NO. 24-20

In the Supreme Court of the United States

MIRIAM FULD, *et al.*,
Petitioners,
v.
PALESTINE LIBERATION ORGANIZATION, *et al.*

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

BRIEF OF SENATOR CHARLES GRASSLEY, REPRESENTATIVE JERROLD NADLER, SENATOR RICHARD BLUMENTHAL, SENATOR TAMMY DUCKWORTH, SENATOR MARCO RUBIO, AND SENATOR CHRIS COONS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST[1]

Amici are a bipartisan group of members of the U.S. Senate and the House of Representatives with deep experience guiding national antiterrorism policy. They have served on congressional committees with jurisdiction over issues related to foreign relations, the judiciary, homeland security, and armed services. They also share a commitment to the private right of action provided in the Anti-

[1] All parties received 10-days' advance notice of the filing of this brief. No counsel for any party authored this brief in whole or in part, and no one other than amici or their counsel made a monetary contribution intended to fund the brief 's preparation or submission.

Terrorism Act of 1992 (ATA), 18 U.S.C. § 2331 *et seq*. Amici include those who were involved in enacting the ATA and monitoring its implementation for over 30 years. They were also involved in enacting the Anti-Terrorism Clarification Act of 2018 (ATCA), Pub. L. No. 115-253, 132 Stat. 3183-3185, and the Promoting Security and Justice for Victims of Terrorism Act of 2019 (PSJVTA), Pub. L. No. 116-94, div. J, tit. IX, § 903 (codified at 18 U.S.C. § 2334(e)), a pair of legislative efforts to strengthen the ATA in response to jurisdictional obstacles that certain circuit courts imposed on terror victims and their families.

The decision under review holds the PSJVTA facially unconstitutional, effectively eviscerating the ATA's private right of action in many of its most important applications—against the very organizations it was enacted to bring into our courts. The decision did so by adopting a definition of Due Process, and a conception of the territorial boundaries on Congress's power to legislate against extraterritorial threats, which will severely hamper Congress's efforts to combat terrorism. Amici therefore submit this brief to urge this Court to reverse this erroneous and troubling decision.

INTRODUCTION AND SUMMARY OF ARGUMENT

For decades, starving terror networks of funding has been a central focus of Congress's national security efforts, one that has been singularly effective in bringing terror sponsors to justice, reducing terrorists' destructive capabilities, and saving American lives. Private civil actions have proven to be an integral component of that strategy. Such suits provide a measure of justice to terror

victims and their families and impose uniquely effective financial pressures on the perpetrators, directors, and sponsors of terror.

Congress's enactment of the ATA unlocked private civil lawsuits' terror-fighting potential, removing many of the jurisdictional barriers that once made it difficult to reach terror sponsors like the PLO and PA. And after new jurisdictional barriers emerged to prevent American plaintiffs from haling the PLO and PA into U.S. courts, Congress, with input from the Executive Branch, responded with new legislation, most recently the Promoting Security and Justice for Victims of Terrorism Act of 2019 (PSJVTA), Pub. L. No. 116-94, div. J, tit. IX, § 903. That act restored the ATA's full effectiveness against the PLO and PA, by declaring their post-enactment presence in the United States, and their post-enactment support of terrorism, to constitute consent to ATA suits in U.S. courts. But the court of appeals in this case held the PSJVTA unconstitutional through a novel and erroneous interpretation of the Due Process clause that disregards the understanding of Congress's virtually unfettered power to legislate against extraterritorial threats that has persisted since the founding, and instead subjects Congress's powers to even greater territorial restraints than those imposed on the States.

This decision effectively eviscerates the ATA—contravening the considered judgment of Congress, sapping strength from a key component of the Nation's anti-terrorism strategy, and dangerously constricting Congress's powers to meet an ever-wider variety of extraterritorial threats. The decision will leave the Political Branches with sharply limited options to staunch the continued, admit-

ted, and unapologetic support of terrorism against American citizens by Respondents, even as those organizations continue to operate freely on U.S. soil. It will also allow Respondents to evade responsibility for past acts of terror that have left scores of Americans dead and scores of families to grieve with no chance at justice.

This case therefore raises constitutional questions of the highest order about Congress's authority to combat terrorism, and about whether Due Process Clause protections designed to limit the States' power to encroach on the sovereignty of sister States ought to be applied to shelter foreign terrorists and their sponsors, including those which maintain a presence in the U.S.

This Court should take this case to reverse the decision below, remove the barriers preventing the PSJVTA's constitutional operation, and confirm Congress's authority to combat terror occurring outside the borders of the United States where the Political Branches have determined that federal interests require the exercise of such authority.

ARGUMENT

I. The lower court has nullified an Act of Congress and eviscerated a critical component of Congress's comprehensive anti-terror scheme.

In the proceedings below in this case, Judge Menashi, joined by Chief Judge Livingston and Judges Sullivan and Park, identified this case as having "exceptional importance." Pet. App. 232a. That description is entirely accurate. The decision below facially invalidates an Act of Congress as unconstitutional, which, "on its own," makes this case worthy of immediate review. *Id.* 233a. This Court's "usual" approach is to grant certiorari any time "a lower court has invalidated a federal statute." *Iancu* v.

Brunetti, 139 S. Ct. 2294, 2298 (2019). And for that reason alone, it would be appropriate for this Court to grant certiorari in this case.

But this Court's review is especially critical because the PSJVTA is not just any federal statute. It is a key component of Congress's comprehensive scheme to protect Americans from being harmed by international terrorism—and a key for unlocking the terror-fighting potential of another federal statute that had been hobbled by improper constitutional interpretation: the ATA, Pub. L. 102–572, tit. X, § 1003, 106 Stat. 4522-4524 (Oct. 29, 1992) (codified as amended at 18 U.S.C. §§ 2331 *et seq.*). Congress enacted the ATA to "remove the jurisdictional hurdles in the courts confronting victims [of international terrorism]"—and to ensure that Respondents (and others like them) can be held accountable for harms they have inflicted on innocent Americans abroad. *The Antiterrorism Act of 1991: Hearing Before the Subcomm. on Intellectual Property & Judicial Admin. of the H. Comm. on the Judiciary*, 102d Cong. 10 (1992) (*1992 Hearing*) (letter from Sen. Grassley); 137 Cong. Rec. S4511-04 (1991) (statement of Sen. Grassley) (same); 137 Cong. Rec. S1771-01 (1991) (statement of Sen. Grassley) (same).

Yet the decision under review has imposed *new* jurisdictional barriers that undermine the ATA, even after Congress amended the law to remove such barriers, effectively placing the PLO and PA beyond the reach of Congress and American courts, notwithstanding the PLO's and PA's continued enjoyment of the benefits of operating in the United States and their continuing payments to terrorists for murdering and maiming U.S. citizens. That result is not required by the Due Process Clause and should not be left standing.

A. Congress enacted the ATA to overcome jurisdictional obstacles to holding terrorists accountable in U.S. courts.

Congress's impetus for enacting the ATA dates back to the 1970s and 1980s, when the Nation was stunned by a series of brazen terror attacks against Americans abroad. 136 Cong. Rec. S4592, S4594 (1990) (statement of Sen. Heflin). These included the PLO's kidnapping and murder of U.S. Ambassador Cleo Noel in Sudan in 1973; Hezbollah's suicide truck-bomb attack that killed 220 U.S. Marines in Beirut in 1983; Hezbollah terrorists' murder of U.S. Navy Diver Robert Stethem during the hijacking of TWA Flight 847 in 1985; and the bombing of Pan Am Flight 103, which ended the lives of more than 250 people above Lockerbie, Scotland in 1988.

1. These horrendous attacks of the 70s and 80s brought attention to a significant "gap" in the Nation's legal strategy for combatting oversees terrorism, 136 Cong. Rec. S14283 (1990) (statement of Sen. Grassley). Up to that time, Congress had focused on enacting *criminal* anti-terrorism laws—many of which explicitly reached actors and conduct beyond our borders. In addition, Congress and the Executive Branch negotiated, ratified, and implemented a series of international anti-terrorism conventions prohibiting hijacking,[2] aircraft sabotage,[3] hostage-

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[2] Convention for the Suppression of Unlawful Seizure of Aircraft, S. Treaty Doc. 92-1 (ratified Sept. 8, 1971); Antihijacking Act of 1974, Pub. L. 93-366, 88 Stat. 409 (Aug. 5, 1974) (adding 49 U.S.C. § 1472(n)).

[3] Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, S. Treaty Doc. 92-32 (ratified Oct. 3, 1972); Aircraft Sabotage Act, Pub. L. 98-473, tit. II, ch. XX, Part B, 98 Stat. 2187 (Oct. 12, 1984) (amending 18 U.S.C. § 32).

taking,[4] use of biological[5] and nuclear weapons,[6] assassination, kidnapping and assault of diplomats,[7] and piracy on the high seas.[8] Congress also enacted many laws that were expressly designed to act extraterritorially, punishing international terrorists for harms inflicted on Americans abroad, including by prohibiting assassination, kidnapping, and assault against senior government officials

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[4] International Convention against the Taking of Hostages, S. Treaty Doc. 96-49 (ratified July 30, 1981); Act for the Prevention and Punishment of the Crime of Hostage-Taking, Pub. L. 98-473, tit. II, ch. XX, Part A, 98 Stat. 2186 (Oct. 12, 1984) (adding 18 U.S.C. § 1203).

[5] Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, S. Treaty Doc. 92-29 (ratified Dec. 16, 1974); Biological Weapons Anti-Terrorism Act of 1989, Pub. L. 101-298, 104 Stat. 201 (May 22, 1990) (adding 18 U.S.C. § 175).

[6] Convention on the Physical Protection of Nuclear Material, S. Treaty Doc. 96-43 (ratified July 30, 1981); Convention on the Physical Protection of Nuclear Material Implementation Act of 1982, Pub. L. 97-351, 96 Stat. 1663 (Oct. 18, 1982) (adding 18 U.S.C. § 831).

[7] Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, S. Treaty Doc. 93-36 (ratified Oct. 28, 1975); Act for the Prevention and Punishment of Crimes Against Internationally Protected Persons, Pub. L. 94-467, 90 Stat. 1997 (Oct. 8, 1976) (amending 18 U.S.C. §§ 112, 1116, 1201).

[8] Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, S. Treaty Doc. 101-1 (ratified Nov. 22, 1989).

(1982),[9] and terror attacks against United States nationals (1986).[10]

2. But while Congress had long combatted terrorism through *criminal* laws that allowed foreign terrorists to be tried in U.S. courts, it was not until the enactment of the ATA that Congress utilized the potential to fight terrorists through *civil* lawsuits. With the ATA, Congress recognized that civil lawsuits could provide a means of "fill[ing] the gap" in federal national security legal strategy by providing the "civil counterpart" to the nation's extraterritorial criminal statutes, *ibid.* (statement of Sen. Grassley); see also *1992 Hearing* at 11. Congress recognized that allowing such private civil actions for terror attacks would not only provide compensation to the victims of terror but could provide "an important instrument in the fight against terrorism" itself, *id.* at 10 (letter from Sen. Grassley), by striking at "the resource that keeps [international terrorists] in business—their money." 138 Cong. Rec. S17252-04 (1992) (statement of Sen. Grassley). The ATA reaffirmed America's "commitment to the rule of law," under which "the people of the United States" could "bring terrorists to justice the American way, by using the framework of our legal system to seek justice against those who follow no framework or defy all notions of morality and justice." *Antiterrorism Act of 1990: Hearing Before the Subcommittee on Courts and Administrative Practice of the Senate Committee on the Judiciary,*

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[9] Pub. L. 97-285, 96 Stat. 1219 (Oct. 6, 1982) (amending 18 U.S.C. § 351).

[10] Omnibus Diplomatic Security and Antiterrorism Act of 1986, Pub. L. 99-399, § 1202, 100 Stat. 896 (Aug. 27, 1986) (currently codified as amended at 18 U.S.C. § 2332).

101st Cong., 2d Sess. at 2-3 (July 25, 1990) ("*1990 Hearing*").

The attacks of the 1970s and 80s also illustrated why the ATA was necessary to facilitate these civil suits, revealing terrorism to be "a wrong that, by its nature, falls outside the usual jurisdictional categories of wrongs that national legal systems have traditionally addressed." S. Rep. No. 102-342, at 22.

One case more than any other illustrated the limitations of these traditional remedies: the PLO's 1985 murder of wheelchair-bound Leon Klinghoffer, an American passenger aboard the Italian vessel *Achille Lauro*. *1990 Hearing* 56. The incident not only prompted public outcry and a congressional inquiry into the PLO and its finances, *id.* at 109-117, but also revealed the difficulty in holding organizational perpetrators or terrorism accountable, given the welter of technical challenges that the PLO raised when sued by the Klinghoffer family. The ATA's legislative record is replete with references to the legal challenges of the *Klinghoffer* case—and shows how Congress drew inspiration from that case in order to solve them.[11] "Only by virtue of the fact that the attack violated certain

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[11] See 137 Cong. Rec. S1771-01 (1991) (statement of Sen. Grassley) ("The PLO must be held accountable for its crimes and the Klinghoffers are making sure that, at least in some way, the PLO will be brought to justice."); 138 Cong. Rec. S17252-14 (1992) (statement of Sen. Grassley) ("[T]he first and best remedy is to bring these terrorists to justice in our courts of law. But often, the terrorists elude justice, as in the Achille Lauro case, where Leon Klinghoffer, an elderly American was callously murdered by PLO terrorists."); 136 Cong. Rec. S14279, S14284 (1990) (statement of Sen. Grassley) (By enacting Section 2333, Congress intended to "put terrorist[s] on notice[] [t]o keep their hands off Americans" like Leon Klinghoffer); see also *1992 Hearing* at 4.

Admiralty laws and that the [PLO] had assets and carried on activities in New York, was the court able to establish jurisdiction over the case." *Id.* at 5. But Congress was concerned that "[a] similar attack occurring on an airplane or in some other [foreign] locale might not have been subject to civil action in the U.S.," and therefore Congress passed the ATA to "codify" the *Klinghoffer* ruling and "make[] the rights of American victims definitive," 137 Cong. Rec. S4511-04 (1991) (statement of Sen. Grassley), whenever they seek redress for terrorism-related injuries from attacks occurring overseas.

3. The ATA therefore allows U.S. nationals to bring actions for injuries from acts of "international terrorism" that "occur primarily outside the territorial jurisdiction of the United States." See 18 U.S.C. § 2331(1)(C). And the ATA brings the same "jurisdictional structure that undergirds the reach of American criminal law to the civil remedies it defines." S. Rep. 102-342, at 45 (1992). Congress specifically enacted the ATA as a counterpart to 18 U.S.C. § 2331 [now 2332], the "so-called 'long-arm statute,' which provides extraterritorial criminal jurisdiction for acts of international terrorism against U.S. Nationals," allowing them to be tried, convicted, and sentenced in U.S. district courts. H.R. Rep. No. 102-1040, at 5 (1992).[12]

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[12] Antiterrorism Act of 1991, Hearing before the Subcommittee on Intellectual Property and Judicial Administration of the Committee on the Judiciary, United States House of Representatives, 102d Cong., Second Session at 1 (Sept. 18, 1992) ("House Hearing") (Subcommittee Chairman Hughes: the "new civil legal cause of action for international terrorism by providing for extraterritorial jurisdiction over terrorist acts against U.S. nationals…parallels criminal legisla-

Congress was attentive to the sensitivities raised by this sort of extraterritorial legislation. Congress considered testimony about the ATA's Due Process implications, *1990 Hearing* 79, 121-131, and as a result, tailored the statute to provide a cause of action only where vital U.S. interests are at stake. Congress was confident that Due Process posed no impediment to reaching acts of terrorism committed abroad by the PLO, because the *Klinghoffer* case itself had shown "that the U.S. courts have jurisdiction over the PLO." 137 Cong. Rec. S4511 (1991) (statement of Sen. Grassley).

That jurisdictional understanding held even after the creation of the PA in 1993 and persisted for decades. During that time, Congress continued combatting international terrorism by enacting extraterritorial criminal laws prohibiting foreign murders of U.S. nationals,[13] maritime piracy against U.S. nationals,[14] violence at international

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tion which we enacted in 1986"); *id.* at 11 (Ranking Member Moorhead: legislation "will provide civil sanctions as a counterpart to the criminal statute"); 136 Cong. Rec. 7594 (Apr. 19, 1990) (Statement of Sen. Heflin) ("While Congress has enacted various laws aimed at extending American criminal jurisdiction for acts of international terrorism against our citizens, there are currently no laws expressly providing Federal civil remedies against these outrageous acts."); 137 Cong. Rec. 9883 (May 2, 1991) (Statement of Rep. Feighan).

[13] Federal Death Penalty Act of 1994, Pub. L. 103-322, tit. VI, § 60009 (adding 18 U.S.C. § 1119).

[14] *Id.* § 60019 (adding 18 U.S.C. § 2280); USA PATRIOT Act, Pub. L. 107-56, § 306, 115 Stat. 237 (Oct. 26, 2001) (adding 18 U.S.C. ch. 111A); see USA FREEDOM Act of 2015, Pub. L. 114-23, §§ 801-805, 129 Stat. 300-309 (June 2, 2015) (adding 18 U.S.C. §§ 2280a and 2281a and amending 18 U.S.C. §§ 2280 and 2281).

airports against U.S. nationals,[15] use of weapons of mass destruction against U.S. nationals,[16] war crimes against U.S. nationals,[17] the provision of material support and resources to foreign terrorist organizations designated as threats to U.S. interests or U.S. nationals,[18] use of nuclear weapons[19] and chemical weapons against U.S. nationals,[20] transnational terrorism against U.S. nationals,[21] aircraft

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[15] Federal Death Penalty Act of 1994, Pub. L. 103-322, tit. VI, § 60021 (adding 18 U.S.C. § 37).

[16] *Id.* § 60021 (adding 18 U.S.C. § 37).

[17] War Crimes Act of 1996, Pub. L. 104-192, 110 Stat. 2104 (adding 18 U.S.C. § 2401).

[18] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132 (Apr. 4, 1996), § 303 (adding 18 U.S.C. § 2339B); see USA FREEDOM Act of 2015, Pub. L. 114-23, §§ 81-812, 129 Stat. 309-313 (June 2, 2015) (adding 18 U.S.C. § 2332i and amending 18 U.S.C. § 831).

[19] *Id.* § 502 (amending 18 U.S.C. § 831).

[20] *Id.* § 521 (adding 18 U.S.C. § 2332c); Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. 105-277, div. I, title II, § 201, 112 Stat. 2681-866 (Oct. 21, 1998) (adding 18 U.S.C. § 229).

[21] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, § 702 (adding 18 U.S.C. § 2332b).

hijacking against U.S. nationals,[22] narcoterrorism harming U.S. nationals,[23] terrorist bombings against U.S. nationals,[24] and the financing of terrorism harming U.S. nationals.[25]

During that same period, private parties successfully sued the PLO and PA in numerous civil cases under the ATA. In each case, district courts held that the PLO and PA were subject to personal jurisdiction in the United States.[26] And both the PLO and PA were forced to pay

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[22] *Id.* § 721 (Apr. 4, 1996) (amending 18 U.S.C. §§ 32, 37, and 49 U.S.C. § 46502(b)).

[23] USA PATRIOT Act, Pub. L. 107-56, § 122, 115 Stat. 225 (Oct. 26, 2001) (adding 21 U.S.C. § 960a).

[24] Terrorist Bombings Convention Implementation Act of 2002, Pub. L. 107-197, § 101, 116 Stat. 721 (June 25, 2002) (adding 18 U.S.C. § 2332f).

[25] Suppression of the Financing of Terrorism Convention Implementation Act of 2002, Pub. L. 107-197, § 202, 116 Stat. 724 (June 25, 2002) (adding 18 U.S.C. § 2339C).

[26] *See Sokolow* v. *Palestine Liberation Org.*, No. 04-cv-397, 2011 WL 1345086, at *3 n.7 (S.D.N.Y. Mar. 30, 2011) (collecting cases); *Klinghoffer* v. *S.N.C. Achille Lauro*, 795 F. Supp. 112, 114 (S.D.N.Y. 1992); *Ungar* v. *Palestinian Auth.*, 153 F. Supp. 2d 76, 88 (D.R.I. 2001); *Biton* v. *Palestinian Auth,*, 310 F. Supp. 2d 172, 179 (D.D.C. 2004); *Knox* v. *Palestine Liberation Org.*, 248 F.R.D. 420, 427 (S.D.N.Y. 2008); *Klieman* v. *Palestinian Auth.*, 467 F. Supp. 2d 107, 113 (D.D.C. 2006). The rule was so well established that the PLO and PA stopped contesting jurisdiction in some cases. *Gilmore* v. *Palestinian Interim Self-Government Auth.*, 422 F. Supp. 2d 96, 102 n.4 (D.D.C. 2006) ("Defendants did not move to dismiss the PLO and the PA from this action for lack of personal jurisdiction.").

substantial sums to U.S. victims of international terror attacks.[27]

B. Congress amended the ATA in response to new jurisdictional obstacles that hindered its operation.

1. Things changed, however, after the Court's decisions in *Daimler AG* v. *Bauman*, 134 S. Ct. 746 (2014), and *Walden* v. *Fiore*, 134 S. Ct. 1115 (2014). After *Daimler* and *Walden* were decided, the PLO and PA began advancing the argument that U.S. courts no longer had jurisdiction over either of them, and that meritorious suits brought against them by Americans who had been injured or killed in acts of international terrorism had to be dismissed. See *Waldman* v. *Palestine Liberation Org.*, 835 F.3d 317, 322 (2d Cir. 2016), *vacated sub nom. Sokolow* v. *Palestine Liberation Org.*, 140 S. Ct. 2714 (2020); see also *Livnat* v. *Palestinian Auth.*, 851 F.3d 45, 142 (D.C. Cir. 2017).

Certain courts agreed—including the lower court. Although both *Daimler* and *Walden* concerned Fourteenth Amendment Due Process standards applicable only against the States, this Court held that these precedents should also govern Fifth Amendment Due Process standards applicable in federal district court. *Waldman*, 835 F.3d at 337; see also *Livnat* v. *Palestinian Auth.*, 851 F.3d 45, 57-59 (D.C. Cir. 2017). And on the basis of that understanding, the court below applied the personal jurisdiction

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[27] See, e.g., *Ungar* v. *Palestinian Auth.*, 715 F. Supp. 2d 253, 269 (D.R.I. 2010) ($116 million judgment paid on installment basis); *Knox* v. *Palestine Liberation Org.*, No. 03 Civ. 446 (VM) (THK), 2009 WL 1591404, at *12 (S.D.N.Y. Mar. 26, 2009) ($5 million per month payments), *adopted*, 628 F. Supp. 2d 507 (S.D.N.Y. 2009).

standards from *Walden* and *Daimler* on terms that essentially precluded the ATA from being applied to conduct occurring abroad by any foreign-terror-sponsoring organization like the PLO or PA. The court decided that the ATA could not be constitutionally applied to Respondents because neither of them could be considered "at home," in *Daimler*'s parlance, in this country. 835 F.3d at 331-35. The court also concluded that the PLO's and PA's terror-sponsoring activities lacked the "'substantial connection'" to the United States that *Walden* demands, because their "'suit-related conduct'" occurred abroad, and "the plaintiff-victims[' status as] United States citizens" was insufficient to establish the requisite connection. *Id.* at 335 (quoting *Walden*, 134 S. Ct. at 1121). These rulings effectively precluded the PLO, the PA, or any similar foreign sponsor of terrorism acting abroad, from being hailed into U.S. courts under general or specific personal jurisdiction Due Process standards.[28]

2. In response, Congress quickly and decisively passed the ATCA (Pub. L. No. 115-253, 132 Stat. 3183-3185 (2018)) using a long-recognized and firmly established basis for obtaining personal jurisdiction—jurisdiction by *consent*. The statute provided that any person who

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[28] Some of the present Amici, as well as the House of Representatives acting on a bipartisan basis, urged this Court to review the decision in *Sokolow*, expressing the view that Fourteenth Amendment personal jurisdiction standards had no application to suits arising under federal law where Congress provided for federal jurisdiction in federal courts. See Br. for the U.S. House of Reps. as Amicus Curiae, *Sokolow* v. *PLO*, No. 16-1071 (Apr. 2017) (H.R. Br.); Br. of U.S. Senator Charles E. Grassley *et al.* as Amici Curiae, *Sokolow* v. *PLO*, No. 16-1071 (Apr. 2017). The Supreme Court declined review. 138 S. Ct. 1438 (2018).

benefited from a waiver of 22 U.S.C. § 5202 (a statute excluding the PLO and its agents from the United States) or accepted specified forms of U.S. foreign assistance (which both the PLO and PA had received) would be deemed to have consented to personal jurisdiction in U.S. civil actions brought under the ATA. Pub. L. 115-253, § 4(a) (formerly codified at 18 U.S.C. § 2334(e)(1)(A)). After the ATCA became law, the PLO and PA stopped accepting any of the foreign assistance that qualified under the Act. In addition, the Second and D.C. Circuits held that the PLO and PA were not benefiting from a waiver of the relevant statute, and thus the ATCA's "factual predicates" had not been established against them. *Klieman* v. *Palestinian Auth.*, 923 F.3d 1114, 1128-31 (D.C. Cir. 2019), *vacated*, 140 S. Ct. 2713 (2020); *Waldman*, 925 F.3d at 574.

3. Congress again responded with the Promoting Security and Justice for Victims of Terrorism Act of 2019 (PSJVTA). Pub. L. No. 116-94, div. J, tit. IX, § 903. The PSJVTA expanded the bases for jurisdiction established by the ATCA. And it specifically identified the PA and PLO by name, 18 U.S.C. § 2334(e)(5), expressly providing that those organizations' post-enactment activities in the United States would be deemed to constitute consent to jurisdiction in civil ATA cases, with narrow exceptions for participation in official U.N. business and other specified activities. 18 U.S.C. § 2334(e)(1)(B). The PSJVTA also contained a new jurisdictional provision under which the PLO and PA would be deemed to have consented to personal jurisdiction in civil ATA cases if they made post-enactment payments to terrorists who had been imprisoned for injuring or killing American citizens or made such payments to the families of terrorists who had been killed doing so. 18 U.S.C. § 2334(e)(1)(A).

Congress based the PSJVTA on the same consent-based theory that undergirded the ATCA: that imposing such conditions on "the PLO and the PA" was eminently reasonable as "Congress has repeatedly tied their continued receipt of privileges," including this country's tolerance of their "continued presence in the United States" "to their commitment to renounce terrorism." See H.R. Rep. No. 115-848, at 7 (2018). Congress gave the PLO and PA a choice: abide by conditions on matters of intense interest to the United States or provide grounds to "reopen[] the courthouse doors to American victims and their families," 137 Cong. Rec. S7183 (2019) (statement of Sen. Grassley), who had seen their cases "dismissed for lack of jurisdiction after years of litigation," *id.* at S7182 (statement of Sen. Lankford).

C. The court below overturns the PSJVTA, despite Congress's determination that holding the PLO and PA accountable in U.S. civil cases serves vital U.S. national security interests.

1. The court of appeals in this case shut the courthouse doors once again. The court accepted that the PLO and PA had engaged in conduct necessary to trigger jurisdiction under the PSJVTA by paying terrorists who had murdered Americans and by conducting activities inside the United States. App. Pet. App. 38a. Yet the court held the Act unconstitutional on its face. In the court's view, the Fifth Amendment's Due Process Clause requires a that Congress can only enact consent-to-jurisdiction statutes like the PSJVTA if it provides those subject to the Act with some "reciprocal bargain" in return. *Id.* 24a-26a. And granting the PLO and PA's permission to be present and engage in activities in the United States does *not* count as such a "benefit." See *id.* 28a. If left standing, this ruling

would invalidate Congress's express determination to revive the ATA and would likely prohibit Congress from passing any future deemed-consent legislation reaching the PLO and PA that would pass constitutional muster.

2. Leaving the decision in place would thus hamstring key components of the United States' antiterrorism strategy. Congress has long understood that terror enterprises "rest[] on a foundation of money." See *Antiterrorism Act of 1990: Hearing on S. 2465 Before the Sen. Subcomm. on Courts & Admin. Practice*, 101st Cong. 84 (1990) (testimony of Joseph A. Morris, former General Counsel, U.S. Information Agency). Congress has therefore employed a robust and comprehensive scheme—composed of administrative sanctions, civil and criminal penalties—that aims to deny malefactors of every dollar they might use to fund terrorism. And these government efforts to combat terror financing have been demonstrably effective. See The 9/11 Commission Report, *Final Report of the National Commission on Terrorist Attacks Upon the United States* 382–383 (2004). For instance, documents found in Osama Bin Laden's compound revealed that efforts to restrict terrorist funding had frustrated al Qaeda's efforts to raise and transfer money around the world. Juan C. Zarate, Treasury's War: *The Unleashing of a New Era of Financial Warfare* ix (2013).

Congress has determined that government enforcement alone is not enough to stanch the flow of terror funds. Civil litigation under the ATA plays an irreplaceable role in reinforcing these governmental antiterrorism efforts, providing "an invaluable supplement to the criminal justice process and administrative blocking orders," Jimmy Gurulé, *Unfunding Terror: the Legal Response to the Financing of Global Terrorism* 325 (2008). Private

civil litigation also provides advantages that make it a more effective terror-fighting tool than criminal enforcement efforts, including a less stringent burden of proof, an absence of constitutional restrictions on investigation, and broader discovery rights than those accorded governmental agents. *Ibid.* Private civil lawsuits also provide "an important failsafe function" against the winds of political change, "by ensuring that legal norms are not wholly dependent on the current attitudes of public enforcers." John C. Coffee Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working*, 42 Md. L. Rev. 215, 227 (1983).

Accordingly, by undercutting the operation of the ATA, the court of appeals not only denied relief to American victims of international terrorism, it blunted a vital tool in our Nation's war on terror, frustrating an Act of Congress that concerns one of the gravest threats facing our nation. The Court's review is warranted to reverse that improper result.

II. The lower court has misconstrued the requirements of Due Process and inserted the judiciary into matters committed to the Political Branches.

It is not just the lower court's result—striking down as unconstitutional a federal statute aimed at national security—that raises concerns for Congress and warrants this Court's review. The decision's legal underpinnings themselves threaten to undermine Congress's legitimate authority to legislate consistent with the Due Process Clause and to meet future threats facing the Nation.

A. In holding that federal legislation concerning the territorial reach of the federal courts' adjudicative powers

is subject to the same Due Process limits as state laws and state courts, the court below disregarded an understanding of Due Process, and different understandings of state versus federal sovereignty that have persisted since the founding.

"For the first 150 years of the Republic, *** the recognized doctrines of jurisdiction worked very differently for state and federal courts." Stephen E. Sachs, *The Unlimited Jurisdiction of the Federal Courts*, 106 Va. L. Rev. 1703, 1706 (2020). Unlike the jurisdictional limitations imposed upon state courts by the Fourteenth Amendment, "as originally understood, the Fifth Amendment did not impose any limits on the personal jurisdiction of the federal courts. Instead, it was up to Congress to impose such limits by statute." *Douglass* v. *Nippon Ysen Kabushiki Kaisha*, 46 F.4th 226, 255 (5th Cir. 2022) (en banc) (Oldham, J., dissenting). Accordingly, "[i]f Congress wanted to exercise exorbitant [personal] jurisdiction *** a federal court 'would certainly be bound to follow it, and proceed upon the law.'" Sachs, *supra* (quoting *Picquet* v. *Swan*, 19 F. Cas. 609 (C.C.D. Mass. 1828) (No. 11,134) (Story, J.)).

This basic distinction between federal and state jurisdictional power results from peculiar limits on state sovereignty that have no federal analog. In our federal system, "[w]hen a state enters the Union, it surrenders certain sovereign prerogatives." *Massachusetts* v. *EPA*, 549 U.S. 497, 519 (2007). "[T]he sovereignty of each State * * * implie[s] a limitation on the sovereignty of all its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment." *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 293 (1980). Those limitations preserve the balance among States, "acting to ensure that the States

through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *World-Wide Volkswagen*, 444 U.S. at 292. They are an expression of the reality that the States have agreed to coexist under a single Constitution, each agreeing to respect the needs of the other. "[I]f another State were to assert jurisdiction in an inappropriate case, it would upset the federal balance, which posits that each State has a sovereignty that is not subject to unlawful intrusion by other States." *J. McIntyre Mach., Ltd.* v. *Nicastro*, 564 U.S. 873, 884 (2011) (plurality).

But personal jurisdiction "requires a forum-by-forum, or sovereign-by-sovereign, analysis." *McIntyre*, 564 U.S. at 583. And where the relevant "sovereign" is the federal government, the Constitution expressly conveys to Congress the "external powers" to assert jurisdiction over cases arising outside the territory of the United States. *United States* v. *Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 316-18 (1936) (citing *Penhallow* v. *Doane's Administrator*, 3 U.S. (3 Dall.) 54, 80–81 (1795)). And this Court has warned that "the limitations of the Constitution * * * preventing [States] from transcending the limits of their authority" afford "no ground for constructing an imaginary constitutional barrier around the exterior confines of the United States for the purposes of shutting the government off from the exertion of powers which inherently belong to it by virtue of its sovereignty." *United States* v. *Bennett*, 232 U.S. 299, 306 (1914).

From the very beginning, Congress has regulated consistent with the understanding that it could assert extraterritorial jurisdiction to address a series of exterior

threats from abroad. And this Court has consistently upheld those actions. See Pet. 17-20. Yet the decision below upends that understanding entirely.

It is therefore critical for the Court to take this case to ensure that the Fifth Amendment is not interpreted to impose restrictions on the powers of the federal government to enact reasonable legislation advancing extraterritorial national security interests based on federalism constraints meant to limit only the States' powers vis-à-vis one another.

B. Yet even taken on its own terms, the court of appeals' attempt to apply limits on states' territorial authority to Congress and the federal courts is entirely improper. The lower court applied notions of consent that would be more at home in contract law than an explanation of federal power, under which Congress must bargain with terrorists by giving them "governmental benefit[s]" to obtain their willingness to subject themselves to the jurisdiction of U.S. courts. Pet. App. 38a. But even States are not required to provide such reciprocal benefits to enact deemed-consent laws. They need only provide defendants "fair warning" and be "reasonable, in the context of our federal system of government." *Ford Motor Co.* v. *Mont. Eighth Jud. Dist. Ct.*, 592 U.S. 351, 358 (2021) (citation omitted).

There is no legitimate question that the PSJVTA would pass muster under that analysis, because there is no question that the Act gave the PLO and PA the freedom to avoid the jurisdiction of U.S. courts simply by ceasing pay-for-slay "martyr" payments to people who have killed Americans or confining their activities in the United States within the boundaries set in the Act. And there can

be no doubt that the Act reasonably advances legitimate—nay, vital—federal interests.

Furthermore, as Judge Elrod has observed, the Second Circuit's rule means that "*civil* foreign defendants now have more due process rights than *criminal* foreign defendants," *Douglass*, 46 F.4th at 276 (dissenting), when the greater deprivation of liberty in the criminal context obviously calls for greater Due Process protections. See Pet. 24-25.

In the end, the lower court's constitutional analysis amounts to little else beyond a disagreement between one circuit court and Congress itself on complex questions of foreign policy—including the proper way to conduct an anti-terror campaign and whether Respondents should be entitled to continue their odious pay-for-slay practice, which is "an incentive to commit acts of terror." Taylor Force Act, Pub. L. 115-141, Title X, § 1002(1) (22 U.S.C. § 2378c-1 note), while still evading the jurisdiction of U.S. courts. But "[t]he political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns." *Jesner* v. *Arab Bank PLC*, 138 S. Ct. 1386, 1403 (2018). The circuit court's arrogation of those foreign-policy questions to itself is yet another reason this Court's review is necessary.

CONCLUSION

The petition for a writ of certiorari should be granted.

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