No. 16-1071

IN THE

Supreme Court of the United States

MARK SOKOLOW, ET AL.,

Petitioners,

v.

PALESTINE LIBERATION ORGANIZATION AND PALESTINIAN AUTHORITY (AKA PALESTINIAN INTERIM SELF-GOVERNMENT AUTHORITY AND OR PALESTINIAN COUNCIL AND OR PALESTINIAN NATIONAL AUTHORITY),

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

SUPPLEMENTAL BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

SUPPLEMENTAL BRIEF FOR PETITIONERS

The overwhelming consideration for this Court in determining whether to grant review is that the decision below, on constitutional grounds, cut the heart out of a vital federal statute, draining it of its indisputable purpose—protecting U.S. citizens from international terrorism.

The United States' response is remarkable both for what it says, and for what it does *not* say. The government does not deny that the decision below eviscerates the Anti-Terrorism Act. The brief acknowledges as much by its half-hearted assertion that it is "far from clear" that the decision forecloses "many" ATA claims. U.S. Br. 17. Even if that were true—and it is not—it is beside the point. This Court routinely grants review, often at the United States' urging, when, as here, a court of appeals holds a federal statute unconstitutional as applied, even in the absence of a circuit split. *See*, *e.g.*, *United States* v. *Kebodeaux*, 133 S. Ct. 2496, 2501 (2013).

But the United States' brief is even more astonishing because its failure to seek review of the nullification of the ATA is not even accompanied by any argument that the court of appeals' decision is *correct*. It conspicuously says nothing of the merits. That is peculiar because the Second Circuit's decision flatly contradicts two long-held views of the United States: that respondents and entities like them do not have due process rights, and that Congress can constitutionally provide for more expansive exercises of personal jurisdiction than can the States. The govern-

ment does not disclaim these views, but instead accuses petitioners of "overread[ing]" them. U.S. Br. 11 n.2. But the United States' prior submissions are unmistakable.

The government is not being square with the Court. If it believes that Congress's intended applications of the ATA exceed constitutional bounds, it should say so directly in this Court and to Congress. *See* 28 U.S.C. § 530D(a)(1)(B)(ii). But if the government believes—consistent with its prior submissions—that the decision below is wrong, then the effort to deny to Congress an adjudication of that issue in this Court is indefensible. Congress cannot rectify the nullification of the ATA—only this Court can—and the United States' argument that this Court should not address this issue is, to put it bluntly, a blatant abdication of duty. Core applications of a vital anti-terrorism law are at stake. Even if the Executive is willing to forego a defense of this law, the Court should grant review in deference to *Congress's* legislative judgment.

I. THE QUESTION PRESENTED IS UNDISPUTEDLY IMPORTANT.

1. The government acknowledges that the ATA's civil remedy is "an important means of fighting terrorism and providing redress for the victims of terrorist attacks." U.S. Br. 7. Indeed, according to the ATA's principal sponsor and 22 other sitting Senators representing both parties, it is the statute's "single most important feature," and is "vital to this nation's counter-terrorism capabilities." Senators Br. 2.

The petition's principal argument is that certiorari should be granted because "[t]he Second Circuit's

decision, if allowed to stand, will nullify heartland applications" of the ATA on constitutional grounds. Pet. 14. As the Solicitor General argued in another ATA case, when a "court of appeals declare[s] parts of an Act of Congress unconstitutional[]" as applied, "[s]uch a decision would ordinarily warrant this Court's review." Pet., *Holder* v. *Humanitarian Law Project*, No. 08-1498, 2009 WL 1567496, at *9 (U.S.) (June 2009). And review is "especially" warranted where "the statute in question … is a vital part of the Nation's effort to fight international terrorism." *Id.*

The United States does not address this argument until page 17 of its brief, devoting a single paragraph to the point. There, the United States does not dispute that the mass killings in this case are "precisely the type of international terrorist attacks" to which Congress intended the ATA to apply, Senators Br. 4, or that, under the Second Circuit's decision, those applications have been "deem[ed] unconstitutional," *id.* at 2. Instead, the government offers only the vague, non-denial that it is "far from clear" that the Second Circuit's decision "will foreclose *many* claims." U.S. Br. 17 (emphasis added). But the decision below indisputably forecloses claims arising from many acts of terrorism overseas in which the terrorists kill and maim "indiscriminately," Pet. App. 38a, without regard to nationality, such as recent attacks in Brussels, Paris, Nice, London, Manchester, or Barcelona, to name a few.

The decision below cuts deep into the core of Congress's intended applications; the ATA no longer offers redress to "[a]ny national of the United States" injured in acts of "international terrorism" "outside" the United States. 18 U.S.C. §§ 2333(a), 2331(1)(C). As

the United States concedes, the ATA now is limited to attacks where the victims can prove in a court years later that their attackers (who often kill themselves in their attacks) "target[ed] U.S. citizens" or property, or "purposefully availed" themselves of U.S. facilities. U.S. Br. 17, 18. Under this standard, even Leon Klinghoffer, whose 1985 murder by the PLO aboard the *Achille Lauro* was the moving force for the ATA's enactment, Senators Br. 8; House Br. 7; Fed. Officials Br. 9-10, would be denied redress unless his estate could establish that he was murdered because he was *American* rather than because he was *Jewish*.[1]

Whether the applications of the ATA the Second Circuit has deemed unconstitutional are limited (as the United States hints) or many (as the House of Representatives and 23 Senators argue), it cannot be seriously disputed that the applications invalidated are significant, recurring, and at the core of the conduct Congress intended to address. The decision below "vitiates the ATA and frustrates Congress's intended exercise of legislative power to combat terrorism." House Br. 1.

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[1] The "strong[] support[]" the Justice Department once expressed for "provid[ing] a civil remedy for those injured by terrorist acts," including "Leon Klinghoffer," seems to have evaporated. *Antiterrorism Act of 1990: Hearing on S. 2465 Before the Subcomm. on Courts and Administrative Practice of the S. Committee on the Judiciary*, 101st Cong. 25 (1990); *see also* Harold Hongju Koh, *Civil Remedies for Uncivil Wrongs: Combatting Terrorism Through Transnational Public Law Litigation*, 22 Tex. Int'l L.J. 169, 173 (1987) (urging civil remedies legislation to "make terrorists pay up").

The Second Circuit's curtailment of the ATA's civil remedy on constitutional grounds clearly warrants this Court's review.

2. The petition also argues that the Second Circuit's decision warrants review because the court of appeals' application of Fourteenth Amendment due process standards "cripple[s] Congress's ability to create remedies to enforce statutes that validly regulate conduct abroad." Pet. 18. As the House of Representatives explains (at 20), "Congress has enacted numerous other extraterritorial statutes providing for civil causes of action and nationwide service of process." The decision below curbs Congress's prescriptive jurisdiction by rendering these and numerous other laws governing extraterritorial conduct "unenforceable in U.S. courts." Pet. Reply 4-5; *see also*, *e.g.*, *In re Platinum & Palladium Antitrust Litig.*, No. 1:14-cv-9391-GHW, 2017 WL 1169626, at *44-45 (S.D.N.Y. Mar. 28, 2017).

The United States apparently does not disagree, mustering no response to this very significant consequence of the decision below. This Court should grant review to reverse this intrusion on the effective reach of Congress's power to govern extraterritorial conduct.

3. Finally, the petition argues that this Court should grant review because the Second Circuit's decision that any foreign government "not … recognized by the United States government as sovereign" has due process rights, Pet. App. 20a, threatens "the Executive's foreign-affairs prerogatives" by freighting the President's recognition (or de-recognition) decision with far-reaching, unintended constitutional implications, Pet. 21. The Solicitor General does not

deny the impact on the President's powers, likely because the United States previously has advanced the same argument. Br. for U.S., *People's Mojahedin Org. of Iran* v. *Dep't of State*, No. 97-1648, 1998 WL 35239624, at *26 (D.C. Cir.) (Oct. 29, 1998) (granting unrecognized political entities the right to "due process" would mean they could constitutionally challenge Executive actions taken "to punish those entities or coerce them to change their conduct"). Instead, the Solicitor General now posits that a "greater threat" would be presented if courts assessed whether "foreign entities operate as the effective government of a state" or "possess[] the qualifications for statehood." U.S. Br. 11, 12 (quoting *Zivotofsky* v. *Kerry*, 135 S. Ct. 2076, 2084 (2015)). But those are considerations relevant to "[r]ecognition" as a sovereign state, *ibid.*—not whether a "foreign entit[y]" is a "person" granted due process rights by the Fifth Amendment. Correct application of the Fifth Amendment poses no threat to the President's power over recognition of foreign states.

II. THE DECISION BELOW IS WRONG AND WARRANTS THIS COURT'S REVIEW.

Although the United States urges the Court to deny review, it does not say—or even suggest—that the decision below is correct. Indeed, most unusually, the government declines to address the merits at all.[2] That is surprising because the Second Circuit's decision flatly contradicts two clearly expressed positions

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[2] Research revealed only one other instance since 2014 in which the Solicitor General did not state a view on the merits in a petition-stage invitation brief. *See* Br. for U.S., *Warfaa* v. *Ali*, No. 15-1464 (U.S.) (May 2017).

of the United States. The Court should not be dissuaded from reviewing such a consequential decision of a federal appeals court, especially when the government is not even willing to say the decision was correct.

A. Respondents Are Not "Persons" Within The Meaning Of The Due Process Clause.

1. Respondents are "the government of a foreign territory." Opp. 6. They "cannot, by any reasonable mode of interpretation," *South Carolina* v. *Katzenbach*, 383 U.S. 301, 323 (1966), be considered "persons" within the meaning of the Fifth Amendment's Due Process Clause, *see* Pet. 22-27. As the D.C. Circuit wrote in addressing Libya's argument for due process rights under the Fifth Amendment, it would be "highly incongruous to afford greater Fifth Amendment rights" to Libya, which is "entirely alien to our constitutional system," than to the States, "who help make up the very fabric of that system." *Price* v. *Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 96 (D.C. Cir. 2002). Accordingly, the United States has consistently maintained that "[f]oreign entities such as the PLO obviously do not have due process rights since they are not part of our constitutional scheme." Reply App. 57a (Br. for U.S. 44, *Palestine Info. Office* v. *Shultz*, No. 87-5396 (D.C. Cir.) (Jan. 1988)).

2. The government brushes off citation to this position, repeatedly advanced in the courts of the United States, by arguing that petitioners "overread" it, and asserting that its argument did not rest on a "determination that the PLO's governmental attributes rendered it the equivalent of a sovereign" for due process

purposes. U.S. Br. 11 n.2. That is disturbingly disingenuous. The United States asserted in the D.C. Circuit without reservation: "the PLO *obviously* do[es] not have due process rights since they are not part of our constitutional scheme," citing *Katzenbach*. Reply App. 57a (emphasis added). And much more recently, the United States "preserve[d] for possible further review" its argument that, "as a matter of constitutional interpretation," "foreign military/political/terrorist entit[ies]" are "not protected by the Due Process Clause of the United States Constitution, *just as foreign states are not*." Br. for U.S., *People's Mojahedin Org. of Iran* v. *Dep't of State*, No. 09-1059, 2009 WL 6084591, at *36 n.5 (D.C. Cir.) (Oct. 23, 2009) (emphasis added). The United States explained that to hold otherwise would lead to "the strange result that the States of our Union are not protected by the Due Process Clause while a foreign political/military/terrorist entity … can claim the protections of that provision." *Id.* And to support *that* argument, the United States quoted a lower court's holding that "*the PLO is not protected by the United States Constitution*." *Id.* (emphasis added).

It is thus difficult to take seriously the suggestion that this case is not an "appropriate vehicle" for determining "the scope of the term 'person' under the Due Process Clause." U.S. Br. 12. The Solicitor General's first contention—that petitioners' argument "relies on analogizing respondents to foreign sovereigns and municipalities," the status of which "this Court has not yet passed upon," *id.*—misconceives petitioners' merits arguments. Petitioners' position is grounded not on lower court decisions relating to foreign sovereigns and municipalities, but on the text, structure,

and history of the Fifth Amendment, as was this Court's holding in *Katzenbach*. And petitioners will urge, consistent with the United States' own arguments, that "[a]s a matter of constitutional interpretation," giving due process rights to "the PLO" "makes no sense." Br. for U.S., *United States* v. *Rahmani*, No. 02-50355, 2002 WL 32298238, at *52 (9th Cir.) (Nov. 15, 2002). The Court need not resolve the due process status of foreign sovereigns or municipalities to resolve the question presented, though such resolution may well demonstrate that there is no principled basis for distinguishing these entities. *See* Office of Legal Counsel, *Mutual Consent Provisions in the Guam Commonwealth Legislation*, 1994 WL 16193765, at *7 (July 28, 1994) ("[T]he rationale of *South Carolina* v. *Katzenbach* appears to be" that "governmental bodies" are "not protected by the Due Process Clause.").

The government's assertion that "respondents are *sui generis* entities," U.S. Br. 12, is also disingenuous. In prior briefs, the United States characterized the PLO as one of numerous "foreign military/political/terrorist entit[ies]" that are "not protected by the Due Process Clause." Br. for U.S., 2009 WL 6084591, at *36 n.5. As the United States has explained, there are, besides "the PLO," "[m]any important entities on the international scene" that are not sovereign, and yet are not persons entitled to due process. Br. for U.S., *Nat'l Council of Resistance of Iran* v. *Dep't of State*, Nos. 99-1438, 99-1439, 2000 WL 35576228, at *36-38 (D.C. Cir.) (Aug. 21, 2000) (listing entities). If respondents are unique, they are not so in a way relevant to determining whether they are "persons" under the Due Process Clause. As the United States has argued *to this Court*, a "foreign entity" that "conducts

both 'diplomatic' and 'military' activities" "cannot plausibly claim an entitlement to due process protections." Br. for U.S., *People's Mojahedin of Iran* v. *Dep't of State*, No. 99-1070, 2000 WL 34014206, at *15 (U.S.) (Mar. 2000).

B. The Fifth Amendment's Limits On Personal Jurisdiction Are Not The Same As The Fourteenth Amendment's.

The Second Circuit's holding that the due process "analysis is the same under the Fifth Amendment and the Fourteenth Amendment," Pet. App. 23a, is wrong, and this Court's final resolution of the issue is appropriate.

1. Personal jurisdiction limitations on the States are a "consequence of territorial limitations on [their] power." *Hanson* v. *Denckla*, 357 U.S. 235, 251 (1958). This Court has never recognized similar "territorial limitations" on Congress's powers, *id.*, that would cause the exercise of personal jurisdiction over extraterritorial claims to "offend traditional notions of fair play and substantial justice," *Int'l Shoe Co.* v. *Washington*, 326 U.S. 310, 316 (1945). The United States accordingly has urged that "Congress's express constitutional power" over matters outside U.S. borders "enables Congress, consistent with the Fifth Amendment, to provide for the exercise of federal judicial power *in ways that have no analogue at the state level*." Br. for U.S., *BNSF Ry. Co.* v. *Tyrrell*, No. 16-405, 2017 WL 943980, at *32 (U.S.) (Mar. 2017) (emphasis added).

2. The United States nevertheless now says this Court's resolution of the issue—reserved for more

than three decades, *see Omni Capital Int'l, Ltd.* v. *Rudolph Wolff & Co.*, 484 U.S. 97, 102-03 n.5 (1987)—is "premature" and should await "further development," U.S. Br. 17. That is nonsensical. As the House of Representatives explains (at 18 & n.5), the circuits are divided over whether the due process limits on personal jurisdiction are the same under the Fifth and Fourteenth Amendments. The decision below and the D.C. Circuit hold that they are, but numerous courts of appeals have held that "in a federal question case where jurisdiction is invoked based on nationwide service of process," a "different standard" applies. *Klein* v. *Cornelius*, 786 F.3d 1310, 1318 (10th Cir. 2015). This standard does not merely expand a "minimum contacts" analysis beyond "any single State," U.S. Br. 16 n.4, but broadly considers whether the "choice of forum [is] fair and reasonable to the defendant," *Klein*, 786 F.3d at 1318-19; *see also Trs. of Plumbers & Pipefitters Nat'l Pension Fund* v. *Plumbing Servs., Inc.*, 791 F.3d 436, 444 (4th Cir. 2015); *Haile* v. *Henderson Nat'l Bank*, 657 F.2d 816, 825 (6th Cir. 1981). Only this Court can resolve this division.

3. The government attacks petitioners' suggested test for fundamental fairness under the Fifth Amendment—that the defendant must have "interfered with U.S. sovereign interests," Pet. Reply 11—as "novel," U.S. Br. 13. But the United States has frequently advanced a substantially identical test in the criminal context. *E.g.*, Br. for U.S., *Murillo* v. *United States*, No. 16-5924, 2016 WL 7972456, at *9-10 (U.S.) (Dec. 2016). The government asserts that "broader due process principles" apply when the United States prosecutes "conduct affecting U.S. citizens or interests," U.S. Br. 18, but does not even attempt to explain why.

That may be because it is illogical that the Fifth Amendment would allow the United States to prosecute respondents for the murderous acts underlying this case, *see* 18 U.S.C. §§ 2332a(a)(1), 2332f(a)(1), (b)(2)(B), but simultaneously preclude victims from bringing a civil action, *id.* § 2333(a), particularly where the civil action is statutorily predicated on criminal conduct, *id.* § 2331(1)(A). If prosecution of respondents for these acts accords with "traditional notions of fair play and substantial justice," then *a fortiori* so does petitioners' civil action.

CONCLUSION

The Anti-Terrorism Act is an important, thoughtfully considered, congressional effort to defend United States citizens from international terrorism. At the very minimum, this law is entitled to consideration in this Court in the face of the Second Circuit's constitutional decision stripping it of its core purpose and meaning. The Court should grant the petition.

Respectfully submitted.

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March 12, 2018