No. 21-1450

In the Supreme Court of the United States

TÜRKIYE HALK BANKASI A.Ş.,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

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

BRIEF FOR PETITIONER

LISA S. BLATT
Counsel of Record
ROBERT M. CARY
JOHN S. WILLIAMS
SIMON A. LATCOVICH
AMY MASON SAHARIA
WILLIAMS & CONNOLLY LLP
680 Maine Avenue, S.W.
Washington, DC 20024
(202) 434-5000
lblatt@wc.com

QUESTION PRESENTED

Whether U.S. district courts may exercise subject-matter jurisdiction over criminal prosecutions against foreign sovereigns and their instrumentalities under 18 U.S.C. § 3231 and in light of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1441(d), 1602-1611.

PARTIES TO THE PROCEEDING

Petitioner Türkiye Halk Bankasi A.Ş., was a defendant in the district court and the appellant in the Second Circuit. Respondent United States of America was the plaintiff in the district court and the appellee in the Second Circuit.

CORPORATE DISCLOSURE STATEMENT

Petitioner Türkiye Halk Bankasi A.Ş. is 87.7% 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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OPINIONS BELOW

The court of appeals' opinion (Pet.App.1a-24a) is reported at 16 F.4th 336. The court of appeals' order denying rehearing en banc (Pet.App.48a-49a) is unreported. The district court's opinion (Pet.App.25a-47a) is unreported but available at 2020 WL 5849512.

JURISDICTION

The court of appeals denied rehearing en banc on December 15, 2021. Pet.App.48a-49a. The petition for certiorari was filed on May 13, 2022, on extension from Justice Sotomayor, and granted on October 3, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 9 and 11 of the Judiciary Act of 1789, 18 U.S.C. § 3231, and the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1391(f), 1441(d), 1602-1611, are reproduced, *infra*, Add.1a-33a.

STATEMENT

Since the Founding, the United States has resolved its differences with other sovereigns through war and diplomacy, not by prosecuting offending governments in federal court and duking it out over pretrial discovery and alleged *Brady* violations. Until the decision below, no court had authorized the criminal trial of a foreign sovereign or its instrumentalities. Nor did any Administration attempt to prosecute foreign sovereigns for the first two centuries of the Republic. President Madison did not indict Great Britain for arson for torching the White House in 1814. President Roosevelt responded to Pearl Harbor by unleashing the full might of the American military against Japan, not a phalanx of prosecutors. Presidents Nixon and Ford did not turn to antitrust law to address the 1973 OPEC embargo; they chose diplomacy and sanctions. And President Clinton confronted Sudan's role in bombing the U.S. Embassy in Kenya through retaliatory strikes and sanctions, not by conscripting U.S. Attorneys. No matter how outrageous the conduct of a foreign sovereign, the United States hewed to the time-tested tools of the international system. That is no accident: at no point in American history has Congress ever opened federal courts to criminal prosecutions of foreign sovereigns.

With this case, the government identifies prosecution of nonconsenting sovereigns as a hitherto un-utilized tool in its toolkit. Petitioner Türkiye Halk Bankasi A.Ş. (Halkbank) is majority-owned and controlled by the Republic of

Türkiye (formerly Turkey). For sovereign-immunity purposes, Halkbank *is* Türkiye. Yet the United States seeks to hale Halkbank into federal court in the Southern District of New York to face allegations that the Turkish government used Halkbank to violate U.S. criminal law.

Under the government's theory, Congress apparently empowered federal judges to preside over foreign sovereigns' criminal trials from the Founding, yet no one noticed. On that view, 18 U.S.C. § 3231—first enacted as part of the Judiciary Act of 1789—gave the Executive Branch a blank check to prosecute foreign sovereigns by generally granting federal jurisdiction over "all offenses against the laws of the United States."

That reading would have been shocking news to the First Congress and the Founding generation at large. Then as now, plain-vanilla jurisdictional language could not be read to defy the law of nations and authorize the United States to pursue other sovereigns without express language to that effect. At the Founding, many offenses against the laws of the United States were exclusively punishable by death. Further, then as now, "persons" subject to federal criminal laws do not ordinarily mean sovereigns. Had the First Congress audaciously asserted criminal jurisdiction over nonconsenting foreign sovereigns, surely someone would have noticed at some point in the last two hundred-plus years—courts, other countries, or the federal government itself.

Instead, the Court time and again has rejected the notion that general grants of jurisdiction encompass foreign sovereigns. Two centuries ago, Chief Justice Marshall explained that a grant of "all" admiralty jurisdiction in the Judiciary Act of 1789 did not authorize subject-matter jurisdiction over a warship owned and controlled by a foreign power. *Schooner Exchange v. McFaddon*, 11 U.S. 116, 146 (1812); Judiciary Act of 1789,

ch. 20, § 9, 1 Stat. 73, 76. The Court has applied that rule to hold that the same jurisdictional grant did not apply to warships controlled by privateers acting under sovereign commission and merchant ships under a sovereign's control. *See L'Invincible*, 14 U.S. 238, 258 (1816); *Berizzi Bros. v. S.S. Pesaro*, 271 U.S. 562, 576 (1926). For all the same reasons, section 3231's general grant of jurisdiction over criminal offenses—which was part of the same Judiciary Act—does not reach foreign sovereigns. As the government has told foreign courts considering whether to prosecute the United States: "no criminal proceedings can be started against sovereign states." U.S. Br. Add. 38, *SerVaas Inc. v. Mills*, 661 F. App'x 7 (2d Cir. 2016) (No. 14-385) (emphasis omitted).

Even were section 3231 applicable here, section 1604 of the Foreign Sovereign Immunities Act (FSIA) expressly precludes criminal jurisdiction over foreign sovereigns and instrumentalities like Halkbank. Section 1604, unlike section 3231, specifically addresses whether foreign states and their instrumentalities can be sued. The answer: no. FSIA section 1604 provides unambiguously that foreign states and instrumentalities "shall be immune from the jurisdiction of the courts of the United States" absent exceptions applicable to "civil action[s]" only. 28 U.S.C. §§ 1330(a), 1604. The FSIA thus confirms that sovereigns and their instrumentalities like Halkbank are absolutely immune from criminal prosecutions.

For centuries, no one thought the Judiciary Act of 1789 opened a Pandora's box of criminal trials against foreign sovereigns and their instrumentalities. Presidents throughout history were not inexplicably incomplete in surveying their options in foreign affairs. Before now, the federal courts have never approved the criminal trial of a foreign sovereign because Congress kept federal courts

out of the diplomacy business. This Court should keep that door firmly shut.

A. Factual Background

1. In 1933, the Turkish Parliament enacted the "Halkbank and Public Funds Law," Law No. 2284, to create Türkiye Halk Bankasi—"People's Bank of Türkiye" in Turkish. Mehmet Sevimli Decl. ¶ 3, *Owens v. Turkiye Halk Bankasi A.S.*, No. 20-cv-2648 (S.D.N.Y. Sept. 25, 2020), Dkt. 63; Melikşah Yasin Decl. ¶ 2.2, *Owens*, No. 20-cv-2648 (S.D.N.Y. Sept. 25, 2020), Dkt. 64. Halkbank is a state bank headquartered in Istanbul; the Turkish government has always owned the majority of Halkbank's stock and operates the bank. Sevimli Decl. ¶¶ 5-6. (The Turkish government now owns 87.7% of Halkbank's shares.) By statute, Halkbank provides credit for small businesses, shop owners, and tradesmen. *Id.* ¶ 3. Halkbank has no U.S. branches, offices, or employees. *Id.* ¶ 4.

Turkish law establishes and regulates the government's control over Halkbank. Halkbank is a "state economic enterprise[]" subject to mandatory government oversight. *See* Turk. Const. art. 165; *see also* Yasin Decl. ¶ 2.9. Halkbank is "an affiliate of the Ministry of Treasury and Finance," whose Minister oversees Halkbank and exercises the government's ownership control under Turkish Law No. 4603. Sevimli Decl. ¶ 6. (Halkbank previously was an affiliate of the Ministry of Economy.) "The central government determines the management of Halkbank," appointing Halkbank's Board of Directors and senior management, and "is the only determining authority" over Halkbank's governance. Yasin Decl. ¶¶ 2.7, 4.2.

Türkiye created Halkbank "to mobilize scarce domestic resources for capitalist transformation, while asserting Turkish sovereignty." Thomas Marois & Ali Riza Güngen, *Credibility & Class in the Evolution of Public*

Banks: The Case of Turkey, 43 J. Peasant Studs. 1285, 1292 (2016). Halkbank played "an active and influential role in financing national development and state-building processes." *See* Thomas Marois & Ali Riza Güngen, *Reclaiming Turkey's State-Owned Banks* 6 (Mun. Servs. Proj., Paper No. 22, 2013).

Türkiye's "public banks became decisive in Turkey's state-led development plans after 1960," "played a key role in stabilizing Turkey amidst the 2008-2009 global crisis," and continue to "function as nation-wide institutional conduits of government policy." Marois & Güngen, *Credibility*, *supra*, at 1285, 1294, 1299-1302. In recent years the Turkish government has frequently tapped Halkbank to manage government social-support programs, including in response to the Covid-19 pandemic. *Public Banks & Covid-19*, at 333-47 (David A. McDonald et al. eds., 2020).

2. Although Halkbank denies that it engaged in any conduct that violated U.S. law, the indictment alleges that the Turkish government directed Halkbank's activities related to Iranian funds between 2012 and 2016. J.A.13-17, 20-22. Notwithstanding U.S. sanctions on Iran, the United States allowed Türkiye and other allies that had long relied on Iranian oil and gas to continue purchasing those commodities from Iran under certain conditions. Pet.App.4a-5a n.2. Türkiye had to designate a Turkish bank to hold Iran's oil and gas proceeds and to limit Iran's use of the proceeds to approved purposes such as bilateral trade and purchasing humanitarian goods. *See* Pet.App.4a-5a nn.2-3.

The Turkish government designated Halkbank to hold Iran's oil and gas proceeds. J.A.4; Pet.App.4a-5a n.2, 21a & n.62. The indictment alleges that Türkiye's "national oil company and gas company" purchased Iranian

oil and gas, and that Halkbank held the proceeds in accounts belonging to the Central Bank of Iran, the National Iranian Oil Company, and the National Iranian Gas Company. J.A.2; Pet.App.4a.

The indictment alleges that Türkiye's Economy Minister—Halkbank's then-governor—met with Turkish-Iranian businessman Reza Zarrab in 2012. J.A.13. Zarrab allegedly proposed to move Iran's funds out of Halkbank in a way that would later give Iran unrestricted access to its escrowed funds. J.A.12-13. According to the indictment, the Economy Minister "directed that the … scheme should be conducted through Halkbank." J.A.15.

The indictment alleges that "[h]igh-ranking government officials in … Turkey participated in and protected this scheme," directing Halkbank to continue, accelerate, and modify its conduct. J.A.2, 15-17, 20-22, 25, 27. Halkbank's general manager allegedly met with Türkiye's "then-Prime Minister, [Economy Minister], and other Turkish government officials," who ordered Halkbank to continue working with Zarrab. J.A.20-21. After Turkish police interrupted Zarrab's operation, "the then-Prime Minister of Turkey and his associates … [allegedly] instructed Halkbank to resume the scheme." J.A.27. The scheme allegedly "benefit[ted] the Government of Turkey" by "artificially inflat[ing] Turkey's export statistics." J.A.13.

According to the indictment, Halkbank employees carried out the Turkish government's alleged directive by helping transfer Iranian funds to Zarrab's front companies. J.A.11-12. The employees allegedly conspired to accept false documentation claiming that Zarrab was using the funds for private Iranian gold purchases in Türkiye, which would have complied with sanctions. J.A.11-12. In actuality, the government claims, Zarrab took the gold to Dubai. J.A.12, 21. There, he allegedly

exchanged the gold for currency "to fund the activities of the Government of Iran and Iranian companies and persons." J.A.12. When the United States banned private gold sales to Iran in 2013, Zarrab, after meeting with the Turkish Economy Minister again, allegedly began masking the transactions as permissible humanitarian trade. J.A.22-23. The indictment also alleges that Halkbank employees lied to U.S. Treasury officials about Halkbank's activities. J.A.27-28.

The indictment claims that about 5% of the Iranian funds originally held at Halkbank cleared through U.S. banks, usually when gold was sold in Dubai for hard currency or reimported to Türkiye—in either case, after the funds left Halkbank. J.A.2-3, 21, 28. The indictment does not allege that Halkbank directly transferred even a penny from the Iranian accounts to U.S. banks. Instead, the indictment alleges that Zarrab purchased gold in Türkiye, exported it to Dubai, sold it in Dubai, and then moved the proceeds through the international financial system. J.A.11-13, 18-19, 21.

B. Procedural History

1. In 2015, federal prosecutors in the Southern District of New York indicted Zarrab. D. Ct. Dkt. 2. In 2017, they indicted three former Halkbank executives and Türkiye's former Economy Minister. D. Ct. Dkt. 293. Zarrab pleaded guilty and cooperated with the government, testifying against one of Halkbank's former executives at trial. Pet.App.6a n.6; *see United States v. Atilla*, 966 F.3d 118, 122 (2d Cir. 2020).

On October 9, 2019, Turkish forces began unrelated military operations in Syria. Six days later federal prosecutors indicted Halkbank.

The indictment alleges 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.28-33. The government sought forfeiture of all money traceable to the alleged scheme. J.A.34-36.

Halkbank moved to dismiss the indictment, arguing that Halkbank was immune from criminal prosecution under both the common law and the FSIA. Pet.App.33a, 38a. The government did not contest that Halkbank was a foreign-state instrumentality for purposes of common-law immunity or the FSIA. Mot. to Dismiss Opp. 4-9, D. Ct. Dkt. 659; *see* Pet.App.7a n.8. The district court denied the motion to dismiss. Pet.App.25a.

2. The Second Circuit affirmed. Pet.App.24a. The court first held that Halkbank could immediately appeal the district court's denial of sovereign immunity under the collateral-order doctrine. Pet.App.8a-11a.

The court of appeals then held that 18 U.S.C. § 3231's grant of jurisdiction for "all offenses against the laws of the United States" conferred jurisdiction over Halkbank. Pet.App.16a (emphasis omitted). The court rejected Halkbank's immunity claims. The court acknowledged that FSIA section 1604 grants "immun[ity] from the jurisdiction of the courts of the United States," Pet.App.14a, but did not resolve whether that immunity applies to criminal cases, Pet.App.17a. Instead, the court reasoned that if that immunity provision applied, the FSIA's exceptions to immunity in 28 U.S.C. § 1605 also would apply to criminal cases. Pet.App.18a. The court then held that the FSIA's exception for foreign states' "commercial activity" covered Halkbank's conduct, eliminating any immunity under section 1604. Pet.App.18a; 28 U.S.C. § 1605(a)(2).

The court also rejected Halkbank's alternative claim of common-law immunity, holding that any such immunity

has a commercial-activity exception coextensive with the FSIA's exception, and that Halkbank therefore lacked common-law immunity for the same reason it lacked FSIA immunity. Pet.App.23a-24a. Alternatively, the court held that the Executive Branch has the unilateral "prerogative" to abrogate common-law immunity. Pet.App.24a.

SUMMARY OF ARGUMENT

Congress has never authorized U.S. courts to exercise criminal jurisdiction over foreign states and their instrumentalities.

I. The court of appeals had appellate jurisdiction under the collateral-order doctrine. Halkbank's immunity from suit is effectively unreviewable after final judgment.

II. Title 18's general grant of federal criminal jurisdiction, 18 U.S.C. § 3231, does not confer jurisdiction over foreign sovereigns and their instrumentalities. Section 3231 originated in the criminal-jurisdiction provisions of the Judiciary Act of 1789. At the time of the Founding, sovereigns did not hale each other into national courts. In the early years of the Republic, then, this Court held that the 1789 Act's admiralty-jurisdiction provision, which was "descriptive of the ordinary jurisdiction of the judicial tribunals," did not confer jurisdiction over a French warship. *Schooner Exchange v. McFaddon*, 11 U.S. 116, 146 (1812) (Marshall, C.J.). To confer jurisdiction over foreign sovereigns in U.S. courts, the Court explained, Congress needed to speak "in a manner not to be misunderstood." *Id.*

Schooner Exchange implements the principle that courts will not construe federal statutes "to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804). This Court has applied *Schooner Exchange*'s

clear-statement rule to sovereign instrumentalities, including commercial ones. *See L'Invincible*, 14 U.S. 238, 258 (1816); *Berizzi Bros. v. S.S. Pesaro*, 271 U.S. 562, 576 (1926).

Section 3231, like its predecessor in the 1789 Act, describes only the general criminal jurisdiction of U.S. courts. Because Congress has not clearly indicated its intent to exercise criminal jurisdiction over foreign sovereigns and their instrumentalities, the district court lacked jurisdiction over Halkbank.

The broader statutory context confirms the absence of criminal jurisdiction. The First Congress had no reason to extend criminal jurisdiction to foreign sovereigns because they could neither commit criminal offenses nor be punished. The Crimes Act of 1790 applied only to "persons" or similar individuals, and prescribed punishments such as hanging or standing in the pillory that could not apply to sovereign states. And reading the 1789 Act's criminal-jurisdiction provision to reach foreign sovereigns would put that provision in conflict with the 1789 Act's parallel grants of civil jurisdiction, including the similarly worded admiralty-jurisdiction provision construed in *Schooner Exchange*.

Subsequent developments point the same way. Congress' more recent actions, including its enactment of the FSIA in 1976, demonstrate that Congress knows how to speak clearly when it wishes to hale sovereigns into U.S. courts. Congress has never done so in the criminal context. If federal courts had criminal jurisdiction over sovereigns, one would expect to see a history of sovereign prosecutions in U.S. courts. But the government has identified a grand total of nine cases—all involving subpoenas or consenting sovereigns save for one ongoing case where the sovereign has never appeared. The policy consequences of subjecting foreign sovereigns to criminal

jurisdiction—including the risks of retaliation—would have been staggering in 1789 and remain so today.

III. If any doubt remained, Congress removed it in the FSIA. The FSIA broadly provides immunity to foreign states (including their majority-owned instrumentalities like Halkbank) "from the jurisdiction of the courts of the United States and of the States" except as provided by preexisting international agreement or in sections 1605-1607. 28 U.S.C. § 1604. Sections 1605 through 1607, in turn, delineate the scope of the FSIA's grant of jurisdiction in "nonjury *civil* action[s] against a foreign state." *Id.* § 1330(a) (emphasis added). Because the FSIA confers jurisdiction only in civil cases, the immunity exceptions apply only in civil cases. The FSIA thus codifies international law: limited sovereign immunity in civil cases, absolute immunity in criminal cases.

The FSIA's detailed provisions governing civil cases only confirm Congress' understanding that sovereigns enjoy absolute criminal immunity under the FSIA. The FSIA specifies special civil procedures, protects sovereigns against jury trials, limits the kinds of civil claims that can be brought against sovereigns, and carefully defines what counts as a sovereign. It defies reason that Congress conferred these special protections in civil cases but intended for courts to exercise expansive criminal jurisdiction over sovereigns without any similar protections.

IV. Even if the FSIA's exceptions applied in criminal cases, the commercial-activity exception, *id.* § 1605(a)(2), is unavailable here. First, the case is not "based upon" conduct in the United States, *id.*, because the core of the government's allegations concerns Halkbank's activities in Türkiye. Nor is the case based upon conduct in Türkiye having a "direct effect" in the United States. *Id.* The claimed effects—funds passing through U.S. banks several steps after Iranian assets left Halkbank accounts—

are too remote from Halkbank's alleged conduct. Second, Halkbank's alleged conduct implementing a government program at the direction of the Turkish government is sovereign, not commercial, activity.

ARGUMENT

I. The Second Circuit Had Appellate Jurisdiction

The government questions whether this case presents an appealable order. Br. in Opp. 18. But when, as here, district courts deny motions to dismiss based on foreign sovereign immunity, those orders are immediately appealable. Pet.App.8a-11a. Parties may immediately appeal pre-judgment orders that conclusively determine important issues collateral to the merits that are "effectively unreviewable on appeal from a final judgment." *Sell v. United States*, 539 U.S. 166, 176 (2003) (citation omitted).

Jurisdictional immunities from suit are the heartland of that appealability rule. The right not to go to trial "cannot be effectively vindicated after the trial has occurred." *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985). Foreign sovereign immunity is an immunity "from *suit*," not just liability. *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1317 (2017). Thus, in the civil context, "appellate courts have consistently concluded that the denial of a … motion asserting sovereign immunity may be appealed immediately." U.S. Br. 20, *Helmerich*, 137 S. Ct. 1312 (No. 15-423).

The government suggests these appealability rules apply differently in the criminal context. Br. in Opp. 18. But this Court has permitted immediate appeal in criminal cases where similar immunities from suit were at stake. *Helstoski v. Meanor*, 442 U.S. 500, 506-07 (1979) (Speech or Debate Clause immunity); *Abney v. United States*, 431 U.S. 651, 659-60 (1977) (double jeopardy). So

too here, the right to appellate review of Halkbank's immunity from suit would be meaningless after conviction. If foreign sovereigns and instrumentalities like Halbank are immune from suit, they suffer irremediable injuries from being subjected to suit, regardless of the outcome. It would be perverse to allow foreign sovereigns to appeal denials of immunity in the civil, but not criminal, context.

II. 18 U.S.C. § 3231 Does Not Apply to Foreign Sovereigns

Congress controls federal courts' jurisdiction. *Badgerow v. Walters*, 142 S. Ct. 1310, 1315 (2022). The government bears the burden to establish such jurisdiction. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Congress has never taken the extreme step of opening federal courts' doors to prosecutions of foreign sovereigns. 18 U.S.C. § 3231—the only provision the government invokes—comes nowhere close. Section 3231 originated in the Judiciary Act of 1789 and grants jurisdiction over "all offenses against the laws of the United States." That provision makes no mention of foreign states. Since the early days of the Republic, this Court has refused to read parallel jurisdictional grants in the Judiciary Act of 1789 to extend to foreign sovereigns.

Section 3231 is the least likely provision to extend to foreign sovereigns. Since the Founding, international law has prohibited one country from prosecuting another in its own courts. And the structure of the 1789 Act—not to mention the nature of Founding-era criminal law—made the concept of prosecuting another country outlandish.

A. The First Congress Did Not Authorize Criminal Jurisdiction Over Foreign Sovereigns

Section 3231 traces to the Judiciary Act of 1789, which granted federal courts "cognizance of all crimes and offences … cognizable under the authority of the United States." Ch. 20, §§ 9, 11, 1 Stat. 73, 76, 79. That text never

mentions foreign sovereigns. In the government's telling, that jurisdictional grant nonetheless covers anyone charged with committing any federal offense. But the First Congress did not silently authorize federal courts to exercise criminal jurisdiction against Britain, France, or Spain just by generally opening federal courts to prosecutions for federal offenses.

1. Foreign sovereigns fundamentally differ from other actors, let alone ordinary criminal defendants. Foreign sovereigns are "absolute[ly] independen[t]," operating outside our constitutional system, pursuant to their own laws and the law of nations. *See Helmerich*, 137 S. Ct. at 1319 (quoting *Berizzi Bros. v. S.S. Pesaro*, 271 U.S. 562, 575 (1926)). Haling foreign sovereigns before American courts to answer to American law thus affronts the sovereign's "independence and dignity." *Id.* (quoting *Berizzi Bros.*, 271 U.S. at 575). As "the founding era's foremost expert on the law of nations" explained, one sovereign could not "'set himself up for a judge of [another sovereign's] conduct, and to oblige him to alter it.'" *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485, 1493 (2019) (quoting Emer de Vattel, *The Law of Nations* 155 (Joseph Chitty trans., 1883)).

Exercising *any* jurisdiction over foreign sovereigns was inconceivable. Foreign sovereigns enjoyed "virtually absolute immunity" from U.S. jurisdiction. *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983). Any attempt to bring foreign sovereigns into American courts—whether for criminal or civil offenses—would have blatantly violated "the prevailing view of international law," under which "a foreign state was absolutely immune from the jurisdiction of the courts of another state." U.S. Br. 51, *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989) (No. 87-1372). That rule broached "no exceptions." *Restatement (Third) of*

Foreign Relations Law pt. IV, ch. 5, introductory note (1987).

Even when a sovereign entered another sovereign's territory, "his dignity alone … exempt[ed] him from *all* jurisdiction." Vattel, *supra*, at 486 (emphasis added). In short, "[t]he freedom of a foreign sovereign from being haled into court as a defendant has impressive title-deeds." *Nat'l City Bank of N.Y. v. Republic of China*, 348 U.S. 356, 358 (1955). To this day, "[t]he exercise of criminal jurisdiction directly over another State … contravenes international law." Hazel Fox & Philippa Webb, *The Law of State Immunity* 91 (3d ed. 2013).

That red line was especially important at the Founding when America was a "fledgling Republic—struggling to receive international recognition." *See Kiobel v. Royal Dutch Petrol.*, 569 U.S. 108, 123 (2013). The Founders considered it "of high importance to the peace of America that she observe the laws of nations." The Federalist No. 3 (Jay). The new country could not afford to invite retaliation from more powerful sovereigns for transgressing international norms.

Accordingly, during ratification debates over the scope of federal courts' jurisdiction, foreign sovereigns' insulation against any type of involuntary suit was self-evident. At the 1788 Virginia Ratifying Convention, James Madison could "not conceive" that U.S. courts would resolve even a civil controversy "between an American state and a foreign state, without the consent of the parties." 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 533 (Jonathan Elliot ed., 2d ed. 1836). John Marshall agreed: "The previous consent of the parties is necessary" in a dispute between foreign and U.S. States. *Id.* at 557. And, as the government has recognized in the context of the Alien Tort Statute, "the First Congress … clearly would not

have contemplated that a foreign state would be subject to suit." *Amerada Hess* U.S. Br. 51. At the Founding, putting foreign sovereigns on trial would have been unimaginable.

2. Given the Republic-threatening consequences of attempting to regulate foreign sovereigns, this Court has held from the start that federal jurisdictional statutes presumptively do not extend to foreign sovereigns. For more than two centuries, the rule has been that to "claim and exercise jurisdiction" over a foreign sovereign in a way that breaches the sovereign's "immunities," Congress must act "in a manner not to be misunderstood." *Schooner Exchange v. McFaddon*, 11 U.S. 116, 137, 146 (1812) (Marshall, C.J.). In other words, "sovereigns are not presumed without explicit declaration to have opened their tribunals to suits against other sovereigns." *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 762 (1972) (plurality op.) (citing *Schooner Exchange*, 11 U.S. at 146).

The issue first arose in *Schooner Exchange*, where American claimants invoked another provision of the 1789 Act broadly granting federal jurisdiction over "all civil causes of admiralty and maritime jurisdiction." § 9, 1 Stat. at 77. The claimants alleged that Napoleon's men had seized their schooner, outfitted it as a French warship, and sailed to Philadelphia. 11 U.S. at 117-19 (reporter's summary). Their claim to ownership of a vessel in a U.S. port would, under "the general rule," be "within the jurisdiction of our Courts." *Id.* at 146-47 (opinion of the Court).

But Chief Justice Marshall, writing for the Court, refused to construe the "general statutory provision[]" granting admiralty jurisdiction "to give [district courts] jurisdiction" over a foreign sovereign's vessel. *Id.* at 146. Chief Justice Marshall noted that "[t]he jurisdiction of

courts is a branch of that which is possessed by the nation as an independent sovereign power." *Id.* at 136. Under "the usages and received obligations of the civilized world," however, one sovereign's jurisdiction "would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects." *Id.* at 137. That "exemption" from jurisdiction extended broadly, including to "arrest or detention." *Id.* The Court would not presume such "a breach of faith" from sovereigns' traditional "immunities" absent "previous notice" and express authorization. *Id.* at 137, 146. The 1789 Act's admiralty provision "descriptive of the ordinary jurisdiction of the judicial tribunals" was not sufficiently clear to impose jurisdiction over foreign sovereigns. *Id.* at 146.

Importantly, the Court did not confine foreign sovereigns' immunity from jurisdiction to countries themselves. *Contra* Br. in Opp. 13. *Schooner Exchange* involved an in rem suit against a ship "under the immediate and direct command of the sovereign," not against the French Empire. 11 U.S. at 144. Subjecting that instrumentality to jurisdiction nonetheless could not "take place without affecting [the sovereign's] power and … dignity." *Id.*

In invoking the law of nations to limit "an otherwise unqualified jurisdictional grant," Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 136 & n.120 (2010), *Schooner Exchange* rests on a broader, related clear-statement rule: courts will not construe federal statutes "to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) (Marshall, C.J.). As this Court has put it more recently, before so intruding on the "delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed." *McCulloch v. Sociedad*

Nacional de Marineros de Honduras, 372 U.S. 10, 21-22 (1963) (citation omitted).

3. Since *Schooner Exchange*, this Court has repeatedly reiterated that Congress must speak clearly to extend federal-court jurisdiction over foreign sovereigns and their instrumentalities, including commercial enterprises. Generally worded jurisdictional grants do not do the trick.

For instance, *L'Invincible*, 14 U.S. 238 (1816), interpreted the same admiralty-jurisdiction provision of the 1789 Act to exclude sovereign instrumentalities operated by private individuals acting on the sovereign's behalf. Americans sought to reclaim a ship captured by French privateers operating under French commission. *Id.* at 238-39 (reporter's summary). The Court recognized that the case was identical to *Schooner Exchange*, except that the ship "belong[ed] to private adventurers." *Id.* at 252 (opinion of the Court). That distinction was irrelevant. *Id.* The privateers' sovereign commission "oust[ed] the neutral admiralty court of its jurisdiction." *Id.* at 258.

Likewise, in *Berizzi Bros.*, this Court held that federal courts lack "jurisdiction" over "all ships held and used by a government for a public purpose" under the same admiralty-jurisdiction statute. 271 U.S. at 573-74. The case involved a ship owned by the government of Italy, "employed in the carriage of merchandise for hire." *Id.* at 570. The plaintiff claimed that the ship failed to deliver artificial silk and had the ship seized in port. *Id.* at 569-70. Again applying *Schooner Exchange*, this Court held that the "general words" of the admiralty-jurisdiction statute "must be construed … as not intended to include a libel in rem against a public ship." *Id.* at 576. That the ship was involved in merchant shipping made no difference: "[w]hen, for the purpose of advancing the trade of

its people or providing revenue for its treasury, a government acquires, mans, and operates ships in the carrying trade, they are public ships in the same sense that war ships are." *Id.* at 574. Absent "a treaty or statute of the United States evincing" an intent to treat sovereign-owned merchant ships differently, "they must be held to have the same immunity." *Id.*

More generally, since *Schooner Exchange*, the Court has repeatedly refused to interpret general statutory language to reach foreign entities or to intrude on foreign relations. For instance, six years after *Schooner Exchange*, the Court construed a statute forbidding "any person" from committing robbery on the high seas to exclude robberies involving foreigners on foreign ships, even though the phrase "any person" is "broad enough to comprehend every human being." *United States v. Palmer*, 16 U.S. 610, 631 (1818). As Chief Justice Marshall explained for the Court, the legislature would not have intended the at-issue statute to intrude into another nation's authority to "provide[] for such offences the punishment its own policy may dictate." *Id.* at 632. As a result, the Court refused to read the statute's "general words" further than "the legislature intended to apply them." *Id.* at 631.

More recent examples abound. The Alien Tort Statute (ATS) provides jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations." 28 U.S.C. § 1350. Even though "the text reaches '*any* civil action,'" this Court held the ATS does not apply to conduct abroad. *Kiobel*, 569 U.S. at 118, 124-25 (citation omitted). To hold otherwise would risk creating "international discord." *Id.* at 116 (citation omitted).

So too, the Federal Employers' Liability Act contains "broad jurisdictional language" imposing liability on railroads engaged in "'interstate or foreign commerce.'" *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 251 (1991) (quoting 45 U.S.C. § 51). Even that explicit reference to foreign commerce is not enough to overcome the presumption against interfering with foreign nations' affairs. *N.Y. Cent. R.R. Co. v. Chisholm*, 268 U.S. 29, 31 (1925). Imposing liability for activity abroad "would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent." *Id.* at 32 (citation omitted).

This Court has even refused to apply U.S. labor law to a strike in a U.S. port by foreign seamen against their foreign ship. *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 139 (1957). Again, the Court would not "run interference in such a delicate field of international relations" without "the affirmative intention of the Congress clearly expressed." *Id.* at 147. This Court found no evidence that Congress "intended to bring such disputes within the coverage of the [Labor Management Relations] Act." *Id.* at 142.

Thus, the Court's cases since the Founding have charted a consistent course: in the face of a generally worded statute, federal courts do not assume that Congress meant to reach foreign actors, let alone foreign sovereigns. Courts "assume that legislators take account of the legitimate sovereign interests of other nations" and follow international law. *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004). If regulating conduct abroad "creates a serious risk of interference with a foreign nation's ability independently to regulate

its own commercial affairs," *id.* at 165, regulating the foreign nation *itself* creates even greater risks.

4. The foregoing principles resolve this case. Like the admiralty provision in *Schooner Exchange*, section 3231 describes only "the ordinary jurisdiction of the judicial tribunals." *See* 11 U.S. at 146. Because Congress has not provided criminal jurisdiction over foreign sovereigns and their instrumentalities "in a manner not to be misunderstood," *id.*, the district court lacked jurisdiction in this case. Halkbank, an entity created, owned, and controlled by Türkiye, is a sovereign instrumentality, *i.e.*, an arm of Türkiye. The government in the district court thus did not contest Halkbank's status as a foreign sovereign, *see* Mot. to Dismiss Opp. 4-9, D. Ct. Dkt. 659, and the court of appeals' analysis likewise treated Halkbank as a sovereign.

The court of appeals held that section 3231's "all offenses against the laws of the United States" language is "a clear[] textual grant of subject-matter jurisdiction" over foreign states. Pet.App.16a (citation omitted). Were that right, *Schooner Exchange*, *L'Invincible*, and *Berizzi Bros.* should have come out the other way. Again, the admiralty statute there applied to "*all* civil causes of admiralty and maritime jurisdiction," 1789 Act § 9, 1 Stat. at 77 (emphasis added), yet did not provide jurisdiction over sovereign instrumentalities. Section 3231 is just as much a "general statutory provision[]" as the admiralty statute. *See Schooner Exchange*, 11 U.S. at 146. The statute's "general words … must be construed … as not intended to include" sovereign instrumentalities like Halkbank. *See Berizzi Bros.*, 271 U.S. at 576.

B. Statutory Context Confirms that the First Congress Did Not Authorize Criminal Prosecutions of Foreign Sovereigns

A common-sense understanding of the context in which the First Congress enacted the 1789 Act confirms that Congress would not have intended the radical step of subjecting foreign sovereigns to criminal prosecution. *See, e.g.*, *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 159 (2000).

1. Start with the mismatch between foreign sovereigns and the nature of criminal law at the Founding. The first substantive federal criminal statute, the Crimes Act of 1790, identifies "persons" or other individuals such as "captain[s]" as the only actors committing crimes. *See* Ch. 9, §§ 1-32, 1 Stat. 112, 112-19. Likewise, the Fifth Amendment—proposed by Congress to the States one day after Congress passed the 1789 Act—grants criminal-procedure rights to "person[s]." U.S. Const. amend. V.

But, as a matter of "common usage," sovereigns are not "person[s]." *Return Mail, Inc. v. USPS*, 139 S. Ct. 1853, 1862 (2019) (citation omitted). This Court therefore construes statutes to omit sovereigns as "person[s]" "absent an affirmative showing to the contrary." *Id.* at 1863. That rule applies regardless whether the statute in question "imposes liability" or grants a sovereign, like the U.S. government, "a benefit or favorable procedural device." *Id.* at 1862. This Court thus has held that foreign sovereigns—like U.S. States and municipalities—are not "person[s]" eligible to bring suit under 42 U.S.C. § 1983. *Breard v. Greene*, 523 U.S. 371, 378 (1998) (per curiam). The First Congress would not have understood foreign sovereigns as "persons" capable of committing crimes, and would have seen no reason to expand criminal jurisdiction to cover them.

The Crimes Act also demonstrates the First Congress' intent to prevent courts from entangling themselves in international affairs. Under the Crimes Act, attorneys and court officers who "prosecute[d]" or "execute[d]" any "writ or process" against foreign ambassadors, ministers, and their domestic servants, including by "arrest[ing]" such persons, were "deemed violaters of the laws of nations, and disturbers of the public repose," with up to three years imprisonment. Crimes Act §§ 25-26, 1 Stat. at 117-18. That prohibition reflected international law. At the Founding, as today, diplomats were "independent of the sovereign authority and the jurisdiction of the country," including in "criminal matters." Vattel, *supra*, at 471; *see* Vienna Convention on Diplomatic Relations art. 31(1), Apr. 18, 1961, 23 U.S.T. 3227. On the government's view, the First Congress gave federal prosecutors free rein to indict France but inexplicably subjected those same prosecutors to prison time if they so much as subpoenaed the French vice-consul. The more natural inference is that France also was free from criminal process in U.S. courts.

Further, the punishments that the Crimes Act proscribed for federal crimes reinforce that the First Congress was not contemplating putting foreign sovereigns in the dock. Many of the original federal crimes were punishable only by death, by "hanging the person convicted by the neck until dead." Crimes Act § 33, 1 Stat. at 119. For murder, courts could impose surgical "dissection" on top of hanging. *Id.* §§ 4-5, 1 Stat. at 113. Other punishments included "thirty-nine stripes" with a whip, *id.* §§ 15-16, 1 Stat. at 116, or a mandatory minimum of "stand[ing] in the pillory for one hour," *id.* § 18, 1 Stat. at 116. Needless to say, the First Congress did not authorize the indictment and hanging of Great Britain.

2. Reading the Judiciary Act of 1789 to grant criminal jurisdiction over foreign sovereigns also produces serious anomalies with the rest of the Act. Another provision of that Act gave this Court exclusive, original jurisdiction over all "suits or proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants." 1789 Act § 13, 1 Stat. at 80. The First Congress was so concerned about judicial meddling in international affairs, it made this Court alone hear any civil case against the Spanish ambassador's servants. That same Congress did not plausibly authorize newly created inferior courts to hear *criminal* cases against Spain itself or its instrumentalities.

Other general jurisdictional grants in the 1789 Act did not cover foreign sovereigns. The Act's provision granting criminal jurisdiction should be read the same way.

The original grant of criminal jurisdiction over "all crimes and offences" for district courts appeared in section 9 of the 1789 Act. *Infra*, Add.1a. Section 9 also included four grants of civil jurisdiction, each with similar "all" language. First, section 9 granted jurisdiction over "all civil causes of admiralty and maritime jurisdiction." § 9, 1 Stat. at 77 (codified today at 28 U.S.C. § 1333). As discussed, *supra* pp. 17-20, *Schooner Exchange* and its progeny held this provision does not confer jurisdiction over foreign sovereign entities. 11 U.S. at 146.

Second, section 9 granted jurisdiction over "all causes where an alien sues for a tort only in violation of the law of nations," *i.e.*, the Alien Tort Statute. § 9, 1 Stat. at 77 (codified today at 28 U.S.C. § 1350). As the government has observed, that provision "makes no mention of a foreign state as a possible defendant." *Amerada Hess* U.S. Br. 51. This Court thus noted the "lack of certainty as to whether the [ATS] conferred jurisdiction in suits against

foreign states" at the Founding. *Amerada Hess*, 488 U.S. at 436.

Third, section 9 granted jurisdiction over "all suits against consuls or vice-consuls," excluding criminal offenses. § 9, 1 Stat. at 77 (codified today at 28 U.S.C. § 1351(1)). By its terms, that provision cannot confer jurisdiction over foreign states or instrumentalities. And, fourth, section 9 granted jurisdiction over "all suits at common law where the United States sue[s]." *Id.* (codified today at 28 U.S.C. § 1345). That language too does not mention sovereigns and Congress presumably intended the same meaning as the other provisions.

The same word—here, "all"—presumptively bears "a consistent meaning throughout." *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1812 (2019). Section 9 provides no reason to think that Congress intended "all" in the criminal-jurisdiction provision to bear a different meaning than in its neighboring civil-jurisdiction provisions.

C. Nothing Since 1789 Counsels a Different Result

1. Congress has not substantively altered the scope of federal criminal jurisdiction since 1789.[1] In 1948, Congress reorganized federal criminal and jurisdictional law and enacted Title 18, including 18 U.S.C. § 3231, along with Title 28. Act of June 25, 1948, Pub. L. No. 80-772, 62 Stat. 683, 826. The 1948 reorganization presumptively made "no changes of law or policy … unless an intent to make such changes [was] clearly expressed." *Fourco*

[1] The 1789 Act split "cognizance of all crimes and offences … under the authority of the United States" between district and circuit courts depending on the severity of the offense. §§ 9, 11, 1 Stat. at 76, 79. In 1911, Congress abolished circuit court jurisdiction over criminal cases and vested district courts alone with "original jurisdiction …. [o]f all crimes and offenses cognizable under the authority of the United States." *See* Act of Mar. 3, 1911, ch. 231, § 24, 36 Stat. 1087, 1091.

Glass Co. v. Transmirra Prods. Corp., 353 U.S. 222, 227 n.8 (1957) (citation omitted); *see* Edwin D. Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. Pa. L. Rev. 26, 52-55 & n.96 (1952). No such intent was expressed in section 3231, which merely consolidated the redundant "all crimes and offences" to "all offenses" and swapped "cognizable under the authority of" for "against the laws of." The current section 3231 is otherwise identical to the 1789 Act's original grant of criminal jurisdiction over "all … offences."

Not only has Congress retained the same scope of criminal jurisdiction since 1789, but congressional action in the ensuing years confirms that Congress at no point greenlit haling foreign sovereigns into federal courts to face criminal prosecution. When Congress has wanted to confer jurisdiction over foreign sovereigns, Congress has said so expressly. "Congress' awareness of the need to make a clear statement … is amply demonstrated by the numerous occasions on which it has." *See Arabian Am. Oil Co.*, 499 U.S. at 258; *see generally Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 384 (2013).

Most glaring is the FSIA, which provides a sweeping statement of foreign sovereign immunity and comprehensively addresses the amenability to suit of foreign sovereigns and their instrumentalities. That Act grants jurisdiction in "nonjury civil action[s] against … foreign states," including state-owned corporations. 28 U.S.C. §§ 1330(a), 1603(a)-(b). The FSIA expressly authorizes civil nonjury suits against foreign states, *id.* § 1330(a), and places careful limits on precisely when and how that jurisdiction can be exercised, *id.* §§ 1605-1607; *infra* pp. 37-39.

Congress also once provided civil jurisdiction over disputes between "citizens of a State and foreign states," Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, 470, but repealed that jurisdictional grant in 1976 with the FSIA,

Pub. L. No. 94-583, § 3, 90 Stat. 2891, 2891. Again, Congress reached foreign states by expressly naming them in the statute's text. That is not to say that sovereigns were fair game in the civil context. Common-law immunity oftentimes still protected sovereigns from suit. *See Republic of Austria v. Altmann*, 541 U.S. 677, 690 (2004). But in civil cases where courts did not recognize immunity, *see infra* p. 35, civil jurisdiction existed under express congressional authorization.

Similarly, the Bankruptcy Code reaches foreign states. Congress granted district courts "exclusive jurisdiction of all cases under title 11." 28 U.S.C. § 1334(a). Title 11, in turn, explicitly abrogates sovereign immunity for "a governmental unit," defined to include a "foreign state" or its "department, agency, or instrumentality" alongside the United States itself, U.S. States, and their instrumentalities. 11 U.S.C. §§ 101(27), 106(a). In bankruptcy too, Congress imposed guardrails, abrogating immunity only with respect to specific provisions of the Bankruptcy Code and barring punitive damages. *Id.* § 106(a)(1), (3).

2. Another telling sign of the lack of criminal jurisdiction over foreign sovereigns is the United States' consistent representations that no criminal jurisdiction exists or should exist. As recently as 2013, leading scholars observed that, "like most countries, the US does not 'prosecute' states." Fox & Webb, *supra*, at 244. The United States government itself has unequivocally expressed that "criminal proceedings [are] 'categorically different' for immunity purposes" because international law "does not recognize the concept of state criminal responsibility." U.S. Statement of Interest 30, *Matar v.*

Dichter, No. 05-cv-10270 (S.D.N.Y. Nov. 17, 2006) (quoting *Jones v. Saudi Arabia* [2006] UKHL 26, ¶ 39 (op. of Bingham, L.)).

The government takes the same position abroad. In 2014, a Spanish trial court ordered Spanish prosecutors to consider criminal-contempt proceedings against "the US government." U.S. Br. Add. 26, *SerVaas Inc. v. Mills*, 661 F. App'x 7 (2d Cir. 2016) (No. 14-385). The United States responded with alarm: "no criminal proceedings can be started against sovereign states." *Id.* at 38. Spanish prosecutors ultimately declined to press charges. U.S. Statement of Interest Ex. G, at 5, *Agudas Chasidei Chabad of U.S. v. Russian Federation*, No. 05-cv-1548 (D.D.C. Feb. 3, 2016), Dkt. 151-7. The United States can hardly expect foreign courts to honor requests not to prosecute the United States and its allies when the government has no qualms about putting the shoe on the other foot.

If federal courts had criminal jurisdiction over foreign sovereigns, such that prosecuting sovereigns were a core part of "the government's crime-fighting toolkit," Br. in Opp. 11 (citation omitted), one would think that the government would have done so in the first two centuries of the Republic. Yet the government offers only nine instances ever where the United States has sought to invoke any form of criminal jurisdiction over foreign state-owned enterprises. Br. in Opp. 13-14. The oldest is a subpoena case from 1952. The first actual charges are from 1989. None of the nine involves a criminal trial.

Five of the nine proffered cases involve subpoenas—a significantly lesser dignitary harm. In the oldest example, the sovereign successfully invoked immunity. *In re World Arrangements*, 13 F.R.D. 280, 291 (D.D.C. 1952). As that court explained, prosecuting a British-controlled

oil company supplying oil to the Royal Navy "would in reality be to charge and find the British Government guilty of violating a law of the United States"—a result plainly "contrary to the law of nations." *Id.* On that basis, the court refused to enforce a criminal subpoena against the oil company. *Id.*

Three of the four cases where the government brought actual charges are inapt: the sovereigns waived immunity through pleas or non-prosecution agreements. *United States v. Statoil, ASA*, No. 06-cr-960 (S.D.N.Y. Nov. 23, 2009), Dkt. 6; *United States v. Jasin*, No. 91-cr-602, 1993 WL 259436, at *1 (E.D. Pa. July 7, 1993) (Armaments Corporation of South Africa Ltd.); *United States v. Aerlinte Eireann*, No. 89-cr-647 (S.D. Fla. Oct. 6, 1989), Dkt. No. 12. The final example is telling: the sovereign has never appeared in the six years the case has been pending. *United States v. Ho*, No. 16-cr-46 (E.D. Tenn.) (China General Nuclear Power Co.).

If district courts have had criminal jurisdiction over foreign sovereigns since 1789, someone would have noticed before 1989. Yet no enterprising Assistant U.S. Attorney indicted the German Navy for murdering Americans on board the *Lusitania*. Mexico did not seek a non-prosecution clause in the Treaty of Guadalupe Hidalgo. State Department lawyers never pointed out that we could have indicted Spain in federal court for allegedly bombing the U.S.S. Maine.

3. The policy consequences of subjecting sovereigns to criminal prosecution also make it unlikely that Congress intended to open that door. The First Congress would not have intended to invite retaliation from foreign states. Sovereign immunity is built on "reciprocal self-interest." *Nat'l City Bank*, 348 U.S. at 362. As the government has warned, improperly expanding U.S. jurisdiction can "invit[e] retaliatory action from other

nations." *Helmerich* U.S. Br. 22 (quoting *McCulloch*, 372 U.S. at 21). Some nations specifically "base their sovereign immunity decisions on reciprocity." *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 841 (D.C. Cir. 1984).

Especially given America's underdog status in 1789 and its sensitivity to its perceived role alongside other nations, *supra* pp. 16-17, the First Congress would have been loath to open the door to reciprocal prosecution by foreign states. An American prosecution of Great Britain for misprision of treason for paying a double agent might have invited retaliatory prosecution by Great Britain's then-ally the Dutch Republic. Or Great Britain, which then controlled Canada, might have retaliated by prosecuting New York for incursions on British fur trade. The United States settled its post-Revolution disputes with Great Britain in the Jay Treaty of 1794, not by prosecution.

At no time since the Founding has any foreign sovereign apparently expressed concern or even noticed that Congress purportedly subjected every nation in the world to the threat of U.S. criminal prosecutions at the Executive's whim. If U.S. criminal prosecutions were even a possibility, one would think foreign nations would have considered retaliating by enacting laws authorizing prosecutions of America, demanded explanations from the United States, or preemptively negotiated immunity agreements for joint international endeavors.

The risks of retaliation are all the more pronounced today. Holding that Congress opened the spigot of criminal prosecutions by granting federal jurisdiction would ensnare federal courts and juries in diplomatically sensitive cases and invite reciprocal action. For instance, 18 U.S.C. § 1512(c)(1), (h) makes it a crime to corruptly destroy documents relevant to U.S. litigation anywhere in

the world. Congress did not plausibly authorize U.S. prosecutors to charge the Libyan national oil company with destroying documents subject to a discovery hold. Libyan prosecutors might set Israel in their sights. Israel, in turn, could prosecute Iran, and Iran the United States.

The government also could prosecute the Colombian state-owned postal corporation for cocaine smuggling. Colombia, in turn, might prosecute Venezuela's national broadcaster, and Venezuela might retaliate against the United States. This Court should not lightly presume that Congress intended to set off a global circle of recrimination.

The government dismisses any "foreign-policy concerns given the Executive Branch's control" over prosecutions. Br. in Opp. 18. But this Court does not construe Title 18 "on the assumption that the Government will use it responsibly." *McDonnell v. United States*, 579 U.S. 550, 576 (2016) (citation omitted). Nor would the Executive Branch necessarily control all prosecutions against foreign sovereigns. If foreign sovereigns lack criminal immunity, state and local prosecutors could be tempted to try to follow suit.

III. The FSIA Dictates that U.S. Courts Cannot Hear Prosecutions of Foreign Sovereigns

If any doubt remained, Congress in 1976 removed it by enacting the FSIA, which expressly immunizes foreign sovereigns and instrumentalities against *all* federal jurisdiction unless expressly provided in the FSIA. The FSIA confers only *civil* jurisdiction against sovereigns, which the FSIA defines to include majority-owned instrumentalities like Halkbank. As a result, consistent with current international law, sovereigns have absolute immunity from criminal jurisdiction.

A. The FSIA Provides Absolute Criminal Immunity

1. The FSIA rules out criminal jurisdiction over foreign sovereigns. The FSIA, enacted in 1976, "comprehensively regulat[es] the amenability of foreign nations to suit in the United States." *Verlinden*, 461 U.S. at 493.

Like the international law it implemented, the FSIA codifies sovereign immunity as the "baseline rule." *See Opati v. Republic of Sudan*, 140 S. Ct. 1601, 1605 (2020). Section 1604 provides: "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in" 28 U.S.C. §§ 1605-1607 and preexisting international agreements. The FSIA defines a "foreign state" to "include[]" majority-state-owned instrumentalities like Halkbank, providing the same immunity to those entities. *Id.* § 1603(a)-(b); *see* Pet.App.7a n.8.

At the same time, the FSIA unmistakably confers jurisdiction over sovereigns, thus overcoming its baseline rule of immunity, in just one category of cases: "nonjury civil action[s] against a foreign state … 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." 28 U.S.C. § 1330(a). The exceptions to immunity in sections 1605-1607 largely codify "the restrictive theory of immunity" that courts applied in the civil context before the FSIA was enacted, by permitting suit in limited circumstances, including actions based upon foreign states' commercial activities. *Verlinden*, 461 U.S. at 488.

Sections 1604 and 1330(a) thus "work in tandem." *Amerada Hess*, 488 U.S. at 434. Those provisions accordingly protect sovereigns from criminal jurisdiction in U.S.

courts. Section 1604 confers broad immunity from *all* proceedings. And section 1330(a) then limits the scope of immunity in *civil* proceedings, by conferring jurisdiction in nonjury civil actions that fall within the FSIA's exceptions in sections 1605-1607 or preexisting international agreements. Nothing in the FSIA takes away section 1604's broad grant of foreign sovereign immunity for criminal cases.

General jurisdictional grants, like 18 U.S.C. § 3231, do not trump the FSIA's immunity provision. In *Amerada Hess*, this Court held that the Alien Tort Statute's grant of jurisdiction "of any civil action by an alien for a tort only, committed in violation of the law of nations," 28 U.S.C. § 1350, does not authorize actions against foreign sovereigns. 488 U.S. at 437-38. "[T]he comprehensiveness of the statutory scheme in the FSIA," the Court explained, made clear Congress' intent not to allow jurisdiction pursuant to "other grants of subject-matter jurisdiction." *Id.* at 437. "Congress intended courts to resolve *all* [foreign sovereign immunity] claims 'in conformity with the principles set forth' in the [FSIA]." *Altmann*, 541 U.S. at 697-98 (quoting 28 U.S.C. § 1602).

2. Reinforcing the point, Congress enacted the FSIA to codify prevailing international law. *Permanent Mission of India to the U.N. v. City of New York*, 551 U.S. 193, 199 (2007). Then as now, international law forbade one sovereign from prosecuting another. Indeed, for much of the prior two centuries, foreign sovereigns had enjoyed *absolute* immunity from both civil and criminal jurisdiction. *Supra* pp. 15-16. Section 1604 reflects that baseline principle: immunity is the rule, absent specific, textually identified exceptions limited to the *civil* context.

Those limited civil exceptions track twentieth-century international law, which moved away from absolute sovereign immunity in civil cases and permitted suit

against foreign states for their "commercial acts" under the so-called "'restrictive' theory of foreign sovereign immunity." *Jam v. Int'l Fin. Corp.*, 139 S. Ct. 759, 766 (2019). Before the FSIA, foreign sovereigns were occasionally brought into court under the grant of jurisdiction over civil disputes between "citizens of a State[] and foreign states." 28 U.S.C. § 1332(a)(2) (1970). That statute provided no substantive or procedural guidance on how courts should apply their jurisdiction. Courts held that sovereigns could seek "suggestions of immunity" from the State Department or ask the district court to adjudicate sovereign immunity on a case-by-case basis. *Altmann*, 541 U.S. at 690-91 (citation omitted); *see Samantar v. Yousuf*, 560 U.S. 305, 311-12 (2010).

This regime proved "troublesome" in practice as civil sovereign-immunity decisions "were made in two different branches, subject to a variety of factors, sometimes including diplomatic considerations." *Verlinden*, 461 U.S. at 487-88. Congress "abated the bedlam in 1976," *Republic of Argentina v. NML Cap., Ltd.*, 573 U.S. 134, 141 (2014), repealing the grant of diversity jurisdiction over foreign sovereigns and replacing it with the FSIA. *Amerada Hess*, 488 U.S. at 437 n.5.

The shift towards the restrictive theory in international law was limited to the civil context. Opening the door to some civil suits "left untouched the [sovereigns'] position in criminal proceedings." Fox & Webb, *supra*, at 91. Accordingly, other common-law countries adopting the restrictive theory have strictly limited its application to civil cases. *Id.* at 92.[2] Likewise, the U.N. Convention

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[2] *E.g.*, State Immunity Act 1978, c. 33, § 16(4) (UK); State Immunity Act, R.S.C. 1985, c S-18, § 18 (Can.); Foreign States Immunity Law, 5769-2008, § 2 (Isr.); Foreign States Immunities Act 87 of 1981 § 2(3)

on Jurisdictional Immunities of States and Their Property, which (although not in force) "authoritative[ly]" reflects the international law of state immunity, *id.* at 2, adopts the restrictive theory for civil suits but "does not cover criminal proceedings." G.A. Res. 59/38, ¶ 2 (Dec. 2, 2004). The FSIA accomplishes the same: it enacts the restrictive theory in sections 1330(a) and 1605-1607, but only for "nonjury civil action[s]." 28 U.S.C. § 1330(a).

The traditional rule therefore controls in criminal cases: "[a] state … cannot be prosecuted." Elizabeth Helen Franey, "Immunity from the Criminal Jurisdiction of National Courts," *in Research Handbook on Jurisdiction and Immunities in International Law* 205, 207 (Alexander Orakhelashvili ed., 2015); *see also Restatement (Third)*, *supra*, § 461 cmt. c. As a leading English case explains, "[a] state is not criminally responsible in international or English law, and therefore cannot be directly impleaded in criminal proceedings." *Jones* [2006] UKHL 26, ¶ 31.

The government does not contest the "international consensus against prosecuting foreign states" but claims this consensus does not cover state-owned companies, "particularly when those entities are engaged in commercial activity." Br. in Opp. 14. But the government does not cite any source that suggests that international law has viewed state-owned companies differently for immunity purposes in the criminal context. Regardless, the FSIA treats states and their instrumentalities interchangeably for purposes of immunity from jurisdiction. 28 U.S.C. §§ 1603(a)-(b), 1604.

Nor is absolute criminal immunity under international law limited to "public governmental activity," as the

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(S. Afr.); The State Immunity Ordinance, No. 6 of 1981, § 17(2)(b), Pak. Code; State Immunity Act 19 of 1979, ch. 313, § 19(2)(b) (Sing.).

government contends. Br. in Opp. 15 (quoting Fox & Webb, *supra*, at 91). The cited treatise presents regulating "public governmental activity" as just one "way[]" in which criminal jurisdiction "contravenes international law." Fox & Webb, *supra*, at 91. The treatise further explains that sovereigns' "independent status" protects them from prosecution, *id.* at 21—a reason that applies whatever the sovereign is doing. The proof is in the pudding: the government identifies *no* criminal trial of a foreign state-owned company (let alone a sovereign) by any other nation, regardless of whether the activity could be characterized as commercial. The FSIA reflects this global consensus.

3. The FSIA's carefully calibrated provisions governing civil cases against sovereigns—combined with the absence of any such provisions governing criminal cases—confirm that Congress intended to protect sovereigns from criminal prosecution entirely. Any other reading of the FSIA would reproduce in the criminal context the state of the world in the civil context Congress rejected by enacting the FSIA: courts and the Executive muddling along without congressional guidance.

The FSIA describes in exacting detail how civil cases against foreign states should proceed. Special service and venue rules apply. 28 U.S.C. §§ 1391(f), 1608. The foreign state may remove any civil action initially brought in state court. *Id.* § 1441(d). And special limitations on attaching and executing on property apply. *Id.* §§ 1609-1611. Section 3231 and the Federal Rules of Criminal Procedure have none of that detail. For example, the Federal Rules permit the issuance of a summons to an organization not in the United States "by any … means that gives notice." Fed. R. Crim. P. 4.1(c)(3)(D)(ii). But the FSIA limits service to certain approved means, like translated, signature-

required mail to the foreign state's minister of foreign affairs. 28 U.S.C. §§ 1608(a)-(b); *see Republic of Sudan v. Harrison*, 139 S. Ct. 1048, 1057 (2019). The Federal Rules also permit the government to seek forfeiture of property with a nexus to the offense. Fed. R. Crim. P. 32.2(b)(1)(A). But the FSIA makes foreign states' property immune from execution subject to enumerated exceptions. 28 U.S.C. §§ 1609-1611. In the government's view, Mexico and the Bank of England are entitled to only the process due heroin dealers.

The FSIA also embodies Congress' determination that U.S. juries should not sit in judgment of foreign states. The FSIA authorizes jurisdiction only in "nonjury civil action[s]." *Id.* § 1330(a). Juries are a "controversial feature[] of the U.S. legal system." *RJR Nabisco, Inc. v. Eur. Cmty.*, 579 U.S. 325, 347 n.9 (2016) (citation omitted). Congress therefore chose to exempt foreign states from "a form of trial alien to them in civil cases." *Ruggiero v. Compania Peruana de Vapores "Inca Capac Ypanqui,"* 639 F.2d 872, 878 (2d Cir. 1981) (Friendly, J.). In criminal cases too, many countries, including Israel, Mexico, and the Netherlands, do not use juries. Ethan J. Leib, *A Comparison of Criminal Jury Decision Rules in Democratic Countries*, 5 Ohio State J. Crim. L. 629, 631-34 (2008). It would be exceedingly anomalous to conclude that Congress prohibited juries in the civil context in the FSIA but was indifferent to them in the criminal context.

Similar anomalies stem from the limited subject matter of civil claims permitted by the FSIA. The FSIA confers jurisdiction only over certain civil claims like those involving commercial activity or terrorism, reflecting a combination of international law and congressional legislative priorities. 28 U.S.C. §§ 1330(a), 1605-1607. Foreign states can be sued for personal-injury claims, for example, but not "libel, slander, misrepresentation, [or]

deceit." *Id.* § 1605(a)(5). Under the government's theory, however, it could apparently prosecute a foreign state for any crime for which it could prosecute a private citizen, like fraud. If, for example, MI6 lies to the CIA about ongoing British intelligence operations, the United States could prosecute MI6 for making "materially false … statement[s]" even though the FSIA bars civil "misrepresentation" claims. 18 U.S.C. § 1001(a); 28 U.S.C. § 1605(a)(5). The government's position thus subjects foreign states to more criminal than civil liability. That dichotomy is highly anomalous.

Finally, the FSIA provides clear guidance to courts on how to define a sovereign. The FSIA dictates that a foreign company like Halkbank is treated as a foreign state as long as the state owns a majority of its shares. 28 U.S.C. § 1603(a)-(b). Again, no one disputes that Halkbank is a foreign state under the FSIA. Pet.App.7a n.8. To the extent the government suggests that the criminal context distinguishes between sovereigns and sovereign "foreign-owned companies," Br. in Opp. 13, that distinction would flout Congress' considered judgment in the FSIA.

B. The Contrary Arguments Are Unpersuasive

1. The government claims that section 1604's broad grant of immunity does not apply in criminal cases, purportedly because the FSIA "read[] 'as a whole' … confirms that the Act is exclusively civil in its scope and application." Br. in Opp. 7 (citation omitted). That argument is ironic. If context informs the plain meaning of broad statutory language, the rest of the Judiciary Act of 1789 and the Crimes Act of 1790 make obvious that section 3231's "all offenses" does not include foreign sovereigns. *Supra* pp. 23-26; *see Brown & Williamson*, 529 U.S at 133.

The government's argument also fails on its own terms. The government notes that section 1330(a) only authorizes jurisdiction over "nonjury civil action[s]" and that the FSIA's procedures, such as its removal provision, also target "civil action[s]." Br. in Opp. 7 (quoting 28 U.S.C. §§ 1330(a), 1441(d)). That proves Halkbank's point: Congress *granted jurisdiction* only in civil cases. The FSIA's procedural provisions home in on "civil action[s]" because those are the only lawsuits the FSIA permits.

Section 1604, by contrast, uses broader language, stating that foreign states "shall be immune from the jurisdiction of the courts of the United States" subject to the FSIA's exceptions. Congress' choice to use the word "civil" in section 1330(a) but to omit that word in section 1604 presumptively conveys a difference in meaning. *See Badgerow*, 142 S. Ct. at 1318.

The government criticized Halkbank below for reading section 1604 broadly to grant immunity in *civil and criminal* actions, but section 1605 narrowly to apply immunity exceptions only in *civil* cases. U.S. C.A. Br. 37. That criticism is misplaced. Section 1604 *confers* sovereign immunity, whereas section 1605 (in conjunction with section 1330(a)) *waives* sovereign immunity. Section 1604 should be read broadly, consistent with the statute's broad text and the traditional view that "foreign states enjoyed absolute immunity from all actions." *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 821 (2018). Section 1605 should be read narrowly, because this Court "construe[s] waivers of sovereign immunity," like section 1605, "narrowly in favor of the sovereign." *Lane v. Peña*, 518 U.S. 187, 195 (1996); *see Schooner Exchange*, 11 U.S. at 146.

The government invokes "[t]he FSIA's background, purpose, and legislative history" to argue that criminal litigation was not the problem Congress sought to address. Br. in Opp. 7-9. But Congress' focus on the consequences of civil litigation against sovereigns reflects the fact that criminal litigation against sovereigns was inconceivable in 1976. "[T]he lack of specific discussion of one subpart of a subject in the legislative history is no basis for excluding that subpart from the coverage of a statute that is both written and described in its legislative history in all-embracing terms." *Amerada Hess* U.S. Br. 48. In all events, the FSIA's animating purpose was to codify international law—which, to repeat, unambiguously ruled out criminal jurisdiction over sovereigns. *Supra* pp. 15-16, 34-37.

The government claims that Congress cannot have "intended the FSIA to displace the Executive Branch's traditional role in deciding whether to criminally prosecute a foreign-government-owned business." Br. in Opp. 8. The government similarly finds it implausible that Congress would "so dramatically gut[] the government's crime-fighting toolkit without so much as a whisper to that effect in the [FSIA's] extensive legislative history." Br. in Opp. 11 (cleaned up). But criminally prosecuting foreign states is hardly a "traditional" aspect of the government's "crime-fighting toolkit" given that the government never deployed this "tool" in the nearly 200 years of the Republic before the FSIA. *Supra* pp. 29-30. The government identifies not a single pre-FSIA case where it sought to prosecute foreign states or state-owned entities.

The government finally argues that Congress would not have wanted foreign state-owned entities to become "haven[s] for criminal activity." Br. in Opp. 11. When entities are state-owned, however, the government can engage diplomatically with the foreign state. Backing up those efforts are the numerous sticks and carrots that the

United States deploys, including tariffs, investment blocks, visa limits, export controls, economic assistance, military aid, and sanctions. The government can sue civilly under the FSIA too. And statutes and regulations prescribe civil enforcement procedures for sanctions violations. 22 U.S.C. § 8513a(d)(1)(A); 31 C.F.R. pt. 501, app. A.

The government also can indict individual wrongdoers, as it already did here. *Supra* p. 8. When "the government of [China]" allegedly engaged in criminal conduct, the government indicted individuals, not China. Merrick B. Garland, *Remarks on Malign Schemes in the United States on Behalf of the Government of the People's Republic of China* (Oct. 24, 2022), https://bit.ly/3zat1Ax. Because neither states nor their instrumentalities can go to prison, criminal prosecutions add nothing more than a frontal assault on the sovereign's dignity and independence without any clear indication from Congress countenancing that result.

2. The court of appeals assumed that FSIA section 1604 ordinarily bars criminal jurisdiction, but held that immunity from criminal jurisdiction is subject to the exceptions in section 1605. In other words, the court assumed that the FSIA provides only limited immunity—and not absolute immunity—in criminal cases. The court reasoned that section 1605 applies "in *any* case," and "any" includes criminal cases. Pet.App.17a n.48. That conclusion does not withstand scrutiny.

The FSIA's only jurisdictional grant, which incorporates the section 1605 immunity exceptions, applies to "nonjury civil action[s]." 28 U.S.C. § 1330(a). Section 1605's reference to "any case" must be read in connection with section 1330(a)'s conferral of civil jurisdiction over "any claim for relief in personam with respect to which the foreign state is not entitled to immunity under sections

1605-1607." In other words, the FSIA cannot provide an exception for criminal jurisdiction when the FSIA grants jurisdiction only in civil cases.

Section 1605 itself indicates its exclusively civil reach. Several exceptions can plainly apply only in civil cases, covering topics such as "money damages," "rights in property," and arbitration agreements. *Id.* §§ 1605(a)(3)-(6). Those exceptions cannot apply in criminal cases. Br. in Opp. 9 (agreeing as to section 1605(a)(5)). Just like words are "known by the company [they] keep[]," the exceptions must be understood in context to avoid "giving unintended breadth to the Acts of Congress." *See McDonnell*, 579 U.S. at 569 (citation omitted). It would be odd to read section 1605 to apply only sometimes in criminal cases, on an exception-by-exception basis, without any indication in the provision's text that it applies to criminal cases at all.

Applying the FSIA's exceptions to criminal cases also runs afoul of *Charming Betsy*'s rule that statutes "ought never to be construed to violate the law of nations if any other possible construction remains." 6 U.S. at 118. International law is clear that the restrictive theory's exceptions do not apply in criminal cases. Fox & Webb, *supra*, at 94. No other country applies the commercial-activities exception—or any immunity exception—in criminal cases. *See supra* pp. 34-36. Even the government apparently concedes that international law requires absolute criminal immunity for "foreign states themselves." Br. in Opp. 14. But the FSIA treats foreign states and their instrumentalities equally. 28 U.S.C. § 1603(a). So applying the FSIA's exceptions to criminal cases would implausibly subject foreign states themselves to criminal jurisdiction for commercial activities—a plain violation of international law.

3. The court of appeals acknowledged that if the FSIA does not apply in criminal cases, Halkbank would

retain the common-law foreign sovereign immunity that courts recognized prior to the FSIA's enactment. Pet.App.23a. Common-law immunity tracked international law, which granted foreign sovereigns absolute immunity from criminal jurisdiction. *Supra* pp. 15-16, 34-37. Whether at common law or the FSIA, foreign sovereigns and instrumentalities are absolutely immune.

The court of appeals incorrectly held that, assuming the common law applies, the Executive Branch can unilaterally abrogate common-law sovereign immunity by initiating prosecution. Pet.App.24a. In the civil context before the FSIA, courts would defer to the State Department's determination that a defendant *was* a foreign sovereign entitled to immunity. *E.g.*, *Compania Espanola de Navegacion Maritima, S.A. v. The Navemar*, 303 U.S. 68, 74 (1938); *see Samantar*, 560 U.S. at 311. But if the Executive did not recommend immunity, the court would decide for itself whether immunity applied. *Samantar*, 560 U.S. at 311. As the government previously recognized, when it comes to sovereign immunity, "a shift in policy by the executive cannot control the courts." *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 714 (1976) (appendix 2 to opinion of the Court reproducing letter from Acting Legal Adviser Jack B. Tate). Federal prosecutors cannot unilaterally destroy an immunity recognized for centuries the world over.

IV. This Case Does Not Satisfy the FSIA's Commercial-Activities Exception Even If That Exception Applied

Even if the FSIA's exceptions applied in criminal cases, the Second Circuit erred in concluding that this case satisfies the commercial-activities exception, 28 U.S.C. § 1605(a)(2). That exception requires that the action be "based upon" one of three things:

1. "a commercial activity carried on in the United States by the foreign state";
2. "an act performed in the United States in connection with a commercial activity of the foreign state elsewhere"; or
3. "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."

Id. By their terms, each clause requires (1) a nexus to the United States (conduct in or directly affecting the United States) and (2) commercial activity. The indictment's allegations—centered on alleged conduct in Türkiye at the Turkish government's direction—satisfy neither requirement.

1. This case lacks a sufficient connection to the United States. The action is "based upon" neither conduct in the United States (the exception's first two clauses) nor conduct overseas that "causes a direct effect in the United States" (the exception's final clause). *Id.*

a. An action "is 'based upon' the particular conduct that constitutes the 'gravamen' of the suit." *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 35 (2015). The test "zeroe[s] in on the core of the[] suit" or its "foundation"—not on whether some conduct occurred in the United States. *Id.* at 35-36.

This case is "based upon" conduct outside the United States. The "core" or "gravamen" of the suit is Halkbank employees' alleged participation in a plan to transfer Iranian funds in Halkbank accounts in Türkiye to accounts controlled by Zarrab, and to help Zarrab disguise those illicit transfers as legitimate purchases. J.A.3, 11-12. The indictment does not allege that any of this conduct occurred "in the United States." *See* 28 U.S.C. § 1605(a)(2).

The Second Circuit held that the core of the suit includes allegations that Halkbank employees lied to Treasury officials to cover up the scheme. Pet.App.19a. The test, however, is where the "'gravamen' of the suit" occurred, not whether any conduct occurred in the United States. *OBB*, 577 U.S. at 35. For example, in *OBB*, the "foundation" of a suit about injuries suffered at a state-owned rail station in Austria was in Austria, even though the defendant allegedly failed to warn the plaintiff about the unsafe conditions in the United States. *Id.* at 35-36. The defendant's failure to warn was not "wrongful" absent the unsafe conditions in Austria. *Id.* at 35.

Similarly, allegations that Halkbank employees made misrepresentations to Treasury officials do not shift this case's core to the United States. The alleged statements were "wrongful" only because they allegedly did not accurately report what was happening *in Türkiye*.

b. Nor did Halkbank's alleged conduct overseas "cause[] a direct effect in the United States." 28 U.S.C. § 1605(a)(2). An effect is direct if it follows "as an immediate consequence of the defendant's activity." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992) (cleaned up). The exception is not satisfied if "intervening events" occurred between the overseas conduct and the U.S. effect. *Odhiambo v. Republic of Kenya*, 764 F.3d 31, 41 (D.C. Cir. 2014) (Kavanaugh, J.); *accord Restatement (Fourth) of Foreign Relations Law* § 454 n.8 (2018).

Halkbank's alleged acts involved transferring Iranian assets out of Halkbank accounts in Türkiye "to create a pool of Iranian oil funds in Turkey and the United Arab Emirates." J.A.3. The indictment does not allege that Halkbank controlled or directed where the funds went after they left Halkbank accounts in Türkiye. Instead, the indictment alleges that Zarrab purchased gold in Türkiye, exported it to Dubai, sold it in Dubai, and then moved the

proceeds through the international financial system. J.A.11-12, 21. That "variety of intervening events" precludes any finding of a "direct effect." *See Odhiambo*, 764 F.3d at 41.

The Second Circuit reasoned that the alleged scheme "led to approximately $1 billion being laundered through the U.S. financial system." Pet.App.23a. That reasoning ignores the multiple causal steps alleged between Halkbank's conduct and the transfer of funds through the United States. As a result of those intervening causal steps, the funds' transfer through the United States was not the "immediate consequence" of Halkbank's alleged conduct. *Weltover*, 504 U.S. at 618 (citation omitted).

2. Independently, this case lacks a nexus to *commercial* activity. The FSIA defines "commercial activity" as "a regular course of commercial conduct or a particular commercial transaction or act." 28 U.S.C. § 1603(d). As this Court has explained, sovereigns engage in commercial activity where they exercise "only those powers that can also be exercised by private citizens, as distinct from those powers peculiar to sovereigns." *Saudi Arabia v. Nelson*, 507 U.S. 349, 360 (1993) (cleaned up). The analysis focuses on the "conduct alleged," not whether the sovereign engages in commercial activity writ large. *See id.* at 361.

All agree that the Turkish government designated Halkbank to hold Iranian funds as part of a U.S.-approved program to provide Iranian oil and gas to the Turkish people. The indictment alleges that Halkbank, at the direction of Turkish government officials, diverted those funds, in part to boost Türkiye's exports statistics. J.A.13. On the indictment's telling, Halkbank acted as an arm of the Turkish state administering a government program. Thus, even the government's allegations treat this alleged activity as sovereign, not commercial.

The Second Circuit disagreed, reasoning that "any bank" can "violate sanctions." Pet.App.20a. Not here. Only the bank designated by the Turkish government as Türkiye's repository for Iranian assets could have engaged in the alleged conduct. No "private player within the market" could have violated the U.S. sanctions regime because no private player would have had Iranian money in the first place. *See Nelson*, 507 U.S. at 360 (cleaned up).

* * *

For over two centuries, America, like all nations, has settled disputes with other nations in the diplomatic arena, not through criminal indictment, trial, closing arguments before a jury, a presentence report, and a criminal conviction. The indictment against Halkbank is a radical departure from this time-tested consensus. Because Congress has never authorized that departure, this Court should reverse with instructions to dismiss the indictment.

CONCLUSION

The court of appeals' judgment should be reversed.

Respectfully submitted,

LISA S. BLATT
Counsel of Record
ROBERT M. CARY
JOHN S. WILLIAMS
SIMON A. LATCOVICH
AMY MASON SAHARIA
WILLIAMS & CONNOLLY LLP
680 Maine Avenue, S.W.
Washington, DC 20024
(202) 434-5000
lblatt@wc.com

Counsel for Petitioner

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STATUTORY ADDENDUM

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Judiciary Act of 1789, ch. 20, 1 Stat. 73

* * *

SEC. 9. *And be it further enacted,* That the district courts shall have, exclusively of the courts of the several States, cognizance of all crimes and offences that shall be cognizable under the authority of the United States, committed within their respective districts, or upon the high seas; where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted; and shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made, on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts as well as upon the high seas; saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it; and shall also have exclusive original cognizance of all seizures on land, or other waters than as aforesaid, made, and of all suits for penalties and forfeitures incurred, under the laws of the United States. And shall also have cognizance, concurrent with the courts of the several States, or the circuit courts "as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States. And shall also have cognizance, concurrent as last mentioned, of all suits at common law where the United States sue, and the matter in dispute amounts, exclusive of costs, to the sum or value of one hundred dollars. And shall also have jurisdiction exclusively of the courts of the several States, of all suits against consuls or vice-consuls, except for offences above

the description aforesaid. And the trial of issues in fact, in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury.

* * *

SEC. 11. *And be it further enacted*, That the circuit courts shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs, or petitioners; or an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State. And shall have exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except where this act otherwise provides, or the laws of the United States shall otherwise direct, and concurrent jurisdiction with the district courts of the crimes and offences cognizable therein. But no person shall be arrested in one district for trial in another, in any civil action before a circuit or district court: And no civil suit shall be brought before either of said courts against an inhabitant of the United States, by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ, nor shall any district or circuit court have cognizance of any suit to recover the contents of any promissory note or other chose in action in favour of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange. And the circuit courts shall also have appellate jurisdiction from the district courts under the regulations and restrictions herein after provided.

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.

Foreign Sovereign Immunities Act

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. § 1391. Venue generally

* * *

(f) CIVIL ACTIONS AGAINST A FOREIGN STATE.—A civil action against a foreign state as defined in section 1603(a) of this title may be brought—

(1) in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated;

(2) in any judicial district in which the vessel or cargo of a foreign state is situated, if the claim is asserted under section 1605(b) of this title;

(3) in any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state as defined in section 1603(b) of this title; or

(4) in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.

* * *

28 U.S.C. § 1441. Removal of civil actions

* * *

(d) ACTIONS AGAINST FOREIGN STATES.—Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

* * *

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), 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)), 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.

28 U.S.C. § 1608. Service; time to answer; default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with

an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement

for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state—

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made—

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service

applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

28 U.S.C. § 1609. Immunity from attachment and execution of property of a foreign state

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

28 U.S.C. § 1610. Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the

United States or of a State after the effective date of this Act, if—

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

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property—

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: *Provided*, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment, or

(6) the judgment is based on an order confirming an arbitral award rendered against the foreign state,

provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement, or

(7) the judgment relates to a claim for which the foreign state is not immune under section 1605A or section 1605(a)(7) (as such section was in effect on January 27, 2008), regardless of whether the property is or was involved with the act upon which the claim is based.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2), (3), or (5) or 1605(b) of this chapter, regardless of whether the property is or was involved in the act upon which the claim is based, or

(3) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605A of this chapter or section 1605(a)(7) of this chapter (as such section was in effect on January

27, 2008), regardless of whether the property is or was involved in the act upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if—

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

(e) The vessels of a foreign state shall not be immune from arrest in rem, interlocutory sale, and execution in actions brought to foreclose a preferred mortgage as provided in section 1605(d).

(f)(1)(A) Notwithstanding any other provision of law, including but not limited to section 208(f) of the Foreign

Missions Act (22 U.S.C. 4308(f)), and except as provided in subparagraph (B), any property with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the Trading with the Enemy Act (50 U.S.C. App. 5(b)), section 620(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2370(a)), sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701–1702), or any other proclamation, order, regulation, or license issued pursuant thereto, shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state (including any agency or instrumentality or such state) claiming such property is not immune under section 1605(a)(7) (as in effect before the enactment of section 1605A) or section 1605A.

(B) Subparagraph (A) shall not apply if, at the time the property is expropriated or seized by the foreign state, the property has been held in title by a natural person or, if held in trust, has been held for the benefit of a natural person or persons.

(2)(A) At the request of any party in whose favor a judgment has been issued with respect to a claim for which the foreign state is not immune under section 1605(a)(7) (as in effect before the enactment of section 1605A) or section 1605A, the Secretary of the Treasury and the Secretary of State should make every effort to fully, promptly, and effectively assist any judgment creditor or any court that has issued any such judgment in identifying, locating, and executing against the property of that foreign state or any agency or instrumentality of such state.

(B) In providing such assistance, the

Secretaries—

(i) may provide such information to the court under seal; and

(ii) should make every effort to provide the information in a manner sufficient to allow the court to direct the United States Marshall's office to promptly and effectively execute against that property.

(3) WAIVER.—The President may waive any provision of paragraph (1) in the interest of national security.

(g) PROPERTY IN CERTAIN ACTIONS.—

(1) IN GENERAL.—Subject to paragraph (3), the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of—

(A) the level of economic control over the property by the government of the foreign state;

(B) whether the profits of the property go to that government;

(C) the degree to which officials of that government manage the property or otherwise control its daily affairs;

(D) whether that government is the sole beneficiary in interest of the property; or

(E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

(2) UNITED STATES SOVEREIGN IMMUNITY INAPPLICABLE.—Any property of a foreign state, or agency or instrumentality of a foreign state, to which paragraph (1) applies shall not be immune from attachment in aid of execution, or execution, upon a judgment entered under section 1605A because the property is regulated by the United States Government by reason of action taken against that foreign state under the Trading With the Enemy Act or the International Emergency Economic Powers Act.

(3) THIRD-PARTY JOINT PROPERTY HOLDERS.—Nothing in this subsection shall be construed to supersede the authority of a court to prevent appropriately the impairment of an interest held by a person who is not liable in the action giving rise to a judgment in property subject to attachment in aid of execution, or execution, upon such judgment.

28 U.S.C. § 1611. Certain types of property immune from execution

(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if—

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver; or

(2) the property is, or is intended to be, used in connection with a military activity and

(A) is of a military character, or

(B) is under the control of a military authority or defense agency.

(c) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution in an action brought under section 302 of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 to the extent that the property is a facility or installation used by an accredited diplomatic mission for official purposes.