No. 21-1450

IN THE

Supreme Court of the United States

TURKIYE HALK BANKASI A.S.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF FOR THE TURKISH RED CRESCENT, THE UNION OF CHAMBERS AND COMMODITY EXCHANGES OF TURKIYE, AND THE BANKS ASSOCIATION OF TURKIYE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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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.

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INTEREST OF THE *AMICI CURIAE*[1]

The Turkish Red Crescent is the largest humanitarian organization in Türkiye. Founded in 1868, the organization is a non-profit, volunteer-based social service institution providing unconditional aid and humanitarian service. The organization was the first Red Crescent society of its kind and is part of the International Red Cross and Red Crescent Movement.

The Union of Chambers and Commodity Exchanges of Türkiye (TOBB) is a national confederation of all local chambers of commerce and commodity exchanges in the Republic of Türkiye. Founded in 1950, TOBB is the highest legal entity in Türkiye representing the private sector. TOBB's mission is to ensure unity between chambers and commodity exchanges, to enhance the development of the professions in conformance with general interest, to facilitate the professional work of its members, to promote honesty and confidence in the relations of its members with one another and with the public, and to preserve professional discipline and ethics.

The Banks Association of Türkiye was founded in 1958. It is a professional organization, which is a legal entity with the status of a public institution, established pursuant to Turkish law. The head office of the Association is in Istanbul. The Association's purpose is to preserve the rights and benefits of banks,

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[1] No counsel for a party authored this brief in whole or in part, and no person other than the *amici* and their counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties provided written consent to the filing of this brief.

promote the robust functioning and growth of the banking sector, strengthen fair competition, and make decisions in line with the principles of free market economics and the regulations, principles, and rules of banking. The Association's membership includes all deposit banks and development and investment banks operating in Türkiye.

Amici have a strong interest in ensuring the continued cooperation and good relations of sovereigns as it relates to matters of business and charity. The decision below, which would permit the unprecedented criminal prosecution of one sovereign by another, threatens such cooperation and relations and thereby the ability of *amici* to fulfill their respective missions.

INTRODUCTION AND SUMMARY OF ARGUMENT

This first-of-its kind prosecution will, if allowed to proceed, have sweeping global implications that are sure to be as deleterious as they are unpredictable. Nations have never viewed prosecuting one another in their own courts as a legitimate way to resolve international conflict, and Congress plainly denied federal courts jurisdiction over such actions in the Foreign Sovereign Immunities Act.

It did so for a reason. As this Court's precedents repeatedly recognize, the core doctrine of international affairs—and the only one with any bite—is the rule of reciprocity. The United States is an international leader, and history shows that the nations of the

world follow its lead on questions of sovereign immunity. And that is precisely what will happen if the Court upholds the abrogation of immunity in this case, which would give other nations license to wield the same potent weapon against competitor and adversary states. But it is not only (or even primarily) governments that will suffer the fallout. Reprisals will target the parties that foreign nations can most easily reach, and experience shows those will be private entities and their employees. The chilling effect of that threat will deter investment, trade, and commerce, to the detriment of the U.S. and global economies.

There is no telling where the consequences will end, since foundational principles of international cooperation are at stake. Once the United States rejects the equal dignity of sovereigns, the many international norms and systems that depend on the cooperation it facilitates will be threatened, from the system of international humanitarian aid, to the elaborate web of international free-trade agreements, to international war crimes prosecutions, to the extensive system of reciprocal protection of legal rights. International cooperation across these systems begins from the premise of equal sovereign dignity, and removing that premise from the equation will undermine each system, potentially in disastrous ways.

More concretely, it is inevitable that a decision approving prosecution of a sovereign entity will work a sea change in international financial regulation. Given their ubiquitous participation in financial transactions, foreign central banks will have little

choice but to comply with U.S. law on money laundering and sanctions and to impose the requirements of U.S. law on the domestic financial institutions they oversee and serve. But it won't stop there: other nations, especially China and Russia, will have equal claim to impose their financial laws on the world, and there is every reason to believe they will do so. The result will be to ensnare foreign banks and other businesses in a web of overlapping and often contradictory legal regimes, at enormous expense. The likelihood of these, and other, harms only confirms that Congress never gave the government the power it claims here.

ARGUMENT

I. Businesses Will Bear the Burden of Other Nations Following the United States' Denial of Sovereign Immunity from Prosecution

This Court has recognized that "in dealing with international commerce we cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided." *Lauritzen v. Larsen*, 345 U.S. 571, 582 (1953). In spite of that call for caution, the decision below greenlights the unprecedented criminal trial of a foreign sovereign in United States court without acknowledging the significance of that event. If the prosecution of Halkbank is allowed to proceed to trial, experience shows that it will be the first of its kind but assuredly not the last. And businesses around the world will be caught in the crossfire.

A. "It is a basic premise of our legal system that, in general, United States law governs domestically

but does not rule the world." *RJR Nabisco, Inc. v. Eur. Cmty.*, 579 U.S. 325, 335 (2016) (quotation marks omitted). This premise applies to statutes, like the FSIA, "affecting international relations," and it requires courts to "interpret the FSIA…to avoid, where possible, producing friction in our relations with other nations and leading some to reciprocate by granting their courts permission to embroil the United States in expensive and difficult litigation." *Fed. Republic of Germany v. Philipp*, 141 S. Ct. 703, 714 (2021) (cleaned up).

The Court has also repeatedly emphasized that questions of foreign sovereign immunity involve a "very delicate and important inquiry." *The Schooner Exch. v. McFaddon*, 11 U.S. 116, 135 (1812); *see also Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493 (1983) ("Actions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States."). The Court's precedents "aim[] at stability and order through usages which considerations of comity, reciprocity and long-range interest have developed to define the domain which each nation will claim as its own." *Lauritzen*, 345 U.S. at 582.

The principal justification for this approach is the recognition that, where the United States leads, other countries follow. After all, "what is sauce for the goose is normally sauce for the gander." *RJR Nabisco*, 579 U.S. at 349 (quotation marks omitted). As the Court has explained, "any contact which we hold sufficient to warrant application of our law to a foreign transaction will logically be as strong a warrant for a foreign

country to apply its law to an American transaction." *Lauritzen*, 345 U.S. at 582; *see also Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 841 (D.C. Cir. 1984) ("[I]t is possible that a decision to exercise jurisdiction in this case would subject the United States to [reciprocal] suits abroad for torts committed on the premises of embassies located here.").

The Court reiterated this concern last year in considering whether Germany was immune from a lawsuit seeking compensation for artwork stolen during World War II. In answering yes, the Court explained that, "[a]s a Nation, we would be surprised—and might even initiate reciprocal action—if a court in Germany adjudicated claims by Americans that they were entitled to hundreds of millions of dollars because of human rights violations committed by the United States Government years ago." *Philipp*, 141 S. Ct. at 714. Nor is there any "reason to anticipate that Germany's reaction would be any different were American courts to exercise the jurisdiction claimed in this case." *Id.*

The likelihood of reciprocal action is heightened for two additional reasons. First is that much of the world follows the United States' lead on questions of sovereign immunity. The "FSIA was the first national codification of foreign state immunity law and has been a model for other countries." Joan E. Donoghue, The Public Face of Private International Law: Prospects for a Convention on Foreign State Immunity, 57 Law & Contemp. Probs. 305, 308 (Summer 1994). Indeed, foreign courts have followed United States legal precedent applying the FSIA when considering

questions of sovereign immunity. *See, e.g.*, *P.S.A.C. v. United States Defence Dep't.*, 1992 CarswellNat 1005, para. 94 (Can. S.C.) (WL).

Second is that "some foreign states base their sovereign immunity decisions on reciprocity, or parity of reasoning." *Persinger*, 729 F.2d at 841. Accordingly, if one sovereign does not afford other sovereigns immunity from criminal prosecution in its courts, the other sovereigns will not afford the first immunity from criminal prosecution in their courts.

B. The threat of reciprocal action is even greater in the criminal context than in the civil context. This is so because of the uniquely discordant nature of one sovereign haling another into criminal court.

The dignitary injury inherent in criminal prosecution of a foreign sovereign cannot be overstated. There is a unique "stigma inherent" in criminal prosecutions. *Breed v. Jones*, 421 U.S. 519, 529 (1975); *see also In re Winship*, 397 U.S. 358, 367 (1970). A criminal indictment of a sovereign accordingly "is a harsher commentary" than a civil proceeding—one that amounts to a "moral condemnation." John Balzano, Crimes and the Foreign Sovereign Immunities Act: New Perspectives on an Old Debate, 38 N.C. J. Int'l L. 43, 83 (2012) (quotation marks omitted). Simply put, "[i]t denigrates the equality and dignity of the foreign state within the international order by criminally prosecuting it in the courts of a co-equal sovereign." *Id.* It is only natural that, after one nation is branded an alleged criminal in the courts of another, relations between the nations will deteriorate

and reciprocal criminal prosecution—and other forms of retaliation—will follow.

It is no answer for the government to say that the executive branch is competent to balance dignitary interests and the likelihood and degree of reprisals in choosing whether to prosecute. *See* BIO.8. For one thing, the point of the FSIA was to deny the executive branch that very discretion because Congress found its "inconsistent application" of immunity unacceptable. *Samantar v. Yousuf*, 560 U.S. 305, 313 (2010). Any claim to discretion in these choices would seem to rest on the premise that some nations are more worthy of immunity than others, or wield less ability to fight back, and it is hard to imagine a more "inconsistent" approach than that.

For another thing, the government has no discretion over state criminal prosecutions, which its theory of the FSIA would permit. The FSIA generally provides that "a foreign state shall be immune from the jurisdiction of the courts of the United States *and of the States*." 28 U.S.C. § 1604 (emphasis added). The government proposes that this refers only to civil cases, BIO.6, and if that were correct then immunity from suit in state courts is equally limited to civil jurisdiction. Likewise, the theory of the court below that the FSIA's exceptions to sovereign immunity apply in criminal cases would equally render them applicable to state criminal prosecution: the immunity provision is expressly subject to the exceptions "provided in sections 1605 to 1607," 28 U.S.C. § 1604, and those exceptions explicitly apply in state court, *see, e.g.*, *id.* § 1605(a) ("A foreign state shall not be immune from

the jurisdiction of courts of the United States *or of the States* in any case…." (emphasis added); *Verlinden*, 461 U.S. at 488 ("A foreign state is normally immune from the jurisdiction of federal *and state* courts, 28 U.S.C. § 1604, subject to a set of exceptions specified in §§ 1605 and 1607." (emphasis added)). Thus, the power of all prosecutors—state and federal—to prosecute foreign sovereigns rises or falls together.

The FSIA's removal provision does not change this. Rather than strip state-court jurisdiction across the board, the FSIA provides for removal only of a "civil action." 28 U.S.C. § 1441(d). There is no provision for removal of criminal cases, which is powerful evidence that it was inconceivable at the time of the FSIA's enactment that a foreign sovereign would be criminally prosecuted in the United States.

The government's position therefore would permit the 50 state Attorneys General to criminally prosecute foreign sovereigns in state court and try their cases to a jury. It is not difficult to imagine the consequences. State Attorneys General already have proven willing to bring civil actions against foreign sovereigns in federal court. For example, Missouri and Mississippi brought civil lawsuits against various Chinese entities, like the Chinese Communist Party, "[i]n an effort to hold China accountable" for the coronavirus pandemic. Sean Mirski & Shira Anderson, What's in the Many Coronavirus-Related Lawsuits Against China?, Lawfare (June 24, 2020).[2] Missouri's lawsuit was dismissed on sovereign-immunity

[2] *Available at* https://www.lawfareblog.com/whats-many-coronavirus-related-lawsuits-against-china.

grounds. *See Missouri ex rel. Schmitt v. People's Republic of China*, No. 20-cv-99, 2022 WL 2643516 (E.D. Mo. July 8, 2022). If the government is right, that ruling can be sidestepped with a state-court indictment, and any question of immunity would be decided by state-court judges.

C. Experience vindicates the Court's concern with reciprocity. And, of particular interest to *amici*, it also shows that private parties like businesses and their employees will be the targets.

The United States already has seen retaliatory action as a result of criminal actions it has initiated against the employees of foreign state-affiliated entities. For example, the United States indicted multiple employees of telecom-equipment provider Huawei beginning in 2014. *See generally* Stephen J. Schultze, Hacking Immunity: Computer Attacks on United States Territory by Foreign Sovereigns, 53 Am. Crim. L. Rev. 861, 865–66 (2016). Pursuant to a U.S. indictment, Canada arrested Huawei's Chief Financial Officer Meng Wanzhou, and a Canadian court ordered extradition to the United States. *See* Mark Katov, China Charges 2 Canadians With Espionage In Case Tied To U.S. Prosecution Of Huawei, NPR (June 19, 2020).[3] In retaliation, China charged two Canadian nationals—a businessman and an employee of a non-governmental organization—with espionage and detained them in China. *See id.*

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[3] *Available at* https://www.npr.org/2020/06/19/880741322/china-charges-2-canadians-with-espionage-in-case-tied-to-u-s-prosecution-of-huaw.

Private businesses are particularly vulnerable to this form of retaliation. Criminal convictions of businesses "lead not only to any criminal penalties imposed (usually a heavy fine), but also to what others have termed 'collateral consequences'—devastating financial and reputational repercussions that can, and do, force companies out of business." Edward B. Diskant, Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine Through Comparative Criminal Procedure, 118 Yale L.J. 126, 128 (2008). The possibility of criminal prosecution is "the area of arguably the greatest risk to corporations," as they can be "criminally tried and convicted for crimes committed by individual directors, managers, and even low-level employees." *Id.* Indeed, "[t]he risk of indictment alone is devastating: a criminal indictment promises a swift market response, the ouster of leadership, [and] millions of dollars in legal fees." *Id.* It is "common wisdom within the business community" that criminal prosecution of a private business "amounts to a potentially lethal blow for a corporation, one from which the corporation may not recover." *Id.* at 128–29.

It is therefore unsurprising that sovereign retaliatory action often targets private businesses. For example, after the United States indicted five officers of China's People's Liberation Army for hacking and economic espionage, China announced plans for "security checks" for technology firms doing business in China—checks that would uniquely burden blue-chip United States companies like Microsoft, IBM, and Cisco Systems. Chris Buckley, China Plans Security Checks for Tech Firms After U.S. Indictments, New

York Times (May 22, 2014).[4] China also banned the Microsoft Windows operating system from being used on government computers. Shannon Tiezzi, China's Response to the US Cyber Espionage Charges, The Diplomat (May 21, 2014).[5]

As these examples show, countries respond to actions against their agencies or instrumentalities with retaliation against private businesses. If the decision below stands, the risks to business for their international operations will become more severe and possibly unmanageable. Any time the Unites States or a state Attorney General prosecutes a foreign sovereign, prominent businesses of the United States and its allies will face potentially ruinous retaliation. Consider a state Attorney General who, facing high gasoline prices in the state, criminally prosecutes Saudi Arabia or another member of OPEC for violation of state antitrust law. Leading United States companies operating in Saudi Arabia—which range from Boeing to Uber—would be prime targets for retaliatory action. And it will only take a handful of such retaliatory actions before businesses dramatically change their plans for expanding to and investing in the foreign country, or any country, to the detriment of international commerce. And of course, this problem will not only plague U.S. businesses, but businesses from any country that follows the United States' path in allowing criminal prosecution of foreign sovereigns.

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[4] *Available at* https://www.nytimes.com/2014/05/23/world/asia/china-threatens-security-checks-for-tech-firms-after-us-indictments.html?login=email&auth=login-email.

[5] *Available at* https://thediplomat.com/2014/05/chinas-response-to-the-us-cyber-espionage-charges/.

II. Criminally Prosecuting Sovereigns Will Undermine Vital International Cooperation on Humanitarian Relief, Law Enforcement, and Global Commerce

If accepted, the government's position here will also interfere with practically all forms of international cooperation, to the detriment of the public and private interests that depend on it. "As Justice Story put it, 'No nation has ever yet pretended to be the custos morum of the whole world.'" *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 123 (2013) (quoting *United States v. The La Jeune Eugenie*, 26 F. Cas. 832, 847 (No. 15,551) (C.C.Mass.1822)). Nations work together under the premise that consent of equally dignified sovereigns is essential to achieve any progress of any kind across borders. To prosecute foreign sovereigns is to deny that premise, and the response will be emulation, retaliation, and escalation. How that plays out is impossible to predict with precision because international affairs are so complex. What can be forecast is that once the cycle of mistrust begins, it will be difficult to end.

A. This is most apparent for international humanitarian efforts. The United States affords international organizations like the International Committee of the Red Cross (ICRC) the same immunity it affords foreign sovereigns, so prosecuting a foreign nation is precedent for prosecuting an international humanitarian agency. Once that precedent is set, the government cannot control how others will use it.

The world's largest humanitarian network is the International Federation of Red Cross and Red Crescent Societies (IFRC), which comprises the ICRC and 190 national Red Cross and Red Crescent societies (IFRC Societies). *See* IFRC, About the IFRC.[6] Established in 1863 as a private association under Swiss law, the ICRC gained legal status over the decades as an international organization, a status partly enshrined in the 1949 Geneva Conventions and partly in the Statutes of the International Red Cross and Red Crescent Movement. Els Debuf, Tools to do the job: The ICRC's legal status, privileges and immunities, 97 Int'l Review of the Red Cross 320 (2016). IFRC Societies are established in turn by their respective sponsor nations to meet an array of humanitarian needs recognized in the Geneva Conventions. *See* Geneva Convention (IV) Relative to the Treatment of Prisoners of War, art. 11, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; *see also* Kristen Dale, The Red Cross and Red Crescent Movement: Power Players in International and Domestic Natural Disaster Law, 25 Cardozo J. Int'l & Comp. L. 111, 119–20 & nn. 41–42 (2016). "National Societies act as auxiliaries to their national authorities in the humanitarian field," providing "a range of services including disaster relief, and health and social programmes." IRCR, The Movement, *supra*.[7] Each "has its own legal identity." *Id.*

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[6] *Available at* https://www.ifrc.org/who-we-are/about-ifrc.

[7] *Available at* https://www.icrc.org/en/movement#:~:text=It%20was%20founded%20in%201919,services%20of%20the%20armed%20forces.

The government's position would threaten a profound destabilization of this international humanitarian framework because the privileges and immunities of these organizations are intertwined with, even identical to, sovereign-immunity doctrines. The ICRC claims the "international legal status" of "international intergovernmental organizations such as the UN," which entails "immunity from legal process"; "the protection of [its] premises, documents and data from being accessed" by law enforcement; and "testimonial immunity." ICRC, Status update: The ICRC's legal standing explained (Mar. 12, 2019).[8] But that assertion is not self-executing. Like all international organizations, the ICRC "enjoys [only] privileges and immunities" under "international agreements," as recognized by or implemented through domestic law. Restatement (Third) of Foreign Relations Law § 223 cmt. b (1987); *id.* at § 467 cmt. f.

The scope of the ICRC's immunity is directly at issue in this case. The ICRC is an "international organization" under the International Organizations Immunities Act of 1945 (IOIA). *See* 22 U.S.C. § 288f-3 (codifying Exec. Order No. 12643 (June 23, 1988)); *see also id.* § 288 (authorizing such executive orders). IOIA, in turn, affords international organizations "the same immunity from suit and every form of judicial process as is enjoyed by foreign governments," *id.* § 288a(b), which this Court interprets to incorporate the FSIA, *Jam v. Int'l Fin. Corp.*, 139 S. Ct. 759 (2019). As a result, the ICRC's immunity is only as

[8] *Available at* https://www.icrc.org/en/document/status-update-icrcs-legal-standing-explained.

robust as FSIA immunity, and the government's position here equally validates prosecutions against the ICRC and other international organizations.

The government likely has no current intention of prosecuting any international humanitarian organization, but once it maintains the right to do so—and actually brings prosecutions like this one—it can neither control how other nations will view that precedent nor mount a serious opposition to their assertion of the same powers it claims. In that way, the danger to the ICRC and IFRC Societies from the government's position is real and present. Other nations would have no reason not to take advantage of that precedent. After all, humanitarian aid can be orthogonal to perceived national interests that lead to conflict, civilian injuries, and displacement. And, because humanitarian organizations depend on each sovereign to negotiate and recognize their rights and immunities in its territory, it would only take a few prosecutions to hobble the Red Cross movement or render its operational risks prohibitively uncontrollable. Short of that, the ICRC's inability to operate in even some states—likely those where it is most needed—would be a significant setback for the cause of humanitarian relief.

IFRC Societies will experience downstream risks if and when prosecuting humanitarian organizations becomes normalized. Nations cannot be compelled to create IFRC Societies or recognize rights and privileges of other nations' IFRC Societies. If prosecution of humanitarian organizations becomes a recognized

tool of international realpolitik, the potential for mischief will be impossible to quantify or control. Some nations offended by the United States (or other nations) will view prosecution as a proper tool for reprisal, and some prosecutions can proliferate into more. Once the precedent is set, it is difficult to see how it could be un-set.

This is particularly a risk in Türkiye, where the *amicus* Turkish Red Crescent operates, serving all purposes and ideals of the International Red Cross and Red Crescent Movement. ReliefWeb, Turkish Red Crescent Community-Based Migration Programs Socio-Economic Empowerment Program - Final Report, December 2021 (Feb. 1, 2022).[9] The Turkish Red Crescent shoulders unique responsibilities because of Türkiye's geographic posture between Europe and the Middle East. As a result of the 2011 war in Syria, four million immigrants and refugees came to Türkiye, *id.*, and most remain there, *see* Dominic Evans, No Afghan refugee exodus yet but 'massive displacement' possible -U.N. refugee agency, Reuters (Sept. 10, 2021).[10] Türkiye is also host to an additional 300,000 refugees from Afghanistan. *Id.* And Russia's recent invasion of Ukraine drove in more than 68,000 new refugees. Diana Rayes, Ukrainian Refugees in Turkey: Displacement Impact on Mental Health, Pulitzer

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[9] *Available at* https://reliefweb.int/report/turkey/turkish-red-crescent-community-based-migration-programs-socio-economic-empowerment.

[10] *Available at* https://www.reuters.com/world/asia-pacific/no-afghan-refugee-exodus-yet-massive-displacement-possible-un-refugee-agency-2021-09-10/.

Center (July 14, 2022).[11] Beyond serving this large refugee population in Türkiye, the Turkish Red Crescent "has lent a hand to 137 countries…and in the last 10 years it had disaster operations in 78 different countries in times of natural and human related disasters." Turkish Red Crescent, What We Do—International Services.[12]

Because the Turkish Red Crescent's work is necessarily international, it is essential that all nations, especially international leaders, recognize its privileges and immunities. The Turkish government is not without its political rivals, and any one of them could plausibly claim criminal jurisdiction over the Turkish Red Crescent, either through the organization's work in its territory or interaction with its citizens. There is no international ability to constrain a nation in construing its own criminal laws, leaving an organization like the Turkish Red Crescent vulnerable to trumped up charges in the politicized legal system of a foreign nation. Only international cooperation and good will prevent that result, and this depends on the United States' leadership.

B. The government's position would also undermine future efforts at international war-crimes prosecution. All successful past prosecutions have been built on international consensus, all have recognized prosecution of states is impossible, and the United States has zealously objected to prosecutorial regimes

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[11] *Available at* https://pulitzercenter.org/projects/ukrainian-refugees-turkey-displacement-impact-mental-health.
[12] *Available at* https://www.kizilay.org.tr/what-we-do/international-services.

it deemed invasive of national sovereign interests. The government's unilateral prosecution here is a greater affront to national sovereignty than the criminal tribunals it has rejected, and it is difficult to see how, under this precedent, a successful international war-crimes tribunal could ever be established again.

War crimes for most of history could not be punished because of "the practical non-existence of" a "legal apparatus." Robert H. Jackson Center, The Influence of the Nuremberg Trial on International Criminal Law (Tove Rosen, ed.).[13] The United States at one time endorsed that outcome, and it has always recognized that war-crimes prosecution impinges on national sovereignty. For example, the Paris Peace Conference of 1919 rejected among the first proposals for "an international tribunal…for the trial of certain charges" of war crimes because the U.S. delegation objected to, among other things, its proposed jurisdiction over "charges against Heads of States." United Nations International Law Commission, Historical Survey of the Question of International Criminal Jurisdiction, U.N. Doc. A/CN.4/7/Rev/1, 7–8 (1949); *see also id.* at 59 (statement of American delegation) ("Heads of States…should not be made responsible to any other sovereignty."). That states themselves might be put on trial was beyond comprehension.

The possibility of prosecuting sovereigns was again ruled out following World War II, even as the

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[13] *Available at* https://www.roberthjackson.org/speech-and-writing/the-influence-of-the-nuremberg-trial-on-international-criminal-law/.

United States established the first "truly international courts" at Nuremberg and Tokyo. *Id.* at 2. Those tribunals' charters adopted doctrines rejected in 1919, such as abrogation of head-of-state-immunity, *see, e.g.*, Charter of the International Military Tribunal, art. 7, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 ("Nuremberg Charter"); Charter of the International Military Tribunal for the Far East, art. 5, Jan. 19, 1946, T.I.A.S. No. 1589, 4 Bevans 20 ("IMTFE") (similar)[14], but still did not authorize prosecuting sovereigns; only "individuals" could be charged for their "individual responsibility." Nuremberg Charter, arts. 6, 10; IMTFE, art. 5.

Every subsequent international criminal tribunal followed that model. The International Criminal Tribunal for the Former Yugoslavia was given only "jurisdiction over natural persons," Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 6 (2009), as was the International Criminal Tribunal for the Territory of Rwanda, United Nations S.C. Res. 955, art. 5 (1994) (authority over "natural persons"); *see also, e.g.*, Statute of the Residual Special Court of Sierra Leone, United Nations S.C. Res. 1315, art. 6, U.N. Doc. S/RES/1315, Aug. 14, 2000 (similar); Statute of the Special Tribunal for Lebanon, United Nations S.C. Res. 1757, art. 3, U.N. Doc. S/RES/1757, May 30, 2007 (similar); Law

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[14] Prosecution could also proceed against an individual as a member of an organization, which would, if successful, subject other members to liability for their membership. Nuremburg Charter, arts. 6, 10; IMTFE, art. 5 (similar). This bears no analogy to prosecuting a nation.

of the Iraqi Higher Criminal Court, No. 10 art. 1, second, Oct. 18, 2005 (similar). The Geneva Conventions contemplate that future prosecutions in yet-to-be-created tribunals will be against "[p]ersons," not states. Convention on the Prevention and Punishment of the Crime of Genocide, art. 4, Dec. 9, 1948, 78 U.N.T.S. 277, S. Exec. Doc. O, 81-1.

All the while, the United States has retained its skepticism of international tribunals. It has refused to join, and objected to the jurisdiction of, the International Criminal Court, *see* American Service-Members' Protection Act, Pub. L. 107–206, 116 Stat. 820, § 11 (Aug. 2, 2002), even though that tribunal exercises "jurisdiction over natural persons," not states, The Rome Statute of the International Criminal Court, art. 25(1), *opened for signature* July 17, 1998, 37 I.L.M. 1002. Even with that limitation, the ICC was a bridge too far for the United States.

Against that history, the government's position in this case is difficult to comprehend. The call for criminal state liability here falls well beyond the bounds of what the United States would have accepted or what anyone even proposed in the past. The government's position is that it can achieve that result with no international negotiation or consensus at all. If that has been an option all along, it is difficult to understand what Justice Jackson (or anyone else) thought was worth the trouble at Nuremberg.

It is equally difficult to see how anyone would see the trouble as worthwhile in the future—even as the government has apparently found new interest in this possibility. *See* Dan Mangan, Biden calls to put Putin

on trial for war crimes over Russia killings in Ukraine, CNBC (Apr. 5, 2022).[15] If its position here prevails, and other nations adopt it (as they will), there will be no incentive to undertake the difficult work of negotiating the terms of an international tribunal. Any nation could obtain criminal state liability unavailable in any past war crimes prosecution through its own laws and courts, without having to negotiate anything with anyone. The result would be less international consensus against atrocities, fewer resolutions through international tribunals designed to obtain international legitimacy, and a wave of competing national show trials of much sound and fury but signifying nothing.

C. The United States' position, if ratified, will also damage international trade. "Ever since Adam Smith published *The Wealth of Nations* in 1776, the vast majority of economists have accepted the proposition that free trade among nations improves overall economic welfare." Douglas A. Irwin, International Trade Agreements, Econlib.[16] But trade requires cooperation through international agreements, which are difficult to achieve and enforce. Dispute mechanisms in particular present diplomatic challenges because they "undermine national sovereignty." James

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[15] *Available at* https://www.cnbc.com/2022/04/04/biden-calls-to-put-putin-on-trial-for-war-crimes-over-russias-actions-in-ukraine.html.

[16] *Available at* https://www.econlib.org/library/Enc/InternationalTradeAgreements.html#:~:text=The%20WTO%20oversees%20four%20international,TRIPS%20and%20TRIMS%2C%20respectively).

McBride and Andrew Chatzky, How Are Trade Disputes Resolved?, Council on Foreign Relations (Jan. 6, 2020).[17] Introducing criminal prosecution to the mix can only add unpredictability, complexity, and distrust.

"Before World War II, there was no forum for global trade negotiations, and no legal procedure for settling disputes." *See* World Trade Organization, The WTO can settle disputes and reduce trade tensions.[18] Disputes among nations were resolved, not through criminal prosecution, but war. *Id.* After World War II, two significant, parallel efforts to promote international trade emerged. The Truman administration led 50 nations "in negotiations to create an International Trade Organization (ITO) as a specialized agency of the United Nations" to resolve trade disputes. World Trade Organization, The GATT years: from Havana to Marrakesh.[19] The resulting Havana Charter would have authorized the ITO to conduct a multi-step process for resolving disputes between and among member nations. *See* United Nations Conference on Trade and Employment, Havana Charter, U.N. Doc. E/Conf. 2/78, arts. 92–97 (1948). Around the same time, 15 nations negotiated to reduce tariffs and standardize most-favored-nation principles, which became the General Agreement on Tariffs and Trade (GATT). The GATT years, *supra*. The U.S. Senate ratified GATT,

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[17] *Available at* https://www.cfr.org/backgrounder/how-are-trade-disputes-resolved.
[18] *Available at* https://www.wto.org/english/thewto_e/whatis_e/10thi_e/10thi02_e.htm.
[19] *Available at* https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm.

but not the Havana Charter. As a result, international support for the ITO collapsed, and it was never created. This left GATT "a provisional agreement" with an inadequate "dispute settlement system." *Id.*

That inadequacy would plague GATT for the next two generations, until, in 1994—after the largest international negotiation in history—GATT was substantially revised through the Uruguay Round, which created the World Trade Organization (WTO). World Trade Organization, The Uruguay Round.[20] "Dispute settlement is the central pillar" of the WTO, and it mimics the plan contemplated for the ITO, including mediation, litigation, and appeal phases. World Trade Organization, A unique contribution.[21] This time, the United States accepted the system and WTO membership and has frequently invoked the WTO's jurisdiction, including in cases asserting China's facilitation of intellectual-property violations. *See, e.g.*, Request for Consultations by the United States, *China – Certain Measures Concerning the Protection of Intellectual Property Rights*, WTO Doc. WT/DS542/1 (Mar. 26, 2018).[22] The United States has agreed to dispute-resolution processes in other free-trade agreements. *See, e.g.*, North American Free Trade Agreement, Can.-Mex.-U.S., arts. 1901–11, Dec. 17, 1992, 32 I.L.M. 289; U.S.-Australia Free Trade Agreement, U.S.-Austl., arts. 21.1–21.13, May 18, 2004, 43 I.L.M.

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[20] *Available at* https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm.
[21] *Available at* https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm.
[22] *Available at* https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/542-1.pdf&Open=True.

1248; U.S.-Israel Free Trade Agreement, U.S.-Isr., art. 19, Apr. 22, 1985, 24 I.L.M. 653; U.S.-Jordan Free Trade Agreement, U.S.-Jordan, arts. 16–17, Oct. 24, 2000, 41 I.L.M. 63.

That delicate balance cannot be expected to withstand the introduction of criminal prosecution as a new method of dispute resolution. Nations negotiate these reticulated agreements, complete with enforcement mechanisms, because there are no alternatives. Once international prosecution of sovereigns is established, the incentives to do this work will fall away or at least be transformed beyond recognition. Nations may view criminal prosecution as a substitute or supplement for trade-agreement dispute resolution and throw the agreements into disarray. And the dignitary offense of an international prosecution may alone be sufficient to spark trade wars, which are a common response not only to perceived economic aggression (such as tariffs) but also to perceived dignitary injuries. *See, e.g.*, Catherine Kim, The escalating trade war between South Korea and Japan, explained, Vox (Aug. 9, 2019)[23] (describing trade war escalating from competing gibes about Japan's past colonization of South Korea); Nyshka Chandran, Donald Trump insults China with Taiwan phone call and tweets on trade, South China Sea, CNBC (Dec. 5, 2016)[24] ("U.S.-China relations may take a turn for the worse after

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[23] *Available at* https://www.vox.com/world/2019/8/9/20758025/trade-war-south-korea-japan.

[24] *Available at* https://www.cnbc.com/2016/12/05/donald-trump-insults-china-with-taiwan-phone-call-and-tweets-on-trade-south-china-sea.html.

President-elect Donald Trump publicly insulted the mainland twice in a span of 72 hours."). Even if the government trusts itself to be responsible with this new tool, it has no ability to control how other nations use it or the cascade of effects that may follow.

D. There is even more to the potential damage than that, insofar as business interests are concerned. Globalized business requires global protection of businesses' legal rights, which depends—yet again—on international cooperation. Businesses depend on the good faith of foreign governments to provide these protections in law and honor them in practice, and United States leadership is essential to this system of reciprocity.

For example, perceiving "that increased cooperation in international insolvency and bankruptcy matters [was] essential to promoting international commerce and trade," Thomas M. Gaa, Harmonization of International Bankruptcy Law and Practice: Is It Necessary - Is It Possible, 27 Int'l L. 881, 881–82 (1993), the United Nations Commission on International Trade Law proposed the Model Law on Cross-Border Insolvency, which Congress largely adopted in Chapter 15 of the Bankruptcy Code to provide U.S. assistance to foreign insolvencies, *see* 11 U.S.C. §§ 1501 *et seq*. More than 50 nations followed. United Nations Commission on International Trade Law, Status: UNCITRAL Model Law on Cross-Border Insolvency (1997). United States businesses must utilize such protections to obtain bankruptcy relief for assets held in foreign countries, or else they have no recourse at all. *See In re Sheehan*, 48 F.4th 513, 525

(7th Cir. 2022) (finding bankruptcy-estate property held in Ireland could not be protected in U.S. court from dissipation).

The same is true of intellectual-property rights. Because U.S. patents are effective "only throughout the territory of the United States," inventors desiring international protection "must apply for a patent in each of the other countries" where it is needed. U.S. Patent and Trademark Office, Protecting intellectual property rights (IPR) overseas.[25] U.S. citizens' ability to do this depends on several international agreements establishing intellectual-property reciprocity. UK Intellectual Property Office, Intellectual Property Rights in the USA, 3–4 (June 2013).[26]

Another example is arbitration. The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards requires signatory states to "recognize arbitral awards as binding and enforce them" according to the rules governing their own courts' judgments. New York Arbitration Convention, United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. III, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38. "There are 165 parties to the Convention, including virtually every developed country on Earth," and, as a result, "an international arbitral award is enforceable virtually worldwide." Fitch Briefs, Advantages to

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[25] *Available at* https://www.uspto.gov/ip-policy/ipr-toolkits.

[26] *Available at* https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/456368/IP_rights_in_USA.pdf.

International Arbitration: Enforceability (Oct. 14, 2020).[27]

The list of ways in which legal rights of international enterprises depend on international cooperation is endless. Even the recognition of the corporate internal-affairs doctrine, which subjects a corporation's internal disputes and organizational efforts to a single set of rules in the place of incorporation, is a matter of international comity. *See* Mariana Pargendler, The Rise of International Corporate Law, 98 Wash. U. L. Rev. 1765, 1768–69 (2021). That rule, like any other, could be different.

The seeds of mistrust the government sows here may, by chain reaction, make those rules different in the future. Nations cannot be compelled to create legal environments favorable to international business interests. When the United States disregards the dignity of foreign sovereigns, it indirectly challenges foreign sovereigns to retaliate with whatever tools they deem appropriate. This can include withdrawing, in law or practice, legal rights extended to U.S. businesses. And it would only take a few sovereign actions like that to begin the stampede. The time to stop it is before it begins.

III. Permitting Criminal Prosecution of Sovereigns Will Have Serious Regulatory Consequences for Foreign Businesses

If foreign sovereigns and their instrumentalities are subject to prosecution in United States courts,

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[27] *Available at* https://www.fitchlp.com/blog/2020/10/advantages-to-international-arbitration-enforceability/.

they will have little choice but to implement U.S. laws on money laundering and trade sanctions. Thanks to reciprocity, the same threat of criminal prosecution is also likely to compel foreign regulators to implement and comply with similar genres of law propounded by other countries operating payment networks, including China and Russia. The result will be to subject businesses located outside of the United States to a web of overlapping and often conflicting legal requirements, at enormous cost. This is just one example of the far-reaching consequences engendered by the rejection of sovereign immunity in the criminal context.

A. Central banks act not only as regulators and supervisors but as ubiquitous participants in financial transactions. Specifically, most countries employ their central banks as settlement institutions for interbank payments, such as when a depositor at one bank transfers money to a depositor at another. *See generally* J. Andrew Spindler & Bruce J. Summers, The Central Bank and the Payment System, in Bruce J. Summers, The Payment System: Design, Management, and Supervision (1994).[28] While details vary between countries, "central bank accounts are universally relied upon to settle interbank payments." *Id*. at 167. And some countries, including the United States, employ their central banks to clear even small personal and commercial transactions, like those involving checks. *Id*. Accordingly, any sort of transaction that goes beyond shifting funds from one account to

[28] *Available at* https://www.elibrary.imf.org/view/book/9781557753861/ch11.xml.

another within a single bank is likely to involve the central bank.

As a result, central banks are often linked to cross-border transactions. If sender and recipient banks do not both have accounts at a settlement institution, like a central bank, the payment will be automatically routed through one or more correspondent banks, as well as their affiliates. *See* Bank for International Settlements, The Role of Central Bank Money in Payment Systems 10–11 (2003).[29] For dollar-denominated transactions, the correspondent banks are often located in New York. *See Licci v. Lebanese Canadian Bank*, 984 N.E.2d 893, 900 (N.Y. 2012); Alex Lakatos & Marc R. Cohen, Bringing Non-U.S. Defendants Into NY Court, Just Because They Wired Dollars?, Bloomberg Law (July 31, 2017).[30]

Both private litigants and the U.S. government may try to use that sort of attenuated connection as a basis to apply U.S. law. The District Court in this case found a "sufficient domestic nexus" for claims alleging evasion of U.S. sanctions based on the use of New York correspondent accounts in transactions among foreign banks. Pet.App.39a–40a. Indeed, the same district court went further, reasoning that the presumption against extraterritorial application of U.S. law has no application to sanctions-related offenses. *See, e.g.*, *United States v. Zarrab*, 15 CR 867 (RMB), 2016 WL 6820737, at *8–9 (S.D.N.Y. Oct. 17, 2016).

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[29] *Available at* https://www.bis.org/cpmi/publ/d55.pdf.
[30] *Available at* https://www.bloomberglaw.com/document/XCDGLETK000000.

Regardless whether U.S. laws regarding sanctions should apply to foreign actors in some instances, they have never been extended to foreign central banks, which have always been understood to enjoy immunity from criminal prosecution. In upending that settled understanding, the decision below threatens foreign central banks with the indignity and disruption of criminal prosecution for participating in transactions alleged to violate U.S. laws.

Those threats of prosecution are not limited to sanctions matters. The United States broadly criminalizes money laundering, *see* 18 U.S.C. §§ 1956, 1957, and has erected a complex regulatory superstructure to implement that central prohibition, including through prophylactic measures like "know your customer" requirements and extensive record-keeping mandates, *see generally* Rena S. Miller & Liana W. Rosen, Anti-Money Laundering: An Overview for Congress, Cong. Res. Serv. Report No. R44776 (2017).[31] This body of law may similarly implicate cross-border transactions.

The only viable way for a central bank to avoid the threat of U.S. prosecution for participation in cross-border transactions is to adopt U.S. law—and not merely for its own operations, but for its country's entire banking sector. After all, central banks service banks, not end-customers like individuals and businesses whose financial activities may implicate U.S. law. While a central bank may clear and settle payments that are ultimately on behalf of end-customers, it has just enough information on the underlying

[31] *Available at* https://sgp.fas.org/crs/misc/R44776.pdf.

transactions—the source and destination accounts—to expose it to the risk of prosecution, without possessing enough information to consistently smoke out and avoid transactions that would run afoul of U.S. law. For that, it must rely on the banking sector's compliance with U.S. anti-money laundering regulation, such as "know your customer" requirements. Whether or not a nation's legislature chooses to enact U.S.-compliant anti-money laundering laws, its central bank will have to impose them anyway by regulatory fiat.

B. It should be apparent, taking into account the likelihood of reciprocity, that this problem will not be limited to U.S. law. The United States is far from the only nation that wishes to police international capital flows and enforce its financial-policy prerogatives. If the United States appoints itself as the world's policeman, other nations will inevitably enter the fray for that title.

China and Russia are at the front of the pack. Already offended by assertion of U.S. jurisdiction and control over international payments, both have recently launched new payment networks that they expect will, with some foreign-policy muscle, channel payments away from U.S. correspondent banks and related institutions. China's Cross-Border Interbank Payment System (CIPS) is intended to provide an alternative to the SWIFT payments system and the U.S.-based correspondent banking that it facilitates. Reuters, What is China's onshore yuan clearing and

settlement system CIPS? (Feb. 28, 2022).[32] CIPS allows banks to clear and settle cross-border transactions, including ones pushed off of SWIFT by sanctions. *Id*. In 2021, CIPS processed $12.68 trillion in transactions by the 1,280 financial institutions in 103 countries (many recipients of Chinese government investment) that are connected to it. *Id*.

Not to be outdone, Russia has established its own payment network known as "SPFS." The system currently reaches about 400 financial institutions, including an undisclosed number of banks outside of Russia. Alexander Marrow, Russia's SWIFT alternative expanding quickly this year, central bank says, Reuters (Sept. 23, 2022).[33] According to reports, the Russian government is seeking to expand SPFS access in China, Iran, and Türkiye. TASS, Foreign companies may soon get access to Russia's SWIFT alternative (Oct. 4, 2018).[34]

Unfortunately, China's and Russia's claim to enforce their laws through prosecuting foreign sovereigns or their instrumentalities would be no different or lesser than the United States'. Indeed, those nations' authoritarian governments and weak judiciaries pose a potentially greater threat to central banks that refuse to follow their diktats. Moreover, if the United States opens the door, it is far from apparent that China or Russia would limit its prosecutorial

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[32] *Available at* https://www.reuters.com/article/ukraine-crisis-china-cips-idCNL4N2V3163.
[33] *Available at* https://www.reuters.com/business/finance/russias-swift-alternative-expanding-quickly-this-year-says-cbank-2022-09-23/.
[34] *Available at* https://tass.com/pressreview/1024344.

reach to transactions that in some way touch domestic institutions. They may well regard any transaction, anywhere in the world, that conflicts with their policy objectives as grounds for prosecuting the foreign nation central bank that facilitated it. While they may not, for prudential reasons, take aim at the Federal Reserve, less powerful countries' central banks are unlikely to enjoy similar forbearance. And so they will face pressure to impose Chinese law, Russian law, or even both on their domestic banking sectors—in addition to the requirements of domestic law and potentially United States law that they already must bear.

"[T]o serve some immediate interest," the Executive Branch abandoned longstanding principles of sovereign immunity from prosecution, and the consequence of that decision will be, as the first Justice Jackson warned, "a multiplicity of conflicting and overlapping burdens" that tax international commerce. *Lauritzen*, 345 U.S. at 581. Those burdens will fall not just on the financial regulators directly at risk of prosecution, but also and especially on the institutions they oversee, as well as those institutions' own customers.

C. Based on the global experience with anti-money laundering enforcement, those burdens will be substantial, far exceeding any realistic benefits of enforcement.

International agencies including the Financial Action Task Force and United Nations have found that enforcement of anti-money laundering law has been marked by stunning failure. Estimates of the "success rate," in terms of the proportion of criminal proceeds

recovered, range from 0.07 to 1.1 percent, with the latter likely overstated by an order of magnitude. Ronald F. Pol, Anti-money laundering: The world's least effective policy experiment?, 3 Policy Design & Prac. 73, 82–83 (2020).[35] Ultimately, "the proportion of criminal earnings seized by authorities does not even remotely approach tax rates commonly applied to legitimate businesses." *Id.* at 83.

Equally disproportionate, albeit in the opposite direction, are the costs of anti-money laundering compliance. As a rough and conservative estimate, banks and other businesses worldwide spend more than $300 billion annually in compliance costs. *Id.* at 86. That amounts to "more than a hundred *times* the amounts recovered from criminals." *Id.*

This suggests that the consequences of abandoning sovereign immunity from prosecution will be great. The government's position here will result in regulated financial institutions being subjected to additional bodies of anti-money laundering law, imposing billions of dollars in additional compliance costs. By contrast, even a leap in enforcement success that doubles recoveries—an unlikely result—would still leave the overwhelming amount of illicit proceeds untouched by law enforcement. While the U.S. government's interest here is miniscule, the consequences for foreign sovereigns, the businesses they regulate, and their economies are severe.

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[35] *Available at* https://www.tandfonline.com/doi/full/10.1080/25741292.2020.1725366.

CONCLUSION

The Court should reverse.

Respectfully submitted,

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