No. 21-1450

IN THE
Supreme Court of the United States

TÜRKIYE HALK BANKASI A.S., AKA HALKBANK,
Petitioner,

v.

UNITED STATES,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

BRIEF OF MARK B. FELDMAN, ESQ., AND PROFESSOR CHIMÈNE I. KEITNER AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTERESTS OF *AMICI CURIAE*[1]

Mark B. Feldman has been deeply engaged in U.S. foreign relations law since 1965, including sixteen years at the U.S. Department of State, twenty years teaching at the Georgetown University Law Center, and in private practice. As Deputy Legal Adviser (1974–1981), he was the State Department officer primarily responsible for preparing the revised bill that became the Foreign Sovereign Immunities Act ("FSIA"). Mr. Feldman also initiated the modern U.S. practice recognizing immunity for foreign official acts and chaired an American Bar Association committee that developed the 1988 amendments to the FSIA, including the arbitration provision adopted as Section 1605(a)(6) of the Act. He has published numerous law review articles on foreign state immunity and other international law issues. His bibliography is available at www.markfeldmaninternationallaw.com.

Chimène I. Keitner has spent the past twenty years working on issues at the intersection of international law and domestic litigation, and the past ten years focused on questions of foreign state and foreign official immunity. Professor Keitner holds the Alfred and Hanna Fromm Chair in International and

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[1] All parties have consented. Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici* or their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

Comparative Law at the University of California Hastings College of the Law, and previously served as the 27th Counselor on International Law at the U.S. Department of State. Professor Keitner has held leadership roles in the American Society of International Law and the International Law Association, and served as an adviser on sovereign immunity for the American Law Institute's Restatement (Fourth) of the Foreign Relations Law of the United States. Her bibliography is available at www.chimenekeitner.com

Amici have an interest in the proper interpretation and application of the FSIA, as well as the proper interpretation and application of international law in U.S. courts.

SUMMARY OF ARGUMENT

Petitioner, Türkiye Halk Bankasi A.Ş. (Halkbank), stands indicted for serious violations of U.S. criminal law including bank fraud, money laundering, and violations of the International Emergency Economic Powers Act ("IEEPA"). *United States v. Türkiye Halk Bankasi A.S.*, 16 F.4th 336, 341-42 (2d Cir. 2021). Halkbank asks this Court to order dismissal of the indictment on grounds that it is immune from the criminal jurisdiction of U.S. courts under the FSIA and international law and that Congress has never authorized criminal prosecution of foreign sovereigns.

Halkbank's petition rests on a false premise: "For sovereign-immunity purposes, Halkbank *is* Türkiye." Pet. Br. at 3. In fact, Halkbank is no more than a publically-traded commercial banking corporation

majority-owned by the Turkish Wealth Fund ("TWF"), a separate legal entity which is in turn owned by the Turkish State. Under clearly established international law and practice, Halkbank itself is not a sovereign. The Republic of Türkiye is not party to this case, and its sovereign rights are not at issue. The question presented in Petitioner's merits brief concerning the application of 18 U.S.C. § 3231 to foreign sovereigns is not before the Court in this case.

Amici offer their expertise in support of two basic propositions that dispose of this case:

> (1) There is no rule of international law or federal common law barring criminal proceedings against a foreign state-owned enterprise.
>
> (2) The FSIA was not intended to, and does not, deprive the federal courts of jurisdiction over offenses against the laws of the United States.

First, international law is formed by a general and consistent practice of states, followed from a sense of legal obligation. Petitioner cites no authority for its extraordinary assertion that international law in the form of federal common law forbids the United States from enforcing its criminal laws against a company based solely on the identity of that company's shareholders. There is no such prohibition. International law and practice do not treat foreign state-owned enterprises as sovereign, and neither does the long-standing law and practice of the United States. A foreign corporation can be both civilly and criminally liable

under domestic law consistent with international law and federal common law.

Second, the FSIA was drafted purely with civil litigation in mind. It did not modify or otherwise affect the criminal jurisdiction of the state or federal courts. Petitioner's statutory argument lacks any foundation in the text, context, and purpose of the statute. The attorneys in the Justice Department and the State Department who drafted the statute, and the Congress that passed it, were addressing problems arising from private civil litigation against foreign states and their instrumentalities, not criminal law enforcement. Section 1604 must be read together with Section 1330 and Sections 1605–1607. The definition of "foreign state" in the FSIA does not apply beyond the confines of that statute, and it does not turn a company into a foreign sovereign even in the civil litigation context, as evidenced by the different provisions relating to execution of judgment and punitive damages.

Adopting the sweeping logic of Petitioner's arguments falsely equating Halkbank with Türkiye would eliminate the jurisdictional basis for prosecutions of foreign state "agents" and "entities" for fraud, corruption, money laundering, economic espionage, cybercrime, and other serious offenses, contrary to the intent of Congress and without any basis in law.

ARGUMENT

I. International Law in the Form of Federal Common Law Does Not Exempt Foreign State-Owned Enterprises from Criminal Jurisdiction.

To establish an international legal prohibition on the exercise of criminal jurisdiction in this case, Petitioner would need to demonstrate a universally accepted customary international law rule shielding foreign state-owned enterprises from prosecution. But the sources Halkbank cites relate exclusively to foreign sovereigns. There is no authority for the proposition that criminal proceedings in this case are barred by international law in the form of federal common law.

A. A Company Is Not a Sovereign.

Halkbank's international law argument relies on the false premise that Halkbank is a foreign sovereign. Petitioner asserts that "[s]ince the Founding, international law has prohibited one country from prosecuting another in its courts." Pet. Br. at 14. But Halkbank is a company, not a country. Companies and countries are not interchangeable. Halkbank is not Türkiye, and this Court should disregard hyperbole characterizing it as such.

Customary international law is formed by "a general and consistent practice of states followed by them from a sense of legal obligation." *Restatement (Third) Foreign Relations Law* § 102(2) (1987). Halkbank insists that international law shields it from the exercise of U.S. jurisdiction, but it offers no evidence

of a general and consistent practice exempting foreign corporations from either civil or criminal jurisdiction on the sole basis of their shareholders' identity. To the contrary, "[t]he distinction between [state-controlled enterprises], and their governing state, . . . is an accepted distinction in the law of England and other states." *I Congreso del Partido*, [1983] 1 A.C. 258 (Eng.). This has long been the case. *See, e.g.*, *United States v. Deutsches Kalisyndikat Gesellschaft*, 31 F.2d 199, 202 (S.D.N.Y. 1929) ("As appears by affidavit and without contradiction, the French courts do not extend immunity to commercial enterprises owned or controlled by a sovereign state. . . .").

All of the sources Petitioner cites regarding immunity from criminal proceedings refer to states themselves, not state-owned enterprises. *See* Pet. Br. at 36. Yet international law, like U.S. law, distinguishes clearly between foreign states themselves and state-owned corporations. For example, Petitioner cites the *Restatement (Third) of the Foreign Relations Law of the United States* § 461 cmt. *c*. Pet. Br. at 36. A proper reading of that portion of the Restatement contradicts Petitioner's position. Petitioner takes language in this comment out of context by quoting the statement that "[a] state itself is generally not subject to the criminal process of another state[.]" *Restatement (Third)*, *supra*, § 461 cmt. *c*. But the same comment indicates clearly that "[t]he state's responsibility does not immunize the agent[.]" *Id.* Moreover, as comment *a* makes clear, any other "juridical person[]" is subject to criminal process. *See id.* cmt. *a*. That includes foreign corporations, such as Halkbank.

Lady Fox and Professor Webb's well-regarded treatise on state immunity, which Petitioner cites repeatedly, does not teach otherwise. Pet. Br. at 16, 28, 35, 37, 43. None of Petitioner's citations from this treatise supports a categorical exemption of foreign state-owned enterprises from criminal proceedings. To the contrary, under English law, "[s]eparate entities are generally to be treated as private parties." Hazel Fox & Philippa Webb, *The Law of State Immunity* 179 (rev. 3d ed. 2015). Most states do not even include foreign state-owned enterprises in their state immunity acts at all.[2]

U.S. practice is consistent with these international understandings. *See Deutsches Kalisyndikat Gesellschaft*, 31 F.2d at 202 (finding that a company is "an entity distinct from its stockholders" and that no immunity could be claimed based on the argument "that it and the government of France are identical in any respect"); *see also Coale v. Société Co-op Suisse des Charbons, Basle*, 21 F.2d 180, 181 (S.D.N.Y. 1921) (noting that "the corporation is liable" in "the case of a bank where the government owns all the stock"). Multiple cases emphasize the fundamental distinction

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[2] *See, e.g.*, Foreign States Immunities Act 1985 (Cth) s. 22 (Austl.); Immunities and Privileges Act, c. 16:01 § 16(2) (Malawi); State Immunity Ordinance, Ordinance No. 6 of 1981, § 15(2) (Pak.); State Immunity Act 1979 c. 313 § 16(2) (Sing.); Foreign States Immunities Act, Act No. 48 of 1985 § 15(1) (S. Afr.); State Immunity Act 1978, c. 33 §§ 14(1)–(2) (UK). The drafters of the FSIA had idiosyncratic reasons for including state-owned corporations within the statutory definition of "foreign state" for limited purposes in the context of civil litigation, as explained in Part II.C below.

between a foreign sovereign and a state-owned corporation. For example, in 1940, the Appellate Division of the New York Supreme Court clearly explained:

> It does not follow that, because immunity is granted to an ambassador of a foreign government or one of its instrumentalities, a suit may not be maintained against a corporation formed pursuant to the laws of the foreign government, although said corporation is owned by the government, especially when such corporation is engaged in commercial activities.

Hannes v. Kingdom of Roumania Monopolies Institute, 260 A.D. 189, 195 (N.Y. App. Div. 1940); *see also Ulen & Co. v. Bank Gospordarstwa Krajowego*, 261 A.D. 1, 7 (N.Y. App. Div. 1940) (concluding that "a corporation organized by either a domestic or foreign government for commercial objects in which the government is interested, does not share the immunity of the sovereign").

As this Court has long made clear in the context of state sovereign immunity, "a state, when it becomes a stockholder in a bank, imparts none of its attributes of sovereignty to the institution; and . . . this is equally the case, whether it owns a whole or a part of the stock of the bank." *Briscoe v. Bank of Ky.*, 36 U.S. (11 Pet.) 257, 325–36 (1837). "Nor does the fact that the government may own all or a majority of the capital stock take from the corporation its character as such, or make the government the real party in interest." *Amtorg Trading*

Corp. v. United States, 71 F.2d 524, 529 (Cust. & Pat. App. 1934).

In sum, Halkbank is not Türkiye. Petitioner does not benefit—and has never benefitted—automatically from the international law or federal common law protections that Türkiye itself may enjoy.

B. There Is No Rule of International Law or Federal Common Law Barring Criminal Proceedings Against State-Owned Enterprises.

The grant of criminal jurisdiction that forms the basis for the prosecution at issue is not limited to any particular category of defendant. In 1948, Congress granted federal district courts original jurisdiction "of all offenses against the laws of the United States." 18 U.S.C. § 3231 (June 25, 1948, ch. 645, 62 Stat. 826). Even if this grant had implicitly excluded foreign sovereigns—which it did not—that exclusion would not have encompassed state-owned enterprises, which were clearly understood to be separate and distinct from foreign states, as explained in Part I.A above. The same is true of the original grant of jurisdiction over federal crimes in the 1789 Judiciary Act, which gave the district courts "cognizance of all crimes and offences that shall be cognizable under the authority of the United States . . . ," without regard to the identity of the defendant. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73.[3]

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[3] In fact, in multiple civil cases involving foreign officials who claimed they had been acting on behalf of a foreign state, the

Petitioner argues that it makes no sense to grant criminal jurisdiction over foreign states, because sovereigns cannot be held criminally responsible under international law. Pet. Br. at 36-37. But whether there is a concept of State criminality under international law has no bearing on whether domestic law can hold separate entities civilly or criminally liable. Petitioner's assertion that "international law 'does not recognize the concept of state criminal responsibility,'" Pet. Br. at 28 (citation omitted), is simply not relevant here. First, this case involves Halkbank's legal responsibility under U.S. law, not under international law. And second, a company, unlike a country, can bear criminal responsibility under the domestic laws of many states.

It is well established that corporations can be held both civilly and criminally liable in various domestic legal systems. "Legal personality means that corporations can sue and be sued, hold property and transact, and incur criminal liability in their own name and on their own account." Celia Wells, *Corporate Criminal Responsibility*, *in Research Handbook on Corporate Legal Responsibility* 147 (Stephen Tully ed.,

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Attorney General emphasized that any individual who was not a public minister was on the same "footing" as any other foreigner with respect to his "suability" in federal court. *Actions Against Foreigners, Case of Sinclair*, 1 Op. Att'y Gen. 81 (1797); *Suits Against Foreigners, Case of Cochran[e]*, 1 Op. Att'y Gen. 49 (1794); *Suits Against Foreigners, Case of Collot*, 1 Op. Att'y Gen. 45 (1794); *see also Consular Privileges, Case of Létombe*, 1 Op. Att'y Gen. 77, 78 (1797) (indicating that there was no "doubt respecting the suability" of a consul-general who was not a diplomat).

2005). Corporate criminal liability "originated in the Anglo-American case law system." Suzanne Beck, *Corporate Criminal Liability*, *in The Oxford Handbook of Criminal Law* 561 (Markus D. Dubber & Tatjana Hörnle eds., 2015). Over time, various forms of corporate criminal liability have been "introduced in countless civil law countries," *id.* at 564, resulting in "the (almost) worldwide introduction" of this form of liability. *Id.* at 565.

Petitioner's *amicus* Professor O'Keefe asserts that "most states recognize the criminal responsibility of natural persons only[.]" Br. of Professor Roger O'Keefe as *Amicus Curiae* Supporting Petitioner at 11 [hereinafter "O'Keefe *Amicus* Br."]. The only support he offers for this assertion is a quotation from a 1996 article indicating that "corporate criminal liability in Europe is generally more restrictive than in the United States." *Id.* (citation omitted). Yet, as this quotation indicates, many European countries recognize corporate criminal liability. In fact, the same article notes in its opening sentence that "[c]orporate criminal liability under environmental, antitrust, securities, and other laws has grown rapidly over the last two decades both in the United States and overseas." V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 Harv. L. Rev. 1477, 1477 (1996). One can argue about whether this form of liability is effective in deterring or punishing corporate misconduct, but it is clearly not the subject of an international legal prohibition.

As a practical matter, criminal proceedings are simply "the most coercive form of regulation" available

to countries seeking to regulate activities that affect them. David Gaukrodger, *Foreign State Immunity and Foreign Government Controlled Investors*, at 28 (OECD Working Papers on International Investment 2010/02 2010). Petitioner's suggestion that private lawsuits are a host state's only possible means of regulating foreign state-owned enterprises would seriously impair the sovereignty of the regulating state.[4]

Petitioner identifies no foreign case indicating that prosecuting a foreign state-owned company for unlawful banking transactions violates international law. Professor O'Keefe notes that a single French decision found that a foreign state agency exercising sovereign powers was shielded from criminal prosecution by immunity. O'Keefe *Amicus* Br. at 12. However, the same decision held that Registro Italiano Navale ("RINA"), to which the state agency had delegated non-sovereign functions, could not claim immunity from prosecution for a shipwreck that caused a major oil spill. *Agent judiciare du Trésor v. Malta Maritime Authority and Carmel X*, Cour de cassation [Cass.] [supreme court for judicial matters] crim., Nov. 23, 2004, Bull. crim., No. 04-84.265 (Fr.). Moreover, as the court clearly stated, the sole basis for immunity "on the facts of" that case (Professor O'Keefe's translation) was the sovereign nature of the Maritime Authority's

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[4] Other potential limiting principles, such as the domestic presumption against extraterritoriality, could serve to constrain a state's exercise of regulatory authority as a matter of "prescriptive comity," but that principle is not before the Court in this case.

acts, not the fact that it was state owned or controlled.[5] Had the state agency engaged in commercial transactions, it would not have been immune from prosecution.

Other states' legislation governing a foreign state's immunity from civil proceedings does not compel a different conclusion. To the contrary, criminal proceedings explicitly fall outside the scope of most countries' state immunity acts.[6] Moreover, as Petitioner

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[5] There is authority in other countries' case law for the proposition that a state-controlled entity might be able to assert immunity if it is carrying out "acts in the exercise of sovereign authority." OECD Working Paper at 15–16. Yet this Court need not address the complex question of "sovereign authority" under international law, because this case involves traditional banking activities. Under this Court's case law, such activities are commercial in nature, regardless of their asserted purpose or intent. *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992) ("[T]he issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in 'trade and traffic or commerce.'") (citation omitted).

[6] *See, e.g.*, Foreign States Immunities Act 1985 (Cth) s. 3 (Austl.); State Immunity Act, R.S.C. 1985, c S-18 § 18 (Can.); Foreign States Immunity Law, 5769-2008, § 2 (Isr.); Immunities and Privileges Act, c. 16:01 § 18(2) (Malawi); State Immunity Ordinance, Ordinance No. 6 of 1981, § 17(2) (Pak.); State Immunity Act 1979 c. 313 § 19(2) (Sing.); Foreign States Immunities Act, Act No. 48 of 1985 § 2(3) (S. Afr.); State Immunity Act 1978, c. 33 § 16(4) (UK). Petitioner and its *amicus*'s reliance on these statutes to support their positions, *see* Pet. Br. 34–36, 35 n.2; O'Keefe *Amicus* Br. 9 & n.5, is puzzling. To the contrary, these statutes demonstrate the widespread

acknowledges, the U.N. Convention on Jurisdictional Immunities of States and Their Property (not yet in force) "does not cover criminal proceedings." G.A. Res. 59/38, ¶ 2 (Dec. 2, 2004). Were there such a strong international consensus in favor of the rule Petitioner proposes, presumably countries would have included it in a comprehensive treaty on the topic of foreign state immunity. Petitioner cannot construct an international legal prohibition on criminal proceedings out of this consistent silence.

C. Jurisdictional Immunities Operate as Defenses to Jurisdiction, Not *Ex Ante* Carve-Outs.

In attempting to shift the burden to the government to show that international law affirmatively authorizes prosecuting legal persons, including foreign state-owned enterprises, Petitioner fundamentally misunderstands how immunity defenses operate. Jurisdictional immunity, where it applies, operates as an affirmative defense. *See Lewis v. Mutond*, 918 F.3d 142, 145–46 (D.C. Cir. 2019); H.R. Rep. No. 94-1487, at 17 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6616 ("House Report") (characterizing foreign state immunity as "an affirmative defense" and stating that "[t]he ultimate burden of proving immunity would rest with the foreign state"). Immunity does not affect the underlying jurisdictional grant.

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understanding that these state immunity acts, like the FSIA, address civil litigation, not criminal proceedings.

Petitioner also misapprehends basic principles of diplomatic immunity. Petitioner argues that "[o]n the government's view, the First Congress gave federal prosecutors free reign to indict France," while subjecting prosecutors to "prison time if they so much as subpoenaed the French vice-consul." Pet. Br. at 24. This assertion betrays Petitioner's fundamental misapprehension of international law and the scope of jurisdictional immunities. Ambassadors (public ministers) and consuls are fundamentally different positions with fundamentally different legal entitlements. Under the Judiciary Act of 1789, federal courts had exclusive jurisdiction over actions against consuls. Judiciary Act of 1789, ch. 20, §§ 9, 13, 1 Stat. 73. 77, 80. But consular officials were not entitled to jurisdictional immunity. In fact, there were at least two prosecutions of foreign consuls in the 1790's alone. *See United States v. Ravara*, 27 F. Cas. 714 (C.C.D. Pa. 1794) (holding that Ravara, a consul from Genoa, was not privileged from indictment for sending threatening letters for extortion); Letter from Edmund Randolph, Sec'y of State, to Christopher Gore, Att'y of the U.S. for the Mass. Dist. (May 21, 1794); Message from the President of the United States, 19th Cong., 1st Sess., at 277 (1826) (referring to the prosecution of Juteau, Chancellor of the French Consulate at Boston, on charges of arming the privateer *Roland*).

Foreign state immunity itself is a more recent doctrinal innovation than many recognize, historically speaking. *See, e.g.*, Clive M. Schmithoff & Frank Wooldridge, *The Nineteenth Century Doctrine of Sovereign Immunity and the Importance of the Growth*

of State Trading, 2 Denv. J. Int'l L. & Pol'y 199, 199 (1972) ("It is well known that the principle of sovereign immunity finds no support in classical international law. . . . The evolution of the doctrine of sovereign immunity is thus comparatively recent and it was not until the nineteenth century that the doctrine could have been said to be established in a majority of states." (footnote omitted)). There is a reason Chief Justice John Marshall acknowledged, when he penned the opinion in *The Schooner Exchange*, that he was "exploring an unbeaten path with few if any aids from precedents or written law[.]" *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812). No principle identified in that case negates the existence of criminal jurisdiction over a foreign state-owned enterprise alleged to have violated U.S. law.

Halkbank has not provided evidence of any principle of international law that categorically prevents states from exercising regulatory jurisdiction, whether in the form of civil or criminal proceedings, over a company based on the identity of that company's direct or indirect shareholders. Abstract invocations of the principle of sovereign equality do not benefit Halkbank here. Rather, as the Permanent Court of International Justice said in a case in which Türkiye actually was a party (which it is not in the present case): "it is not a question of stating [international law] principles which would permit Türkiye to take criminal proceedings, but of formulating the principles, if any, which might have been violated by such proceedings." *S.S. Lotus* (France v. Turkey), P.C.I.J. Ser. A, No. 10, at 18 (1927).

The materials described above clearly show that absolute immunity of state-owned enterprises from criminal jurisdiction "is not universally accepted." *Id.* at 27. Simply put, Halkbank's arguments do not "establish the existence of a rule of international law prohibiting [the United States] from prosecuting [Halkbank]." *Id.* This Court should decline the invitation to invent one.

II. The FSIA Does Not Deprive the Federal Courts of Criminal Jurisdiction Over Foreign State-Owned Enterprises.

The FSIA does not affect the criminal jurisdiction of the federal courts. This Court has emphasized that the FSIA must be interpreted with reference to its "text, context, and history[.]" *Federal Republic of Germany v. Philipp*, 141 S. Ct. 703, 714 (2021). That text, context, and history make clear that the Act applies exclusively to civil actions. Moreover, while the FSIA applies to both sovereign and non-sovereign state entities, it does not equate them. Halkbank is not a sovereign for any purpose.

A. The FSIA Was Enacted to Address Problems Arising from Civil Litigation.

The FSIA was initiated by the State Department and drafted largely by attorneys in the Departments of Justice and State, including *amicus* Feldman.[7] The Act

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[7] *See* Mark B. Feldman, *Cultural Property Litigation and the Foreign Sovereign Immunities Act of 1976: the Expropriation Exception to Immunity*, Art & Cultural Heritage Law Committee Newsletter 9–13, Vol. 3, No. 2 (ABA Section of International Law,

establishes uniform standards for the determination of foreign sovereign immunity in civil actions in any court in the United States and creates a long-arm statute for federal jurisdiction in civil suits against foreign states, their agencies and instrumentalities. *See* House Report. It does not mention nor constrain the criminal jurisdiction of state or federal courts.

The FSIA was enacted as Public Law 94-583 on October 21, 1976. Section 2 of the Public Law prescribes the jurisdiction of the federal courts:

> § 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.

This framework creates a unique structure linking subject-matter jurisdiction over civil actions against foreign states to a determination that the defendant is not immune. In turn, the statutory criteria for non-immunity require a nexus between the cause of action and U.S. territory.

Summer 2011) (discussing the drafting and revision process between 1973 and the legislation's passage in 1976).

Consistent with the Act's focus on jurisdiction in civil cases, Section 3 of the Public Law amends the diversity jurisdiction of the federal courts, 28 U.S.C. § 1332, to eliminate civil suits against foreign states under that provision and to include suits by "a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States."

The drafters intentionally refrained from making any changes to Title 18, section 3231, which establishes the jurisdiction of the district courts over criminal offenses. They recognized that civil litigation and criminal prosecution are distinct legal regimes. The Justice and State Department attorneys who drafted the FSIA did not wish to affect the criminal jurisdiction of state or federal courts. Bruno Ristau and *amicus* Feldman understood the reference to "civil action" and to "any claim for relief *in personam*" in 28 U.S.C. § 1330(a) to exclude law enforcement issues from the reach of the FSIA. There is no indication that any Member of Congress thought otherwise. *See, e.g.*, Joseph W. Dellapenna, *Suing Foreign Governments and Their Corporations* 37 (2d ed. 2003) (noting that the "Act and its legislative history do not say a single word about possible criminal proceedings under the statute"). As Professor Dellapenna observes, "each provision of the statute is codified—by congressional direction—in title 28 (civil procedure), and no provision appears in title 18 (crimes and criminal procedure)." *Id.*

The drafters, who worked in the Executive branch, were addressing the problem of diplomatic pressures arising from private litigation, not from law

enforcement proceedings by U.S. agencies. When the State Department determined that immunity was appropriate in a civil case brought by private parties, it prepared a formal Suggestion of Immunity for submission to the court by the Department of Justice. *State Department Sovereign Immunity Decisions* 1952–1977, 1977 Digest U.S. Practice International Law 1017, 1019 ("Decisions").

The drafters of the FSIA recognized that criminal justice is the province of the Justice Department and did not seek to interfere in any way with the criminal justice system. If a criminal case presented potential foreign relations concerns, the Secretary of State might have a conversation with the Attorney General, but the State Department would not take a position adverse to the Department of Justice in court.

In light of its purpose, every provision of the Act was framed to deal with issues arising in civil litigation between private claimants and foreign state actors. *See* 28 U.S.C. § 1602 (indicating that the purpose of the statute was to transfer immunity determinations to the courts in order to "protect the rights of both foreign states and *litigants*") (emphasis added). Numerous provisions, including those for venue, 28 U.S.C. §1391(f), service, 28 U.S.C. § 1608(a)–(d), default judgment, 28 U.S.C. § 1608(e), removal from state to federal court, 28 U.S.C. § 1441(d), principles of liability, 28 U.S.C. § 1606, and counterclaims, 28 U.S.C. § 1607, have no application to criminal proceedings. Likewise, the immunity provisions were not drafted with criminal cases in mind. The D.C. Circuit was correct when it noted that

"Congress was focused, laser-like, on the headaches born of private plaintiffs' civil actions against foreign states." *In re Grand Jury Subpoena*, 912 F.3d 623, 630 (D.C. Cir. 2019).

Petitioner acknowledges that the FSIA deals only with civil cases and that Sections 1604 and 1330(a) work in tandem. Pet. Br. at 40. Nonetheless, Petitioner argues that one piece of this complex, integrated statute "presumptively" applies to criminal proceedings:

> Section 1604 . . . stat[es] 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.

Id. This reading is unfounded. As indicated above, Section 1604 works together with Section 1330(a). It does not affect Title 18. Had the drafters intended to deprive federal courts of jurisdiction in other parts of the U.S. Code, they would have said so, and they certainly would have flagged this major departure from existing practice to the enacting Congress.

Petitioner's reading is also internally contradictory. On the one hand, Petitioner seeks to read Section 1604 broadly and out of context. On the other hand, it ignores the explicit language of Section 1605(a), which provides that "[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States *in any case*" that satisfies the

statutory criteria. 28 U.S.C. § 1605(a) (emphasis added). Petitioner cannot have it both ways. Section 1605 implements the restrictive theory of sovereign immunity in order to provide a jurisdictional basis for civil suits under Title 28.

This Court "do[es] not construe statutory phrases in isolation; [it] read[s] statutes as a whole." *Samantar v. Yousuf*, 560 U.S. 305, 319 (2010), *quoting United States v. Morton*, 467 U.S. 822, 828 (1984).[8] Congress, like the drafters, clearly intended Sections 1604 and 1605 to be read together with Section 1330, as this Court recognized in a unanimous decision handed down earlier this year. "The FSIA, . . . creates a uniform body of federal law to govern the amenability of foreign states and their instrumentalities *to suit* in the United States." *Cassirer v. Thyssen-Bornemisza Collection Found.*, 142 S. Ct. 1502, 1508 (2022) (emphasis added). It does this by "first lay[ing] down a baseline principle of foreign sovereign immunity *from civil actions. See § 1604*." *Id.* (emphasis added). Petitioner argues that the exceptions to immunity stipulated by Congress in Section 1605 do not apply in this case, "because this Court 'construe[es]

[8] Moreover, this Court has "repeatedly stated . . . that absent 'a clearly expressed congressional intention,' . . . 'repeals by implication are not favored' . . . . An implied repeal will only be found where provisions in two statutes are in 'irreconcilable conflict,' or where the latter Act covers the whole subject of the earlier one and 'is clearly intended as a substitute.'" *Branch v. Smith*, 538 U.S. 254, 273 (2003) (citations and alterations omitted). None of those factors are present here, where the FSIA deals with civil jurisdiction under Title 28, not criminal jurisdiction under Title 18.

waivers of sovereign immunity,' like section 1605, 'narrowly in favor of the sovereign.'" Pet. Br. at 40. That position is not credible. This Court does not equate laws made by Congress with "waivers" to be construed narrowly.

There is no indication whatsoever in the text or history of the FSIA that Congress intended the statute to modify the core grant of jurisdiction in 18 U.S.C. § 3231 over offenses against U.S. law. It is unthinkable that Congress would have implicitly modified the criminal jurisdiction of the federal courts without any indication in the statute's text or history, and the drafters certainly had no such intent.

B. The Drafters of the FSIA Did Not Intend to Modify Title 18.

As this Court indicated in *Samantar*, which found that the Act does not govern the immunities of foreign officials sued in their personal capacity, the threshold question is whether the Act applies to the subject matter. "The Act, *if it applies*," is the "'sole basis for obtaining jurisdiction over a foreign state in federal court.'" *Samantar*, 560 U.S. at 314, *quoting Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989) (emphasis added). In *Samantar*, this Court indicated:

> The immunity of officials simply was not the particular problem to which Congress was responding when it enacted the FSIA. The FSIA was adopted, rather, to address "a modern world where foreign state enterprises are every day

> participants in commercial activities," and to assure litigants that decisions regarding claims against states and their enterprises "are made on purely legal grounds" [quoting H. R. Rep., at 7]. We have been given no reason to believe that Congress saw as a problem, or wanted to eliminate, the State Department's role in determinations regarding individual official immunity.

Id. at 323.

Likewise, criminal prosecution was not the problem to which Congress was responding when it enacted the FSIA. This Court has repeatedly recognized that the purpose of the FSIA was to transfer determinations of immunity in civil cases brought against foreign states and their entities from the State Department to the courts "in order to free the Government from the case-by-case diplomatic pressures, to clarify the governing standards, and to 'assure litigants that decisions are made on purely legal grounds and under procedures that insure due process.'" *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488 (1983) (citations and alterations omitted). The Justice Department took pains to explain the scope of the Act to Congress in 1976:

> Speaking in broad terms, the bill would subject foreign government agents and their agencies and instrumentalities to *personal suit in contract and in tort* before American courts to the same extent that the United States is subject to suit in

> most foreign countries. The extraordinary increase of trading activities conducted by foreign states in the United States since the end of World War II makes it desirable that Congress legislate comprehensively regarding the competence of American courts to adjudicate disputes *between private parties and foreign states* arising out of their commercial activities and other activities which are of a private law nature.
>
> *[P]rivate parties with claims against foreign states* arising out of their commercial or private-law activities should not be denied their day in court by outmoded notions of absolute immunity which arose in the era of personal sovereigns.

Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Admin. Law & Governmental Rels. of the H. Comm. on the Judiciary, 94th Cong. 29-31 (1976) (testimony of Bruno A. Ristau, Chief, Foreign Litigation Section, Civil Division) ("Hearings") (emphasis added).

Petitioner's reliance on this Court's opinion in *Amerada Hess* is misplaced. Pet. Br. at 34, 41. *Amerada Hess* does not apply for the reasons stated in *Samantar*.

C. Halkbank Is Not a Sovereign for Any Purpose.

Unable to argue that international law and practice view state-owned enterprises as equivalent to foreign states (they do not) or that the FSIA applies to

criminal proceedings (it does not), Petitioner hangs its claim to jurisdictional immunity on a final statutory hook: the definition of "foreign state" in 28 U.S.C. § 1603(a)–(b). Pet. Br. at 39 (emphasis added). Yet Petitioner seemingly ignores that this definition applies solely "[f]or purposes of this chapter." 28 U.S.C. § 1603. Instead, Petitioner claims that this provision "provides clear guidance to courts on how to define a *sovereign*." Pet. Br. at 39. The FSIA does no such thing.

Because the FSIA was designed to address a range of problems related to civil litigation against foreign states and state-related entities, the drafters saw fit to include a broad definition of "foreign state" for certain purposes in the new statutory scheme. Section 1603 encompasses both sovereign and non-sovereign entities in order to accomplish the dual purposes of transferring immunity determinations in civil litigation to the courts and ensuring a basis for long-arm jurisdiction over foreign states and state-related entities. Nevertheless, the FSIA makes a sharp distinction between the "foreign state" and government, on the one hand, and an "agency or instrumentality," which includes an entity "a majority of whose shares . . . is owned by a foreign state . . . ," on the other. 28 U.S.C. § 1603(a)–(b).

The drafters brought state-owned companies under the Act for jurisdictional purposes, but denied them many of the special protections afforded the foreign state itself. In fact, the Act establishes an elaborate two-tier regime making it easier for claimants to sue state-owned enterprises than foreign

governments, 28 U.S.C. §§ 1603, 1608(b), and much easier to execute judgments against their property. 28 U.S.C. § 1610(b). Even more telling, the FSIA bars punitive damages against the foreign state, but allows them against state-owned agencies and instrumentalities. 28 U.S.C. § 1606. This structure does not endow state-owned entities with sovereign status for any purpose, let alone make them immune from criminal prosecution under an entirely different Title in the U.S. code.

As Justice Scalia noted in *Republic of Argentina v. NML Capital Ltd.*, "[t]o understand the effect of the Act, one must know something about the regime it replaced." 573 U.S. 134, 140 (2014). The FSIA was adopted to address "a modern world where foreign state enterprises are every day participants in commercial activities," House Report at 7, 1976 U.S.C.C.A.N. at 6606. Many of the requests for immunity made to the State Department when the Act was being developed involved state-owned enterprises. *See* Decisions, *supra*. In those days, claimants in U.S. courts often attached vessels, planes, or bank accounts of state-owned enterprises to obtain jurisdiction of the foreign state or to execute a judgment against it.

These attachments created sensitive diplomatic problems for the State Department. Several cases involved the Soviet Union. In one instance, in which *amicus* Feldman was involved, Ambassador Dobrynin used a meeting with the Secretary of State on Middle-East peace to request the release of a vessel detained in

the Panama Canal Zone.[9] In others, the State Department found it difficult to deal with the Ambassador's contradictory statements as to whether the entity owning the vessel was part of the Soviet state.[10] Mark B. Feldman, *Foreign Sovereign Immunity in the United States Courts 1976-1986*, 19 Vand. J. Transnat'l L. 19, 27 (1986).

The broad definition of "foreign state" in Section 1603(a) was adopted to move evidentiary problems like these from the State Department to the courts and to base immunity decisions in suits by private plaintiffs on the "nature" of the acts at issue rather than the status of the state-actor involved. *Id.* at 27–28. In addition, the drafters wanted to make it possible for private parties to sue commercial enterprises owned by foreign states without detaining vessels or seizing other assets. To that end, the FSIA bars attachment for purposes of jurisdiction, 28 U.S.C. § 1609, and substitutes a long-arm statute providing jurisdiction in civil cases having a nexus with U.S. territory, 28 U.S.C. § 1330. A broad definition of "foreign state" was necessary to make this system work. Neither the drafters nor the Congress

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[9] *See* Mark B. Feldman, *Foreign Affairs Oral History Collection, Association for Diplomatic Studies and Training*, at 76–77 (2022), https://adst.org/OH%20TOCs/Feldman.Mark.pdf.

[10] James Stang, *Foreign Sovereign Immunities Act: Ownership of Soviet Foreign Trade Organizations*, 3 Hastings Int'l & Comp. L. Rev. 201, 217–18 (1979) ("The Ambassador's statements in *Vopin* and *Prelude* are contradictory. . . . Although the entities served different economic purposes, their legal status was identical.").

imagined that this legislation could affect the criminal jurisdiction of the federal courts.

The FSIA's definition does not disturb the underlying distinction between foreign states themselves and corporations in which a foreign state owns shares. This Court made clear in *Dole Food* that the FSIA is founded on traditional U.S. corporate law principles, which distinguish the corporation as a legal person acting in the economy from its shareholders. *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003).[11] "In issues of corporate law structure often matters. It is evident from the Act's text that Congress was aware of settled principles of corporate law and legislated within that context." *Id.* at 474. "A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities. . . . The fact that the shareholder is a foreign state does not change the analysis." *Id.* at 474–75; *see also First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 626–27 (1983) ("[G]overnment instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such.").

[11] Because Halkbank is not owned directly by Türkiye, it is not clear to *amici* that Halkbank qualifies as an "agency" or "instrumentality" as defined by the FSIA under *Dole Food*. *See id.* at 477 ("A corporation is an instrumentality of a foreign state under the FSIA only if the foreign state itself owns a majority of the corporation's shares.").

The Justice Department reminded Congress of the importance of this tradition in the hearings on the FSIA. Bruno Ristau quoted Chief Justice Marshall in *Bank of the United States v. Planters' Bank of Georgia*, 22 U.S. (9 Wheat.) 904, 907 (1824):

> It is, we think, a sound principle, that when a government becomes a partner in any trading company, it devests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted.

Hearings at 30. The FSIA carries forward the historic distinction between the foreign state itself and state-owned enterprises. It does not make Halkbank a sovereign.

For all of these reasons, Halkbank is not entitled to jurisdictional immunity from criminal prosecution in the district court.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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