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

REPLY BRIEF FOR THE PETITIONERS

SAMUEL SILVERMAN

THE SILVERMAN LAW FIRM, PLLC
16 Squadron Boulevard
New City, New York 10956
(845) 517-0351

JEFFREY FLEISCHMANN

THE LAW OFFICE OF JEFFREY FLEISCHMAN, P.C.
150 Broadway, Suite 900
New York, New York 10038
(646) 657-0351

KENT A. YALOWITZ
Counsel of Record

ARNOLD & PORTER KAYE SCHOLER LLP
250 West 55th Street
New York, NY 10019
(212) 836-8000
Kent.Yalowitz@arnoldporter.com

ALLON KEDEM
JOHN P. ELWOOD
DIRK C. PHILLIPS
STEPHEN K. WIRTH

ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases—Continued Page(s)

Statutes

Statutes—Continued Page(s)

Other Authorities

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

REPLY BRIEF FOR THE PETITIONERS

This is a paradigm case for review. A lower court facially invalidated a statute designed to protect American nationals and deter and disrupt international terrorism, which was enacted pursuant to Congress's authority over national security and foreign affairs. Neither Respondents' erroneous merits contentions, nor their makeweight vehicle arguments, should deter the Court from granting the petition.

I. THE SECOND CIRCUIT'S FACIAL INVALIDATION OF A FEDERAL ANTI-TERRORISM STATUTE MERITS REVIEW

"[W]hen a lower court has invalidated a federal statute," this Court's "usual" approach is to grant certiorari. *Iancu* v. *Brunetti*, 588 U.S. 388, 392 (2019). Here, the Second Circuit facially invalidated 18 U.S.C. § 2334(e). The Court should grant the petition on this basis alone.

The statute is important. Congress enacted it to address an intractable problem—institutionalized support

of terrorism by Respondents, the Palestine Liberation Organization (PLO) and Palestinian Authority (PA). Congress determined that it would further U.S. antiterrorism interests to give the PLO and PA a clear choice: end their pay-for-slay programs and non-U.N. activities within the United States, or else face civil claims by American terror victims and their families under the Anti-Terrorism Act, 18 U.S.C. § 2333 (ATA).

This is not a theoretical problem. Respondents' systemic support for terrorists who murder and maim American citizens has persisted for decades. It also continues today, with pay-for-slay programs already giving cash and other benefits to the Hamas terrorists of October 7 to reward their carnage—including slaughtering dozens of Americans. As the House Judiciary Committee explained, Congress enacted § 2334(e) so that civil suits by U.S. terror victims harmed by the PLO and PA would contribute to U.S. efforts to "halt, deter, and disrupt international terrorism." H.R. Rep. No. 115-858, at 7-8 (2018). The Federal Government's interest in doing so "is an urgent objective of the highest order." *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 28 (2010).

Respondents' assertion (at 25) that these cases "do not raise uniquely American concerns" is bewildering. The ATA creates a private right of action for "national[s] of the United States" who are victims of international terrorism and for their immediate families. 18 U.S.C. § 2333(a). The PSJVTA establishes jurisdiction under the ATA based on conduct that distinctively implicates *American* policy interests: Respondents' financial support for terrorists who have "injured or killed a national of the United States," *id.* § 2334(e)(1)(A)(i)-(ii); and Respondents' conduct of certain "activit[ies] while physically present in the United States," *id.* § 2334(e)(1)(B)(iii). In *Sokolow*, for instance, the jury found that Respondents'

own employees had murdered and maimed Americans; and evidence showed that Respondents paid rewards to those same terrorists and lobbied for their cause, in person and on social media, while present here. Pet. 7, 29.

Respondents also argue (at 25-26) that facial invalidation of the statute doesn't matter much, because the United States still has "a robust arsenal of antiterrorism tools." But it is for the political branches, not the PLO and PA, to decide whether empowering U.S. terror victims to seek justice in U.S. courts is an important antiterrorism tool. The Solicitor General, the House of Representatives, a bipartisan group of congressional leaders, and a former Secretary of State all agree that the decisions below will cause serious harm to federal interests. If the Judiciary is to deprive the United States of this particular tool, respect for the judgment of coequal branches places responsibility for doing so in this Court.

Respondents focus (at 21-27) on whether the petition implicates a circuit conflict. As a threshold matter, this Court routinely grants certiorari even in absence of a split. See Pet. 12 (citing six such cases); U.S. Pet. 23 (citing eight more).

In any event, Respondents mislead in contending (at 22-23) that the Circuits are in harmony. Some courts of appeals have recognized that "a Fifth Amendment analysis of due process is different from one undertaken under the Fourteenth Amendment," *Handley* v. *Ind. & Mich. Elec. Co.*, 732 F.2d 1265, 1271 (6th Cir. 1984), and "the fact that the United States is the sovereign asserting its power undoubtedly must affect the way the constitutional balance is struck," *Rep. of Pan.* v. *BCCI Holdings (Lux.) S.A.*, 119 F.3d 935, 945 (11th Cir. 1997). Numerous jurists have also disagreed with equating the Fourteenth and Fifth Amendment standards. Pet. App. 254a-266a (Menashi, J., dissenting); *Lewis* v. *Mutond*, 62 F.4th 587,

597-598 (D.C. Cir. 2023) (Rao, J., concurring); *Douglass* v. *Nippon Ysen Kabushiki Kaisha*, 46 F.4th 226, 249-282 (5th Cir. 2022) (en banc) (Elrod, J., dissenting); *id.* at 282-284 (Higginson, J., dissenting); *id.* at 284-287 (Oldham, J., dissenting).

In addition, judges have complained that lower-court precedents are "awash with confusion." *Douglass*, 46 F.4th at 250 (Elrod, J., dissenting). That confusion includes disparate treatment of civil and criminal cases. In criminal cases, "a jurisdictional nexus exists when the aim of that activity is to cause harm…to U.S. citizens or interests," *United States* v. *Rafoi*, 60 F.4th 982, 995 (5th Cir. 2023), "even if the defendant did not mean to affect those interests," *United States* v. *Murillo*, 826 F.3d 152, 157 (4th Cir. 2016). It makes no sense for due process to permit the Government to prosecute, imprison, and even execute a foreign person for engaging in criminal conduct abroad, while at the same time drawing a red line against *civil* liability (including civil forfeiture) for the same conduct in the same place. Lower-court "confusion" is an additional reason for review. *Bartenwerfer* v. *Buckley*, 598 U.S. 69, 74 (2023).

II. THE DECISIONS BELOW ARE INCORRECT

Jurisidictional standards under the Fourteenth Amendment differ from those under the Fifth Amendment, which does not limit Congress's authority to enact reasonable statutes that authorize jurisdiction over cases involving extraterritorial conduct. Even under Fourteenth Amendment standards, moreover, the PSJVTA is plainly constitutional.

A. Congress may prescribe personal jurisdiction in federal court to adjudicate a federal claim involving a defendant who has engaged in extraterritorial conduct. Such

jurisdiction comports with the original public meaning of the Due Process Clause and with this Court's precedents.

With regard to original public meaning, Respondents concede that the constitutional plan envisioned adjudication of cases arising extraterritorially, but they assert (at 30-31) that the grant in Article III of subject-matter jurisdiction in admiralty and maritime cases was to the "exclusion of others" implicating extraterritorial conduct. While plainly incorrect, see, *e.g.*, *Abitron Austria GmbH* v. *Hetronic Int'l, Inc.*, 600 U.S. 412, 418 (2023), this response misses the point: The constitutional plan contemplated adjudication of conduct occurring outside the territory of the United States. The question, then, is whether that changed when the Due Process Clause was ratified in 1791. Respondents do not attempt to answer that question with reference to the original public meaning of the Fifth Amendment, because literally no one suggested that the Due Process Clause restricted adjudication of extraterritorial conduct—at least not until well after the Civil War. Pet. 19; see Stephen E. Sachs, *The Unlimited Jurisdiction of the Federal Courts*, 106 Va. L. Rev. 1703, 1712 (2020).

Respondents quote (at 31-32) snippets from cases setting out baseline rules of international law, including *Picquet* v. *Swan*, 19 F. Cas. 609, 613 (C.C.D. Mass 1828) (No. 11,134). But they ignore Justice Story's explanation that Congress has the power to *supersede* those baseline rules: Although exercising jurisdiction over foreign defendants would depart "from the principles and practice of the common law," yet "[i]f congress had prescribed such a rule, the court would certainly be bound to follow it." *Id.* at 615-616. Respondents have nothing to say about this reasoning.

Respondents also ignore this Court's repeated admonition that it is up to *Congress* whether "claims alleging

exclusively foreign conduct may proceed." Pet. 21 (quoting *Abitron Austria*, 600 U.S. at 418).

To be sure, this Court has long held that due process requires fair warning and forbids the arbitrary exercise of Government power. Pet. 25-26. The PSJVTA easily meets that test. Pet. 26-27.

B. The PSJVTA also passes muster under Fourteenth Amendment standards. However, the Second Circuit invented a new test for consent-based jurisdictional statutes, holding that the consent must be "in exchange for, or as a condition of, receiving some form of in-forum benefit or privilege." Pet. App. 25a-26a. Respondents' attempt to defend that test fails.

Respondents say (at 15) that their conduct did not "evince[] [their] intention to submit to the United States courts." (quotation marks omitted). That argument is foreclosed by *Mallory* v. *Norfolk Southern Railway Co.*, 600 U.S. 122 (2023). As here, the defendant in *Mallory* argued that it had "not really submitted" to jurisdiction by engaging in conduct specified by statute, despite "appreciat[ing] the jurisdictional consequences." *Id.* at 144 (plurality). This Court rejected the argument, explaining that "a legion of precedents … attach jurisdictional consequences to what some might dismiss as mere formalities." *Id.* at 145. Indeed, this Court has inferred consent to submit to jurisdiction from far more attenuated indicia than those at issue here—such as fine print in consumer contracts. In those cases, the Court rejected dissenters' assertions that inferred consent was "too weak an imitation of a genuine agreement," *Nat'l Equip. Rental, Ltd.* v. *Szukhent*, 375 U.S. 311, 332 (1964) (Black, J., dissenting), or should be "deemed as wanting in the element of voluntary assent," *Carnival Cruise Lines, Inc.* v. *Shute*, 499 U.S. 585, 598 (1991) (Stevens, J., dissenting).

Respondents' argument (at 15) that their consent-manifesting activities were not "knowing and voluntary" is frivolous. Respondents concede that, after the PSJVTA became effective, they were aware of the law and made monthly payments to terrorists who attacked Americans. See Pet. App. 15a. Respondents thus had a "knowing and voluntary" choice to avoid personal jurisdiction. While Respondents may not have relished the prospect of ending payments to convicted terrorists, hard choices are not "involuntary" choices. In *North Carolina* v. *Alford*, 400 U.S. 25 (1970), a criminal defendant argued that his guilty plea to a murder charge was not "voluntary" under the Due Process Clause, because the evidence against him presented a serious risk that the State would put him to death if he proceeded to trial. *Id.* at 27-28. This Court rejected his claim that these circumstances prevented him from making a voluntary decision in violation of his due process rights: Even the risk of a death sentence did not make the defendant's plea a product of "fear and coercion." *Id.* at 29, 37. If Alford's decision was voluntary, so was Respondents'.

With regard to the U.S.-activities prong, *id.* § 2334(e)(1)(B), in view of Respondents' facial challenge, the Second Circuit assumed that they had engaged in predicate U.S. activities under the PSJVTA. Pet. App. 38a. Indeed, Respondents do not deny engaging in conduct such as notarizing documents and posting political statements on social media. Pet. 29. Respondents instead contend (at 19) that *Petitioners* asked the Second Circuit not to address their U.S. activities. That is a half-truth. At *Respondents'* request, the district courts found that they "need not decide" whether the U.S. activities prong was met in order to facially invalidate the statute. Pet. App. 102a n.3, 87a n.3, 74a-75a. Nonetheless, Petitioners made what record they could of Respondents' U.S.

activities, see *Sokolow* D. Ct. Dkt. 1057, and on appeal explained: "Given the U.S. activities described in the record … remands would be required if this Court adopts [Respondents'] unprecedented 'benefit' theory. Neither district court allowed any discovery concerning [Respondents'] U.S. activities." *Sokolow* Ct. App. Dkt. 568 at 6; see *Fuld* Ct. App. Dkt. 221 at 6.

Respondents further claim (at 24) that under Petitioners' reasoning, Congress could circumvent the Court's general-jurisdiction cases, thus undermining *Daimler AG* v. *Bauman*, 571 U.S. 117 (2014). Leaving aside *Daimler*'s limited focus on a *State's* exercise of extraterritorial jurisdiction, *id.* at 121, *Mallory* rejected this very argument. See 600 U.S. at 166 (Barrett, J., dissenting) (under deemed-consent statutes, "*Daimler*'s ruling would be robbed of meaning by a back-door thief") (citation omitted). This is an *a fortiori* case from *Mallory*, because the *Federal* Government has far greater interests than the States in projecting its authority extraterritorially. Revisiting *Mallory* in the federal context would threaten federal statutes and regulations that rely on implied consent, such as 31 U.S.C. § 5318(k)(3), which requires "any foreign bank that maintains a correspondent account in the United States" to appoint an agent to accept service of government subpoenas for "any records relating to … any account at the foreign bank, including records maintained outside of the United States." Under this Court's precedents, such appointment constitutes valid consent. See, *e.g.*, *Szukhent*, 375 U.S. at 315-316; *Pennsylvania Fire Ins.* v. *Gold Issue Mining Co.*, 243 U.S. 93, 95 (1917); *Balt. & Ohio R.R. Co.* v. *Harris*, 79 U.S. (12 Wall.) 65, 81 (1870).

III. RESPONDENTS' VEHICLE ARGUMENTS ARE MERITLESS

A. Nothing in the procedural history of either case presents a vehicle issue.

1. *Fuld*. Respondents argue (at 27) that the *Fuld* plaintiffs "are estopped from obtaining relief" because they recently obtained a default judgment against Iran and Syria for their role in the murder of Ari Fuld. That merits argument presents no *vehicle* problem, because courts "generally may not rule on the merits of a case without first determining that it has jurisdiction over the category of claim in suit (subject-matter jurisdiction) and the parties (personal jurisdiction)." *Sinochem Int'l Co.* v. *Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430-431 (2007). In any event, no estoppel principle prevents a plaintiff from seeking compensation from multiple parties involved in causing a single injury.

2. *Sokolow*. Respondents argue (at 28) that the Second Circuit's decision in 2019 not to reopen its judgment means the case cannot be "resurrected." But *this* Court reopened the Second Circuit's judgment in its 2020 GVR order. 140 S. Ct. 2714. Respondents argued that the Court should not do so because the Second Circuit had declined to reopen its judgment on independent "finality grounds …unaffected by the subsequent passage of the PSJVTA." Br. in Opp. (No. 19-764) at 2, 12-16. This Court nonetheless granted the petition, *vacated the judgment*, and remanded—necessarily rejecting Respondents' "finality" argument. On remand, the Second Circuit addressed the constitutional issue on the merits, Pet. App. 69a ("we incorporate the entirety of *Fuld*'s analysis here"), and this Court may do so as well.

Respondents' argument (at 28-29) that the district court's underlying judgment was "void" at the time it was entered is similarly irrelevant. This Court "applie[s] intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying

conduct occurred or when the suit was filed." *Hamdan* v. *Rumsfeld*, 548 U.S. 557, 576 (2006) (quotation marks omitted); see *United States* v. *Alabama*, 362 U.S. 602, 604 (1960) (lower courts lacked subject-matter jurisdiction, but statue enacted while case was pending in Supreme Court required decision "on the basis of law now controlling"). Here, Congress enacted a statute that expressly confers jurisdiction in existing cases. PSJVTA, Pub. L. No. 116- 94, div. J, tit. IX, § 903(b)(5). This Court's precedents require applying the statute at this stage.

Respondents rely (at 29) on *Roman Catholic Archdiocese of San Juan, Puerto Rico* v. *Acevedo Feliciano*, 589 U.S. 57 (2020), but that case undermines their argument. There, a state court had been *ousted* of jurisdiction by removal to federal court under a federal statute providing that, once a removal petition is filed, "the State court shall proceed no further unless and until the case is remanded." *Id.* at 63 (quoting 28 U.S.C. § 1446(d)). The upshot: Courts must honor Congress's jurisdictional instructions—regardless whether they *oust* jurisdiction or *confer* it.

B. Contrary to Respondents' assertion (at 29), there is no need for further percolation. Besides the extensive opinions below, numerous others have addressed the key issues. See *Lewis*, 62 F.4th at 596-598 (Rao, J., concurring); *Douglass*, 46 F.4th at 243-249 (Ho, J., concurring); *id.* at 249-282 (Elrod, J., dissenting); *id.* at 282-284 (Higginson, J., dissenting); *id.* at 284-287 (Oldham, J., dissenting); *Herederos de Roberto Gomez Cabrera, LLC* v. *Teck Res. Ltd.*, 43 F.4th 1303, 1307-1310 (11th Cir. 2022).

As Respondents observe (at 4), the Government recommended further percolation in 2017. But the 2017 petition did not arise from facial invalidation of a federal statute. Now, the Government *agrees* there is no reason for further delay: "The 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." U.S. Pet. 24.

C. Respondents' assertion (at 29) that Petitioners "forfeited" their originalism argument is baseless. Petitioners presented the argument to the court of appeals in a principal brief, *Fuld* Ct. App. Dkt. 67 at 52-57, and petitions for rehearing, *Sokolow* Ct. App Dkt. 599 at 6-9; *Fuld* Ct. App. Dkt. 242 at 6-9. Judge Menashi addressed it at length in his dissent, Pet. App. 254a-266a, and Judge Bianco in his concurrence, *id.* 223a-226a. There is no vehicle issue, because the argument was "raised and resolved in the lower courts" and "set forth in the petition." *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 645–646 (1992) (cleaned up).

D. Finally, Respondents' separation-of-powers argument (at 33) is not a vehicle issue, but a merits issue. At the merits stage, Respondents will be free to attempt to raise this issue as an alternative ground for affirmance, although their election not to cross-petition makes it unlikely that the Court will address it. See *14 Penn Plaza LLC* v. *Pyett*, 556 U.S. 247, 126 (2009). In any event, the issue is a makeweight: A statute does not "usurp the judicial function" if it "leaves the determination of certain facts to the courts." *Peterson* v. *Islamic Republic of Iran*, 758 F.3d 185, 191 (2d Cir. 2014), *aff'd sub nom. Bank Markazi* v. *Peterson*, 578 U.S. 212 (2016). The PSJVTA does just that, requiring courts to find personal jurisdiction over Respondents only if certain factual predicates are met—predicates that Respondents *concede* have been met here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

SAMUEL SILVERMAN

THE SILVERMAN LAW FIRM, PLLC
16 Squadron Boulevard
New City, New York 10956
(845) 517-0351

JEFFREY FLEISCHMANN

THE LAW OFFICE OF JEFFREY FLEISCHMAN, P.C.
150 Broadway, Suite 900
New York, New York 10038
(646) 657-0351

KENT A. YALOWITZ
Counsel of Record

ARNOLD & PORTER KAYE SCHOLER LLP
250 West 55th Street
New York, NY 10019
(212) 836-8000
Kent.Yalowitz@arnoldporter.com

ALLON KEDEM
JOHN P. ELWOOD
DIRK C. PHILLIPS
STEPHEN K. WIRTH

ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000

NOVEMBER 2024