Nos. 24-20 & 24-151

In the
Supreme Court of the United States

MIRIAM FULD, ET AL., PETITIONERS,

v.

PALESTINE LIBERATION ORGANIZATION, ET AL.

UNITED STATES, PETITIONER,

v.

PALESTINE LIBERATION ORGANIZATION, ET AL.

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

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BRIEF OF PROFESSOR STEPHEN E. SACHS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8 of the Constitution of the United States provides in relevant part:

> "The Congress shall have Power[:] * * *
>
> To regulate Commerce with foreign Nations * * *;
>
> To define and punish * * * Offences against the Law of Nations; * * * —And
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Harvard Law School provides financial support for activities related to faculty members' research and scholarship, which may help defray the costs of preparing this brief. (The Law School is not a signatory to this brief, and the views expressed here are solely those of the *amicus curiae*.) Otherwise, no person or entity other than the *amicus curiae* has made a monetary contribution intended to fund the preparation or submission of this brief.

> United States, or in any Department or Officer thereof."

Article III, Section 2, Clause 1 of the Constitution provides in relevant part:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under * * * the Laws of the United States, * * * [and] to Controversies * * * between a State, or the Citizens thereof, and foreign States, Citizens or Subjects * * * ."

Article IV, Section 1, of the Constitution provides:

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

The Fifth Amendment to the Constitution provides in relevant part:

> "No person shall * * * be deprived of life, liberty, or property, without due process of law * * * ."

Section One of the Fourteenth Amendment to the Constitution provides in relevant part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law * * * ."

Section 2334(a) of Title 18, United States Code, provides:

> "(a) GENERAL VENUE.—
>
> Any civil action under section 2333 of this title against any person may be instituted in the district court of the United States for any district where any plaintiff resides or where any defendant resides or is served, or has an agent. Process in such a civil action may be served in any district where the defendant resides, is found, or has an agent."

Other relevant statutory provisions have been set out by the petitioners.

SUMMARY OF ARGUMENT

The temptation in this case is to treat the United States as if it were simply one big state. The State of Nevada, even were it the size of the entire United States, still could not call to answer every defendant who attacked a Nevadan abroad. See *Walden* v. *Fiore*, 571 U.S. 277, 288–89 (2014). As this limit is enforced under the Fourteenth Amendment's Due Process Clause, and as the Fifth Amendment has a Due Process Clause too, it is tempting to conclude that the United States labors under precisely the same constraint, with the only difference being one of size.

This temptation is to be resisted, for the United States is not simply one big state. True, neither the United States nor any state may deprive a person of life, liberty, or property without due process of law. But the United States and a single state differ greatly

with respect to the external limits on their sovereign authority—that is, with respect to the *principles* the Due Process Clauses enforce and for which those Clauses have "become a refuge." *Mallory* v. *Norfolk S. Ry. Co.*, 143 S. Ct. 2028, 2050 (2023) (Alito, J., concurring in part and concurring in the judgment). State laws are restricted to each state's sphere of authority, serving as "rules of decision" only "in cases where they apply." 28 U.S.C. § 1652 (2018). Yet Acts of Congress can be "the supreme Law of the Land," U.S. Const. art. VI, cl. 2, overriding contrary doctrines and extending beyond our borders to protect Americans abroad.

This Court should not bind the United States with the fetters worn by individual states simply because the latter have become so familiar—especially when neither the original Constitution nor this Court's precedents require it. As Justice Story recognized, Congress could have "a subject of England, or France, or Russia * * * summoned from the other end of the globe to obey our process, and submit to the judgment of our courts"; such a statute might violate "principles of public law, public convenience, and immutable justice," but a federal court "would certainly be bound to follow it, and proceed upon the law." *Picquet* v. *Swan*, 19 F. Cas. 609, 613–15 (CCD Mass 1828) (No. 11,134). If Congress had such powers at the Founding, it never lost them since. So long as Congress's power to call foreigners to answer is at least as broad as its power to regulate their conduct abroad, the respondents here were obliged to appear in the district court, and the plaintiffs' claims must be allowed to proceed.

1. As an original matter, the Fifth Amendment did not place territorial restrictions on Congress's powers to call defendants to answer. Rules of personal jurisdiction predated the Due Process Clause; they were rules of general and international law, which states might override within their own courts but which would be enforced by the courts of other states, as well as by federal courts in diversity jurisdiction or under the Full Faith and Credit Clause. To the extent the issue arose in the early Republic, there was no question but that Congress could supplant these rules with rules of its own design, just as it could use other enumerated powers to supplant other rules of international law. See generally Sachs, *The Unlimited Jurisdiction of the Federal Courts*, 106 Va. L. Rev. 1703 (2020). After the Civil War, the Fourteenth Amendment enabled the better enforcement of jurisdictional limits on state courts via federal-question review: to deprive someone of life, liberty, or property through a jurisdictionless judgment was to deprive them of these things without due process of law. See *Pennoyer* v. *Neff*, 95 U.S. 714, 732–33 (1878); see generally Sachs, Pennoyer *Was Right*, 95 Tex. L. Rev. 1249 (2017). That had no impact on federal courts, however, which already had to comply with the rules as set out by Congress and as understood by this Court.

2. Congress has not lost these powers since. While the era of *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), identified various "territorial limitations on the power of the respective States," *Hanson* v. *Denckla*, 357 U.S. 235, 251 (1958), this Court has never reflected those limitations back onto the United

States as a whole. Instead, different principles of sovereign authority continue to apply via due process to the federal government and to the states. Nor would reversing this approach be harmless. Pretending that the United States is simply one big state for personal-jurisdiction purposes would limit the federal government in negotiating treaties and conducting foreign relations. It would also interfere with federal laws on antitrust, securities regulation, bankruptcy, and child custody. The Court should not pretermit the political branches' consideration of these issues by deciding the case on a mistaken due process claim.

3. To decide the case before it, this Court need not determine the full scope of Congress's jurisdictional powers. The respondents here were served with process within the United States in a manner explicitly authorized by statute, under clear Article I authority, with subsequent enactments making it as clear as Congress knows how that such service is to be held effective. The Court may uphold such service while leaving open the outer limits of what the Fifth Amendment might permit, just as it has for the last two hundred years. It also need not take any view of the parties' complex arguments about formal and informal consent to jurisdiction, under either the Fourteenth Amendment or the Fifth. But by the same token, the Court should not *rule out* the possibility that Justice Story was correct. As the Second Circuit's judgment can only be right if Justice Story was wrong, the Court should reverse that judgment and remand.

ARGUMENT

I. As an original matter, the Fifth Amendment did not impose territorial restrictions on Congress's power over federal personal jurisdiction.

Showing that the Fifth Amendment did *not* stop Congress from extending personal jurisdiction abroad is, as the Solicitor General notes, "an exercise in proving a negative," U.S. Br. 47 (quoting Sachs, *Unlimited Jurisdiction*, *supra*, at 1710–11). For a long while Congress did not try. The Judiciary Act required personal service in the district where the defendant lived or was found for jurisdiction *in personam*, while *in rem* jurisdiction traditionally required that the property attached be located or brought within the forum. See ch. 20, § 11, 1 Stat. 73, 79 (1789); J. Story, Commentaries on the Conflict of Laws §§ 549–550, at 461–63 (Boston, Hilliard, Gray & Co. 1834). So while the facts of Founding-era federal cases often addressed events in distant climes, see Pet. Br. 17–19, subconstitutional law typically required the target of the litigation to be present in the United States.

Even without examples of Congress asserting jurisdiction abroad, however, the history makes clear that it had power to do so. Courts prove negatives all the time, as they have to; otherwise they might be unable to reject a claimed due process right to buy spray paint, see *Nat'l Paint & Coatings Ass'n* v. *City of Chicago*, 45 F.3d 1124, 1129–30 (CA7), *cert. denied*, 515 U.S. 1143 (1995), simply because the Founders never restricted its sale. What matters in assessing, say, a

due process right to chew gum is not whether the Founders "*did* ban chewing gum * * * , but whether the American legal system thought they *could*." Sachs, *Dobbs and the Originalists*, 47 Harv. J.L. & Pub. Pol'y 539, 555 (2024). And in the early Republic, when the most authoritative figures in the American legal system discussed Congress's power over personal jurisdiction, they consistently emphasized what Congress could do—even to the point of calling a defendant "from the other end of the globe." *Picquet*, 19 F. Cas. at 613 (Story, J.).

A. Congress's broad power over personal jurisdiction followed ineluctably from the Founders' understanding of the field. Personal jurisdiction at the Founding was a topic not of constitutional law, but of general and international law, enforced by both state and federal courts.

Long before the Due Process Clauses, rules of personal jurisdiction were already enforced among the states, derived from law-of-nations principles that defined each state's sovereign authority. Under these principles, if any government sought to exercise "a jurisdiction which, according to the law of nations, its sovereign could not confer," that government's own courts might enforce the resulting judgments, but other courts would not. See *Rose* v. *Himely*, 8 U.S. (4 Cranch) 241, 276–77 (1808) (Marshall, C.J.). State courts thus refused to recognize or enforce judgments from other states that exceeded jurisdictional limits. See, *e.g.*, *Jenkins* v. *Putnam*, 1 S.C.L. (1 Bay) 8, 9–10 (1784) (per curiam); *Kibbe* v. *Kibbe*, 1 Kirby 119, 126 (Conn Super Ct 1786); *Phelps* v. *Holker*, 1 U.S. (1

Dall.) 261, 264 (Pa. 1788) (opinion of M'Kean, C.J.); Sachs, *Pennoyer Was Right*, *supra*, at 1269–73.

The same rules applied after Ratification. Early state cases applying the Full Faith and Credit Clause assessed other states' judgments based on the same personal jurisdiction principles that had applied when they had all been "Free and Independent States." The Declaration of Independence para. 32 (U.S. 1776); see *Bissell* v. *Briggs*, 9 Mass. (9 Tyng) 462, 464–68 (1813); *Kilburn* v. *Woodworth*, 5 Johns. 37, 41 (NY 1809) (per curiam) (citing *Phelps* and *Kibbe*); see generally Sachs, Pennoyer *Was Right*, *supra*, at 1273–78. As this Court made clear in *D'Arcy* v. *Ketchum*, state personal jurisdiction was subject to the "well-established rules of international law, regulating governments foreign to each other." 52 U.S. (11 How.) 165, 174 (1851).

When state legislatures attempted to expand their courts' jurisdiction, their efforts were likewise restricted by international law, for "beyond its own territory" a legislature could "only affect its own subjects or citizens." *Rose*, 8 U.S. at 279. In *Flower* v. *Parker*, Justice Story on circuit refused to allow a Massachusetts personal-jurisdiction statute to bind an absent citizen of Louisiana, as "the legislature of a state can bind no more than the persons and property within its territorial jurisdiction." 9 F. Cas. 323, 324 (CCD Mass 1823) (No. 4891). The Court in *D'Arcy* similarly disregarded as *ultra vires* a New York statute asserting jurisdiction over other states' citizens by process served on their local business partners. As the Court explained, such a judgment would be void without the defendant's consent or personal service in New York,

for under "the international law as it existed among the States in 1790[,] * * * neither the legislative jurisdiction, nor that of courts of justice, had binding force." 52 U.S. at 176.

The Fifth Amendment played no significant role in these doctrines. Both state and federal courts consistently understood legislative and judicial jurisdiction as the product of international principles, not of the Due Process Clause or its state-constitutional equivalents. If a party sought the recognition and enforcement of a state judgment in a federal court (as in *Flower* or *D'Arcy*), the international-law inquiry would cover the waterfront: either the state judgment complied with the rules, in which case recognizing it posed no constitutional problem, or it did not so comply, in which case recognition would be refused on ordinary subconstitutional grounds. The Fifth Amendment simply never came into it.

The same was true of state constitutions. At the same time that Massachusetts refused to enforce a New Hampshire judgment obtained by exorbitant means (albeit means used in "many of the States, of which *this* is one," *Bartlet* v. *Knight*, 1 Mass. 401, 410 (1805) (opinion of Sedgwick, J.)), both states had "law of the land" clauses in their constitutions, see Mass. Const. of 1780, pt. 1, art. XII; N.H. Const. of 1784, pt. 1, art. 15, but neither invoked these clauses to restrain the reach of their courts. Likewise, New York's constitution at the time of *D'Arcy* contained an exact replica of the Fifth Amendment's Due Process Clause, see N.Y. Const. of 1846, art. I, § 6, but not a single Justice brought it up. Due process was simply not the issue.

B. To the extent that jurisdictional rules were derived from principles of international law rather than of due process, Congress might have been presumed to respect them, but it could also choose to override them. See generally *Murray* v. The *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); see also *The Marianna Flora*, 24 U.S. (11 Wheat.) 1, 39–40 (1826); *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815). And in the rare cases in which jurists directly discussed the issue, they consistently described Congress's power over federal personal jurisdiction in expansive terms.

In *Mills* v. *Duryee*, for example, Justice Johnson worried that a federal statute, if misconstrued, might enforce state judgments obtained through jurisdictionally dubious means. 11 U.S. (7 Cranch) 481, 486 (1813) (Johnson, J., dissenting). He described as an "eternal principle[] of justice" the rule that states may not call to answer "persons not owing them allegiance or * * * found within their limits," a rule "Courts of justice never can dispense with *but when compelled by positive statute*." *Id.* (emphasis added). And he made clear that "[i]f a different decision were necessary to give effect to [the Full Faith and Credit Clause], and the act of 26th May, 1790, I should not hesitate to yield to that necessity." *Id.*

Justice Story took the same approach in *Picquet*. There Congress had incorporated certain state procedures by reference—including, according to the plaintiff, state laws playing jurisdictional tricks that international law would otherwise forbid, such as basing *in personam* jurisdiction on an attachment of minor property. See 19 F. Cas. at 609–10, 614. Justice Story

acknowledged that these state laws, though in tension with "the law of nations," *id*. at 611, might be valid within the state's own tribunals: "it is not for us to say, that such legislation may not be rightful, and bind the state courts." *Id*. at 614. But even as he denounced the notion that "an alien, who has never been within the United States," might "be bound thereby to appear," Justice Story made one thing clear: "If congress had prescribed such a rule, *the court would certainly be bound to follow it, and proceed upon the law*." *Id*. at 615 (emphasis added).

Despite the breadth of the plaintiff's theory, that "a subject of England, or France, or Russia, having a controversy with one of our citizens, may be summoned from the other end of the globe to obey our process, and submit to the judgment of our courts," *id*. at 613—and despite finding it inconsistent with "public law, public convenience, and immutable justice," *id.* at 614—Justice Story did not suggest that it was in any tension with the Fifth Amendment, though "now was the time to say so." Sachs, *Unlimited Jurisdiction*, *supra*, at 1716. Rather, he argued only that "[s]uch an intention * * * ought not to be presumed" by federal courts without "irresistible proof" that "congress have, in an unambiguous manner, made it imperative upon them," *id*. at 613–14. The sole question, as Justice Story saw it, was "whether such a rule ought to be inferred from so general a legislation as congress has adopted"—for if so, he would "proceed upon the law." *Id*. at 615; see Sachs, *Unlimited Jurisdiction*, *supra*, at 1714–16.

This Court soon endorsed Justice Story's reasoning "as having great force." *Toland* v. *Sprague*, 37 U.S. (12

Pet.) 300, 328 (1838). Here a plaintiff again tried to incorporate state jurisdictional shenanigans by reference, *id.* at 327; again the Court concluded that the federal statute forbade that, *id.* at 328; and again it reasoned that Congress might have, but under the circumstances had not, "acted under the idea that the process of the circuit courts could reach persons in a foreign jurisdiction," *id.* at 330. Indeed, three Justices dissented on this very point, invoking the support of a number of circuit courts which read the statute to enable jurisdiction over a defendant "not an inhabitant of the United States." See *id.* at 336–37 (Taney, C.J., dissenting); *id.* at 337 (Baldwin, J., dissenting) (stating that he "would go further as to the authority of the courts of the United States"); *id.* at 337–38 (Wayne, J., dissenting); cf. *id.* at 338 (opinion of Catron, J.) (expressing uncertainty on the point).

As an international matter, of course, as Justice Story had written in *Flower*, "[n]o legislature can compel any persons, beyond its own territory, to become parties to any suits instituted in its domestic tribunals." 9 F. Cas. at 324–25. But "[i]f congress had prescribed such a rule," *Picquet*, 19 F. Cas. at 615, it could override any international law to the contrary. A *federal* jurisdictional statute would be binding in both federal and state courts, for Acts of Congress were the "supreme Law of the Land," with "the Judges in every State * * * bound thereby." U.S. Const. art. VI, cl 2.

Additionally, Congress had enumerated power to "make all Laws which shall be necessary and proper for carrying into Execution" not only its own legislative powers, but also "all other Powers vested by this

Constitution in the Government of the United States, or in any Department or Officer thereof." *Id*. art. I, § 8, cl. 18. That included carrying into execution the Article III heads of jurisdiction, which were among of the "Powers vested" in the judicial department. And one way to carry into execution the power to hear controversies between citizens and aliens might be for "a subject of England, or France, or Russia, having a controversy with one of our citizens, [to] be summoned from the other end of the globe to obey our process, and submit to the judgment of our courts." *Picquet*, 19 F. Cas. at 613. As Justice Story later put it, "in all cases, where the judicial power of the United States is to be exercised, it is for congress alone to furnish the rules of proceeding, to *direct the process*, [and] to declare [its] nature and effect." 3 Joseph Story, Commentaries on the Constitution of the United States § 1752, at 625–26 (Boston, Hilliard, Gray & Co. 1833) (emphasis added).

C. The Fourteenth Amendment did nothing to diminish Congress's power over personal jurisdiction. Rather than altering the jurisdictional rules or reassigning the authority to change them, the Amendment provided a new means for federal courts to enforce the preexisting limits on state sovereign authority.

When the Fourteenth Amendment was written, there would have been no reason to assume that the phrase "due process of law" imposed any new rules of personal jurisdiction. Only a few state courts had held jurisdictional rules to have *any* state-constitutional force; only one had phrased this holding in terms of due process, see *Beard* v. *Beard*, 21 Ind. 321, 324

(1863), while the majority had adhered to the traditional approach described above. See Sachs, *Unlimited Jurisdiction*, *supra*, at 1723 & nn.123–125.

But while personal jurisdiction had never been a subfield of due process, there was still an important connection between them. A judgment without jurisdiction was a "nullity," *Kempe's Lessee* v. *Kennedy*, 9 U.S. (5 Cranch) 173, 184 (1809) (Marshall, C.J.) (summarizing argument of counsel), or a piece of "waste paper," *Voorhees* v. *Jackson*, 35 U.S. (10 Pet.) 449, 475 (1836); and a deprivation of life, liberty, or property built on no better foundation than a piece of "waste paper" was a deprivation without due process of law. If a state court lacked personal jurisdiction over the defendant, then executing its judgment against him would violate the new Amendment's guarantee.

So while the Fourteenth Amendment did not alter the rules of personal jurisdiction, it did create a new route to appellate review of a state's compliance with those rules. Prior to the Amendment, an exorbitant state-court judgment could not be appealed to this Court, as violations of general or international law did not raise any federal question. *N.Y. Life Ins. Co.* v. *Hendren*, 92 U.S. 286, 286–87 (1876). As *Pennoyer* put it, "there was no mode of directly reviewing such judgment or impeaching its validity within the State where rendered; and * * * it could be called in question only when its enforcement was elsewhere attempted." 95 U.S. at 732. But with the Amendment in place, such judgments could be "directly questioned, and their enforcement in the State resisted, on the ground that

proceedings in a court of justice to determine the personal rights and obligations of parties *over whom that court has no jurisdiction* do not constitute due process of law." *Id.* at 733 (emphasis added). In other words, the Fourteenth Amendment made every state personal-jurisdiction ruling a ground for immediate federal-question review, measuring the state's action against the limits of its sovereign authority just as before. See *Belcher* v. *Chambers*, 53 Cal. 635, 643 (1879); *Elasser* v. *Haines*, 18 A. 1095, 1097 (NJ 1889); Sachs, *Pennoyer Was Right*, *supra*, at 1287–1313.

As this Court has explained in the context of jurisdiction to tax, the phrase "due process" in the Fourteenth Amendment does not encode some secret list of jurisdictional rules, to be applied to the states and the federal government both. Rather, it simply "requires that the limits of jurisdiction," *whatever they are*,

> shall not be transgressed. That requirement leaves the limits of jurisdiction to be ascertained in each case with appropriate regard to the distinct spheres of activity of state and nation. The limits of state power are defined in view of the relation of the states to each other in the Federal Union. The bond of the Constitution qualifies their jurisdiction.

Brunet v. *Brooks*, 288 U.S. 378, 401 (1933).

The Fourteenth Amendment thus did nothing to diminish Congress's power over the personal jurisdiction of the federal courts. The Amendment acts as a restraint on the states, not on the federal government. And it imposes no particular design on the sovereign

authority of either the states or the federal government, but merely enforces the limits on the states' sovereign authority, taking those limits as it finds them.

So the Fifth Amendment likewise plays no significant role in federal jurisdictional doctrine. If a federal court renders a judgment under a personal-jurisdiction statute within Congress's enumerated powers, then it is acting within the scope of the sovereign authority conferred on the United States, and there is no Fifth Amendment personal-jurisdiction problem to be found. And if a federal court renders a judgment that goes beyond its statutory authority, or if it acts under a personal-jurisdiction statute that Congress lacked enumerated power to pass, then the judgment would be reversed on statutory or substantive constitutional grounds, and again there is no role for Fifth Amendment personal-jurisdiction doctrines to play. To the extent that Congress can act within the scope of its sovereign authority to expand the jurisdiction of the federal courts, neither the Fifth Amendment nor the Fourteenth would interfere.

II. Congress has not lost its power to call foreign defendants to answer.

Nothing that has happened since the adoption of the Fourteenth Amendment has deprived Congress of its Founding-era power to direct judicial process abroad or to call foreign defendants to answer. In particular, this power has not been constrained by the developments in Fourteenth Amendment jurisprudence under *International Shoe Co.* v. *Washington*, 326 U.S.

310 (1945), and its progeny. Such cases explicitly excepted the federal government from their scope, and this Court's due process precedents continue to treat the federal government differently from the states. By contrast, reversing that approach today and treating the United States simply as one big state would starkly alter the powers of the political branches, disrupting multiple statutory regimes.

A. In its post-*International Shoe* cases, this Court repeatedly left open the question of Fifth Amendment limits on the federal government—most recently in *Bristol-Myers Squibb Co.* v. *Superior Court*, 582 U.S. 255, 269 (2017). That was entirely appropriate, because the reasoning of *International Shoe* and its progeny applies differently to the federal courts than to those of the states.

The *International Shoe* Court reframed the preexisting due process inquiry to require that an *in personam* defendant who was "not present within the territory of the forum" must "have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." 326 U.S. at 316 (internal quotation marks omitted). Yet what *counts* as fair play, according to those traditional notions, itself depends on the scope of a state's sovereign authority. That is why *International Shoe* required "such contacts * * * with the state of the forum *as make it reasonable, in the context of our federal system of government*, to require the [defendant] to defend the particular suit which is brought there." 326 U.S. at 317 (emphasis added); cf. *J. McIntyre Mach., Ltd.* v. *Nicastro*, 564 U.S. 873, 880 (2011)

(opinion of Kennedy, J.) (describing how a defendant might "fall within the State's authority").

What is reasonable, in the context of our federal system of government, may be very different for an individual state of that system than for the federal government itself. This distinction is recognized throughout the Court's due process jurisprudence. For example, this Court has more than once held that states lack power to apply certain prohibitions or penalties to lawful conduct outside their borders, a disability the Fourteenth Amendment's Due Process Clause will enforce. See, *e.g.*, *State Farm Mut. Auto Ins. Co.* v. *Campbell*, 538 U.S. 408, 421 (2003); *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 572 (1996); *N.Y. Life Ins. Co.* v. *Head*, 234 U.S. 149, 161 (1914); *Huntington* v. *Attrill*, 146 U.S. 657, 669 (1892). No matter how broad a power Nevada's constitution might confer, for example, its legislature still cannot decide the speed limits in New Jersey—not because anything in the Constitution says so, but because "[t]he general rules of international comity" continue to govern the several states. *Attrill*, 146 U.S. at 669.

The treatment of the federal government is very different. The United States can and does prohibit conduct outside its borders, so long as it falls within some enumerated power in the Constitution. See, *e.g.*, *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991); *Lauritzen* v. *Larsen*, 345 U.S. 571, 578 (1953). In exercising those powers, moreover, the United States is not always bound to remain within the limits of international law. It might be presumed that Congress adheres to those limits, see *Charming Betsy*, 6

U.S. at 118; but when Congress is explicit, and when it acts within its constitutional powers, those instructions must be adhered to. See *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21–22 (1963). To the extent that courts of appeals have considered due process challenges to extraterritorial federal statutes, they have regarded the scope of federal regulatory authority as far broader than that of any individual state. See, *e.g.*, *United States* v. *Yousef*, 327 F.3d 56, 86, 109 (CA2 2003); *United States* v. *Yunis*, 924 F.2d 1086, 1091 (CADC 1991).

Indeed, both the courts of appeals and the respondents in this case seem to recognize the necessity of distinguishing the scope of federal authority from that of the states. Consider whether the district court would have had jurisdiction in this case if the terrorists whom these defendants rewarded had been targeting Americans in particular—even had they acted out of simple anti-American animus, with no aspiration to influence our government's deliberations or foreign policy. If such attacks aimed at Americans abroad would be treated differently—as both respondents and the courts of appeals seem to envision[2]—then the federal courts are being treated differently as well, for such jurisdiction is unavailable to the states.

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[2] See *Lewis* v. *Mutond*, 62 F.4th 587, 594 (CADC 2023) (accepting, but finding insufficiently pled, a theory that defendants had "specifically targeted the United States" by "singl[ing] out" victims "because they are Americans" (internal quotation marks omitted)); *Waldman* v. *Palestine Liberation Org.*, 835 F.3d 317, 338 (CA2 2016) (distinguishing these facts from "terrorist attacks

For example: had Anthony Walden acted out of simple anti-Nevada animus in detaining the cash of Nevada resident Gina Fiore (perhaps because he considered Las Vegas tawdry), still "no part of [his] course of conduct" would have "occurred in Nevada"; he would still never have "traveled to, conducted activities within, contacted anyone in, or sent anything or anyone to Nevada"; and "direct[ing] his conduct at plaintiffs whom he knew had Nevada connections" would still "not create sufficient contacts" with the State of Nevada, as opposed to residents thereof. *Walden*, 571 U.S. at 288–89. Indeed, *Walden* specifically *rejected* as too expansive a test permitting state-court jurisdiction when a defendant "(1) intentionally targets (2) a known resident of the forum (3) for imposition of an injury (4) to be suffered by the plaintiff while she is residing in the forum state"—let alone while she travels abroad. *Id*. at 289 n.8; cf. *id*. at 288 (distinguishing *Calder* v. *Jones*, 465 U.S. 783 (1984), on the ground that there the "defendants' intentional tort actually occurred *in* California"); *id*. at 290 n.9 (emphasizing the physical, as opposed to virtual, contacts "where the conduct giving rise to this litigation took place").

In other words, if the United States were *really* to be treated as one big state, to be subjected to the *In-*

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* * * specifically targeted against United States citizens"); cf. Br. in Opp. 25 (insisting that "the attacks at issue were random attacks, not aimed at Americans"); Corrected Brief & Special Appendix for Defendants-Appellants in No. 15-3151 (CA2), at 46 (arguing that the record lacked evidence that "the attacks at issue targeted the United States").

ternational Shoe test unmodified, someone who murders Americans abroad specifically because they are Americans (and with no other desire to influence policies in America) is immune from the jurisdiction of American courts. The instinctive reaction to this position by both respondents and the court of appeals is good evidence that it is untenable. Individual states may have only limited powers to punish conduct outside their borders that is lawful where it occurs; but a government authorized to regulate foreign commerce, as well as to "define and punish * * * Offences against the Law of Nations," U.S. Const. art. I, § 8, cl. 10, also has the "incidental or implied powers" to call those who violate those regulations and commit those offenses before its courts. *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 406 (1819).

B. Ignoring the difference in sovereign authority between the United States and each individual state would unduly limit the powers of the political branches.

1. Consider the treaty power. If the United States were to ratify the Lugano Convention, it would be committing to have tort suits heard "in the courts for the place where the harmful event occurred"—something currently forbidden when the defendant lacks contacts there. Compare Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Lugano Convention), art. 5(3), 2007 O.J. (L 339) 5, with *McIntyre*, 564 U.S. 873.

Or if the United States were to ratify the Hague Judgments Convention, which it has already signed,

see HCCH, *Status Table*, Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (updated Sept. 19, 2024), https://www.hcch.net/en/instruments/conventions/status-table/?cid=137, it would be obliged to enforce certain foreign judgments "unless the activities of the defendant in relation to the transaction *clearly* did not constitute a purposeful and substantial connection to that State." Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters art. 5.1(g), July 2, 2019, U.N.T.S. No. 58036 (emphasis added). But if a transaction actually (albeit unclearly) failed to make the necessary connection to the forum state, the treaty's obligations and those of *International Shoe* might conflict. Holding the United States bound by the *International Shoe* standard could render it unable to negotiate, ratify, or comply with such treaties, undermining its efforts to secure reciprocal recognition for American judgments abroad. But if, instead, Fifth Amendment due process simply takes the rules for federal jurisdiction as it finds them, then the political branches retain the power to adjust those rules by treaty.

2. Imposing one-big-state restrictions on federal jurisdictional powers would hamper our foreign relations in other ways as well. In particular cases, for example, Congress might have very good reasons to implement an otherwise objectionable jurisdictional regime. Following the examples of Austria, Belgium, Italy, and Portugal, Congress might choose to employ "retaliatory" personal jurisdiction, subjecting foreign-

ers to our courts whenever Americans in similar circumstances would be subjected to theirs. See Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 Ga. J. Int'l & Compar. L. 1, 15 (1987). This approach might involve the exercise of truly exorbitant jurisdiction, but only when foreign countries were doing the same (and in an effort to get them to stop). But if Congress is bound by a Fifth-Amendment copy of *International Shoe*, then this tool for pursuing foreign relations and protecting Americans from aggressive courts would be lost. The Court should therefore leave any worries about potential foreign retaliation to the judgment of Congress, *contra* U.S. Br. 47–48, rather than preemptively (and blindly) disable the political branches' future conduct of foreign relations.

3. A number of existing federal statutes also assume that the federal government has broader personal-jurisdiction powers than it would have as one big state under *International Shoe*. Federal antitrust law, for example, applies to certain foreign commercial activities with "a direct, substantial, and reasonably foreseeable effect" on American imports, 15 U.S.C. § 6a(1), (1)(A) (2018)—even though "'foreseeability' alone has never been a sufficient benchmark for personal jurisdiction" in state courts under the Fourteenth Amendment. *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 295 (1980). Yet Congress has provided that process in such a suit may be served on a foreign defendant "wherever it may be found" (that is, worldwide), and that venue may be laid "in any district wherein it may be found or transacts business," 15 U.S.C. § 22 (2018), whether or not those business

activities relate to the suit under the standard minimum-contacts test.

Similar language, both as to service and foreseeability, is found in the Securities Exchange Act. See 15 U.S.C. § 78aa(a)–(b) (2018). And federal bankruptcy law enables the bankruptcy court to take jurisdiction of the debtor's property "wherever located" throughout the world, 11 U.S.C. § 541(a) (2018), with worldwide service of process and broad personal jurisdiction, see Fed. R. Bankr. P. 7004(a)(1) (incorporating Fed. R. Civ. P. 4(f), (h)); *id.* 7004(f)—though appellate courts in the thrall of *International Shoe* have restricted the bankruptcy courts' ability to protect that property from foreign interference, see, *e.g.*, In re *Sheehan*, 48 F.4th 513, 520–22 (CA7 2022). Treating the Fifth Amendment as imposing state-level constraints on the United States would interfere with each of these statutory regimes.

Adopting the respondents' theories would also pose difficulties to Congress in regulating child custody cases within the United States. The Parental Kidnaping Prevention Act uses Congress's full-faith-and-credit power to "prescribe * * * the Effect" of state "judicial Proceedings," assigning exclusive jurisdiction in child custody cases to the courts of a single state. 28 U.S.C. § 1738A (2018); U.S. Const. art. IV, § 1. But the state that Congress chose in its statute might not always be the same state that this Court's state-court due process jurisprudence would otherwise choose. See Br. of Professor Stephen E. Sachs as *Amicus Curiae* in No. 16-405, at 20. If the *International Shoe* test is written directly into the Fifth and Fourteenth

Amendments' Due Process Clauses, as if in invisible ink, see Br. in Opp. 2 (arguing that Congress lacks "power to authorize violations of the Due Process Clause" (quoting *Quill Corp*. v. *North Dakota*, 504 U.S. 298, 305 (1992))), then Congress cannot override the Fourteenth Amendment to consolidate child-custody litigation in a single forum. But if the *International Shoe* standard derives instead from more general principles defining the "territorial limitations on the power of the respective States," *Hanson*, 357 U.S. at 251, then Congress might have the power to adjust those limitations in particular cases (such as under the Full Faith and Credit Clause), and its statute would be entirely valid.

In other words, accepting respondents' theories would drag this Court into deeper waters than respondents may realize. There is no reason to bring these various federal powers into doubt.

III. The Court may uphold personal jurisdiction here without determining the full scope of Congress's powers.

For the last two centuries this Court has left open the question of exactly how far Congress may extend the federal courts' personal jurisdiction abroad. It should continue to do so. Because this case may be decided correctly without exploring the outer limits of the Fifth Amendment, the Court should merely hold that the service here was authorized by statute and was constitutionally sufficient for the district court's personal jurisdiction.

A. Section 2334(a) of Title 18 is a nationwide-service provision, enabling jurisdiction-creating "[p]rocess in such a civil action" to "be served in any district where the defendant * * * is found." This language is common to many statutory regimes, see, *e.g.*, 15 U.S.C. § 15(a) (antitrust laws); *id.* § 78aa(a) (securities regulation); 18 U.S.C. § 1965(a) (RICO), and it has been construed to apply to any place where the defendant is "present in the district by its officers and agents carrying on the business of the corporation." *People's Tobacco Co.* v. *Am. Tobacco Co.*, 246 U.S. 79, 84 (1918). Thus, in *Fuld*, service was made at the defendants' office on the Upper East Side; in *Sokolow*, service was made personally to their chief representative in the United States at his home. See *Fuld*, D. Ct. Docs. 8, 9; *Sokolow*, D. Ct. Doc. 2; Pet. App. 239a; Pet. Br. 22. In both cases, the defendants were present in such districts by officers or agents carrying on their business there. They were not "only casually" present, *St. Clair* v. *Cox*, 106 U.S. 350, 357 (1882), nor do they here contest the sufficiency of this service under Civil Rule 4.

In other words, as far as this Court is concerned, defendants were served with process within the territory of the United States, where they were conducting official business, and under a federal law making such service effective. Just as the Fourteenth Amendment recognizes in-state service as a permissible ground for jurisdiction over the individuals served, see *Burnham* v. *Super. Ct.*, 495 U.S. 604 (1990), the Fifth Amendment does not forbid in-United-States service, as explicitly permitted by a federal statute, as a basis for

jurisdiction over the entities these individuals represent. The two subsequent statutes that Congress enacted to fend off contrary court decisions are icing on the cake, making it as clear as humanly possible that the statutory prerequisites to federal personal jurisdiction have been satisfied.

The initial federal statute providing for such service is squarely within Congress's enumerated powers, moreover, and also within any "territorial limitations on the power of" the United States that the Fifth Amendment's Due Process Clause might enforce. *Hanson*, 357 U.S. at 251. Again, jurisdiction over foreign terrorists who injure Americans—as well as over their patrons—is a necessary and proper means of executing Congress's powers to regulate foreign commerce and to define and punish offenses against the law of nations. Congress's *intra*territorial power over foreign commerce likewise enables it to declare that when foreign entities like the defendants are "found" in the United States, having established offices or sent representatives here, those representatives and the employees in those offices are legally capable of receiving process on behalf of the organization.

B. This Court can say as much while reserving the question whether extraterritorial exercises of jurisdiction are *always* within the territorial limitations on Congress's power, even when Congress might lack authority to supply the rule of decision. For example, while Congress might lack enumerated power to rewrite French traffic laws, the Article III courts have judicial power to hear a diversity suit by an American against a Frenchman over an ordinary car accident on

the streets of Paris. Whether sending a summons to France and calling the Frenchman to appear in a federal court is necessary and proper to carrying that grant of jurisdiction into execution (or, indeed, within the territorial limitations on the power of the United States) is a question for another day—and one the Court should explicitly reserve.

The Court can also avoid addressing any other sorts of limits the Fifth Amendment might impose. For example, even a Congress that summons defendants from the other end of the globe might still have to afford them adequate notice, see *Mullane* v. *Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950), and perhaps could not deprive them of their day in court by siting the litigation in a deliberately inconvenient place (say, Adak, the furthest settlement of the Aleutian islands, see *Bd. of Trs., Sheet Metal Workers' Nat'l Pension Fund* v. *Elite Erectors, Inc.*, 212 F.3d 1031, 1036 (CA7 2000)). But there is no question that the respondents here received adequate notice under *Mullane*, and the Manhattan courthouses of the Southern District of New York are only a convenient subway ride away from their permanent office on East 65th Street. Whatever the outer limits of Fifth Amendment due process might be, they are not implicated here.

Nor need the Court reach any fraught issues of implied consent. Because Congress framed its more recent enactments in such terms, the parties have debated at length whether the United States (or, indeed, an individual state) may declare that a defendant's engaging in certain activities within its borders, or re-

warding attacks on its residents abroad, will constitute consent to its personal jurisdiction. See Pet. Br. 33–46; U.S. Br. 22–30; Br. in Opp. 8–21. Such declarations raise the question whether any constitutional difference exists between a defendant's formal and informal consent, if both are equally knowing and voluntary. As there are a "variety" of means of obtaining a defendant's consent, *Mallory*, 143 S. Ct. at 2044 (opinion of Gorsuch, J.); see *Ins. Corp. of Ir.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982); compare *Hess* v. *Pawloski*, 274 U.S. 352, 356–57 (1927), with *Shaffer* v. *Heitner*, 433 U.S. 186, 216 (1977), and *Daimler AG* v. *Bauman*, 571 U.S. 117, 135 n.13, 138 n.18 (2014), some of which are more permissible than others for the states to employ, see Sachs, *Dormant Commerce and Corporate Jurisdiction*, 2023 Sup. Ct. Rev. 213, exploring these questions may open up more complex issues better left for other cases.

Instead, the simpler path is to recognize that the Due Process Clauses indirectly enforce more general limitations on sovereign authority, that the spheres of sovereign authority of the United States and of the several states are not the same, and that the Fifth Amendment entails different limits on Congress and the federal courts than the Fourteenth Amendment imposes on state legislatures and courts. As this case falls squarely within the extraterritorial powers of Congress to regulate, and thus within the "territorial limitations on [its] power," *Hanson*, 357 U.S. at 251, it also falls within its incidental and extraterritorial powers to call defendants to answer for violating those very regulations. The Court need say no more.

CONCLUSION

The judgment of the United States Court of Appeals for the Second Circuit should be reversed and the case remanded.

Respectfully submitted,

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