Nos. 24-20 & 24-151

IN THE

Supreme Court of the United States

MIRIAM FULD, ET AL.,

Petitioners,

v.

PALESTINE LIBERATION ORGANIZATION, ET AL.

Respondents.

UNITED STATES,

Petitioner,

v.

PALESTINE LIBERATION ORGANIZATION, ET AL.

Respondents.

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

BRIEF OF ABRAHAM D. SOFAER AND LOUIS J. FREEH AS AMICI CURIAE SUPPORTING PETITIONERS

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INTEREST OF AMICI[1]

Amici Abraham D. Sofaer and Louis J. Freeh are former federal officials with legal and policy expertise in the fields of foreign affairs and separation of powers. Both were United States District Judges in the Southern District of New York, and both also served in the Executive Branch—Mr. Sofaer as the Legal Adviser of the Department of State, and Mr. Freeh as the Director of the Federal Bureau of Investigation.

Amici have an interest in preserving the federal government's ability to protect American nationals abroad, as well as an interest in ensuring that Americans harmed by terrorist attacks have access to U.S. courts, as intended by Congress. Accordingly, amici urge this Court to hold that the district court has personal jurisdiction over respondents with respect to the claims of the plaintiffs in this case and that such jurisdiction is not precluded by the Fifth Amendment.

SUMMARY OF ARGUMENT

The Second Circuit's decision rests on the premise that the Fifth Amendment imposes the same restrictions on Congress as the Fourteenth Amendment does on the States in the realm of personal jurisdiction. The Court should reject that premise. Unlike the States, which generally may not regulate extraterritorial conduct, Congress has both the responsibility and the power to govern foreign affairs—including the power to proscribe specified extraterritorial conduct as tortious—which necessarily entails the power to hale

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[1] No party's counsel authored this brief in whole or in part, and no person other than the amici and their counsel contributed money intended to fund preparing or submitting this brief.

foreign actors who harm U.S. nationals into U.S. courts to answer for those torts. Accordingly, the constitutional concerns animating the Fourteenth Amendment's restrictions on personal jurisdiction simply do not apply to Congress.

The Constitution vests broad powers in the federal government to enact laws with extraterritorial effect, and to enforce those laws by subjecting foreign persons and entities to jurisdiction in U.S. courts. Founding-era sources, as well as settled rules of international law, show that the judicial power of the United States is coextensive with those powers—such that if Congress has the power to enact a substantive extraterritorial prohibition, Congress also has the power to require defendants to answer claims for violating that prohibition in U.S. courts.

The Anti-Terrorism Act (ATA) is a paradigmatic example of Congress exercising its power to enact legislation with extraterritorial effect—and simultaneously creating federal jurisdiction over civil actions to enforce that law. 18 U.S.C. §§ 2333-34. Originally enacted in response to an overseas terrorist attack committed by the PLO, the ATA now provides a civil remedy to Americans injured by terrorist attacks—wherever those attacks occur. The ATA is part of an array of extraterritorial statutes that protect our nationals and our national security. These statutes authorize a broad range of responses to foreign threats to U.S. nationals, including military force, harsh economic sanctions, and criminal liability. Compared to these other tools, civil liability under the ATA represents a measured response to those who are complicit with terrorism against Americans.

The Sokolow plaintiffs relied on the ATA and prevailed at trial, persuading a jury that respondents were legally responsible for the terrorist attacks that injured petitioners and their loved ones. The Second Circuit held, however, that personal jurisdiction was lacking based on intervening Fourteenth Amendment precedents. *See Waldman v. Palestine Liberation Org.*, 835 F.3d 817 (2d Cir. 2016), *cert denied,* 584 U.S. 915 (2018). As a result of two acts of Congress—the Anti-Terrorism Clarification Act of 2018 (ATCA), Pub. L. No. 115-253, 132 Stat. 3183, and the Promoting Security and Justice for Victims of Terrorism Act of 2019 (PSJVTA), Pub. L. No. 116-94, div. J, tit. IX, 133 Stat. 3082, discussed more fully in merits brief of the United States (at 10-13), this case has remained alive.

These statutes were enacted to supplement the ATA's enforcement mechanism. In the PSJVTA, Congress spoke clearly, determining that specific conduct by the PLO and PA would constitute consent to personal jurisdiction in civil ATA actions. The PSJVTA thus provides unambiguous notice to these defendants that if they make pay-for-slay payments to people who injure or kill American nationals (or to their families), or if they engage in certain activities in the United States, they must also defend civil ATA actions in U.S. courts—where they will have all the substantive and procedural protections an American litigant would have. Like the ATA itself, the PSJVTA is a measured response to these defendants' notorious record of financially supporting terrorism.

The Second Circuit held that Congress has no power to enact such a law, holding that the government must provide some benefit to defendants before subjecting them to personal jurisdiction by consent. In

effect, the Second Circuit's decision takes the civil-liability option off the table vis-à-vis these defendants. That was error. The Fifth Amendment does not prohibit Congress from enacting statutes subjecting foreign persons to personal jurisdiction for torts injuring U.S. nationals, even when the underlying conduct occurs entirely outside the United States.

Petitioners persuasively argue that the PSJVTA is constitutional, and this brief will not dwell on those arguments. Instead, it will show that, even without the ATCA or the PSJVTA, the district court had jurisdiction because the United States does not have to rely on consent to enable its courts to exercise personal jurisdiction over the defendants in this case. Thus, where Congress specifically provides for jurisdiction over conduct abroad that harms the United States or its citizens, as it has done in the ATA, neither the Fifth Amendment nor any other constitutional provision prevents a district court from exercising personal jurisdiction over such claims. This Court should so hold, removing uncertainty about the scope of jurisdiction in ATA cases as well as other federal causes of action protecting U.S. nationals and property.

ARGUMENT

This Court has left "open the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court" as the Fourteenth Amendment imposes on state courts. *Bristol-Myers Squibb Co. v. Superior Ct. of Cal.*, 582 U.S. 255, 269 (2017). Amici urge this Court to resolve that question, and to recognize Congress's full power both to legislate extraterritorially, and to

subject foreign actors who threaten American nationals and national security to jurisdiction in U.S. courts.

This Court Should Hold That the Fifth Amendment Does Not Prevent Congress From Legislatively Establishing Personal Jurisdiction Over Terrorism Tort Claims Arising Out of Injuries to U.S. Nationals, Their Family Members, or Their Businesses

A. The Constitution Vests Power in the United States to Subject Foreign Persons to U.S. Law

The United States unquestionably has the power to subject foreign persons to substantive federal law. This includes Congress's power to provide for jurisdiction over foreign persons in U.S. courts to answer for extraterritorial violations of U.S. law. The scope of this power is coextensive with Congress's power to enact the underlying substantive law in the first instance—and the scope of that power is broad because Congress is charged with protecting our national interests and the safety of our nationals from harm abroad.

"Congress has the authority to enforce its laws beyond the territorial boundaries of the United States." *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991). Indeed, this Court "has repeatedly upheld [Congress's] power to make laws applicable to persons or activities beyond our territorial boundaries where United States interests are affected." *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 813-14 (1993) (Scalia, J., dissenting); *see, e.g.*, *United States v. Bowman*, 260 U.S. 94, 98-99 (1922) (allowing prosecution of a conspiracy to defraud the United States that was

carried out on the high seas and in Brazil); *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 355-56 (1909) ("[C]ivilized countries . . . will punish anyone, subject or not, who shall do certain things . . . . In cases immediately affecting national interests they may go further still and may make, and, if they get the chance, execute, similar threats as to acts done within another recognized jurisdiction.").

This legal principle has deep roots, dating back to the Founding, as described in the work of Emmerich de Vattel, author of the leading Founding-era treatise on the law of nations:[2]

> Whoever uses a citizen ill, indirectly offends the state, which is bound to protect this citizen; and the sovereign of the latter should avenge his wrongs, punish the aggressor, and, if possible, oblige him to make full reparation; since otherwise the

[2] Vattel was "[t]he international jurist most widely cited in the first 50 years after the Revolution," and in 1775 Benjamin Franklin reported that his book "has been continually in the hands of the members of our Congress now sitting." *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 461 n.12 (1987); *see* Letter from Benjamin Franklin to Charles-Guillaume-Frédéric Dumas (Dec. 9, 1775), https://founders.archives.gov/documents/Franklin/01-22-02-0172; Alexander Hamilton, Opin. of the Secretary of the Treasury (Sept. 15, 1790), https://founders.archives.gov/documents/Jefferson/01-17-02-0016-0018 (describing Vattel as "perhaps the most accurate and approved of the writers on the laws of Nations"). This Court has repeatedly cited Vattel's work with favor. *See Franchise Tax Bd. of Cal. v. Hyatt*, 587 U.S. 230, 239 (2019); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 714 (2004); *United States v. Arjona*, 120 U.S. 479, 484 (1887); *Brown v. United States*, 12 U.S. 110, 112 (1814).

> citizen would not obtain the great end of the civil association, which is, safety.

2 Emmerich de Vattel, *Law of Nations* § 71 (Joseph Chitty ed., T. & J. W. Johnson & Co. 1872); *see also* 1 *Law of Nations* § 17 ("If a nation is obliged to preserve itself, it is no less obliged carefully to preserve all its members.").

The Constitution reflects Congress's broad power to protect American nationals and American interests against foreign threats. Thus, Article I empowers Congress to "provide for the common defense," "regulate commerce with foreign nations," "establish a uniform rule of naturalization," "define and punish piracies and felonies committed on the high seas, and offenses against the law of nations," "declare war," and to "make all laws which shall be necessary and proper for carrying into execution the foregoing powers." U.S. Const. art. I, § 8, cl. 1, 3-4, 10-11, 18.

The power to enact such substantive protections would mean little if the Constitution did not also authorize the federal government to enforce those protections by executive and judicial action. Thus, Founding-era sources embrace the notion that the judicial power is "coextensive" or "commensurate" with the legislative power. At the Constitutional Convention, James Madison explained that "[a]n effective Judiciary establishment commensurate to the legislative authority, was essential." 1 *Records of the Federal Convention of*

1787, at 124 (Max Farrand, ed., Yale Univ. Press 1911).[3]

Others expressed the same views at ratifying conventions, most prominently James Wilson of Pennsylvania.[4] In response to an anti-federalist complaint "that the judicial powers were coëxtensive with the legislative powers," Wilson replied:

> I believe they ought to be coëxtensive; otherwise, laws would be framed that could not be executed. Certainly, therefore, the executive and judicial departments ought to have power commensurate to the extent of the laws; for, as I have already asked, are we to give power to make laws, and no power to carry them into effect?

2 *Debates in the Several State Conventions on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia in 1787*, at 469 (Jonathan Elliot, ed., J.B. Lippincott Co. 1891) (hereinafter "*Debates*"). Wilson also expressed his view

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[3] Madison was the "master-builder of the constitution"—and "unquestionably the leading spirit" of the constitutional convention. Max Farrand, *The Framing of the Constitution of the United States* 196 (1913).

[4] Wilson is traditionally viewed by historians as second only to Madison in his influence on the Constitution. Farrand, *The Framing of the Constitution of the United States* 197. Recent scholarship suggests that Wilson drafted the document. Ian Bartrum, *James Wilson and the Moral Foundations of Popular Sovereignty*, 64 Buffalo L. Rev. 225, 256 n.154 (2016). His widely circulated State House Yard speech was "perhaps the single most influential and important contribution to the ratification debates." *Id.* at 256.

that "the objects of the judicial department" under the Constitution will "extend beyond the bounds of any particular State" and that "a great number of the civil causes there enumerated, depend either upon the law of nations, or the marine law, that is, the general law of mercantile countries." 3 *Records of the Federal Convention* 167.[5] In *The Federalist* No. 80, Alexander Hamilton echoed this understanding: "If there are such things as political axioms, the propriety of the judicial power of a government being co-extensive with its legislative, may be ranked among the number." Alexander Hamilton, *The Federalist* No. 80 (1788).

Article III expresses this intention by extending "the judicial power" to "all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority," and to "all cases of admiralty and maritime jurisdiction," U.S. Const. art. III, § 2, cl. 1. That language does not impose a territorial limitation; indeed, its sweeping language—referring to "all cases," and reaching "admiralty and maritime jurisdiction"—forecloses any such limitation. Thus, the First

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[5] *Accord* 2 *Debates* at 445 (Wilson: "I would not have the legislature sit to make laws which cannot be executed. It is not meant here that the laws shall be a dead letter."), *id.* at 515 (Wilson: judicial power "commensurate with the legislative powers"); 3 *Debates* 517 (Edmund Pendleton, Virginia: "Taking it for granted, then, that a judiciary is necessary, the power of that judiciary must be coëxtensive with the legislative power, and reach to all parts of society intended to be governed."); 4 *Debates* 158 (William Richardson Davie, North Carolina: "I thought, if there were any political axiom under the sun, it must be, that the judicial power ought to be coëxtensive with the legislative. . . . If laws are not to be carried into execution by the interposition of the judiciary, how is it to be done?").

Congress granted the federal district courts jurisdiction to hear cases arising outside the geographic territory of the United States. The Judiciary Act of 1789 granted jurisdiction in "all causes where an alien sues for a tort only in violation of the law of nations" as well as over "civil causes of admiralty and maritime jurisdiction" arising "upon the high seas," and over crimes committed "upon the high seas," Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 76-77, which were defined in the Crimes Act of 1790, Act of Apr. 30, 1790, ch. 9, §§ 8-13, 1 Stat. 113-15. This early congressional practice provides contemporaneous and weighty evidence of the Constitution's meaning. *See, e.g.*, *Haaland v. Brackeen*, 599 U.S. 255, 290 (2023); *Alden v. Maine*, 527 U.S. 706, 743-44 (1999).

The Fifth Amendment—approved by Congress on the day the Judiciary Act became law—did not add any territorial limitation on the judicial power. Indeed, no less an authority than Madison himself said, during the deliberations on the Judiciary Act of 1789, that the judicial system "ought to be commensurate with the other branches of the Government," and that "the Executive [power] is co-extensive with the Legislative, and it is equally proper that this should be the case with the judiciary." 1 *Annals of Cong.* 843 (Aug. 29, 1789). And indeed, the historical record is devoid of any evidence that any of the framers believed the Due Process Clause of the Fifth Amendment meant anything different.

Practice after ratification of the Fifth Amendment likewise shows that it did not impose any territorial limitation on the judicial power. For example, in 1791, Edmund Randolph, the first Attorney General, prepared a report on the First Judiciary Act in which he

noted that the federal courts had the exclusive power "to decide all cases arising wholly on the sea, and not within the precincts of any county" as well as rights "created by Congress [which] may have a special remedy given to them in the federal courts." Edmund Randolph, Report from the Attorney General on the Judiciary System of the United States, Communicated to the House of Representatives on Dec. 31, 1790, reprinted in I *Am. State Papers, Misc.* No. 17, at 22 (Walter Lowrie & Walter S. Franklin, eds., 1834). Consistent with that view, this Court embraced the axiom that "the judicial power of every well constituted government must be co-extensive with the legislative, and must be capable of deciding every judicial question which grows out of the constitution and laws." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 384 (1821) (Marshall, C.J.); *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738, 818 (1824) (Marshall, C.J.) (similar); *Kendall v. United States ex rel. Stokes*, 37 U.S. (1 Pet.) 524, 619 (1838) ("[I]n every well organized government the judicial power should be coextensive with the legislative, so far at least as private rights are to be enforced by judicial proceedings"); *Waring v. Clarke*, 46 U.S. (5 How.) 441, 504 (1847) ("The object of the framers of the Constitution was to make the judicial co-extensive with the legislative power.").

Many early cases involving extraterritorial statutes dealt with piracy, which, like international terrorism, was a form of organized non-state violence that occurred outside the territorial United States. Blackstone said of pirates that "every community hath a right by the rule of self-defence, to inflict that punishment upon him." 4 William Blackstone, *Commentaries on the Laws of England* 71 (1770). Congress enacted

extraterritorial criminal laws against piracy in 1790, and this Court upheld those laws without requiring any proof that the pirates had intentionally targeted the territory of the United States. Thus, Chief Justice Marshall's opinion in *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 630 (1818), stated that "there can be no doubt of the right of the legislature to enact laws punishing pirates, although they may be foreigners, and may have committed no particular offence against the United States." Similarly, in *Talbot v. Jansen*, 3 U.S. (3 Dall.) 133, 159-60 (1795) (opin. of Iredell, J.), the Court confirmed jurisdiction over a civil claim for damages arising out of acts of piracy on the high seas, explaining that "all piracies and trespasses committed against the general law of nations, are enquirable, and maybe proceeded against, in any nation where no special exemption can be maintained, either by the general law of nations, or by some treaty which forbids or restrains it." *See also United States v. Smith*, 18 U.S. 153, 161 (1820) ("[A]ll nations [may punish] all persons, whether natives or foreigners, who have committed this offence against any persons whatsoever, with whom they are in amity."); *The Marianna Flora*, 24 U.S. (11 Wheat.) 1, 40-41 (1825) (Story, J.) (holding that any pirate, wherever found, "may be justly subjected to the penalty of confiscation for such a gross breach of the law of nations"). "From the very organization of the government, and without intermission, Congress has also asserted the power . . . to punish crimes committed on vessels of the United States while on the high seas or on navigable waters not within the territorial jurisdiction of a state." *United States v. Flores*, 289 U.S. 137, 151-52 (1933).

In addition to these Founding-era sources, modern principles of customary international law support the understanding that Congress has the power to grant U.S. courts jurisdiction to decide cases arising from extraterritorial violations. Indeed, "modern customary international law generally does not impose limits on jurisdiction to adjudicate" violations of validly prescribed laws. Restatement (Fourth) of the Foreign Relations Law of the United States § 422, Reporters' Note 1 (Am. L. Inst. May 2022 Update); *see* William S. Dodge, *A Modest Approach to the Customary International Law of Jurisdiction*, 32 Eur. J. Int'l L. 1471, 1473 (2021) ("[N]o customary international law rules limiting personal jurisdiction currently exist."). Instead, the general rule is that, if a sovereign has the power to enact a statute that regulates extraterritorial conduct, it also has the power to enforce that statute.

Customary international law further recognizes that nations have prescriptive jurisdiction over extraterritorial conduct that has substantial effects within their territory (effect jurisdiction), Restatement (Fourth) of Foreign Relations Law § 409, cmt a; conduct that harms their nationals (passive personality jurisdiction), *id.* § 411, cmt. a; conduct that threatens their security (protective principle jurisdiction), *id.* § 412; and "certain offenses of universal concern, such as . . . certain acts of terrorism" (universal jurisdiction), *id*. § 413.

Consistent with these authorities, Congress has enacted various laws with extraterritorial effect, including statutes intended to "deter and prevent price

manipulation" in "international commerce,"[6] to provide damages to the victims of torture,[7] to control the unauthorized transshipment of U.S.-origin military equipment and services outside the United States,[8] and to impose sanctions (including on non-U.S. persons) to deal with unusual and extraordinary external threats to the national security, foreign policy, or economy of the United States,[9] among others.

B. Congress Has Repeatedly Exercised its Broad Powers to Enact Legislation with Extraterritorial Effect to Prevent, Punish, and Redress Terrorism

Congress's power to enact laws with extraterritorial effect is at its zenith with respect to issues of foreign affairs, national security, and the protection of American nationals—including addressing terrorism, which "threatens the vital interests of the United States," Justice Against Sponsors of Terrorism Act (JASTA), Pub. L. No. 114-222, § 2(a)(1), 130 Stat. 852 (2016), and violates the law of nations, *e.g.*, *United States v. Ahmed*, 94 F. Supp. 3d 394, 415 n.8 (E.D.N.Y. 2015).[10]

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[6] *See* 7 U.S.C. § 5.

[7] Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992), codified at 28 U.S.C. § 1350 note.

[8] *See* 22 U.S.C. § 2778(a)(1).

[9] *See* 50 U.S.C. §§ 1701-1708.

[10] Some courts previously reasoned that "terrorism" is not sufficiently well-defined to constitute a violation of the law of nations. But times have changed, and "there is sufficient international agreement suggesting the existence of a specific, identifia-

Pursuant to this broad authority, Congress has created "a comprehensive statutory and regulatory regime that prohibits terrorism and terrorism financing." *Jesner v. Arab Bank, PLC*, 584 U.S. 241, 268 (2018). This regime includes anti-terrorism conventions joined not only by the United States but also by nearly every nation in the world[11]; statutes including the ATA, JASTA, and criminal material support statutes; executive orders[12]; regulatory regimes[13]; and administrative actions such as designating organizations as Foreign Terrorist Organizations (FTOs) and Specially Designated Global Terrorists (SDGTs).

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ble, uncontroversial and universal prohibition on terrorism," especially as to certain "specific acts, such as deliberate attacks on innocent civilians, hostage taking and aircraft hijacking." Daniel J. Hickman, *Terrorism as a Violation of the "Law of Nations:" Finally Overcoming the Definitional Problem*, 29 Wis. Int'l L.J. 447, 462 (2011); *see also Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257, 284 (E.D.N.Y. 2007) (holding that certain terrorist acts violate the law of nations).

[11] The International Convention for the Suppression of the Financing of Terrorism, art. 7(2)(a), Dec. 9, 1999, S. Treaty Doc. No. 106-49, 39 I.L.M. 268, provides for universal jurisdiction over the financing of terrorism and, by necessary implication, recognizes universal jurisdiction over acts of terrorism. *See also* International Convention for the Suppression of Terrorist Bombings, Jan. 12, 1998, S. Treaty Doc. No. 106-6, 2149 U.N.T.S. 256.4.

[12] *E.g.*, Exec. Order 13,886, 84 Fed. Reg. 48,041 (Sept. 9, 2019); Exec. Order No. 13,372, 70 Fed. Reg. 8499 (Feb. 16, 2005); Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001); Exec. Order No. 13,099, 63 Fed. Reg. 45,167 (Aug. 20, 1998).

[13] *E.g.*, 31 C.F.R. Part 594 (Global Terrorism Sanctions Regulations); 31 C.F.R. Part 595 (Terrorism Sanctions Regulations); 31 C.F.R. Part 596 (Terrorism List Governments Sanctions Regulations); 31 C.F.R. Part 597 (Foreign Terrorist Organizations Sanctions Regulations).

One key extraterritorial federal regime is the International Emergency Economic Powers Act (IEEPA), which authorizes the President to effectuate foreign policy and national security by freezing "any property" that is "subject to the jurisdiction of the United States." 50 U.S.C. § 1702(a)(1)(A), (B).[14] Under this and related laws, "[t]he United States has long asserted jurisdiction over certain activities abroad, such as those involving the reexport of U.S. origin goods . . . [which] is necessary to insure that export controls are not circumvented by shipment through third countries." *Export Administration Act: Hearing Before the Subcomm. on Int'l Econ. Pol'y of the S. Comm. on Foreign Rels.*, 98th Cong. 44 (1983) (testimony of Kenneth W. Dam, Deputy Secretary of State). The Department of Justice has long taken the position "that the President would have broad discretion under the IEEPA to determine whether a foreign nation or national has an 'interest' in property subject to U.S. jurisdiction," and also "whether any of the authority granted in [50 U.S.C. § 1702] should be exercised over that property, provided the President does not attempt to regulate transactions that are purely domestic in nature." *Legal Authorities Available to the President to Respond to a Severe Energy Supply Interruption or Other Substantial Reduction in Available Petroleum Prods.*, 6 U.S. Op. O.L.C. 644, 681-82 (1982).

Some IEEPA-authorized regulatory regimes operate directly on non-U.S. persons. For example, the Iranian Transactions and Sanctions Regulations prohibit *all* re-exportation of U.S.-origin goods, technology, and

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[14] IEEPA is not limited to terrorism although it has been used extensively to prevent support to terrorists.

services, "wherever located," to Iran, 31 C.F.R. § 560.204, and *all* re-exportation of goods subject to the Export Administration Regulations to Iran, *id*. § 560.205(a); *see* 15 C.F.R. § 746.7(e). Similarly, the Cuban Assets Control Regulations regulate *all* interests in "property subject to the jurisdiction of the United States," "wheresoever located." 31 C.F.R. § 515.201(a). The Export Administration Regulations apply to "[a]ll U.S. origin items wherever located," 15 C.F.R. § 734.3(a)(2), and specifically prohibit "[r]eexport and export from abroad of foreign-made items incorporating more than a de minimis amount of controlled U.S. content," *id*. § 736.2(b)(2).

Federal enforcement actions frequently reach extraterritorial conduct. For example, the Treasury Department has frozen tens of millions of dollars in assets of designated organizations—including entities that have not attacked within the territory of the United States—such as Hamas and Hezbollah. *See* Office of Foreign Assets Control, U.S. Department of Treasury, *Terrorist Assets Report* 8-10 (2020) (reporting $63 million in assets blocked from designated organizations). The Treasury Department also takes enforcement actions against foreign actors that make prohibited wire transfers using U.S. financial institutions—even if those transfers originate and terminate abroad. *See, e.g.*, Press Release, U.S. Dep't of Treasury, *Settlement Agreement between the U.S. Department of the Treasury's Office of Foreign Assets Control and Sojitz (Hong Kong) Limited* (Jan. 11, 2022), https://home.treasury.gov/policy-issues/financial-sanctions/recent-actions/20220111_33. The CFTC has taken administrative enforcement actions against persons acting abroad to manipulate market benchmarks

such as LIBOR. *See, e.g.*, Press Release, CFTC, *CFTC Orders Glencore to Pay $1.186 Billion for Manipulation and Corruption* (May 24, 2022), https://www.cftc.gov/PressRoom/PressReleases/8534-22. Similarly, the Commerce Department has taken enforcement action against Russian companies operating abroad because those companies were using U.S.-origin goods, and the Commerce Department wanted to use "every tool at its disposal to demonstrate the power and reach of U.S. law and disrupt Russia's ability to wage war." Press Release, U.S. Dep't of Commerce, *BIS Takes Enforcement Action Against Russian Cargo Airline Operating in Violation of U.S. Export Controls* (Apr. 21, 2022), https://www.commerce.gov/news/press-releases/2022/04/bis-takes-enforcement-action-against-russian-cargo-airline-operating.

The ATA is an extraterritorial statute designed to advance U.S. foreign policy and national security. The statute was motivated by the PLO's murder of U.S. citizen Leon Klinghoffer aboard an Italian cruise ship. H.R. Rep. No. 102-1040, at 5 (1992). Recognizing that existing law was inadequate to "provid[e] victims of terrorism with a remedy for a wrong that, by its nature, falls outside the usual jurisdictional categories," S. Rep. No. 102-342, at 22 (1992), Congress determined that the "extension of civil jurisdiction" to terrorism cases was necessary to fill a damaging "gap in our efforts to develop a comprehensive legal response to international terrorism," H.R. Rep. No. 102-1040, at 5. The ATA thus "provid[es] extraterritorial jurisdiction over terrorist acts abroad against United States nationals." S. 2465, 101st Cong. (1990). In this way, it complements legislation "provid[ing] extraterritorial

criminal jurisdiction for acts of international terrorism against U.S. nationals." H.R. Rep. No. 102-1040, at 5; *see also Gamble v. United States*, 587 U.S. 678, 687 (2019) (explaining that "[t]he murder of a U.S. national is an offense to the United States," which is "why the killing of an American abroad is a federal offense that can be prosecuted in our courts, *see* 18 U.S.C. § 2332(a)(1)" as permitted by "customary international law").

To ensure the ATA's efficacy, Congress imbued the statute with broad jurisdictional and venue provisions, 18 U.S.C. §§ 2334(a), 2338, designed to "extend[] the same jurisdictional structure that undergirds the reach of American criminal law to the civil remedies that it defines," S. Rep. No. 102-342, at 45. Congress also sharply limited *forum non conveniens* arguments, 18 U.S.C. § 2334(d), to ensure that Americans harmed by terrorism can pursue "broad remedies in a procedurally privileged U.S. forum," *Goldberg v. UBS AG*, 660 F. Supp. 2d 410, 422 (E.D.N.Y. 2009). Those features account for "the unusual mobility of terrorists, their organizations, and their financiers." H.R. Rep. No. 102-1040, at 6. They also reflect Congress's view that "vital interests in protecting U.S. nationals and combating terrorism are linked directly to the assertion of jurisdiction over ATA civil claims." Amicus Br. of U.S. Senators Charles E. Grassley *et al.* at 7, *Sokolow v. Palestine Liberation Org.*, No. 16-1071 (U.S. Apr. 6, 2017), 2017 WL 1291691 ("Grassley Br.").

Over the years, Congress has repeatedly re-emphasized the need for U.S. courts to maintain jurisdiction over terrorism-related offenses that occur abroad. For example, when Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),

Pub. L. No. 104-132, 110 Stat. 1214, it found that international terrorism "threatens the vital interests of the United States," and that a legislative response was authorized by Congress's "power to punish crimes against the law of nations and to carry out the treaty obligations of the United States," *id*. § 301(a)(1), (2). Congress also found that "international terrorism affects the interstate and foreign commerce of the United States by harming international trade and market stability, and limiting international travel by United States citizens as well as foreign visitors to the United States." *Id*. § 301(a)(4).

Later, when Congress enacted JASTA, it found that entities that "contribute material support or resources" to terrorists that attack Americans "necessarily direct their conduct at the United States, and should reasonably anticipate being brought to court" here. JASTA § 2(a)(6). JASTA's "purpose" is "to provide civil litigants with the broadest possible basis, consistent with the Constitution of the United States, to seek relief against persons, entities, and foreign countries, *wherever acting and wherever they may be found*, that have provided material support, directly or indirectly," to foreign terrorists. *Id*. § 2(b) (emphasis added).

Even more recently, Congress reiterated that "civil lawsuits against those who support, aid and abet, and provide material support for international terrorism serve the national security interests of the United States by deterring the sponsorship of terrorism and by advancing interests of justice, transparency, and accountability." Sudan Claims Resolution Act, Pub. L. No. 116-260, div. FF, tit. XVII, § 1706(a)(1), 134 Stat. 3294 (2020).

Those findings confirm "Congress's considered judgment" that personal "jurisdiction over ATA claims is appropriate and consistent with the Due Process Clause." Grassley Br. 4.

C. The ATA, as Enacted in 1992, Provides a Constitutional Basis for Personal Jurisdiction in This Case.

The foregoing principles establish that the Second Circuit erred when it found that the district court lacked jurisdiction and dismissed the case in 2016. *Waldman v. Palestine Liberation Org.,* 835 F.3d 817 (2d Cir. 2016). That erroneous dismissal prompted Congress to enact two statutes to undergird jurisdiction in this case. As amici now show, those statutes were unnecessary because the ATA provides a constitutional basis for jurisdiction for this case.

The ATA was enacted as section 1003 of the Federal Courts Administration Act of 1992, Pub. L. 102-572, 108 Stat. 4506, 18 U.S.C. §§ 2331-35, by adding civil remedies to the existing criminal prohibitions in what is now section 2332. Sections 2333 and 2334 provide a statutory basis for the claims in this case. Respondents' defense, accepted by the court of appeals in *Waldman,* is that the statute violated the Fifth Amendment because, contrary to the ruling of the district court, general jurisdiction does not apply here. 835 F.3d at 325-26.

The appeals court then turned to specific jurisdiction. Relying on existing circuit precedent, it equated the reach of the district courts under the Fifth Amendment to the limits applicable to state courts under the Fourteenth, except that the applicable conduct of the

defendants can be with the entire United States, instead of just the forum state. *Waldman*, 835 F.3d at 330, 335, 342. However, as explained *supra*, the Fifth Amendment imposes no limit on what Congress may provide for federal courts, comparable to what the Fourteenth Amendment has for state courts. Because sections 2333 and 2334 clearly allowed the district court to exercise personal jurisdiction over respondents, the contrary rulings of the Second Circuit must be reversed.

The Court should decide this case on this basis for several reasons. First, it will decide the issue expressly left open in *Bristol-Myers Squibb,* 582 U.S. at 269, and hold that Congress is not limited by the Fifth Amendment the same way that States are limited by the Fourteenth. It is simply untenable for the scope of Congress's power to exist in a state of limbo or uncertainty. The legislature and litigants alike require clear guidance about the scope of congressional authority.

Second, deciding the case by holding that consent-based jurisdiction is unnecessary here is a far better use of judicial resources than merely considering the particulars of the PSJVTA—a statute that applies only to these defendants. A broader ruling would obviate the need for Congress to enact similar provisions for claims against terrorists other than these respondents, or claims arising under other causes of action. Indeed, a ruling on the ground urged by amici would apply to any claim under the ATA, just as Congress intended when it enacted the statute. It would also apply to other statutes in which Congress has provided for jurisdiction in U.S. courts for claims based on injuries to the United States or to the person or property of U.S. nationals.

This final point is critical. Congress has repeatedly sought to protect U.S. nationals and U.S. property from the persistent threat of international terrorism—including through civil tort law. Grievously injured U.S. nationals have availed themselves of that remedy, only to face years of unnecessary litigation over personal jurisdiction. Congress has *twice* intervened on the victims' behalf—but the Second Circuit's flawed approach to personal jurisdiction has stymied those efforts, leading to a massive waste of legislative, judicial, and party resources. This ongoing uncertainty undermines Congress's power to protect Americans, making it more difficult for our people to travel the world in safety. Enough is enough. The Court should make clear, once and for all, that Congress's power to protect Americans includes the power to subject those who would harm us to civil jurisdiction in the United States.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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