives foreign states, including appellant, of their historic immunity from criminal jurisdiction. The district court's decision to assume criminal jurisdiction over a foreign state ignores the text and structure of the FSIA; ignores the history of foreign sovereign immunity; cannot be squared with international law; and departs from the practice of other Nations. It should be reversed.

STATEMENT OF JURISDICTION

The district court purported to have jurisdiction under 18 U.S.C. § 3231. J.A.114. Appellant Türkiye Halk Bankasi A.Ş. (Halkbank) is immune from that jurisdiction under 28 U.S.C. § 1604 and the common law because, as the indictment establishes, it is an agency or instrumentality of a foreign state, the Republic of Turkey. *See infra* Part II.

On October 1, 2020, the district court denied Halkbank's motion to dismiss the indictment on foreign sovereign immunity grounds. J.A.103. Halkbank timely filed a notice of interlocutory appeal on October 9, 2020. J.A.119. This Court has jurisdiction over Halkbank's appeal under 28 U.S.C. § 1291, pursuant to the collateral-order doctrine. *See infra* Part I.

STATEMENT OF THE ISSUES

1. Whether this Court has jurisdiction over Halkbank's appeal pursuant to the collateral-order doctrine.

2. Whether foreign sovereign immunity bars the prosecution below.

STATEMENT OF THE CASE

This case raises the question whether the FSIA and common law permit criminal prosecution of foreign sovereigns in the courts of the United States. The district court (Judge Richard M. Berman) denied defendant–appellant's

motion to dismiss the superseding indictment on foreign sovereign immunity grounds. J.A.103. Halkbank now appeals.

A. The Foreign Sovereign Immunities Act

1. As early as 1812, the Supreme Court recognized that the common law afforded foreign sovereigns immunity from the jurisdiction of U.S. courts. *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136–38 (1812). The "perfect equality and absolute independence of sovereigns" had "given rise to a class of cases in which every sovereign is understood" to grant immunity to other sovereigns. *Id.* at 137. The scope of the immunity was defined by "the usages and received obligations of the civilized world." *Id.*; *see id.* at 136–42.

Initially "foreign states enjoyed absolute immunity from *all actions* in the United States," both civil and criminal. *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 821 (2018) (emphasis added). "[T]he whole civilized world concurred" that sovereign immunity included the foreign sovereign's immunity from "arrest or detention." *The Schooner Exchange*, 11 U.S. (7 Cranch) at 137; *see also Tucker v. Alexandroff*, 183 U.S. 424, 458 (1902) (*The Schooner Exchange* recognized immunity from "civil and criminal jurisdiction"). Absolute foreign sovereign immunity from all jurisdiction remained the law in U.S. courts for more than 150 years.

Beginning in 1952, however, courts began recognizing that international norms no longer provided foreign sovereign immunity in some civil cases. The shift was a reaction to the Tate Letter, in which the State Department explained that its "study of the law of sovereign immunity" in the courts of other Nations had yielded "little support … for continued full acceptance of the absolute theory of sovereign immunity." *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 711, 714 (1976) (Tate Letter reproduced as Appendix 2 to opinion of White, J.). Most Nations had already recognized "the 'restrictive theory' of sovereign immunity." *Permanent Mission of India to the U.N. v. City of New York*, 551 U.S. 193, 199 (2007). Under the "restrictive" theory, foreign states would continue to have sovereign immunity, but there would be an exception for civil cases "arising out of a foreign state's strictly commercial acts." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 487 (1983). Although the State Department "realized that a shift in policy by the executive cannot control the courts," the Department announced that it would follow the restrictive theory and no longer suggest immunity to the courts in civil cases arising out of a foreign state's commercial activities. *Alfred Dunhill*, 425 U.S. at 714 (Tate Letter); *see also Rubin*, 138 S. Ct. at 822.

Importantly, however, the "adoption of a restrictive [theory] has not been treated as having any relevance in relation to the Absolute Immunity of the foreign State from criminal proceedings." Hazel Fox & Philippa Webb, *The Law of State Immunity* 94 (3d ed. 2013); *see also id.* at 91 (The movement in "civil proceedings from an absolute to a restrictive [theory] of State immunity left untouched the position [of absolute immunity] in criminal proceedings."). "Without exception," therefore, "the legislation in common law countries introducing the restrictive approach of immunity in civil proceedings excludes its application to criminal proceedings." *Id.* at 92 & nn.67–68 (collecting examples of sovereign immunity statutes).

2. Congress codified these common-law principles in the FSIA, which "comprehensively regulat[es] the amenability of foreign nations to suit in the United States." *Verlinden*, 461 U.S. at 493; *see Permanent Mission of India*, 551 U.S. at 199 (the FSIA "codif[ies] … international law at the time of the FSIA's enactment"). "[C]onsistent with the way in which the law of sovereign immunity has developed," H.R. Rep. No. 94-1487, at 17 (1976), the FSIA "starts from a premise of immunity and then creates exceptions to the general principle." *Bolivarian Republic of Venez. v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1320 (2017) (quoting H.R. Rep. No. 94-1487, at 17). The

FSIA's immunity provision codified the common-law principle of presumptive sovereign immunity from *all* jurisdiction, both civil and criminal: "[A] foreign state shall be immune from the jurisdiction of the courts of the United States and of the States" when no exception to immunity applies. 28 U.S.C. § 1604; *see Keller v. Cent. Bank of Nigeria*, 277 F.3d 811, 820 (6th Cir. 2002), *abrogated on other grounds by Samantar v. Yousuf*, 560 U.S. 305 (2010).[1] And the FSIA's jurisdictional provision enacted the restrictive theory as an exception to immunity by granting district courts jurisdiction over foreign states for "nonjury civil action[s]" when a statutory exception to immunity does apply—for example, when the suit is based on the foreign state's commercial activities. 28 U.S.C. § 1330(a); *see id.* § 1605(a)(2).

As the Supreme Court has observed, "[s]ections 1604 and 1330(a) work in tandem" and provide "the sole basis for obtaining jurisdiction over a foreign state in our courts." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). Together, these provisions capture the common law

[1] The FSIA's immunity provision does not distinguish between a foreign state and an agency or instrumentality of a foreign state. 28 U.S.C. § 1604. Agencies and instrumentalities—which encompass foreign corporations majority-owned by the foreign state in which they are organized, *id.* § 1603(b)—are thus entitled to the same immunity from jurisdiction as the foreign state itself. *See id.* §§ 1603–04.

at the time of the FSIA's enactment: Foreign states are immune from criminal jurisdiction, but district courts have jurisdiction over certain civil actions under the restrictive theory.

B. The Government's Allegations

The facts of this case concern the U.S. sanctions regime targeting Iran between 2012 and 2016. As relevant here, the National Defense Authorization Act of 2012 sought to curb purchases of Iranian petroleum by other countries. The law exempted from possible sanctions close allies, like Turkey, which were permitted to continue purchasing Iranian petroleum so long as they significantly reduced their consumption going forward. Over time, additional sanctions rules dictated that, in order to remain exempt from future sanctions, proceeds of Iranian oil sales had to be held in a separate escrow account in the purchasing country. Among other uses, these funds could be used to facilitate either (i) the sale of humanitarian goods to Iran; or (ii) at various times, gold transactions with Iranian merchants. Financial institutions that facilitated transactions outside of these parameters risked being sanctioned. *See United States v. Atilla*, 966 F.3d 118, 124 (2d Cir. 2020) (describing the sanctions regime); J.A.25–30 (same); *see also* 22 U.S.C. § 8513a(d)(4)(D).

As the indictment establishes, Halkbank is a Turkish bank whose shares are majority-owned by the State of Turkey. J.A.19, 22. Halkbank is therefore a foreign state within the meaning of the FSIA, a conclusion the government did not dispute below. *See* 28 U.S.C. § 1603(a)–(b); *see also* D. Ct. ECF No. 659, at 8 (government's opposition to Halkbank's motion to dismiss). In 2012, in accordance with the National Defense Authorization Act, Turkey designated Halkbank to serve as the "sole repository of proceeds from the sale of Iranian oil" to Turkey. J.A.23; *see also* J.A.20. As a result of the authorized sale of oil to Turkey, significant amounts of money accumulated in Iran's account at Halkbank. J.A.23.

The government alleges that in 2012, a Turkish-Iranian businessman named Reza Zarrab approached Halkbank's general manager with a plan "to extract the Iranian oil proceeds" stored in Halkbank accounts so that Iran could use them to pay its international obligations. J.A.33; *see also* J.A.20. The goal of the alleged scheme "was to create a pool of Iranian oil funds in Turkey and the United Arab Emirates held in the names of front companies, which concealed the funds' Iranian nexus." J.A.21–22; *see* J.A.21 (alleging "$20 billion worth of otherwise restricted Iranian funds" accessed through scheme). "From there, the funds were [allegedly] used to make international payments

on behalf of the Government of Iran and Iranian banks." J.A.22. According to the government, Zarrab facilitated this extraction through two schemes: his "gold scheme" and his "fake food scheme." J.A.31, 49. In the gold scheme, Zarrab allegedly used the escrowed Iranian funds to facilitate what appeared to be gold purchases by private Iranian citizens, which at the time was a permitted use of the funds. J.A.20–21, 27, 32. The government alleges these purchases were made by the Iranian government, not the private purchasers listed on the paperwork. J.A.20–21, 32. In the fake food scheme, Zarrab supposedly accessed escrowed Iranian funds by purporting to facilitate purchases of food and medicine for use in Iran, which again was a permitted use of the funds. J.A.25–26, 45.

The allegations of the so-called gold scheme and so-called fake food scheme—and Halkbank's supposed efforts with Zarrab to avoid Treasury potentially imposing sanctions in the future—constitute the majority of the indictment. But these allegations must be put into context. Since this indictment was returned, this Court has held that it is not unlawful "to conspire to evade or avoid the *prospective* imposition of prohibitions." *Atilla*, 966 F.3d at 124 (emphasis added). That is, it is not unlawful to conspire to evade the imposition of *future* sanctions.

Despite some differences, the two alleged schemes followed a similar pattern. Zarrab would approach Halkbank claiming to facilitate the purchase of Turkish gold by private Iranian citizens or the purchase of food and medicine for use in Iran. *See id.* at 122; *see also* J.A.32, 45. According to the government, Halkbank would transfer funds to Zarrab or an intermediary after ensuring the transactions would not subject Halkbank to potential sanctions. Halkbank executives allegedly conspired with and advised Zarrab "to use false documentation and misrepresentations" to "conceal[] the true nature of these transactions," and to ensure the paperwork on the transactions would pass the bank's compliance process. *See* J.A.21, 32, 40–41, 46–47. Halkbank executives also allegedly lied to Department of Treasury officials about the transactions to ensure that the United States did not sanction the bank. J.A.32, 45.

After the funds left Halkbank, Zarrab would allegedly deposit them into one of his companies' accounts in Dubai, and then use the funds to facilitate Iran's payment requests. *See* J.A.21–22, 32–33, 45. Many steps after leaving Halkbank, some of those funds—approximately five percent according to the indictment—are alleged to have momentarily passed through correspondent accounts in U.S. banks for conversion into U.S. dollars, which supposedly caused those U.S. banks to be in violation of U.S. sanctions. *See* 31 C.F.R.

§ 560.204 (prohibiting U.S. persons from exporting services to Iran); *see also* J.A.21–22, 32–33, 44, 52.

In 2015, the government indicted Zarrab for his alleged role in the scheme. ECF No. 1-2, at 23. He ultimately cooperated with the government and pleaded guilty in 2017. *See Atilla*, 966 F.3d at 122; J.A.104. The government also indicted several former Halkbank executives, one of whom was convicted of several charges in a 2018 jury trial. *Atilla*, 966 F.3d at 121; ECF No. 1-2, at 59; J.A.104.

In late 2019, the government indicted Halkbank on six counts: conspiracy to defraud the United States, conspiracy to violate the International Emergency Economic Powers Act, bank fraud, conspiracy to commit bank fraud, money laundering, and conspiracy to commit money laundering. J.A.53–59. The indictment is replete with attacks on the Turkish state. *See, e.g.*, J.A.19–20, 34–35, 38, 43, 45, 51–52.

On March 31, 2020, Halkbank pleaded not guilty on all counts. D. Ct. ECF No. 621, at 8.

C. Relevant District Court Proceedings

On August 10, 2020, Halkbank moved to dismiss the indictment on several grounds, including (as relevant to this appeal) foreign sovereign immunity. D. Ct. ECF No. 645, at 1; D. Ct. ECF No. 646, at 7–13. Halkbank explained that it is a "foreign state" under the FSIA because the Republic of Turkey owns a majority of Halkbank's shares. 28 U.S.C. § 1603(a)–(b); *see* J.A.19, 22. Because Halkbank qualifies as a "foreign state," the FSIA grants it presumptive immunity "from the jurisdiction of the courts of the United States and of the States." 28 U.S.C. § 1604. The plain text of the FSIA's immunity provision "does not limit [its] grant of immunity to civil cases," and therefore "grants immunity to foreign sovereigns from criminal prosecution." *Keller*, 277 F.3d at 820. Halkbank also argued that the FSIA's immunity exceptions did not apply: First, they applied only in civil cases; and second, even if they applied in criminal cases, they would not apply on the facts alleged. D. Ct. ECF No. 646, at 10–13. Finally, Halkbank argued that even if the FSIA did not apply to criminal cases at all, common-law foreign sovereign immunity bars criminal prosecution of foreign states. D. Ct. ECF No. 646, at 13; *see Samantar*, 560 U.S. at 324 ("Even if a suit is not governed by the [FSIA], it may still be barred by foreign sovereign immunity under the common law.").

The government opposed Halkbank's motion to dismiss. D. Ct. ECF No. 659, at 8, 11–22. The government did not dispute that Halkbank qualifies as a foreign state. Instead, it argued that foreign states have no immunity from criminal prosecution whatsoever, either under the FSIA or the common law. The government argued that the FSIA's grant of immunity "from the jurisdiction of the courts of the United States" should be read only to apply in civil cases, and that the government could unilaterally override any common-law immunity from criminal prosecution. D. Ct. ECF No. 659, at 11–16. Moreover, the government argued that it had sidestepped foreign sovereign immunity altogether by invoking the general grant of criminal jurisdiction in 18 U.S.C. § 3231, rather than the FSIA's jurisdictional provision found at 28 U.S.C. § 1330(a). D. Ct. ECF No. 659, at 11–12. Finally, the government argued that even if the FSIA granted Halkbank presumptive foreign sovereign immunity, the statute's commercial-activities exception "would strip away any immunity." D. Ct. ECF No. 659, at 16–22.

2. On October 1, 2020, the district court denied Halkbank's motion to dismiss. J.A.103. As relevant here, the district court acknowledged that Halkbank qualifies as a "foreign state" under the FSIA "because it is majority-

owned by the Turkish government." J.A.109. FSIA immunity therefore "presumably extends to Halkbank." J.A.109. Without quoting, discussing, or even citing to the FSIA's immunity provision, however, the district court held that the "FSIA does not appear to grant immunity in criminal proceedings." J.A.109. The court acknowledged that federal courts have split on that question, J.A.109–10 & n.5, but in a few brief sentences based its holding on the absence of a specific grant of criminal immunity in the statute and the statute's purpose to regulate civil lawsuits. J.A.109–10.

The court further held that even if the FSIA applied in criminal cases, the commercial-activities exception would strip immunity in this case. J.A.110–12. The court did not directly address Halkbank's argument that the exceptions apply only in civil cases. Instead, it held that "Halkbank's business meetings, conference calls, and other interactions and communications at the U.S. Department of Treasury," as well as its alleged fund transfers in Turkey, satisfied the commercial-activities exception. J.A.111–12.

Finally, the district court rejected Halkbank's common-law argument, holding that the common law permitted the Executive Branch to make "case-by-case" determinations whether to extend sovereign immunity to foreign states. J.A.112.

3. On October 9, 2020, Halkbank timely filed a notice of interlocutory appeal of the district court's order to the degree it denied Halkbank's motion to dismiss on foreign sovereign immunity grounds. J.A.119. Halkbank simultaneously moved in the district court to stay the prosecution pending this Court's resolution of Halkbank's foreign sovereign immunity claim. D. Ct. ECF No. 680, at 1–2. The district court denied the stay motion. D. Ct. ECF No. 686, at 9.

D. Preliminary Proceedings in This Court

On November 6, 2020, Halkbank moved in this Court to stay the prosecution pending appeal. ECF No. 13. Halkbank explained that under settled Second Circuit precedent, a defendant may immediately appeal a district court's denial of foreign sovereign immunity, and that appeal divests the district court of jurisdiction to proceed. ECF No. 13, at 15–20. The government opposed Halkbank's stay motion, and moved to dismiss Halkbank's appeal or, in the alternative, to set expedited briefing. ECF No. 29. The government argued primarily that because (in its view) foreign states have no sovereign immunity from criminal prosecution at all, Halkbank has no right to an interlocutory appeal to assert that immunity. ECF No. 29, at 14–16.

On December 23, 2020, this Court granted Halkbank's motion to stay the prosecution pending the outcome of this appeal. ECF No. 49. The Court deferred ruling on the government's motion to dismiss and ordered the Clerk to set an expedited briefing schedule. ECF No. 49.

STANDARD OF REVIEW

This Court reviews "a district court's decision concerning subject matter jurisdiction under the FSIA for clear error as to factual findings, and *de novo* as to legal conclusions." *Anglo-Iberia Underwriting Mgmt. Co. v. P.T. Jamsostek*, 600 F.3d 171, 175 (2d Cir. 2010).

SUMMARY OF ARGUMENT

I. This Court has jurisdiction to hear Halkbank's foreign sovereign immunity appeal.

A. Appeal from final judgment cannot repair the damage to Halkbank's claimed immunity from litigation that results from requiring Halkbank to litigate in the first place. That is why this Court has repeatedly held that a defendant can immediately appeal the denial of a motion to dismiss on foreign sovereign immunity grounds.

B. The government's arguments against jurisdiction rely on the government's view that the FSIA does not apply in criminal cases. That is the merits question this Court must decide. Black-letter law establishes that as long as

Halkbank has raised a colorable claim to immunity from litigation, the collateral-order doctrine gives this Court jurisdiction to hear the appeal.

II. Foreign sovereign immunity bars the prosecution below.

A. Foreign states are immune from criminal prosecution under the FSIA.

1. The FSIA's plain text codifies foreign states' common-law immunity from criminal jurisdiction. The FSIA's immunity provision broadly grants foreign states presumptive immunity "from the jurisdiction of the courts of the United States"—both civil and criminal. *See* 28 U.S.C. § 1604. And the FSIA's jurisdictional provision grants district courts jurisdiction only over "nonjury *civil* action[s] against a foreign state" that satisfy the Act's immunity exceptions. *Id.* § 1330(a) (emphasis added). The statutory scheme leaves no place for criminal jurisdiction against foreign states.

2. The common law, historical practice, the practice of other Nations, and international law each confirm the FSIA's plain-text meaning. The common law provided for absolute criminal immunity for foreign states and limited immunity in civil cases under the restrictive doctrine. Accordingly, we have found no pre-FSIA case in which the government criminally prosecuted a foreign sovereign. The FSIA's structure preserves that status quo, which also

comports with the foreign sovereign immunity laws of other Nations as well as international law. The district court's holding that foreign states lack any immunity from criminal jurisdiction breaks from the common law, our allies' practices, and international law.

3. The district court's reasons for departing from the plain meaning of the statute are unconvincing. The district court did not cite, discuss, or quote the language of §§ 1604 or 1330(a), nor did it grapple with the common-law or the international law context in which the FSIA arose. Instead it cited to a handful of opinions that similarly overlooked the text and context of the statute and presumed that Congress would have spoken more clearly if it meant to limit criminal jurisdiction. These courts and the district court in this case have it backward: Foreign sovereign immunity from criminal jurisdiction was the status quo when Congress enacted the FSIA. If Congress intended to strip foreign sovereigns of that immunity, it would have said so.

B. The FSIA's immunity exceptions do not affect Halkbank's immunity from criminal prosecution in this case.

1. The FSIA's exceptions to immunity do not apply in criminal cases. The structure of the FSIA confirms that result: District courts have jurisdiction only over "nonjury civil action[s]" against foreign states. 28 U.S.C.

§ 1330(a). The text of the exceptions confirms that they do not apply in criminal cases. And reading the exceptions to apply only in civil cases conforms to the common law, international law, and the practice of other Nations, each of which applies the restrictive theory only to civil matters.

2. The commercial-activities exception does not apply on the facts of this case for two reasons. First, Halkbank's conduct at issue in this case is not commercial. The government is prosecuting Halkbank for its alleged role in intermediating trade between Turkey and Iran. Halkbank was exercising sovereign rather than commercial powers. Second, none of Halkbank's relevant conduct had a direct effect in the United States as required by the FSIA. Any contact with the United States did not occur as a result of any act of Halkbank—much less "directly" as a result of any act of Halkbank. Rather, any contact with the United States occurred because of the acts and decisions of others.

3. The district court erred in holding that the government satisfied the commercial-activities exception. In much of its analysis, the district court focused on the wrong alleged conduct: a handful of alleged communications between Halkbank and the Treasury Department. Those communications do not

constitute the gravamen of the government's prosecution. Moreover, in holding that Halkbank's acts had a "direct effect" in the United States, the district court focused on the amount of money that allegedly passed through U.S. bank accounts. But this Court has made clear that it is the *immediacy* of an act's effects, rather than the *substantiality* of the actor's conduct, that governs.

C. Finally, even if the FSIA does not apply in criminal cases, the common law still bars the prosecution below. Foreign states enjoy absolute immunity from criminal jurisdiction under the common law. The district court's conclusion that the Executive can deny a foreign state immunity on a case-by-case basis misinterprets the common-law regime.

ARGUMENT

I. This Court Has Jurisdiction Under the Collateral-Order Doctrine

The collateral-order doctrine permits this appeal. *See* ECF No. 39, at 7–21. The government's arguments to the contrary address the merits of this appeal, not whether the collateral-order doctrine grants this Court the jurisdiction to hear it.

A. A party may immediately appeal an interlocutory order under the collateral-order doctrine if the order (1) "conclusively determine[s] the disputed question," (2) "resolve[s] an important issue completely separate from the merits of the action," and (3) is "effectively unreviewable on appeal from a

final judgment." *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 799 (1989) (citation omitted). Second Circuit case law conclusively establishes that Halkbank's sovereign immunity appeal satisfies all three prongs.

"This [C]ourt has consistently held that [a] threshold sovereign-immunity determination is immediately reviewable under the collateral-order doctrine." *Funk v. Belneftekhim*, 861 F.3d 354, 363 (2d Cir. 2017) (internal quotation marks omitted). A district court's order denying foreign sovereign immunity "conclusively determines the issue of subject matter jurisdiction, thus satisfying the first prong, and the issue of jurisdiction is separate from the merits, thus meeting the second." *Rein v. Socialist People's Libyan Arab Jamahiriya*, 162 F.3d 748, 755 (2d Cir. 1998). Denials of foreign sovereign immunity meet the final prong because "when the jurisdictional issue is one of *immunity*, including sovereign immunity, appeal from final judgment cannot repair the damage that is caused by requiring the defendant to litigate. '[S]overeign immunity is an immunity from trial and the attendant burdens of litigation[.]'" *Id.* at 756 (quoting *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 443 (D.C. Cir. 1990)). "A sovereign that is required to litigate a case on the merits before it can appeal the assertion of jurisdiction

over it has not been afforded the benefit of the immunity to which it is entitled." *Id.* Because immunity from suit loses much of its value if it is not granted at the outset of litigation, the Supreme Court has consistently approved immediate immunity appeals in both criminal and civil contexts. *See, e.g.*, *Mitchell v. Forsyth*, 472 U.S. 511, 526, 530 (1985) (qualified immunity); *Helstoski v. Meanor*, 442 U.S. 500, 506–08 (1979) (Speech-or-Debate-Clause immunity); *Abney v. United States*, 431 U.S. 651, 659–62 (1977) (double jeopardy).

That reasoning controls here. If the district court erred in denying Halkbank's claim to foreign sovereign immunity, "appeal from final judgment cannot repair the damage that is caused by requiring [Halkbank] to litigate." *Rein*, 162 F.3d at 756. Halkbank's invocation of a non-frivolous claim to sovereign immunity is enough to establish this Court's jurisdiction.

B. In moving to dismiss the appeal, the government's arguments assumed the "FSIA does not apply in criminal cases." ECF No. 29, at 14. These arguments improperly address the merits of Halkbank's appeal rather than this Court's jurisdiction. So long as Halkbank has raised a colorable claim to immunity from litigation, the collateral-order doctrine gives this Court jurisdiction to hear the appeal.

The government cannot credibly deny that FSIA immunity is an immunity from litigation; the Supreme Court, this Court, and every federal court of which Halkbank is aware to have addressed the question have affirmed that conclusion.[2] The question before this Court is therefore whether FSIA immunity extends to the facts and posture of this case. That is the same question this Court confronts in every FSIA interlocutory appeal. "[T]he collateral order doctrine can apply when foreign sovereign immunity is conclusively denied to a party who invokes it to avoid the burden of litigation," regardless of the reason why the district court conclusively denied immunity or whether the immunity claim ultimately succeeds on appeal. *Funk*, 861 F.3d at 364. So long as Halkbank raises "a colorable claim to [sovereign] immunity, [this Court has] jurisdiction to consider [that] claim, since otherwise that claim would be 'effectively lost.'" *See Toussie v. Powell*, 323 F.3d 178, 182 (2d Cir. 2003) (qualified

[2] *See, e.g.*, *Helmerich & Payne*, 137 S. Ct. at 1317 ("foreign sovereign immunity's basic objective [is] to free a foreign sovereign from *suit*," which is why "court[s] should normally … reach a decision about immunity [at] the outset of the case"); *Funk*, 861 F.3d at 363 (FSIA immunity is "immunity from suit" requiring immediate appeal to protect); *see also Process & Indus. Devs. v. Fed. Republic of Nigeria*, 962 F.3d 576, 584 (D.C. Cir. 2020) (collecting cases).

immunity); *see also Process & Indus. Devs.*, 962 F.3d at 586 (courts "must resolve colorable assertions of immunity before the foreign sovereign may be required to address the merits at all").

Nor can the government short-circuit this Court's review by conflating the merits of Halkbank's immunity claim with this Court's power to hear it. Because the government's motion to dismiss the appeal depends "upon its view of the merits of the case, [its argument] does not involve a lack of subject matter jurisdiction." *Sarhank Grp. v. Oracle Corp.*, 404 F.3d 657, 660 (2d Cir. 2005); *see Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) (court has jurisdiction where party's claim of right "will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another" (quoting *Bell v. Hood*, 327 U.S. 678, 685 (1946)). Otherwise, every unsuccessful sovereign immunity appeal would be dismissed for want of jurisdiction.

II. Foreign Sovereign Immunity Bars the Prosecution Below

The district court erred in denying Halkbank's foreign sovereign immunity claim. The FSIA grants foreign sovereigns immunity from criminal

prosecution. The FSIA's exceptions to immunity do not strip Halkbank of immunity. And even if criminal cases fell outside the FSIA's ambit, the common law grants foreign sovereigns absolute immunity from criminal prosecution.

A. The FSIA Grants Foreign States Immunity from Criminal Prosecution

1. The Statute's Plain Text Establishes Foreign States' Immunity from Criminal Prosecution

The FSIA "embodies basic principles of international law long followed both in the United States and elsewhere." *Helmerich & Payne*, 137 S. Ct. at 1319; H.R. Rep. No. 94-1487, at 14 (same). The statute's plain text therefore unsurprisingly establishes that foreign states are immune from criminal jurisdiction. Two provisions operate "in tandem" to codify that result, *Amerada Hess*, 488 U.S. at 434: The FSIA's immunity provision grants foreign states presumptive immunity from *all* federal court jurisdiction, and the FSIA's jurisdictional provision enacts the restrictive theory by abrogating that immunity only over certain *civil* actions. This statutory scheme closely mirrors the common-law approach.

By its terms, the FSIA's immunity provision grants presumptive immunity from all jurisdiction, both civil and criminal: "[A] foreign state shall be immune from *the jurisdiction of the courts of the United States* and of the

States," unless a statutory exception applies. 28 U.S.C. § 1604 (emphasis added). The text nowhere suggests its grant of presumptive immunity is limited to civil jurisdiction. *Keller*, 277 F.3d at 820.[3] "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992). Indeed, "[w]hen it desires to do so, Congress knows how to" limit a provision's application to civil cases. *See Amerada Hess*, 488 U.S. at 440. Elsewhere in the FSIA, Congress did exactly that. *See, e.g.*, 28 U.S.C. § 1330(a) (jurisdiction only over "any nonjury civil action"); *id.* § 1441(d) (removal of "civil action" against foreign state). Courts have a "duty to refrain from reading a phrase into the statute when Congress has left it out" and to "presume[] that Congress acts intentionally and purposely" when it includes a term only in some parts of a statute. *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (citation omitted).

[3] *See also Dale v. Colagiovanni*, 337 F. Supp. 2d 825, 842–43 (S.D. Miss. 2004), *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); David P. Stewart, Fed. Judicial Ctr., The Foreign Sovereign Immunities Act: A Guide for Judges 1 n.2 (2d ed. 2018) ("nothing in the text or legislative history [of the FSIA] supports" the conclusion that "states or their agencies or instrumentalities can be subject to criminal proceedings in U.S. courts").

The FSIA's jurisdictional provision, meanwhile, enacts the restrictive theory by giving the federal district courts jurisdiction only over "nonjury civil action[s] against a foreign state" that satisfy the statutory immunity exceptions. *Id.* § 1330(a). The lack of any criminal jurisdiction in § 1330(a) is dispositive. Congress made clear that "jurisdiction in actions against foreign states is comprehensively treated by the new section 1330," making that provision "the sole basis for obtaining jurisdiction over a foreign state in our courts." *Amerada Hess*, 488 U.S. at 434, 437 n.5 (quoting H.R. Rep. No. 94-1487, at 14); *see also* H.R. Rep. No. 94-1487, at 12–13 ("Section 1330 provides a comprehensive jurisdictional scheme in cases involving foreign states.").[4] The Supreme Court and this Court have therefore held that the FSIA's jurisdictional provision displaces "other statutes conferring jurisdiction in general terms on district courts." *Amerada Hess*, 488 U.S. at 437 n.5; *see Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venez.*, 863 F.3d 96, 112–13 (2d Cir. 2017) (an "independent grant of subject matter jurisdiction" does not circumvent the FSIA, which is the "only source of subject matter jurisdiction over a

[4] *See also, e.g.*, *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 393 (2015); *Samantar*, 560 U.S. at 314; *Permanent Mission of India*, 551 U.S. at 197; *Republic of Aus. v. Altmann*, 541 U.S. 677, 699 (2004); *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993).

foreign sovereign or its instrumentalities in the courts of the United States" (citation omitted)); *see also United States v. Assa Co.*, 934 F.3d 185, 189–90 (2d Cir. 2019) (any action against a foreign state "*must* go through the FSIA" jurisdictional provision and not through "other federal jurisdictional statutes").

"Congress [thus] established [in the FSIA] a comprehensive framework for resolving any claim of sovereign immunity." *Altmann*, 541 U.S. at 699; *see* 28 U.S.C. § 1602 ("Claims of foreign states to immunity should henceforth be decided … in conformity with [the FSIA]."). "The key word" is "*comprehensive*," a term the Supreme Court has used "often and advisedly to describe the Act's sweep." *Republic of Arg. v. NML Capital, Ltd.*, 573 U.S. 134, 141 (2014) (collecting cases); *see also* H.R. Rep. No. 94-1487, at 12 (the FSIA "sets forth the sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states before Federal and State courts in the United States"). The upshot of the FSIA's comprehensive scheme is that foreign sovereigns remain absolutely immune from criminal jurisdiction, as they were prior to the FSIA's enactment, but are amenable to civil jurisdiction under the restrictive theory.

2. The Common Law, Historical Practice, the Practice of Other Nations, and International Law Each Confirm the FSIA's Plain-Text Meaning

Nothing about the FSIA's codification of foreign states' criminal immunity is surprising. The FSIA's common-law roots, historical practice, the practice of other Nations, and international law each confirm that the FSIA means what it says in barring criminal jurisdiction over foreign states.

For more than 150 years, "foreign states enjoyed absolute immunity from all actions in the United States," both civil and criminal. *Rubin*, 138 S. Ct. at 821; *see supra* p.3. Even as the United States and other Nations adopted the restrictive theory "in relation to civil proceedings," they uniformly "left untouched the position [of absolute immunity] in criminal proceedings." Fox & Webb, *supra*, at 91. For that reason, at the time Congress enacted the FSIA, sovereigns remained absolutely immune from criminal prosecution in the United States. *See id.* at 91–92. That conclusion comports with historical practice: Before the FSIA's enactment, the United States had never prosecuted a foreign state or its agencies or instrumentalities. "The FSIA is a statute that 'invade[d] the common law' and accordingly must be 'read with a presumption favoring the retention of long-established and familiar principles.'" *Matar v. Dichter*, 563 F.3d 9, 13 (2d Cir. 2009) (quoting *Isbrandtsen Co. v.*

Johnson, 343 U.S. 779, 783 (1952)). With the FSIA, no presumption is necessary as the statute's plain terms preserve long-established principles: retaining a presumption of immunity in all cases, including criminal cases; while enacting the restrictive theory of limited immunity in civil cases, particularly for commercial acts.

The contemporaneous practice of other Nations likewise confirms the FSIA's meaning. "Without exception," other common-law countries that enacted their own sovereign immunity statutes around the time of the FSIA made clear that the restrictive theory "excludes … application to criminal proceedings"—exactly what §§ 1604 and 1330(a) accomplish. Fox & Webb, *supra*, at 92; *see, e.g.*, Foreign States Immunities Act 87 of 1981 § 2 (S. Afr.) ("The provisions of this Act shall not be construed as subjecting any foreign state to the criminal jurisdiction of the courts of the Republic."); *see also Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia)* [2006] UKHL 26, [31] (appeal taken from Eng.) ("A state is not criminally responsible in international or English law, and therefore cannot be directly impleaded in criminal proceedings.").[5]

[5] *See also, e.g.*, State Immunity Act, R.S.C. 1985, c S-18 (Can.) (no criminal jurisdiction over foreign states); The State Immunity Ordinance, No. 6 of 1981, The Gazette of Pakistan Extraordinary, Mar. 11, 1981; State Immunity Act,

International law further confirms that the FSIA means what it says. "The exercise of criminal jurisdiction directly over another State infringes international law's requirements of equality and non-intervention." Fox & Webb, *supra*, at 91. "International law sets limits on the legislative jurisdiction of States," including "prevent[ing] the application of the penal code of one State to another State." *Id.* The 2004 United Nations Convention on Jurisdictional Immunities of States and their Property, which reflects the restrictive theory, thus "does not apply to criminal proceedings," a position "in line with the received position of jurists and courts that … an independent State cannot be held criminally liable under the municipal law of another State and hence enjoys absolute immunity in respect of criminal proceedings." *Id.* at 314; *see also Jones*, UKHL 26, [31] (a foreign state "cannot be directly impleaded in criminal proceedings"); Restatement (Third) of Foreign Relations Law of the United States § 461 cmt. a (1987) (a foreign state "would not be prosecuted under normal criminal process"; a state can "give effect to its law by certain nonjudicial measures"); *id.* § 461 cmt. c (a foreign state "is generally not subject to the criminal process of another state").

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ch. 313 (2014) (Singapore) (same); State Immunity Act 1978, c. 33, § 16 (UK) (same).

"An age-old canon of construction instructs that 'an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.'" *Fox TV Stations, Inc. v. Aereokiller, LLC*, 851 F.3d 1002, 1011 (9th Cir. 2017) (quoting *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)). Congress expressly referenced the state of "international law" when it enacted the FSIA. 28 U.S.C. § 1602 (congressional findings and statement of purpose). Here, the plain reading of the FSIA that foreign states are immune from criminal jurisdiction comports with international law; the district court's conclusion that foreign states have no criminal immunity whatsoever would flout international law.

3. The District Court Erred in Holding that the FSIA Does Not Grant Immunity in Criminal Cases

In one short paragraph, the district court concluded that the "FSIA does not appear to grant immunity in criminal proceedings." J.A.109. Notably, the district court reached that conclusion without citing, discussing, or quoting the language of §§ 1604 or 1330(a). *See* J.A.109–10. Instead, it cited a handful of non-binding opinions, none of which adequately grappled with the FSIA's common-law roots, structure, international law, or the practice of other Nations. *See Southway Constr. Co. v. Cent. Bank of Nigeria*, 198 F.3d 1210, 1214–16 (10th Cir. 1999); *United States v. Noriega*, 117 F.3d 1206, 1211–12 (11th Cir.

1997); *United States v. Hendron*, 813 F. Supp. 973, 974–77 (E.D.N.Y. 1993). Each of those opinions, like the district court's reasoning below, relied heavily on the idea that most of the FSIA focuses on civil proceedings. *See, e.g.*, *Hendron*, 813 F. Supp. at 975 ("*Other than the broad text of § 1604's declaration of immunity*, nothing in the text of the Act suggests that it applies to criminal procedures." (emphasis added)). One suggested that "[i]f Congress intended" to grant criminal immunity, "Congress should amend the FSIA to expressly so state." *Southway*, 198 F.3d at 1215.

Respectfully, these courts' analyses is exactly backward. The plain language of the FSIA grants foreign states presumptive immunity from *all* the jurisdiction of the federal courts, "and does not limit this grant of immunity to civil cases." *Keller*, 277 F.3d at 820; *see also supra* n.3 (collecting cases). Moreover, the FSIA's lack of detailed provisions governing criminal process against foreign states reflects that, unlike in civil cases, foreign states retain absolute, rather than restricted, immunity. The district court, which did not analyze the text of the statute or the content of the common law it codified, gave no reason why the plain reading of the statute cannot be right. A court "may not narrow a provision's reach by inserting words Congress chose to omit." *Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721, 1725 (2020). Unless and until Congress acts

to modify foreign states' immunity, this Court should apply the FSIA as written to bar criminal jurisdiction over foreign states, including those states' agencies and instrumentalities.

B. The FSIA Immunity Exceptions Do Not Change the Result

The district court erred in holding that even if the FSIA extended foreign sovereign immunity to criminal cases, the "FSIA's [commercial-activities] exceptions would clearly apply and support the Halkbank prosecution." J.A.110. The FSIA exceptions, which codify the civil-jurisdiction restrictive theory, do not apply in criminal cases. And even if they did, the commercial-activities exception would not apply on the facts of this case.

1. The FSIA's Exceptions Do Not Apply in Criminal Cases

The district court did not expressly address Halkbank's argument that the FSIA's immunity exceptions apply only in civil cases. The structure of the FSIA, the text of the exceptions, the common law, and international law confirm that the exceptions are irrelevant to criminal jurisdiction.

Most fundamentally, the district court's application of the commercial-activities exception to a criminal prosecution ignores the FSIA's basic structure: The statute's immunity provision provides blanket, presumptive immunity from all forms of jurisdiction, while the statute's jurisdictional provision, which covers "nonjury civil action[s]," constitutes the "sole basis for obtaining

jurisdiction over a foreign state in [federal] courts." *Amerada Hess*, 488 U.S. at 434; *see supra* pp.3–7. Because the jurisdictional provision covers only "nonjury civil action[s]," 28 U.S.C. § 1330(a), the immunity exceptions simply do not make a difference in criminal cases.

As this Court has explained, any action in federal court against a foreign state "*must* go through the FSIA" jurisdictional provision and not through "other federal jurisdictional statutes." *Assa Co.*, 934 F.3d at 189–90; *see also Mobil Cerro Negro*, 863 F.3d at 112–13 (an "independent grant of subject matter jurisdiction" does not circumvent the FSIA, which is the "only source of subject matter jurisdiction over a foreign sovereign or its instrumentalities in the courts of the United States" (citation omitted)). "[T]he FSIA … abrogate[d]" general jurisdictional statutes, leaving only § 1330(a) as a basis for jurisdiction. *Mobil Cerro Negro*, 863 F.3d at 113.[6] Because a criminal prosecution is not a "nonjury civil action," a criminal case cannot satisfy the jurisdictional provision even if it did, somehow, satisfy an immunity exception.

[6] The D.C. Circuit therefore erred in holding that district courts retain jurisdiction under the "separate grant of [criminal] subject-matter jurisdiction" in 18 U.S.C. § 3231. *In re Grand Jury Subpoena*, 912 F.3d 623, 631 (D.C. Cir. 2019) (per curiam). As this Court noted in *Assa Co.*, 934 F.3d at 189 n.4, the Supreme Court rejected a similar argument in *Amerada Hess*. There, the plaintiffs sought to bring their claims under the Alien Tort Statute's general grant of subject-matter jurisdiction over torts committed in violation of the

The text of the exceptions themselves confirms that they are irrelevant to criminal cases. All but one of the substantive exceptions are, by their terms, already limited to civil cases. Most exceptions apply only to "money damages" claims for tortious acts, terrorism, hostage taking, and other wrongs. 28 U.S.C. §§ 1605(a)(5), 1605A, 1605B. Others cover disputes over "rights in property" or maritime claims. *Id.* § 1605(a)(3), (b). Although the commercial-activity exception does not expressly mention civil remedies, *see id.* § 1605(a)(2), it would make no sense, in context, to read that one substantive exception alone to apply to criminal cases. *See Hendron*, 813 F. Supp. at 975 (commercial-activities exception "hardly suggests criminal prosecution"). That reading would, absurdly, permit criminal prosecution for commercial crimes, but only money-damages claims for tortious acts, terrorism, murder, or torture. *See, e.g.*, *Pub. Citizen v. DOJ*, 491 U.S. 440, 453–54 (1989) (discussing presumption against statutory interpretations that lead to absurd results).

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law of nations. *Amerada Hess*, 488 U.S. at 432. The Supreme Court rejected that gambit, holding that § 1330 constitutes "the sole basis for obtaining jurisdiction over a foreign state in [federal] courts" and that "statutes conferring jurisdiction in general terms" no longer applied even absent a "*pro tanto* repealer." *Id.* at 434, 437 & n.5. Only after rejecting the ATS's application did the Court "turn to whether any of the exceptions enumerated in the Act apply here." *Id.* at 439; *see also Mobil Cerro Negro*, 863 F.3d at 113 (rejecting application of general jurisdictional statute even where "two exceptions to sovereign immunity found in the FSIA" apply).

And applying any of the immunity exceptions to criminal prosecutions would raise the specter of American *state* criminal prosecution of foreign sovereigns—an unlikely result. The better reading is that the structure of the FSIA and the text of the exceptions indicate that the exceptions apply only in the civil context.

That reading also conforms to the common law and the international practice of other Nations. The immunity exceptions "codif[y] … the restrictive theory of sovereign immunity." *Verlinden*, 461 U.S. at 488. But the movement "in relation to civil proceedings from an absolute to a restrictive [theory] of State immunity left untouched the position [of absolute immunity] in criminal proceedings." Fox & Webb, *supra*, at 91; *see also id.* at 94 ("The adoption of a restrictive [theory] has not been treated as having any relevance in relation to the Absolute Immunity of the foreign State from criminal proceedings …."). That is why common-law Nations that have implemented the restrictive theory, including the exceptions to immunity, have "[w]ithout exception … exclude[d] [their] application to criminal proceedings." *Id.* at 92; *see supra* n.5.[7]

[7] The D.C. Circuit's reasoning that the immunity exceptions apply to criminal actions because the exceptions say that they "apply to 'any case' that falls within one of the listed provisions" would not get the government very far. *In re Grand Jury Subpoena*, 912 F.3d at 632. That reasoning does not establish whether criminal cases actually fall "within one of the listed" exceptions. For

The FSIA's limited grant of jurisdiction to civil cases does the same. There is no reason to think that Congress intended to massively (and silently) expand the application of the restrictive theory to the criminal sphere—a step no other Nation had taken at the time or has taken since. Fox & Webb, *supra*, at 91, 92, 94. Reading the FSIA to accomplish the expansion of the restrictive theory to criminal jurisdiction cannot be squared with Congress's intention that the FSIA "reflect basic principles of international law." *Helmerich & Payne*, 137 S. Ct. at 1320. Congress understood that "conform[ing] fairly closely [to] accepted international standards … would diminish the likelihood that other nations would each go their own way, thereby subjecting the United States abroad to more claims than we permit in this country." *Id.* (cleaned up). Stripping foreign states, their agencies, and their instrumentalities of immunity from criminal prosecution in our courts would undermine the reciprocity and comity at the heart of Congress's scheme.

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example, the terrorism exception only applies where "money damages are sought against a foreign state for personal injury or death." 28 U.S.C. § 1605A(a)(1). Even though that exception applies "in any case" where its substantive requirements are met, it plainly does not apply to criminal cases.

2. The Commercial-Activities Exception Does Not Apply on the Facts of This Case

Even if the commercial-activities exception applies in criminal cases generally, it is not satisfied here. The district court's contrary holding misapplied the law. *See* J.A.110–12.

a. Once Halkbank has made a prima facie showing that it is a foreign state, the government bears the burden of "showing that an exception to the FSIA applies." *Matar*, 563 F.3d at 12. The commercial-activities exception applies if the action is "based upon" (1) "commercial activity carried on in the United States by the foreign state"; (2) "an act performed in the United States in connection with a commercial activity of the foreign state elsewhere"; or (3) "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a *direct effect* in the United States." 28 U.S.C. § 1605(a)(2) (emphasis added). "[A]n action is 'based upon' the 'particular conduct' that constitutes the 'gravamen' of the suit." *OBB Personenverkehr AG*, 136 S. Ct. at 396. That is, "[r]ather than individually analyzing each of the [government's] causes of action, [courts] zero[] in on the core of their suit." *Id.*

Here, the "particular conduct" that constitutes the "gravamen" or "core" of the government's complaint is clear: The indictment focuses heavily on

Halkbank's alleged "participat[ion] in several types of illicit transactions for the benefit of Iran," the "purpose and effect of [which] was to create a pool of Iranian oil funds in Turkey and the United Arab Emirates held in the names of front companies" that Iran could use "to make international payments on behalf of the Government of Iran and Iranian banks." J.A.20–22. These alleged acts constituted "the core of the alleged scheme" that gave rise to the government's case. *Kensington Int'l Ltd. v. Itoua*, 505 F.3d 147, 156 (2d Cir. 2007). And that conduct occurred overseas—specifically, in Turkey. Therefore the commercial-activities exception applies only if those transactions constitute "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2).

The exception does not apply for two reasons. First, Halkbank's relevant alleged conduct was sovereign, not commercial. Conduct is a commercial activity when a foreign sovereign "exercises *only those powers that can also be exercised by private citizens*, as distinct from those powers peculiar to sovereigns." *Nelson*, 507 U.S. at 360 (emphasis added) (internal quotation marks omitted). Halkbank's facilitation of Turkish–Iranian trade was a sovereign activity. The government has not pointed to any private bank in Turkey that

engaged in these transactions or explained why Halkbank's conduct was "the type of activity by which a private party engages in trade or commerce." *Jam v. Int'l Fin. Corp.*, 139 S. Ct. 759, 772 (2019) (cleaned up). "Private citizens" did not have the power to intermediate Iranian oil sales. Rather, Turkey designated Halkbank, consistent with the National Defense Authorization Act of 2012, to act on Turkey's behalf as the "sole repository of proceeds from the sale of Iranian oil" to Turkey's "national oil company and gas company." *See* J.A.20, 23; *see also* 22 U.S.C. § 8513a(d)(4)(D) (proceeds of oil sales must be "credited to an account located in the country with primary jurisdiction over the foreign financial institution"). There is no dispute that Halkbank's involvement resulted from Turkey's efforts to comply with the United States' demand that Turkey "significantly reduce[] its volume of petroleum and petroleum products purchased from Iran." *See* J.A.26.

Halkbank's administration of the sanctions rules for Turkey and facilitation of a complex trade relationship between Turkey, Iran, and the United States was not a commercial activity of the sort the FSIA intended to capture. *See Barnet as Tr. of 2012 Saretta Barnet Revocable Tr. v. Ministry of Culture & Sports of the Hellenic Republic*, 961 F.3d 193, 202 (2d Cir. 2020) (ministry's

assertion of ownership over property via demand letter did not satisfy exception because state "acted within [a] legal framework" of patrimony laws established by the foreign sovereign); *Anglo-Iberia Underwriting Mgmt.*, 600 F.3d at 177–78 (state-owned health insurance provider engaged in sovereign, not commercial activities because of its unique role in the health insurance marketplace).

The fact that some banking activities are commercial does not mean that anything a bank does is automatically commercial. Indeed, the government made this very point in *Jam*. 139 S. Ct. at 772 (noting government's argument that some development banks' loans "may not qualify as 'commercial' under the FSIA"). The alleged banking activities in this case, which were deeply enmeshed in a complex trade relationship between two sovereigns and shaped by the sanctions regime of a third sovereign, were not of the type a private entity might carry on in the "regular course of commercial conduct." 28 U.S.C. § 1603(d); *see Jam*, 139 S. Ct. at 772; *Barnet*, 961 F.3d at 201–02.

Second, Halkbank's alleged participation in these transactions in Turkey did not have a "direct effect" in the United States. 28 U.S.C. § 1605(a)(2). A "direct effect" must "follow[] as an immediate consequence of the defend-

ant's activity." *Republic of Arg. v. Weltover, Inc.*, 504 U.S. 607, 618 (1992) (alterations and internal quotation marks omitted). "Immediacy" is the test, not "substantiality" or "foreseeability." *Virtual Countries, Inc. v. Republic of S. Afr.*, 300 F.3d 230, 236 (2d Cir. 2002) (quoting *Weltover*, 504 U.S. at 618). "[T]he requisite immediacy is lacking where the alleged effect depend[s] crucially on variables independent of the conduct of the foreign state." *Guirlando v. T.C. Ziraat Bankasi A.S.*, 602 F.3d 69, 75 (2d Cir. 2010) (citation omitted).

Here, the government's own allegations suggest that only five percent of the funds Halkbank purportedly transmitted out of Halkbank entered the United States, and the government does not allege that any of those funds entered the United States as an "immediate" consequence of Halkbank's actions. *See* J.A.21, 52. On the contrary, any contact with the United States happened at least several transactions after the funds left Halkbank, and as a result of others' acts—not Halkbank's. *See* J.A.21–22. Where an effect in the United States "falls at the end of a long chain of causation and is mediated by numerous actions by third parties," that effect does not qualify as a direct effect for purposes of the commercial-activities exception. *Virtual Countries*, 300 F.3d at 237; *see also United World Trade, Inc. v. Mangyshlakneft Oil Prod. Ass'n*, 33 F.3d 1232, 1238 (10th Cir. 1994) (rejecting "the proposition that

any involvement in a commercial transaction by a United States bank means that a defendant's activity has had a 'direct effect' in the United States").

b. The district court's holding that the government's case satisfies each prong of the commercial-activities exception misapplies the case law. First, the court held that the government's prosecution is "based upon a commercial activity carried on in the United States by the foreign state"—specifically, "Halkbank's business meetings, conference calls, and other interactions and communications at the U.S. Department of Treasury." 28 U.S.C. § 1605(a)(2); *see* J.A.111. That reasoning fails for several reasons: First, Halkbank's handful of alleged contacts with Treasury does not constitute the "gravamen" of the government's claims. The "core of the alleged scheme" giving rise to the indictment was the allegedly fraudulent transactions in Turkey in which Halkbank supposedly participated. *Kensington Int'l*, 505 F.3d at 156; *see supra* pp.7–11. Second, the district court stretched the meaning of "commercial activity" past breaking. The commercial-activities exception does not simply treat any non-sovereign act as a commercial activity. On the contrary, it requires asking "whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in 'trade and traffic or commerce.'" *Weltover*, 504 U.S. at 614;

see also 28 U.S.C. § 1603(d) (defining commercial activity as "a regular course of commercial conduct or a particular commercial transaction or act"). Communicating with the Treasury Department is not a "commercial transaction or act."

Next, the district court held that Halkbank's communications with the Treasury Department constituted "an act performed in the United States in connection with a commercial activity of the foreign state elsewhere." 28 U.S.C. § 1605(a)(2); *see* J.A.111. This reasoning also fails: Again, Halkbank's communications with Treasury are not the "gravamen" of the government's complaint. Moreover, the purported "commercial activity of the foreign state elsewhere"—Halkbank's mediation of embargoed Iranian oil funds as part of the sanctions regime—was sovereign, not "commercial activity." *See supra* pp.40–42.

Finally, the district court held that the indictment satisfied the third commercial-activities exception as based on "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); *see* J.A.111–12. The district court erred both in concluding that Halkbank's actions are commercial, *see supra* pp.40–42, and in concluding that

they had a direct effect. In particular, the court's direct-effect analysis focused on the substantiality and alleged foreseeability that $1 billion worth of funds would pass through U.S. bank accounts—ignoring entirely this Court's instruction that immediacy controls. *See Virtual Countries*, 300 F.3d at 236.

C. If the FSIA Does Not Apply, Halkbank Is Immune Under the Common Law

"Even if a suit is not governed by the [FSIA], it may still be barred by foreign sovereign immunity under the common law." *Samantar*, 560 U.S. at 324. The government argued below, and the district court held, that the FSIA simply does not apply in criminal cases. J.A.109–10. Although that view is mistaken, even if it were true, Halkbank would remain immune under the common law.

Foreign states were absolutely immune from criminal jurisdiction at common law, even after the United States and other Nations adopted the restrictive theory in civil cases. Fox & Webb, *supra*, at 91–92; *see supra* p.5. Although absolute immunity from civil jurisdiction gradually faded as international norms moved toward the restrictive theory, *Alfred Dunhill*, 425 U.S. at 714 (Tate Letter), neither the government nor the district court has identified any evidence that international norms now allow governments to exercise criminal jurisdiction over foreign states. On the contrary, the laws of other

Nations, the United Nations Convention on Jurisdictional Immunities of States and their Property, international law, and eminent treatises confirm that criminally prosecuting foreign states remains improper the world over. *See supra* pp.29–32. Halkbank therefore retains its common-law absolute immunity from criminal prosecution.

In holding otherwise, the district court relied on cases in the civil context in which the Executive Branch made "case-by-case" determinations whether to grant foreign sovereign immunity. J.A.112 (citing *Verlinden*, 461 U.S. at 486, and *Republic of Iraq v. Beaty*, 556 U.S. 848, 857 (2009)). That reasoning misunderstands the role of the Executive in immunity determinations under the common law and flouts the separation of powers.

The courts at common law "relied heavily upon the advice" of the Executive on the application of common-law sovereign immunity principles—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. *Helmerich & Payne*, 137 S. Ct. at 1320. In civil cases, the Supreme Court sometimes said the Executive's views were "conclusive" on the courts, *Ex parte Republic of Peru*, 318 U.S. 578, 589 (1943),

or that it was "not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize." *Republic of Mexico v. Hoffman*, 324 U.S. 30, 35 (1945).

But the courts' reliance on the Executive to apply international law and sovereign immunity norms does not extend to allowing the Executive to unilaterally *abrogate* the common law. "When the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 714 (2004) (emphasis and citation omitted). "International law," including the common law of foreign sovereign immunity, "is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction." *The Paquete Habana*, 175 U.S. 677, 700 (1900).

The State Department in the Tate Letter candidly acknowledged its limited authority to determine immunity law, observing that "a shift in policy by the executive cannot control the courts" and grounding its policy not on any lawmaking power but on the evolution of the international common law of foreign sovereign immunity. *Alfred Dunhill*, 425 U.S. at 714 (Tate Letter). At

common law, the Executive itself operated within the bounds of international law and custom.

Allowing the Executive to unilaterally abrogate still-existing common-law immunity also cannot be squared with the separation of powers. "[W]hether the realm is foreign or domestic, it is still the Legislative Branch, not the Executive Branch, that makes the law." *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 21 (2015); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) ("In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."). "By reason of its authority over foreign commerce and foreign relations, Congress has the undisputed power to decide, as a matter of federal law, whether and under what circumstances foreign nations should be amenable to suit in the United States." *Verlinden*, 461 U.S. at 493. Common-law principles govern unless *Congress* manifests its will to change that law "by passing an act for [that] purpose. [Until then], the Court is bound by the law of nations which is a part of the law of the land." *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815). So although courts properly, and often conclusively, defer to the Executive's application of sovereign immunity principles, the courts need not do so where the Executive's action clearly violates the common

law. Absent any argument that the common law and international norms now permit criminal prosecution of foreign states, any effort to modify the common law should be addressed to Congress.

CONCLUSION

The order of the district court denying Halkbank's motion to dismiss on foreign sovereign immunity grounds should be reversed, and this case should be remanded with instructions to dismiss the superseding indictment.

Respectfully submitted,

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January 27, 2021

CERTIFICATE OF COMPLIANCE
WITH TYPEFACE AND WORD-COUNT LIMITATIONS

I, Robert M. Cary, counsel for appellant and a member of the Bar of this Court, certify, pursuant to Federal Rules of Appellate Procedure 32(a)(7)(B), that the attached Brief of Defendant-Appellant is proportionally spaced, has a typeface of 14 points or more, and contains 10,545 words.

JANUARY 27, 2021

/s/ *Robert M. Cary*
ROBERT M. CARY

CERTIFICATE OF SERVICE

I, Robert M. Cary, counsel for appellant and a member of the Bar of this Court, certify that, on January 27, 2021, a copy of the attached Brief of Defendant-Appellant and the special appendix were filed with the Clerk and served on the parties through the Court's electronic filing system. I further certify that all the parties required to be served have been served. In addition, I certify that copies of the Brief of Defendant-Appellant and the special appendix will be sent, via third-party commercial carrier, to the Clerk and to the following counsel:

Michael Dennis Lockard
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JANUARY 27, 2021

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SPECIAL APPENDIX

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	
	:	15 Cr. 867 (RMB)
- against -	:	
	:	**DECISION & ORDER**
HALKBANK	:	
Defendants.	:	

Having carefully reviewed the record herein, including without limitation: (1) the Halkbank Indictment, dated October 15, 2019; (2) Halkbank's motion to dismiss the Indictment, dated August 10, 2020; (3) the Government's opposition to the motion to dismiss, dated August 31, 2020; (4) Halkbank's reply brief, dated September 8, 2020; (5) the oral argument held on September 18, 2020, and (6) all prior related proceedings, **the Court denies Halkbank's motion to dismiss as follows**:[1]

I. Background

On October 15, 2019, Türkiye Halk Bankasi A.S. ("Halkbank") was charged in a six count Indictment with the following crimes: **Count One** - Conspiracy to Defraud the United States in violation of 18 U.S.C. § 371; **Count Two** - Conspiracy to Violate the International Emergency Economic Powers Act ("IEEPA") in violation of 50 U.S.C. § 1705, Executive Orders 12959, 13059, 13224, 13599, 13622, & 13645, and 31 C.F.R. §§ 560.203, 560.204, 560.205, 561.203, 561.204, & 561.205; **Count Three** - Bank Fraud in violation of 18 U.S.C. §§ 1344 and 2; **Count Four** - Conspiracy to Commit Bank Fraud in violation of 18 U.S.C. § 1349; **Count Five** - Money Laundering in violation of 18 U.S.C. §§ 1956(a)(2)(A) and 2; and **Count Six** - Conspiracy to Commit Money Laundering in violation of 18 U.S.C. § 1956(h). See Indictment at 35-41.[2]

[1] **Any issues or arguments raised by the parties but not specifically addressed in this Decision and Order have been considered by the Court and rejected.**

[2] Halkbank is one of Turkey's largest state-owned banks. See Eric Lipton, U.S. Indicts Turkish Bank on Charges of Evading Iran Sanctions, *New York Times* (Oct. 15, 2019).

According to the Government: "[t]he Indictment alleges that Halkbank participated in 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, and lied to Treasury Department officials in the United States to conceal the scheme and evade applicable sanctions." See Opp. at 10; Indictment at 2-4, 21-26, 34. "The scheme involved fraudulent gold and humanitarian trade transactions run through Halkbank." Opp. at 3. "Through these methods, Halkbank illicitly transferred approximately $20 billion worth of otherwise restricted Iranian funds." Indictment at 3. "As alleged, at least approximately $1 billion was laundered through the U.S. on behalf of the Government of Iran and Iranian entities." Opp. at 3.

One of Halkbank's alleged co-conspirators, Reza Zarrab, a dual citizen of Turkey and Iran, pled guilty before this Court on October 26, 2017 to designing the sanctions evasion scheme. Another of Halkbank's alleged co-conspirators, Mehmet Hakan Atilla, who was the Deputy General Manager of International Banking at Halkbank, was convicted by an S.D.N.Y. jury on January 3, 2018 of conspiracy to defraud the United States; conspiracy to violate the IEEPA and the Iranian Transactions and Sanctions Regulations ("ITSR"); bank fraud; conspiracy to commit bank fraud; and conspiracy to commit money laundering. See May 16, 2018 Judgment. Atilla was sentenced to 32 months imprisonment (and he completed his sentence). Id. On July 20, 2020, the Second Circuit affirmed Atilla's conviction and sentence. See discussion of Second Circuit ruling at pp.5-6 infra.

Prior Related Motions to Dismiss

On July 18, 2016, Zarrab moved to dismiss the March 30, 2016 Indictment against him which charged Zarrab with conspiracy to defraud the United States; conspiracy to violate the IEEPA; conspiracy to commit bank fraud; and conspiracy to commit money laundering. In his motion, Zarrab raised some of the same issues which are raised here. Among other things, Zarrab contended that: the alleged conspiracy to defraud the U.S. Office of Foreign Assets Control ("OFAC") "occurred entirely abroad;" the IEEPA and bank fraud statutes "do[] not apply extraterritorially;" "the indictment fails to allege a conspiracy to commit bank fraud;" and "conspiracy to commit money laundering is an improper duplicative charge [of

the IEEPA charge]." See July 18, 2016 Mot. at 4, 25, 33, 35; Aug. 22, 2016 Reply at 11-12, 17. Following briefing, by Decision & Order, dated October 17, 2016, the Court denied Zarrab's motion to dismiss. *See United States v. Zarrab*, 2016 WL 6820737, at *4, 8, 12, 15-16 (S.D.N.Y. Oct. 17, 2016) ("The Indictment alleges a violation of § 371 against Zarrab and his co-conspirators;" "the Indictment alleges a domestic nexus between Zarrab and his co-conspirators' conduct and the United States, i.e. the exportation of services from the United States;" "the Indictment clearly states the elements of a conspiracy to commit bank fraud;" and "Zarrab's argument that the conspiracy to commit money laundering charge 'merges' with the IEEPA [count] . . . is unpersuasive").

On October 9, 2017, Atilla moved to dismiss the September 6, 2017 Indictment against him. Atilla's motion raised some of the same issues which are raised here. In his motion, Atilla contended, among other things, that he "cannot be charged with activity that is exclusively foreign based with no direct U.S. effect;" "there is no allegation linking Atilla with the U.S;" and the IEEPA and ITSR cannot be applied extraterritorially to a foreign national. See Oct. 9, 2017 Mot. at 4, 13, 16. On November 16, 2017, after briefing, the Court denied Atilla's motion to dismiss. See Nov. 16, 2017 Tr. at 12:5-22:7 ("The Second Circuit Court of Appeals has made it abundantly clear that the execution of money transfers from the United States to Iran on behalf of another . . . constitutes the exportation of a service and may be in violation of IEEPA and ITSR." Id. at 19:22-20:1; "the indictment . . . reflects the elements of each count in the indictment and establishes a sufficient nexus between Mr. Atilla and his co-conspirators' conduct and the United States . . . Mr. Atilla is charged with participating in the same conspiracies as eight other defendants, i.e., at its core, circumventing U.S. sanctions against Iran via Halkbank." Id. at 20:24-22:13; "Mr. Atilla is [also] alleged to have . . . lied to U.S. regulators." Id. at 15:18-20).

II. Legal Standard

"[T]he indictment has a strong presumption of validity . . . [and is] only rarely dismissed." *United States v. Cornielle*, 171 F.3d 748, 752 (2d Cir. 1999). "An indictment . . . if valid on its face . . . is enough to call for trial of the charge[s] on the merits." *Costello v. U.S.*, 350 U.S. 359, 409 (1956). "The dismissal of an indictment is an 'extraordinary remedy' reserved only for extremely limited circumstances

implicating fundamental rights." *See United States v. De La Pava*, 268 F.3d 157, 165 (2d Cir. 2001). "An indictment need only provide sufficient detail to assure against double jeopardy and state the elements of the offense charged, thereby apprising the defendant of what he must be prepared to meet." *United States v. Tramunti*, 513 F.2d 1087, 1113 (2d Cir. 1975).

There is "a substantial public interest in ensuring that the Government may pursue prosecutions based upon indictments that are legally sufficient." *United States v. Samia*, 2017 WL 980333, at *3 (S.D.N.Y. Mar. 13, 2017); *United States v. Fields*, 592 F.2d 638, 648 (2d Cir. 1978). "In reviewing a motion to dismiss an indictment, the Court must take the allegations of the indictment as true." *See United States v. Avenatti*, 432 F.Supp.3d 354, 360-61 (S.D.N.Y. 2020) (citing *Boyce Motor Lines v. United States*, 342 U.S. 337, 343 n. 16 (1952)); *New York v. Tanella*, 374 F.3d 141, 148 (2d Cir. 2004).

"The standard for the sufficiency of an indictment is not demanding and requires little more than that the indictment track the language of the statute charged and state the time and place (in approximate terms) of the alleged crime." *United States v. Hayes*, 811 Fed. App'x 30, 37 (2d Cir. 2020) (citing *United States v. Balde*, 943 F.3d 73, 89 (2d Cir. 2019)) (internal citations omitted).

"The law of the case [doctrine] . . . expresses the practice of courts generally to refuse to reopen what has been decided." *See Colvin v. Keen*, 900 F.3d 63, 68 (2d Cir. 2018) (internal citations and quotations omitted). "When a court has ruled on an issue, that decision should generally be adhered to by that court in subsequent stages in the same case." *United States v. Uccio*, 950 F.2d 753, 758 (2d Cir. 1991). "The court has discretion to apply the law of the case doctrine, notwithstanding a 'difference in parties,' provided that doing so would be consistent with the court's 'good sense.'" *See S.E.C. v. Penn*, 2020 WL 1272285, at *3 (S.D.N.Y. Mar. 17, 2020). "A late-added party, or a co-party who did not participate in the proceedings that led to the first ruling, might be required to show reasons to doubt the adequacy of the underlying argument or of the ruling itself." See 18B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 4478.5 (2d ed.).

III. Second Circuit Court of Appeals July 20, 2020 Decision in the Atilla Case

On September 18, 2020, at the oral argument of Halkbank's motion to dismiss, both Halkbank and the Government sought to rely upon the Second Circuit's decision in *United States v. Atilla*, 966 F.3d 118 (2d Cir. 2020). According to the defense, "the Second Circuit's opinion in *Atilla* stands for one thing and one thing only . . . evasion of secondary sanctions is not a crime." See Sept. 18, 2020 Tr. at 34:14-16. "Halkbank was indicted on the assumption that the entire $20 billion . . . was unlawful because it violated secondary sanctions, and the Second Circuit said, no, that's not the law." Id. at 35:13-17.

The Government counters that "the *Atilla* decision is a ruling of the Second Circuit with respect to the very scheme alleged in this [Halkbank's] indictment and is controlling. The Second Circuit [] viewed the . . . allegations underlying the scheme and concluded that [the allegations] support IEEPA conspiracy involving primary sanctions, bank fraud conspiracy, money laundering conspiracy and . . . bank fraud." Id. at 33:14-21. "In affirming Atilla's convictions . . . the Second Circuit . . . necessarily found that the scheme contemplated laundering the money through the U.S. financial system." Id. at 20:23-25; see also Reenat Sinay, "Feds Say 2nd Circ. Ruling Bolsters Halkbank Sanctions Case," *Law360.com* (Sept. 18, 2020).

In the Court's view, the Second Circuit ruling stands for several relevant propositions. First and foremost, the Second Circuit affirmed Atilla's convictions and sentence for conspiracy to defraud the U.S., conspiracy to violate the IEEPA, bank fraud, conspiracy to commit bank fraud, and conspiracy to commit money laundering. *See United States v. Atilla*, 966 F.3d 118 (2d Cir. 2020). Second, the Second Circuit rejected "secondary sanctions liability" under the IEEPA but affirmed Atilla's conviction under the Government's alternate primary sanctions theory that "Atilla conspired to violate the IEEPA by exporting services (including the execution of U.S. dollar transfers) from the United States to Iran in violation of the ITSR [Iranian Transactions and Sanctions Regulations]." *Atilla*, 966 F.3d at 127. Third, the evidence of Atilla's convictions was "overwhelming" and "demonstrated that the purpose of the scheme was to convert Iranian oil proceeds held at Halkbank into a form that could be used to fund international payments on behalf of the Government of Iran." *Id.* at 128-29. "These international

payments were likely to pass through the U.S. financial system" and "senior-level executives at Halkbank knew the particulars of the scheme, including the importance of the international payments and of U.S. dollar transactions." *Id.* at 121-22, 128-29. "Atilla wanted the Iranian transactions to remain obscured by Zarrab because Atilla knew that they violated U.S. sanctions on Iran." *Id.* at 129. Fourth, that "Atilla repeatedly lied to Treasury officials to conceal the sanctions avoidance scheme . . . [and] he was aware that the scheme involved international payments through U.S. banks that were violations of U.S. sanctions." *Id.*[3]

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[3] Among the evidence adduced at Atilla's trial were meetings between and among Atilla and U.S. Treasury officials Adam Szubin, former Director of OFAC, and David Cohen, former U.S. Undersecretary of the Treasury for Terrorism and Financial Intelligence. These meetings took place both in the U.S. and in Turkey. Indeed, some of these meetings took place at the U.S. Department of Treasury in Washington D.C. See Dec. 7, 2017 Tr. at 1082, 1083:17-19; see also Dec. 12, 2017 Tr. at 1413:6-10; 1474:16-17.

A meeting at the U.S. Department of Treasury in Washington D.C. in March 2012 is reflected in the following trial testimony: AUSA Lockard: "On March 14, 2012, where was the meeting held?" Cohen: "In my office at the Treasury Department." AUSA Lockard: "Who were the participants in that meeting?" Cohen: "Mr. Atilla and Mr. Aslan [the former General Manager of Halkbank] . . . the Halkbank executives were in Washington for a meeting." AUSA Lockard: "What were the topics that you discussed with Mr. Atilla and Mr. Aslan at this meeting in March?" Cohen: "[I]ssues relating to Iran sanctions . . . They told us that they . . . were not allowing Iran to acquire gold . . . using the proceeds that Halkbank was holding for Iran from the sale of oil . . . [W]e were assured that . . . they understood that Iran would look to use deceptive practices to evade sanctions and [] that they had mechanisms in place at the bank to ensure that they would detect and prevent Iranian efforts to evade the sanctions." See Dec. 8, 2017 Tr. at 1112:22-1118:7.

At the so-called "pull-aside" meeting in Turkey in February 2013, according to Szubin, Szubin warned Atilla "one-on-one" that: "to the extent he [Atilla] was viewing this as a kind of routine discussion or . . . visit . . . that wasn't the case. This was a very conscious visit to Halkbank, by me, because of concerns that were pretty serious about what was going on at Halkbank. And that we viewed them in sort of a category unto themselves, that I wasn't having this same level of conversation with any other bank." See Dec. 12, 2017 Szubin Testimony Tr. at 1436.

At another meeting at the U.S. Department of Treasury in Washington D.C. in October 2014, Atilla gave assurances to Cohen about Halkbank's relationship with Reza Zarrab: AUSA Lockard: "Directing your attention to early October of 2014, did you meet with anyone from Halkbank at that time?" Cohen: "Mr. Atilla and the new CEO of Halkbank . . . in my office in Washington . . . I wanted to know what Halkbank's involvement with Mr. Zarrab was." AUSA Lockard: "Did Mr. Atilla provide any additional details about Mr. Zarrab's then-current business with the bank?" Cohen: "He [Atilla] mentioned that they had a loan for some properties that Mr. Zarrab owned. My recollection is it was a relatively small relationship . . . I was being assured that everything was okay." See Dec. 8, 2017 Tr. at 1149:19-1152:8.

IV. Halkbank's Motion to Dismiss

Halkbank's motion seeks to dismiss all six counts in the Indictment. Halkbank contends that it is immune from prosecution under the Foreign Sovereign Immunities Act ("FSIA"). See Mot. at 1. Halkbank also contends that the Indictment is barred by the "presumption against extraterritoriality." Id. at 12. Halkbank asserts that the Court lacks personal jurisdiction over Halkbank because of the absence of "minimum contacts" with the United States. Id. at 8. Halkbank also seeks to dismiss Counts One, Three, Four, and Six on particularized individual grounds, including respectively failure to allege a conspiracy to defraud the U.S; failure to allege bank fraud; and failure to allege conspiracy to commit bank fraud. Halkbank claims that Count Six is multiplicitous of Count Two.[4]

Halkbank is Not Immune from Prosecution under the FSIA

Halkbank argues that the Foreign Sovereign Immunities Act (FSIA) "extends [] immunity to any 'instrumentality of a foreign state.'" See Mot. at 1. Immunity presumably extends to Halkbank because it is majority-owned by the Turkish government. Id. The Government counters persuasively that FSIA does not apply in criminal cases and that, even if FSIA did apply, "the statute's 'commercial activities' exception would strip away any immunity." See Opp. at 6-7, 9-14.

The Court concludes that Halkbank is not immune from prosecution. For one thing, FSIA does not appear to grant immunity in criminal proceedings. *See United States v. Hendron*, 813 F.Supp. 973, 975 (E.D.N.Y. 1993); *United States v. Biggs*, 273 Fed. App'x 88, 89 (2d Cir. 2008); Opp. at 6-9; *see also Southway v. Central Bank of Nigeria*, 198 F.3d 1210, 1215 (10th Cir. 1999); *United States v. Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997). In *United States v. Hendron*, the district court undertook a comprehensive analysis of the text and legislative history of FSIA and concluded that FSIA "applies only to civil proceedings." *See Hendron*, 813 F.Supp. at 975. Nothing in the text of FSIA suggests that it applies to criminal proceedings; and the "legislative history . . . gives no hint that Congress was

[4] Halkbank argues that "sovereign immunity," the absence of "extraterritoriality," and the absence of minimum contacts (each) void Counts One through Six. Halkbank does not appear to be seeking dismissal of Counts Two and Five on any particularized individual grounds.

concerned [about] a foreign defendant in a criminal proceeding." *Hendron*, 813 F.Supp. at 976; *see also In re Grand Jury Proceeding*, 752 F.Supp. 2d 173, 179 (D.P.R. 2010). "The basic purpose of the [FSIA] is to give the district courts jurisdiction to hear **civil cases** involving claims against foreign states, and their instrumentalities which have waived their immunity from suit." *Corporacion Venezolana de Fomento v. Vintero Sales Corp.*, 629 F.2d 786, 790 (2d Cir. 1980) (emphasis added); *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488 (1983); *see generally* Robert A. Katzmann, Judging Statutes (Oxford University Press, 2014) pp. 31-32 ("the fundamental task for the judge . . . is to interpret language in light of the statute's purpose(s)").[5]

Even assuming, *arguendo*, that FSIA provided immunity in this criminal case (which it does not), FSIA's commercial activity exceptions would clearly apply and support the Halkbank prosecution. The commercial activity exception provides that "a foreign state will not be immune from suit in any case: (1) in which the action is based upon 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." *See Hanil Bank v. PT. Bank Negara Indonesia (Persero)*, 148 F.3d 127, 130-31 (2d Cir. 1998) (citing 28 U.S.C. § 1605(a)(2)).

The Government points to Halkbank's alleged misrepresentations made to U.S. Treasury officials both in and outside the United States and to Halkbank's use of U.S. banks to facilitate fraudulent transactions in excess of $1 billion as bases for denying immunity (under the commercial activity exception). See Opp. at 9-12. The Indictment alleges, among other things, that: (a) "Halkbank . . . participated in the design of fraudulent transactions intended to deceive U.S. regulators and foreign banks, and lied to U.S. regulators about Halkbank's involvement;" (b) "Senior officers of Halkbank . . .

[5] It should be noted that not all Circuits agree with *Hendron*. *See e.g. Keller v. Central Bank of Nigeria*, 277 F.3d 811 (6th Cir. 2002).

concealed the true nature of these transactions from officials with the U.S. Department of the Treasury so that Halkbank could supply billions of dollars' worth of services to the Government of Iran without risking being sanctioned by the United States and losing its ability to hold correspondent accounts with U.S. financial institutions;" and (c) "The purpose and effect of the scheme in which Halkbank [] participated was to create a pool of Iranian oil funds in Turkey . . . 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 U.S. financial system in violation of U.S. sanctions laws," see Indictment at 1-4, 26, 34. According to the Government, Halkbank has forfeited any purported immunity from prosecution in the U.S. See Opp. at 9-12.

Halkbank's business meetings, conference calls, and other interactions and communications at the U.S. Department of Treasury described in the Indictment fall under the first commercial activity exception. See Opp. at 11 citing *Pablo Star Ltd. v. Welsh Gov't*, 961 F.3d 555 (2d Cir. 2020). They amount to "commercial activity carried on in the United States." 28 U.S.C. § 1605(a)(2). Halkbank's business meetings, conference calls, and other interactions and communications at the U.S. Department of Treasury also fall under the second commercial activity exception. They amount to "act[s] performed in the United States in connection with a commercial activity elsewhere," including Halkbank's banking activity in Turkey. See Opp. at 10-11; 28 U.S.C. § 1605(a)(2); *see also Devengoechea v. Bolivarian Republic of Venezuela*, 2016 WL 3951279, at *9 (S.D.Fl. Jan. 20, 2016); *Abdulla v. Embassy of Iraq at Washington D.C.*, 2013 WL 4787225, at *7 (E.D.Pa. Sept. 9, 2013).

Halkbank's business meetings, conference calls, and other interactions and communications with the U.S. Department of Treasury (in and outside the U.S.) coupled with its alleged "laundering [of] more than $1 billion through the U.S. financial system in violation of the U.S. embargo on Iran" fall under the third commercial activity exception. They include "acts outside the territory of the United States in connection with a commercial activity elsewhere that [] cause[d] a direct effect in the United States." 28 U.S.C. § 1605(a)(2); see Opp. at 12; see also *Atlantica Holdings v. Sovereign Wealth Fund Samruk-Kazyna JSC*, 813 F.3d 98, 109 (2d Cir. 2016); *Nnaka v. Fed. Republic of Nigeria*, 238 F.Supp.3d 17, 30

(D.D.C. 2017); *Hanil Bank*, 148 F.3d at 131-33. At oral argument on September 18, 2020, the Government persuasively contended that: "[y]ou have a plan by [Halkbank] and Iran, among others, to victimize the United States and its financial institutions, which was successfully completed to the tune of a billion dollars. So, there is no dispute, frankly, that there is a direct effect [in the United States]." See Sept. 18, 2020 Tr. at 29:19-31:9. "While it is true that the bank helped Iran secretly transfer approximately $20 billion-worth in violation of a host of international sanctions . . . the more than $1 billion . . . in other words, 100% of the U.S. criminal conduct . . . passed through domestic accounts." See Opp. at 19. "An injury knowingly caused in the United States is sufficient to satisfy the direct effect requirement and that's exactly what you have here." See Sept. 18, 2020 Tr. at 31:2-5. "The gravamen of the claim is the conspiracy and the scheme to launder money through the United States. That's what gives rise to criminal liability." Id. at 29:19-31:9; *see also Atlantica*, 813 F.3d at 107.

The Court also rejects Halkbank's claim that it is entitled to immunity under the common law. See Mot. at 1. For one thing, Halkbank cites no support for this argument. Rather, Halkbank unpersuasively relies upon *Samantar v. Yousuf*, a case in which the plaintiff sued an individual foreign official "in his personal capacity." *See Samantar v. Yousuf*, 130 S.Ct. 2278, 2281 (2010); *Tawfik v. al-Sabah*, 2012 WL 3542209, at *2 (S.D.N.Y. Aug. 16, 2012); see also Sept. 18, 2020 Tr. at 27:4-6. Second, at common law, "the granting or denial of . . . foreign sovereign immunity . . . was historically the case-by-case prerogative of the Executive Branch" and courts "deferred to the decisions of . . . the Executive Branch on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities." *See Verlinden*, 103 S.Ct. at 486; *Republic of Iraq v. Beaty*, 556 U.S. 848, 857 (2009); Opp. at 9. By pursuing Halkbank's prosecution, according to the Government, the U.S. Executive Branch "has clearly manifested its clear sentiment that Halkbank should be denied immunity." See Opp. at 9 (quoting *Noriega*, 117 F.3d at 1212).

The Presumption Against Extraterritoriality Does Not Bar the Charges in the Indictment

Halkbank argues that the Indictment should be dismissed because the applicable statutes "do not apply extraterritorially." See Mot. at 12, 14. The Government counters persuasively that "the Indictment involves a domestic, rather than an extraterritorial, application of the IEEPA, the bank fraud statute, the money laundering statute, and § 371." See Opp. at 18.

The Court finds that the presumption against extraterritoriality does not apply. Indeed, "there is a sufficient domestic nexus between the allegations in [the Indictment] to avoid the question of extraterritorial application altogether." *See United States v. Mostafa*, 965 F.Supp.2d 451, 469 (S.D.N.Y. 2013). According to the Government, "the very purpose of the scheme was to launder Iranian oil proceeds through U.S. financial institutions for use to make international payments throughout the world." See Opp. at 18. The alleged scheme involved Halkbank's "concealment of information from, and misrepresentations to, U.S. government departments and officials in this country." See Opp. at 19. And, "at least approximately $1 billion was laundered through the U.S. . . . through domestic accounts." See Opp. at 3, 19; *United States v. Prevezon Holdings, Ltd.*, 251 F.Supp.3d 684 (S.D.N.Y. 2017); *United States v. Buck*, 2017 WL 4174931, at *6-8 (S.D.N.Y. Aug. 28, 2017); *United States v. Hayes*, 99 F. Supp. 3d 409, 422 (S.D.N.Y. 2015).

The Indictment clearly alleges domestic application in that "Halkbank knowingly facilitated the scheme [and] participated in the design of fraudulent transactions intended to deceive U.S. regulators;" "Senior officers of Halkbank . . . acting within the scope of their employment and for the benefit of Halkbank, concealed the true nature of these transactions from officials with the U.S. Department of Treasury;" "between at least approximately December 2012 and October 2013, more than $900 million in such transactions were conducted by U.S. financial institutions through correspondent accounts held in the United States;" and "Halkbank continued executing the evasion and money laundering scheme until at least in or about March 2016 . . . [and] continued to deceive Treasury officials." See Indictment at 1-3, 26, 34; see also *Force v. Facebook*, 934 F.3d 53, 73 (2d Cir. 2019) ("the case involves a domestic application

of the statute . . . the conduct relevant to the statute's focus occurred in the United States, [and] the case involves a permissible domestic application even if other conduct occurred abroad").[6]

The Court has Personal Jurisdiction over Halkbank

Halkbank argues that "to meet the requirements of the Due Process Clause, the Government must establish either (1) that Halkbank has 'continuous and systematic' contacts with the United States . . . or (2) that the conduct giving rise to the alleged crimes 'arises out of' activities by Halkbank in the United States." See Mot. at 9. The Government counters correctly that "[n]either the Supreme Court nor the Second Circuit has ever held that the [] minimum-contacts test must be satisfied for personal jurisdiction in criminal cases." See Opp. at 16; see also *United States v. Halkbank*, 426 F.Supp.3d 23, 35 (S.D.N.Y. 2019) ("While minimum contacts challenges may be appropriate in civil cases, such challenges do not apply in criminal matters . . . Halkbank's reliance upon minimum contacts jurisprudence is simply misplaced.").

The Court clearly has personal jurisdiction over Halkbank. It is axiomatic that where, as here, a District Court has subject matter jurisdiction over the criminal offenses charged, it also has personal jurisdiction over the individuals charged in the indictment. 18 U.S.C. § 3231 ("The district courts of the United States shall have original jurisdiction . . . of all offenses against the laws of the United States"); *United States v. Maruyasu Indus. Co., Ltd.*, 229 F.Supp.3d 659, 670 (S.D. Ohio 2017); Opp. at 15. "A defendant need not acquiesce in or submit to the court's jurisdiction or actually participate in the proceedings in order for the court to have personal jurisdiction over the defendant." *United States v. McLaughlin*, 949 F.3d 780, 781 (2d Cir. 2019).

[6] The Court in Zarrab's proceedings also found that "[t]he enactment and promulgation of the IEEPA and ITSR reflect the United States' interest in protecting and defending itself against, among other things, Iran's sponsorship of international terrorism, Iran's frustration of the Middle East peace process, and Iran's pursuit of weapons of mass destruction, which implicate the national security, foreign policy, and the economy of the United States." *See Zarrab*, 2016 WL 6820737, at *8; *see also United States v. Vilar*, 729 F.3d 62, 73 (2d Cir. 2013) ("the presumption against extraterritoriality does [not] apply . . . in situations where the law at issue is aimed at protecting the right of the government to defend itself"); *Facebook*, 934 F.3d at 73; *United States v. Tajideen*, 319 F.Supp.3d 445, 457 (D.D.C. 2018).

As noted, the Court has already rejected Halkbank's minimum contacts personal jurisdiction argument by Decision & Order, dated December 5, 2019. "[I]t is improper to make a personal jurisdiction motion based upon the absence of minimum U.S. contacts in a criminal case . . . [S]uch challenges do not apply to criminal matters . . . A federal district court has personal jurisdiction to try any defendant brought before it on a federal indictment charging a violation of federal law." *See United States v. Halkbank*, 426 F.Supp.3d 23, 35 (S.D.N.Y. 2019) (collecting cases); *see also United States v. Quintieri*, 306 F.3d 1217, 1225 (2d Cir. 2002) ("the law of the case doctrine . . . holds that when a court has ruled on an issue, that decision should generally be adhered to by that court in subsequent stages in the same case").

Even assuming, *arguendo*, that "minimum contacts" were required (which they are not), the Court would likely find that Halkbank purposefully availed itself of the United States banking system as part of its alleged scheme. See Opp. at 16-17. "It should hardly be unforeseeable to a bank that selects and makes use of a particular forum's banking system that it might be subject to the burden of a lawsuit in that forum for wrongs related to, and arising from, that use." *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 732 F.3d 161, 171-73 (2d Cir. 2013); *Nike, Inc. v. Wu*, 349 F.Supp.3d 310, 330 (S.D.N.Y. Sept. 25, 2018) ("the Banks have sufficient minimum contacts . . . as the selection and repeated use of New York's banking system constitutes purposeful availment of the privilege of doing business in New York").

The Court also finds that Halkbank's "acts could be expected to or did produce an effect in the United States" and that the "aim of that activity [was] to cause harm inside the United States or to U.S. citizens or interests." *See United States v. Epskamp*, 832 F.3d 154, 168 (2d Cir. 2016); *Mostafa*, 965 F. Supp. 2d at 459; Opp. at 15-17.

The Indictment Alleges a Conspiracy to Defraud the United States in Count One

Halkbank argues, among other things, that "Count One should be dismissed because the Indictment does not allege a conspiracy to 'defraud' the United States" under 18 U.S.C. § 371. Mot. at 24. The Government counters persuasively that the Indictment adequately alleges a conspiracy under 18 U.S.C. § 371 because it "tracks the language of the statute and states the time and place (in approximate terms) of the alleged crime, which is all that is required to deny a motion to dismiss." Count One "is

based on the bank's concealment of information from, and misrepresentations to, U.S. government departments and officials." See Opp. at 1, 17, 19.

The Court finds that the four elements of a § 371 conspiracy to defraud offense are clearly alleged, including: "(1) that the defendant entered into an agreement; (2) to obstruct a lawful function of the Government; (3) by deceitful or dishonest means; and (4) at least one overt act in furtherance of the conspiracy." *See United States v. Ballistrea*, 101 F.3d 827, 832 (2d Cir. 1996). That is, the Indictment alleges that, "[f]rom at least in or about 2012, up to and including in or about 2016, in the Southern District of New York, Turkey, the United Arab Emirates, and elsewhere . . . Halkbank . . . and others known and unknown, knowingly and willfully combined, conspired, confederated, and agreed together and with each other to defraud the United States and an agency thereof, to . . . impede and obstruct the lawful and legitimate governmental functions and operations of the U.S. Department of Treasury in the enforcement of economic sanctions laws and regulations administered by that agency." The Indictment also alleges that: "Throughout the scheme, senior executives from Halkbank [] took steps to prevent U.S. authorities, particularly OFAC [Office of Foreign Assets Control], from detecting the illicit nature of the transfers being conducted through Zarrab's companies;" and "[a]fter continuation of the scheme following Zarrab's arrest, officials at Halkbank [] continued to deceive Treasury officials about the bank's relationship with Zarrab." See Indictment at 34-35; *United States v. Tochelmann*, 1999 WL 294992, at *2 (S.D.N.Y. May 11, 1999).

In affirming Atilla's conviction, the Court of Appeals held: "Atilla's challenge to his § 371 conviction fails because § 371's defraud clause was properly applied to his case . . . it has been well established that the term 'defraud' in § 371 . . . embraces 'any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of Government.'" *United States v. Atilla*, 966 F.3d 118, 130 (2d Cir. 2020) (internal citations and quotations omitted).

The Indictment Alleges Bank Fraud in Count Three

Halkbank argues that the Indictment "fails to allege a scheme to defraud a U.S. bank." See Mot. at 18. The Government counters persuasively that the Indictment "tracks the language of the bank fraud

statute and states the time and place (in approximate terms) of the alleged crime, which is all that is required to deny a motion to dismiss." See Opp. at 21 (internal citations omitted).

The Indictment clearly alleges bank fraud in violation of 18 U.S.C. § 1344 which prohibits "knowingly execut[ing], or attempt[ing] to execute a scheme or artifice (1) to defraud a financial institution; or (2) to obtain any of the money, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations or promises." The Indictment, as noted, states that "[f]rom at least in or about 2012, up to and including in or about 2016, in the Southern District of New York, Turkey, the United Arab Emirates, and elsewhere . . . Halkbank . . . and others . . . did knowingly execute and attempt to execute a scheme or artifice to defraud a financial institution, the deposits of which were then insured by the Federal Deposit Insurance Corporation . . . and to obtain moneys, funds . . . and other property owned by and under the custody and control of such financial institution, by means of false and fraudulent pretenses, representations, and promises . . . inducing U.S. financial institutions to conduct financial transactions on behalf of and for the benefit of the Government of Iran . . . by deceptive means." Indictment at 38.

The Indictment also provides details of the scheme to defraud U.S. banks, stating that "[t]he purpose and effect of the scheme . . . was to create a pool of Iranian oil funds . . . in the names of front companies, which concealed the funds' Iranian nexus . . . to make international payments on behalf of the Government of Iran . . . that passed through the U.S. financial system;" that "such transactions were conducted by U.S. financial institutions through correspondent accounts held in the United States;" and that "at least approximately $1 billion was laundered through unwitting U.S. financial institutions." Id. at 3-4, 26, 34.

The Indictment Alleges Conspiracy to Commit Bank Fraud in Count Four

Halkbank argues that the Indictment "fails to allege . . . a conspiracy to commit bank fraud." See Mot. at 18. The Government counters persuasively that the Indictment tracks the language of the bank fraud conspiracy statute (18 U.S.C. § 1349) and states the time and place in approximate terms of the alleged crime. See Opp. at 21.

The Court finds that the Indictment clearly alleges a conspiracy to commit bank fraud in violation of 18 U.S.C. § 1349 by stating that "[f]rom at least in or about 2012, up to and including in or about 2016, in the Southern District of New York, Turkey, the United Arab Emirates, and elsewhere . . . Halkbank . . . and others . . . knowingly and willfully combined, conspired, confederated, and agreed together and with each other to commit bank fraud." See Indictment at 38-39. The Indictment "tracks the statutory language and specifies the nature of the criminal activity . . . [sufficient] to withstand a motion to dismiss." *United States v. Citron*, 783 F.2d 307, 314 (2d Cir. 1986).

Halkbank's Contention that Count Six is Multiplicitous is Denied

Halkbank contends that Count Two (conspiracy to violate the IEEPA) and Count Six (conspiracy to commit money laundering) are multiplicitous because "the government details the same scheme consisting of the same transfers of funds, from the same accounts, on the same dates as the basis for the two charges." See Mot. at 22, 24. The Government counters that because Count Two and Count Six are "distinct offenses" the Court should reject the bank's multiplicity argument. The Government also argues that "a pre-trial multiplicity motion is premature." See Opp. at 23-24.

"Courts in this Circuit have routinely denied pre-trial motions to dismiss potentially multiplicitous counts as premature." *See United States v. Medina*, 2014 WL 3057917, at *3 (S.D.N.Y. July 7, 2014) (citing *United States v. Josephberg*, 459 F.3d 350, 355 (2d Cir. 2006)). If the Court were to deal with the issue on the merits at this time, it would likely reject the motion because Count Two and Count Six each "contains an element not contained in the other" and "one crime could be proven without necessarily establishing the other." *See United States v. Budovsky*, 2015 WL 5602853, at *11 (S.D.N.Y. Sept. 23, 2015); *United States v. Regensberg*, 604 F.Supp.2d 625, 633 (S.D.N.Y. 2009); Opp. at 23-24.

V. Conclusion & Order

Halkbank's motion to dismiss [Dck. # 645] is respectfully denied.

Dated: New York, New York
October 1, 2020

Richard M. Berman

RICHARD M. BERMAN, U.S.D.J.

18 U.S.C. § 3231. District courts

The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof.

28 U.S.C. § 1330. Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605–1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605–1607 of this title.

28 U.S.C. § 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

28 U.S.C. § 1603. Definitions

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof , or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332 (c) and (e) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. 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.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

28 U.S.C. § 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act 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. § 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or 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;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: *Provided*, That—

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in section 31301 of title 46. Such action shall be brought, heard, and determined in accordance with the provisions of chapter 313 of title 46 and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

[(e), (f) Repealed. Pub. L. 110–181, div. A, title X, § 1083(b)(l)(B), Jan. 28, 2008, 122 Stat. 341.]

(g) LIMITATION ON DISCOVERY.—

(1) IN GENERAL.—(A) Subject to paragraph (2), if an action is filed that would otherwise be barred by section 1604, but for section 1605A or section 1605B, the court, upon request of the Attorney General, shall stay any request, demand, or order for discovery on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action, until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere.

(B) A stay under this paragraph shall be in effect during the 12-month period beginning on the date on which the court issues the order to stay discovery. The court shall renew the order to stay discovery for additional 12-month periods upon motion by the United States if the Attorney General certifies that discovery would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action.

(2) SUNSET.—(A) Subject to subparagraph (B), no stay shall be granted or continued in effect under paragraph (1) after the date that is 10 years after the date on which the incident that gave rise to the cause of action occurred.

(B) After the period referred to in subparagraph (A), the court, upon request of the Attorney General, may stay any request, demand, or order for discovery on the United States that the court finds a substantial likelihood would—

(i) create a serious threat of death or serious bodily injury to any person;

(ii) adversely affect the ability of the United States to work in cooperation with foreign and international law enforcement agencies in investigating violations of United States law; or

(iii) obstruct the criminal case related to the incident that gave rise to the cause of action or undermine the potential for a conviction in such case.

(3) EVALUATION OF EVIDENCE.—The court's evaluation of any request for a stay under this subsection filed by the Attorney General shall be conducted ex parte and in camera.

(4) BAR ON MOTIONS TO DISMISS.—A stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

(5) CONSTRUCTION.—Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States.

(h) JURISDICTIONAL IMMUNITY FOR CERTAIN ART EXHIBITION ACTIVITIES.—
(1) IN GENERAL.—If—

(A) a work is imported into the United States from any foreign state pursuant to an agreement that provides for the temporary exhibition or display of such work entered into between a foreign state that is the owner or custodian of such work and the United States or one or more cultural or educational institutions within the United States;

(B) the President, or the President's designee, has determined, in accordance with subsection (a) of Public Law 89–259 (22 U.S.C. 2459(a)), that such work is of cultural significance and the temporary exhibition or display of such work is in the national interest; and

(C) the notice thereof has been published in accordance with subsection (a) of Public Law 89–259 (22 U.S.C. 2459(a)),

any activity in the United States of such foreign state, or of any carrier, that is associated with the temporary exhibition or display of such work shall not be considered to be commercial activity by such foreign state for purposes of subsection (a)(3).

(2) EXCEPTIONS.—

(A) NAZI-ERA CLAIMS.—Paragraph (1) shall not apply in any case asserting jurisdiction under subsection (a)(3) in which rights in property taken in violation of international law are in issue within the meaning of that subsection and—

(i) the property at issue is the work described in paragraph (1);

(ii) the action is based upon a claim that such work was taken in connection with the acts of a covered government during the covered period;

(iii) the court determines that the activity associated with the exhibition or display is commercial activity, as that term is defined in section 1603(d); and

(iv) a determination under clause (iii) is necessary for the court to exercise jurisdiction over the foreign state under subsection (a)(3).

(B) OTHER CULTURALLY SIGNIFICANT WORKS.—In addition to cases exempted under subparagraph (A), paragraph (1) shall not apply in any case asserting jurisdiction under subsection (a)(3) in which rights in property taken in violation of international law are in issue within the meaning of that subsection and—

(i) the property at issue is the work described in paragraph (1);

(ii) the action is based upon a claim that such work was taken in connection with the acts of a foreign government as part of a systematic campaign of coercive confiscation or misappropriation of works from members of a targeted and vulnerable group;

(iii) the taking occurred after 1900;

(iv) the court determines that the activity associated with the exhibition or display is commercial activity, as that term is defined in section 1603(d); and

(v) a determination under clause (iv) is necessary for the court to exercise jurisdiction over the foreign state under subsection (a)(3).

(3) DEFINITIONS.—For purposes of this subsection—

(A) the term "work" means a work of art or other object of cultural significance;

(B) the term "covered government" means—

(i) the Government of Germany during the covered period;

(ii) any government in any area in Europe that was occupied by the military forces of the Government of Germany during the covered period;

(iii) any government in Europe that was established with the assistance or cooperation of the Government of Germany during the covered period; and

(iv) any government in Europe that was an ally of the Government of Germany during the covered period; and

(C) the term "covered period" means the period beginning on January 30, 1933, and ending on May 8, 1945.

28 U.S.C. § 1605A. Terrorism exception to the jurisdictional immunity of a foreign state

(a) IN GENERAL.—

(1) NO IMMUNITY.—A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

(2) CLAIM HEARD.—The court shall hear a claim under this section if—

(A)(i)(I) the foreign state was designated as a state sponsor of terrorism at the time the act described in paragraph (1) occurred, or was so designated as a result of such act, and, subject to subclause (II), either remains so designated when the claim is filed under this section or was so designated within the 6-month period before the claim is filed under this section; or

(II) in the case of an action that is refiled under this section by reason of section 1083(c)(2)(A) of the National Defense Authorization Act for Fiscal Year 2008 or is filed under this section by reason of section 1083(c)(3) of that Act, the foreign state was designated as a state sponsor of terrorism when the original action or the related action under section 1605(a)(7) (as in effect before the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104–208) was filed;

(ii) the claimant or the victim was, at the time the act described in paragraph (1) occurred—

(I) a national of the United States;

(II) a member of the armed forces; or

(III) otherwise an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment; and

(iii) in a case in which the act occurred in the foreign state against which the claim has been brought, the claimant has afforded the foreign state a reasonable

opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration; or

(B) the act described in paragraph (1) is related to Case Number 1:00CV03110 (EGS) in the United States District Court for the District of Columbia.

(b) LIMITATIONS.—An action may be brought or maintained under this section if the action is commenced, or a related action was commenced under section 1605(a)(7) (before the date of the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104–208) not later than the latter of—

(1) 10 years after April 24, 1996; or

(2) 10 years after the date on which the cause of action arose.

(c) PRIVATE RIGHT OF ACTION.—A foreign state that is or was a state sponsor of terrorism as described in subsection (a)(2)(A)(i), and any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, shall be liable to—

(1) a national of the United States,

(2) a member of the armed forces,

(3) an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment, or

(4) the legal representative of a person described in paragraph (1), (2), or (3), for personal injury or death caused by acts described in subsection (a)(1) of that foreign state, or of an official, employee, or agent of that foreign state, for which the courts of the United States may maintain jurisdiction under this section for money damages. In any such action, damages may include economic damages, solatium, pain and suffering, and punitive damages. In any such action, a foreign state shall be vicariously liable for the acts of its officials, employees, or agents.

(d) ADDITIONAL DAMAGES.—After an action has been brought under subsection (c), actions may also be brought for reasonably foreseeable property loss, whether insured or uninsured, third party liability, and loss claims under life and property insurance policies, by reason of the same acts on which the action under subsection (c) is based.

(e) SPECIAL MASTERS.—

(1) IN GENERAL.—The courts of the United States may appoint special masters to hear damage claims brought under this section.

(2) TRANSFER OF FUNDS.—The Attorney General shall transfer, from funds available for the program under section 1404C of the Victims of Crime Act of 1984 (42 U.S.C. 10603c) [footnote omitted], to the Administrator of the United States district court in which any case is pending which has been brought or maintained under this section such funds as may be required to cover the costs of special masters appointed under paragraph (1). Any amount paid in compensation to any such special master shall constitute an item of court costs.

(f) APPEAL.—In an action brought under this section, appeals from orders not conclusively ending the litigation may only be taken pursuant to section 1292(b) of this title.

(g) PROPERTY DISPOSITION.—

(1) IN GENERAL.—In every action filed in a United States district court in which jurisdiction is alleged under this section, the filing of a notice of pending action pursuant to this section, to which is attached a copy of the complaint filed in the action, shall have the effect of establishing a lien of lis pendens upon any real property or tangible personal property that is—

(A) subject to attachment in aid of execution, or execution, under section 1610;

(B) located within that judicial district; and

(C) titled in the name of any defendant, or titled in the name of any entity controlled by any defendant if such notice contains a statement listing such controlled entity.

(2) NOTICE.—A notice of pending action pursuant to this section shall be filed by the clerk of the district court in the same manner as any pending action and shall be indexed by listing as defendants all named defendants and all entities listed as controlled by any defendant.

(3) ENFORCEABILITY.—Liens established by reason of this subsection shall be enforceable as provided in chapter 111 of this title.

(h) DEFINITIONS.—For purposes of this section—

(1) the term "aircraft sabotage" has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation;

(2) the term "hostage taking" has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages;

(3) the term "material support or resources" has the meaning given that term in section 2339A of title 18;

(4) the term "armed forces" has the meaning given that term in section 101 of title 10;

(5) the term "national of the United States" has the meaning given that term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22));

(6) the term "state sponsor of terrorism" means a country the government of which the Secretary of State has determined, for purposes of section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) [footnote omitted], section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371), section 40 of the Arms Export Control Act (22 U.S.C. 2780), or any other provision of law, is a government that has repeatedly provided support for acts of international terrorism; and

(7) the terms "torture" and "extrajudicial killing" have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991 (28 U.S.C. 1350 note).

28 U.S.C. § 1605B. Responsibility of foreign states for international terrorism against the United States

(a) DEFINITION.—In this section, the term "international terrorism"—

(1) has the meaning given the term in section 2331 of title 18, United States Code; and

(2) does not include any act of war (as defined in that section).

(b) RESPONSIBILITY OF FOREIGN STATES.—A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which money damages are sought against a foreign state for physical injury to person or property or death occurring in the United States and caused by—

(1) an act of international terrorism in the United States; and

(2) a tortious act or acts of the foreign state, or of any official, employee, or agent of that foreign state while acting within the scope of his or her ·office, employment, or agency, regardless where the tortious act or acts of the foreign state occurred.

(c) CLAIMS BY NATIONALS OF THE UNITED STATES.—Notwithstanding section 2337(2) of title 18, a national of the United States may bring a claim against a foreign state in accordance with section 2333 of that title if the foreign state would not be immune under subsection (b).

(d) RULE OF CONSTRUCTION.—A foreign state shall not be subject to the jurisdiction of the courts of the United States under subsection (b) on the basis of an omission or a tortious act or acts that constitute mere negligence.

28 U.S.C. § 1606. Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

28 U.S.C. § 1607. Counterclaims

In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim—

(a) for which a foreign state would not be entitled to immunity under section 1605 or 1605A of this chapter had such claim been brought in a separate action against the foreign state; or

(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.