No. 17-508

IN THE

Supreme Court of the United States

RIVKA LIVNAT, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF BEN-YOSEF LIVNAT, *et al.*,

Petitioners,

v.

PALESTINIAN AUTHORITY, A/K/A THE PALESTINIAN INTERIM SELF-GOVERNMENT AUTHORITY,

Respondent.

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

BRIEF IN OPPOSITION

GASSAN A. BALOUL
Counsel of Record
MITCHELL R. BERGER
ALEXANDRA E. CHOPIN
SQUIRE PATTON BOGGS (US) LLP
2550 M Street, NW
Washington, D.C. 20037
(202) 457-6000
gassan.baloul@squirepb.com

Counsel for Respondent

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QUESTION PRESENTED

The question presented is substantially the same as in *Sokolow* v. *Palestine Liberation Organization*, No. 16-1071, in which this Court denied certiorari on April 2, 2018. It is:

Whether the D.C. Circuit correctly applied settled standards of jurisdictional due process explicated recently in *Daimler* and *Walden* – and in full accord with the Second Circuit, and the views of the United States expressed in substantially similar cases – to hold that personal jurisdiction cannot be exercised over a non-sovereign foreign government on claims arising from overseas terrorist attacks, when Petitioners' allegations confirm that the suit-related conduct was neither expressly aimed at nor substantially connected with the United States.

PARTIES TO THE PROCEEDING

Petitioners are plaintiffs from two related cases that were consolidated in the court of appeals and argued together: Rivka Livnat (individually and as personal representative of the Estate of Ben-Yosef Livnat), Noam Livnat, Shira Livnat (individually and as the natural guardian of minor plaintiffs A.L., B.L., N.L., and O.L.), Yehuda Livnat, Rachel Luz, Odeya Gordon, Navah Alfasi, Ora Binyamin, Yitzhak Safra, Natan Safra, and Yisrael Safra.

Respondent (the defendant below) is the Palestinian Authority ("PA").

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RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The court of appeals' opinion is reported at 851 F.3d 45 (D.C. Cir. 2017). Pet. App. 1a-26a. The relevant opinions and orders of the district court are reported at 82 F. Supp. 3d 19 (D.D.C. 2015) (Pet. App. 27a-63a), and 82 F. Supp. 3d 37 (D.D.C. 2015) (Pet. App. 64a-100a).

JURISDICTION

The court of appeals entered its judgment on March 24, 2017, and denied a timely petition for rehearing and rehearing *en banc* on May 16, 2017. Pet. App. 101a-103a. Chief Justice Roberts extended the time for filing a petition for a writ of certiorari until September 28, 2017. *See* No. 17A100. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Pertinent constitutional and statutory provisions are reproduced at Pet. 1-2.

INTRODUCTION

1. This Court denied review, in accord with the views of the United States, of virtually the same Question Presented just two months ago in a look-alike case against the PA. *Sokolow* v. *PLO*, No. 16-1071, 138 S. Ct. 1438 (2018). Petitioners concede that *Sokolow* presented "the same issues" as here, and for that reason requested that the *Sokolow* and *Livnat*

Petitions be resolved together.[1] The Court should deny the *Livnat* Petition just as it denied the *Sokolow* petition.

This Court denied the *Sokolow* petition consistent with the views of the United States (as voiced by the Solicitor General), the denial of certiorari and briefs of the United States in two other substantially similar Antiterrorism Act ("ATA") cases stemming from the September 11, 2001 attacks ("*Terrorist Attacks*"),[2] and this Court's precedent.

The Court's denials of certiorari in *Sokolow* and *Terrorist Attacks* are particularly relevant to consideration of the *Livnat* Petition, because all four petitions raise functionally indistinguishable due process and personal jurisdiction issues under the ATA, and are factually analogous. In all four cases, further, the courts of appeals rejected the appellants' arguments under the same "settled standards" of jurisdictional due process.[3] This Court's repeated denials of certiorari in these cases strongly supports denying review here as well.

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[1] Pet. at 4; *see also id.* at i, 5 n.2. For clarity, Respondent refers to the decision challenged in the Petition as "*Livnat*," and the Second Circuit's decision in *Waldman* v. *PLO*, 835 F.3d 317 (2d Cir. 2016) as "*Sokolow*."

[2] *O'Neill* v. *Asat Trust Reg. (In re Terrorist Attacks on September 11, 2001)*, 714 F.3d 659, 674 (2d Cir. 2013), *cert. denied*, *O'Neill* v. *Al Rajhi Bank*, 134 S. Ct. 2870 (2014) ("*O'Neill*"); *In re Terrorist Attacks on September 11, 2001*, 538 F.3d 71, 95 (2d Cir. 2008), *cert. denied*, *Fed. Ins. Co.* v. *Saudi Arabia*, 557 U.S. 935 (2009) ("*Federal Insurance Company*") *abrogated on other grounds by Samantar* v. *Yousuf*, 560 U.S. 305 (2010) (together, "*Terrorist Attacks*").

[3] Brief for the U.S. as Amicus Curiae at 6, 16, *O'Neill* v. *Al Rajhi Bank*, No. 13-318 (May 27, 2014) ("*O'Neill* Amicus Brief");

The Petition accordingly raises no new issues and breaks no new ground, such that there are no "compelling reasons" for review. Sup. Ct. Rule 10; *see Edwards* v. *Hope Med. Grp.*, 115 S. Ct. 1, 2 (1994) (Scalia, J., Circuit Justice) ("We have already denied certiorari in two of those [similar] cases, and it is in my view a certainty that four Justices will not be found to vote for certiorari on the . . . question unless and until a conflict in the Circuits appears."); *Miroyan* v. *United States*, 439 U.S. 1338, 1338-39 (1978) (Rehnquist, J., Circuit Justice) (same).

2. Respondent is a "person" for Fifth Amendment purposes, and is thus entitled to due process. There is no circuit split on this point, and the United States took the same position in its recent CVSG brief in *Sokolow*.

For decades, plaintiffs have tried to eject the PA and its diplomatic and political arm, the Palestine Liberation Organization ("PLO"), from the shelter of the Fifth Amendment's Due Process Clause, because neither allegedly is a "person."[4] The courts of appeals and lower federal courts consistently have rejected that argument, because the PA and the PLO are not recognized by the United States as a sovereign government. *Livnat* adopted the same rationale, in express reliance on *Sokolow* and D.C. Circuit precedent, concluding that the PA is a "person" for Fifth Amendment

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see also Pet. App. 20a-24a (D.C. Cir. Op.); Resp't. App. 23a-26a (*Sokolow* CVSG); Brief for the U.S. as Amicus Curiae at 19-20, *Fed. Ins. Co.* v. *Kingdom of Saudi Arabia*, No. 08-640 (May 29, 2009) ("*Federal Insurance Company* Amicus Brief").

[4] The PLO is not a party in this Petition, but was in *Sokolow*, where it was adjudged, like the PA, to be a "person" entitled to jurisdictional due process protection.

due process purposes because Palestine (which Respondent governs) is not a U.S.-recognized sovereign state. Pet. App. 13a-14a; *see also Sokolow,* 835 F.3d at 329.

The United States recently advised this Court in its *Sokolow* CVSG brief that it agrees both with the D.C. Circuit in *Livnat* and the Second Circuit in *Sokolow* that the PA is entitled to due process. The Solicitor General urged denial of review in *Sokolow* and repeatedly used the *Livnat* Court's analysis to illustrate its rationale for that position. The Solicitor General averred that *Livnat* properly "concluded that foreign non-sovereign governmental entities like respondents do not fall outside due process protections" and, further, that *Livnat* properly "rejected the argument that the PA is outside our domestic structure of government, explaining that this Court had consistently 'rejected the notion that 'alien' entities — such as foreign corporations — 'are disqualified from due-process protection.'" Resp't. App. 15a-16a (*Sokolow* CVSG) (internal hyphenation omitted) (quoting Pet. App. 10a (D.C. Cir. Op.)).

There is no circuit split on this issue—a fact made clear by the mutually reinforcing decisions here and in *Sokolow*—and which counsels denial of the Petition. More specifically, after the Second Circuit's decision in *Sokolow*, the D.C. Circuit in *Livnat* issued its own decision, which echoed the jurisdictional due process analysis of the *Sokolow* Court. The United States subsequently advocated for denial of the *Sokolow* petition by relying substantially on the *Livnat* Court's jurisdictional due process analysis. *See, e.g.*, Resp't. App. 13a-16a (*Sokolow* CVSG) (citing Pet. App. 4a-6a, 8a-15a (D.C. Cir. Op.)) (asserting that the Second Circuit's recognition of due process protections for the PA and PLO "does not conflict with any decision of

this Court, implicate any conflict among the courts of appeals, or otherwise warrant this Court's intervention at this time").

This Court should deny the Petition, further, because this case presents due process issues that are unlikely to recur. Both *Livnat* and *Sokolow* held that the PA is a unique non-sovereign foreign government, effectively in a category of one. *See* Pet. App. 8a (D.C. Cir. Op.) ("This case is different. Both parties acknowledge that the Palestinian Authority is not recognized by the United States as a government of a sovereign state. And the appellants . . . concede that the Palestinian Authority is not sovereign in 'law' or 'fact,' apparently referring to the Palestinian Authority's limited powers and incomplete independence from Israel."); *Sokolow*, 835 F.3d at 323 ("While the United States does not recognize Palestine or the PA as a sovereign government . . . the PA is the governing authority in Palestine and employs tens of thousands of security personnel in Palestine.") (citation and internal quotation marks omitted). As a result, there will be only "episodic" future application of the one-off conclusion that the Palestinian government is a "person" for due process purposes. *Rice* v. *Sioux City Mem'l Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955).

3. The court of appeals correctly applied the settled standards of jurisdictional due process enunciated in *Walden* v. *Fiore*, 134 S. Ct. 1115, 1121 & n.6 (2014). Applying what it termed the "status quo of personal-jurisdiction doctrine," the court of appeals concluded it could not exercise specific jurisdiction over Respondent, because Petitioners failed to establish a substantial connection between the United States and the attack in question. Pet. App. 20a. Petitioners had claimed only that the attack at issue had targeted

"Israelis and Jews." Pet. at 9; *see* Pet. App. 21a-22a (D.C. Cir. Op.) (finding no alleged "affiliation between the forum and the underlying controversy") (alteration omitted) (quoting *Walden*, 134 S. Ct. at 1121 n.6) (internal quotation marks omitted).

The Second Circuit addressed this precise issue and fact pattern in *Sokolow*, where the petitioners admitted that the attacks were aimed at Israel and Israelis, and that the impact on American citizens consequently "was indeed random," because the terrorists fired their guns "indiscriminately" and sought to kill "as many people as possible." *Sokolow* JA 3836, JA 3944.[5]

In determining whether it had specific jurisdiction, the *Sokolow* Court relied on *Walden* and its progenitors to underscore that "the defendant's suit-related conduct must create a substantial connection" with the forum by engaging in conduct that was "expressly aimed" or "purposefully directed" at the forum. *Sokolow*, 835 F.3d at 335, 337-38 (quoting *Walden*, 134 S. Ct. at 1121, 1123). These are the same settled due process standards that the Second Circuit applied to the jurisdiction questions in the *Terrorist Attacks* cases.[6] *See O'Neill*, 714 F.3d at 674-76 (examining

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[5] JA cites refer to the joint appendices filed with the Circuit courts in *Sokolow* and *Livnat*.

[6] The *Terrorist Attacks* cases arose from the September 11th attacks on the United States and implicated the Nation's antiterrorism interests at their apex. By contrast, this case arises from an attack in the West Bank, which, as Petitioners ackowledge, are random and "indiscriminate by nature." Pet. at 28 (quoting *Sokolow* Pet. at 17); *see also* Pet. App. 22a-23a (D.C. Cir. Op.), 49a (*Livnat* D.D.C. Op.), 86a (*Safra* D.D.C. Op.) (noting complete lack of connection between the attack in question and the United States).

whether defendants "purposeful[ly] direct[ed]" conduct at the "forum"); *Federal Insurance Company*, 538 F.3d at 93-94 (same).

The court of appeals here aligned its jurisdictional due process analysis with the Second Circuit's in *Sokolow* to examine whether the appellants had demonstrated an "affiliation between the forum and the underlying controversy." *Walden*, 134 S. Ct. at 1121 n.6. *Sokolow* correctly disallowed the petitioners' "random, fortuitous, or attenuated" grounds for specific jurisdiction; the United States in *Sokolow* relied on *Livnat* to argue that the Second Circuit had correctly applied those standards. *Sokolow*, 835 F.3d at 337 (quoting *Walden*, 134 S. Ct at 1123).

Swimming against that tide, Petitioners would have this Court supplant the minimum contacts analysis with a foreseeability test that turns solely on "private and governmental interests" favoring extraterritorial application of U.S. law. Pet. at 25. Just as the petitioners did in *Sokolow* and *Terrorist Attacks*, Petitioners press the Court to jettison *Walden*'s forum-connection requirement, and instead create a new, "flexible" view of Fifth Amendment due process that would abandon the long-settled minimum contacts standards in favor of an impromptu analysis authorizing universal personal jurisdiction, save only in circumstances of "fundamental unfairness."[7]

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[7] Pet. at 25; *see also* Brief of Former Federal Officials as Amici Curiae in Support of Petitioners at 5, 20, 24-25, *Sokolow* v. *PLO,* No. 16-1071 (Apr. 6, 2017) (implying that the only limit to personal jurisdiction under the Fifth Amendment is "fundamental unfairness"); Brief of Former Federal Officials as Amici Curiae in Support of Petitioners at 12-13, 21-22, *Livnat* v. *Palestinian Auth.*, Nos. 15-7024 & 15-7025 (July 16, 2015) (same).

It was dispositive for the court of appeals, and for the Second Circuit and the United States in *Sokolow*, that no decision ever has adopted the petitioners' "far broader 'sovereign interests' theory, under which the Fifth Amendment's due process limitations are satisfied so long as the defendant's conduct interfered with U.S. sovereign interests." Resp't. App. 22a (*Sokolow* CVSG) (quoting Pet. App. 18a (D.C. Cir. Op.) for the same proposition) (internal quotation marks omitted).

For its part, the Second Circuit had examined the respondents' contacts with the forum as the driver of this analysis, rather than the respondents' ostensible "knowledge of [the petitioners'] strong forum connections," *Sokolow*, 835 F.3d at 335-37 (citing *Walden*, 134 S. Ct. at 1124) (citations and internal quotation marks omitted). The United States concurred with this approach, because "a court may not exercise specific jurisdiction merely because a defendant could foresee that his conduct would have some effect in the forum." Resp't. App. 19a (*Sokolow* CVSG) (citing *Calder* v. *Jones*, 465 U.S. 783, 789-90 (1984)).

Petitioners here complain, however (just as those in *Sokolow* did), that the court's jurisdictional reach in Fifth Amendment cases is unconstrained by the "minimum contacts" requirement developed in cases under the Fourteenth Amendment. Pet. at 21-24. No court has ever accepted that proposition, a point the United States reinforced in its *Sokolow* CVSG brief. Resp't. App. 21a-23a (*Sokolow* CVSG) (citing, *inter alia,* Pet. App. 18a (D.C. Cir. Op.)).

Petitioners lean on legislative history for this "novel argument" (as the United States termed it) about Fifth Amendment jurisdiction. Resp't. App. 18a (*Sokolow* CVSG); *see* Pet. at 5-7. Congress cannot legislate

around the Due Process Clause, no matter the prescriptive goals or good intentions behind the legislation. It is a bedrock constitutional principle that due process constrains the federal courts' jurisdiction to adjudicate claims against specific defendants in specific cases. *See, e.g.*, *Helicopteros Nacionales de Colombia* v. *Hall*, 466 U.S. 408 (1984); *see also Galvan* v. *Press*, 347 U.S. 522, 531 (1954) (noting that the political branches must respect "the procedural safeguards of due process" even when addressing "[p]olicies pertaining to the entry of aliens").

The case-specific application of settled jurisdictional due process standards does not encroach on Legislative Branch jurisdiction to prescribe laws, or on Executive Branch authority to enforce the Nation's antiterrorism laws and policies. The court of appeals in *Livnat*, in accord with the Second Circuit and the antecedent views of the United States in *Terrorist Attacks*, adhered to that uncontroversial principle. *See* Pet. App. 16a, 20a (D.C. Cir. Op.); *Sokolow*, 835 F.3d at 344; Resp't. App. 23a-24a (*Sokolow* CVSG); *Federal Insurance Company* Amicus Brief at 21. The court of appeals recognized correctly that to permit legislative objectives to supplant the constitutional standard for personal jurisdiction (which Petitioners advocate) would transgress separation of powers principles by permitting Congress to dictate the parameters of jurisdictional due process protections under the Constitution.

Petitioners exaggerate the potential impact of *Livnat*, just as the *Sokolow* petitioners did. Judicial application of the "expressly aimed" test for specific personal jurisdiction does not affect: Legislative power to prescribe antiterrorism laws; administrative rule-making jurisdiction (such as the designation of

Foreign Terrorist Organizations); personal jurisdiction in criminal cases; and, in civil cases, judicial application of the due process tests for general personal jurisdiction, and for specific personal jurisdiction under a "purposeful availment" theory. The political branches also have a robust arsenal of tools available for fighting terrorism that are unconstrained by the traditional due process limits on jurisdiction in ATA civil cases. *See* Pet. App. 20a-21a (D.C. Cir. Op.); *Sokolow*, 835 F.3d at 341-42 & n.13; *Federal Insurance Company* Amicus Brief at 21.

At the root of Petitioners' protest is how the court of appeals applied the settled jurisdictional due process standards to the facts of their case. The *Sokolow* petitioners made the same fact-bound objection, which the United States addressed in a manner equally applicable here. Resp't. App. 26a (*Sokolow* CVSG) (urging the Court that "a fact-intensive dispute regarding the record in this case does not warrant this Court's review"); *accord O'Neill* Amicus Brief at 22 (arguing that "Petitioners' fact-specific disagreement . . . does not warrant this Court's review"); *see also Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co*., 336 U.S. 271, 275 (1949) (admonishing that this Court is not "a court for correction of errors in fact finding").

The Petition accordingly should be denied.

STATEMENT OF THE CASE

Respondent is the government of parts of the West Bank and the Gaza Strip, collectively referred to as "Palestine." Pet. App. 2a (D.C. Cir. Op.). The 1993 Oslo Accord created the Palestinian Authority and limited its reach to domestic governance, while Israel

retains external security control. *Id*. (D.C. Cir. Op.); *see also* Interim Agreement on the West Bank and Gaza Strip, Isr.-PLO., art. X, Sept. 28, 1995, 36 I.L.M. 551, 561. The PA does not maintain a presence in the United States. The PLO, as the international diplomatic arm of the PA, maintains a Washington D.C. office. *See Livnat* JA 69 ¶ 14, JA 71 ¶ 19.

The United States does not recognize as sovereign either Palestine, or the PA as its government. Pet. App. 2a-3a (D.C. Cir. Op.).

All Petitioners are U.S. citizens who reside in Israel. Pet. App. 28a (*Livnat* D.D.C. Op.), 65a (*Safra* D.D.C. Op.). Their claims arise from a 2011 shooting at Joseph's Tomb, a religious site in the West Bank city of Nablus. *See* Pet. App. 2a (D.C. Cir. Op.), 29a-30a (*Livnat* D.D.C. Op.), 66a-67a (*Safra* D.D.C. Op.). Although Petitioners assert the district court had specific personal jurisdiction, they do not allege that they were attacked because they are American citizens, or that the attacker had actual knowledge or even a reason to believe that those injured were Americans or otherwise connected to the United States. *See* Pet. App. 49a (*Livnat* D.D.C. Op.); Pet. App. 85a-86a (*Safra* D.D.C. Op.).

To the contrary, Petitioners allege that security personnel affiliated with the PA carried out the attack in order to target "Israelis and Jews" visiting the shrine. *See, e.g.*, Pet. at 9 (alleging PA practice of incentivizing "acts of violence and terror against Israelis and Jews"); JA 27 (*Livnat* Compl. ¶ 37) ("It is widely known that Joseph's Tomb is a Jewish religious site that is visited by many Jews, and that . . . it is one of the few locations in the entire West Bank where PA security officers routinely come into contact with

Israeli and Jewish civilians.") JA 50 (*Safra* Compl. ¶ 33) (same).

Petitioners' general jurisdiction claim never came close to satisfying *Daimler*'s "at home" test, because the PA is headquartered in Palestine, and Petitioners pointed only to PLO diplomatic activities in the United States. *Daimler A.G.* v. *Bauman*, 571 U.S. 117, 112 (2014); *see also* Pet. App. 44a-45a (*Livnat* D.D.C. Op.), 81a-82a (*Safra* D.D.C. Op.). The court of appeals noted that Petitioners were prudent to abandon their general jurisdiction argument, because the "[t]he Palestinian Authority is . . . not subject to general jurisdiction in the United States." Pet. App. 21a (D.C. Cir. Op.).

Petitioners' similarly anemic specific jurisdiction claim rested only on conclusory allegations that the attack was part of Respondent's alleged "general practice of using terrorism to influence United States public opinion and policy." Pet. App. 3a (D.C. Cir. Op.) (quoting JA 23 (*Livnat* Compl. ¶ 14), JA 45 (*Safra* Compl. ¶ 10)) (internal quotation marks omitted). Petitioners alternatively claimed that the court could exercise specific jurisdiction because it was foreseeable that the attack would harm U.S. citizens living in Israel. *See* Pet. App. 48a-49a (*Livnat* D.D.C. Op.), 85a-86a (*Safra* D.D.C. Op.).

The court of appeals rejected as "conclusory" Petitioners' specific jurisdiction theory, noting that Petitioners' evidence consisted of a single declaration of an academic hypothesizing about PA policy, which did "not even mention the attack," and failed to establish a "link between that practice and the . . . attack." Pet. App. 22a-23a. Petitioners accordingly could not satisfy their burden of proof to show that there was an

"affiliation between the forum and the underlying controversy." Pet. App. 21a (D.C. Cir. Op.) (alteration omitted) (quoting *Walden*, 134 S. Ct. at 1121 n.6).

The court of appeals further concluded that the district court did not abuse its discretion in denying jurisdictional discovery, which could not cure these deficits. *See* Pet. App. 23a-24a; *see also id*. at 56a-57a (*Livnat* D.D.C. Op.), 93a-94a (*Safra* D.D.C. Op.). The D.C. Circuit unanimously denied rehearing *en banc*. *See* Pet. App. 103a.

REASONS TO DENY THE PETITION

I. FEDERAL COURTS AND THE UNITED STATES AGREE THAT A FOREIGN GOVERNMENT NOT RECOGNIZED AS SOVEREIGN BY THE U.S. IS A "PERSON" FOR PURPOSES OF JURISDICTIONAL DUE PROCESS.

There is no conflict in the federal courts, or with the United States (as confirmed by the Solicitor General in *Sokolow*), that foreign governments not recognized as sovereign by the U.S. are "persons" entitled to jurisdictional due process. *See* Pet. App. 13a-14a (D.C. Cir. Op.); *Sokolow*, 835 F.3d at 329 (holding that the PA and PLO receive due process); Resp't. App. 15a n.1 (*Sokolow* CVSG) (asserting that *Livnat* and *Sokolow* were in "accord with a substantial number of district court decisions concluding that [the PA and/or the PLO] have due process rights in the personal jurisdiction context").[8]

[8] *See also* Resp't. App. 15a (*Sokolow* CVSG) (noting that *Livnat* and *Sokolow* are the "only . . . appellate decision[s] addressing the legal status of non-sovereign foreign entities"); *Toumazou* v. *Turkish Republic of N. Cyprus*, No. 14-7170, 2016 U.S. App.

Likewise, in recommending against certiorari in *Sokolow*, the United States emphasized that the Second Circuit's decision "accords with the D.C. Circuit's decision in *Livnat* . . . which also held that the PA is entitled to due process protections." Resp't. App. 15a (*Sokolow* CVSG); *see also id*. at 14a-16a, 21a-22a, 24a (equating the two decisions).

Sovereignty is a narrow exception to the general rule that all individuals and entities receive defensive jurisdictional due process when haled into court in the United States. *See GSS Grp. Ltd* v. *Nat'l Port Auth.*, 680 F.3d 805, 813 (D.C. Cir. 2012) (limiting the due process exception to "sovereigns"); *Price* v. *Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 98-99 (D.C. Cir. 2002) (same); *see also Frontera Res. Azer. Corp.* v. *State Oil Co. of the Azer. Republic*, 582 F.3d 393, 399 (2d Cir. 2009) (same).

Petitioners accordingly cannot rely on precedent concerning U.S. recognized sovereigns—which they (like the *Sokolow* petitioners) do at great length. *See* Resp't. App. 14a-16a (*Sokolow* CVSG) (relying on Pet. App. 4a-10a (D.C. Cir. Op.) to reject this argument). According to the Solicitor General, "the Second and D.C. Circuits have recognized that the reasoning of those decisions is limited to sovereigns, and they have held that non-sovereign foreign entities like respondents [the PA and PLO] do receive due process protections." Resp't. App. 16a (*Sokolow* CVSG); *see*

LEXIS 787, at *2 (D.C. Cir. Jan. 15, 2016) (assuming without deciding that an unrecognized government was entitled to jurisdictional due process); Pet. App. 35a-36a (*Livnat* D.D.C. Op.), 72a-73a (*Safra* D.D.C. Op.) (collecting district court cases applying jurisdictional due process to this Respondent); *Estate of Klieman* v. *Palestinian Auth*., 82 F. Supp. 3d 237, 243-44 (D.D.C. 2015).

also Pet. App. 10a (D.C. Cir. Op.) ("Both the Supreme Court and this court have repeatedly held that foreign corporations may invoke due process protections to challenge the exercise of personal jurisdiction over them . . . .") (citation omitted).

Entitlement to due process raises, but does not answer, the question of whether a defendant is subject to personal jurisdiction in a specific case. No court has recognized a "bad actor" exception to jurisdictional due process, regardless of the gravity of the alleged actions. *See, e.g.*, *Daimler*, 571 U.S. at 121 (applying due process in case involving claims of torture and murder). Instead, U.S. courts consistently have recognized the due process rights of accused terrorists, and have had little trouble finding personal jurisdiction over terrorists when they target the United States. Therefore, when international terrorists like ISIS and al Qaeda face claims in U.S. courts, the jurisdictional question is whether their case-specific actions were attacks against the United States, not whether they should be deprived of due process. *See O'Neill*, 714 F.3d at 674-76; *Federal Insurance Company*, 538 F.3d at 93-95.

Petitioners here, like those in *Sokolow*, liken the PA to sovereign "States of the Union" that are excluded from the Due Process clause under *South Carolina* v. *Katzenbach*, 383 U.S. 301, 323-24 (1966). Pet. at 13. The federal courts and the United States have uniformly rejected this interpretation, because non-sovereign foreign governments, unlike the States, have no attributes of sovereignty.

Specifically, non-sovereign foreign governments do not receive a foreign sovereign's bundle of rights under international law, including diplomatic relations, sovereign immunity, comity, and deference under the Act

of State doctrine. *See* Pet. App. 11a (D.C. Cir. Op.) (noting the "panoply of mechanisms in the international arena" available to sovereigns) (quoting *Price*, 294 F.3d at 98) (internal quotation marks omitted); *Sokolow*, 835 F.3d at 329 ("Foreign sovereign states do not have due process rights but receive the protection of the Foreign Sovereign Immunities Act."); *accord* Resp't. App. 14a (*Sokolow* CVSG) ("This Court has recognized one class of entities that are not 'persons' for purposes of due process: the States of the Union. . . . '[T]he Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union.'") (quoting *Katzenbach*, 383 U.S. at 323-24) (citations omitted).

Petitioners also point to the jurisdictional due process treatment of municipalities to attempt a comparison with non-U.S. recognized foreign governments. The court of appeals here and the United States in *Sokolow* rejected this approach, as municipalities are created under State law and benefit from the sovereignty and power of the States. *See* Pet. App. 15a (D.C. Cir. Op.); Resp't. App. 16a-17a (*Sokolow* CVSG). As the United States explained, the lack of due process for municipalities rests "on the principle that municipalities are creatures of a State and therefore lack any constitutional rights against the State. . . That rationale does not extend to foreign entities like [the PA]." *Id*. at 16a (quoting Pet. App. 15a (D.C. Cir. Op.)) (internal quotation marks omitted).

Respondent is not entitled to the protections, immunity, and privileges that the United States grants to sovereign states. *See, e.g.,* Pet. App. 11a (D.C. Cir. Op.) ("[T]he United States recognizes special privileges, based on comity and international-law principles, for sovereigns alone."); *Klinghoffer* v. *S.N.C.*

Achille Lauro Ed Altri-Gestione, 937 F.2d 44, 48 (2d Cir. 1991) ("[U]nrecognized regimes are generally precluded from appearing as plaintiffs in an official capacity without the Executive Branch's consent.") (citing *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 410-11 (1964)).

In *Sokolow*, the United States invoked *Livnat* and these underlying reasons to demonstrate that the PA's entitlement to jurisdictional due process is consistent with existing law. Resp't. App. 15a n.1 (*Sokolow* CVSG) (holding that "decisions of the D.C. Circuit [in this case] and the court of appeals below accord with a substantial number of district court decisions concluding that [Respondent] ha[s] due process rights in the personal jurisdiction context").

Petitioners nonetheless make much of ostensible prior U.S. government positions that non-sovereign foreign political organizations do not receive due process. *See* Pet. at 15-17. The United States in *Sokolow* admonished that this argument "overread[s]" those prior U.S. briefs. Resp't. App. 17a n.2 (*Sokolow* CVSG) ("The government's argument rested on the incompatibility of the PLO's assertion of sovereign status with its claim of First Amendment rights, not on an independent determination that the PLO's governmental attributes rendered it the equivalent of a sovereign."). Petitioners similarly overread here, for three reasons.

First, the United States has long acknowledged that "a foreign government" is entitled to assert defenses based on jurisdictional due process, even if it is not automatically entitled to make affirmative procedural due process challenges to U.S. government action. *See* Brief for Respondents, *Nat'l Council of Resistance of Iran* v. *Dep't of State*, No. 99-1438, 2000 WL 35576228,

at *37 (D.C. Cir. Aug. 21, 2000) (distinguishing between jurisdictional due process and the "quite different" claims for constitutional "rights and protections in dealings with Congress and the Executive Branch").

Second, no court ever has accepted Petitioners' contention that foreign political entities are not entitled to jurisdictional due process because they have governmental attributes. Pet. App. 6a (D.C. Cir. Op.) ("Nothing in *Price*, other precedent, or the appellants' arguments compels us to extend the [exception for sovereign states] to all foreign government entities."); *accord Sokolow*, 835 F.3d at 329.

Third, in considering the views of the United States in procedural due process cases, federal courts consistently have resolved the entitlement question not based on the governmental attributes of a foreign political entity, but instead on whether the entity has established a substantial or sufficient connection with the United States. *See, e.g., People's Mojahedin Org. of Iran* v. *Dep't of State*, 182 F.3d 17, 22 (D.C. Cir. 1999) (concluding that the LTTE and MEK had no due process rights because they had no "presence" in the United States) (emphasis added); *United States* v. *Hossein Afshari*, 426 F.3d 1150, 1153 (9th Cir. 2005) (failing to reach the United States' argument that the MEK was not entitled to due process); *Nat'l Council of Resistance of Iran*, 251 F.3d 192, 201-03 (D.C. Cir. 2001) (declining to decide if the NCRI was entitled to due process because the NCRI did not qualify as a government, and thus did not come within the "ambit of authorities governing the interrelationship of two sovereigns").

In *Sokolow*, the United States expressly rejected Petitioners' government-function test for jurisdictional

due process in light of separation of powers law. *See* Resp't. App. 18a (*Sokolow* CVSG) (citing *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2084 (2015)). The Petitioners' test could lead to *de facto* recognition by the courts of non-sovereign foreign governments like Respondent, and "risks judicial determinations at odds with Presidential determinations underlying recognition." Resp't. App. 18a (*Sokolow* CVSG). Only the President may recognize a foreign sovereign, and the Judiciary is barred from actions that "in effect . . . exercise the recognition power." *Zivotofsky*, 135 S. Ct. at 2095; *see also id*. at 2091 (explaining "[T]he Judiciary is not responsible for recognizing foreign nations . . . . 'Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but is a political question . . . .'") (citation omitted); *see also Nat'l City Bank* v. *Republic of China*, 348 U.S. 356, 358 (1955) ("The status of the Republic of China in our courts is a matter for determination by the Executive and is outside the competence of this Court."); *United States* v. *Belmont*, 301 U.S. 324, 328 (1937) (holding that the issue of "who is the sovereign of a territory is not a judicial question, but one the determination of which by the political departments conclusively binds the courts").

Even so, as the United States explained in *Sokolow*, cases involving Palestine are poor vehicles for resolving the "person" issue. That is because the PA is a "*sui generis*" entity "with a unique relationship to the United States government, [and] a ruling on whether respondents [the PA/PLO] have due process protections is unlikely to have broad utility in resolving future cases concerning other entities." Resp't. App. 18a (*Sokolow* CVSG). This Court generally declines to review questions that "imply a reach to a problem beyond the academic or the episodic," particularly

"where the issues involved reach constitutional dimensions." *Rice*, 349 U.S. at 74.

The court of appeals' decision on the foundational issue of whether the PA is entitled to due process thus does not warrant review.

II. THE COURT OF APPEALS CORRECTLY APPLIED SETTLED STANDARDS OF JURISDICTIONAL DUE PROCESS.

The court of appeals below correctly applied settled jurisdictional due process principles to conclude that Petitioners had failed to demonstrate a *prima facie* case for specific jurisdiction. In that respect, *Livnat* is in line not only with the Second Circuit in *Sokolow*, but also with the views of the United States in *Sokolow* and previously in *Terrorist Attacks*.

In ATA civil cases such as these, settled standards of jurisdictional due process require a threshold determination of whether an overseas actor has established "minimum contacts" with the United States under *Walden*; and if so, whether the exercise of jurisdiction is "reasonable" under a multi-factor test. *See Sokolow,* 835 F.3d at 331; *O'Neill,* 714 F.3d at 673; *Federal Insurance Company*, 538 F.3d at 93.

Although federal courts developed the relevant jurisdictional due process standards in Fourteenth Amendment cases, the courts routinely apply them in Fifth Amendment cases, adjusted only to acknowledge the nationwide scope of relevant minimum contacts. In concert with that practice, the court of appeals below employed the "usual due-process standards" to evaluate the PA's relevant contacts, consistent with the Second Circuit in *Sokolow* and *Terrorist Attacks*, and with the views of the United States in those cases. Pet. App. 20a; *see Sokolow,* 835 F.3d at 329-31 (holding

that Fifth Amendment due process standards emulate those under the Fourteenth Amendment, adjusted only to consider nationwide minimum contacts); Resp't. App. 21a-22a (*Sokolow* CVSG) (same); *see also supra* n.3 (discussing U.S. amicus briefs in *Terrorist Attacks*).[9]

As did the *Sokolow* petitioners, however, Petitioners here dispute that Fifth Amendment jurisdictional due process standards are congruent with the Fourteenth Amendment jurisdictional standards articulated in *Daimler* and *Walden*. Instead, they maintain that "[p]rinciples of federalism" mandate a less stringent Fifth Amendment jurisdictional standard than that applied under the Fourteenth Amendment—one omitting the "minimum contacts" requirement. Pet. at 21-22.[10]

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[9] The views of the United States in two cases last term are also consistent with this position. In *BNSF Railway Co*. v. *Tyrell*, the United States explained that the only salient difference between Fifth and Fourteenth Amendment jurisdictional due process is that, under the Fifth Amendment, "a defendant may have sufficient aggregate contacts with the Nation as a whole, or the requisite relationship with the United States, for purposes of personal jurisdiction, even though it does not have such contacts or the requisite relationship with a particular State." Brief for the U.S. as Amicus Curiae at 31-32, *BNSF Ry. Co.* v. *Tyrrell*, No. 16-405 (Mar. 6, 2017); *see also* Brief for the U.S. as Amicus Curiae at 31 n.4, *Bristol-Myers Squibb Co.* v. *S.F. Cnty*, No. 16-466 (Mar. 8, 2017).

[10] Petitioners' reliance on *J. McIntyre Machinery, Ltd.* v. *Nicastro*, 564 U.S. 873 (2011) (plurality opinion), in support of a federalism-based theory of personal jurisdiction is misplaced. Pet. at 21-22. Courts interpret *J. McIntyre* as calling for the application of a traditional minimum-contacts analysis in Fifth Amendment cases, adjusted to account for the U.S. as a whole, rather than with individual states. *See, e.g., Sokolow*, 835 F.3d at 328-31; *Erno Kalman Abelesz* v. *OTP Bank*, 692 F.3d 638, 660

As the Second Circuit did in *Sokolow*, the court of appeals here disagreed, because "personal jurisdiction is not just about federalism" and the fairness concerns that undergird Fifth Amendment due process require preservation of the minimum contacts standard. Pet. App. 19a; *accord Sokolow,* 835 F.3d at 328 ("Personal jurisdiction is 'a matter of individual liberty' because due process protects the individual's right to be subject only to lawful power.'") (quoting *J. McIntyre Machinery, Ltd.*, 564 U.S. at 873).

The court of appeals consequently rejected Petitioners' "newly devised theory . . . that the Fifth Amendment is less concerned with circumscribing the power of courts than is the Fourteenth Amendment," because "[n]o court has ever held that the Fifth Amendment permits personal jurisdiction without the same 'minimum contacts' with the United States as the Fourteenth Amendment requires with respect to States." Pet. App. 17a-18a. The United States in *Sokolow* agreed, and argued that those petitioners' same "novel" theory was unworthy of consideration. Resp't. App. 18a-24a (*Sokolow* CVSG).

Livnat reached this conclusion consistent with the precedent of this Court, and the Second, Sixth, Seventh, Eleventh, and Federal Circuits, which consistently apply the Fourteenth Amendment jurisdictional due process framework in Fifth Amendment cases. *See* Pet. App. 18a (D.C. Cir. Op.) (collecting cases); *accord Sokolow*, 835 F.3d at 330 ("This Court's precedents clearly establish the congruence of due process analysis under both the Fourteenth and Fifth Amendments."); *Republic of Argentina* v. *Weltover*,

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(7th Cir. 2012); *Pangaea, Inc.* v. *Flying Burrito LLC*, 647 F.3d 741, 746 (8th Cir. 2011).

Inc., 504 U.S. 607, 619 (1992); *Mathews* v. *Eldridge*, 424 U.S. 319, 332-35 (1976).

Petitioners' proposed "flexible" sovereign-interests test would create a number of obvious snares and entanglements. First, the new test would unravel longstanding precedent that a forum's interests in adjudicating a case are insufficient – standing alone – to support specific jurisdiction over a foreign defendant. *See* Pet. App. 18a (D.C. Cir. Op.); *accord Sokolow*, 835 F.3d at 330. Forum "interests" are one of multiple factors in the secondary "reasonableness" analysis for specific jurisdiction, but play no part in the antecedent minimum contacts analysis. *See Daimler*, 571 U.S. at 139 n.20 (citing, *inter alia*, *Asahi Metal Indus. Co.* v. *Super. Ct. of Cal.*, 480 U.S. 102, 112 (2014)).

Second, a "flexible" sovereign-interests test would confound this Court's pursuit of "[s]imple jurisdictional rules [that] . . . promote greater predictability" by creating inconsistency in the courts. *Daimler*, 571 U.S. at 137 (citation and internal quotation marks omitted); *accord* Pet. App. 20a (D.C. Cir. Op.).

Petitioners' proposed test likewise would engender jurisdictional overreach in similarly-worded federal statutes with jurisdictional provisions that the ATA emulates. Born of a well-meaning desire to combat terrorism, this *ad hoc* new rule undoubtedly would become the law of unintended consequences because it necessarily would govern all other federal-question cases.[11] A rule of universal jurisdiction developed in

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[11] *See, e.g., Morrison* v. *Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010); *Wultz* v. *Islamic Republic of Iran*, 762 F. Supp. 2d 18, 26-29 (D.D.C. 2011) (opinion withdrawn in part by *Wultz* v. *Bank of China Ltd.*, 865 F. Supp. 2d 425 (S.D.N.Y. 2012)) (discussing "similarly-worded" jurisdictional provisions in the ATA, the Clayton Act, 15 U.S.C. § 22, and the Securities Exchange Act, 15

the heated context of a terrorism case inevitably would spawn jurisdictional overreach when applied in standard-fare federal-question cases under securities, antitrust, and intellectual property laws.

Given the uniform view of the courts of appeals and the United States regarding the congruence of Fourteenth and Fifth Amendment jurisdictional standards, further review by this Court is unwarranted.

III. *LIVNAT* NARROWLY ADDRESSES ONE ASPECT OF CIVIL JURISDICTION IN ATA CASES, AND DOES NOT AFFECT LEGISLATIVE, EXECUTIVE, OR CRIMINAL JURISDICTION TO COMBAT TERRORISM; CONGRESS CANNOT LEGISLATE AROUND THE CONSTITUTION.

Relying on *Livnat*, the United States in *Sokolow* confirmed that the application of jurisdictional due process standards in ATA civil cases does not limit the powers of the courts or the political branches to combat terrorism. *See* Resp't. App. 23a-24a (*Sokolow* CVSG) (citing Pet. App. 20a) (D.C. Cir. Op.).[12]

U.S.C. § 78aa); *see also* RICO, 18 U.S.C. § 1965(a)-(b); *c.f.* Pet. at 31 (acknowledging the impact of this decision "is not limited to the ATA").

[12] *See also, e.g.*, *Federal Insurance Company* Amicus Brief at 21 (arguing that the "court of appeals' decision concern[ed] only personal jurisdiction," did "not speak to the legislative jurisdiction of Congress to apply federal law extraterritorially," and would not impact criminal personal jurisdiction that "is based on the physical presence of the defendant in the forum, independent of any minimum-contacts analysis"); *United States* v. *Perez*, 752 F.3d 398, 407 (4th Cir. 2014) ("[P]ersonal jurisdiction in a criminal case is still based on physical presence.").

For example, the U.S. courts have unquestioned jurisdiction over: (1) "defendants accused of targeting U.S. citizens;" (2) cases where "the United States was the focal point of the harm;" (3) defendants that have conducted relevant activity in the United States, by, *e.g.*, "making use of U.S. financial institutions to support international terrorism"; and, (4) "cases involving the application of U.S. criminal laws to conduct affecting U.S. citizens or interests." Resp't. App. 23a-24a (*Sokolow* CVSG).

More specifically, the D.C. Circuit and the Second Circuit, along with other federal courts, consistently find specific jurisdiction in ATA civil cases that involve intentionally tortious conduct "expressly aimed" or "purposefully directed" at the United States, including at U.S. territory, embassies, diplomats, military bases, and other direct extensions of the United States itself. *See, e.g., O'Neill*, 714 F.3d at 678-79; *Mwani* v. *Bin Laden*, 417 F.3d 1, 13 (D.C. Cir. 2005) (finding specific jurisdiction over perpetrators of bombing of the American Embassy in Kenya); *Morris* v. *Khadr*, 415 F. Supp. 2d 1323, 1336 (D. Utah 2006) (establishing specific jurisdiction over individual that attacked American soldiers in Afghanistan); *Rein* v. *Socialist People's Libyan Arab Jamahiriya*, 995 F. Supp. 325, 330 (E.D.N.Y. 1998) (finding specific jurisdiction based on the intentional destruction of United States flag aircraft).

The narrow question of personal jurisdiction in ATA civil cases has no impact on the vast sweep of Legislative and Executive powers to combat terrorism. The United States itself has announced this fact, writing in its *Sokolow* CVSG that "nothing in the court's opinion calls into question the United States' ability to prosecute defendants under the broader due process principles the courts have recognized in cases

involving the application of U.S. criminal laws to conduct affecting U.S. citizens or interests." Resp't App. 24a (*Sokolow* CVSG) (citing *Sokolow*, 835 F.3d at 340-41).

By its express terms, the decision below applied only the "purposefully directed" or "expressly aimed" prong of the due process test for specific jurisdiction, and does not impact: congressional jurisdiction to legislate or prescribe laws combating terrorism;[13] personal jurisdiction in criminal cases;[14] the administrative power of the United States government to take action by rule-making (such as the designation of Foreign Terrorist Organizations); personal jurisdiction in civil ATA cases under the alternative theories of general jurisdiction, or the "purposeful availment" prong of specific jurisdiction;[15] the secondary reasonableness prong of the civil specific personal jurisdiction standard;[16] the ability, if any, of foreign non-sovereign governments to initiate affirmative claims against the U.S. government based on to procedural due process protections; and, the robust arsenal of other tools that the political branches have for addressing international terrorism.[17]

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[13] Pet App. 20a (D.C. Cir. Op.) ("We do not address Congress's power to legislate extraterritorially or the personal jurisdiction the federal courts have over criminal defendants.").

[14] *Id.*

[15] *Id.* at 21a ("The appellants do not argue that the Palestinian Authority may be 'fairly regarded as at home' in the United States . . . .") (quoting *Daimler*, 571 U.S. at 137).

[16] *See id.* at 20a ("[O]ur holding merely adheres to the status quo of personal-jurisdiction doctrine.").

[17] *See id*. ("[W]e do not diminish any law-enforcement tools that currently exist."). For example, the Taylor Force Act, passed as § 7041 of the Consolidated Appropriations Act, Pub. L. 115-31,

Petitioners incorrectly posit that personal jurisdiction in ATA civil cases should reach as far as "Congress intended" such that jurisdiction to adjudicate an ATA civil claim and Congress's jurisdiction to prescribe that remedy are identical. Pet. at 4.

Petitioners ignore the immutable principle that "Congress cannot wish away a constitutional provision." Pet. App. 16a (D.C. Cir. Op.); *accord Sokolow*, 835 F.3d at 344 (holding that "federal courts cannot exercise jurisdiction in a civil case beyond the limits prescribed by the due process clause of the Constitution"); *see also, e.g., Glencore Grain Rotterdam B.V.* v. *Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1121 (9th Cir. 2002) ("It is a bedrock principle of civil procedure and constitutional law that a statute cannot grant personal jurisdiction where the Constitution forbids it.") (citations and internal quotation marks omitted); *Republic of Panama* v. *BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935, 939 (11th Cir. 1997) ("[T]he Due Process Clause of the Fifth Amendment provides an independent constitutional limitation on the court's exercise of personal jurisdiction.").

As a result, the Fifth and Fourteenth Amendments envision that there may be a gap between the scope of legislative power to proscribe and the jurisdiction of courts to adjudicate a claim against a specific defendant under that legislation. *See Weltover*, 504 U.S. at 619-20 (assuming that *International Shoe*'s "minimum contacts" test for personal jurisdiction defines jurisdiction to adjudicate under the Fifth Amendment); *FTC* v. *Compagnie de Saint-Gobain-*

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131 Stat. 135 (2017), reduces aid to any Palestinian government by any amounts paid to surviving family members of those killed in clashes with Israel or prisoners in Israeli custody.

Pont-A-Mousson, 636 F.2d 1300, 1318 (D.C. Cir. 1980) (distinguishing between the "congressional implementation of a constitutional grant of subject matter jurisdiction" and "limits of personal jurisdiction" which are "circumscribed by the Due Process Clause of the Constitution").

This difference is readily evident in criminal cases, which require the physical presence of the defendant even when an indictment alleges violations of a legislative prescription with extraterritorial effect. *See Federal Insurance Company* Amicus Brief at 21 ("[I]n a criminal case, personal jurisdiction is based on the physical presence of the defendant in the forum . . . ."); *see also Perez,* 752 F.3d at 407 (same).

In an ATA civil case, similarly, a court's jurisdiction to adjudicate turns on something more than Congress's proscription of certain extraterritorial actions—the defendant's individual actions must have been purposefully or expressly aimed at the United States forum, and not simply have had an effect on Americans.[18]

At the core of this Petition, as it was in *Sokolow*, is a request to review the court of appeal's application of jurisdictional due process standards to the facts of this

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[18] The ATA's legislative history gives "no indication that Congress thought ordinary due-process requirements would not apply here." Pet. App. 16a (D.C. Cir. Op.). Petitioners argue that congressional intent to authorize extraterritorial U.S. jurisdiction is shown by the prohibition on a *forum non conveniens* defense in the ATA. *See* Pet. at 6, 27-28. But *forum non conveniens* is a prudential doctrine, not a constitutional one. Congress is free to shape the non-constitutional dimensions of the jurisdiction of U.S. courts. *See Sokolow*, 835 F.3d at 334 n.12 (distinguishing between constitutional personal jurisdiction standard and *forum non conveniens*).

case. *See* Pet. at i (limiting the Question Presented to review of the decision "in these suits"); *id.* at 29 n.7 (conceding that the D.C. Circuit "did not elaborate on the showing victims of international terror must make to establish specific personal jurisdiction but held instead that petitioners failed to meet their burden").

Petitioners asserted that the attack in this case was foreseeable because they occurred in a "uniquely volatile location," and because "PA security officers predictably and routinely come into contact with Israeli and American Jewish civilians." Pet. at 11. The court of appeals rejected as "conclusory" Petitioners' specific jurisdiction theory, noting that Petitioners' evidence consisted of a single declaration of an academic hypothesizing about PA policy, which did "not even mention the attack," and failed to establish a "link between that practice and the . . . attack." Pet. App. 22a-23a.

This Court and the United States uniformly take the view that "certiorari is not warranted to address the court of appeals' factbound application of established specific-jurisdiction principles." Resp't. App. 24a (*Sokolow* CVSG); *see also O'Neill* Amicus Brief at 22 ("Petitioners' fact-specific disagreement" with the court of appeals "close[] pars[ing]" of "petitioners' allegations to determine whether they raised an inference that the defendants expressly aimed their conduct at the United States. . . . does not warrant this Court's review."); *Federal Insurance Company* Amicus Brief at 20 ("[T]he court's case-specific holdings on this score do not warrant review by this Court."). The Supreme Court is not "a court for correction of errors in fact finding." *Graver Tank & Mfg. Co.*, 336 U.S. at 275. The Petition thus should be denied.

CONCLUSION

For all of the foregoing reasons, the Court should deny the Petition.

Respectfully submitted,

GASSAN A. BALOUL
Counsel of Record
MITCHELL R. BERGER
ALEXANDRA E. CHOPIN
SQUIRE PATTON BOGGS (US) LLP
2550 M Street, NW
Washington, D.C. 20037
(202) 457-6000
gassan.baloul@squirepb.com

Counsel for Respondent

June 13, 2018

APPENDIX

APPENDIX A

In the Supreme Court of the United States

No. 16-1071

MARK SOKOLOW, *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 UNITED STATES AS AMICUS CURIAE

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
CHAD A. READLER
Acting Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
RACHEL P. KOVNER
Assistant to the Solicitor General
SHARON SWINGLE
LEWIS S. YELIN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

JENNIFER G. NEWSTEAD
Legal Adviser
Department of State
Washington, D.C. 20520

QUESTION PRESENTED

Whether the district court had personal jurisdiction to adjudicate petitioners' claims against respondents under the Anti-Terrorism Act of 1992, 18 U.S.C. 2333(a).

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In the Supreme Court of the United States

No. 16-1071

MARK SOKOLOW, *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 UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. a. Petitioners are United States citizens, and the guardians, family members, and personal representatives of the estates of United States citizens, who were injured or killed in seven terrorist attacks in or near Jerusalem. Pet. App. 5a n.2. In 2004, petitioners filed suit against respondents Palestinian Authority (PA) and Palestine Liberation Organization (PLO) under the Anti-Terrorism Act of 1992 (ATA), which provides a right of action to United States nationals

and their estates, survivors, or heirs for injuries caused by acts of international terrorism. 18 U.S.C. 2333(a). Respondents moved to dismiss the claims for lack of personal jurisdiction. See Pet. App. 5a.

The district court denied respondents' motion, holding that it had general jurisdiction over respondents. Pet. App. 52a-74a. The court framed the jurisdictional inquiry as "whether a defendant has minimum contacts with the forum" sufficient to justify maintenance of the suit and "whether it would be reasonable, under the circumstances of the particular case, to exercise jurisdiction over the defendant." *Id.* at 60a. The court reasoned that respondents' "continuous and systematic" presence in the United States was sufficient to support general jurisdiction, and that respondents could therefore be sued in the United States on all claims, regardless of whether the claims concerned respondents' conduct within the United States. *Id.* at 61a. The court emphasized that respondents "purposely engaged in numerous activities" here, including commercial and public-relations activities, and that respondents maintained an office in Washington, D.C. *Id.* at 62a; see *id.* at 63a-65a. The court also concluded that exercising personal jurisdiction over respondents was reasonable in light of "traditional notions of fair play and substantial justice." *Id.* at 72a (citations and internal quotation marks omitted).

Respondents moved for reconsideration after this Court "significantly narrowed the general personal jurisdiction test in [*Daimler AG* v. *Bauman*, 134 S. Ct. 746 (2014)]." Pet. App. 14a. The district court denied the motion. *Id.* at 75a-81a. The court stated that respondents were effectively "at home in the United States" because their activities here were "continuous and systematic." *Id.* at 77a. And the court stated that

it did not have "any basis to believe" that respondents were engaged in more continuous or systematic activities in any other country. *Id.* at 77a. Respondents raised their jurisdictional arguments again in seeking summary judgment. *Ibid.* The court denied that motion, rejecting respondents' argument that their contacts with the United States were insufficient to support general jurisdiction under *Daimler*. *Id.* at 82a-87a.

b. The district court permitted claims concerning six terrorist attacks to proceed to a jury trial. Pet. App. 9a n.4. Petitioners presented evidence linking respondents to each of the attacks, *id.* at 9a-11a, 35a-36a, but "did not allege or submit evidence that [petitioners or their decedents] were targeted in any of the six attacks at issue because of their United States citizenship or that [respondents] engaged in conduct in the United States related to the attacks," *id.* at 15a.

The jury found respondents civilly liable for the six attacks under several theories. It concluded that, for all of the attacks, respondents had provided material support or resources. Pet. App. 35a. It also concluded that, for five of the attacks, respondents were responsible based on respondeat-superior principles because a PA police officer or other PA employee had either carried out the attack or provided material support or resources for the attack. *Ibid.* The jury further concluded that, in connection with three of the attacks, respondents knowingly provided material support to organizations designated by the State Department as foreign terrorist organizations, and members of those organizations carried out the attacks. *Id.* at 36a. Finally, the jury concluded for one of the attacks that respondents had harbored or concealed a person that they knew or had reasonable grounds to believe was involved with the attacks. *Ibid.* The jury awarded

petitioners damages of $218.5 million, which were increased to $655.5 million under the ATA's treble-damages provision. *Id*. at 6a; see 18 U.S.C. 2333(a).

2. The court of appeals vacated and remanded the case to the district court with instructions to dismiss petitioners' suit for lack of personal jurisdiction. Pet. App. 1a-51a.

As an initial matter, the court of appeals rejected petitioners' argument that respondents have no due process rights because respondents "are foreign governments and share many of the attributes typically associated with a sovereign government." Pet. App. 19a; see *id.* at 19a-20a. The court acknowledged that it had held that "[f]oreign sovereign states do not have due process rights," and instead enjoy the protections against suit afforded by the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1602 *et seq*. Pet. App. 19a (citing *Frontera Res. Azerbaijan Corp.* v. *State Oil Co. of the Azerbaijan Republic*, 582 F.3d 393, 398-401 (2d Cir. 2009)). But the court explained that "neither the PLO nor the PA is recognized by the United States as a sovereign state, and the executive's determination of such matter is conclusive." *Id.* at 20a (citing *Zivotofsky* v. *Kerry*, 135 S. Ct. 2076, 2088 (2015)). The court noted that petitioners had pointed to no decision "indicating that a non-sovereign entity with governmental attributes lacks due process rights." *Id.* at 19a-20a.

The court of appeals next turned to whether the exercise of personal jurisdiction over respondents was consistent with the Due Process Clause of the Fifth Amendment. In analyzing that question, the court rejected petitioners' argument that the principles of general and specific jurisdiction developed in the context of the Fourteenth Amendment's Due Process

Clause were inapplicable because the Fourteenth Amendment "is grounded in concepts of federalism [and] was intended to referee jurisdictional conflicts among the sovereign States." Pet. App. 21a. The court explained that its "precedents clearly establish the congruence of due process analysis under both the Fourteenth and Fifth Amendments." *Id.* at 22a. The "principal difference," the court further explained, "is that under the Fifth Amendment the court can consider the defendant's contacts throughout the United States, while under the Fourteenth Amendment only the contacts with the forum state may be considered." *Ibid.* (citation omitted). The court observed that it "ha[d] already applied Fourteenth Amendment principles to Fifth Amendment civil terrorism cases," among others. *Id.* at 22a-23a (citing *In re Terrorist Attacks on Sept. 11, 2001*, 714 F.3d 659, 673-674 (2d Cir. 2013), cert. denied, 134 S. Ct. 2870 (2014); *In re Terrorist Attacks on Sept. 11, 2001*, 538 F.3d 71, 93 (2d Cir. 2008), cert. denied, 557 U.S. 935 (2009); *Texas Trading & Milling Corp.* v. *Federal Republic of Nigeria*, 647 F.2d 300, 315 n.37 (2d Cir. 1981), cert. denied, 454 U.S. 1148 (1982)).

Applying these principles, the court of appeals held that the district court lacked general jurisdiction over respondents. Pet. App. 25a-32a. It explained that "[a] court may assert general personal jurisdiction over a foreign defendant to hear any and all claims against that defendant only when the defendant's affiliations with the State in which suit is brought 'are so constant and pervasive as to render [it] essentially at home in the forum State.' " *Id.* at 24a (internal quotation marks omitted; brackets in original) (quoting *Daimler*, 134 S. Ct. at 751). The court concluded that "overwhelming evidence" showed that respondents were at home in the West Bank and in Gaza. *Id.* at 27a. In contrast,

respondents' activities in the United States were more limited and resembled "those rejected as insufficient by the Supreme Court in *Daimler*." *Id.* at 28a.

The court of appeals also found respondents' contacts with the United States insufficient for purposes of specific jurisdiction—a question that petitioners had invited the court to address even though the district court had not decided that issue. Pet. App. 32a-50a; see Pet. C.A. Br. 32-33; see also Pet. App. 32a (finding specific jurisdiction "sufficiently briefed and argued to allow [the court] to reach that issue"). The court concluded that respondents' actions relating to the six terrorist attacks at issue did not create "a substantial connection" to the United States. Pet. App. 32a (quoting *Walden* v. *Fiore*, 134 S. Ct. 1115, 1121 (2014)). "While the plaintiff-victims were United States citizens," *id.* at 33a, the court explained that the residence or citizenship of victims alone "is an insufficient basis for specific jurisdiction over the defendants," *id.* at 36a; see *id.* at 39a (discussing *Walden*, 134 S. Ct. at 1119). The court also determined that there was "no basis to conclude that [respondents] participated in these acts in the United States or that their liability for these acts resulted from their actions that did occur in the United States." *Id.* at 36a. And it rejected petitioners' contention that respondents had aimed their conduct at the United States by targeting U.S. citizens, because it determined that petitioners' own evidence established that the attacks were indiscriminate—not targeted at Americans. *Id.* at 37a-39a; see *id.* at 45a. The court contrasted petitioners' suit with previous ATA cases, which it noted had involved more extensive forum-related conduct. *Id.* at 40a-49a.

DISCUSSION

Private actions under the Anti-Terrorism Act are an important means of fighting terrorism and providing redress for the victims of terrorist attacks and their families. The court of appeals held here, however, that this particular action is barred by constitutional constraints on the exercise of personal jurisdiction because the district court had neither general nor specific jurisdiction over respondents in this suit arising from overseas terrorist attacks. Petitioners challenge that conclusion on three grounds: they argue that respondents lack any rights at all under the Due Process Clause of the Fifth Amendment (Pet. 22-27); in the alternative the court of appeals erred in applying principles of personal jurisdiction developed under the Due Process Clause of the Fourteenth Amendment to assess jurisdiction under the Due Process Clause of the Fifth Amendment (Pet. 27-30); and in any event the court of appeals erred in its application of specific-jurisdiction principles to the facts of this case (Pet. 30-34). The court of appeals' rejection of those arguments does not conflict with any decision of this Court, implicate any conflict among the courts of appeals, or otherwise warrant this Court's intervention at this time.

1. The court of appeals' conclusion that respondents are entitled to due process protections does not warrant this Court's review.

a. The court of appeals' determination does not conflict with any decision of this Court. The Fifth and Fourteenth Amendments prohibit the federal government and the States, respectively, from depriving any "person" of "life, liberty, or property, without due process of law." U.S. Const. Amends. V, XIV. Due process requires that "in order to subject a defendant to a

judgment *in personam*," the defendant must generally have sufficient "contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *International Shoe Co.* v. *State of Washington*, 326 U.S. 310, 316 (1945) (citation omitted); see *Insurance Corp. of Ireland, Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) (explaining that the requirements of personal jurisdiction flow "from the Due Process Clause").

Because the Due Process Clauses of the Fifth and Fourteenth Amendments "speak[] only of 'persons,' " *Livnat* v. *Palestinian Auth.*, 851 F.3d 45, 48 (D.C. Cir. 2017) (citation omitted), petition for cert. pending, No. 17-508 (filed Sept. 28, 2017), whether an entity receives due process protections depends on whether the entity qualifies as a "person." This Court has recognized one class of entities that are not "persons" for purposes of due process: the States of the Union. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 323-324 (1966), abrogated on other grounds by *Shelby Cnty.* v. *Holder*, 133 S. Ct. 2612 (2013). In reaching that result, the Court stated only 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." *Ibid.*

This Court has not recognized any other class of entities—whether natural or artificial—as outside the category of "persons" for purposes of due process. It has treated as "persons" domestic and foreign entities of various types, such as corporations. See, *e.g.*, *International Shoe*, 326 U.S. at 316-317 (domestic corporation); *Daimler AG* v. *Bauman*, 134 S. Ct. 746, 750-752 (2014) (German public stock company); *Goodyear*

Dunlop Tires Operations, S. A. v. *Brown*, 564 U.S. 915, 918-920 (2011) (foreign subsidiaries of a U.S. tire manufacturer). Because this Court's existing jurisprudence has set only States of the Union outside of the category of "persons," this Court's decisions do not establish that foreign entities like respondents are barred from invoking due process protections.

b. The Second Circuit's treatment of respondents as entities that receive due process protections also does not conflict with any decision of another court of appeals. In fact, the decision below accords with the D.C. Circuit's decision in *Livnat*, *supra*, which also held that the PA is entitled to due process protections. 851 F.3d at 48, 50. *Livnat* appears to be the only other appellate decision addressing the legal status of non-sovereign foreign entities that exercise governmental power.[1] In *Livnat*, the D.C. Circuit understood this Court's decision in *Katzenbach* to reflect the principle that the term "person" excludes "sovereigns"—an understanding that the court saw as consistent with common usage. *Id.* at 50 ("[I]n common usage, the term 'person' does not include the sovereign.") (citation omitted). After noting the distinctive attributes of sovereign entities, the D.C. Circuit concluded that foreign non-sovereign governmental entities like respondents do not fall outside due process protections. *Id.* at 50-52. In addition, the D.C. Circuit rejected the argument that the PA is outside our domestic structure of government, explaining that this Court had consistently "rejected the notion that 'alien'

[1] The decisions of the D.C. Circuit and the court of appeals below accord with a substantial number of district court decisions concluding that one or both of respondents have due process rights in the personal jurisdiction context. See *Livnat* v. *Palestinian Auth.,* 82 F. Supp. 3d 19, 26 (D.D.C. 2015) (compiling cases).

entities"—such as foreign corporations—"are disqualified from due-process protection." *Id.* at 50.

Petitioners err in contending (Pet. 24-25) that the decision below conflicts with federal appellate decisions addressing the status of foreign sovereigns. As petitioners note (Pet. 24), the Second and D.C. Circuits have held that foreign sovereigns lack due process rights—a question on which this Court reserved decision in *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607, 619 (1992) (assessing personal jurisdiction over Argentina under specific-jurisdiction principles, while "[a]ssuming, without deciding, that a foreign state is a 'person' for purposes of the Due Process Clause"). See *Frontera Res. Azerbaijan Corp.* v. *State Oil Co. of the Azerbaijan Republic*, 582 F.3d 393, 399-400 (2d Cir. 2009); *Price* v. *Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 95-100 (D.C. Cir. 2002). But as noted above, the Second and D.C. Circuits have recognized that the reasoning of those decisions is limited to sovereigns, and they have held that non-sovereign foreign entities like respondents do receive due process protections. Pet. App. 19a-20a; see *Livnat*, 851 F.3d at 48, 50.

Contrary to petitioners' suggestion (Pet. 24), there is also no conflict between the decision below and *City of East St. Louis* v. *Circuit Court for Twentieth Judicial Circuit*, 986 F.2d 1142, 1144 (7th Cir. 1993), which indicated that municipalities lack due process rights. As *Livnat* observed, *City of East St. Louis* rested on the "principle that municipalities are creatures of a State and therefore lack any constitutional rights against the State." 851 F.3d at 53 (citing *City of East St. Louis*, 986 F.2d at 1144, and discussing cases cited therein, including *City of Newark* v. *New Jersey*, 262 U.S. 192, 196 (1923)). That rationale does not extend

to foreign entities like respondents. The court of appeals' treatment of respondents as subject to due process protections therefore does not implicate any conflict.[2]

Petitioners contend (Pet. 21) that this Court should decide whether respondents are entitled to due process protections in the absence of a conflict because the decision below may "interfere with the Executive's foreign-affairs prerogatives." In the view of the United States, petitioners' approach poses a greater threat of such interference. The power to recognize foreign governments is exclusively vested in the President. *Zivotofsky* v. *Kerry*, 135 S. Ct. 2076, 2086 (2015); see *ibid.* ("Recognition is a topic on which the Nation must speak . . . with one voice.") (citations and internal quotation marks omitted). The President's recognition of a foreign state "is a 'formal acknowledgement' that a particular 'entity possesses the qualifications for statehood' or 'that a particular regime is the effective government of a state,' " *Id.* at 2084 (quoting 1

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[2] Petitioners overread the United States' 1988 brief in a case in which the Palestine Information Office (PIO) challenged an order issued by the State Department under the Foreign Missions Act, 22 U.S.C. 4301 *et seq.*, and Article II directing the PIO—an agent of the PLO—to cease operations. See Pet. Reply Br. 7. The government's brief argued that the court of appeals should reject the PLO's claims of a First Amendment violation because sovereign entities lack constitutional rights and the PLO was asserting that it was a sovereign entity. See Pet. Reply App. 41a ("Foreign political entities such as the PLO, which purport to be sovereign entities, have no constitutional rights."); *id.* at 45a ("Because the PLO purports to be an independent foreign entity, it has no constitutional rights."); see also *id.* at 57a (similarly rejecting procedural due process claim). The government's argument rested on the incompatibility of the PLO's assertion of sovereign status with its claim of First Amendment rights, not on an independent determination that the PLO's governmental attributes rendered it the equivalent of a sovereign.

Restatement (Third) of Foreign Relations Law of the United States § 203 cmt. a (1987))—not merely a determination that the United States will "accord [a government] certain benefits," Pet. 26. An approach under which courts would assess the extent to which foreign entities operate as "the effective government of a state" or "possess[] the qualifications for statehood," *Zivotofsky*, 135 S. Ct. at 2084 (citation omitted), risks judicial determinations at odds with Presidential determinations underlying recognition.

c. The Court has not seen any need to revisit the scope of the term "person" under the Due Process Clauses since *Katzenbach*, and in any event this case would not be an appropriate vehicle for doing so for two reasons. First, petitioners' argument relies (Pet. 23-24) on analogizing respondents to foreign sovereigns and municipalities, but this Court has not yet passed upon the status of those entities for due process purposes. Second, because respondents are *sui generis* entities with a unique relationship to the United States government, a ruling on whether respondents have due process protections is unlikely to have broad utility in resolving future cases concerning other entities. See Pet. 8-9 (stating that respondents are not recognized as sovereign by the United States but "interact with the United States as a foreign government," "employ 'foreign agents' " that are registered "as agents of the 'Government of a foreign country' " under the Foreign Agents Registration Act of 1938, 22 U.S.C. 611, and "have received over a billion dollars" from the United States in "government-to-government assistance") (citation omitted).

2. Certiorari is also not warranted to consider petitioners' novel argument that federal courts may exercise personal jurisdiction under the Fifth Amendment

whenever "a defendant's conduct interfered with U.S. sovereign interests as set out in a federal statute, and the defendant was validly served with process in the United States pursuant to a nationwide-service-of-process provision." Pet. Reply Br. 11 (emphasis omitted).

a. The court of appeals' rejection of petitioners' Fifth Amendment theory does not conflict with any decision of this Court. This Court has explained that due process requires "certain minimum contacts" with the forum "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *International Shoe*, 326 U.S. at 316 (quoting *Milliken* v. *Meyer*, 311 U.S. 457, 463 (1940)). In cases arising under the Fourteenth Amendment, principles of general jurisdiction permit defendants to be sued for any conduct in a forum where their contacts are "so 'continuous and systematic' as to render them essentially at home." *Goodyear*, 564 U.S. at 919. Principles of specific jurisdiction permit defendants to be sued in a forum where they are not essentially at home if there is "an affiliation between the forum and the underlying controversy, principally [an] activity or an occurrence that takes place in the forum State." *Bristol-Myers Squibb Co.* v. *Superior Court*, 137 S. Ct. 1773, 1781 (2017) (brackets in original) (quoting *Goodyear*, 564 U.S. at 919). In the context of an intentional tort, a court may exercise specific jurisdiction over a defendant who has "expressly aimed" tortious actions at the forum—including by committing a tortious act with "kn[owledge] that the brunt of th[e] injury would be felt" there. *Calder* v. *Jones*, 465 U.S. 783, 789-790 (1984); see *Walden* v. *Fiore*, 134 S. Ct. 1115, 1123 (2014). But a court may not exercise specific jurisdiction merely because a defendant could foresee that his conduct would have some effect in the forum. *Calder*, 465 U.S. at 789-790.

The Second Circuit's reliance on these principles developed in the context of the Fourteenth Amendment to assess the sufficiency of respondents' contacts under the Fifth Amendment does not conflict with any decision of this Court. This Court has repeatedly reserved the question whether the limitations on personal jurisdiction under the Fifth Amendment differ from the limitations under the Fourteenth Amendment. See *Bristol-Myers*, 137 S. Ct. at 1783-1784; *Omni Capital Int'l, Ltd.* v. *Rudolf Wolff & Co.*, 484 U.S. 97, 102 n.5 (1987); see also *J. McIntyre Mach., Ltd.* v. *Nicastro*, 564 U.S. 873, 885 (2011) (plurality opinion); *Asahi Metal Indus. Co.* v. *Superior Court*, 480 U.S. 102, 113 n.* (1987) (opinion of O'Connor, J.). Recent personal jurisdiction cases arising in federal district courts have not presented that question because "[f]ederal courts ordinarily follow state law in determining the bounds of their jurisdiction over persons." *Daimler*, 134 S. Ct. at 753; see Fed. R. Civ. P. 4(k)(1)(A) (authorizing service of process on a defendant "who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located").

b. The Second Circuit's approach to jurisdiction under the Fifth Amendment also does not conflict with any decision of another court of appeals. Statutes such as the ATA present questions concerning Fifth Amendment jurisdictional limitations because they contain nationwide service-of-process and venue provisions that permit a federal court to exercise jurisdiction over defendants who would not be subject to suit in the courts of the State in which the federal court is located. See Fed. R. Civ. P. 4(k)(1)(A) and (C) (authorizing service of process on a defendant who is not "subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located" if service is

"authorized by a federal statute"); 18 U.S.C. 2334(a) (providing that an ATA defendant "may be served in any district where the defendant resides, is found, or has an agent").

In analyzing such statutes, courts of appeals generally have adapted Fourteenth Amendment jurisdictional principles to the Fifth Amendment context in the manner that the court below did: by considering a defendant's contacts with the Nation as a whole, rather than only contacts with a particular State, in deciding whether the defendant had the contacts needed for personal jurisdiction. See, *e.g.*, *In re Application to Enforce Admin. Subpoenas Duces Tecum of SEC*, 87 F.3d 413, 417 (10th Cir. 1996) ("When the personal jurisdiction of a federal court is invoked based upon a federal statute providing for nationwide or worldwide service, the relevant inquiry is whether the respondent has had sufficient minimum contacts with the United States."); *Livnat*, 851 F.3d at 55.[3] The decision below is consistent with those decisions, because the

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[3] See also Pet. App. 22a; *In re Federal Fountain, Inc.,* 165 F.3d 600, 602 (8th Cir. 1999) (en banc); *United States SEC* v. *Carrillo*, 115 F.3d 1540, 1543 (11th Cir. 1997); *United Liberty Life Ins. Co.* v. *Ryan*, 985 F.2d 1320, 1330 (6th Cir. 1993); *United Elec., Radio & Mach. Workers of Am.* v. *163 Pleasant St. Corp.*, 960 F.2d 1080, 1085-1086 (1st Cir. 1992); *Go-Video, Inc.* v. *Akai Elec. Co.*, 885 F.2d 1406, 1414-1416 (9th Cir. 1989); *Lisak* v. *Mercantile Bancorp, Inc.*, 834 F.2d 668, 671-672 (7th Cir. 1987), cert. denied, 485 U.S. 1007 (1998); 4 Charles Alan Wright et al., *Federal Practice and Procedure* § 1068.1 (4th ed. 2015).

Several courts also have suggested that if a defendant has sufficient contacts, a court must determine that "the plaintiff 's choice of forum [is] fair and reasonable." *Peay* v. *BellSouth Med. Assistance Plan*, 205 F.3d 1206, 1212 (10th Cir. 2000); see *Republic of Panama* v. *BCCI Holdings (Lux.) S.A.*, 119 F.3d 935, 947 (11th Cir. 1997); see also *Livnat*, 851 F.3d at 55 n.6 (noting that issue but declining to express a view).

Second Circuit concluded that the district court lacked jurisdiction on the ground that respondents' contacts with the United States as a whole were inadequate to ground either general or specific jurisdiction. Pet. App. 23a-50a.

Petitioners point to no decision adopting their far broader "sovereign interests" theory, under which the Fifth Amendment's due process limitations are satisfied so long as the "defendant's conduct interfered with U.S. sovereign interests as set out in a federal statute, and the defendant was validly served with process in the United States pursuant to a nationwide-service-of-process provision." Pet. Reply Br. 11 (emphasis omitted). Indeed, the D.C. Circuit concluded that "[n]o court has ever" adopted such an argument. *Livnat*, 851 F.3d at 54.[4]

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[4] The cases noted by an amicus curiae (House Amicus Br. 18 n.5) are not to the contrary. In three of the decisions, a federal statute provided for nationwide service of process, and the court held that due process did not require the existence of minimum contacts with any single State under ordinary *International Shoe* analysis. *Klein* v. *Cornelius*, 786 F.3d 1310, 1318-1319 (10th Cir. 2015) (rejecting Texas defendant's challenge to jurisdiction of federal court in Utah in receivership proceedings); *Trustees of the Plumbers & Pipefitters Nat'l Pension Fund* v. *Plumbing Servs., Inc.*, 791 F.3d 436, 443-444 (4th Cir. 2015) (rejecting Alabama corporations' challenge to jurisdiction over an ERISA claim in federal court in Virginia, where the ERISA plan was administered); *Haile* v. *Henderson Nat'l Bank*, 657 F.2d 816, 820, 823-824 (6th Cir. 1981) (rejecting Alabama defendants' challenge to jurisdiction of federal court in Tennessee in receivership proceeding), cert. denied, 455 U.S. 949 (1982). The remaining decision similarly stated that aggregation of nationwide contacts under the Fifth Amendment might be permissible when a statute authorizes nationwide service of process, but it found no personal jurisdiction over a foreign defendant because there was no applicable statute of that kind. *Max Daetwyler Corp.* v. *R. Meyer*,

c. Review of petitioners' broad Fifth Amendment arguments would be premature. Few courts have had the opportunity to consider such arguments. And the contours and implications of petitioners' jurisdictional theory—which turns on whether a defendant's conduct "interfered with U.S. sovereign interests as set out in a federal statute," Pet. Reply Br. 11—are not themselves well developed. Under these circumstances, further development in the lower courts is likely to be useful before this Court addresses arguments that the federal courts may, in particular circumstances, exercise personal jurisdiction over civil cases without regard to the principles of specific and general jurisdiction developed under the Fourteenth Amendment.

d. Review of petitioners' theory is not currently warranted on the ground that application of Fourteenth Amendment-derived jurisdictional principles "leaves the [ATA] a practical nullity" and "would bar most suits under the Act based on overseas attacks." Pet. 17. It is far from clear that the court of appeals' approach will foreclose many claims that would otherwise go forward in federal courts. As the court of appeals explained, its approach permits U.S. courts to exercise jurisdiction over defendants accused of targeting U.S. citizens in an act of international terrorism. Pet. App. 45a; see *Morris* v. *Khadr*, 415 F. Supp. 2d 1323, 1335-1336 (D. Utah 2006). It permits U.S. courts to exercise jurisdiction if the United States was the focal point of the harm caused by the defendant's participation in or support for overseas terrorism. See Pet. App. 40a (discussing *Mwani* v. *Bin Laden*, 417 F.3d 1 (D.C. Cir. 2005) (attack on U.S. embassy)); *id.*

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762 F.2d 290, 294 (3d Cir.), cert. denied, 474 U.S. 980 (1985). None of the decisions adopted a standard similar to petitioners' "sovereign interests" theory.

at 41a-43a (discussing *In re Terrorist Attacks on Sept. 11, 2001*, 714 F.3d 659 (2d Cir. 2013) (overseas provision of material support expressly aimed at the United States when terrorist organization was known to be targeting the United States), cert. denied, 134 S. Ct. 2870 (2014)). And the court of appeals stated that it would permit U.S. courts to exercise jurisdiction over defendants alleged to have purposefully availed themselves of the privilege of conducting activity in the United States, by, for example, making use of U.S. financial institutions to support international terrorism. See *id.* at 46a-47a (discussing *Licci* v. *Lebanese Canadian Bank, SAL*, 732 F.3d 161 (2d Cir. 2013)). In addition, nothing in the court's opinion calls into question the United States' ability to prosecute defendants under the broader due process principles the courts have recognized in cases involving the application of U.S. criminal laws to conduct affecting U.S. citizens or interests. See *id.* at 44a; accord *Livnat*, 851 F.3d at 56. Under these circumstances, in the absence of any conflict or even a developed body of law addressing petitioners' relatively novel theory, this Court's intervention is not warranted.

3. Finally, certiorari is not warranted to address the court of appeals' factbound application of established specific-jurisdiction principles. See Pet. 30-34. As a threshold matter, the court of appeals correctly identified those principles. The court analyzed whether "the defendant's suit-related conduct * * * create[d] a substantial connection with the forum State." Pet. App. 32a (quoting *Walden*, 134 S. Ct. at 1121); see *id.* at 33a (framing the inquiry as "whether the defendants' suit-related conduct—their role in the six terror attacks at issue—creates a substantial connection with the forum State pursuant to the ATA"). Petitioners misread the decision below as holding that petitioners

could establish specific jurisdiction only if respondents " 'specifically targeted' U.S. citizens or territory." Pet. Reply Br. 11 (quoting Pet. App. 45a). The court of appeals stated that respondents had not "specifically targeted United States citizens," Pet. App. 45a, in distinguishing two cases invoked by petitioners, in which the defendants were accused of providing material support or financing to terrorist organizations whose "specific aim" was to "target[] the United States," or to "kill Americans and destroy U.S. property," *id.* at 42a, 45a (citations omitted); see *id.* at 42a-45a (discussing *In re Terrorist Attacks on Sept. 11, 2001*, 714 F.3d 659 (2d Cir. 2013); *United States* v. *al Kassar*, 660 F.3d 108 (2d Cir. 2011), cert. denied, 566 U.S. 986 (2012)). But the court of appeals recognized that specific jurisdiction may exist when "the brunt" or "the focal point" of the harm from an intentional tort is felt in the forum State. *Id.* at 43a (quoting *Calder*, 465 U.S. at 789). The court found petitioners' claims did not meet that standard because Israel, not the United States, was "the focal point of the torts alleged in this litigation." *Ibid.*

Petitioners' remaining disagreements with the decision below amount to disagreements about what petitioners' evidence established. Petitioners argue (Pet. 31-32) that the court erred in applying principles of specific jurisdiction because, in petitioners' view, respondents expressly aimed their conduct at the United States. But the court of appeals found that the record did not establish that proposition. Rather, the court concluded, petitioners' "own evidence establishe[d] the random and fortuitous nature of the terror attacks." Pet. App. 38a. And it observed that it is "insufficient to rely on a defendant's 'random, fortuitous, or attenuated contacts' " "with the forum to establish specific

jurisdiction." *Id.* at 37a (quoting *Walden*, 134 S. Ct. at 1123).

Petitioners similarly argue that "[t]he jury's verdict establishes that respondents intended" to influence United States policy, because the ATA reaches only "violent acts that 'appear intended' either 'to influence the policy of a government by intimidation or coercion,' 'to affect the conduct of a government by mass destruction, assassination, or kidnapping,' or 'to intimidate or coerce a civilian population.' " Pet. 31-32 (citation omitted). But the ATA covers attacks intended to influence foreign governments, such as Israel, as well as attacks that are intended (or appear intended) to influence the United States. As a result, the jury's verdict does not demonstrate that the court of appeals erred in applying principles of specific jurisdiction to the record in this case. In any event, a fact-intensive dispute regarding the record in this case does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
CHAD A. READLER
Acting Assistant
Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
RACHEL P. KOVNER
Assistant to the
Solicitor General
SHARON SWINGLE
LEWIS S. YELIN
Attorneys

JENNIFER G. NEWSTEAD
Legal Adviser
Department of State

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