No. 16-564

IN THE
Supreme Court of the United States

ROGER DARIN,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For a Writ of Certiorari
To the United States Court of Appeals
For the Second Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The central question in this case is whether the government can criminally charge a foreign defendant based on allegations that fail to establish "minimum contacts" between the defendant and the United States. This question is squarely presented here because the petitioner, Roger Darin, plainly lacks minimum contacts with the United States—not only did his alleged conduct not take place here, he also did not "follow[] a course of conduct *directed* at the" United States. *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 884 (2011) (plurality opinion) (emphasis added). The circuits are divided on this question, and—in an era of increasingly internationalized criminal prosecutions—it is an important and timely question for this Court to resolve.

In its opposition, the government does not dispute that the circuits are split on whether the due process test for extraterritorial criminal prosecutions incorporates principles of civil personal jurisdiction. Nor does the government seriously maintain that if minimum contacts principles were applied here, the complaint against Roger Darin could stand. Instead, the government argues, the Court should not grant *certiorari* because (i) the only issue before the Court is the Second Circuit's decision that it lacked jurisdiction under the collateral order doctrine, Opp. 7-9, and (ii) Roger Darin is a fugitive who is "flouting the judicial process," *id.* 16 (internal quotation marks omitted).

As an initial matter, even if the government were correct that the Second Circuit's ruling on the

collateral order doctrine is the only issue before the Court, *certiorari* would still be appropriate because the Second Circuit's ruling on this issue conflicts with two decisions of the Seventh Circuit. In any case, the government is not correct that this is the only issue before the Court. The Second Circuit also considered and rejected Mr. Darin's mandamus petition on the merits, which raised the same due process issues as his direct appeal.

As for the government's argument that Roger Darin is a "fugitive," it relies on precisely the Catch-22 logic that renders this case important for review. Far from "flouting the judicial process," Roger Darin has done nothing more than remain in his home country, where he lives openly and lawfully, and respectfully invoke his Fifth Amendment right not to be "improperly haled before a court for trial" in this country. *United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1257 (9th Cir. 1998). If defendants like Roger Darin cannot vindicate this due process right without voluntarily traveling to this country and being "haled before a court for trial," the right not to come here in the first place becomes meaningless. *Certiorari* is accordingly appropriate for this reason as well.

I. *Certiorari* Should Be Granted To Resolve The Circuit Split Regarding The Due Process Test Governing Prosecutions Of Foreign Defendants For Wholly Extraterritorial Conduct.

The circuits disagree on the due process test that applies in criminal prosecutions of foreign de-

fendants for wholly extraterritorial conduct. Pet. 15-22. In particular, the courts of appeals are divided over whether to apply a "sufficient nexus" test, which "serves the same purpose as the 'minimum contacts' test in personal jurisdiction." *Klimavicius-Viloria*, 144 F.3d at 1257. The Fifth and Ninth Circuits have embraced this test, whereas the First, Third, and Eleventh Circuits have rejected it. Pet. 16-19.

The government does not dispute this split exists. Opp. 19. Instead, it argues that this case is not an appropriate vehicle to resolve the split. The government's arguments are unavailing.

1. The government maintains that the court of appeals ruled only that it lacked jurisdiction under the collateral order doctrine and did not reach the merits of the due process issue. *See id.* 7-9. This is incorrect. As the government acknowledges,[1] the Second Circuit also considered Mr. Darin's mandamus petition, which raised the same due process issue as his direct appeal. The Second Circuit denied mandamus on the merits, holding "Darin has not demonstrated that exceptional circumstances warrant the requested relief." Pet. App. 3a. The Second Circuit's denial of mandamus "in a brief unpublished

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[1] The government acknowledges Mr. Darin's mandamus petition but asserts that "he does not appear to challenge that aspect of the court's decision." Opp. 7 n.3 (citing Pet. 29 n.10). This is not correct. The footnote in Mr. Darin's petition cited by the government merely notes the principle that mandamus relief is not a substitute for direct appeal *at the appellate level*. Both Mr. Darin's direct appeal and his mandamus petition are properly before the Court in this petition.

order," Opp. 7, is not a barrier to review. *See Commissioner v. McCoy*, 484 U.S. 3, 7 (1987) (per curiam) ("[T]he fact that the Court of Appeals' order under challenge here is unpublished carries no weight in our decision to review the case.").

Even setting aside Mr. Darin's mandamus petition, the Second Circuit's dismissal of Mr. Darin's appeal on jurisdictional grounds is not a barrier to granting *certiorari* and resolving the circuit split. This Court's long-standing rule "precludes a grant of certiorari only when the question presented was not pressed or passed upon below." *United States v. Williams*, 504 U.S. 36, 41 (1992) (internal quotation marks omitted). "[T]his rule operates (as it is phrased) in the disjunctive . . . ." *Id.* Mr. Darin has pressed his due process claim throughout this case. Pet. 9-13; Pet. App. 5a-6a, 19a-21a, 27a, 49a-57a. Accordingly, if the Court concludes—as it should—that jurisdiction exists under the collateral order doctrine, *see* Pet. 23-30, it should reach the merits of Mr. Darin's claim.

2. The government argues that *certiorari* is not appropriate because "the district court correctly found that petitioner did not qualify for relief under . . . the more stringent due process standard that petitioner claims some courts have adopted." Opp. 19. Not so. As discussed above, the defining characteristic of "the more stringent due process standard" that the Fifth and Ninth Circuits have adopted is its reliance on minimum contacts principles of civil personal jurisdiction. The district court did not consider minimum contacts principles, Pet. App. 19a-21a, and the government addresses them only in

passing to assert they are irrelevant, Opp. 20-21. To be sure, *some* circuits have concluded minimum contacts principles are irrelevant, *see id.* 21 (quoting *United States v. Ali*, 718 F.3d 929, 944 (D.C. Cir. 2013)), but other circuits have disagreed. The government's argument, in other words, assumes one side of the split is correct and the other side does not exist.

Despite its assertion that the "choice between the standards could not make any difference to the outcome of this case," *id.* 19, the government offers no meaningful argument that Roger Darin has minimum contacts with the United States. Instead, the government simply recites the allegations in the complaint and concludes they are sufficient under any test.[2] *Id.* 18. Yet the only connection between Roger Darin and the United States alleged in the complaint is that he "caused the publication of manipulated interest rate information in New York, New York," Compl. 2—along with every other country in the world—where it was relied upon in transactions. Such an allegation of "worldwide reliance" is not enough to establish minimum contacts with the United States. *See* Pet. 20.

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[2] The government asserts that Mr. Darin and Tom Hayes "engag[ed] in electronic chats routed through the Southern District." Opp. 3. This is inaccurate. The complaint merely alleges that "Darin engaged in electronic chats with Hayes," without alleging that those chats were routed through the United States. *See* Compl. 2 (capitalization omitted). Even if this had been alleged, however, it would not establish a "sufficient nexus." *See Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 455 (3d Cir. 2003) (email correspondence insufficient for personal jurisdiction absent purposeful availment of forum).

The government also cites the alleged conduct of Tom Hayes, Roger Darin's alleged co-conspirator, who engaged in transactions with U.S. counterparties. Opp. 18. The government contends that "under basic conspiracy principles, acts taken by petitioner's co-conspirator can be imputed to him." *Id.* The only way the government can make this argument, however, is by ignoring this Court's repeated admonition that minimum contacts must be assessed for each individual. *See Walden v. Fiore*, 134 S. Ct. 1115, 1122 (2014) (personal jurisdiction depends on "contacts that the defendant *himself* creates with the forum State" (internal quotation marks omitted)); *Calder v. Jones*, 465 U.S. 783, 790 (1984) ("Each defendant's contacts with the forum State must be assessed individually."). Here again, the government's only response is to argue that civil cases are irrelevant, Opp. 19 n.9, but this is the very point of conflict between the circuits.

More fundamentally, the government fails to explain *why* the civil standard should be irrelevant, given that the question in both civil and criminal contexts is the same: when it is fundamentally unfair to hale someone into court in this country. The government's failure to articulate any rationale for its distinction is all the more glaring because the one criminal case to address this question has made clear that sufficient nexus "is a preliminary determination totally distinct from the crime itself" that "must be considered before" principles of secondary liability, such as "whether the defendant acted as a principal or an aider and abettor." *United States v. Perlaza*, 439 F.3d 1149, 1168-69 (9th Cir. 2006); *see also* Lea Brilmayer & Charles Norchi, *Federal Extraterritori-*

ality and Fifth Amendment Due Process, 105 Harv. L. Rev. 1217, 1259-60 (1992) ("Conspiracy theory does not obviate the need to inquire into the defendant's purposeful connections with the forum—a central element of fairness in due process analysis.").

Ford v. United States, 273 U.S. 593 (1927), relied upon by the government, is not to the contrary. *Ford* did not address constitutional due process, but rather a statutory question more recently decided by this Court in *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 254-55 (2010): whether a particular exercise of a statute is impermissibly extraterritorial. The Court accordingly focused on the conspiracy as a whole and noted that "the conspiracy charged . . . had for its object crime in the United States, and was carried on partly in . . . this country." *Ford*, 273 U.S. at 624.

It is undisputed that for purposes of determining whether the complaint alleges an impermissible extraterritorial application of the conspiracy and wire fraud statutes (a determination *not* at issue here), a court could consider the conduct of both Tom Hayes and Roger Darin. But for purposes of examining whether the Constitution permits Mr. Darin to be haled into federal court for *any* crime (what *is* at issue here), his contacts with the United States "must be assessed individually." *Calder*, 465 U.S. at 790.[3]

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[3] The government conflates these distinct inquiries when it states that "Petitioner does not dispute the district court's holding that this case involves a domestic application of the (...continued)

II. *Certiorari* Should Also Be Granted To Prevent A Catch-22 That Deprives Foreign Defendants Of The Ability To Vindicate Their Fifth Amendment Rights.

The government does not dispute that the combined effect of the decisions below creates a Catch-22 for foreign defendants in Roger Darin's situation. Nor does the government demonstrate that this incongruous result is compelled by either of the doctrines relied upon below: the collateral order doctrine or the fugitive disentitlement doctrine. Rather, the lower courts' refusal to reach the merits of Mr. Darin's claim misapplies those doctrines and conflicts with Seventh Circuit law.

A. The Collateral Order Doctrine

The government argues that the collateral order doctrine does not apply because the sufficient nexus protection is not a "right not to be tried." Opp. 12 (internal quotation marks omitted). Disregarding cases holding the opposite, *see Klimavicius-Viloria*, 144 F.3d at 1257 (sufficient nexus "ensure[s] that a defendant is not improperly haled before a court for

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relevant criminal statutes." Opp. 20. This is true but irrelevant to the question here: whether the Fifth Amendment permits Mr. Darin to be haled into U.S. court. *See United States v. Davis*, 905 F.2d 245, 248 (9th Cir. 1990) (considering statutory question—"whether Congress has constitutional authority to give extraterritorial effect to" statute—separately from due process question—"whether the Constitution prohibits the United States from punishing Davis' conduct").

trial"), the government strains to distinguish the cases in which the Seventh Circuit did what the Second Circuit here refused to do: permit immediate appeal of motions to dismiss on behalf of foreign defendants contesting the government's ability to hale them into court in this country.

In both *United States v. Kashamu*, 656 F.3d 679, 681-83 (7th Cir. 2011), and *United States v. Bokhari*, 757 F.3d 664, 669-71 (7th Cir. 2014), the Seventh Circuit allowed immediate appeal because waiting until after trial would moot the defendant's motion to dismiss the indictment without trial. The government observes that these cases did not involve the specific right at issue here, Opp. 14-15, and that is not in dispute: in *Kashamu*, the motion was based on collateral estoppel and in *Bokhari*, it was based on international comity. What the government does not do, however, is explain why the sufficient nexus protection is any less a "right not to be tried" than the rights at issue in these cases. The government further notes that *Kashamu* and *Bokhari* "rest[ed] on the decision of a foreign court assertedly exonerating the defendant," *id.*, but this distinction is irrelevant. What matters for the collateral order doctrine is the nature of the *right*: whether it is "a right not just not to be convicted, but not to be tried." *Kashamu*, 656 F.3d at 682. *Kashamu* and *Bokhari* both involved such a right, and so does this case.[4]

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[4] The government also argues that the due process violation asserted by Mr. Darin is not appealable under the collateral order doctrine because it "is not a violation of an explicit statutory or constitutional guarantee that trial will not occur." Opp. (...continued)

B. The Fugitive Disentitlement Doctrine

The government fares no better with respect to the fugitive disentitlement doctrine, where the decision below conflicts with the Seventh Circuit's decidecision in *In re Hijazi*, 589 F.3d 401 (7th Cir. 2009).[5] The government observes that some facts in that case are absent here—such as Mr. Hijazi's surrender to Kuwaiti authorities—but the government fails to rebut the essential similarity between the two cases: that Mr. Darin, like Mr. Hijazi, is a foreign defendant residing outside the United States who asserts that his life has been badly damaged by a charge inappropriately pending in this country. The damage would be cured if his challenge were successful and made permanent if not. *See id.* at 413-14.

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13 (internal quotation marks omitted). If the government's argument is that Mr. Darin's appeal is foreclosed because the words "sufficient nexus" do not appear in the Fifth Amendment, then so, too, would be the appeals in *Kashamu* and *Bokhari*, both of which were permitted even though the phrases "collateral estoppel" and "international comity" do not appear in the Constitution.

[5] The Court's fugitive disentitlement jurisprudence serves only to underscore how far removed Roger Darin is from the definition of "fugitive." In *Degen v. United States*, 517 U.S. 820, 821-22 (1996), for example, the defendant distributed drugs in the United States before fleeing the country. In *Ortega-Rodriguez v. United States*, 507 U.S. 234, 239, 250-51 (1993), the defendant fled after his conviction and before his sentencing. The common theme in both cases is the defendant's flight, and it is undisputed that no such flight occurred here.

Hijazi also belies the government's pejorative characterizations of Mr. Darin's decision to remain in Switzerland. *See* Opp. 12 (asserting Mr. Darin is "stymying further proceedings in his case" and "manufactur[ing] appellate jurisdiction by simply refusing to face charges"); *id.* 17 (noting Mr. Darin's "refusal to submit to the jurisdiction of the U.S. courts"). Just as in *Hijazi*, Mr. Darin "was lawfully in [Switzerland] at the time of the [complaint] and remains so today." 589 F.3d at 407. "The government cites no support for the proposition that [Mr. Darin] has no right to stay there, and . . . [i]n fact, . . . [the] court's authority to command his appearance [was] precisely the issue[]" the court was asked to resolve. *Id.* The government's argument on the fugitive disentitlement doctrine, in other words, already assumes it has prevailed on the merits of whether the extraterritorial application of U.S. criminal law to Roger Darin comports with due process. But the government has not prevailed. Roger Darin is a foreign citizen making a claim, equal in the eyes of the law to the government's claim, that he has been inappropriately summoned to a country with which he has no connection. The government should not be able to bar his claim forever merely by disparaging his decision not to come when called.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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