No. 19-764

In the Supreme Court of the United States

MARK SOKOLOW, ET AL.,
Petitioners,
v.
PALESTINE LIBERATION ORGANIZATION AND PALESTINIAN AUTHORITY.

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

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF SENATOR CHARLES GRASSLEY, REPRESENTATIVE JERROLD NADLER, REPRESENTATIVE ROBERT GOODLATTE (RET.), SENATOR RICHARD BLUMENTHAL, SENATOR MARCO RUBIO, REPRESENTATIVE THEODORE DEUTCH, SENATOR THOM TILLIS, REPRESENTATIVE KATHLEEN RICE, AND SENATOR BILL NELSON (RET.) AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE AMICUS BRIEF

Pursuant to Supreme Court Rule 37.2(b), amici curiae Senator Charles Grassley, Representative Robert Goodlatte (ret.), Representative Jerrold Nadler, Senator Marco Rubio, Senator Richard Blumenthal, Senator Thom Tillis, Representative Kathleen Rice, and Senator Bill Nelson (ret.) request leave to file the following brief in support of Petitioners in the above-captioned matter. In support of that motion, Amici would show the following.

1. Amici are a bipartisan group of current and former members of the U.S. Senate and the House of Representatives. Amici have a depth of experience with the Nation's antiterrorism policy. They have served on congressional committees with jurisdiction over issues related to terrorism and national security, including the Senate Judiciary Committee (including three current or former Chairs of

that committee); the House Foreign Affairs Committee; the Senate Foreign Relations Committee; the House Committee on Homeland Security; the House Armed Services Committee; and the Senate and House Intelligence Committees. Amici also share a commitment to ensuring the efficacy of the private right of action provided in the Anti-Terrorism Act of 1992 (ATA). Not only do Amici include those involved in enacting the ATA and monitoring its implementation over the intervening 25 years, but each Amicus was a cosponsor of the Anti-Terrorism Clarification Act of 2018 (ATCA), or the Promoting Security and Justice for Victims of Terrorism Act of 2019 (PSJVTA), a pair of legislative efforts to strengthen the ATA in direct response to lower court rulings—including by the court of appeals in this case—that have left the ATA unconstitutional in most of its applications.

2. Amici wish to submit this brief because they believe the ATCA itself has now been misinterpreted, both in this case and in a decision of the District of Columbia Circuit, *Klieman* v. *Palestinian Authority*, No. 19-741. They request that the Court grant certiorari to see these misinterpretations corrected, as well as to overturn the lower courts' rulings nullifying Congress's power to provide meaningful relief and a federal forum for American citizens and nationals who are attacked or killed overseas by terrorists.

3. Counsel for all parties received notice of amici curiae's intent to file this brief 10 days before its due date. Petitioners have consented to the filing of this brief, but Respondents have not consented.

Accordingly, Amici respectfully request leave to file the enclosed amicus curiae brief in support of the Petitioners in this case.

Respectfully submitted,

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STATEMENT OF INTEREST[1]

Amici are a bipartisan group of current and former members of the U.S. Senate and the House of Represent-

[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than amici or their counsel made a monetary contribution intended to fund the brief's preparation or submission.

atives. Amici have deep experience with the Nation's anti-terrorism policy. They have served on congressional committees with jurisdiction over issues related to terrorism and national security, including three current or former Chairs of the Senate Judiciary Committee. Amici also share a commitment to protecting the private right of action provided in the Anti-Terrorism Act of 1992 (ATA). Not only do Amici include those involved in enacting the ATA and monitoring its implementation over the intervening 25 years, but each Amicus cosponsored the Anti-Terrorism Clarification Act of 2018 (ATCA), or the Promoting Security and Justice for Victims of Terrorism Act of 2019 (PSJVTA), a pair of legislative efforts to strengthen the ATA in direct response to lower court rulings—including by the court of appeals in this case—that have left the ATA unconstitutional in most applications.

Amici submit this brief because the ATCA itself has now been misinterpreted, both in this case and in a decision of the District of Columbia Circuit, *Klieman* v. *Palestinian Authority*, No. 19-741. The Court should grant certiorari to see these misinterpretations corrected, as well as to overturn the lower courts' rulings nullifying Congress's power to provide meaningful relief and a federal forum for American citizens who have been harmed by overseas terrorism.

Amici also write to make the Court aware of the PSJVTA, enacted only weeks ago as a further legislative response to the erroneous lower-court rulings in these cases—one that impacts both this case and *Klieman*.

INTRODUCTION AND SUMMARY OF ARGUMENT

For decades, starving terror networks of funding has been a central focus of Congress's efforts to promote national security, one that has been signally effective in reducing terrorists' destructive capabilities and saving American lives. Private civil actions are an integral component of that strategy. Such suits provide a measure of justice to terror victims and their grieving families and impose uniquely effective financial pressure on the sponsors, directors, and perpetrators of terror.

The enactment of the ATA was critical in unlocking private lawsuits' terror-fighting potential, by removing many of the jurisdictional barriers making it difficult to hold perpetrators of international terrorism accountable for the harms they inflict. Yet this case and *Klieman* have dramatically reduced the ATA's effectiveness through a series of rulings advancing overly simplistic, mechanical, and incorrect legal theories.

First, the Second Circuit held that the ATA—an Act of Congress designed to govern cases like this one—could not constitutionally be applied to hold liable the very entities it was enacted to reach. Congress swiftly and unanimously responded with the ATCA to remove this supposed constitutional barrier, reasonably conditioning this Nation's suspension of restrictions on Respondents—and its tolerance of their continued presence within our borders—upon consent to jurisdiction in civil ATA. But the lower court held this unambiguous attempt to reach Respondents *still* somehow missed the mark, and refused to apply the ATCA to them.

These decisions effectively eviscerate the ATA—contravening the considered judgment of Congress, sapping strength from a key component of the Nation's anti-terrorism strategy, and dangerously constricting Congress's powers to meet an ever-wider variety of extraterritorial threats. These decisions have also permitted Respondents to evade responsibility for heinous acts of terror that left scores of Americans dead and scores of families to grieve with no chance at justice.

This case therefore raises constitutional questions of the highest order about Congress's authority to combat terrorism, and about whether Due Process Clause protections designed to limit the States' power to encroach on the sovereignty of sister States ought to be applied to shelter foreign terrorists and their sponsors, including those which maintain a presence in the U.S. And these issues have only become more salient now that the District of Columbia Circuit in *Klieman* has joined the Second Circuit's erroneous statutory and constitutional rulings. These questions thus warranted this Court's review when the petitions here and *Klieman* were originally filed.

But events since then have made intervention by this Court even more appropriate. Just weeks ago, Congress passed the Promoting Security and Justice for Victims of Terrorism Act of 2019 (PSJVTA), Pub. L. No. 116-94, div. J, tit. IX, § 903, which directly responds to these cases, making even more clear that the Petitioners are entitled to maintain claims against Respondents under the ATA.

A proper respect for the Legislative Branch should lead this Court, as the head of the Judicial Branch, to have the final word in ensuring the correct interpretation and application of this anti-terrorism law that Congress has twice amended in response to unsound and dangerous

lower-court decision, and to halt their unjustifiable restraints on the Legislative Branch's ability to enact laws in this important domain. This Court has options about how best to implement that review. The course Amici recommend is for the Court to grant, vacate, and remand both this case and *Klieman* for consideration of the PSJVTA's impact.

ARGUMENT

I. The issues presented for review are of surpassing importance.

The multiple decisions in this case and in *Klieman* present issues of surpassing importance warranting review. Individually, each of them renders the ATA ineffective for the overwhelming majority of international terrorist attacks within its scope—including in cases of the very type for which the ATA was designed to furnish a remedy, by the very perpetrators of terror Congress meant to reach. Collectively, they will do even deeper constitutional damage, striking hard blows to Congress's authority to address some of the gravest threats facing the Nation. Allowing these rulings to stand would extinguish a class of cases that Congress has repeatedly acted to preserve—as recently as a few weeks ago—based on their vital role in the Nation's anti-terror strategy and the compelling need to provide meaningful compensation to innocent American victims of heinous acts of international terrorism.

A. The decisions under review eviscerate the ATA, a critical component of Congress's comprehensive antiterrorism scheme.

Congress's purpose in creating the ATA, Pub. L. 102–572, tit. X, § 1003, 106 Stat. 4522-4524 (Oct. 29, 1992) (codified as amended at 18 U.S.C. §§ 2331 *et seq.*), was to "*remove* the jurisdictional hurdles in the courts confronting victims [of international terrorism]"—and to ensure that Respondents in this case (and others like them) would be held accountable for harms they have inflicted on innocent Americans. *The Antiterrorism Act of 1991: Hearing Before the Subcomm. on Intellectual Property & Judicial Admin. of the H. Comm. on the Judiciary*, 102d Cong. 10 (1992) (*1992 Hearing*) (letter from Sen. Grassley) (emphasis added); 137 Cong. Rec. S4511-04 (1991) (statement of Sen. Grassley) (same); 137 Cong. Rec. S1771-01 (1991) (statement of Sen. Grassley) (same). Yet the lower courts here and in *Klieman* have erected new jurisdictional barriers that eviscerate the ATA's application and have somehow placed Respondents beyond its reach.

1. Congress created the ATA to overcome obstacles to holding terrorists accountable in U.S. Courts.

The impetus for enacting the ATA dates back to the 1970s and 1980s, when the Nation was stunned by terror attacks against Americans abroad. 136 Cong. Rec. S4592, S4594 (1990) (statement of Sen. Heflin). These included the PLO's kidnapping and murder of U.S. Ambassador Cleo Noel in Sudan in 1973; Hezbollah's suicide truck bombing attack killing 220 U.S. Marines in Beirut in 1983; Hezbollah terrorists' murder of U.S. Navy Diver Robert Stethem during the hijacking of TWA Flight 847 in 1985;

and the bombing of Pan Am flight 103, killing more than 250 above Lockerbie, Scotland in 1988.

These horrendous attacks brought attention to a significant "gap" in Congress's anti-terrorism strategy, 136 Cong. Rec. at S14283 (1990) (statement of Sen. Grassley), which up to that time had focused on combatting overseas terrorism with extraterritorial *criminal* laws. Congress recognized that civil lawsuits could provide a means of "fill[ing] the gap by providing the civil counterpart" to these criminal statutes, *id.* (statement of Sen. Grassley); see also *1992 Hearing* at 11. Congress recognized that allowing private civil actions for these horrific attacks would not only provide remedies to the victims of terror, but could provide "an important instrument in the fight against terrorism," *id.* at 10 (letter from Sen. Grassley), by striking at "the resource that keeps [international terrorists] in business—their money." 138 Cong. Rec. S17252-04 (1992) (statement of Sen. Grassley). The ATA reaffirmed America's "commitment to the rule of law," under which "the people of the United States" could "bring terrorists to justice the American way, by using the framework of our legal system to seek justice against those who follow no framework or defy all notions of morality and justice." *Antiterrorism Act of 1990: Hearing Before the Subcommittee on Courts and Administrative Practice of the Senate Committee on the Judiciary,* 101st Cong., 2d Sess. at 2-3 (July 25, 1990) ("*1990 Hearing*").

The attacks of the 1970s and 1980s also revealed terrorism to be "a wrong that, by its nature, falls outside the usual jurisdictional categories of wrongs that national legal systems have traditionally addressed." S. Rep. No. 102-342, at 22. And it was one case more than any other

that illustrated those problems: the 1985 murder of wheelchair-bound Leon Klinghoffer, an American passenger aboard the Italian vessel *Achille Lauro*. The ship was hijacked by four members of the PLO, who executed Mr. Klinghoffer and threw his body into the sea. *1990 Hearing* 56. The incident prompted public outcry and a congressional inquiry into the PLO and its finances, *id.* at 109-117, but also revealed the difficulty in holding the perpetrators accountable, given the welter of technical defenses that the PLO sought to invoke when sued by the Klinghoffer family. The ATA's legislative record is replete with references to these challenges in the *Klinghoffer* case—and shows how Congress drew inspiration from that case in how to solve them.[2] "Only by virtue of the fact that the attack violated certain Admiralty laws and that the [PLO] had assets and carried on activities in New York, was the court able to establish jurisdiction over the case." *Id.* at 5. But Congress was concerned that "[a] similar attack occurring on an airplane or in some other locale might not have been subject to civil action in the U.S.," and therefore passed the ATA to "codify" the *Klinghoffer* ruling and

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[2] See 137 Cong. Rec. S1771-01 (1991) (statement of Sen. Grassley) ("The PLO must be held accountable for its crimes and the Klinghoffers are making sure that, at least in some way, the PLO will be brought to justice."); 138 Cong. Rec. S17252-14 (1992) (statement of Sen. Grassley) ("[T]he first and best remedy is to bring these terrorists to justice in our courts of law. But often, the terrorists elude justice, as in the Achille Lauro case, where Leon Klinghoffer, an elderly American was callously murdered by PLO terrorists."); By enacting Section 2333, Congress intended to "put terrorist[s] on notice[] [t]o keep their hands off Americans" like Leon Klinghoffer. 136 Cong. Rec. S14279, S14284 (1990) (statement of Sen. Grassley); see also *1992 Hearing* at 4.

"make[] the rights of American victims definitive," 137 Cong. Rec. S4511-04 (1991) (statement of Sen. Grassley), when they sought redress from terrorists who had attacked them overseas. The ATA therefore allowed U.S. nationals to bring an action for injuries from acts of "international terrorism" that "occur primarily outside the territorial jurisdiction of the United States." See 18 U.S.C. § 2331(1)(C).

Congress was attentive to the sensitivities raised by this sort of extraterritorial legislation. Witnesses testified before Congress about the ATA's Due Process implications, *1990 Hearing* 79, 121-131, and as a result, Congress tailored the statute to provide a cause of action only where vital U.S. interests are at stake. But Congress was confident that Due Process would not pose any impediment to reaching acts of terrorism committed by the PLO, because the *Klinghoffer* case itself had shown "that the U.S. courts have jurisdiction over the PLO." 137 Cong. Rec. S4511 (1991) (statement of Sen. Grassley). And that understanding held for over 25 years. Pet. App. 101a-102a n.10.

2. The lower court improperly imposed new jurisdictional hurdles on the ATA's operation.

a. Things changed, however, in the wake of this Court's decisions in *Daimler AG* v. *Bauman*, 134 S. Ct. 746 (2014), and *Walden* v. *Fiore*, 134 S. Ct. 1115 (2014). Within months, the PLO and PA were arguing that "personal jurisdiction" principles required dismissal of proper and meritorious suits brought by Americans injured abroad. Pet. App. 23a; Pet. for a Writ of Certiorari at 6, *Klieman* v. *Palestinian Authority*, No. 19-741.

b. The panel in this case agreed. Although *Daimler* and *Walden* applied Fourteenth Amendment Due Process standards, which apply only against the States and not against the federal government, the panel decided these precedents should still govern the PLO's challenge to the federal courts' jurisdiction to hear cases stating claims under a federal statute with an avowedly extraterritorial reach. Pet. App. 29a-30a. That is a premise this Court has taken care to avoid endorsing and that a number of lower courts have expressly rejected. See *Omni Capital International, Ltd.* v. *Rudolf Wolff & Co.*, 484 U.S. 97, 102 n.5 (1987) (noting that this Court had "no occasion" to consider the Fifth Amendment's limits on personal jurisdiction); *Asahi Metal Industry Co.* v. *Superior Court of California*, 480 U.S. 102, 107 n.* (1987) (same); see also Pet. 21-22.

In applying the personal jurisdiction standards from *Walden* and *Daimler*, the panel decided that the ATA could not be constitutionally applied to Respondents or virtually any of the other international terror perpetrators and sponsors Congress meant to reach. While committing acts of terrorism against U.S. citizens should *always* be enough to confer jurisdiction in U.S. courts, the Second Circuit held that it is virtually *never* enough, because terror sponsors like Respondents are not usually "at home," in *Daimler*'s parlance, in this country. Pet. App. 27a. The court also concluded that Respondents' actions relating to the six terrorist attacks at issue here did not create the "'substantial connection'" to the forum *Walden* demands for specific personal jurisdiction, Pet. App. 32a (quoting *Walden*, 134 S. Ct. at 1121), because "the plaintiff victims[' status as] United States citizens," *id.* at 40a, was insufficient, *id.* at 43a, and 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.

c. Many Amici here urged that this Court grant review and overturn that holding. See Br. for the U.S. House of Reps. as Amicus Curiae, *Sokolow* v. *PLO*, No. 16-1071 (Apr. 2017) (H.R. Br.); Br. of U.S. Senator Charles E. Grassley *et al.* as Amici Curiae, *Sokolow* v. *PLO*, No. 16-1071 (Apr. 2017). There they argued that the lower court's equation of Fifth and Fourteenth Amendment Due Process standards was incorrect, owing to the very different interests at stake under each. See H.R. Br. 14-22.

For one thing, the limits on the power of state courts imposed by the Fourteenth Amendment are rooted in peculiar limits on state sovereignty that have no federal analog. In our federal system, "[w]hen a state enters the Union, it surrenders certain sovereign prerogatives." *Massachusetts* v. *EPA*, 549 U.S. 497, 519 (2007). "[T]he sovereignty of each State * * * implie[s] a limitation on the sovereignty of all its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment." *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 293 (1980). Those limitations preserve the balance among States, "acting to ensure that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *World-Wide Volkswagen*, 444 U.S. at 292. They are an expression of the reality that the States have agreed to coexist under a single Constitution, each agreeing to respect the needs of the other. "[I]f another State were to assert jurisdiction in an inappropriate case, it would upset the federal balance, which posits that

each State has a sovereignty that is not subject to unlawful intrusion by other States." *J. McIntyre Mach., Ltd.* v. *Nicastro*, 564 U.S. 873, 884 (2011) (plurality).

But personal jurisdiction "requires a forum-by-forum, or sovereign-by-sovereign, analysis." *McIntyre*, 564 U.S. at 583. And where the relevant "sovereign" is the federal government, "[t]here is no reason to assume that the scope of legitimate judicial authority of the United States as it operates in the international community is essentially parallel to the scope of the authority of each of our individual states." Wendy Perdue, *Aliens, the Internet, and "Purposeful Availment": A Reassessment of Fifth Amendment Limits on Personal Jurisdiction*, 98 Nw. U. L. Rev. 455, 461 (2004). Indeed, this Court has admonished that "the limitations of the Constitution * * * preventing [States] from transcending the limits of their authority" afford "no ground for constructing an imaginary constitutional barrier around the exterior confines of the United States for the purposes of shutting the government off from the exertion of powers which inherently belong to it by virtue of its sovereignty." *United States* v. *Bennett*, 232 U.S. 299, 306 (1914). The Fifth Amendment therefore should not be read to impose restrictions on the powers of the federal government to enact reasonable legislation advancing extraterritorial national security interests based on federalism constraints meant to limit only the States' powers vis-à-vis one another.

Yet it is not simply that the Constitution does not saddle the federal government with the same restrictions on sovereignty it imposes on the States. It is also that the Constitution conveys specific extraterritorial powers to the federal government that it withholds from the States. There can be no doubt that the federal government (in

contrast to the States) "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). It has enumerated powers to enact extraterritorial legislation that "appl[ies] to conduct occurring abroad," *Kiobel* v. *Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1665 (2013), including the authority "to define and punish * * * Offences against the Law of Nations," U.S. Const. art I, § 8, cl. 10, the power to regulate foreign commerce, *id.* art I, § 8, cl. 3, and the power to declare war, *id*. art I, § 8, cl. 1. Thankfully, the States have no equivalent rights against each other—"Massachusetts cannot invade Rhode Island" to enforce its will, nor can it "negotiate [a] * * * treaty with China or India." *Mass.* v. *EPA*, 549 U.S. at 519. Accordingly, there are numerous "overriding national interests which justify * * * federal legislation that would be unacceptable for an individual State." *Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 100 (1976) (footnote omitted). The Nation's compelling interest in protecting its citizens from terror attacks is just such an overriding national interest, and ought to support federal court jurisdiction over the Respondents in this case, whether or not State courts would have comparable power.

d. This is exactly what the Justice Department argued in *Daimler*, when it came to bringing foreign corporations into federal courts. There it explained that "the United States' special competence in matters of * * * foreign affairs, in contrast to the limited and mutually exclusive sovereignty of the several States * * * would permit the exercise of federal judicial power in ways that have no analogue at the state level." U.S. Br. at 3, n.1, *DaimlerChrysler A.G.* v. *Bauman*, No. 11-965 (July 2013). Yet when it came to this case, and bringing *terrorists* into federal

courts, the Justice Department masked its position, declining to say whether the Second Circuit "correctly" or "incorrectly" decided the case, U.S. Br. at 17, *Sokolow* v. *PLO*, No. 16-1071 (Feb. 2018). Rather, the first time this case came to the Court, the Solicitor General recommended against review on the ground that "further development in the lower courts is likely to be useful." *Ibid.* The Court denied certiorari. 138 S. Ct. 1438 (2018).

3. The lower court also misinterpreted Congress's effort to address the jurisdictional concerns.

Amici disagreed with the lower courts' narrowing of the ATA. Immediately after this Court denied review, Amici acted quickly and decisively to introduce legislation in direct response to the lower court's decision. The ATCA, Pub. L. No. 115-253, 132 Stat. 3183-3185 (2018), passed Congress unanimously. The House Judiciary Committee explained that the law was a direct response to the denial of certiorari in the earlier phase of this case in order to overturn the "flawed Second Circuit decision" and others that "have allowed entities that sponsor terrorist activity against U.S. nationals overseas to avoid the jurisdiction of U.S. courts" in civil ATA cases, frustrating Congress's determination to "halt, deter, and disrupt international terrorism." H.R. Rep. No. 115-858, at 3, 6, 7 (2018).

As relevant here, the ATCA provides that a defendant "benefiting from a waiver or suspension" of § 1003 of the Anti-Terrorism Act of 1987, Pub. L. No. 100-204, tit. X, is deemed to consent to personal jurisdiction in civil ATA cases if it (i) "continues to maintain any office, headquarters, premises, or other facilities or establishments within the jurisdiction of the United States," or (ii) "establishes"

such a facility. 18 U.S.C. § 2334(e)(1)(B). The ATCA likewise specifies that it is meant to operate retroactively "regardless of the date of the occurrence of the act of international terrorism upon which [a] civil action [brought under 18 U.S.C. § 2333] was filed," 18 U.S.C. § 2334(e)(1).

a. There is no legitimate question that the ATCA was tailor-made to reach these Respondents. The reference in Section 2334(e)(1)(B) to "§ 1003 of the Anti-Terrorism Act of 1987" is to a statute that pertains directly to the PLO and its agents, making it unlawful to "expend funds" or "establish or maintain * * * facilities or establishments within the jurisdiction of the United States," "if the purpose be to further the interests of the Palestine Liberation Organization." 22 U.S.C. § 5202. And Congress was well aware that the State Department had waived or suspended the effect of that statute just one year before enactment of the ATCA—"consistent with the president's authorities to conduct the foreign relations of the United States." See Jim Zanotti, Congressional Research Services, *The Palestinians: Background and U.S. Relations* 4 nn.14-15 (Nov. 21, 2018), <https://fas.org/sgp/crs/mideast/RL34074.pdf>.

Congress was also aware that the PLO and PA had been conducting activities within the "jurisdiction of the United States," at their building on East 65th Street in New York City—because the Second Circuit's *Klinghoffer* decision and its progeny had documented that Respondents conducted a variety of activities at that location, and the court held that at least *some* of those activities subjected Respondents to jurisdiction in the U.S. courts. *Klinghoffer* v. *S.N.C. Achille Lauro*, 937 F.2d 44, 51-52 (2d Cir. 1991). That is exactly why the House Judiciary Committee Report explained that the ATCA "*applies to the*

Palestinian Liberation Organization" and its affiliates (like the PA) if any of them "continues to maintain any office * * * or other facilities within the U.S." H.R. Rep. No. 115-858, at 7 & n.23 (2018) (emphasis added); accord 164 Cong. Rec. H6617-6618 (2018) (statement of Rep. Nadler). Indeed, Congress noted that it was "particularly" reasonable to impose this condition on "the PLO and the PA," "as Congress has repeatedly tied their continued receipt of privileges" such as "continued presence in the United States" "to their commitment to renounce terrorism," making it "eminently reasonable" to deem such presence "consent to jurisdiction in cases in which [their] terrorist acts injure or kill U.S. nationals." H.R. Rep. No. 115-848, at 7. Congress could hardly have been clearer that the entire thrust of the ATCA was to express to Respondents that their enjoyment of hospitality within our borders, would require accepting adjudications of responsibility for their acts of terrorism against American nationals.

b. Yet once again, the Second Circuit failed to allow jurisdiction over the Respondents. It ignored that the ATCA's entire purpose was to bring these very parties within the reach of U.S. courts, in favor of a brittle formalism that ignored the ATCA's expansive text. For instance, it read the ATCA's phrase "waiver or suspension" of § 1003 as requiring a narrow form of express waiver of the that section's sanctions, so narrow as to exclude the implicit waiver evident from the fact that the PLO and PA do, in fact, continue to expend funds and maintain facilities in the United States with the full knowledge of the Executive Branch, which § 1003 would prohibit absent Executive Branch largess. 22 U.S.C. §§ 5201-5202. Indeed, the panel demanded a particular form of waiver: a formal written certification signed by the President under a third

statute—one mentioned nowhere in the ATCA or its legislative history. Pet. App. 7a-8a (following *Estate of Klieman* v. *Palestinian Authority*, 923 F.3d 1115 (D.C. Cir. 2019), *petition for cert. filed*, No. 19-741); see Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, § 7041(k)(2)(B)(i), 133 Stat. 341. The court also held that Respondents' East 65th Street facility "is not considered to be within the jurisdiction of the United States" because it is used in part by the Palestinian UN observer, Pet. App. 8a—despite relying upon *Klinghoffer*, which had recognized that Respondents also used that facility for activities that unequivocally subject them to U.S. jurisdiction. Pet. at 11.

Finally, the Second Circuit failed to give effect to the ATCA's expressly retroactive application, by asserting without explanation that "the ATCA does not provide explicitly or implicitly that closed cases can be reopened." Pet. App. 9a. Accordingly, the court failed to give the ATCA the effect it was manifestly intended to have.

4. These rulings have rendered the ATA essentially unenforceable.

a. These rulings have rendered the ATA unenforceable against the very entities it intended to reach, in the cases where Congress was determined to afford a civil remedy. Under these decisions, victims will rarely, if ever, be able to establish general jurisdiction against any terror defendant, because international terrorists are unlikely to be found "at home" in the United States. Victims will likewise be unable to establish specific jurisdiction over international terrorists in all but the rarest circumstances. And victims will likewise be unable to establish the ATCA's conditions for consent to establishing jurisdiction—be-

cause if the factual predicates for the ATCA cannot be established against the Respondents, they cannot be established against anyone. Consequently, the decision below renders the ATA a virtual dead letter in most international terrorist attacks.

b. This holding knocks a key leg out from under the United States' antiterrorism strategy. Congress has long understood that terror enterprises "rest[] on a foundation of money." See *Antiterrorism Act of 1990: Hearing on S. 2465 Before the Sen. Subcomm. on Courts & Admin. Practice*, 101st Cong. 84 (1990) (testimony of Joseph A. Morris, former General Counsel, U.S. Information Agency). Congress has therefore employed a robust and comprehensive scheme—composed of administrative sanctions, civil and criminal penalties—that aims to deny malefactors of every dollar they might use to fund terrorism. See, e.g., the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), § 301(a)(7), 110 Stat. 1247 (18 U.S.C. § 2339B note) (imposing criminal sanctions for material support for terrorism); *id.* § 319(a)(2)(C), 110 Stat. at 1248 (authorizing the Secretaries of State and Treasury to designate and freeze the assets of foreign terrorist organizations); 50 U.S.C. § 4605(j) (imposing strict controls on exports to countries that support international terrorism).

These government efforts to combat terror financing have been demonstrably effective. See The 9/11 Commission Report, *Final Report of the National Commission on Terrorist Attacks Upon the United States* 382–383 (2004). For instance, documents found in Osama Bin Laden's compound revealed that efforts to restrict terrorist funding had frustrated al Qaeda's efforts to raise and transfer money around the world. Juan C. Zarate, Treasury's War:

The Unleashing of a New Era of Financial Warfare ix (2013).

Yet government enforcement alone is not enough to stanch the flow of terror funds. Civil litigation under the ATA plays an essential role in reinforcing these governmental antiterrorism efforts, providing "an invaluable supplement to the criminal justice process and administrative blocking orders," Jimmy Gurulé, *Unfunding Terror: the Legal Response to the Financing of Global Terrorism* 325 (2008) (*Unfunding Terror*). Private civil litigation also provides advantages over criminal enforcement efforts, including a less stringent burden of proof, an absence of constitutional restrictions on investigation, and broader discovery rights than those accorded governmental actors/parties. *Unfunding Terror* 325. And they provide "an important failsafe function by ensuring that legal norms are not wholly dependent on the current attitudes of public enforcers." John C. Coffee Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working*, 42 Md. L. Rev. 215, 227 (1983).

Accordingly, by undercutting the operation of the ATA, the lower courts not only have denied relief to American victims of international terrorism, they have hobbled an important weapon in our Nation's war on terror, thereby frustrating the considered judgment of Congress in one of the most important areas of national policy. Leaving these cases to "percolate" has not led to the proper development of the law that the Solicitor General optimistically forecasted. It has instead added layers of erroneous statutory interpretation to the constitutional infirmity of the Second Circuit's original ruling.

B. This case raises core questions about Congress's authority to enact extraterritorial legislation.

Review is further warranted because of more far-ranging concerns for Congress's powers that have arisen as a result of the decisions in these cases—concerns that have only deepened over time.

1. For one thing, as the Second Circuit has itself acknowledged, equating the Due Process analysis under the Fifth Amendment and the Fourteenth Amendment "impose[s] a unilateral constraint on United States courts, even when the political branches conclude that personal jurisdiction over a defendant for extraterritorial conduct is in the national interest." Pet. at 30a. And that understates things considerably. When Fourteenth Amendment precedents like *Daimler* and *Walden* are applied to determine whether perpetrators of terrorism and their sponsors may avoid accountability in U.S. courts, Congress is forced to lay down arms against foes that are not subject to similar constraints, and often still actively seek to do us harm. And there is no neutral principle by which this contraction of jurisdictional power can be confined to private lawsuits. The civil power of the Attorney General (and the Executive agencies to impose administrative sanctions) is obviously subject to these decisions, and the same basic "jurisdictional structure" undergirds Congress's extraterritorial criminal anti-terrorism measures as well. S. Rep. No. 102-342, at 45. Accordingly, if the lower courts' erroneous constitutional rulings are not reviewed here, Congress will have very little ability to enact enforceable extraterritorial legislation to combat terrorism. Congress

cannot and should not be disarmed in the fight against terrorism by the misapplication of constitutional law by this Nation's own courts.

That contraction of Congressional authority also calls into question a number of other extraterritorial provisions enacted by Congress outside the terrorism context, including the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-1707 (2012); the Commodity Exchange Act, 7 U.S.C. §§ 1-27f (2012); the Securities Exchange Act, 15 U.S.C. §§ 78a-78qq (2012); and the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68 (2012). All this provides further reason for the Court to revisit its reasons for denying certiorari on the lower court's constitutional rulings.

II. Vacatur and remand is nevertheless appropriate to allow for lower court consideration of the PSJVTA in the first instance.

For all the reasons described above, this case and *Klieman* both present questions of congressional power and national security of the greatest importance to the Nation, questions that readily warrant this Court's plenary review. The importance of this case is only heightened by the fact that the Legislative Branch has spoken once again on these issues in response to the lower court's erroneous rulings in this case.

1. On December 20, 2019, after the petitions in both this case and *Klieman* were filed, the Promoting Security and Justice for Victims of Terrorism Act of 2019 (PSJVTA) became law. Pub. L. No. 116-94, div. J, tit. IX, § 903. The PSJVTA overcomes each of the lower court's objections to applying the ATCA. It amends § 2334(e)(1) to omit the "benefiting from a waiver or suspension" requirement,

thus dispelling the lower courts' concern over whether or not Respondents are benefitting from a waiver under Section 1003 of the Anti-Terrorism Act of 1987, 22 U.S.C. § 5202. Pet. App. 7a-8a. Instead, the statute applies to "defendants," a term defined to include Respondents by name, thus leaving absolutely no doubt that they are covered. PSJVTA § 903(c)(1)-(5).

Congress likewise mooted the lower courts' concern over whether Respondents' East 65th Street building is "within the jurisdiction of the United States" because of its use by the Palestinian UN observer. Pet. App. 8a. It did so by broadening Section 2334(e)(1)(B)(i) to apply to any property that lies "in the United States," PSJVTA § 903(c)(1)(B), not merely those within U.S. "jurisdiction." The PSJVTA goes on to clarify that any facility that is not used "*exclusively* for the purpose of conducting official business of the United Nations" will be "considered to be in the United States," notwithstanding any other law or treaty, thus plainly capturing the dual uses to which Respondents have long put the East 65th Street Building. PSJVTA § 903(c)(3) & (4) (emphasis added).

Finally, where the lower courts questioned whether the ATCA reached Respondents, because "the ATCA does not provide explicitly or implicitly that closed cases can be reopened," Pet. App. 9a, Congress made the amended statute applicable to "any case pending on or after August 30, 2016," PSJVTA § 903(d)(2), *i.e.*, the day before the Second Circuit issued its decision in this case reversing the judgment for petitioners, Pet. App. 11a. And it did so expressly to ensure that the Judicial Branch is empowered to reopen claims by U.S. nationals previously dismissed on "personal jurisdiction" grounds—*i.e.*, this case and cases

like *Klieman*. This legislation meant to "reopen the courthouse doors to American victims and their families," 137 Cong. Rec. S7183 (2019) (statement of Sen. Grassley) who had their cases "dismissed for lack of jurisdiction after years of litigation," *id.* at S7182 (statement of Sen. Lankford).

3. Because the Legislative Branch has spoken on these issues with the PSJVTA, it is only appropriate that this Court, as the final arbiter within the Judicial Branch, have the final say on the statutory and constitutional issues in this case. Yet this is a Court of review, not first view, and out of respect for the court of appeals, remand would be appropriate. Neither the court below nor the *Klieman* court has had occasion to consider the impact of the PSJVTA on the decisions under review. They should have an opportunity to do so, not only because the PSJVTA responds to their rulings directly, but also because this action by Congress informs the meaning of the proper scope of its previous enactments like the ATCA. See *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000) ("Over time * * * subsequent acts can shape or focus [Congress's] meaning[]"). Either way, the lower courts should be given the opportunity to consider this new information in their decisions. The likely result is that they will reverse themselves without the need for this Court's further intervention.

CONCLUSION

The petition for a writ of certiorari should be granted.

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