No. 22-562

In the Supreme Court of the United States

STEPHEN DOUGLASS, *ET AL.*, PETITIONERS,

v.

NIPPON YUSEN KABUSHIKI KAISHA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF U.S. TERROR VICTIMS AS AMICI CURIAE SUPPORTING RESPONDENT

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INTEREST OF *AMICI*[1]

Amici are U.S. nationals prosecuting claims under the Anti-Terrorism Act of 1992 (ATA) against the Palestine Liberation Organization (PLO) and the Palestinian Authority (PA) for death and injury in terror attacks organized, financed, and perpetrated by the PLO and PA's officers and agents.[2]

Amici have an interest in ensuring that their ATA claims—which arise under federal law and were brought in federal courts—are adjudicated on the merits. Congress's power to authorize a federal court to exercise personal jurisdiction over foreign defendants such as the PLO and PA should not be geographically constrained in

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[1] Counsel of record for all parties received timely notice of the intent to file this brief. No party or counsel for a party made a monetary contribution to the preparation or submission of this brief. All parties consented to the filing of the brief. No counsel for a party authored this brief in whole or in part.

[2] *Amici* are: Katherine Baker, Alan Bauer, Binyamin Bauer, Daniel Bauer, Revital Bauer, Yehonathon Bauer, Yehuda Bauer, Rebekah Blutstein, Doctor Richard Blutstein, Doctor Larry Carter, Shaun Coffel, Robert L Coulter, Jr., Robert L. Coulter, Sr., Chana Bracha Goldberg, Eliezer Simcha Goldberg, Esther Zahava Goldberg, Karen Goldberg, Shoshana Malka Goldberg, Tzvi Yehoshua Goldberg, Yaakov Moshe Goldberg, Yitzhak Shalom Goldberg, Elise Janet Gould, Ronald Allan Gould, Shayna Eileen Gould, Nevenka Gritz, Norman Gritz, Oz Joseph Guetta, Varda Guetta, Leonard Mandelkorn, Nurit Mandelkorn, Shaul Mandelkorn, Dianne Coulter Miller, Jessica Rine, Elana R. Sokolow, Jamie A. Sokolow, Lauren M. Sokolow, Mark I. Sokolow, Rena M. Sokolow, Eva Waldman, Henna Novack Waldman, Morris Waldman, and Shmuel Waldman (collectively the *Sokolow Amici*); Miriam Fuld, Natan Shai Fuld, Naomi Fuld, Tamar Gila Fuld, and Eliezer Yakir Fuld (collectively the *Fuld Amici*); and Estate of Esther Klieman, by and through its administrator Aaron Kesner, Nachman Klieman, Ruanne Klieman, Dov Klieman, Yosef Klieman, and Gavriel Klieman (collectively the *Klieman Amici*).

the way that the Fourteenth Amendment constrains the exercise of personal jurisdiction by particular States. *Amici* also have an interest in ensuring that any standard for evaluating the exercise of personal jurisdiction under the Fifth Amendment leaves ample room for the political branches in their assessment of foreign policy and national security—areas in which they exercise exclusive control and merit special deference.

In 2019, Congress enacted a statute for the purpose of facilitating personal jurisdiction in certain ATA cases, the Promoting Security and Justice for Victims of Terrorism Act of 2019 (PSJVTA) (codified at 18 U.S.C. § 2334(e)). The PSJVTA links personal jurisdiction in ATA cases to conduct by the PLO and PA that is of obvious and important interest to the United States: conducting activities within the United States; and making payments to terrorists who killed or injured Americans. 18 U.S.C. § 2334(e)(1). The PLO and PA have challenged the PSJVTA's constitutionality, including in cases in which *amici* are parties. See *Sokolow* v. *PLO*, 140 S. Ct. 2714 (2020) (GVR for further consideration in light of the PSJVTA); *Klieman* v. *PA*, 140 S. Ct. 2713 (2020) (same); *Fuld* v. *PLO*, 578 F. Supp. 3d 577 (S.D.N.Y. 2022), *appeal pending*, No. 22-76 (2d Cir.).

SUMMARY OF ARGUMENT

1. The questions presented in the Petition concern the exercise of general personal jurisdiction under Federal Rule of Civil Procedure 4(k)(2) in an admiralty case arising outside the United States against a foreign defendant. The court of appeals determined that a federal court may not exercise jurisdiction over petitioners' claims because they do not arise from or relate to respondent's business activities in the United States and because respondent was not "at home" in the United States.

In so ruling, the court of appeals avoided deciding a different, recurring, and far more important question: whether the Fifth Amendment imposes a geographic restriction on Congress's power to authorize federal courts to exercise personal jurisdiction in cases arising under federal law. In fact, the court of appeals went out of its way to distinguish the situation before it—which involved an assertion of jurisdiction under a Federal Rule of Civil Procedure—from a case in which *Congress* has enacted a statute providing for the exercise of personal jurisdiction by a federal court for the purpose of carrying into execution the United States' unique authority over foreign relations or national security. Pet. App. 9 n.8, 20. The parties did not brief that issue; and the Government, although invited to participate, declined the invitation. Five dissenters concluded that the Fifth Amendment "imposes *no* limit on Congress's ability to extend the range of federal courts' civil process." *Id.* at 93 (emphasis in original).

2. In an appropriate case, this Court should decide whether the Fifth Amendment's Due Process Clause permits federal courts to exercise personal jurisdiction authorized by a federal statute over a foreign defendant whose conduct harms U.S. citizens or U.S. interests outside the United States. The question is exceptionally important, because many federal statutes authorize such jurisdiction in order to advance the federal government's unique interests as the national sovereign.

However, this case does not present a good vehicle for deciding that question. The parties did not brief it in the district court, the court of appeals, or the Petition; the Government did not participate below; neither the parties nor the court of appeals sussed out the applicable federal interests; and the issue is made more complex by the intermediation of the Rules Enabling Act.

An opportunity for the Court to consider this important issue may soon arise. *Amici* and other plaintiffs are currently litigating the personal-jurisdiction issue in cases arising under federal anti-terrorism statutes that expressly permit the exercise of personal jurisdiction over foreign defendants based on their conduct abroad in order to promote U.S. national security and foreign policy. The United States has intervened in several of these cases to defend the constitutionality of these statutes. In *Fuld* v. *Palestine Liberation Organization*, No. 22-76 (2d Cir.), this issue has been presented squarely and has been fully briefed by all parties, including the United States.

Those cases are better vehicles than this one for deciding the important and recurring issue: The Government and the parties have fully briefed the relevant governmental interests; the limits imposed by the Rules Enabling Act are not implicated in those cases; and the holding sought by the Government and the plaintiffs in those cases is an incremental one, rather than one that tests the outer limits of the Fifth Amendment, as the dissent's position did in this case.

3. The Fifth Amendment imposes no geographic limitations on the power of Congress to authorize the exercise of personal jurisdiction in furtherance of legitimate federal interests. As this Court has instructed, considering whether the exercise of personal jurisdiction over a defendant comports with due process requires careful attention to the particular sovereign interests at stake. The United States, as the national sovereign, plays a special role within our constitutional system. And federal assertions of personal jurisdiction over a foreign defendant—unlike State assertions of jurisdiction over an out-of-state defendant—do not infringe the interests of any other sovereign within our constitutional framework.

Treating the Fifth Amendment standards as imposing a geographic restriction on the United States would improperly constrain enforcement of federal policy against foreign defendants who violate federal law abroad, where Congress has determined that such enforcement furthers federal interests.

In cases governed by the Fifth Amendment, instead of applying geographic limitations (as are imposed on the several States), the Court should judge assertions of personal jurisdiction by asking whether the defendant has received fair warning and whether the exercise of jurisdiction reasonably advances legitimate governmental interests in the context of our federal system, as the courts of appeals unanimously do in criminal cases. The Fifth Amendment's limitations on the exercise of jurisdiction over defendants by federal courts in federal cases are satisfied if the defendant has received fair warning that particular conduct may subject it to the jurisdiction of the United States and if the exercise of such jurisdiction reasonably advances legitimate federal interests, regardless of the geographic location of the conduct.

ARGUMENT

The Court should deny the petition. The Fifth Circuit majority carefully avoided deciding the important and recurring question whether the Fifth Amendment bars personal jurisdiction when *Congress* has authorized, by statute, the exercise of personal jurisdiction over disputes arising abroad in order to advance federal interests. Because this case involves an assertion of jurisdiction under a Federal Rule of Civil Procedure, any constitutional question would be complicated by the confounding issue of whether the Rules Enabling Act imposes limits on the rulemaking power to provide for personal jurisdiction. In addition, the federal interests relevant to the due process inquiry were not briefed or

addressed in the lower courts, and the United States declined to participate. Other cases on the horizon are superior vehicles, compared to this case, for deciding the Fifth Amendment question: They sharply present the federal interests at stake; the United States has participated in briefing those interests in the lower courts; the cases do not implicate the Rules Enabling Act; and the holding sought by the Government and the plaintiffs in those cases is an incremental one, rather than one that tests the outer limits of the Fifth Amendment.

1. The two questions presented in the Petition concern the exercise of personal jurisdiction under Federal Rule of Civil Procedure 4(k)(2) in an admiralty case. Rule 4(k)(2) applies only where, as here, no federal statute authorizes the exercise of personal jurisdiction. Cf. Fed. R. Civ. P. 4(k)(1)(C) (establishing jurisdiction via service "authorized by a federal statute"). In that context, the *en banc* majority determined that the district court lacked jurisdiction over petitioners' claims because they do not arise from or relate to respondent's business activities in the United States and because respondent was not "at home" here. Pet. App. 14, 33-34. The court rejected petitioners' arguments that declining to exercise general jurisdiction in such a case would render Rule 4(k)(2) a nullity and that "the unique nature of admiralty and maritime law enhances the application of Rule 4(k)(2)" because admiralty is "different from most other categories of U.S. law." CA5 Br. for Appellants at 13, 23-24 (Sept. 21, 2020). The Petition asks this Court to take up those questions.

In its ruling, the majority was careful to distinguish the case before it, which implicated jurisdiction based on service under a Federal Rule of Civil Procedure, from cases raising a sharper and narrower question: whether the Fifth Amendment can bar personal jurisdiction when

Congress has authorized the exercise of personal jurisdiction over disputes arising abroad in order to advance federal interests. As the majority explained:

> This majority opinion addresses the exact arguments raised by the plaintiffs consistently throughout the litigation. But for one point, we will not address the dissents' wholly novel arguments, which pointedly divorce themselves from the parties' theory of the case. * * *
>
> If we were to address the merits of the principal dissent's theory, however, we would note its repeated insistence that, consistent with the Fifth Amendment, *Congress* could pass a law to subject foreign defendants to American federal court jurisdiction for any injuries inflicted on American citizens or claims arising abroad. Whether this is correct or not, we do not assay.

Pet. App. 8 n.8 (emphasis in original). The court said that the exercise by a federal court of "coercive power over a foreign nonresident defendant" would "offend Fifth Amendment due process when the relationship among the defendant, the United States, and the litigation is insufficient," but emphasized that "the impact of foreign relations and national security surely can affect the United States' 'sovereign reach' in ways irrelevant to this case." *Id.* at 20.

In her thorough and scholarly lead dissenting opinion, Judge Elrod focused not on whether the exercise of personal jurisdiction would reasonably advance an identified federal interest, but on the broader question whether the Fifth Amendment imposes *any* restriction even in the absence of legislative specification of a federal interest, ultimately concluding that "it imposes *no* limit on Congress's ability to extend the range of federal

courts' civil process," with the exception of requiring fair warning. *Id.* at 93-94 (emphasis in original).

Thus, neither the majority nor the dissent evaluated whether the exercise of personal jurisdiction in this case would reasonably advance a legitimate governmental interest in the context of our federal system. Compare *id.* at 9 n.8 ("we cannot analyze this theory because the dissent posits no rule or limits flowing from the Fifth Amendment"), with *id.* at 48 ("The majority opinion fails to prove—as a matter of the Fifth Amendment's text, history, and structure—the existence of a principled limit on Congress's ability to authorize federal courts' personal jurisdiction over a foreign defendant."). Judge Elrod's dissent asserted that the Rules Enabling Act supports the exercise of personal jurisdiction, *Id.* at 59-61 n.6, but the majority did not address this question.

2. The question avoided by the court of appeals majority—whether the Fifth Amendment imposes a geographic restriction on the power of Congress to authorize a federal court to exercise personal jurisdiction in a federal case—is one of exceptional importance and recurring interest. In many cases, lower courts have conflated the Fifth Amendment and Fourteenth Amendment jurisprudence, leading to dismissals of civil actions in federal cases brought under federal statutes in which Congress has authorized the exercise of personal jurisdiction. These rulings have rested on the erroneous theory that the geographic location of the wrongdoer's conduct constrains the power of Congress to authorize the exercise of personal jurisdiction regardless of the important federal interests at stake.[3]

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[3] *Shatsky* v. *Palestine Liberation Org.*, 955 F.3d 1016, 1037 (D.C. Cir. 2020); *Klieman* v. *Palestinian Auth.*, 923 F.3d 1115, 1124-25

Cases presenting this issue are currently pending in the Second Circuit, as well as in district courts in the D.C. and Tenth Circuits. In several of those cases, the United States has intervened as of right. In three of those cases, district courts have held statutes unconstitutional in reliance on reasoning that incorrectly imposes Fourteenth Amendment geographic restrictions on Congress.

In cases like those being prosecuted by *amici* terror victims, jurisdiction rests on statutes in which Congress has not merely authorized service of process, 18 U.S.C. § 2334(a), but has expressly authorized personal jurisdiction, 18 U.S.C. § 2334(e). In such cases, the exercise of personal jurisdiction is triggered by a foreign defendant's conduct that is of obvious and important interest to the United States: conducting activities within the United States; or making payments to terrorists who killed or injured Americans. 18 U.S.C. § 2334(e)(1). Congress has also made specific findings supporting the exercise of

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(D.C. Cir. 2019), *vacated*, 140 S. Ct. 2713 (2020); *Livnat* v. *Palestinian Auth.*, 851 F.3d 45, 57 (D.C. Cir. 2017); *United States ex. rel. TZAC, Inc.* v. *Christian Aid*, No. 17-cv-4135 (PKC), 2021 WL 2354985, at *4 (S.D.N.Y. June 9, 2021), *aff'd*, No. 21-1542, 2022 WL 2165751, at *2 (2d Cir. June 16, 2022); *Spetner* v. *Palestine Inv. Bank*, 495 F. Supp. 3d 96, 112-13 (E.D.N.Y. 2020); *Prime Int'l Trading, Ltd.* v. *BP P.L.C.*, 784 F. App'x 4, 9 (2d Cir. 2019); *Relevent Sports, LLC* v. *U.S. Soccer Fed'n, Inc.*, No. 19-cv-8359 (VEC), 2020 WL 4194962, at *7 n.12 (S.D.N.Y. July 20, 2020); *In re SSA Bonds Antitrust Litig.*, 420 F. Supp. 3d 219, 240-41 (S.D.N.Y. 2019); *Dennis* v. *JPMorgan Chase & Co.*, 343 F. Supp. 3d 122, 199-207 (S.D.N.Y. 2018); *Sonterra Cap. Master Fund Ltd.* v. *Credit Suisse Grp. AG*, 277 F. Supp. 3d 521, 596 (S.D.N.Y. 2017); *FrontPoint Asian Event Driven Fund, L.P.* v. *Citibank, N.A.*, No. 16-cv-5263 (AKH), 2017 WL 3600425, at *5-7 (S.D.N.Y. Aug. 18, 2017); *In re Platinum & Palladium Antitrust Litig.*, No. 14-cv-9391 (GHW), 2017 WL 1169626, at *1, *49 (S.D.N.Y. Mar. 28, 2017).

such jurisdiction: that international terrorism "threatens the vital interests of the United States," Justice Against Sponsors of Terrorism Act, Pub. L. 114-222, § 2(a)(1), and that persons who knowingly or recklessly contribute material support or resources to terrorists "necessarily direct their conduct at the United States, and should reasonably anticipate being brought to court in the United States to answer for such activities," *id.* § 2(a)(6).[4]

Such cases directly raise federal interests of a different order than the interests supporting jurisdiction under Rule 4(k)(2), and far different than the constitutionally limited interests of the several States under the Fourteenth Amendment. One such case, *Fuld* v. *Palestine Liberation Organization*, No. 22-76 (2d Cir.), has been fully briefed by plaintiffs and the United States; squarely presents the constitutional question described in this brief; and awaits oral argument.

Statutory-jurisdiction cases present superior vehicles for deciding the constitutional question avoided by the court of appeals majority. They do not implicate the limits of Federal Rules promulgated under the Rules Enabling Act, in which any federal interest is at best indirect. Some scholars have asserted that the Rules Enabling Act does not authorize rulemaking to create amenability of a person to the personal jurisdiction of a court. See Stephen E. Sachs, *The Unlimited Jurisdic-*

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[4] Congress has also set out its purpose "to provide civil litigants [prosecuting terror claims] with the broadest possible basis, consistent with the Constitution of the United States, to seek relief against persons, entities, and foreign countries, wherever acting and wherever they may be found," *id.* § 2(b), and has instructed that its statutes "should be liberally construed to carry out the purposes of Congress to provide relief for victims of terrorism," PSJVTA § 903(d)(1)(A) (set out as a note to 18 U.S.C. § 2333).

tion of the Federal Courts, 106 Va. L. Rev. 1703, 1707 (2020) ("the relevant rules' validity has been questioned since their adoption, and the skeptics have recently grown in number"). Cases involving anti-terrorism statutes also have the benefit of accounting for the views of the United States, which has participated in *Fuld* and similar cases starting at the district-court stage. Notably, one member of the Fifth Circuit in the present case lamented the absence of briefing in this case by the Government, in light of the international sensitivities. Pet. App. 124 n.4 (Higginson, J., dissenting). Finally, those cases do not require adoption of an all-or-nothing approach that seems to have animated the dissenters in this case. They easily accommodate an incremental approach in which the Court evaluates whether the statutory provision reasonably advances legitimate governmental interests, as required under a traditional due process analysis.

3. Lower-court decisions holding that the Fifth Amendment imposes a geographic restriction on the power of Congress to authorize a federal court to exercise personal jurisdiction in a federal case are incorrect. "[P]ersonal jurisdiction requires a forum-by-forum, or sovereign-by-sovereign, analysis." *J. McIntyre Mach., Ltd.* v. *Nicastro*, 564 U.S. 873, 884 (2011) (plurality opinion). "Because the United States is a distinct sovereign, a defendant may in principle be subject to the jurisdiction of the courts of the United States but not of any particular State." *Ibid.* As the Solicitor General has explained, "[t]he United States' constitutional powers and special competence in foreign affairs, as distinguished from the geographically cabined and mutually exclusive sovereignty of the several States, would permit exercises of federal judicial power that have no analogue at the state level." U.S. Br. at 31-32, *Mallory* v. *Norfolk Southern*

Ry. Co., No. 21-1168 (Sept. 2022); see U.S. Br. at 32, *Ford Motor Co.* v. *Montana Eighth Judicial Dist. Ct.*, 141 S. Ct. 1017 (2021) (similar).

In cases governed by the Fourteenth Amendment, interstate federalism principles limit a State's assertion of personal jurisdiction "to ensure that States with 'little legitimate interest' in a suit do not encroach on States more affected by the controversy." *Ford Motor Co.* v. *Montana Eighth Judicial Dist. Ct.*, 141 S. Ct. 1017, 1025 (2021) (quoting *Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 137 S. Ct. 1773, 1780 (2017)). "The sovereignty of each State implies a limitation on the sovereignty of all its sister States," and "this federalism interest may be decisive." *Bristol-Myers Squibb*, 137 S. Ct. at 1780 (cleaned up). Limits on state adjudicative jurisdiction thus align with state regulatory jurisdiction under the Commerce Clause, which similarly limits each State's extraterritorial regulatory powers. *Healy* v. *Beer Inst., Inc.*, 491 U.S. 324, 336 (1989).

The majority and dissenters below all agreed that interstate federalism considerations—which can be dispositive in the Fourteenth Amendment context—"are irrelevant under the Fifth Amendment." Pet. App. 17 (majority); *id.* at 80 (dissent). That is correct. "Power over external affairs is not shared by the States," but instead "is vested in the national government exclusively." *United States* v. *Pink*, 315 U.S. 203, 233 (1942); see *Arizona* v. *United States*, 567 U.S. 387, 395 (2012). The Constitution's text allocates matters involving national security, foreign affairs, and foreign commerce exclusively to the national government. Compare U.S. Const. art. I, § 8, cls. 1, 3, 11; art. II, § 2; and art. IV, § 4, with U.S. Const. art. I, § 10, cls. 2-3.

Assertions of sovereignty by the national government over disputes arising abroad do not infringe the

sovereignty of any other actor within our constitutional framework. Unlike the States, "Congress has the authority to enforce its laws beyond the territorial boundaries of the United States." *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991); see *Gamble* v. *United States*, 139 S. Ct. 1960, 1967 (2019); *Restatement (Third) of the Foreign Relations Law of the United States* § 403 comment a & reporter's note 1 (2018). Thus, "the underlying sovereignty considerations of the United States within the world community are quite different from those of the states within our confederation of states." Wendy Collins Perdue, *Aliens, the Internet, and "Purposeful Availment": A Reassessment of Fifth Amendment Limits on Personal Jurisdiction*, 98 Nw. U. L. Rev. 455, 457 (2004). While the courts are mindful of the effects of jurisdictional decisions on "international rapport," *Daimler AG v. Bauman*, 571 U.S. 117, 142 (2014), this Court defers to the judgment of the political branches on the potential for "'serious foreign policy consequences'" flowing from the exercise of federal jurisdiction. *Jesner* v. *Arab Bank, PLC*, 138 S. Ct. 1386, 1407 (2018) (quoting *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U.S. 108, 124 (2013)).

The dissenters below make a powerful case that the Due Process Clause of the Fifth Amendment, as originally understood, "imposed few (if any) barriers to federal court personal jurisdiction." Pet. App. 61 (discussing Stephen E. Sachs, *The Unlimited Jurisdiction of the Federal Courts*, 106 Va. L. Rev. at 1710-1712; Max Crema & Lawrence B. Solum, *The Original Meaning of "Due Process of Law" in the Fifth Amendment*, 108 Va. L. Rev. 447, 453 (2022)). But at minimum, the Fifth Amendment is satisfied if the statute in question provides fair warning to the defendant that its conduct might subject it to jurisdiction in the United States and if it reasonably advances a legitimate federal interest. This

is the standard generally applied in due process review,[5] and it is the standard uniformly adopted by the courts of appeals, see Pet. App. 91-93 & n.34 (collecting cases).

CONCLUSION

The question whether the Fifth Amendment's Due Process Clause bars federal courts from exercising personal jurisdiction authorized by Congress over a foreign defendant whose conduct harms U.S. citizens or U.S. interests outside the United States is a recurring and important question, which the Court should resolve in a suitable case.

Respectfully submitted.

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[5] See *Lingle* v. *Chevron U.S.A. Inc.*, 544 U.S. 528, 542 (2005) (federal regulation should be upheld unless it "fails to serve any legitimate governmental objective," rendering it "so arbitrary or irrational that it runs afoul of the Due Process Clause"); *Rogers* v. *Tennessee*, 532 U.S. 451, 460 (2001) (Due Process Clause ensures "fundamental fairness through notice and fair warning and the prevention of the arbitrary and vindictive use of the laws.") (punctuation omitted for clarity).

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