No. 24-151

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

PALESTINE LIBERATION ORGANIZATION, ET AL.

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

REPLY BRIEF FOR THE PETITIONER

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In 2019, Congress enacted the Promoting Security and Justice for Victims of Terrorism Act (PSJVTA or Act), Pub. L. No. 116-94, Div. J, Tit. IX, § 903, 133 Stat. 3082. The Act provided that, subject to certain exceptions, respondents would be "deemed to have consented to personal jurisdiction" in the United States for civil suits under the Anti-Terrorism Act (ATA), Pub. L. No. 102-572, § 1003, 106 Stat. 4522 (18 U.S.C. 2331 *et seq.*), if they made payments to designees or relatives of terrorists who injured or killed U.S. nationals or maintained premises or conducted activities in the United States. 18 U.S.C. 2334(e)(1) (Supp. IV 2022). In two cases brought against respondents by terrorism victims and their families, *Fuld* v. *Palestine Liberation Organization*, 578 F. Supp. 3d 577 (S.D.N.Y. 2022), and *Sokolow* v. *Palestine Liberation Organization*, 607 F. Supp. 3d 323 (S.D.N.Y. 2022), district courts concluded that the

Act violates the Due Process Clause of the Fifth Amendment and granted respondents' motions to dismiss for lack of personal jurisdiction. The Second Circuit affirmed and later denied rehearing en banc over the dissent of four judges.

The plaintiffs and the United States—which intervened below to defend the PSJVTA's constitutionality—have filed petitions for writs of certiorari (Nos. 24-20 and 24-151) seeking this Court's review of the Second Circuit's decision holding the Act unconstitutional. Respondents oppose the petitions, contending that the court of appeals' decision does not warrant further review and is correct on the merits. See Br. in Opp. 8-34. Respondents are mistaken on both counts.

A. The Question Presented Warrants This Court's Review Now

1. Respondents do not dispute that "[t]his Court's 'usual' approach 'when a lower court has invalidated a federal statute' is to 'grant[] certiorari,'" and that the Court has thus "recently and repeatedly granted certiorari to review decisions of lower courts holding federal statutes unconstitutional even in the absence of a square circuit conflict." Pet. 22-23 (quoting *Iancu* v. *Brunetti*, 588 U.S. 388, 392 (2019), and collecting cases) (second set of brackets in original). There is no basis to depart from that practice here. Four judges of the court of appeals dissented from the denial of rehearing en banc, Pet. App. 98a-138a (Menashi, J.), noting that these cases not only involve the constitutionality of an Act of Congress, but also raise "significant questions about constitutional limits on the jurisdiction of the federal courts," "judicial deference to the political branches in the realm of foreign affairs," and "the invalidation of a jury verdict and award under the ATA," *id.* at 102a-103a. Judge

Bianco, who joined the panel opinions below and filed a lengthy opinion concurring in the denial of rehearing, acknowledged that the PSJVTA serves Congress's "important objectives" relating to "foreign entities who are engaged in alleged conduct that is illegal and/or contrary to the national security interests of the United States." *Id.* at 96a-97a; see *id.* at 76a-97a. Respondents thus are wrong in asserting that "the decisions below have no legal importance except to the parties" and "no broader practical importance." Br. in Opp. 25.

Because the PSJVTA is a federal statute, moreover, these cases present an occasion on which the Court may address the important and recurring question whether the Due Process Clauses of "the Fifth and Fourteenth Amendments restrict personal jurisdiction in the same way." Pet. 18; see 24-20 Pet. 15-25. Respondents treat that question as settled, see Br. in Opp. 22-23, but this Court has repeatedly reserved it, Pet. 4, 18, and it is the subject of significant debate in the lower courts, see, *e.g.*, *Douglass* v. *Nippon Yusen Kabushiki Kaisha*, 46 F.4th 226, 249-282 (5th Cir. 2022) (Elrod, J., dissenting), cert. denied, 143 S. Ct. 1021 (2023); Pet. App. 125a-126a (Menashi, J., dissenting from denial of rehearing en banc). The Second Circuit's decision holding the PSJVTA unconstitutional raises important questions of federal law.

Contrary to respondents' contention (Br. in Opp. 25), the United States said nothing to the contrary in its amicus curiae brief at a prior stage of the *Sokolow* case, which predated Congress's enactment of the PSJVTA. In 2017, this Court invited the Acting Solicitor General to file a brief addressing whether the Court should grant review of the Second Circuit's initial decision ordering dismissal of *Sokolow* based on the absence of "general" or "specific" personal jurisdiction. U.S. Br.

at 1, 4-6, *Sokolow* v. *Palestine Liberation Org.*, No. 16-1071 (Feb. 22, 2018); see 835 F.3d 317, 332-344; Pet. 3 (discussing the various "bases for personal jurisdiction that satisfy due process"). The government's brief recommended that the Court deny certiorari (as it ultimately did, 584 U.S. 915) because of the absence of a conflict between that decision and any decision of this Court or another court of appeals, and the brief suggested that the availability of other forms of legal recourse for acts of international terrorism made it unnecessary to deviate from the Court's usual certiorari criteria. See U.S. Br. at 7-18, *Sokolow*, *supra* (No. 16-1071). The government recognized, however, that "[p]rivate actions under the Anti-Terrorism Act are an important means of fighting terrorism and providing redress for victims of terrorist attacks and their families." *Id.* at 7.

The subsequent enactment of the PSJVTA strongly reinforced the latter point, providing a consent-based framework for establishing personal jurisdiction over respondents in ATA suits. The judgment of Congress and the President to provide a statutory basis for adjudicating such claims is entitled to significant weight. See Pet. 18, 22. And the government seeks certiorari here on different grounds than did the *Sokolow* plaintiffs in 2017: the court of appeals held an Act of Congress unconstitutional, and its decision is inconsistent with decisions of this Court that—due to the PSJVTA's consent-based ground for personal jurisdiction—were not implicated by the Second Circuit's earlier decision. See Pet. 13-22. Indeed, one of the key cases here, *Mallory* v. *Norfolk Southern Railway Co.*, 600 U.S. 122 (2023), had not been decided yet.

2. Respondents further contend (Br. in Opp. 27) that these cases have procedural problems "preventing this

Court from providing the relief Plaintiffs seek." That is incorrect.

a. Respondents posit that the *Fuld* plaintiffs are estopped from pursuing their claims by having recently obtained a default judgment in a different district court holding Hamas responsible for the relevant terrorist attack. Br. in Opp. 27-28 (discussing *Fuld* v. *Islamic Republic of Iran*, No. 20-cv-2444, 2024 WL 1328790 (D.D.C. Mar. 28, 2024)). But that form of estoppel—judicial estoppel—applies only when, *inter alia*, a litigant's position is "'clearly inconsistent' with its earlier position." *New Hampshire* v. *Maine*, 532 U.S. 742, 750 (2001) (citations omitted); see *id.* at 749-750. The *Fuld* plaintiffs claim here that respondents "'encouraged, incentivized, and assisted' the *nonparty* who committed the attack," Pet. App. 4a (quoting Am. Compl. ¶ 4) (emphasis added), which is not necessarily inconsistent with the attack's having been carried out by Hamas. In any event, "the relief Plaintiffs seek" in this Court (Br. in Opp. 27) is a determination that respondents are subject to personal jurisdiction in the district court. That respondents might subsequently assert a case-specific defense of judicial estoppel is not a reason for this Court to decline to consider the threshold personal-jurisdiction issue that was resolved below and resulted in a decision holding an Act of Congress unconstitutional. Cf. *Exxon Mobil Corp.* v. *Saudi Basic Indus. Corp.*, 544 U.S. 280, 293 (2005) ("Preclusion, of course, is not a jurisdictional matter.").

b. Respondents argue that interests of finality counsel against review in the *Sokolow* case, citing an earlier decision of the court of appeals declining to recall its mandate. Br. in Opp. 28-29; see 925 F.3d 570, 575-576. In the decision at issue here, however, the court declined to recall its mandate not for finality reasons but

based on its holding in *Fuld* that the PSJVTA is unconstitutional. See Pet. App. 71a; see also *ibid.* ("the enactment of a new statute might justify" recalling a mandate). Respondents are poorly positioned to invoke finality concerns, given that the *Sokolow* plaintiffs obtained a judgment against respondents in 2015, only for respondents to win reversal on appeal. See Pet. 6.

Respondents' suggestion that the 2015 judgment is "'void'" and cannot be "resurrected," Br. in Opp. 28-29 (citation omitted), simply begs the question whether the PSJVTA is constitutional. The statute applies "to any case pending on or after August 30, 2016," including *Sokolow*. PSJVTA § 903(d)(2), 133 Stat. 3085. And this Court has recognized that a change in law can establish a district court's jurisdiction while a case is pending in an appellate court. See *Andrus* v. *Charlestone Stone Prods. Co.*, 436 U.S. 604, 607 n.6 (1978); *United States* v. *Alabama*, 362 U.S. 602, 604 (1960) (per curiam).

It is true, as respondents note (Br. in Opp. 28-29), that the *Sokolow* plaintiffs filed a "backup" complaint against respondents alleging the same claims in 2018, *Sokolow* Pls. C.A. Br. 2; see 925 F.3d at 576 n.2, and that pending cases in the Tenth Circuit and the District of Columbia likewise involve the PSJVTA, see Pet. 23. That is all the more reason to grant certiorari now. Denying review would merely delay resolution of the PSJVTA's constitutionality and result in potentially wasteful litigation in those other cases. And respondents do not dispute that "[t]he legal issues have been thoroughly aired in the opinions of the courts below and the judges concurring in and dissenting from denial of rehearing en banc," Pet. 24.

c. Forfeiture concerns are likewise no impediment to this Court's review. Respondents contend that the

government has departed from the "'knowing and voluntary' standard" for consent to personal jurisdiction it advanced in the courts below and now "seeks a sea change in Fifth Amendment jurisdictional due process" by advocating an analysis focused on fairness. Br. in Opp. 1, 30 (citation omitted). But there is no inconsistency between those arguments—and the government argued both below and in its certiorari petition that exercising personal jurisdiction under the PSJVTA is fair because, among other reasons, respondents knowingly and voluntarily took actions triggering the PSJVTA's consent provision. See Pet. 14-16; *Sokolow* Gov't C.A. Br. 18-21. Far from representing a "sea change," a flexible and fairness-focused approach has been central to this Court's "jurisdictional due process" jurisprudence for decades. Br. in Opp. 1; see Pet. 3, 13-17. The government also preserved below the argument that the Fifth and Fourteenth Amendment standards differ in this area. See *Fuld* Gov't C.A. Br. 35-40; *Sokolow* Gov't C.A. Br. 30-35.

Respondents likewise err in contending (Br. in Opp. 29) that the private plaintiffs forfeited their "originalism arguments" about the Fifth Amendment. See, *e.g.*, *Fuld* Pls. C.A. Br. 52 (arguing that "[t]he Due Process Clause, as originally framed and ratified, did not impose a territorial restriction on the judicial power of the United States"); *id.* at 52-57; *Sokolow* Pls. C.A. Br. 37 n.8 (reserving the argument that the Fifth and Fourteenth Amendment due-process standards differ).[1] Respondents, in

[1] In their brief supporting the United States' petition for certiorari, the private plaintiffs note (at 2-3) that the government has not joined in their argument that the Fifth Amendment's Due Process Clause imposes no limitations on personal jurisdiction, and they accordingly urge the Court not to consolidate the petitions. But the private plaintiffs' view of the Fifth Amendment is simply an addi-

short, offer no sound reason for this Court to delay its consideration of the PSJVTA's constitutionality.

B. The Court Of Appeals' Decision Is Incorrect

On the merits, respondents recapitulate the Second Circuit's errors and reinforce the need for this Court's intervention.

1. As noted above and in the United States' petition, this Court "has 'eschewed any "mechanical or quantitative" test'" for due-process limitations on personal jurisdiction "in favor of 'a flexible approach' focused on fairness." Pet. 14 (quoting *Mallory*, 600 U.S. at 139 (plurality opinion)). For a number of reasons, exercising personal jurisdiction over respondents pursuant to the PSJVTA would not be unfair, much less "so deeply unfair that it violates [their] constitutional right to due process." *Mallory*, 600 U.S. at 153 (Alito, J., concurring in part and concurring in the judgment); see Pet. 14-17.

Like the court of appeals, the brief in opposition puts up little resistance in this regard. See Pet. 20 ("The court of appeals scarcely disputed the fundamental fairness of asserting jurisdiction over respondents in the circumstances of this case."). Respondents do not dispute, among other things, that they bear the burden of showing that the PSJVTA "'offend[s] some principle of justice so rooted in the traditions and conscience of our people as to be ranked' among those secured by the Due Process Clause." Pet. 21 (quoting *Mallory*, 600 U.S. at 131 n.4 (plurality opinion)) (citation omitted). They do not dispute that the PSJVTA applies only to ATA actions, which by definition relate to the United States.

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tional argument for why the PSJVTA is constitutional. Because the certiorari petitions thus involve "the same or related questions," the cases should be consolidated, Sup. Ct. R. 27.3.

See 18 U.S.C. 2333(a). They do not dispute that they triggered the PSJVTA's consent provision by making payments to designees and family members of terrorists who injured or killed Americans, the very sort of conduct that is the subject of these cases. Br. in Opp. i, 15-17; see 18 U.S.C. 2334(e)(1)(A) (Supp. IV 2022).[2] They do not dispute that they made the relevant payments voluntarily and with knowledge of the jurisdictional consequences under the PSJVTA. See, *e.g.*, Br. in Opp. 15 (payments "reflect Respondents' own domestic laws and policies"). Nor do they contend that they have faced hardship in litigating these cases or similar previous ATA cases in this country. See Pet. 5-6.

Even applying the Fourteenth Amendment standard for jurisdictional due process, therefore, subjecting respondents to suit in the United States under the PSJVTA is "reasonable, in the context of our federal system of government," and "does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316-317 (1945) (citation omitted). And the Act's constitutionality is especially clear under the Fifth Amendment, which affords Congress substantial flexibility to provide for personal jurisdiction over out-of-forum defendants beyond what the Fourteenth Amendment might allow for the States. Those principles carry particular weight where,

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[2] Respondents do deny having satisfied the PSJVTA's "activities" prong, 18 U.S.C. 2334(e)(1)(B) (Supp. IV 2022). See Br. in Opp. 17-20. They did not make that argument on appeal, however, and the Second Circuit held the Act facially unconstitutional irrespective of that factual issue. See Pet. App. 28a-30a; *id.* at 88a n.1 (Bianco, J., concurring in denial of rehearing en banc); contra Br. in Opp. 21 (asserting that "[t]he court of appeals expressly left undecided whether the PSJVTA could be constitutional 'under different circumstances'") (citation omitted).

as here, the statute involves the Nation's compelling interest in opposing international terrorism and in protecting the safety and vindicating the claims of its nationals. See Pet. 17-19, 22.

2. Respondents' arguments to the contrary lack merit. They insist that they did not truly "submit to jurisdiction in the United States," and that the PSJVTA merely "takes the same conduct rejected by the courts of appeals as insufficient to create" either general or specific jurisdiction "and instructs courts to now treat it as 'deemed consent' to jurisdiction." Br. in Opp. 5-6, 15; see Pet. App. 47a. Yet a parallel argument failed in *Mallory*. 600 U.S. at 144 (plurality opinion) (defendant claimed "it has not *really* submitted to proceedings in Pennsylvania"); see *id.* at 150 (Alito, J., concurring in part and concurring in the judgment). And rather than taking past conduct and branding it as consent, the PSJVTA gave respondents the opportunity to decide whether to take the actions triggering consent on a forward-looking basis. See 18 U.S.C. 2334(e)(1)(A) and (B) (Supp. IV 2022) (basing consent on actions taken after specified dates). Those actions may not suffice to establish general or specific jurisdiction as those concepts are understood in other settings, but consent is an independent basis for personal jurisdiction. See Pet. 3. And contrary to respondents' contention (Br. in Opp. 33), the PSJVTA presents no more of a separation-of-powers issue—by "directing courts to always find consent if its factual predicates are met"—than does any jurisdictional consent statute. Cf. *Bank Markazi* v. *Peterson*, 578 U.S. 212, 215 (2016) (rejecting a separation-of-powers challenge to a statute that "designates a particular set of assets and renders them available to satisfy" specified judgments).

Respondents thus err in claiming (Br. in Opp. 23) that "[p]etitioners do not defend the PSJVTA on the basis of consent." The consent is simply *constructive* consent, Pet. 16, triggered by respondents' knowing and voluntary actions. Echoing the court of appeals, respondents contend that constructive consent can support personal jurisdiction only when it is based on the exchange of "some benefit or privilege" or the defendant's "litigation-related activities." Br. in Opp. 14; see Pet. App. 22a-24a. But neither the court of appeals nor respondents have provided any reason why those two contexts—which have little apparent in common—exhaust the "variety of legal arrangements" that can support "implied consent to the personal jurisdiction of the court." *Insurance Corp. of Ir., Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982). In any event, the PSJVTA's activities prong does contemplate an exchange, see Pet. 21; while respondents assert that any permission to operate in the United States would have to be granted more "formally" to constitute such an exchange, Br. in Opp. 19 (brackets and citation omitted), they provide no explanation for that supposed limitation. The PSJVTA comports with due process, and neither the court of appeals' nor respondents' reasoning to the contrary can withstand scrutiny.

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the petitions should be granted in both Nos. 24-20 and 24-151.

Respectfully submitted.

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