No. 24-20

IN THE

Supreme Court of the United States

MIRIAM FULD, ET AL., PETITIONERS,

v.

PALESTINE LIBERATION ORGANIZATION, ET AL.

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

BRIEF FOR THE U.S. HOUSE OF REPRESENTATIVES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The U.S. House of Representatives (House)[2] has a compelling institutional interest in preserving its constitutional authority to enforce the laws it enacts beyond U.S. borders. Congress has repeatedly exercised that authority to protect American citizens from terrorism while they are overseas. In the Anti-Terrorism Act of 1992 (ATA), Congress provided a civil remedy to any U.S. national injured by an act of international terrorism. 18 U.S.C. § 2333(a). But lower courts substantially curtailed the impact of the statute years ago by concluding that they lacked personal jurisdiction over Respondents, the Palestinian Authority (PA) and the Palestine Liberation Organization (PLO), and other ATA defendants.

Congress responded on a bipartisan basis. First, it enacted the Anti-Terrorism Clarification Act of 2018 (ATCA), Pub. L. No. 115-253, 132 Stat. 3183. When that proved ineffective based on subsequent lower court decisions, Congress passed the statute at issue here: the Promoting Security and Justice for Victims of

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[1] Consistent with Supreme Court Rule 37.6, the House states that no counsel for a party authored this brief in whole or in part and that no person or entity other than the House or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] The House's Bipartisan Legal Advisory Group (BLAG) unanimously authorized the filing of this *amicus* brief. BLAG comprises the Honorable Mike Johnson, Speaker of the House, the Honorable Steve Scalise, Majority Leader, the Honorable Tom Emmer, Majority Whip, the Honorable Hakeem Jeffries, Minority Leader, and the Honorable Katherine Clark, Minority Whip, and it "speaks for, and articulates the institutional position of, the House in all litigation matters." Rule II.8(b), Rules of the U.S. House of Representatives, 119th Cong. (2025), https://perma.cc/6WM7-5HHV.

Terrorism Act of 2019 (PSJVTA), Pub. L. No. 116-94, div. J, tit. IX, § 903, 133 Stat. 2534, 3082-85 (codified at 18 U.S.C. § 2334(e)). The PSJVTA expressly provides federal courts with personal jurisdiction over defendants in ATA cases under specific circumstances. In particular, Congress intended to give federal courts personal jurisdiction over Respondents in cases like this. But the court below frustrated Congress's efforts, concluding that the PSJVTA violates the Fifth Amendment's Due Process Clause. *See* Pet. App. 6a.

In deciding this case, the Court will either restore the ATA as an important tool in the fight against international terrorism or gut it. But the ramifications will go well beyond that law. The Court's decision here will affect Congress's ability to enforce *any* federal statute beyond the borders of the United States. Most importantly, if the Second Circuit's decision is affirmed, Congress's authority to legislate extraterritorially to advance our nation's interests will be substantially diminished, with consequences rippling throughout the U.S. Code.

SUMMARY OF THE ARGUMENT

Congress has broad constitutional authority to pass laws that apply outside the United States. Federal courts have the corresponding authority to decide disputes under those laws (including when Congress expressly empowers them with such authority, as it did here). The Fifth Amendment's Due Process Clause is no obstacle: it does not constrain Congress's ability to subject foreign defendants to the jurisdiction of federal courts. In holding the PSJVTA facially unconstitutional, the decision below wrongly concluded that it does, effectively treating Congress as if it were a state legislature.

But Congress's legislative authority is meaningfully different. Congress, unlike a state legislature, has the constitutional authority to apply its laws extra-territorially and regularly does so in a wide variety of areas. Here, for example, Congress enacted the ATA to combat international terrorism and protect Americans around the globe. However, the court below, by holding that it could not exercise personal jurisdiction over Respondents because they lack certain contacts with the United States (killing Americans is not enough), eviscerated the statute. If this Court endorses that view here, the ATA would not be the only casualty. Affirming the Second Circuit would impede Congress's ability to effectively legislate extraterritorially in any context.

This Court should not take that step because the decision below rests on a fundamental flaw: that the Fifth Amendment's Due Process Clause constrains federal courts' ability to exercise personal jurisdiction in the same way the Fourteenth Amendment constrains state courts' ability to do so. To begin, importing personal jurisdiction restrictions from the Fourteenth Amendment into the Fifth Amendment finds no support in the original meaning of the Fifth Amendment's Due Process Clause. Rather, as understood by Americans around the time of ratification, the Fifth Amendment did not limit Congress's authority to subject foreign defendants to federal court jurisdiction. This interpretation is confirmed by early Congressional practice and judicial precedent.

It is also consistent with our nation's broader constitutional structure. Under our constitutional framework, one state may not intrude upon the sovereignty of a sister state by attempting to apply its laws there. The Fourteenth Amendment's personal-

jurisdiction restrictions thus promote a core constitutional principle—interstate federalism. The Fifth Amendment, by contrast, has nothing to do with interstate federalism. Congress, unlike a state, has sweeping authority to legislate abroad, and the Constitution leaves to Congress (and the President) how to manage U.S. relations with other countries. Neither the constitutional text nor the broader constitutional structure supports applying the Fourteenth Amendment's personal-jurisdiction restrictions to the Fifth Amendment.

Nor does the PSJVTA raise any separation-of-powers concerns. The statute simply provides a new legal standard for courts to apply. In no way does it usurp the judicial function by dictating the outcomes of cases.

The Court should reverse the court below and hold that the PSJVTA is constitutional.

ARGUMENT

I. Congress may pass laws that apply to foreign conduct, but those laws are ineffective if courts lack personal jurisdiction over foreign actors

A. Congress has the constitutional authority to legislate beyond the borders of the United States. *See, e.g.*, U.S. Const. art. 1, § 8, cl. 3 (granting Congress the power to "regulate Commerce with foreign Nations"); *id.* cl. 10 (granting Congress the power to "define and punish ... Offences against the Law of Nations"); *id.* cl. 18 (granting Congress the power to "make all Laws which shall be necessary and proper for carrying into Execution … all other Powers vested by this Constitution in the Government of the United States," which includes the power to implement treaties). For

decades, this Court has recognized Congress's authority, when it makes its intent clear, to "enforce its laws beyond the territorial boundaries of the United States." *See EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991).

Congress uses this constitutional authority not only to deter terrorism against Americans abroad but also to advance many other important federal interests. *See* Austen L. Parrish, *Evading Legislative Jurisdiction*, 87 Notre Dame L. Rev. 1673, 1675 n.6 (2012) (listing these areas of law: corporate law and governance, bankruptcy and tax, criminal, environmental, civil rights, and labor laws (citation omitted)). Some of these statutes are geared toward foreign actors or foreign conduct. Consider the Death on the High Seas Act. *See* 46 U.S.C. §§ 30301-08. It allows a decedent's representative to sue "the person or vessel responsible" "[w]hen the death of an individual is caused by wrongful act, neglect, or default occurring on the high seas," *see id.* § 30302, including deaths involving airplane crashes into the high seas. *See Exec. Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 263-64 (1972); *see also Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 219, 231 (1996) (holding that the Death on the High Seas Act "supplie[d] the substantive United States law" in suit against a Korean airline after its flight strayed into Soviet Union airspace and was shot down over the Sea of Japan). And the Helms-Burton Act imposes liability on anyone who "traffics in property which was confiscated by the Cuban Government" to which a U.S. national has a claim. *See* 22 U.S.C. § 6082(a)(1)(A); *Marti v. Iberostar Hoteles y Apartamentos S.L.*, 54 F.4th 641, 643-44 (11th Cir. 2022) (reversing a stay in a suit against a Spanish company over a hotel that the Cuban government allegedly seized from the plaintiff's family and was

allegedly operating with the Spanish company). Nor are these examples limited to the civil context. Rather, Congress has also focused criminal statutes on foreign conduct, such as certain killings of U.S. nationals overseas. *See, e.g.*, 18 U.S.C. § 2332.

Even laws not primarily aimed at foreign conduct or foreign actors still can have extraterritorial reach. For example, the False Claims Act, 31 U.S.C. §§ 3729-33, applies to false claims submitted by a foreign entity. *See, e.g.*, Press Release, U.S. Att'y's Off. D.N.J., Chinese Manufacturer and U.S. Companies Admit Scheme to Evade U.S. Customs Duties (Dec. 19, 2022), https://perma.cc/2P52-5Y5V (noting that a Chinese company settled with the United States and resolved its "potential liability under … the False Claims Act"). And U.S. antitrust laws apply to anticompetitive conduct involving foreign actors. *See, e.g.*, U.S. Dep't Just. & FTC, *Antitrust Guidelines for International Enforcement and Cooperation* 1 (2017), https://perma.cc/C2JC-KG2G ("To protect U.S. consumers and businesses from anticompetitive conduct in foreign commerce, the federal antitrust laws have applied to 'commerce with foreign nations' since their inception."); 15 U.S.C. § 6a (setting forth circumstances when the Sherman Act applies to conduct involving trade or commerce with foreign nations).

B. The effectiveness of many of these laws is substantially undermined, however, if U.S. courts cannot exercise personal jurisdiction over foreign actors. *See* Aaron D. Simowitz, *Defining* Daimler*'s Domain: Consent, Jurisdiction, and the Regulation of Terrorism*, 55 Willamette L. Rev. 581, 582 (2019) ("If [a sovereign's] courts cannot get power over the parties covered by a sovereign's public law, that public law will be limited, distorted, or nullified.").

1. The statute implicated here, the ATA, has been weakened in this way. Congress enacted the ATA as part of its broad authority over foreign affairs. *See* U.S. Const. art. I, § 8, cls. 3, 10. The statute provides a civil remedy to any U.S. national injured by an act of international terrorism, allowing victims to "recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees." 18 U.S.C. § 2333(a). Its reach is broad, imposing liability "at any point along the causal chain of terrorism." S. Rep. No. 102-342, at 22 (1992). By adopting the ATA, Congress intended to "interrupt, or at least imperil, the flow of money" to international terrorists. *See id.* Such action strikes at "the resource that keeps [terrorists] in business—their money"—and gives American victims their day in court. *See* 138 Cong. Rec. 33629 (1992) (statement of Sen. Grassley).

It is difficult to overstate the importance of the issue that the ATA addresses. Congress has found that "international terrorism is a serious and deadly problem that threatens the vital interests of the United States." Pub. L. No. 104-132, tit. III, § 301(a)(1), 110 Stat. 1214, 1247 (1996); *see also Holder v. Humanitarian L. Project*, 561 U.S. 1, 28 (2010) ("[C]ombating terrorism is an urgent objective of the highest order."); *Goldberg v. UBS AG*, 660 F. Supp. 2d 410, 431 (E.D.N.Y. 2009) (explaining that "[t]here can be no dispute that combating international terrorism is a paramount interest of the United States"). It is literally a matter of life and death. But Congressional efforts to thwart international terrorism are frustrated if courts cannot exercise personal jurisdiction over those who commit or support terrorist acts against Americans abroad. The cases consolidated in this appeal are a prime example.

2. Congress intended for Respondents, the PA and the PLO, to be held accountable under the ATA for their attacks on Americans. Indeed, Congress was spurred to act by the PLO's murder of Leon Klinghoffer, an American citizen. *See* H. Rep. No. 102-1040, at 5 (1992) ("Only by virtue of the fact that the attack violated certain Admiralty laws and that the organization involved—the [PLO]—had assets and carried on activities in New York, was the court able to establish jurisdiction over the case. A similar attack occurring on an airplane or in some other locale might not have been subject to civil action in the U.S."); 137 Cong. Rec. 8143 (1991) (statement of Sen. Grassley) ("[A] New York Federal District Court ruled in the Klinghoffer versus PLO case (after years of litigation), that the U.S. courts have jurisdiction over the PLO. The New York court set the precedent; S. 740 would codify that ruling and makes the right of American victims definitive."); 137 Cong. Rec. 3304 (1991) (statement of Sen. Grassley) ("The PLO must be held accountable for its crimes and the Klinghoffers are making sure that, at least in some way, the PLO will be brought to justice.").

But after this Court's decision in *Daimler AG v. Bauman*, 571 U.S. 117 (2014), which limited the ability of state courts to exercise general personal jurisdiction over foreign corporations, "every pending ATA case against the [PA or PLO, except one,] was dismissed on jurisdictional grounds" by district courts. *See* Simowitz, *supra*, at 583. As explained below, this was based on the mistaken view that the Fourteenth Amendment's restrictions on state-court personal jurisdiction apply to the Fifth Amendment. The lone exception was *Sokolow v. Palestine Liberation Organization*, one of the appeals consolidated here, where the district court refused to reconsider (based on *Daimler*) its decision denying Respondents' motion to dismiss. No.

04-cv-397, 2014 WL 6811395, at *1 (S.D.N.Y. Dec. 1, 2014), *vacated and remanded sub nom. Waldman v. Palestine Liberation Org.*, 835 F.3d 317 (2d Cir. 2016). But the Second Circuit subsequently disagreed and ordered the district court to dismiss the *Sokolow* case for lack of personal jurisdiction. *See* Pet. App. 141a.

As the House Judiciary Committee explained, these decisions "called into question the ATA's continued ability to bring terrorists or their abettors to justice in U.S. courts." H. Rep. No. 115-858, at 6 (2018); *see also* 165 Cong. Rec. S7182 (daily ed. Dec. 19, 2019) (statement of Sen. Grassley) ("[S]tarting in 2015, lower court decisions made it impossible for American victims injured abroad to hold sponsors of international terrorism accountable in our own courts. These decisions nullified the fundamental purpose of the ATA—to protect Americans wherever in the world they may be—and disrespected Congress's power to protect U.S. citizens and U.S. interests.").

Congress thus passed the ATCA in response to the "flawed Second Circuit decision" in *Sokolow*. *See* H. Rep. No. 115-858, at 6; *see also* 165 Cong. Rec. S7182 (daily ed. Dec. 19, 2019) (statement of Sen. Grassley). It provided that a defendant "shall be deemed to have consented to personal jurisdiction" in ATA cases if, over 120 days after enactment, the defendant either (1) accepted certain "form[s] of assistance" or (2) while "benefiting from a waiver or suspension of" a federal law that forbids the PLO and its constituent groups from operating such an office, maintained a U.S. office. Pub. L. No. 115-253, § 4(a). Congress again sought to make the ATA an effective tool for preventing international terrorism and compensating American victims of international terrorism. *See* H. Rep. No. 115-858, at 7-8. But this attempt to fill the personal-

jurisdiction gap created by lower courts failed because the Second Circuit held that neither of the ATCA's factual predicates were satisfied. *See* Pet. App. 132a. The legislation thus had no impact on federal courts' personal jurisdiction over the PA and PLO. The ATA was again hollowed out by the Judicial Branch.

Given the critical national security and foreign policy interests at stake, Congress acted yet again and passed the PSJVTA, the statute at issue here, "to restore U.S. court jurisdiction over" the PA and PLO. *See* 165 Cong. Rec. S7182 (daily ed. Dec. 19, 2019) (statement of Sen. Lankford); *see also id.* (statement of Sen. Grassley) (describing the PA's "zeal to dodge legal responsibility" and explaining that the PSJVTA was a "respon[se] to the [PA's] actions"). The PSJVTA provided Respondents a choice: they could continue their "pay to slay" policies (and/or engage in certain activities in the United States) and be deemed to consent to personal jurisdiction in ATA cases, or they could abandon these policies (and not engage in certain U.S.-based activities), and they would not be deemed to consent to personal jurisdiction in ATA cases. *See* 18 U.S.C. § 2334(e). Under these "pay to slay" policies, Respondents "pay terrorists or families of terrorists who injured or killed Americans," which is "nothing short of an incitement for further acts of terrorism." *See* 165 Cong. Rec. S7183 (daily ed. Dec. 19, 2019) (statement of Sen. Grassley).

But according to the court below, Respondents still may not be held responsible in federal courts—and American terrorist victims still may not obtain justice—unless the victims can show that the terrorists are subject to general or specific personal jurisdiction as cabined by this Court's Fourteenth Amendment jurisprudence. And if that is the case, foreign terrorists would rarely be held accountable

under the ATA. General personal jurisdiction—which requires a defendant to have certain contacts *with the United States*—would rarely allow a court to exercise personal jurisdiction over a foreign actor who harms an American abroad. *See Douglass v. Nippon Yusen Kabushiki Kaisha*, 46 F.4th 226, 276 (5th Cir. 2022) (en banc) (Elrod, J., dissenting) (explaining that foreign defendants will "[r]arely" be at home in the United States, so a court exercising general personal jurisdiction over a foreign defendant is "an 'exceptional case' very seldom encountered in real life" (citation omitted)), *cert. denied sub nom. Douglass v. Kaisha*, 143 S. Ct. 1021 (2023). Likewise, it is hard to imagine specific personal jurisdiction (as narrowly applied by the court below) faring much better when dealing with foreign actors who injure Americans abroad. This is because those foreign actors would need to engage in litigation-related contacts in the United States. *See* Pet. App. 8a-9a (noting no specific personal jurisdiction when terrorist attacks occurred outside the country).[3]

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[3] The court below held open the possibility that victims could also show that Respondents consented to personal jurisdiction. Indeed, the PSJVTA is structured as a consent statute. But according to the court below, Congress cannot treat certain actions that affect the United States as a party's consent to personal jurisdiction, even if the party were on notice and continued to engage in that conduct. Rather, Congress must provide a would-be defendant with a reciprocal benefit or otherwise concoct a "reciprocal bargain[]." *See* Pet. App. 23a-24a. Such a requirement substantially hamstrings Congress, which may be (understandably) reluctant to provide would-be foreign defendants, especially groups like the PLO or PA that engage in or support terrorism, with a benefit. The decision below thus complicates Congress's ability to use a consent statute and, in turn, makes it harder for victims to hold terrorists accountable. Certain litigation-related conduct by foreign defendants may also amount to consent, *id.* at 22a-23a, but that does nothing to

All said, the Second Circuit's reading of the Fifth Amendment would generally prevent victims of foreign terrorists from receiving compensation for their injuries, thus "nullif[ying] the fundamental purpose of the ATA." *See* 165 Cong. Rec. S7182 (daily ed. Dec. 19, 2019) (statement of Sen. Grassley); *Douglass*, 46 F.4th at 278 (Elrod, J., dissenting) ("In significantly curtailing plaintiffs' recourse to our nation's federal courts, the majority's decision effectively neuters Congress of its ability to use our own legal system and its well-established rule of law to help right the most grievous wrongs committed against Americans abroad.").

3. This view—which imports the Fourteenth Amendment Due Process Clause's restrictions into the Fifth Amendment—would also curb the extraterritorial reach of many other laws that Congress has enacted. *See* Aaron D. Simowitz, *Federal Personal Jurisdiction and Constitutional Authority*, 56 N.Y.U. J. Int'l L. & Pol. 345, 349 (2023) (explaining that lower court decisions applying Fourteenth Amendment precedent in the Fifth Amendment context "have had the effect of neutering numerous federal statutory causes of action, including the federal statutory cause of action created by Congress under the ATA").

Indeed, the Helms-Burton Act would be of little help to U.S. nationals who have claims to assert against foreign traffickers if federal courts lack personal jurisdiction over those traffickers. *See, e.g.*, *Herederos De Roberto Gomez Cabrera, LLC v. Teck Res. Ltd.*, 43 F.4th 1303, 1306, 1313 (11th Cir. 2022) (finding no personal jurisdiction over a Canadian company that allegedly illegally trafficked in confiscated Cuban

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preserve Congressional authority. Personal jurisdiction, under this scenario, would depend upon the beneficence of foreign terrorists.

property); *Douglass*, 46 F.4th at 275-76 (Elrod, J., dissenting) (explaining that because of the court's decision that imports Fourteenth Amendment restrictions into the Fifth Amendment, "Cuban refugees who have lost everything to Communist confiscation will not be able, meaningfully, to avail themselves of remedial federal legislation"); *id.* at 279 (calling the Helms-Burton Act "an empty gesture" in the Fifth Circuit). The effectiveness of other laws aimed at foreign conduct would be limited, too. *See, e.g.*, *id.* at 229-31, 243 (majority op.) (finding no personal jurisdiction in suit brought under the Death on the High Seas Act over a foreign company that chartered a ship that crashed into an American destroyer and killed seven American sailors).

Nor can the False Claims Act (a statute not primarily aimed at foreign conduct) effectively protect the federal government from foreign fraudsters if courts lack personal jurisdiction over some of those fraudsters. *See, e.g.*, *United States ex rel. TZAC, Inc. v. Christian Aid*, No. 21-1542, 2022 WL 2165751, at *1-2 (2d Cir. June 16, 2022) (finding no personal jurisdiction over a federal contractor that allegedly told the federal government "that it had not provided material support for terrorism even though it earlier sponsored a vocational training class that was taught by an arm of a foreign terrorist organization"); *United States ex rel. Conyers v. Kellogg, Brown & Root, Inc.*, No. 12-cv-04095, 2015 WL 1510544, at *4-6, *9-11 (C.D. Ill. Mar. 30, 2015) (same for federal subcontractor that allegedly submitted fraudulent claims related to delivering water trucks, fuel trucks, and reefers to American troops in Iraq); *United States v. Kellogg Brown & Root Servs., Inc.*, No. 12-cv-4110, 2014 WL 4948136, at *1, *4-9 (C.D. Ill. Sept. 30, 2014) (same for federal sub-

contractor that allegedly "inflated the costs of providing living quarters for American troops in Iraq").

Antitrust laws, too, would fail to effectively protect Americans from anticompetitive conduct involving foreign actors if courts lack personal jurisdiction over certain price manipulators. *See, e.g.*, *In re SSA Bonds Antitrust Litig.*, 420 F. Supp. 3d 219, 229-41 (S.D.N.Y. 2019) (finding no personal jurisdiction over foreign defendants in putative class action alleging bond price fixing); *Dennis v. JPMorgan Chase & Co.*, 343 F. Supp. 3d 122, 200-08 (S.D.N.Y. 2018) (same for putative class action accusing financial institutions of manipulating interest rates used as benchmarks for financial derivatives pricing).

In sum, Congress has broad constitutional authority to apply federal statutes to foreign conduct and foreign actors. But lower courts have substantially undermined the effectiveness of these statutes by concluding that they lack personal jurisdiction over foreign actors in many circumstances. The ATA, for example, has become a shell of the robust terrorism-fighting tool that Congress envisioned. This deeply troubling development flows from the flawed view that the Fifth Amendment's Due Process Clause constrains the federal government in the same way the Fourteenth Amendment's Due Process Clause constrains state governments.

II. The PSJVTA is consistent with the Fifth Amendment and the separation of powers

The Fifth Amendment's Due Process Clause does not restrict Congress's ability to define the jurisdiction of the lower courts. The historical record—including the Clause's original public meaning—confirms as much. So long as Congress acts within its constitutional

authority when it enacts a statute, as it did with the ATA, the Fifth Amendment in no way limits Congress's ability to vest federal courts with personal jurisdiction over foreign actors for purposes of enforcing that law. This is different from the Fourteenth Amendment, which does limit states' ability to exercise personal jurisdiction over nonresidents. While the Fourteenth Amendment's Due Process Clause advances interstate federalism by preventing one state from intruding on the sovereignty of a sister state, such federalism concerns are not implicated when Congress provides federal courts with jurisdiction over residents of foreign countries. Jurisdiction-granting statutes like the PSJVTA therefore do not violate the Fifth Amendment, which serves no Fourteenth-Amendment-like function. Nor do they create any separation-of-powers issues by intruding on the judicial function—far from it. Those statutes supply courts with new standards for deciding disputes; they do not dictate their outcomes.

A. The Fourteenth Amendment's Due Process Clause restricts the ability of state courts to exercise personal jurisdiction over a nonresident defendant. *See Bristol-Myers Squibb Co. v. Super. Ct. of Cal.*, 582 U.S. 255, 261-62 (2017). But this Court has "le[ft] open the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court." *Id.* at 269. It does not. The Fifth Amendment's text and historical context, as well as contemporaneous practice and judicial precedent, all confirm this conclusion.

As originally understood, the Fifth Amendment's Due Process Clause did not restrict Congress's ability to define the jurisdiction of federal courts. Consequently, Congress may, consistent with the Fifth Amendment,

subject foreign defendants to the personal jurisdiction of federal courts based on conduct that occurs outside the United States. The Fifth Amendment prevents the deprivation of a covered person's life, liberty, or property without legally valid process. The PSJVTA, however, empowers federal courts to provide Respondents with the very process that would precede any legal deprivation. Therefore, it complies with the Fifth Amendment.[4]

1. The text of the Fifth Amendment's Due Process Clause, as understood by Americans around the time of its ratification, did not constrain Congress's ability to subject foreigners to the jurisdiction of federal courts. *See* Stephen E. Sachs, *The Unlimited Jurisdiction of the Federal Courts*, 106 Va. L. Rev. 1703, 1710 (2020) ("[A]s to the scope of the courts' territorial jurisdiction, the [Fifth Amendment's Due Process] Clause has nothing to say."); *see also id.* ("[I]f Congress expands federal personal jurisdiction by statute, … th[is] policy decision[] wouldn't—and shouldn't—be hampered by an ever-expanding vision of the Due Process Clause."). The Clause instead provides that "[n]o person shall … be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. The contemporaneous understanding of this language was that the federal government could not deprive a person of certain rights unless that person was first given legally valid process. *See* Max Crema & Lawrence B. Solum, *The Original Meaning of "Due Process of Law" in the Fifth Amendment*, 108 Va. L. Rev. 447, 525 (2022)

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[4] As explained (at 13-15) in the House's cert-stage *amicus* brief, Respondents are not "persons" entitled to rights under the Fifth Amendment's Due Process Clause. But even if they are, the PSJVTA is consistent with the Fifth Amendment for the reasons explained herein.

(explaining that this was the understanding of the Clause before ratification and that "the available evidence suggests" this meaning "persisted for decades following the enactment of the Bill of Rights").

The Founders, who "considered themselves inheritors of the English common law," understood the phrase to have the same well-established meaning that it had under the English common law. *See id.* at 484-85; *see also id.* at 467 ("From its first recorded use in the 1300s through to the Founding era, 'due process of law' was understood to mean a writ or precept authorizing the deprivation of a right or imposing an obligation."). Both the original public meaning of the text and the historical context in which it was ratified support this conclusion: the federal government may deprive a person of certain rights only after he or she receives process from a court with jurisdiction to provide it. *See id.* at 466.

2. Early Congressional practice and judicial precedent confirm that Congress has the authority to vest federal courts with extraterritorial jurisdiction. This is unsurprising: as explained above, Congress's constitutional authority to enforce its laws beyond U.S. borders would be ineffective if courts lacked personal jurisdiction over foreign actors.

In 1789, the First Congress empowered federal courts to exercise jurisdiction over crimes committed on the high seas and over "all civil causes of admiralty and maritime jurisdiction … upon the high seas." *See* Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 76-77. A few years later, in *Talbot v. Jansen*, 3 U.S. (3 Dall.) 133 (1795), this Court affirmed an award of civil damages in a dispute over an incident on the high seas. *See id.* at 159-60 (opinion of Iredell, J.) (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").

In *Picquet v. Swan*, 19 F. Cas. 609 (C.C.D. Mass. 1828) (No. 11,314), Justice Story (riding circuit) left little doubt about Congress's ability to empower courts to exercise jurisdiction over foreign persons. There, he explained that, under the default general-law rule, "a court created within and for a particular territory is bounded in the exercise of its power by the limits of such territory." *Id.* at 611. But he was clear that Congress had the power to change that default rule with positive legislation. *See id.* at 613 ("[I]ndependent of some positive provision to the contrary, no judgment could be rendered in the circuit court against any person, upon whom process could not be personally served within the district."). Under that legislation, foreign persons "having a controversy with one of our own citizens[] may be summoned from the other end of the globe to obey our process, and submit to the judgment of our courts." *Id.* And if Congress passed such legislation, Justice Story explained that "the court would certainly be bound to follow it, and proceed upon the law." *Id.* at 615.

Justice Story ultimately held in *Picquet* that the defendant, an American citizen living abroad, had not been properly served. *Id.* at 616. But that turned solely on his conclusion that Congress had not spoken clearly enough to overcome the general-law rule that a court may exercise its authority only in the territory where it was created. *See id.* at 613 ("Such an intention … ought not to be presumed, unless it is established by irresistible proof. My opinion is, that congress never had any such intention ….); *see also*

Douglass, 46 F.4th at 259 (Elrod, J., dissenting) ("If there were a moment in the opinion to mention any lurking Fifth Amendment due process issue, this would have been it."); Sachs, *supra*, at 1716 ("In discussing these outlandish exercises of jurisdiction, Justice Story neither referenced due process as a barrier nor invoked any notion of constitutional avoidance."). This is consistent with the original public meaning of the Fifth Amendment's Due Process Clause: that it "merely required lawful process in keeping with the common law or duly enacted legislation." *Douglass*, 46 F.4th at 260 (Elrod, J., dissenting).

Picquet neither broke new ground nor went unnoticed by this Court. Justice Story "follow[ed] with undoubting confidence the … reasoning" in *Ex parte Graham*, 10 F. Cas. 911 (C.C.E.D. Pa. 1818) (No. 5,657). *Picquet*, 19 F. Cas. at 611-12. There, the court found that a Philadelphia merchant was improperly arrested in Pennsylvania under process issued by a federal court in Rhode Island. *Ex parte Graham*, 10 F. Cas. at 911, 913. The problem, again, was one of authorization; Congress had not empowered the Rhode Island court to exercise jurisdiction over a nonresident physically absent from the judicial district. *See id.* at 913 (explaining that in such a situation "there are difficulties, which, in the opinion of the court, nothing but an act of congress can remove"). It was not a due process problem.

This Court in *Toland v. Sprague*, 37 U.S. (12 Pet.) 300 (1838), agreed that Congress possesses the authority to empower courts to exercise jurisdiction over persons located abroad. This Court described "the reasoning in [*Picquet*], generally, as having great force" and "concur[red]" with it. *Id.* at 328. Like Justice Story in *Picquet*, this Court in *Toland* agreed that Congress

could empower a court to exercise jurisdiction over persons located outside its territory (including abroad) but ultimately concluded that Congress had not exercised that authority in that case. *See id.* at 330 ("That independently of positive legislation, the [judicial] process can only be served upon persons within the same districts."). There was, again, no question that Congress had this authority; it simply had not exercised it.

Respondents (at 31-32) tried to twist the historical record when opposing the petitions for writs of certiorari. They quoted from scholars and early judicial decisions that, as they tell it, show that the Founding generation believed federal courts' jurisdiction over foreign persons was limited. But those sources do no more than set out the default general-law rule, and none even mention the Fifth Amendment. Congress, as explained above, is free to change the default rule by empowering federal courts to exercise jurisdiction over foreign actors. That Respondents cited Justice Story to support their claim exposes the flaw in their argument: *Picquet* establishes that Justice Story saw the issue just as the House does.

In sum, early Congressional practice and judicial precedent confirm that the Fifth Amendment's Due Process Clause imposes no Fourteenth-Amendment-like restrictions on federal courts' ability to exercise personal jurisdiction over nonresidents. *See Douglass*, 46 F.4th at 262 (Elrod, J., dissenting) ("[E]arly American cases show—by what they omit—that the Fifth Amendment's Due Process Clause does not restrict Congress's ability to prescribe, by law, the extent to which federal courts may issue process and thereby acquire personal jurisdiction over even foreign defendants a world away."). Rather, "[i]n general,

Congress can extend the federal courts' personal jurisdiction as far as it wants." Sachs, *supra*, at 1729. This view persisted over the decades following ratification, and "not until the Civil War did a single court, state or federal, hold a personal-jurisdiction statute invalid on due process grounds." *See id.* at 1712.

B. The lack of support for imposing Fourteenth-Amendment-like restrictions on Congress's ability to vest federal courts with jurisdiction over foreign actors goes beyond the meaning of the relevant constitutional text; any such restrictions would also lack grounding in the broader constitutional structure. Most importantly, the federalism interests at play in the Fourteenth Amendment context are not at issue in the Fifth Amendment context. A primary function of the Fourteenth Amendment's restrictions on state court jurisdiction is preventing one sovereign state from intruding upon another's sovereignty. That dynamic does not apply to the federal government, which does not have sister-state sovereigns in our constitutional framework.

Restrictions on the ability of state legislatures to authorize personal jurisdiction largely reflect the "territorial limitations on the power of the respective States." *See Bristol-Myers Squibb*, 582 U.S. at 263 (citation omitted). States generally have no power beyond their borders. *See, e.g.*, *People v. Arellano-Avila*, 20 P.3d 1191, 1193 (Colo. 2001) ("[N]o state court or government has authority beyond its own borders, each state being sovereign as to its own territory and those residing therein." (alteration in original) (citation omitted)). After all, each state "retain[s] many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts." *Bristol-Myers Squibb*, 582 U.S. at 263 (citation

omitted). The Fourteenth Amendment's constraints on state court jurisdiction thus prevent one state from intruding upon the sovereignty of another. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980) ("The sovereignty of each State, in turn, implied a limitation on the sovereignty of all of its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment."). In this way, the Fourteenth Amendment "act[s] as an instrument of interstate federalism." *See id.* at 294.

But while, for example, California lacks the authority to enforce its laws in Texas, the federal government does have the constitutional authority to enforce federal laws abroad. *See, e.g.*, Pet. App. 261a (Menashi, J., dissenting from the denial of rehearing en banc) ("In contrast to state legislatures, 'Congress has the authority to enforce its laws beyond the territorial boundaries of the United States.'" (quoting *EEOC*, 499 U.S. at 248)). And when Congress validly exercises its constitutional authority to subject foreign actors to a federal statute, the Constitution does not concern itself with any potential effect on a foreign sovereign. *See* Aaron D. Simowitz, *Legislating Transnational Jurisdiction*, 57 Va. J. Int'l L. 325, 359 (2018) ("Where the federal sovereign is acting vis-à-vis foreign sovereigns, there can be no issue of horizontal federalism. Similarly, there is no issue of vertical federalism—the federal sovereign is not taking actions that may intrude on the quasi-sovereign states, but again, is instead taking action that affects foreign sovereigns." (footnote omitted)); *see also* Pet. App. 259a (Menashi, J., dissenting from the denial of rehearing en banc) ("The Due Process Clause of the Fifth Amendment, by contrast, is *not* an instrument of interstate federalism. While states may not intrude on

each other's or the federal government's prerogatives, Congress may decide to intrude on foreign governments' prerogatives."); *Douglass*, 46 F.4th at 265 (Elrod, J., dissenting) ("Domestically, Fourteenth Amendment due process thus prevents states from unjustifiably trenching on others' sovereign prerogative to have their courts hear cases concerning defendants residing or doing business within state borders. … But in the international sphere, our Constitution dictates no particular ordering of relations with other countries. Rather, the Constitution assigns that job to Congress and the President." (citation omitted)).

Just as Congress has legislative authority that states do not, federal courts also possess authority that state courts do not: "[t]he authority of Congress to assert legislative power extraterritorially means that the federal courts must have a corresponding power to adjudicate disputes concerning [Congress's] laws." Pet. App. 261a (Menashi, J., dissenting from the denial of rehearing en banc). In opposing the petitions for writs of certiorari, Respondents (at 31) argued that "the Constitution expressly confers extraterritorial jurisdiction in limited cases to the exclusion of others." To be sure, the Constitution says that "[t]he judicial Power shall extend … to all Cases of admiralty and maritime Jurisdiction." U.S. Const. art. III, § 2, cl. 1. But those are grants of subject matter jurisdiction; they say nothing about the federal courts' ability to exercise personal jurisdiction. *Cf.* Sachs, *supra*, at 1704 ("A federal court's *subject-matter* jurisdiction is affirmatively limited by the Constitution. Its territorial, *personal* jurisdiction is not."). Indeed, Respondents seemingly have no problem with federal courts exercising personal jurisdiction over foreign actors in suits involving admiralty and maritime. But they do not explain why it would be constitutionally suspect for federal courts

to also exercise personal jurisdiction over foreign actors in other categories of suits that are mentioned in Article III: suits (1) arising under a treaty, (2) between the citizens of a state and citizens of a foreign state, or (3) arising under the laws of the United States. *See* U.S. Const. art. III, § 2, cl. 1.

Respondents (at 31) also pointed to Congress's constitutional authority to "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations" to support their claim that Congress has only limited authority to legislate extraterritorially. *See* U.S. Const. art. I, § 8, cl. 10. But it is unclear how this bears on personal jurisdiction, either. Congress, of course, must have the constitutional authority to enact a substantive law. As we explained above, Congress had the constitutional authority to enact the ATA to provide a civil remedy to American victims of international terrorism; Respondents do not argue otherwise. Article I, like Article III, says nothing about the ability of federal courts to exercise personal jurisdiction. It does, however, give Congress the constitutional authority to enact laws to administer the judicial power. *See* Sachs, *supra*, at 1729 (explaining that the Necessary and Proper Clause allows Congress to enact laws to carry the judicial power into execution). The PSJVTA is one such law. So far from limiting Congress's authority in this context, Article I supports Congress's ability to empower courts to exercise personal jurisdiction over foreign actors.

In sum, Congress's legislative authority is not limited from an extraterritorial perspective in the way states' legislative authorities are. Neither does Congress risk intruding on a co-equal sovereign that is part of our constitutional framework when it enacts laws like

the PSJVTA that permit courts to exercise personal jurisdiction over foreign actors.

C. Nor does Congress raise any separation-of-powers concerns when it enacts such a law. Indeed, personal-jurisdiction-granting statutes like the PSJVTA simply allow courts to decide disputes among the affected parties. In no way do they dictate the outcomes of those disputes.

In opposing the petitions for writs of certiorari, Respondents argued (at 33) that the PSJVTA usurps the judicial function. This argument misunderstands both the statute and this Court's precedent. The relevant question for separation-of-powers purposes is whether Congress has (properly) made new law or (improperly) tried to tell the courts how to apply existing law to a given set of facts. *Compare Bank Markazi v. Peterson*, 578 U.S. 212, 229-30 (2016) (explaining that "a statute does not impinge on judicial power" simply because "it directs courts to apply a new legal standard to" pending cases, even when it "effectively permit[s] only one possible outcome"), *with City of Arlington v. FCC*, 569 U.S. 290, 297 (2013) (noting that Congress may not "prescribe or superintend how [the courts] decide" cases).

The PSJVTA made new law: it replaced the ATCA's personal-jurisdiction standard (where a defendant would be deemed to consent if it accepted certain benefits or conducted certain activities in the United States, *see* Pub. L. No. 115-253, § 4(a)) with the current one (where defendants are deemed to consent, if, among other things, they continue their pay-to-slay policies impacting Americans, *see* Pub. L. No. 116-94, § 903(c)(1)). Courts, in turn, apply that standard and determine whether, based on the facts before them, the defendant has engaged in the conduct that amounts to

consent under the statute. Indeed, that is precisely what the district courts did here. *See, e.g.*, Pet. App. 87a ("As Plaintiffs presented sufficient evidence to show that Defendants['] conduct meets the factual predicate in 18 U.S.C. §2334(e)(l)(A)(ii) …, the PSJVTA is applicable to this case."); *id.* at 102a n.3 ("Because the Court concludes that the PSJVTA's first prong has been met, it need not decide whether Defendants' conduct also implicates the second prong.").

To be sure, "Congress could not enact a statute directing that, in 'Smith v. Jones,' 'Smith wins.'" *See Bank Markazi*, 578 U.S. at 225 n.17. But the PSJVTA, like the statute at issue in *Bank Markazi* (a case Respondents cite at 33), does no such thing. In *Bank Markazi*, victims of Iran-sponsored terrorism obtained monetary judgments against Iran and attempted to enforce those judgments by filing writs of execution against certain bonds held in a New York bank account. *See id.* at 219-21. While those proceedings were pending, Congress enacted a statute that stated the assets at issue were available for execution if certain standards were satisfied—the statute was so specific that it mentioned the case by docket number. *See id.* at 218-19. The bank that held the assets then argued that the law "tread[ed] impermissibly on judicial turf" by dictating a "rule[] of decision to the Judicial Department" in a pending case. *See id.* at 226.

This Court rejected that argument and held that the statute was constitutional. *See id.* at 215 ("Congress, our decisions make clear, may amend the law and make the change applicable to pending cases, even when the amendment is outcome determinative."). As the Court explained, the statute created a new standard for courts to apply. *See id.* at 231-32 ("[The statute] provides a new standard …. Applying laws

implementing Congress' policy judgments, with fidelity to those judgments, is commonplace for the Judiciary."). In doing so, the Court contrasted the situation there with the one in *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871), where this Court held a statute that did not create any "new circumstances" but required courts to deem certain evidence (a pardon) insufficient to satisfy a standard established by existing law unconstitutional. *See* 80 U.S. at 146-47; *Bank Markazi*, 578 U.S. at 228 ("[T]he statute in *Klein* infringed the judicial power, not because it left too little for courts to do, but because it attempted to direct the result without altering the legal standards governing the effect of a pardon—standards Congress was powerless to prescribe.").

In no way does the PSJVTA direct any result or intrude upon the Judiciary's Article III power. Congress did not direct courts how to apply existing law to specific facts. Instead, the PSJVTA, like the statute in *Bank Markazi*, creates a new legal standard—if a party takes certain actions, it will be deemed to consent to personal jurisdiction—that courts apply to the facts before them.

As Respondents tell it (at 33), "[t]he PSJVTA usurps the judicial function by directing courts to always find consent if its factual predicates are met—regardless of whether constitutional standards for consent are satisfied." But that misunderstands the separation-of-powers analysis, which focuses on whether the law creates a standard for the courts to apply. *See, e.g.*, *Bank Markazi*, 578 U.S. at 231 ("[The statute] changed the law by establishing new substantive standards, entrusting to the District Court application of those standards to the facts (contested or uncontested) found by the court."). Beyond that, nothing in the PSJVTA

prohibits courts from considering whether the statute is constitutional—of course they can. *Cf. Bond v. United States*, 572 U.S. 844, 857 (2014) ("The notion that some things 'go without saying' applies to legislation just as it does to everyday life."). But the jurisdictional standards that flow from the Fourteenth Amendment—including those related to consent—do not apply to federal statutes like the PSJVTA. That is a function of constitutional interpretation, as explained above, not statutory declaration, as Respondents suggest. As a result, Respondents' attempt to repackage their Fourteenth Amendment argument as a separation-of-powers violation falls flat.

It is unsurprising that a personal jurisdiction consent statute like the PSJVTA does not usurp the judicial function. After all, Congress may empower courts to exercise personal jurisdiction without requiring a would-be party to consent. *See, e.g.*, 28 U.S.C. § 1330(b) ("Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title."). It necessarily follows that Congress may give a would-be party a choice: take certain actions and be subject to a court's personal jurisdiction or do not take those actions and avoid a court's personal jurisdiction. And when Congress takes that step, it is doing no more than prescribing a new standard for a court to apply, and if that standard is satisfied, allowing the court to decide a dispute among the parties before it.

* * *

By vesting the district court with personal jurisdiction over Respondents, the PSJVTA allows a federal court to provide the legal process that precedes

any deprivation of liberty or property. It is thus consistent with the Fifth Amendment and, by setting a new standard for courts to apply, raises no separation-of-powers concerns.

CONCLUSION

The Court should reverse the judgment below and hold that the PSJVTA does not violate the Fifth Amendment.

Respectfully submitted,

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