No. 24-20

IN THE

Supreme Court of the United States

MIRIAM FULD, ET AL., PETITIONERS,

v.

PALESTINE LIBERATION ORGANIZATION, ET AL.

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

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

MATTHEW B. BERRY
General Counsel
Counsel of Record
TODD B. TATELMAN
Deputy General Counsel
BRADLEY CRAIGMYLE
Associate General Counsel
ANDY T. WANG
RACHEL A. JANKOWSKI
Assistant General Counsels
OFFICE OF GENERAL COUNSEL
U.S. HOUSE OF REPRESENTATIVES
5140 O'Neill House Office Building
Washington, D.C. 20515
(202) 225-9700
Matthew.Berry@mail.house.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES Page(s)

INTEREST OF *AMICUS CURIAE*[1]

The U.S. House of Representatives (House)[2] has a compelling institutional interest in preserving its constitutional authority to legislate effectively to protect American citizens while they are abroad. 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). And in the Promoting Security and Justice for Victims of 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)), Congress responded to an earlier Second Circuit decision by expressly providing federal courts with personal jurisdiction over defendants in ATA cases under specific circumstances. Petitioners—victims of terrorist attacks committed, directed, or incited by the Palestinian Authority (PA) and the Palestine Liberation Organization (PLO)—are precisely whom Congress intended the ATA and PSJVTA to benefit.

---

[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. Consistent with Supreme Court Rule 37.2, the House states that counsel for the parties received timely notice of intent to file 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, 118th Cong. (2023), https://perma.cc/DK3P-55K6.

The Second Circuit, however, held below that the PSJVTA violates the Fifth Amendment's Due Process Clause. Pet. App. 6a. That decision is the latest in a series of Second Circuit decisions that, by depriving federal courts of personal jurisdiction over international terrorists in most circumstances, frustrates Congress's efforts to combat terrorism. The decision below also improperly cabins Congress's broad constitutional authority to legislate extraterritorially to protect U.S. interests, threatening to undermine numerous other federal statutes.

SUMMARY OF THE ARGUMENT

The Court should grant certiorari to review the Second Circuit's highly consequential and deeply problematic decision.

This Court's intervention is necessary: the decision below held that a federal statute (the PSJVTA) is facially unconstitutional and is the third time that the Second Circuit has hollowed out the ATA by concluding that federal courts may exercise personal jurisdiction over foreign terrorists only in rare circumstances. Congress has already enacted two laws to address the Second Circuit's damaging decisions to no avail. *See* Anti-Terrorism Clarification Act of 2018 (ATCA), Pub. L. No. 115-253, § 4, 132 Stat. 3183, 1384-85; PSJVTA, § 903. If this latest ruling is allowed to stand, American victims of international terrorism will be unlikely to get their day in court, and foreign terrorists will not need to worry about civil judgments draining their resources. Yet these are the exact policy objectives that Congress has consistently attempted to advance in the ATA, ATCA, and PSJVTA. Given the important interests at stake, this Court should end the back-and-forth between Congress and the Second Circuit and definitively resolve whether the Fifth

Amendment's Due Process Clause precludes Congress from providing an effective civil remedy to American victims of foreign terrorist attacks.

On the merits, the decision below made errors that create uncertainty and call other federal statutes into question. By incorrectly treating Respondents as "persons" under the Fifth Amendment, it gives these de facto governments more constitutional rights than both state governments and foreign governments recognized by the Executive Branch, which are not protected by the Fifth Amendment's Due Process Clause. It then compounds that error by importing personal jurisdiction restrictions from the Fourteenth Amendment into the Fifth Amendment. But that move is inconsistent with the original meaning of the Fifth Amendment's Due Process Clause, which does not constrain Congress's ability to subject foreign defendants to the jurisdiction of federal courts. This makes sense because the Fourteenth Amendment restricts state courts, and states generally have little power to legislate beyond their borders. Congress, by contrast, has sweeping constitutional authority to do so. The Court should grant the petition and correct these errors.

ARGUMENT

I. The decision below invalidated a federal statute and warrants review

This Court should grant review because the decision below facially invalidated a federal statute and is the latest in a line of Second Circuit decisions that substantially undermines Congress's efforts to combat international terrorism. Congress has twice attempted unsuccessfully to address the Second Circuit's concerns, and it is now time for this Court to step in and provide

guidance. After all, the decision below impairs Congress's ability to legislate extraterritorially to deter terrorism and to advance many other important objectives.

A. The Second Circuit held that a federal statute that furthers important national security and foreign policy interests is facially unconstitutional

When a lower court invalidates a federal statute, this Court typically grants certiorari because of the gravity of the case. *See Iancu v. Brunetti*, 588 U.S. 388, 392 (2019). This is true even absent a circuit split. *See, e.g.*, *Saenz v. Roe*, 526 U.S. 489, 498 (1999) ("Although the decision of the Court of Appeals is consistent with the views of other federal courts that have addressed the issue, we granted certiorari because of the importance of the case." (footnote and citation omitted)). Indeed, declaring a statute unconstitutional is the "gravest and most delicate duty that this Court is called on to perform." *Blodgett v. Holden*, 275 U.S. 142, 148 (1927). Consequently, the Court has a heightened obligation "to review the exercise of the grave power of annulling an Act of Congress." *United States v. Gainey*, 380 U.S. 63, 65 (1965) (citation omitted).

The Second Circuit's facial invalidation of a federal statute alone justifies this Court's review. But the important interests at stake—compensating American victims of international terrorism and deterring terrorists—and the Second Circuit's repeated attempts to stymie a series of Congressional efforts to advance these vital interests heighten the need for review here. *See, e.g.*, *Christopher v. Harbury*, 536 U.S. 403, 412 (2002) (granting certiorari "because of the importance of th[e] issue to the Government in its conduct of the Nation's foreign affairs").

As part of its broad authority over foreign affairs, *see* U.S. Const. art. I, § 8, cls. 3, 10, Congress has decided it is in the national security and foreign policy interests of the United States to permit American victims of international terrorism to seek compensation from terrorists in federal courts.

Over thirty years ago, Congress overwhelmingly passed the ATA, which has been called "an important instrument in the fight against terrorism" and in the effort to provide relief to American victims of international terrorism. *See Antiterrorism Act of 1991: Hearing on H.R. 2222 Before the Subcomm. on Intell. Prop. & Jud. Admin. of the H. Comm. on the Judiciary*, 102d Cong. 10 (1992) (letter from Sen. Grassley). Through the ATA's provisions for damages and broad liability "at any point along the causal chain of terrorism," Congress intended to "interrupt, or at least imperil, the flow of money" to international terrorists. S. Rep. No. 102-342, at 22 (1992). In other words, Congress enacted the ATA to strike at "the resource that keeps [terrorists] in business—their money." 138 Cong. Rec. 33629 (Oct. 7, 1992) (statement of Sen. Grassley).

For nearly a quarter century, courts exercised personal jurisdiction over Respondents in ATA cases. However, in 2016, the Second Circuit held that the due process analysis for personal jurisdiction is "basically the same under both the Fifth and Fourteenth Amendments." Pet. App. 156a. Thus, federal courts could not exercise personal jurisdiction over international terrorists, unless those terrorists were "at home" in the United States, "expressly aimed" their attacks at the United States, or had sufficient "suit-related conduct" within the United States. *Id.* at 157a-182a (alteration and citation omitted). This decision dramatically limited the ATA's extraterritorial reach.

In direct response to that "flawed" decision, H. Rep. No. 115-858, at 6-8 (2018), Congress overwhelmingly passed the ATCA. Congress, through the ATCA, intended to improve the ATA, including by addressing "lower court decisions that have allowed entities that sponsor terrorist activity against U.S. nationals overseas to avoid" federal court jurisdiction. *Id.* at 3. It provided that a defendant "shall be deemed to have consented to personal jurisdiction" in ATA cases if, more than 120 days after enactment, it accepted certain "form[s] of assistance" or maintained an office within the United States while "benefiting from a waiver or suspension of" a federal law that forbids the PLO and its constituent groups from operating such an office. Pub. L. No. 115-253, § 4. By enacting the ATCA, Congress sought "to halt, deter, and disrupt international terrorism and to compensate U.S. victims of international terrorism." H. Rep. No. 115-858, at 7-8.

However, the ATCA did not have its intended effect because the Second Circuit held that neither of the ATCA's factual predicates were satisfied here. Pet. App. 132a. Thus, the legislation had no impact on federal courts' personal jurisdiction over Respondents.

Congress then enacted the PSJVTA in another attempt to give American victims of international terrorism their day in federal court. 165 Cong. Rec. S7182 (daily ed. Dec. 19, 2019) (statements of Sens. Lankford and Grassley). The PSJVTA provided Respondents a choice. They would be deemed to consent to personal jurisdiction in ATA cases if they continued their "pay to slay" policies, *see* 18 U.S.C. § 2334(e)(1)(A), where they "pay terrorists or families of terrorists who injured or killed Americans," which are "nothing short of an incitement for further acts of terrorism," 165 Cong. Rec. S7183 (daily ed. Dec. 19,

2019) (statement of Sen. Grassley). Likewise, Respondents would be deemed to consent to personal jurisdiction in such cases if they conducted certain activities in the United States, such as maintaining an office, *see* 18 U.S.C. § 2334(e)(1)(B), unless a statutory exception applied, *see id.* § 2334(e)(3). Congress thus carefully crafted the PSJVTA to balance a host of foreign policy and national security interests.

The Second Circuit, however, has once again frustrated Congressional efforts to combat terrorism. In this latest decision, it held that the PSJVTA's "deemed consent" provision violates the Fifth Amendment's Due Process Clause. Pet. App. 45a. It explained that consent may be implied through litigation-related conduct or another arrangement that shows a reciprocal bargain. *See id.* at 20a. The PSJVTA, according to the Second Circuit, was not one such arrangement because, in its view, Respondents received no government benefit from the statute. *Id.* at 21a, 25a-28a.

The time has arrived for this Court to weigh in on this matter. The interests at stake are momentous. *See Holder v. Humanitarian L. Project*, 561 U.S. 1, 28, 35 (2010) (noting "combatting terrorism is an urgent objective of the highest order"); *Gamble v. United States*, 587 U.S. 678, 687 (2019) (holding that the "murder of a U.S. national is an offense to the United States as much as it is to the country where the murder occurred"). And Congress has done what it can to address this problem. Congress has now enacted two statutes (the ATCA and PSJVTA) on a widely bipartisan basis to address Second Circuit decisions dramatically curtailing the reach and effectiveness of the ATA. But due to subsequent Second Circuit decisions, neither statute has fixed the problem.

The ping-pong between Congress and the Second Circuit has gone on long enough. If the Fifth Amendment's Due Process Clause precludes Congress from providing American victims of international terrorism an effective civil remedy in most circumstances, this Court should be the one to say so. Conversely, if the Fifth Amendment's Due Process Clause does not restrict Congress's ability to subject Respondents to the jurisdiction of the federal courts in ATA cases, as the House believes, this Court should grant review and reverse the Second Circuit's judgment.

B. The decision below undermines Congress's broad power to legislate extraterritorially and injects uncertainty into the legislative process

Congress's extraterritorial legislative efforts extend well beyond its interests in combatting terrorism and compensating terrorist victims. Congress has enacted statutes that apply extraterritorially in numerous areas: antitrust, copyright, securities regulation, trademark, corporate law and governance, bankruptcy and tax, criminal, environmental, civil rights, and labor laws. *See* Austen L. Parrish, *Evading Legislative Jurisdiction*, 87 Notre Dame L. Rev. 1673, 1707 n.6 (2012) (citation omitted). The decision below thus interferes with Congress's constitutional authority to legislate extraterritorially not only to combat terrorism but to advance American interests in many other contexts.

1. The decision below effectively shrinks Congress's power to legislate extraterritorially to that of a state legislature, which has little to no power to do so. The Second Circuit held that Congress's ability to authorize personal jurisdiction—which courts need to decide cases brought under an extraterritorial law—is restricted in "basically the same" way as that of a state legislature.

See Pet. App. 17a, 47a-49a (citation omitted). Those restrictions on states "are a consequence of territorial limitations on the[ir] power." *See Bristol-Myers Squibb Co. v. Super. Ct. of Cal.*, 582 U.S. 255, 263 (2017) (citation omitted). By imposing a corresponding territorial limit on Congress, the decision below severely restricts federal courts from exercising jurisdiction over disputes that stem from any acts committed outside the United States. But the whole purpose of extraterritorial legislation is to reach conduct outside the United States. This cabining of jurisdiction thus blunts Congress's power to legislate extraterritorially. *Cf. Personal Jurisdiction—General Jurisdiction—Consent-by-Registration Statutes*—International Shoe *and Its Progeny*—Mallory v. Norfolk Southern Railway Co., 137 Harv. L. Rev. 360, 368 (2023) ("The courts of appeals have tended to gut the applicability of … federal statutes [that create extraterritorial causes of action and authorize personal jurisdiction without tying it to state long-arm statutes, as the ATA does,] by limiting the territorial reach of federal courts ….").

Here is why. The court below held that courts must have (a) general personal jurisdiction, meaning the defendant is at home in the United States, (b) specific personal jurisdiction, meaning the defendant engages in conduct in the United States that is related to the underlying lawsuit, or (c) the defendant's voluntary agreement to proceed in the forum, meaning the defendant's consent. *See* Pet. App. 17a-19a. These will usually not supply jurisdiction when the injury-causing conduct—presumably caused by a foreign actor—takes place outside the United States.

General personal jurisdiction—which requires a defendant to have certain contacts *with the United States*—will almost never 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) (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 faring much better when dealing with foreign actors who injure Americans abroad. This is because those foreign actors would need to have litigation-relevant contacts with the United States. *See* Pet. App. 8a-9a (noting no specific personal jurisdiction when terrorist attacks took place outside the country).

As one academic put it, the requirements of general and specific personal jurisdiction (as set out in this Court's Fourteenth Amendment precedent and applied by some lower courts 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." *See* Aaron D. Simowitz, *Federal Personal Jurisdiction and Constitutional Authority*, 56 N.Y.U. J. Int'l L. & Pol. 345, 349 (2023); *see also Douglass*, 46 F.4th at 277 (Elrod, J., dissenting) ("Applying *Bristol-Myers*'s forum-injury requirement would squelch federal courts' exercise of *specific* jurisdiction over American injuries sustained abroad, just as *Daimler*'s 'at home' test would squash federal courts' exercise of *general* jurisdiction over foreign corporate defendants doing substantial, considerable business in the United States."). This increases Congress's need to rely on consent statutes like the PSJVTA. *Cf.* Simowitz, *supra*, at 349 (arguing the PSJVTA was necessary

because "both general and specific jurisdiction" had "repeatedly [been] narrow[ed]").

But the decision below hamstrings Congress's ability to rely on even consent statutes. Congress cannot, according to the court below, treat certain actions that affect the United States as a party's consent to personal jurisdiction, even if the party was 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.[3] But Congress may be (understandably) reluctant to provide would-be foreign defendants, such as groups that engage in or support terrorism, with a benefit. The decision below thus complicates Congress's ability to use a consent statute.

In sum, the decision below hampers Congress's ability to combat terrorism and to "right the most grievous wrongs committed against Americans abroad." *See Douglass*, 46 F.4th at 278-79 (Elrod, J., dissenting). It likewise undermines Congress's ability to legislate extraterritorially in other areas. It thus warrants this Court's supervisory review.

2. The decision below also injects uncertainty into the legislative process and casts doubt on the extraterritorial reach of statutes that Congress has enacted to advance U.S. policy. It is currently unclear if the Fifth Amendment's due process requirements constrain Congress's ability to legislate extraterritorially. Congress thus has a strong interest in obtaining clarification from this Court to guide its ongoing legislative efforts.

---

[3] Certain litigation-related conduct may also amount to consent, *id.* at 22a-23a, but Congress, of course, has no control over that.

The Court should take this opportunity to resolve the ambiguity the decision below amplifies, thereby "preserving a stable background against which Congress can legislate with predictable effects." *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 261 (2010).

Congress is not the only one that needs guidance: so do the lower courts. Indeed, some lower courts, lacking clarity from this Court, have applied the Fourteenth Amendment's restrictions on personal jurisdiction to the Fifth Amendment and thus limited the application and enforcement of other existing federal laws. *See, e.g.*, *United States ex rel. TZAC, Inc. v. Christian Aid*, No. 21-1542, 2022 WL 2165751, at *2 (2d Cir. June 16, 2022) (False Claims Act); *Douglass*, 46 F.4th at 231, 241-43 (Death on the High Seas Act); *Herederos de Roberto Gomez Cabrera, LLC v. Teck Res. Ltd.*, 43 F.4th 1303, 1307-8 (11th Cir. 2022) (Helms-Burton Act).

If the Fifth Amendment restricts Congress's ability to legislate extraterritorially in an effective manner, this Court should be the one to say so.

II. The decision below wrongly held that the PSJVTA is inconsistent with the Fifth Amendment's Due Process Clause

The court below wrongly held that Respondents, which hold themselves out as governing entities, have rights under the Fifth Amendment, even though state governments and recognized foreign governments do not. It also held that the Fourteenth Amendment's restrictions on personal jurisdiction apply in the Fifth Amendment context. That conclusion finds no support in the original public meaning of the Fifth Amendment's Due Process Clause. And it treats Congress, which has sweeping authority to legislate extraterritorially, like a state legislature, which has almost none.

A. Respondents are not "persons" entitled to rights under the Fifth Amendment's Due Process Clause

As an initial matter, the PSJVTA is constitutional because neither the PLO nor the PA is a "person" for purposes of the Fifth Amendment. This Court has long held that "[t]he word 'person' in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union." *South Carolina v. Katzenbach*, 383 U.S. 301, 323-24 (1966), *abrogated in part on other grounds by Shelby Cnty. v. Holder*, 570 U.S. 529 (2013). This is because the Fifth Amendment's Due Process Clause "recognizes and protects an individual liberty interest." *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982).

Aligned with this Court's precedent, lower federal courts have consistently held that foreign governments are also not "persons" for purposes of the Fifth Amendment. *See e.g.*, *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 96 (D.C. Cir. 2002). Neither are municipal governments. *See e.g.*, *City of E. St. Louis v. Cir. Ct. for Twentieth Jud. Cir.*, 986 F.2d 1142, 1144 (7th Cir. 1993). That is because for both entities, the core concept of due process "to secure the individual from the arbitrary exercise of the powers of government," *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 845-46 (1998), is simply inapplicable.

The same is true here for Respondents, which purport to function as governments and are thus indistinguishable from de jure governments for Fifth Amendment purposes. The United Nations has recognized the PLO as "the representative of the Palestinian people." G.A. Res. 3210 (XXIX), at 3 (Oct. 14, 1974); *see also* G.A. Res. 3236 (XXIX), at 4 (Nov. 22,

1974); G.A. Res. 67/19, at 2 (Nov. 29, 2012). And the PA was established by a treaty between Israel and the PLO. Agreement on the Gaza Strip and the Jericho Area art. III, May 4, 1994, 33 I.L.M. 622. Under its terms, "Israel shall transfer authority … from the Israeli military government and its Civil Administration to the [PA], hereby established," which "has, within its authority, legislative, executive and judicial powers and responsibilities." *Id.* arts. III, V. This transfer of government authority by treaty is another indication that Respondents constitute de facto foreign governments. *See* Restatement (Third) of Foreign Relations Law § 201 (1987) (explaining that for states, the government must have "the capacity to engage in[] formal relations with other such entities").

While the United States does not recognize Respondents as the government of a state, Fifth Amendment personhood cannot turn on diplomatic recognition. For one, while the Executive has the sole power of recognition, this "exclusive power extends no further than [the President's] formal recognition determination." *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 30 (2015). This makes sense as interpreting due process rights to hinge on diplomatic recognition (or rather a lack thereof) would mean the Executive alone would be able to strip, and bestow, important constitutional protections on a whim. Consider how President Carter switched recognition of the government of "China" from the Republic of China (Taiwan) to the People's Republic of China in the 1970s.[4] It makes little sense for an entity's due process rights to depend on such a turnabout. "Fundamental

[4] Joint Communiqué on the Establishment of Diplomatic Relations, China.-U.S., Jan. 1, 1979, https://perma.cc/AL65-HMLS.

constitutional rights are not typically so contingent." Pet. App. 238a (Menashi, J., dissenting).

Moreover, as the D.C. Circuit warned when it comes to foreign governments:

> practical problems might arise were we to hold that foreign states may cloak themselves in the protections of the Due Process Clause. For example, the power of Congress and the President to freeze the assets of foreign nations, or to impose economic sanctions on them, could be challenged as deprivations of property without due process of law. The courts would be called upon to adjudicate these sensitive questions, which in turn could tie the hands of the other branches as they sought to respond to foreign policy crises.

Price, 294 F.3d at 99.

These concerns apply with equal force to de facto governments, especially those that promote or engage in terrorism. For example, not only Respondents, but potentially the Islamic State of Iraq and the Levant (ISIL), Hamas, or the Houthis, could challenge sanctions or restrictions the United States has imposed against them under the Fifth Amendment's Due Process Clause if they are considered persons.

In short, affording Respondents and other terrorist de facto governments greater due process protections than are afforded to recognized foreign governments and to the States and municipalities that comprise our Nation "would distort the very notion of 'liberty' that underlies the Due Process Clause," *id.*, and create substantial practical difficulties.

B. The court below wrongly held that the test for personal jurisdiction is the same under the Fifth and Fourteenth Amendments

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*, 582 U.S. at 261-62. 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. The court below held—wrongly—that it does. Pet. App. 17a, 47a-52a. The Fifth Amendment's Due Process Clause, as originally understood, does not restrict Congress's ability to define the jurisdiction of federal courts. This means that 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. What the Fifth Amendment does is prevent the deprivation of a covered person's life, liberty, or property without a legally valid process. The PSJVTA, enacted as part of Congress's broad authority to legislate over foreign affairs, empowers federal courts to provide Respondents with the very process that would precede any legal deprivation. Therefore, it complies with the Fifth Amendment even if Respondents are persons for purposes of the Due Process Clause.

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 persons located abroad 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."). The Clause provides that "[n]o person shall … be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. As understood by Americans around the time the Fifth Amendment was ratified, this meant that the federal government could not deprive a person of certain rights unless the person was first given a 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, 526 (2022) (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, show this: the federal government may deprive a person of certain rights only after the person receives process from a court with lawful authority (jurisdiction) to provide it. *See id.* at 466.

2. Early Congressional practice and judicial precedent confirm that Congress has the authority to empower federal courts with extraterritorial jurisdiction. So long as it does that, the Fifth Amendment's Due Process Clause "has nothing to say" about the personal jurisdiction of the federal courts. *See* Sachs, *supra*, at 1710; *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."). 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 that took place on the high seas. *See id.* at 159-60 (opinion of Iredell, J.) (explaining "[t]hat … 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").

And in *Picquet v. Swan*, 19 F. Cas. 609 (C.C.D. Mass. 1828), 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 positive 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 *Piquet* 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 within which 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 was, again, that Congress had not empowered the Rhode Island court to exercise jurisdiction over a nonresident who was not physically

present in 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. 300 (1838), agreed that Congress has 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, in the Court's view, exercised it.

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. *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 (citation omitted).

3. This reading finds support in the broader structure of the Constitution. For example, Congress has sweeping authority to legislate extraterritorially. *See, e.g.*, U.S. Const. art. I, § 8, cl. 3 (power to "regulate Commerce with foreign Nations"); *id.* cl. 10 (power to "define and punish" crimes on the high seas and "Offences against the Law of Nations"); *see also EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) ("Both parties concede, as they must, that Congress has the authority to enforce its laws beyond the territorial boundaries of the United States."). But that power would have little effect if courts could not exercise personal jurisdiction over persons located abroad to enforce those laws. *Cf.* Pet. App. 261a-62a (Menashi, J., dissenting) ("The authority of Congress to assert legislative power extraterritorially means that the federal courts must have a corresponding power to adjudicate disputes concerning its laws."). Separately, the Constitution empowers Congress to create the lower courts—and to control their jurisdiction—and expressly extends the judicial power to disputes that occur outside the United States and disputes that involve foreign subjects. *See* U.S. Const. art. III, §§ 1-2. This context supports the conclusion that the Fifth Amendment's Due Process Clause does not restrict federal courts' ability to exercise personal jurisdiction over those located abroad.

This broader constitutional structure also shows why the concerns that the Fourteenth Amendment's restrictions on personal jurisdiction are meant to address have no place in the Fifth Amendment context. For example, this Court has explained that the Fourteenth Amendment's restrictions prevent one

state from intruding on the sovereignty of another state. *See Bristol-Myers Squibb*, 582 U.S. at 263 ("The sovereignty of each State … implie[s] a limitation on the sovereignty of all its sister States." (alterations in original) (citation omitted)). The federal government, by contrast, has the constitutional authority to enforce federal laws abroad; there is no analog to the "interstate federalism" at play in the Fourteenth Amendment context, *see id.* Thus, the Fourteenth Amendment's "reasonableness" test, *see World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980), which "relie[s] on the principles traditionally followed by American courts in marking out the territorial limits of each State's authority," *Burnham v. Super. Ct. of Cal.*, 495 U.S. 604, 609 (1990), has no bearing on the personal jurisdiction of the *federal* courts.

* * *

By expressly 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 constitutional even if Respondents are persons for purposes of the Fifth Amendment's Due Process Clause.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

MATTHEW B. BERRY
General Counsel
Counsel of Record
TODD B. TATELMAN
Deputy General Counsel
BRADLEY CRAIGMYLE
Associate General Counsel
ANDY T. WANG
RACHEL A. JANKOWSKI
Assistant General Counsels
OFFICE OF GENERAL COUNSEL
U.S. HOUSE OF REPRESENTATIVES
5140 O'Neill House Office Building
Washington, D.C. 20515
(202) 225-9700
Matthew.Berry@mail.house.gov

August 8, 2024