No.

In the Supreme Court of the United States

MIRIAM FULD, ET AL., PETITIONERS,

v.

PALESTINE LIBERATION ORGANIZATION, ET AL.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Anti-Terrorism Act (ATA), 18 U.S.C. § 2331 *et seq.*, provides an extraterritorial private right of action for victims of terror attacks committed against American nationals abroad. In 2019, Congress amended the ATA by enacting the Promoting Security and Justice for Victims of Terrorism Act (PSJVTA). Under the PSJVTA, the Palestinian Liberation Organization (PLO) and Palestinian Authority (PA) "shall be deemed to have consented to personal jurisdiction" in an ATA action if:

> (a) more than 120 days after the statute's enactment, they pay any terrorist convicted of or killed while committing a terror attack against an American national, and the payment is made "by reason of" the conviction or terror attack, 18 U.S.C. § 2334(e)(1)(A); or
>
> (b) more than 15 days after the statute's enactment, they "conduct any activity" while physically present in the United States (with limited exceptions), *id.* § 2334(e)(1)(B).

The PLO and PA engaged in both categories of conduct after the trigger dates. But in the decisions below, the Second Circuit facially invalidated the PSJVTA. The court held that the Fifth Amendment forbids Congress from specifying conduct that triggers a defendant's consent to federal jurisdiction unless the statute provides the defendant with some "governmental benefit" in return, and that the PLO and PA had not received such a benefit.

The question presented is:

Whether the PSJVTA violates the Fifth Amendment.

PARTIES TO THE PROCEEDING

Petitioners, who were plaintiffs-appellants below, are: Mark I. Sokolow, Rena M. Sokolow, Jamie A. Sokolow, Lauren M. Sokolow, Elana R. Sokolow, Dr. Alan J. Bauer, Revital Bauer, Yehonathon Bauer, Binyamin Bauer, Daniel Bauer, Yehuda Bauer, Shmuel Waldman, Henna Novack Waldman, Morris Waldman, Eva Waldman, Rabbi Leonard Mandelkorn, Shaul Mandelkorn, Nurit Mandelkorn, Oz Joseph Guetta, Varda Guetta, Nevenka Gritz, individually, and as successor to Norman Gritz, and as personal representative of the Estate of David Gritz, Shayna Eileen Gould, Ronald Allan Gould, Elise Janet Gould, Jessica Rine, Katherine Baker, individually and as personal representative of the Estate of Benjamin Blutstein, Rebekah Blutstein, Richard Blutstein, individually and as personal representative of the Estate of Benjamin Blutstein, Larry Carter, individually and as personal representative of the Estate of Diane ("Dina") Carter, Shaun Choffel, Dianne Coulter Miller, individually and as personal representative of the Estate of Janis Ruth Coulter, Robert L Coulter, Jr., individually and as personal representative of the Estate of Janis Ruth Coulter, Ann Marie K. Coulter, as personal representative of the estate of Robert L. Coulter, Sr., individually and as personal representative of the Estate of Janis Ruth Coulter, Chana Bracha Goldberg, Eliezer Simcha Goldberg, Esther Zahava Goldberg, Karen Goldberg, individually, as personal representative of the Estate of Stuart Scott Goldberg, and as natural guardian of plaintiff Yaakov Moshe Goldberg, Shoshana Malka Goldberg, Tzvi Yehoshua Goldberg, Yaakov Moshe Goldberg, minor, by his next friend and guardian Karen Goldberg, Yitzhak Shalom Goldberg, Miriam Fuld, individually, as personal representative and administrator of the Estate of Ari Yoel Fuld, deceased, and as natural guardian of plaintiff Natan

Shai Fuld, Natan Shai Fuld, minor, by his next friend and guardian Miriam Fuld, Naomi Fuld, Tamar Gila Fuld, and Eliezer Yakir Fuld.

Respondents are the Palestine Liberation Organization and Palestinian Authority (aka Palestinian Interim Self-Government Authority and or Palestinian Council and or Palestinian National Authority), who were defendants-appellees below, and the United States, which was intervenor-appellant below.

RELATED PROCEEDINGS

United States District Court (S.D.N.Y.):

Sokolow v. *Palestine Liberation Org.*, No. 04 Civ. 397 (Oct. 1, 2015)

Fuld v. *Palestine Liberation Org.*, No. 20 Civ. 3374 (Jan. 7, 2022)

United States Court of Appeals (2d Cir.):

Waldman v. *Palestine Liberation Org.*, No. 15-3135 (Aug. 31, 2016) (initial panel opinion)

Waldman v. *Palestine Liberation Org.*, No. 15-3135 (June 3, 2019) (subsequent panel opinion)

Waldman v. *Palestine Liberation Org.*, No. 15-3135 (Sept. 8, 2023) (panel opinion after remand from this Court)

Fuld v. *Palestine Liberation Org.*, No. 22-76 (Sept. 8, 2023)

United States Supreme Court:

Sokolow v. *Palestine Liberation Org.*, No. 16-1071 (Apr. 2, 2018)

Sokolow v. *Palestine Liberation Org.*, No. 19-764 (May 29, 2020)

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Statement by President George Bush Upon Signing S. 1569, 28 Weekly Comp. Pres. Docs. 2112 (Oct. 29, 1992) 5

Other Authorities

Henry J. Bourguignon, *The First Federal Court: The Federal Appellate Prize Court of the American Revolution 1775-1787* (1977) 16

Nathan S. Chapman, *Due Process Abroad*, 112 Nw. U. L. Rev. 377 (2017) 18, 19

The Complete Bill of Rights (Neil H. Cogan ed., 2d ed. 2015) 18

Other Authorities—Continued Page(s)

Max Crema & Lawrence B. Solum, *The Original Meaning of "Due Process of Law" in the Fifth Amendment*, 108 Va. L. Rev. 447 (2022) 16, 18

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The Federalist No. 80 (Rossiter ed. 1961) 17

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The Records of the Federal Convention of 1787 (Max Farrand ed., 1911) 16, 17

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OPINIONS BELOW

The opinions of the court of appeals (App. 1a-70a) are reported at 82 F.4th 64 (*Waldman*) and 82 F.4th 74 (*Fuld*). The court's order denying rehearing in banc (App. 204a-268a) is reported at 101 F.4th 190. Earlier opinions of the court of appeals in *Waldman* (App. 126a-182a) are reported at 835 F.3d 317 and 925 F.3d 570. Opinions of the district court (App. 71a-125a) are reported at 578 F. Supp. 3d 577 (*Fuld*), 590 F. Supp. 3d 589 (*Sokolow*), and 607 F. Supp. 3d 323 (*Sokolow*).[1] Other opinions of the district court (App. 183a-203a) are unreported.

JURISDICTION

The court of appeals entered its judgment and order on September 8, 2023, and denied timely rehearing petitions on May 10, 2024. App. 204a-268a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant constitutional and statutory provisions are reproduced in the Appendix. App. 307a-317a.

[1] The *Sokolow* case was captioned in the Second Circuit as *Waldman* v. *Palestine Liberation Organization*.

INTRODUCTION

Dissenting from the denial of rehearing en banc, Judge Menashi (joined by Chief Judge Livingston and Judges Sullivan and Park) identified this case as one of "exceptional importance." App. 232a. To start, the Second Circuit facially invalidated a federal statute as unconstitutional. That step, "on its own," warrants immediate review. *Id.* at 233a.

But the Promoting Security and Justice for Victims of Terrorism Act of 2019 (PSJVTA) is not just any federal statute. It was enacted by Congress, in direct response to lower-court decisions in this case, for the express purpose of ensuring the courthouse door did not close on American victims of international terrorism. Under the PSJVTA, the Palestinian Liberation Organization (PLO) and Palestinian Authority (PA) are deemed to consent to jurisdiction in cases under the Anti-Terrorism Act (ATA) if, following specified trigger dates, they pay financial rewards to terrorists for killing or injuring Americans or they engage in any activity in the United States (with certain exceptions). The political branches determined that this statute serves vital national interests in disrupting and deterring terrorism, compensating American terror victims, and promoting peace in the Middle East.

The ruling below not only renders the ATA a dead letter in its heartland application, but it also severely restricts the power of Congress to provide for jurisdiction over *any* extraterritorial events. In short, the Second Circuit hamstrung Congress on matters involving foreign affairs and national security.

That decision is more than dangerous; it is flat wrong. It disregards the original public meaning of the Fifth Amendment's Due Process Clause, instead applying to the *federal* government the territorial limitations on *state* jurisdiction under the Fourteenth Amendment. As Judge

Oldham explained when this issue was before the Fifth Circuit, "I do not understand how or why we'd take an *un*-originalist interpretation of the Fourteenth Amendment, pull it back in time to 1791, and use it to blind ourselves to an *originalist* interpretation of the Fifth Amendment." *Douglass* v. *Nippon Ysen Kabushiki Kaisha*, 46 F.4th 226, 285 (5th Cir. 2022) (en banc) (dissenting).

But the Second Circuit's analysis would be wrong even under Fourteenth Amendment standards. It ignored this Court's instruction that an exercise of personal jurisdiction satisfies due process if the defendant received "fair warning" that "a particular activity may subject them to the jurisdiction of a foreign sovereign," and if the exercise of jurisdiction is "reasonable, in the context of our federal system." *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 592 U.S. 351, 358-359 (2021) (quotation marks omitted). As the Second Circuit acknowledged, App. 30a, the PSJVTA indisputably satisfies those "basic principles of due process": It provides clear warning about exactly what conduct will give rise to jurisdiction in exactly what kinds of cases; and it advances the federal government's legitimate interests in deterring and disrupting terrorism, protecting Americans, and ending the PLO and PA's institutionalized practice of promoting terrorism using financial rewards.

The decision below also conflicts with this Court's decisions on deemed-consent statutes, most prominently *Mallory* v. *Norfolk Southern Railway Co.*, 600 U.S. 122 (2023). In *Mallory*, as here, the defendant argued that it had "not *really* submitted" to jurisdiction when it engaged in the consent-triggering conduct specified by statute, despite "appreciat[ing] the jurisdictional consequences" of doing so. *Id.* at 144 (plurality). This Court rejected the defendant's argument, since "a legion of precedents …

attach jurisdictional consequences to what some might dismiss as mere formalities." *Id.* at 145.

Instead of following *Mallory*, the Second Circuit invented a new "reciprocity" test, under which a deemed-consent statute is valid only if the defendant receives a "governmental benefit" in return for submitting to jurisdiction. App. 38a. The Second Circuit created this test for the supposed purpose of ensuring that the consent-manifesting conduct is a sufficiently close "proxy for actual consent" (*ibid.*)—the very concept this Court rejected in *Mallory*.

The Second Circuit then misapplied its newly created test by holding that a defendant receives no "benefit" if the defendant's jurisdiction-triggering conduct is unlawful. As Judge Menashi put it, that is simply "perverse." App. 231a. A defendant who "extract[s] a benefit" from the forum without permission to do so should get lesser protection from having to face a trial on the merits in the forum's courts, not greater. App. 232a.

This Court's immediate intervention is needed.

STATEMENT

A. Legal Background

1. The ATA provides a private right of action to U.S. nationals and their families to recover for death and injuries sustained by reason of an act of international terrorism. 18 U.S.C. § 2333(a). The law was inspired by a civil suit brought against the PLO for the murder of Leon Klinghoffer, a wheelchair-bound American cruise ship passenger who was shot in the face and thrown into the sea by PLO hijackers.

Klinghoffer's family held the PLO accountable for the murder by invoking federal admiralty jurisdiction. H.R. Rep. No. 102-1040, at 5 (1992). The Senate Judiciary Committee explained that the ATA would "open[] the

courthouse door to victims of international terrorism," by "extend[ing] the same jurisdictional structure that undergirds the reach of American criminal law to the civil remedies that it defines." S. Rep. No. 102-342, at 45 (1992). President Bush signed the law to "ensure that…a remedy will be available for Americans injured abroad by senseless acts of terrorism." *Statement by President George Bush Upon Signing S. 1569*, 28 Weekly Comp. Pres. Docs. 2112 (Oct. 29, 1992).

For nearly 25 years, federal courts exercised general personal jurisdiction over the PLO and the PA in civil ATA cases based on their systematic and continuous presence in the United States. App. 193a n.10 (collecting cases). In 2016, however, the Second Circuit held that U.S. courts could no longer do so because this Court had "narrowed the test for general jurisdiction" in *Daimler AG* v. *Bauman*, 571 U.S. 117 (2014). App. 141a. It also found specific jurisdiction over the PLO and PA absent because the "conduct that could have subjected them to liability under the ATA" had occurred "outside the United States." App. 166a.

2. Congress responded to the decision by enacting the Anti-Terrorism Clarification Act of 2018 (ATCA), which invoked a traditional basis for the exercise of personal jurisdiction: consent. Under the ATCA, any defendant "benefiting from a waiver or suspension" of 22 U.S.C. § 5202—which forbids the PLO and its affiliates from maintaining an office or spending money in the United States—"shall be deemed to have consented to personal jurisdiction" in civil ATA cases if the defendant maintains "any office within the jurisdiction of the United States" after January 31, 2019, "regardless of the date of the occurrence of the act of international terrorism." Pub. L. No. 115-253, 132 Stat. 3183-3185 (formerly codified at 18 U.S.C. § 2334(e)(1)(B)). The House Judiciary Committee

explained: "It is eminently reasonable to condition" the PLO's and PA's "continued presence in the United States on [their] consent to jurisdiction …, as Congress has repeatedly tied their continued receipt of these privileges to their adherence to their commitment to renounce terrorism." H.R. Rep. No. 115-858, at 7 (2018).

In response to another Second Circuit ruling in this case, which held that the ATCA's factual predicates had not been met, App. 29a-30a, Congress amended the ATCA by enacting the PSJVTA. Pub. L. No. 116-94, div. J, tit. IX, § 903 (codified at 18 U.S.C. § 2334(e)). The PSJVTA has two operative prongs:

- Subparagraph (1)(A) provides that the PLO and PA are deemed to have consented to personal jurisdiction in civil ATA cases if, at least 120 days after the law's enactment, the defendant makes any payment to a designee of an individual imprisoned for, or killed while, committing a terror attack that killed or injured a national of the United States, if the payment is made "by reason of" the terrorist's death or imprisonment. 18 U.S.C. § 2334(e)(1)(A).

- Subparagraph (1)(B) provides that the PLO and PA are deemed to have consented to personal jurisdiction in civil ATA cases if, at least 15 days after enactment, the defendant "conducts any activity while physically present in the United States on behalf of the Palestine Liberation Organization or the Palestinian Authority." Subparagraph (1)(B) is subject to six exceptions, including maintaining an office or conducting an activity "exclusively for the purpose of conducting official business of the United Nations." *Id.* § 2334(e)(3)(A), (B).

Congress instructed that the statute must be "liberally construed to carry out the purposes of Congress to provide relief for victims of terrorism." PSJVTA § 903(d)(1)(A).

B. Factual and Procedural Background

These cases arose out of a series of terror attacks in Israel that killed or injured U.S. nationals. Officials and employees of the PLO and PA planned, directed, and participated in these attacks.

1. The *Sokolow* case was brought by American families victimized in terror attacks in Israel between 2001 and 2004. Mark Sokolow and his family were on vacation in Jerusalem, buying a pair of shoes for their twelve-year-old daughter when a PA intelligence agent detonated a 22-pound bomb in her backpack, killing one and injuring the Sokolows and more than 100 others. Alan Bauer and his seven-year-old son were walking down a crowded street when a suicide bomber blew himself up at the direction of a PA security officer, sending shrapnel into the father's arm and the boy's brain. Scott Goldberg was killed on his way to work when a PA police officer detonated himself on a local bus; Goldberg left a widow and seven children. Four other plaintiffs died when a massive bomb went off in a university cafeteria at lunchtime; their parents learned about their deaths at home in the United States—some by recognizing their children's bodies or personal effects on the news.

The *Fuld* case was brought by the family of Ari Fuld, an American citizen and father of four. In September 2018, Mahmoud Abbas, the Chairman of the PLO and President of the PA, falsely announced that the Government of Israel was planning to establish special Jewish prayer zones inside the al-Aqsa Mosque, one of Islam's holiest sites. C.A. Doc. 66, at A47-49, Case No. 22-76 (2d Cir. 2023). Hours later, a Palestinian terrorist, incited by

Abbas's false accusations, stabbed Mr. Fuld to death outside a shopping mall.

2. The plaintiff families sued under the ATA in the U.S. District Court for the Southern District of New York.

In *Sokolow*, after a seven-week trial, the jury found that PLO and PA employees, acting within the scope of their employment, had planned or participated in each of the attacks. C.A. Doc. 81-3, at 9436, Case No. 15-3135. Evidence also showed that the PLO and PA had provided so-called "martyr" payments to the families of the suicide terrorists in honor of their attacks and had rewarded the surviving officers—imprisoned for their crimes—with generous salaries and promotions. C.A. Doc. 64, at 4375, 4385, Case No. 15-3135; C.A. Doc. 67, at 5230-5231, Case No. 15-3135. The jury awarded plaintiffs $218.5 million in damages, which was automatically trebled under the ATA.

On appeal, the Second Circuit reversed for lack of personal jurisdiction. App. 1a. The circuit held that the PLO and PA enjoy due process rights because "neither the PLO nor the PA is recognized by the United States as a sovereign state." App. 153a. It also held that the test for personal jurisdiction is "the same under both the Fifth and Fourteenth Amendments." App. 156a. Applying Fourteenth Amendment standards, it held that U.S. courts could not exercise general jurisdiction because the defendants were "at home" in "Palestine," and could not exercise specific jurisdiction because the conduct giving rise to liability "occurred *entirely* outside the territorial jurisdiction of the United States." App. 167a.

Petitioners sought review in this Court, which called for the views of the Solicitor General. The Solicitor General recommended against review, saying that "further development in the lower courts is likely to be useful before this Court addresses" the issues. U.S. Br. at 17,

Sokolow v. *Palestine Liberation Org.*, No. 16-1071 (Feb. 2018). This Court denied review. 138 S. Ct. 1438 (2018).

After Congress enacted the ATCA, the *Sokolow* plaintiffs moved to recall the Second Circuit's mandate. The court denied the motion, holding that the term "waiver or suspension" as used in the ATCA meant only an "express waiver," so that the statute's factual predicates had not been satisfied. App. 133a. Congress then enacted the PSJVTA, and this Court vacated the Second Circuit's judgment and remanded for further consideration in light of the new statute. 140 S. Ct. 2714 (2020). The Second Circuit in turn remanded to the district court for findings and conclusions.

3. On remand to the district court in *Sokolow*, and on a motion to dismiss in *Fuld*, the PLO and PA challenged the PSJVTA on the ground that the statute facially violated their right to due process under the Fifth Amendment. The United States intervened in both cases to defend the law's constitutionality. See 28 U.S.C. § 2403(a).

In *Sokolow*, plaintiffs provided extensive evidence, which the PLO and PA did not dispute, that following the PSJVTA's trigger date, defendants systematically paid salaries to at least 175 terrorists "by reason of" terror attacks that resulted in the death of Americans. Dist. Ct. Dkt. 1018, ¶¶ 2-202, No. 04 Civ. 397 (S.D.N.Y.); Dist. Ct. Dkt. 1015-1, No. 04 Civ. 397 (S.D.N.Y.). Plaintiffs also provided evidence that the PLO and PA had engaged in post-trigger-date activities while present in the United States that did not fall within any statutory exemption. App. 98a. Plaintiffs in *Fuld* made similar allegations in an amended complaint, which tracked much of this evidence. App. 95a.

The *Sokolow* and *Fuld* district courts accepted that the PLO and PA had met the factual requirements of both prongs of the PSJVTA. However, they held the law facially unconstitutional under the Due Process Clause of

the Fifth Amendment. App. 87a-90a, 108a-124a. They reasoned that this Court's decision in *Daimler* had rendered consent-to-jurisdiction cases decided under pre-*International Shoe* precedents "obsolete." App. 76a. In so ruling, the *Fuld* district court relied on the Pennsylvania Supreme Court's decision in *Mallory* v. *Norfolk Southern Railway Co.*, 266 A.3d 542 (Pa. 2021), *rev'd*, 600 U.S. 122 (2023). App. 113a n.6.

4. The Second Circuit heard the cases in tandem and affirmed. Like the district courts, the court of appeals accepted that the PLO and PA had engaged in the relevant jurisdiction-triggering conduct by paying terrorists who had murdered Americans and by conducting non-exempt activities inside the United States. App. 38a. It also did not dispute that the PSJVTA meets "minimum due process requirements" by providing fair warning to the defendants of the relevant conduct and by reasonably advancing legitimate governmental interests. App. 29a-30a.

The Second Circuit nevertheless held the PSJVTA unconstitutional on its face. In the court's view, the Fifth Amendment's Due Process Clause requires a consent-to-jurisdiction statute to provide a defendant with some "reciprocal bargain" in return. App. 24a-26a. The court also held that the PLO and PA's permission to be present in the United States and to engage in activities here does *not* count as such a "benefit." According to the court, this was because the PLO and PA's consent-manifesting conduct was "prohibited" by prior law. App. 28a.

Finally, the panel rejected the requests of the United States and plaintiffs to reconsider its prior decision that the Fifth and Fourteenth Amendments "parallel one another in civil cases," on the ground that this holding was now the law of the Circuit. App. 47a.

Plaintiffs and the United States sought rehearing en banc. The Second Circuit denied the petitions. App. 208a.

Judge Menashi, joined in full or in part by three other judges, dissented. App. 229a-267a. In his view, "[t]he panel's decision lacks a basis in the Constitution and cannot be reconciled with Supreme Court precedent on personal jurisdiction." App. 230a.

Judge Menashi explained that the panel's decision rested on three errors. First, "[n]o law requires Congress to extend a benefit to those over whom it authorizes personal jurisdiction. Instead, as the Supreme Court has made clear, consent based on conduct need only be knowing and voluntary and have a nexus to the forum." *Ibid.* Those conditions were satisfied here. *Ibid.*

Second, "even if the panel were correct that the Due Process Clause required a reciprocal benefit, the statute here involves such a benefit because the defendants are deemed to have consented based on the privilege of residing and conducting business in the United States—not to mention furthering their political goals at the expense of American lives." App. 231a.

Third, "the federal government is not similarly situated to the state governments in the extraterritorial reach of its courts." App. 232a. Under its original public meaning, "the Due Process Clause of the Fifth Amendment does not limit the exercise of personal jurisdiction by the federal courts." App. 255a.

Judge Bianco, who sat on the panel that invalidated the PSJVTA, concurred in the denial of rehearing, reiterating his view that the statute is facially unconstitutional. App. 209a-228a.

REASONS FOR GRANTING THE PETITION

The Second Circuit declared a federal statute facially unconstitutional. The ruling undermines fundamental national security and foreign policy determinations at the very core of Congress's and the President's constitutional authority and expertise—determinations that the political branches have repeatedly and emphatically reaffirmed in a series of statutory amendments attempting to overcome the Second Circuit's misguided decisions. And the decision below is *already* undermining federal authority and interests in a variety of contexts.

The ruling below is also incorrect. It answers a recurring and important question contrary to the original public meaning of the Fifth Amendment; flouts this Court's decisions; and improperly hamstrings congressional authority to provide for jurisdiction over extraterritorial conduct affecting federal interests. This Court should grant review and reverse.

I. THE INVALIDATION OF A FEDERAL ANTI-TERRORISM STATUTE MERITS REVIEW

"[W]hen a lower court has invalidated a federal statute," this Court's "usual" approach is to grant certiorari. *Iancu* v. *Brunetti*, 588 U.S. 388, 392 (2019). The Court applies a "strong presumption in favor of granting writs of certiorari to review decisions of lower courts holding federal statutes unconstitutional," *Maricopa Cnty.* v. *Lopez-Valenzuela*, 574 U.S. 1006, 1007 (2014) (Thomas, J., respecting denial of stay), and it routinely does so even in absence of circuit conflict. See, *e.g.*, *SEC* v. *Jarkesy*, No. 22-859 (2024); *Vidal* v. *Elster*, 602 U.S. 286 (2024); *Consumer Fin. Prot. Bureau* v. *Cmty. Fin. Servs. Ass'n of Am.*, 601 U.S. 416 (2024); *United States* v. *Hansen*, 599 U.S. 762 (2023); *Torres* v. *Texas Dep't of Public Safety*, 597 U.S. 580, 586 (2022); *United States* v. *Vaello Madero*, 596 U.S. 159 (2022).

Review is particularly warranted in light of the subject-matter of the law struck down and the Second Circuit's frustration of not one but two statutes enacted on a bipartisan basis (in a time of limited bipartisanship). The PSJVTA aims to "halt, deter, and disrupt international terrorism," H.R. Rep. No. 115-858, at 7-8, and to give American terror victims and their families their day in court.

The Government's interest in combatting terrorism "is an urgent objective of the highest order." *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 28 (2010); see *Gamble* v. *United States*, 587 U.S. 678, 687 (2019) ("special protection for U.S. nationals serves key national interests"). The law also gives the PLO and PA reason to end their notorious pay-for-slay policy, under which terrorists (or their families) receive a reward for murdering Jews. That noxious practice is "an incentive to commit acts of terror," Taylor Force Act, Pub. L. 115-141, Title X, § 1002(1) (22 U.S.C. § 2378c-1 note), and it "threaten[s] prospects for peace, pushing the chance for a Palestinian state further and further out of reach." 163 Cong. Rec. H9650 (Dec. 5, 2017) (Rep. Engel).

Review is also warranted because the court of appeals second-guessed the policy judgments reflected in the PSJVTA, which are "of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." *Chicago & S. Air Lines, Inc.* v. *Waterman SS Corp.*, 333 U.S. 103, 111 (1948). Indeed, the law merits especially "respectful review by courts," because Congress enacted and the President signed the PSJVTA "in furtherance of their stance on a matter of foreign policy." *Bank Markazi* v. *Peterson*, 578 U.S. 212, 215 (2016). The decision below thus "implicates separation of powers" to an even greater

extent than the typical case—in which there are good reasons for immediate review when "a federal judge strikes down an act of a coequal branch of government." *Heckler* v. *Edwards*, 465 U.S. 870, 881 (1984).

II. THE COURT OF APPEALS ERRED BY INVALIDATING THE PSJVTA

This Court has never invalidated a federal jurisdictional statute on due process grounds. Overwhelming historical evidence (and scholarly consensus) explain why: "[A]s originally understood, the Fifth Amendment did not impose any limits on the personal jurisdiction of the federal courts. Instead, it was up to Congress to impose such limits by statute." *Douglass*, 46 F.4th at 284 (Oldham, J., dissenting). No one at the Founding understood the Fifth Amendment as constraining Congress's authority to authorize jurisdiction over cases involving extraterritorial conduct *at all*; indeed, the federal courts routinely adjudicated such cases for more than 200 years.

But even if the standards for personal jurisdiction under the Fifth and Fourteenth Amendments were the same, the court of appeals' approach was wrong. In enacting the PSJVTA, Congress specified—in advance and with sufficient warning—the conduct that would subject the PLO and PA to jurisdiction in a limited category of civil cases at the heartland of federal concern. That easily satisfies the Fourteenth Amendment's requirement that exercises of personal jurisdiction must provide "fair warning" and must be "reasonable, in the context of our federal system of government." *Ford Motor Co.*, 592 U.S. at 358 (citation omitted). The Second Circuit's invention of a "governmental benefit" requirement for consent-based jurisdiction, and the court's perverse application of that novel test, are both indefensible.

A. The Fifth Amendment Does Not Limit Congress's Authority To Enact Reasonable Personal Jurisdiction Statutes

The Second Circuit held that the personal jurisdiction limitations developed under the Fourteenth Amendment also apply in cases in federal court governed by the Fifth Amendment. App. 17a, 47a. This was contrary to the original public meaning of the Fifth Amendment's Due Process Clause and its application by this Court since that time. As Professor Sachs explains: "For the first 150 years of the Republic…the recognized doctrines of jurisdiction worked very differently for state and federal courts." Stephen E. Sachs, *The Unlimited Jurisdiction of the Federal Courts*, 106 Va. L. Rev. 1703, 1706 (2020). As originally understood, congressional power over personal jurisdiction was unlimited: "If Congress wanted to exercise exorbitant [personal] jurisdiction…a federal court 'would certainly be bound to follow it, and proceed upon the law.'" *Ibid.* (quoting *Picquet* v. *Swan*, 19 F. Cas. 609 (C.C.D. Mass. 1828) (No. 11,134) (Story, J.)). The decision below, by subjecting Congress to the same limitations on jurisdiction that apply to the States, improperly "takes the Fourteenth Amendment as given, and remakes the Fifth Amendment in its image." *Id.* at 1705.

1. The Fifth Amendment's text, the historical backdrop against which that text was drafted and ratified, and practice in the years following ratification all confirm that the Fifth Amendment's Due Process Clause was not originally understood as restricting personal jurisdiction at all. Much less did it forbid adjudication if the "suit-related conduct" did not occur "in the United States," as the Second Circuit held. App. 8a.

a. The phrase "due process of law" does not call to mind limitations on personal jurisdiction based on the location of the underlying conduct. So it was in 1791 as well.

Founding-era dictionaries offered two potentially relevant definitions for "process"—one meaning "all the proceedings in any cause"; the other meaning "the writs and precepts that go forth in an action." Max Crema & Lawrence B. Solum, *The Original Meaning of "Due Process of Law" in the Fifth Amendment*, 108 Va. L. Rev. 447, 487-488 (2022). Neither sense restricts personal jurisdiction based on the location of the conduct giving rise to the case.

b. The history preceding the Fifth Amendment's ratification firmly supports the conclusion that the Due Process Clause was not understood to constrain the power of the federal courts in adjudicating extraterritorial conduct. When the United States declared independence from England, its powers of "external sovereignty" became "vested in the federal government as necessary concomitants of nationality." *United States* v. *Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 316-318 (1936) (citing *Penhallow* v. *Doane's Administrator*, 3 U.S. (3 Dall.) 54, 80-81 (1795)). During the Articles of Confederation period, courts in the newly independent nation adjudicated thousands of "prize" and "capture" cases, which arose from extraterritorial events and implicated controversies with foreign parties. See Henry J. Bourguignon, *The First Federal Court: The Federal Appellate Prize Court of the American Revolution 1775-1787*, at 75-77 (1977). Many delegates to the Philadelphia Convention had extensive experience with such cases. *Id.* at 328-329; see 1 *The Records of the Federal Convention of 1787*, at 124 (Max Farrand ed., 1911) (Farrand).

Building on the Founders' experience with prize and capture cases, the Constitution expressly contemplates adjudication of cases arising outside the territory of the United States, including admiralty and maritime cases

and crimes "not committed within any State." U.S. Const. art. III, § 2.

This extraterritorial power was a deliberate feature of the constitutional plan. Otherwise, as James Wilson explained, the federal government would be "give[n] power to make laws, and no power to carry them into effect." 2 *Debates on the Federal Constitution* 469 (Jonathan Elliot, 2d ed. 1836) (*Debates*). At the Philadelphia Convention, Madison observed that "[a]n effective Judiciary establishment commensurate to the legislative authority, was essential." 1 Farrand 124. Hamilton echoed this view in the Federalist Papers: "If there are such things as political axioms, the propriety of the judicial power of a government being co-extensive with its legislative, may be ranked among the number." *The Federalist* No. 80 at 476 (Rossiter ed. 1961); accord 3 *Debates* 517 (Pendleton in Virginia); 4 *Debates* 156-158 (Davie in North Carolina). Put simply, Congress could legislate extraterritorially—and what Congress could legislate, the federal courts could adjudicate.

In the Judiciary Act of 1789, the First Congress granted the federal courts extraterritorial jurisdiction over "civil causes of admiralty and maritime jurisdiction" arising "upon the high seas," and over crimes committed "upon the high seas." Ch. 20, § 9, 1 Stat. 76-77. Actions taken by the First Congress are "presumptively consistent with the Bill of Rights." *Town of Greece* v. *Galloway*, 572 U.S. 565, 602 (2014) (Alito, J., concurring). Indeed, during deliberations on the Judiciary Act, Madison—who earlier that summer had drafted and introduced the Bill of Rights—reiterated his view that the judicial power "ought to be commensurate with the other branches of the Government." 1 *Annals of Cong.* 843 (Aug. 29, 1789).

c. Nothing in the known historical record of ratification of the Bill of Rights in 1791 indicates that *anyone* contemporaneously understood the Due Process Clause as limiting the judicial power of the United States to the adjudication of cases arising within the Nation's borders. See generally Sachs, *supra*, at 1706; Crema & Solum, *supra*, at 507; *The Complete Bill of Rights* 529-571 (Neil H. Cogan ed., 2d ed. 2015). To the contrary, practice following ratification of the Due Process Clause confirms that it imposed no such limitation. In the years following ratification, the Framers—now implementing the Constitution they had drafted, advocated for, and voted to ratify—confirmed that the judicial power extended to cases involving conduct occurring outside the Nation's borders.

Most prominently, in *Talbot* v. *Jansen*, 3 U.S. (3 Dall.) 133 (1795), this Court unanimously affirmed the exercise of jurisdiction over a civil claim for damages arising out of an incident on the high seas. As Justice Iredell explained, "trespasses committed against the general law of nations, are enquirable, and may be proceeded against, in any nation where no special exemption can be maintained, either by the general law of nations, or by some treaty which forbids or restrains it." *Id.* at 159-160.[2]

Talbot marked the beginning of what would become long-settled and established practice. "The prosecution and punishment of extraterritorial crimes, including crimes committed by aliens, was one of the federal government's top priorities" in the decades following ratification, and "the federal government principally used two enforcement mechanisms—punishment after criminal trial, and civil forfeiture after a condemnation by a federal court sitting in admiralty." Nathan S. Chapman, *Due*

[2] Every member of the *Talbot* Court had attended the Philadelphia Convention, his home State's ratifying convention, or both.

Process Abroad, 112 Nw. U. L. Rev. 377, 409 (2017). "Americans appeared to believe that both enforcement mechanisms were consistent with due process of law." *Id.* at 410.

2. Perhaps the clearest articulation of Congress's power to create jurisdiction over foreign conduct and defendants is *Picquet* v. *Swan*. There, Justice Story (riding Circuit) explained that Congress could enact a law providing that "a subject of England, or France, or Russia, having a controversy with one of our own citizens, may be summoned from the other end of the globe to obey our process, and submit to the judgment of our courts." 19 F. Cas. at 613. And though such a law might be "repugnant to the general rights and sovereignty of other nations," "[i]f congress had prescribed such a rule, the court would certainly be bound to follow it, and proceed upon the law." *Id.* at 613, 615. This Court endorsed *Picquet*'s reasoning in *Toland* v. *Sprague*, 37 U.S. (12 Pet.) 300 (1838), explaining that "positive legislation" would be necessary to authorize federal courts to hear cases involving "persons in a foreign jurisdiction." *Id.* at 330; see *The Marianna Flora*, 24 U.S. (11 Wheat.) 1, 18 (1825) (Story, J.) ("[T]he act of Congress is decisive on th[e] subject" of sending a ship captured on the high seas for adjudication to the United States, "and whatever may be the responsibility incurred by the nation to foreign powers, in executing such laws, there can be no doubt that Courts of justice are bound to obey and administer them").

No case went the other way: "[N]ot until the Civil War did a single court, state or federal, hold a personal-jurisdiction statute invalid on due process grounds." Sachs, *supra*, at 1712; accord Chapman, *supra*, at 442. Treatises of the era confirm that the federal courts properly exercised jurisdiction over extraterritorial conduct. See, *e.g.*, 1 James Kent, *Commentaries on*

American Law 186 (6th ed. 1826) ("It is of no importance, for the purpose of giving jurisdiction, *on whom* or *where* a piratical offence has been committed.") (emphasis in original).

After the Civil War, this Court held repeatedly that if a sovereign is permitted to exclude an entity from its territory, the sovereign has the right to permit entry on reasonable conditions, including consent to suit. See, *e.g.*, *St. Clair* v. *Cox*, 106 U.S. 350, 356 (1882). The Court also applied that principle to the Fifth Amendment. In *Baltimore & Ohio Railroad Co.* v. *Harris*, 79 U.S. (12 Wall.) 65 (1870), this Court upheld the assertion of personal jurisdiction by courts of the District of Columbia over a Maryland corporation that injured a passenger in Virginia. It reasoned that Congress was within its rights to determine that a corporation "may exercise its authority in a foreign territory [*i.e.*, in D.C.] upon such conditions as may be prescribed by the law of the place. One of these conditions may be that it shall consent to be sued there." *Id.* at 81.

In sum, an *in personam* suit "could be maintained by anyone on any claim in any place the defendant could be found." *Mallory*, 600 U.S. at 128 (plurality).

3. Personal jurisdiction rules under the Fourteenth Amendment changed in the *Lochner* era, when this Court began invoking due process to restrict *state* authority to adjudicate cases involving conduct occurring in other States. See, *e.g.*, *Baker* v. *Baker, Eccles & Co.,* 242 U.S. 394, 403 (1917); *Riverside & Dan River Cotton Mills* v. *Menefee*, 237 U.S. 189, 194-195 (1915); *Simon v. S. R. Co.*, 236 U.S. 115, 130 (1915). But even then, the Court repeatedly reaffirmed that territorial limitations imposed on *the States* by the Fourteenth Amendment afford "no ground for constructing an imaginary constitutional barrier around the exterior confines of *the United States* for the purposes of shutting [the federal] 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) (emphasis added); see *Burnet* v. *Brooks*, 288 U.S. 378, 403-405 (1933); *Cook* v. *Tait*, 265 U.S. 47, 55-56 (1924); *Panama R. Co.* v. *Napier Shipping Co.*, 166 U.S. 280, 285 (1897) ("The fact that the cause of action arose in the waters of a foreign port is immaterial.").

This Court has continued to restrict state power to exercise personal jurisdiction by imposing "territorial limitations" under the Due Process Clause of the Fourteenth Amendment, which "act[s] as an instrument of interstate federalism." *Bristol-Myers Squibb Co.* v. *Superior Ct. of Cal.*, 582 U.S. 255, 263 (2017). Yet it has expressed the *opposite* view about the territorial competence of the *National* Government: "If Congress has provided an unmistakable instruction that the provision is extraterritorial, then claims alleging exclusively foreign conduct may proceed." *Abitron Austria GmbH* v. *Hetronic Int'l, Inc.*, 600 U.S. 412, 418 (2023). This is true "regardless of whether the particular statute regulates conduct, affords relief, or merely confers jurisdiction." *RJR Nabisco, Inc.* v. *Eur. Cmty.*, 579 U.S. 325, 326 (2016). And this Court has been careful, when considering constraints imposed on the jurisdiction of a State under the Fourteenth Amendment, to make clear that it was *not* suggesting that "the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court." *Bristol-Myers Squibb Co.*, 582 U.S. at 269.

4. As a result of the rulings below, courts in the Second Circuit—and others that have followed suit—now routinely dismiss civil cases brought under other federal statutes involving extraterritorial conduct, notwith-

standing statutory authorization for such suits.[3] As Judge Elrod observed, the law of these Circuits "effectively neuters Congress of its ability to use our own legal system and its well-established rule of law to help right the most grievous wrongs committed against Americans abroad." *Douglass*, 46 F.4th at 278 (dissenting).

In *Douglass*, for instance, the Fifth Circuit, citing the Second Circuit's decision here, applied the Fourteenth Amendment's test for personal jurisdiction to suits under the Death on the High Seas Act, which authorizes the personal representative of a person who died on the high seas to "bring a civil action in admiralty against the person or vessel responsible." 46 U.S.C. § 30302. As a result, claims under that statute are now effectively limited to those against domestic entities. See *Douglass*, 46 F.4th at 276-277 (Elrod, J., dissenting). Under similar reasoning, the Eleventh Circuit recently gutted the Helms-Burton Act, 22 U.S.C. § 6081 *et seq.*, which imposes liability on persons who traffic in U.S. property expropriated by the Castro regime. *Herederos de Roberto Gomez Cabrera, LLC* v. *Teck Resources Ltd.*, 43 F.4th 1303, 1308 (11th Cir. 2022).

An even more striking illustration of the harmful consequences of conflating the Fifth and Fourteenth Amendments' tests comes from the Second Circuit itself. In a recent case, the court affirmed the dismissal of a False Claims Act complaint for lack of personal jurisdiction because the "fraudulent [documents] were signed by [the fraudster's] executives in cities outside of the United States." *United States ex. rel. TZAC, Inc.* v. *Christian*

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[3] See, *e.g.*, *Prime Int'l Trading, Ltd.* v. *BP P.L.C.*, 784 Fed. App'x 4, 9 (2d Cir. 2019); *In re SSA Bonds Antitrust Litig.*, 420 F. Supp. 3d 219, 240–241 (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).

Aid, No. 17-cv-4135 (PKC), 2021 WL 2354985, at *4 (S.D.N.Y. June 9, 2021), *aff'd mem.* No. 21-1542, 2022 WL 2165751 (2d Cir. June 16, 2022). Thus, in the Second Circuit, even a fraud perpetrated *against the United States* is beyond the judicial power of the United States if the fraudster acted abroad.

Unsurprisingly, the Second Circuit's position has been subject to widespread scholarly and judicial criticism. See, *e.g.*, Sachs, *supra*, at 1706 (Second Circuit's approach is "all backwards"); *Lewis* v. *Mutond*, 62 F.4th 587, 597-598 (D.C. Cir. 2023) (Rao, J., concurring) ("little (or no) evidence" supporting it); *Douglass*, 46 F.4th at 263 (Elrod, J., dissenting) ("This is anachronism."); *id.* at 284 (Oldham, J., dissenting).

5. Reverse-incorporating the Fourteenth Amendment's federalism-based limitations into the fundamentally different Fifth Amendment context also creates intolerable doctrinal incongruities. As Judge Elrod put it, circuit "precedents are awash with confusion." *Id.*, 46 F.4th at 282 (Elrod, J., dissenting).

First, the PLO and PA are foreign political entities aspiring to international statehood; as such, their amenability to suit in federal court should lie solely in the hands of the political branches, *not* the Judiciary. As the Office of Legal Counsel put it, "[b]ecause the PLO purports to be an independent sovereign entity, we have little difficulty concluding that it falls into [the] category" of entities that "exist outside the constitutional compact and have no rights or responsibilities under it." 11 Op. O.L.C. 105 (1987). The Second Circuit got this backwards, holding that the PLO and PA have due process rights *because* they are not "recognized by the United States as a sovereign state." App. 94a, 153a. According to the Second Circuit, allowing the political branches to subject the PLO and PA to suit would infringe their "fundamental rights."

App. 30a n.11. Judge Menashi explained why this was wrong:

> [F]oreign states are not "persons" entitled to rights under the Due Process Clause. So if tomorrow the Department of State recognized the PA as the sovereign government of "Palestine"—as the defendants believe it is—then there would be no question at all that the PSJVTA is constitutional and that the Due Process Clause is not implicated. Fundamental constitutional rights are not typically so contingent.

App. 238a (citation omitted). Relatedly, because of their status, the United States has the absolute right to exclude the PLO and PA from its territory. See *Palestinian Info. Off.* v. *Shultz*, 853 F.2d 932, 940 (D.C. Cir. 1988). Under long-standing case law, the sovereign's right to exclude these entities includes the less-draconian right to permit entry on reasonable conditions, including consent to suit. *St. Clair*, 106 U.S. at 356; *Harris*, 79 U.S. at 81.

Second, as Judge Elrod has observed, the Second Circuit's rule means that "*civil* foreign defendants now have more due process rights than *criminal* foreign defendants." 46 F.4th at 276; accord App. 250a (Menashi, J., dissenting). In criminal cases arising from extraterritorial conduct, the courts of appeals unanimously exercise jurisdiction whenever a defendant caused harm to "U.S. citizens or interests." *United States* v. *Epskamp*, 832 F.3d 154, 167-168 (2d Cir. 2016) (quotation marks omitted). The PSJVTA would easily satisfy that test, since it is focused on acts of terrorism harming a "national of the United States." 18 U.S.C. § 2333(a). But the Second Circuit has now imposed a far more stringent requirement for civil cases, asserting that the "the due process test for asserting jurisdiction over extra-territorial criminal conduct… differs from the test applicable in [a] civil case." App. 175a.

That makes no sense. Outside the context of personal jurisdiction, this Court has sometimes required a stricter due process standard in criminal cases than in civil cases. See, *e.g.*, *Turner* v. *Rogers*, 564 U.S. 431, 442 (2011); *Addington* v. *Texas*, 331 U.S. 418, 429-432 (1979). But it has never suggested that the reverse should be true—that a stricter standard might apply in civil cases than in criminal cases. How could it be constitutional for the government to obtain a sentence of death against a foreign national for acts of terrorism committed abroad, but *un*constitutional for it to seek a civil fine or forfeiture of the same defendant's property based on the same conduct in the same place? Or as Judge Elrod aptly summarized: "It is nonsense on stilts to hold that allowing a civil lawsuit against a foreign defendant for foreign conduct violates due process but that a criminal prosecution against the *same* defendant for the *same* foreign conduct does not." *Douglass*, 46 F.4th at 270 (dissenting).

B. The PSJVTA Satisfies Due Process Even Under The Fourteenth Amendment Standard

Even if the Court were apply the Fourteenth Amendment's due process standard to jurisdictional statutes enacted by Congress, the Second Circuit's decision to invent a new due process test and its application of that new test were both indefensible.

The Traditional Due Process Test

1. Under the Fourteenth Amendment, exercises of jurisdiction must provide the defendant with "fair warning" and must be "reasonable, in the context of our federal system of government." *Ford Motor*, 592 U.S. at 358 (citations omitted). This parallels the Court's general understanding that due process safeguards "fundamental fairness (through notice and fair warning) and the prevention of the arbitrary and vindictive use of the laws." *Rogers* v.

Tennessee, 532 U.S. 451, 460 (2001); see *Village of Euclid* v. *Amber Realty Co.*, 272 U.S. 365, 395 (1926); *Hurtado* v. *California*, 110 U.S. 516, 527 (1884).

The PSJVTA easily meets that test. It provides "fair warning," by specifying the conduct deemed to constitute consent to jurisdiction, and by giving the PLO and PA an advance-warning period. See *id.* § 2334(e)(1)(A). The statute also reasonably advances legitimate—indeed, vital—federal interests. Congress enacted the PSJVTA to deter and disrupt terrorism; compensate American terror victims; and end the PLO and PA's noxious pay-for-slay policy, thereby advancing the prospects for peace in the Middle East. See p. 13, *supra*.

The PSJVTA is thus reasonable within our federal system. Importantly, "personal jurisdiction requires a forum-by-forum, or sovereign-by-sovereign, analysis." *J. McIntyre Mach., Ltd.* v. *Nicastro*, 564 U.S. 873, 884 (2011) (plurality). In the context of state-court jurisdiction, the "federalism interest may be decisive," because "[t]he sovereignty of each State implies a limitation on the sovereignty of all its sister States." *Bristol-Myers Squibb*, 582 U.S. at 263. In that context, federalism principles "ensure that States with little legitimate interest in a suit do not encroach on States more affected by the controversy." *Ford Motor*, 592 U.S. at 360 (quotation marks omitted).

This case is different. It implicates national interests of the United States. The law creates jurisdiction in a limited category of antiterrorism cases under a *federal* statute (the ATA) that involve *American citizens* and that advance *federal* interests. Such assertions of jurisdiction do not infringe the sovereignty of any other entity within our constitutional framework. Determinations about whether and when to subject foreign entities such as these defendants to jurisdiction is a question well within the competency and authority of the political branches. See 11 Op.

O.L.C. at 108 ("the political branches may deny foreign [political] entities as such all constitutional rights").

2. Rather than apply established due-process standards, the Second Circuit invented a new due-process test for consent-based jurisdictional statutes. According to the court, Congress (or a State) cannot enact a consent-based jurisdictional statute unless the consent is "in exchange for, or as a condition of, receiving some in-forum benefit or privilege." App. 24a. In the court's view, this additional requirement ensures that the "predicate conduct" is a sufficiently close "proxy for actual consent." *Ibid.* This reasoning cannot be squared with this Court's precedents.

As this Court explained just last Term, a defendant validly consents under a jurisdiction-triggering statute if the defendant "appreciated the jurisdictional consequences attending [its] actions and proceeded anyway." *Mallory*, 600 U.S. at 144 (plurality). Deemed-consent statutes permissibly "adapt the traditional rule about transitory actions for individuals to artificial persons created by law" by ensuring that corporate defendants are deemed to be "found" in the State. *Id.* at 129-130.

In *Mallory*, as here, the defendant argued that it had "not *really* submitted" to jurisdiction by engaging in a "meaningless formalit[y]"—in that case, designating an agent for service of process despite "appreciat[ing] the jurisdictional consequences" of doing so. *Id.* at 144. This Court rejected the defendant's argument: "a legion of precedents … attach jurisdictional consequences to what some might dismiss as mere formalities." *Id.* at 145. "[U]nder [those] precedents a variety of 'actions of the defendant' that may seem like technicalities nonetheless can 'amount to a legal submission to the jurisdiction of a court.' That was so before *International Shoe*, and it remains so today." *Id.* at 146 (quoting *Ins. Corp. of Ireland* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 704-

705 (1982)). Justice Alito, whose concurrence formed the majority, agreed: There was no due process violation because the defendant "acted with knowledge of state law when it registered," such that the Court may "presume that by registering, it consented to all valid conditions imposed by state law." *Id.* at 151 (cleaned up). That reasoning controls here.

3. The Second Circuit rejected the relevance of *Mallory* on the ground that the statute there gave the defendant "a benefit from the forum in exchange for its amenability to suit in the forum's courts." App. 20a. Judge Menashi explained why that is incorrect:

> [A] *separate* statute treats "'qualification as a foreign corporation' to be a 'sufficient basis' for Pennsylvania courts 'to exercise general personal jurisdiction' over an out-of-state company." *Mallory*, 600 U.S. at 151 (Alito, J.) (quoting 42 Pa. Stat. § 5301(a)(2)(i) (2019)). Neither statute indicated that personal jurisdiction was being *exchanged* for the benefit of operating in Pennsylvania; the statutes did not even reference each other.

App. 244a.

The ruling below also reflects a basic logic error. While "accepting an in-state benefit with jurisdictional strings attached" is *one* way to consent to personal jurisdiction, *Mallory*, 600 U.S. at 145 (plurality), this Court has never suggested it is the *only* way. To the contrary, even a "trivial thing" like taking "one step" across an "invisible state line" can lead to "jurisdictional consequences [that] are immediate and serious." *Ibid.* Or as Justice Jackson explained, a defendant may consent to jurisdiction "more than one way," including: (1) "explicitly or implicitly consenting," by engaging in conduct deemed consent under law; (2) by "fail[ing] to follow specific procedural rules"; *or* (3) by "voluntarily invoking certain benefits from a

State that are conditioned on submitting to the State's jurisdiction." *Id.* at 147-148. The Second Circuit simply erased the first category. That was incorrect. As Justice Jackson explained:

> Regardless of whether a defendant relinquishes its personal-jurisdiction rights expressly or constructively, the basic teaching of *Insurance Corp. of Ireland* is the same: When a defendant chooses to engage in behavior that "amount[s] to a legal submission to the jurisdiction of the court," the Due Process Clause poses no barrier to the court's exercise of personal jurisdiction."

Id. at 148.

Application Of The Second Circuit's "Reciprocity" Test

1. As Judge Menashi pointed out, even if a reciprocal "benefit" were required, the PLO and PA received one, "because the defendants are deemed to have consented based on the privilege of residing and conducting business in the United States—not to mention furthering their political goals at the expense of American lives." App. 231a. The Second Circuit observed that PLO and PA "do not dispute they have engaged in these types of activities." App. 73a.

It is uncontested that after the statutory trigger date, defendants continued their pay-for-slay programs, and that their U.S.-based officers, employees, and agents conducted extensive domestic activities, such as: notarizing documents in the United States, as a part of a certification process for use by defendants' agencies; meeting with U.S.-based groups to encourage them to "lobby[] the government, lobby[] Congress" to support "justice for the Palestinian people"; and using U.S.-based social media platforms to "raise public awareness" and "bring attention" to their cause. *Sokolow* D.Ct. Dkt. 1057 at 6-11. The

PLO and PA's ability to engage in these activities while physically present in the United States was a meaningful benefit. Cf. *Burnham* v. *Superior Court*, 495 U.S. 604, 637 (1990) (Brennan, J., concurring) (defendant received "significant benefits" by visiting forum State for three days).

2. The Second Circuit dismissed defendants' U.S.-based conduct as irrelevant. According to the court, "federal law has long prohibited the PLO and PA from engaging in any activities or maintaining any offices in the United States." App. 28a. As a result, the court said, the PSJVTA "exacts 'deemed' consent…without conferring any rights or benefits on [them] in return." App. 29a. That reasoning is both legally and logically flawed.

As a legal matter, the court was simply incorrect that the PLO and PA's jurisdiction-triggering conduct was prohibited by federal law. The relevant statute forbids them to "expend funds" or maintain an office in the United States. 22 U.S.C. § 5202; see *Application of the Anti-Terrorism Act of 1987 to Diplomatic Visit of Palestinian Delegation*, 46 Op. O.L.C. __ (slip op. Oct 28, 2022). Their non-expenditure activities—including notarizing documents, holding meetings, and issuing public statements—are *not* illegal. See App. 251a (Menashi, J., dissenting) ("At least with respect to the PA, most such activities do not appear to be prohibited.").

But even if all their U.S.-based conduct were prohibited, that would only make the PSJVTA *more* reasonable, not less. As Judge Menashi explained, "[t]he fact that the PLO and the PA extracted a benefit from the United States in violation of the law—and additionally benefited from the federal government's nonenforcement of the law—does not alter the fact that those organizations received the benefit from the forum that the statute envisions." App. 250a. Indeed, "a foreign actor that conducts *unauthorized* business in the United States has obtained

an even greater benefit from the forum than the foreign actor that complies with American law," App. 250a, and it would be "perverse" to give the law-breaker protection that a law-abiding foreigner does not get, App. 231a.

To drive the point home, consider an analogous consent statute. "[A]ll 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to [blood alcohol content] testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense." *Missouri* v. *McNeely*, 569 U.S. 141, 161 (2013). Under the Second Circuit's "benefits" test, these implied-consent statues would be constitutional only as applied to validly licensed drivers who exchange consent for the "privilege of driving on state roads." App. 37a n.14 (citation omitted). They would be *unconstitutional* as applied to motorists whose licenses have been suspended or revoked, because such persons are already "prohibited" from driving under existing law. No principle of due process imposes such irrational limits on the political branches.

III. THESE CASES PRESENT AN IDEAL VEHICLE FOR RESOLVING THE ISSUES PRESENTED

These cases (consolidated by the court of appeals) are an ideal vehicle, both for considering the PSJVTA's constitutionality and for resolving long-reserved questions about Congress's authority under the Fifth Amendment. They present the legal issues squarely and cleanly. The PSJVTA's constitutionality—including the question whether the Fifth Amendment constrains Congress's authority to create personal jurisdiction in the same manner that the Fourteenth Amendment constrains the States—was raised and thoroughly briefed by all parties, including the Government, which intervened in both cases. As for the facts, the PLO and PA did not contest below the granular and expansive factual showing that they engaged in

specified conduct such as paying the families of convicted or "martyred" terrorists and conducting U.S.-based activities. The district courts and the Second Circuit all assumed for purposes of their rulings that both of the statute's prongs were satisfied. App. 38a, 87a-90a, 108a-124a.

The legal issues were also outcome-determinative in both cases. In *Sokolow*, petitioners prevailed on the merits of their ATA claims after a seven-week trial, and the jury's verdict and corresponding judgment were thrown out solely on the basis of personal jurisdiction. In *Fuld*, the district court dismissed the complaint for lack of personal jurisdiction.

Finally, there is no reason to postpone review of the question whether due process constrains Congress under the Fifth Amendment the same way that it constrains the States under the Fourteenth Amendment. The percolation recommended by the Government in 2018 has led to extensive opinions, concurrences, and dissents in the Second, Fifth, Eleventh, and D.C. Circuits. See *Lewis*, 62 F.4th at 596-598 (Rao, J., concurring); *Douglass*, 46 F.4th at 243-249 (Ho, J., concurring); *id.* at 249-282 (Elrod, J., dissenting); *id.* at 282-284 (Higginson, J., dissenting); *id.* at 284-287 (Oldham, J., dissenting); *Herederos de Roberto Gomez Cabrera*, 43 F.4d at 1307-1310.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 2024

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APPENDIX A

22-76-cv (L)
Fuld v. Palestine Liberation Organization

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2022

Argued: May 3, 2023

Decided: September 8, 2023

Docket Nos. 22-76-cv (L), 22-496-cv (Con)

MIRIAM FULD, INDIVIDUALLY, AS PERSONAL REPRESENTATIVE AND ADMINISTRATOR OF THE ESTATE OF ARI YOEL FULD, DECEASED, AND AS NATURAL GUARDIAN OF PLAINTIFF NATAN SHAI FULD, NATAN SHAI FULD, MINOR, BY HIS NEXT FRIEND AND GUARDIAN MIRIAM FULD, NAOMI FULD, TAMAR GILA FULD, AND ELIEZER YAKIR FULD,

Plaintiffs – Appellants,

UNITED STATES OF AMERICA,

Intervenor – Appellant,

—v.—

THE PALESTINE LIBERATION ORGANIZATION AND THE PALESTINIAN AUTHORITY (A/K/A "THE PALESTINIAN INTERIM SELF-GOVERNMENT AUTHORITY," AND/OR "THE PALESTINIAN COUNCIL," AND/OR "THE PALESTINIAN NATIONAL AUTHORITY"),

*Defendants – Appellees.**

Before: LEVAL AND BIANCO, *Circuit Judges*, AND KOELTL, *District Judge*.[**]

The plaintiffs, several family members of a United States citizen killed in an overseas terrorist attack, appeal from a judgment of the United States District Court for the Southern District of New York (Furman, *J.*) dismissing their claims against the Palestine Liberation Organization ("PLO") and the Palestinian Authority ("PA") for lack of personal jurisdiction. The Government, as intervenor in accordance with 28 U.S.C. § 2403(a) and Federal Rule of Civil Procedure 5.1(c), also appeals from that judgment. On appeal, both the plaintiffs and the Government argue that the district court erred in finding unconstitutional the Promoting Security and Justice for Victims of Terrorism Act of 2019 ("PSJVTA"), Pub. L. No. 116-94, § 903(c), 133 Stat. 2534, 3082, the statute on which the plaintiffs relied to allege personal jurisdiction over the defendants. The PSJVTA specifically provides that the PLO and the PA "shall be deemed to have consented to personal jurisdiction" in any civil action pursuant to the Anti-Terrorism Act, 18 U.S.C. § 2333, irrespective of "the date of the occurrence of the act of international terrorism" at issue, upon engaging in certain forms of post-enactment conduct, namely (1) making payments, directly or indirectly, to the designees or families of incarcerated or deceased terrorists, respectively, whose acts of terror injured or killed a United States national, or (2) undertaking any activities within the United States, subject to a handful of exceptions. *Id.* § 2334(e). We conclude that the PSJVTA's "deemed consent" provision is inconsistent

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[*] The Clerk of Court is directed to amend the official caption as set forth above.

[**] Judge John G. Koeltl, of the United States District Court for the Southern District of New York, sitting by designation.

with the dictates of the Fifth Amendment's Due Process Clause. Accordingly, we **AFFIRM** the judgment of the district court.

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Tenney, Rep. Bradley E. Schneider, Sen. James Lankford, Sen. Marco Rubio, Rep. Kathleen Rice, Rep. Lee Zeldin, Rep. Theodore Deutch, and Rep. Grace Meng in Support of Plaintiffs-Appellants and Intervenor Appellant.

Joshua E. Abraham, Abraham Esq. PLLC, New York, NY, *for Amici Curiae Constitutional Law Scholars Philip C. Bobbitt, Michael C. Dorf, and H. Jefferson Powell in Support of Plaintiffs-Appellants.*

KOELTL, *District Judge*:

The plaintiffs, several family members of a United States citizen killed in an overseas terrorist attack, appeal from a judgment of the United States District Court for the Southern District of New York (Furman, *J.*) dismissing their claims against the Palestine Liberation Organization ("PLO") and the Palestinian Authority ("PA"). The district court dismissed those claims for lack of personal jurisdiction over the defendants. The Government, as intervenor in accordance with 28 U.S.C. § 2403(a) and Federal Rule of Civil Procedure 5.1(c), also appeals from the judgment.

At issue in this appeal is the constitutionality of the Promoting Security and Justice for Victims of Terrorism Act of 2019 ("PSJVTA"), Pub. L. No. 116-94, § 903(c), 133 Stat. 2534, 3082, the federal statute on which the plaintiffs relied to allege personal jurisdiction over the defendants. The PSJVTA was enacted for the precise purpose of preventing dismissals based on lack of personal jurisdiction in cases just like this one — civil actions against the PLO and the PA pursuant to the Anti-Terrorism Act ("ATA"), 18 U.S.C. § 2333, which provides a damages remedy for

United States nationals injured "by reason of an act of international terrorism," *id.* § 2333(a).

Congress crafted the PSJVTA in response to a series of judicial decisions, all arising out of civil ATA cases related to terrorist activity abroad, which held that federal courts had no general or specific personal jurisdiction over the PLO and the PA. The resulting statute reflects a legislative effort to create personal jurisdiction over those entities based on alleged consent, which, when validly given, may constitute an independent constitutional basis for subjecting a nonresident defendant to litigation in a particular forum. The PSJVTA specifically provides that the PLO and the PA "shall be deemed to have consented to personal jurisdiction in [any] civil [ATA] action," irrespective of "the date of the occurrence of the act of international terrorism" at issue, upon engaging in certain forms of post-enactment conduct, namely (1) making payments, directly or indirectly, to the designees or families of incarcerated or deceased terrorists, respectively, whose acts of terror injured or killed a United States national, or (2) undertaking any activities within the United States, subject to a handful of exceptions. *Id.* § 2334(e).

The district court determined that this "deemed consent" provision was an unconstitutional attempt to create personal jurisdiction over the defendants where none existed, and it accordingly dismissed the plaintiffs' civil ATA action for lack of personal jurisdiction pursuant to Federal Rule of Civil Procedure Rule 12(b)(2). Both the plaintiffs and the Government (together, "appellants") challenge that conclusion on appeal, arguing principally that the exercise of this "deemed consent" jurisdiction under the PSJVTA satisfies the Fifth Amendment's Due Process Clause.

We conclude that the PSJVTA's provision for "deemed consent" to personal jurisdiction is inconsistent with the requirements of constitutional due process. Accordingly, we **AFFIRM** the district court's judgment dismissing this case.

I. BACKGROUND

The plaintiffs are the widowed spouse and children of Ari Yoel Fuld, a United States citizen who was fatally stabbed during a September 2018 terrorist attack outside a shopping mall in the West Bank. In the aftermath of Fuld's death, the plaintiffs commenced this action against the PLO and the PA, alleging that these defendants had "encouraged, incentivized, and assisted" the nonparty who committed the attack on Fuld. Am. Compl. ¶ 4. The PA, established in 1993 pursuant to the Oslo Accords, is the non-sovereign and interim governing body of parts of the Gaza Strip and the West Bank (collectively referred to here as "Palestine"). The PLO, an entity founded in 1964, conducts Palestine's foreign affairs and serves as a Permanent Observer to the United Nations ("UN") on behalf of the Palestinian people. The plaintiffs seek monetary relief from both defendants pursuant to the ATA, 18 U.S.C. § 2333, which, as relevant here, provides United States nationals "injured . . . by reason of an act of international terrorism" with a civil damages remedy against "any person who aids and abets, by knowingly providing substantial assistance [to]," the perpetrator of the attack. *Id.* § 2333(a), (d)(2).

Several years before these plaintiffs initiated their case, and prior to the passage of the PSJVTA, this Court decided *Waldman v. Palestine Liberation Organization*, 835 F.3d 317 (2d Cir. 2016) ("*Waldman I*"), *cert denied sub nom. Sokolow v. Palestine Liberation Organization*, 138 S. Ct. 1438 (2018) (mem.), which arose out of litigation

involving civil ATA claims similar in key respects to those asserted here.[1] The *Waldman* plaintiffs, a group of United States citizens injured or killed during terror attacks in Israel and the estates or survivors of such citizens, sued the PLO and the PA for money damages pursuant to the ATA, alleging that the defendants had provided material support to the nonparties who carried out the attacks. After more than a decade of litigation and a substantial jury verdict in favor of the plaintiffs, the defendants filed their appeal in this Court, where they reasserted their longstanding objection that the claims against them should be dismissed for lack of personal jurisdiction.

This Court ultimately agreed with the defendants, concluding that dismissal was required because, notwithstanding the "unquestionably horrific" nature of the attacks underlying the plaintiffs' claims, "[t]he district court could not constitutionally exercise either general or specific personal jurisdiction over the defendants." *Waldman I*, 835 F.3d at 344. We explained, as a threshold matter, that while sovereign governments lack due process rights, "neither the PLO nor the PA is recognized by the United States as a sovereign state," and accordingly, both defendants are entitled to due process protections. *Id.* at 329. Moreover, we noted that our precedents established that the "due process analysis" in the personal jurisdiction context "is basically the same under both the Fifth and Fourteenth Amendments," except that "under the Fifth Amendment the court can consider the defendant's contacts throughout the United States, while under the

[1] The procedural history of the *Waldman* litigation (captioned *Sokolow v. Palestine Liberation Organization*, No. 04-cv-397 (S.D.N.Y.) in the district court) is set forth in greater detail in *Waldman v. Palestine Liberation Organization*, F.4th , No. 15-3135 (2d Cir. Sept. 8, 2023) ("*Waldman III*") (per curiam), which we also decide today.

Fourteenth Amendment only the contacts with the forum state may be considered." *Id.* at 330 (quoting *Chew v. Dietrich*, 143 F.3d 24, 28 n.4 (2d Cir. 1998)).

With these background principles in mind, we concluded that the district court lacked general personal jurisdiction over the defendants "pursuant to the Supreme Court's recent decision" in *Daimler AG v. Bauman*, 571 U.S. 117 (2014), because neither defendant's contacts with the forum were "so constant and pervasive as to render [it] essentially at home" in the United States. *Waldman I*, 835 F.3d at 331, 335 (quoting *Daimler*, 571 U.S. at 122). We rejected the notion that the defendants could be considered "essentially at home" in this country based on their activities in Washington, D.C., which were "limited to maintaining an office [there], promoting the Palestinian cause in speeches and media appearances, and retaining a lobbying firm." *Id.* at 333. Rather, both the PLO and the PA "are 'at home' in Palestine, where these entities are headquartered and from where they are directed." *Id.* at 334 (citing *Daimler*, 571 U.S. at 139 n.20).

This Court likewise held that the district court could not properly exercise specific personal jurisdiction over the PLO and the PA, in view of the absence of any "substantial connection" between "the defendants' suit-related conduct — their role in the six terror attacks at issue — [and] . . . the forum." *Id.* at 335 (citing *Walden v. Fiore*, 571 U.S. 277, 284 (2014)). We explained that the terrorist attacks themselves took place outside the United States, that "the defendants' [related] activities in violation of the ATA occurred outside the United States," and that none of these acts were "specifically targeted" or "expressly aimed" at the United States. *Id.* at 335, 337–38. Indeed, the attacks in question were "random," such that they "affected United States citizens only because [those citizens]

were victims of indiscriminate violence . . . abroad." *Id.* at 337. Thus, the actions for which the defendants had been sued "were not sufficiently connected to the United States to provide specific personal jurisdiction," and the "limits prescribed by [constitutional] due process" required that the case be dismissed. *Id.* at 337, 344. In a series of comparable cases, the United States Court of Appeals for the District of Columbia Circuit reached the same conclusions. *See Livnat v. Palestinian Auth.*, 851 F.3d 45, 54–58 (D.C. Cir. 2017) (concluding, in a civil ATA case arising out of overseas terror attacks, that exercising general or specific jurisdiction over the PA would not "meet the requirements of the Fifth Amendment's Due Process Clause"), *cert. denied*, 139 U.S. 373 (2018) (mem.); *see also Shatsky v. Palestine Liberation Org.*, 955 F.3d 1016, 1036–37 (D.C. Cir. 2020) (same as to both the PLO and the PA); *Est. of Klieman v. Palestinian Auth.*, 923 F.3d 1115, 1123–26 (D.C. Cir. 2019) ("*Klieman*") (same), *judgment vacated on other grounds*, 140 S. Ct. 2713 (2020) (mem.), *opinion reinstated in part*, 820 F. App'x 11 (D.C. Cir. 2020) (mem.).

Congress responded to *Waldman I* and similar decisions with federal legislation known as the Anti-Terrorism Clarification Act of 2018 ("ATCA"), Pub. L. No. 115-253, 132 Stat. 3183, which modified an existing ATA provision, 18 U.S.C. § 2334, to include a new subsection (e) concerning the "[c]onsent of certain parties to personal jurisdiction." *See* ATCA § 4, 132 Stat. at 3184. This new subsection provided that "regardless of the date of the occurrence of the act of international terrorism upon which [a] civil action [pursuant to the ATA] was filed," a defendant would "be deemed to have consented to personal jurisdiction in such civil action if," after more than 120 days following the ATCA's enactment, the defendant (1) "accept[ed]" certain "form[s] of assistance" from the United States, or (2) "maintain[ed]" an office "within the jurisdiction of the

United States" while "benefiting from a waiver or suspension" of 22 U.S.C. § 5202, a statutory provision expressly barring the PLO from operating any such office. ATCA § 4, 132 Stat. at 3184.

Before the expiration of the 120-day period, both the PLO and the PA formally terminated their acceptance of any relevant assistance from the United States, and the PLO shuttered its diplomatic mission in Washington, D.C. — its only office operating in the United States pursuant to a waiver of 22 U.S.C. § 2502.[2] *See Klieman*, 923 F.3d at 1128–30.

This Court subsequently denied a motion to recall the mandate in *Waldman I* based on the ATCA, because neither of the statute's "factual predicates" for personal jurisdiction could be satisfied. *Waldman v. Palestine Liberation Org.*, 925 F.3d 570, 574–75 (2d Cir. 2019) ("*Waldman*

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[2] The PLO had previously maintained this Washington, D.C. office pursuant to an express waiver of 22 U.S.C. § 5202, which expired around the time of the office's closure. At that point, no waivers or suspensions of this provision remained in effect. *See Klieman*, 923 F.3d at 1130. The PLO has continued to operate its UN Permanent Observer Mission in New York, but it does so without any need for a waiver or suspension of 22 U.S.C. § 5202, which forbids the PLO from "maintain[ing] an office . . . within the jurisdiction of the United States." 22 U.S.C. § 5202(3); *see Klieman*, 923 F.3d at 1129–30. That statutory prohibition "does not apply . . . to the PLO's Mission in New York," because the PLO's UN office falls beyond the jurisdiction of the United States in light of the UN Headquarters Agreement. *Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria*, 937 F.2d 44, 46, 51 (2d Cir. 1991) ("[T]he PLO's participation in the UN is dependent on the legal fiction that the UN Headquarters is not really United States territory at all, but is rather neutral ground over which the United States has ceded control."); *see also United States v. Palestine Liberation Org.*, 695 F. Supp. 1456, 1471 (S.D.N.Y. 1988) ("The PLO Mission to the United Nations is an invitee of the United Nations under the Headquarters Agreement and its status is protected by that agreement.").

II") (per curiam), *cert. granted, judgment vacated sub nom. Sokolow v. Palestine Liberation Org.*, 140 S. Ct. 2714 (2020) (mem.). Around the same time, the D.C. Circuit Court of Appeals made a similar finding. *See Klieman*, 923 F.3d at 1128 (dismissing ATA claims against the PLO and the PA for lack of personal jurisdiction and explaining, in relevant part, that the ATCA's "factual predicates" had not been "triggered").

While petitions for writs of certiorari from *Waldman II* and *Klieman* were pending, Congress stepped in again, this time enacting the PSJVTA on December 20, 2019. *See* Pub. L. No. 116-94, § 903(c), 133 Stat. 2534, 3082 (2019). Section 903(c) of the PSJVTA superseded the relevant portions of the ATCA, resulting in various amendments to the personal jurisdiction provisions of 18 U.S.C. § 2334(e).[3] 133 Stat. at 3083–85. Those amendments included a narrowed definition of the term "defendant," which now refers exclusively to the PLO, the PA, and any "successor[s]" or "affiliate[s]" thereof. 18 U.S.C. § 2334(e)(5). In drafting the PSJVTA, Congress also specified new post-enactment conduct that would be "deemed" to constitute "consent" to personal jurisdiction in "any civil action" under the ATA, "regardless of the date of the occurrence of the act of international terrorism upon which such civil action was filed." *Id.* § 2334(e)(1).

As amended pursuant to the PSJVTA, 18 U.S.C. § 2334(e)(1) includes two subparagraphs that list the

[3] The PSJVTA also includes a number of additional provisions, but only the jurisdictional amendments of § 903(c) are at issue in this case. We do not pass on the constitutionality of any portion of the PSJVTA other than § 903(c). However, for purposes of clarity, this opinion refers to § 903(c) as the PSJVTA, which is consistent with the nomenclature used in the district court's decision and the parties' briefs on appeal.

circumstances under which "a defendant shall be deemed to have consented to personal jurisdiction" in a civil ATA case. Subparagraph (A) provides, first, that a defendant "shall be deemed to have consented" to such jurisdiction if, "after . . . 120 days" following the enactment of the PSJVTA (that is, after April 18, 2020), the defendant "makes any payment, directly or indirectly":

> (i) to any payee designated by any individual who, after being fairly tried or pleading guilty, has been imprisoned for committing any act of terrorism that injured or killed a national of the United States, if such payment is made by reason of such imprisonment; or
>
> (ii) to any family member of any individual, following such individual's death while committing an act of terrorism that injured or killed a national of the United States, if such payment is made by reason of the death of such individual.

Id. § 2334(e)(1)(A). This subparagraph refers, in the words of other federal legislation on the subject, to a "practice of paying salaries to terrorists serving in Israeli prisons[] [and] to the families of deceased terrorists," Taylor Force Act, Pub. L. No. 115-141, § 1002, 132 Stat. 348, 1143 (2018), which Congress has previously condemned as "an incentive to commit acts of terror." *Id.*

Subparagraph (B) of the PSJVTA provides that "a defendant shall be deemed to have consented to personal jurisdiction" in a civil ATA action if, "after 15 days" following the PSJVTA's enactment (that is, after January 4, 2020), the defendant "continues to maintain," "establishes," or "procures any office, headquarters, premises, or other facilities or establishments in the United States," or otherwise "conducts any activity while physically present in the United States on behalf of the [PLO] or the [PA]." 18

U.S.C. § 2334(e)(1)(B). The PSJVTA exempts "certain activities and locations" from the reach of subparagraph (B), including facilities and activities devoted "exclusively [to] the purpose of conducting official business of the United Nations," *id.* § 2334(e)(3)(A)–(B), specified activities related to engagements with United States officials or legal representation, *id.* § 2334(e)(3)(C)–(E), and any "personal or official activities conducted ancillary to activities listed" in these exceptions, *id.* § 2334(e)(3)(F).

The PSJVTA includes a "rule[] of construction," which provides that the legislation's terms "should be liberally construed to carry out the purposes of Congress to provide relief for victims of terrorism." PSJVTA § 903(d)(1)(A), 133 Stat. at 3085. Congress also specified that the PSJVTA "shall apply to any case pending on or after August 30, 2016," *id.* § 903(d)(2), 133 Stat. at 3085, referring to the date just one day before this Court's decision in *Waldman I*.

On April 27, 2020, several months after the PSJVTA's enactment, the Supreme Court granted certiorari in *Waldman II* and *Klieman*, vacated both judgments, and remanded the cases "for further consideration in light of the [PSJVTA]." *Sokolow*, 140 S. Ct. at 2714; *see Klieman*, 140 S. Ct. at 2713. Three days later, on April 30, 2020, the plaintiffs commenced this action. The plaintiffs invoked the PSJVTA as the sole basis for personal jurisdiction, and their amended complaint alleged that both prongs of the statute's "deemed consent" provision had been satisfied. With respect to the first prong, the plaintiffs alleged that, after April 18, 2020, the defendants continued an existing practice of making payments to (1) the designees of incarcerated terrorists who were fairly convicted of attacks that killed or injured United States nationals, and (2) the families of deceased terrorists who died while committing

attacks that killed or injured United States nationals. *See* 18 U.S.C. § 2334(e)(1)(A). For the second prong, the plaintiffs alleged that, after January 4, 2020, the defendants (1) used an office maintained in the United States, namely their UN Permanent Observer Mission in New York City, for purposes other than official UN business, and (2) engaged in various activities on their own behalf while in the United States, including providing consular services, holding press conferences, and publishing various online and print materials designed to influence American foreign policy. *See id.* § 2334(e)(1)(B).

The PLO and the PA moved to dismiss the plaintiffs' amended complaint for lack of personal jurisdiction and for failure to state a claim, pursuant to Federal Rules of Civil Procedure 12(b)(2) and 12(b)(6), respectively. In connection with their Rule 12(b)(2) motion, the defendants challenged the constitutionality of the PSJVTA, arguing that the statute's provision for "deemed consent" to personal jurisdiction violated due process requirements. The district court certified this constitutional challenge to the United States Attorney General, and the Government intervened in the action to defend the PSJVTA. *See* 28 U.S.C. § 2403(a); Fed. R. Civ. P. 5.1.

In a January 6, 2022 decision, the district court granted the defendants' Rule 12(b)(2) motion to dismiss on the ground that it could not validly exercise personal jurisdiction under the PSJVTA's "deemed consent" provision. *See Fuld v. Palestine Liberation Org.*, 578 F. Supp. 3d 577, 580, 596 (S.D.N.Y. 2022). The court noted at the outset that "a defendant's knowing and voluntary consent, whether express or implied," can serve as an "independent" basis for personal jurisdiction, separate and apart from "general jurisdiction[] . . . [and] specific jurisdiction." *Id.* at 579. Moreover, the court observed that the PLO and

the PA did "not dispute" the plaintiffs' allegation that they had made payments triggering the PSJVTA's first "deemed consent" prong.[4] *Id.* at 583. Nevertheless, the district court concluded that "deemed consent" under the PSJVTA could not "constitutionally provide for personal jurisdiction over [the] [d]efendants." *Id.* at 587. The court reasoned that the predicate activities under the PSJVTA do not "even remotely signal[] approval or acceptance of," or an "inten[t] to submit to," jurisdiction in the United States, *id.* (internal quotation marks omitted), that the statute "push[es] the concept of consent well beyond its breaking point," *id.* at 595, and that "legislature[s] [cannot] simply create [personal] jurisdiction out of whole cloth by deeming any conduct [whatsoever] to be 'consent,'" *id.* at 580. In short, the district court concluded that "deemed consent jurisdiction" under the PSJVTA is not "consistent with the requirements of due process," and accordingly, the action had to be dismissed for lack of personal jurisdiction. *Id.* (internal quotation marks omitted).

The district court entered final judgment on January 7, 2022. Both the plaintiffs and the Government timely appealed.

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[4] The defendants did, however, "contest [the] [p]laintiffs' allegations that the PSJVTA's second 'deemed consent' prong ha[d] been met." *Fuld*, 578 F. Supp. 3d at 583 n.3. The defendants argued that to the extent they had conducted activities within the United States after the relevant post-enactment date, all of those activities fell within the exceptions for UN-related undertakings and "ancillary" conduct. 18 U.S.C. § 2334(e)(3). In light of its finding that "the PSJVTA's first prong ha[d] been met," the district court declined to consider "whether [the] [d]efendants' conduct also implicate[d] the second prong." *Fuld*, 578 F. Supp. 3d at 583 n.3. It is also unnecessary to address that question on this appeal.

II. DISCUSSION

We review the dismissal of a complaint for lack of personal jurisdiction *de novo*, construing the pleadings in the light most favorable to the plaintiffs and resolving all doubts in the plaintiffs' favor. *V&A Collection, LLC v. Guzzini Props. Ltd.*, 46 F.4th 127, 131 (2d Cir. 2022). Likewise, we review *de novo* questions of law, including challenges to the constitutionality of a statute. *United States v. Wasylyshyn*, 979 F.3d 165, 172 (2d Cir. 2020).

"Before a court may exercise personal jurisdiction over a defendant, three requirements must be met: (1) 'the plaintiff's service of process upon the defendant must have been procedurally proper'; (2) 'there must be a statutory basis for personal jurisdiction that renders such service of process effective'; and (3) 'the exercise of personal jurisdiction must comport with constitutional due process principles.'" *Schwab Short-Term Bond Mkt. Fund v. Lloyds Banking Grp. PLC*, 22 F.4th 103, 121 (2d Cir. 2021) (quoting *Waldman I*, 835 F.3d at 327–28). In this case, the parties do not dispute that the first and second requirements were waived and satisfied, respectively.[5] *See Fuld*, 578 F. Supp. 3d at 583. We therefore consider only the third requirement — "whether jurisdiction over the defendants may be exercised consistent with the Constitution." *Waldman I*, 835 F.3d at 328.

The principle that a court must have personal jurisdiction over a defendant "recognizes and protects an individual liberty interest" flowing from the Constitution's guarantees of due process. *Ins. Corp. of Ireland v.*

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[5] Specifically, the defendants "waived any defenses regarding proper service of process," and with respect to the second requirement, the defendants do not dispute that they "made payments" sufficient to satisfy the PSJVTA's first statutory prong for "deemed consent." *Fuld*, 578 F. Supp. 3d at 583.

Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982). As we explained in *Waldman I*, that principle extends to both the PLO and the PA, each of whom enjoys a due process right "to be subject only to [a court's] lawful power." 835 F.3d at 328–29 (citing *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 884 (2011) (plurality opinion)). In particular, constitutional due process ensures that a court will exercise personal jurisdiction over a defendant only if "the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). The Supreme Court's precedents discussing that requirement, including its canonical opinion in *International Shoe*, have arisen under the Due Process Clause of the Fourteenth Amendment — a constraint on the power of state tribunals. *See* U.S. CONST. amend. XIV, § 1; *see also Int'l Shoe*, 326 U.S. at 311. But we have previously explained that the personal jurisdiction analysis is "basically the same" under the Fifth Amendment's Due Process Clause, which limits the power of the federal courts and governs the inquiry here.[6] *Waldman I*, 835 F.3d at 330 (internal quotation marks omitted); *see* U.S. CONST. amend. V.

The Supreme Court has recognized three distinct bases for exercising personal jurisdiction over an out-of-forum defendant in accordance with the dictates of due process: general jurisdiction, specific jurisdiction, and consent. *See, e.g.*, *Burger King Corp. v. Rudzewicz*, 471 U.S.

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[6] As noted above, the "principal difference" between these due process standards arises in the context of a minimum-contacts inquiry: the analysis under the Fourteenth Amendment is limited to the defendant's contacts with the forum state, while the Fifth Amendment permits consideration of the defendant's contacts with the United States as a whole. *Waldman I*, 835 F.3d at 330 (citing *Chew*, 143 F.3d at 28 n.4).

462, 472–73 & 472 n.14 (1985); *J. McIntyre Mach.*, 564 U.S. at 880–81 (plurality opinion). The first two bases, "general (sometimes called all-purpose) jurisdiction and specific (sometimes called case-linked) jurisdiction," "giv[e] content" to the holding of *International Shoe*, which established that a court may hear claims against a defendant who has not submitted to its authority only where the defendant has certain "contacts" with the forum. *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1024 (2021); *see Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 923– 24 (2011); *Int'l Shoe*, 326 U.S. at 316. General jurisdiction, as its name suggests, allows a court to hear "any and all claims" against a defendant — but, for businesses and organizations, only when that defendant is "essentially at home" in the forum. *Ford*, 141 S. Ct. at 1024 (quoting *Goodyear*, 564 U.S. at 919); *see Daimler*, 571 U.S. at 127. Specific jurisdiction, in contrast, covers a "narrower class of claims," *Ford*, 141 S. Ct. at 1024, and depends "on the relationship among the defendant, the forum, and the litigation," *Walden*, 571 U.S. at 284 (internal quotation marks omitted). In particular, a court may exercise specific jurisdiction if the defendant has "purposefully avail[ed] itself of the privilege of conducting activities within the forum," *Hanson v. Denckla*, 357 U.S. 235, 253 (1958), or if the defendant has intentionally directed wrongdoing at the forum, *Calder v. Jones*, 465 U.S. 783, 790 (1984). Even then, the court's authority is limited solely to claims that "arise out of or relate to" the defendant's forum contacts. *Ford*, 141 S. Ct. at 1025 (quoting *Bristol-Myers Squibb Co. v. Super. Ct. of Cal.*, 582 U.S. 255, 262 (2017)); *see Burger King*, 471 U.S. at 472–73.

Neither of those two bases for personal jurisdiction is at issue here. In the proceedings before the district court, the plaintiffs never argued for general or specific jurisdiction over the PLO and the PA. Nor do they contest the

district court's conclusion that "[a]ny such argument would be foreclosed by . . . *Waldman I*." *Fuld*, 578 F. Supp. 3d at 584. Instead, the plaintiffs rely exclusively on consent, the third independent basis for exercising personal jurisdiction over an out-of-forum defendant. *See Ins. Corp. of Ireland*, 456 U.S. at 703; *Burger King*, 471 U.S. at 472 & n.14. The plaintiffs contend that the PLO and the PA are deemed to have consented to personal jurisdiction in this civil ATA action pursuant to the PSJVTA, because engaging in the statute's predicate conduct amounts to "implied" or "constructive" consent. *See, e.g.*, Pls.' Br. at 13. Both the plaintiffs and the Government argue that the PSJVTA establishes consent-based jurisdiction in accordance with due process principles, and that the district court erred in holding otherwise.

We disagree. For the reasons set forth below, we conclude that the PSJVTA's "deemed consent" provision is inconsistent with the Due Process Clause of the Fifth Amendment. Because the statute does not establish a federal court's authority over the PLO and the PA consistent with the Fifth Amendment's requirement of due process, this case against those defendants was properly dismissed for lack of personal jurisdiction.

A.

Consent to personal jurisdiction is a voluntary agreement on the part of a defendant to proceed in a particular forum. *See Nat'l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 316 (1964) (a defendant "may agree . . . to submit to the jurisdiction of a given court"); *J. McIntyre Mach.*, 564 U.S. at 880–81 (plurality opinion) ("explicit consent" is among the "circumstances, or . . . course[s] of conduct, from which it is proper to infer . . . an intention to submit to the laws of the forum"); *Knowlton v. Allied Van Lines, Inc.*, 900 F.2d 1196, 1199 (8th Cir. 1990) ("A defendant may

voluntarily consent or submit to the jurisdiction of a court which otherwise would not have jurisdiction over it."). In several of its decisions, including, most recently, *Mallory v. Norfolk Southern Railway Co.*, 143 S. Ct. 2028 (2023), the Supreme Court has explained why such consent suffices to establish personal jurisdiction: "Because the [due process] requirement of personal jurisdiction [is] first of all an individual right, it can, like other such rights, be waived." *Ins. Corp. of Ireland*, 456 U.S. at 703; *see Burger King*, 471 U.S. at 472 n.14 ("[T]he personal jurisdiction requirement is a waivable right[.]"); *Mallory*, 143 S. Ct. at 2043 (plurality opinion) ("[P]ersonal jurisdiction is a *personal* defense that may be waived or forfeited." (emphasis in original)); *id.* at 2051 (Alito, J., concurring in part and concurring in the judgment) ("If a person voluntarily waives th[e] [personal jurisdiction] right, that choice should be honored."). Thus, when a defendant has validly consented to personal jurisdiction, a court may exercise authority over that defendant in conformity with the Due Process Clause, even in the absence of general or specific jurisdiction. *See, e.g.*, *Mallory*, 143 S. Ct. at 2039 (plurality opinion) (explaining that "consent can . . . ground personal jurisdiction" apart from a defendant's forum contacts (internal quotation marks omitted)); *see also Knowlton*, 900 F.2d at 1199.

The Supreme Court has recognized a "variety of legal arrangements [that] have been taken to represent express or implied consent" to personal jurisdiction consistent with due process. *Ins. Corp. of Ireland*, 456 U.S. at 703; *see Mallory*, 143 S. Ct. at 2038 n.5 (majority opinion). For example, a defendant's consent to personal jurisdiction may be implied based on litigation-related conduct, or where a defendant accepts a benefit from the forum in exchange for its amenability to suit in the forum's courts. *See, e.g.*, *Ins. Corp. of Ireland*, 456 U.S. at 703–05; *Mallory*, 143 S.

Ct. at 2033 (majority opinion); *id.* at 2041 n.8 (plurality opinion). In such cases, it is often fair and reasonable to infer the defendant's voluntary agreement to submit itself to a court's authority. But consent cannot be found based solely on a government decree pronouncing that activities unrelated to being sued in the forum will be "deemed" to be "consent" to jurisdiction there. 18 U.S.C. § 2334(e)(1); *cf. Ins. Corp. of Ireland*, 456 U.S. at 705 (distinguishing between litigation-related conduct that establishes personal jurisdiction and "mere assertions of . . . power" over a defendant (quoting *Chicago Life Ins. Co. v. Cherry*, 244 U.S. 25, 29 (1917))). A prospective defendant's activities do not signify consent to personal jurisdiction simply because Congress has labeled them as such.

Thus, while "[a] variety of legal arrangements . . . [may] represent . . . consent to . . . personal jurisdiction," *id.* at 703, the PSJVTA is not among them. The PSJVTA's provision for consent-based jurisdiction over the PLO and the PA, in which Congress has "deemed" the continuation of certain conduct to constitute "consent," falls outside any reasonable construction of valid consent to proceed in a particular forum's courts.

1.

We begin with some of the "various ways" in which "consent may be manifested," either "by word or [by] deed." *Mallory*, 143 S. Ct. at 2039 (plurality opinion). It is well-established that a defendant may expressly consent to personal jurisdiction in a particular court by contract, usually through an agreed-upon forum-selection clause. *See Ins. Corp. of Ireland*, 456 U.S. at 703–04; *see also Szukhent*, 375 U.S. at 316 ("[P]arties to a contract may agree in advance to submit to the jurisdiction of a given court."). So long as such "forum-selection provisions have been obtained through 'freely negotiated' agreements and are not

'unreasonable and unjust,' their enforcement [against a defendant] does not offend due process." *Burger King*, 471 U.S. at 472 n.14 (quoting *Bremen v. Zapata Off- Shore Co.*, 407 U.S. 1, 15 (1972)); *see also Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595 (1991) ("[F]orum selection clauses . . . are subject to judicial scrutiny for fundamental fairness."). Likewise, a court may exercise authority over a defendant on the basis of express consent provided in a stipulation. *See Ins. Corp. of Ireland*, 456 U.S. at 704; *Petrowski v. Hawkeye-Sec. Co.*, 350 U.S. 495, 496 (1956) (per curiam) ("[The] respondent, by its stipulation, waived any right to assert a lack of personal jurisdiction over it.").

The Supreme Court has acknowledged that a defendant may, in certain circumstances, impliedly consent to personal jurisdiction through litigation- related conduct. *See, e.g.*, *Ins. Corp. of Ireland*, 456 U.S. at 703–05. Such conduct includes a defendant's voluntary in-court appearance, *see id.* at 703, unless the defendant has appeared for the limited purpose of contesting personal jurisdiction (in which case, the defendant typically preserves the defense), *see Mallory*, 143 S. Ct. at 2044 (plurality opinion). Moreover, in keeping with the principle that "[t]he expression of legal rights is often subject to certain procedural rules," a defendant's "failure to follow [such] rules" with regard to personal jurisdiction may "result in a curtailment of [its] right[]" to enforce that requirement. *Ins. Corp. of Ireland*, 456 U.S. at 705. "Thus, the failure to enter a timely objection to personal jurisdiction constitutes, under Rule 12(h)(1), a waiver of the objection." *Id.* Similarly, a defendant's failure to comply with certain pretrial orders concerning jurisdictional discovery may justify a "sanction under Rule 37(b)(2)(A) consisting of a finding of personal jurisdiction." *Id.* The Supreme Court has found that other litigation activities can subject a litigant to

personal jurisdiction as well. *See, e.g.*, *id.* at 704; *Leman v. Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 451 (1932).[7]

The Supreme Court has also recognized that a prospective defendant may be subject to personal jurisdiction if it has accepted a government benefit from the forum, in

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[7] Among these other examples, the only instances in which findings of "implied consent" have been premised on a defendant's omission are those where the defendant "fail[ed] to follow" litigation rules and orders related to personal jurisdiction, *Ins. Corp. of Ireland*, 456 U.S. at 703, 705, and thereby "forfeited" — rather than waived — the defense. *See, e.g.*, *City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 133–34, 135 (2d Cir. 2011) ("Personal jurisdiction . . . can . . . be purposely waived or inadvertently forfeited. . . . [A] defendant forfeits its jurisdictional defense if it appears before a district court to press that defense but then willfully withdraws from the litigation and defaults[.]"); *Hamilton v. Atlas Turner, Inc.*, 197 F.3d 58, 61–62 (2d Cir. 1999) ("Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right. . . . [The defendant] participated in pretrial proceedings but never moved to dismiss for lack of personal jurisdiction despite several clear opportunities to do so during the four-year interval after filing its answer. These circumstances establish a forfeiture." (internal quotation marks and citations omitted)). It can be said that in failing to follow such rules or orders, a defendant effectively concedes the issue. *See Ins. Corp. of Ireland*, 456 U.S. at 705, 709 (where noncompliance with litigation rules and orders supports a "presumption of fact" as to the "want of merit in the asserted [personal jurisdiction] defense," "[t]he preservation of due process [is] secured" (quoting *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 350–51 (1909))). While forfeiture of a personal jurisdiction defense may be the product of mistake or inadvertence, rather than affirmative conduct evincing agreement, the Supreme Court has counted such forfeitures among the "legal arrangements [that] have been taken to represent . . . implied consent to . . . personal jurisdiction." *Id.* at 703. But beyond these forfeitures in the context of litigation, the existing precedent suggests that the conduct necessary to support an inference of implied consent, whether related to the litigation or not, must be some "intentional[]" act that can reasonably be construed as a waiver of the personal jurisdiction requirement. *Id.* at 704.

return for which the defendant is required to submit itself to suit in the forum. *See Mallory*, 143 S. Ct. at 2044 (plurality opinion) (explaining that personal jurisdiction may exist where the defendant has "accept[ed] an in-state benefit with jurisdictional strings attached"). The Supreme Court's recent decision in *Mallory* highlighted such an arrangement: *Mallory* approved the exercise of consent-based jurisdiction pursuant to a state business registration statute that "require[d] an out-of-state firm to answer any suits against it in exchange for status as a registered foreign corporation and the benefits that entails." *Id.* at 2033 (majority opinion). A plurality of the Justices noted that this sort of "exchange" between the defendant and the forum — in other words, "consent to suit in exchange for access to a State's markets" — "can signal consent to jurisdiction" in at least some cases. *Id.* at 2041 n.8 (plurality opinion) (alterations adopted).

The litigation-related activities or reciprocal bargains described above, just like "explicit consent," can supply a basis "from which it is proper to infer . . . an intention to submit" to the forum, *J. McIntyre Mach.*, 564 U.S. at 880–81 (plurality opinion), or are otherwise "of such a nature as to justify the fiction" of consent to a court's authority, *Int'l Shoe*, 326 U.S. at 318; *see also Ins. Corp. of Ireland*, 456 U.S. at 705 (explaining, with regard to litigation conduct, that "due process [is] secured" where the conduct supports a "presumption of fact" as to the existence of personal jurisdiction). Under such circumstances, the assertion of consent-based personal jurisdiction does "not offend traditional notions of fair play and substantial justice," and is therefore consistent with constitutional due process. *Ins. Corp. of Ireland*, 456 U.S. at 702–03 (quoting *Int'l Shoe*, 326 U.S. at 316).

2.

The appellants argue that the PSJVTA's "deemed consent" provision subjects the PLO and the PA to personal jurisdiction in a manner consistent with due process limits. But the statute's terms are insufficient to establish the defendants' valid consent, either express or implied, to waive their constitutional right not to be sued in a court that lacks personal jurisdiction over them.

It is undisputed that this case does not involve a defendant's express consent in any form — and for that reason, the plaintiffs' argument that a finding of consent "follows *a fortiori* from" *Carnival Cruise* is misplaced. *See* Pls.' Br. at 12– 13, 28–29. In that case, the Supreme Court held that a specific forum-selection clause in a cruise ticket was enforceable against the parties who had assented to the agreement at issue. *See Carnival Cruise*, 499 U.S. at 587–89. The decision in *Carnival Cruise* did not "infer[] consent" at all, *see* Pls.' Br. at 27–29, but instead enforced the express jurisdiction-conferring language of a contract after accounting for considerations of notice and fundamental fairness.[8] *See Carnival Cruise*, 499 U.S. at 593–95.

The appellants characterize the PSJVTA as establishing implied consent, but the statute provides no basis for a finding that the defendants have agreed to submit to the jurisdiction of the United States courts. The PSJVTA does not purport to determine that any litigation-related conduct on the part of the PLO or the PA constitutes implied consent to jurisdiction. Nor does the PSJVTA require submission to the federal courts' jurisdiction in exchange for,

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[8] The plaintiffs also rely on *Szukhent*, 375 U.S. 311. But *Szukhent* concerned the validity under the Federal Rules of Civil Procedure of a contract provision that expressly appointed an agent for service of process. *Id.* at 315. As in *Carnival Cruise*, *Szukhent* enforced the express terms of a contract. No express contract is at issue here.

or as a condition of, receiving some in-forum benefit or privilege. Instead, Congress selected certain non-litigation activities in which the PLO and the PA had already engaged (or were alleged to have engaged) and decreed that those activities, if continued or resumed after a certain date, "shall be deemed" to constitute "consent[] to personal jurisdiction." 18 U.S.C. § 2334(e)(1); *see, e.g.*, *Klieman*, 923 F.3d at 1123–24, 1127, 1129–30 (describing allegations of PLO and PA activity in the United States); Taylor Force Act § 1002, 132 Stat. at 1143 (discussing the relevant payments). The defendants' support for terrorism not targeted at the United States and their limited activities within the United States have already been found to be insufficient to establish general or specific jurisdiction over the PLO and the PA in similar ATA cases, *see, e.g.*, *Waldman I*, 835 F.3d at 339–42, and those same activities cannot reasonably be interpreted as signaling the defendants' "intention to submit" to the authority of the United States courts, *see J. McIntyre Mach.*, 56 U.S. at 881 (plurality opinion). Rather, such activities allegedly constitute "consent" under the PSJVTA only because Congress has labeled them that way. Thus, under the statute, the defendants incur a jurisdictional penalty for the continuation of conduct that they were known to partake in before the PSJVTA's enactment — conduct which, on its own, cannot support a fair and reasonable inference of the defendants' voluntary agreement to proceed in a federal forum. This declaration of purported consent, predicated on conduct lacking any of the indicia of valid consent previously recognized in the case law, fails to satisfy constitutional due process.

Pursuant to the PSJVTA's first prong, the PLO and the PA "shall be deemed to have consented to personal jurisdiction" for "mak[ing] any payment" to the designees of incarcerated terrorists, or to the families of deceased

terrorists, whose acts of terror "injured or killed a national of the United States." 18 U.S.C. § 2334(e)(1)(A). This specific non-litigation conduct cannot reasonably be understood as signaling the defendants' agreement to submit to the United States courts. Accordingly, the effect of the first prong is to subject the defendants to a jurisdictional sanction — "deemed consent" to the federal courts' authority — for continuing to make the payments at issue. Illustrating the point, the appellants themselves repeatedly emphasize that the PSJVTA's first prong serves to deter a congressionally disfavored activity. *See, e.g.*, Pls.' Br. at 11 (the first prong "incentivizes [the] [d]efendants to halt the universally condemned practice of making [the] payments" at issue); Intervenor Br. at 25–26 (the first prong "discourage[s]" payments that Congress has linked to terrorist activity). But Congress has a variety of other tools at its disposal for discouraging the payments in question. *See, e.g.*, 22 U.S.C. § 2378c-1(a)(1)(B) (barring certain U.S. foreign aid that "directly benefits" the PA until both the PLO and the PA have "terminated" the relevant payments). Imposing consent to personal jurisdiction as a consequence for those payments, and thereby divesting the defendants of their Fifth Amendment liberty interest, is not among them.

The second prong of the PSJVTA similarly specifies predicate conduct that does not evince the defendants' agreement to subject themselves to the jurisdiction of the United States courts. This prong provides that the PLO and the PA "shall be deemed to have consented to personal jurisdiction" for "maintain[ing] any office" or "conduct[ing] any activity while physically present in the United States," with a limited set of exceptions. 18 U.S.C. § 2334(e)(1)(B). The appellants repeatedly suggest that this prong is consistent with relevant precedents because it "[c]ondition[s] permission" for the defendants to engage

in such activities, and to receive the attendant benefits of doing so, "on their consent to personal jurisdiction in ATA actions." Intervenor Br. at 24; *see* Pls.' Br. at 48 (the defendants' "receipt of [certain] benefits" is "condition[ed] . . . on their consent"). But this characterization is inaccurate, given that the statute does not provide the PLO or the PA with any such benefit or permission. With the exception of UN-related conduct and offices, which are protected pursuant to international treaty (and which, as set forth in 18 U.S.C. § 2334(e)(3), are exempt from the PSJVTA's second prong), federal law has long prohibited the defendants from engaging in any activities or maintaining any offices in the United States, absent specific executive or statutory waivers.[9] *See, e.g., Klinghoffer v.*

[9] For example, the Anti-Terrorism Act of 1987 imposes a "wide gauged restriction of PLO activity within the United States [that], depending on the nature of its enforcement, could effectively curtail any PLO activities in the United States, aside from the Mission to the United Nations." *Palestine Liberation Org.*, 695 F. Supp. at 1471; *accord Klinghoffer*, 937 F.2d at 51 ("[W]ere the PLO not a permanent observer at the UN, it would not be entitled to enter New York at all."); *see* Anti-Terrorism Act of 1987, Pub. L. 100-204, tit. X, §§ 1002–1005, 101 Stat. 1331, 1406–1407 (codified at 22 U.S.C. §§ 5201–5203) (stating Congress's "determin[ation] that the PLO and its affiliates are a terrorist organization . . . and should not benefit from operating in the United States," 22 U.S.C. § 5201(b), and prohibiting various activities related to the PLO, including "expend[ing] [PLO] funds," *id.* § 5202). Similar restrictions apply to the PA. *See, e.g.*, Palestinian Anti-Terrorism Act of 2006 ("PATA"), Pub. L. No. 109-446, § 7(a), 120 Stat. 3318, 3324 (codified at 22 U.S.C. § 2378b note) (barring the PA from "establish[ing] or maintain[ing] an office, headquarters, premises, or other facilities or establishments within the jurisdiction of the United States" absent a specified certification). The Government acknowledges that these restrictions can be lifted or relaxed only through the execution of formal waivers or suspensions under statutorily required procedures. *See* Intervenor Br. at 24–25 (citing relevant waiver provisions); *see also Klieman*, 923 F.3d at 1129–31 (describing the "formal . . . waiver procedure" applicable to 22 U.S.C. § 5202).

S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria, 937 F.2d 44, 46, 51 (2d Cir. 1991) (explaining that "the PLO is prohibited from engaging in any activities in this country other than the maintenance of a mission to the UN"). The PSJVTA does not purport to relax or override these prohibitions, and the appellants have not identified any other change in existing law (for example, a statutory or executive waiver) that would otherwise authorize the restricted conduct. Thus, the statute's second prong cannot reasonably be construed as requiring a defendant's consent to jurisdiction in exchange for permission to engage in the predicate activities, because the defendants have not been granted permission to engage in those activities at all.[10] Instead, the second prong exacts "deemed" consent as a price to be paid upon "conduct[ing] [such] activit[ies]," 18 U.S.C. § 2334(e)(1)(B), without conferring any rights or benefits on the defendants in return.

The appellants argue that the PSJVTA is constitutionally sound because it gives the defendants "fair

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[10] The appellants do not dispute that the defendants are statutorily barred from conducting activities in the United States. Rather, the plaintiffs suggest that the Government has historically permitted certain activities as "a matter of grace," thereby allowing the Government to require consent in return. Pls.' Reply Br. at 25. But the Government retains the authority to enforce the relevant prohibitions and could exercise it at any time. *See* 22 U.S.C. § 5203 (authorizing the Attorney General to take any "necessary steps," including "legal action," to enforce the restrictions as to the PLO); PATA § 7(b), 120 Stat. at 3324 (same as to the PA). Turning a blind eye to prohibited conduct that remains subject to sanction or curtailment is not the same as authorizing such conduct. *Cf. Klieman*, 923 F.3d at 1131 (rejecting an attempt to "equate [a] government 'failure to prosecute'" certain activities under 22 U.S.C. § 5202 with the "waiver or suspension" of the restrictions of those activities, for purposes of an analysis under the ATCA).

warning" of the relevant jurisdiction-triggering conduct and "reasonably advances legitimate government interests in the context of our federal system." Pls.' Br. at 11. They derive this standard from a variety of cases describing basic principles of due process, including the Supreme Court's decisions on specific jurisdiction in *Ford Motor Co.*, 141 S. Ct. 1017, and *Burger King*, 471 U.S. 462. However, the concepts of "fair warning" and "legitimate government interests" establish only minimum due process requirements. These generalizations about due process do not resolve the precise issue in this case, which is whether the defendants have consented to suit in the absence of general or specific jurisdiction. None of the cases on which the appellants rely to support their broad due process test purported to answer that question.[11]

Tellingly, the appellants have cited no case implying consent to personal jurisdiction under circumstances similar to those in this action. Instead, all of the appellants' authorities concerning such implied consent involved a defendant's litigation-related conduct, or a defendant's acceptance of some in-forum benefit conditioned on amenability to suit in the forum's courts. Those cases premised consent on activities from which it was reasonable to infer

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[11] The plaintiffs also argue that the district court's analysis was flawed because it referred to the right at issue here, the due process right not to be haled into a forum lacking personal jurisdiction, as a "fundamental constitutional right." *See Fuld*, 578 F. Supp. 3d at 580, 591. The Supreme Court has recognized that "certain fundamental rights" trigger "heightened" scrutiny, *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997), and accordingly, the plaintiffs suggest that the district court must have applied an unduly strict standard in this case. These arguments are without merit. The district court was plainly using the phrase "fundamental" in a colloquial sense, not as a formal classification or a term of art, and we see no indication that the district court applied an inappropriately rigorous standard of scrutiny.

a defendant's submission to personal jurisdiction, but that is not the situation here.

For example, in *Insurance Corporation of Ireland*, a decision that the appellants have relied on extensively, a defendant appeared before the district court to assert a personal jurisdiction defense, but then repeatedly failed to comply with discovery orders "directed at establishing jurisdictional facts" related to its contacts with the forum. 456 U.S. at 695; *see id.* at 698–99. The district court accordingly imposed a discovery sanction pursuant to Federal Rule of Civil Procedure 37(b)(2)(A), which provides that certain facts may "be taken as established" when a party "fails to obey a[] [discovery] order" concerning those facts. Fed. R. Civ. P. 37(b)(2)(A). Consistent with that Rule, the district court treated the nonresident defendant's forum contacts as having been proven, which in turn established personal jurisdiction. *See Ins. Corp. of Ireland*, 456 U.S. at 695, 699.

The Supreme Court rejected the defendant's argument that this discovery sanction violated due process. *Id.* at 696. Relying on its previous decision in *Hammond Packing Co. v. Arkansas*, 212 U.S. 322 (1909), the Supreme Court explained that the "preservation of due process was secured by the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense." *Ins. Corp. of Ireland*, 456 U.S. at 705 (quoting *Hammond Packing*, 212 U.S. at 350–51). In other words, the defendant's "failure to supply the requested information as to its contacts with [the forum]," after "[h]aving put the issue in question," could fairly be construed as a tacit acknowledgment that the sought-after facts would establish personal jurisdiction. *Id.* at 709.

The current case bears no resemblance to *Insurance Corporation of Ireland*. In contrast to the "actions of the defendant" at issue there, *id.* at 704, the relevant conduct under the PSJVTA takes place entirely outside of the litigation. Moreover, the Supreme Court made clear that the application of the *Hammond Packing* presumption in *Insurance Corporation of Ireland*, along with the exercise of personal jurisdiction that followed from it, was appropriate only because the defendant's litigation conduct related to whether personal jurisdiction existed. To underscore the point, the Supreme Court distinguished *Hovey v. Elliott*, 167 U.S. 409 (1897), which held that due process was violated where a court rendered judgment against a defendant "as 'punishment' for failure" to pay a certain fee — conduct plainly unrelated to any "asserted defense" in that case. *Ins. Corp. of Ireland*, 456 U.S. at 705–06. The effect of the PSJVTA is similar: the statute subjects the defendants to the authority of the federal courts for engaging in conduct with no connection to the establishment of personal jurisdiction, and indeed with no connection to litigation in the United States at all.

With respect to non-litigation conduct, the appellants rely heavily on cases finding consent to jurisdiction based on business registration statutes, which the plaintiffs described at oral argument as "no different" from the PSJVTA. However, the Supreme Court's recent decision in *Mallory* makes plain why those statutes are readily distinguishable. *Mallory* arose out of a Virginia resident's lawsuit in Pennsylvania state court against his former employer, a Virginia railroad corporation, for damages sustained as a result of work in Virginia and Ohio. *See* 143 S. Ct. at 2032–33. The plaintiff argued that the defendant had consented to personal jurisdiction in Pennsylvania when it registered as a foreign corporation under Pennsylvania law, which "requires out-of-state companies that register

to do business in the [state] to agree to appear in its courts on 'any cause of action' against them." *Id.* at 2033 (quoting 42 Pa. Cons. Stat. § 5301(a)(2)(i), (b) (2019)); *see also id.* at 2037 (noting that the Pennsylvania statute "explicit[ly]" provides for general jurisdiction over registered foreign corporations). The defendant did not dispute that it had registered under the Pennsylvania statute, but it "resisted [the plaintiff's] suit on constitutional grounds," raising the question of "whether the Due Process Clause of the Fourteenth Amendment prohibits a State from requiring an out-of-state corporation to consent to personal jurisdiction to do business there." *Id.* at 2033.

The Supreme Court rejected this due process challenge and held that the defendant was subject to jurisdiction in Pennsylvania based on the state's business registration statute. *See id.* at 2032, 2037–38. The majority reasoned that the case fell "squarely within [the] rule" of *Pennsylvania Fire Insurance Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917), *see Mallory*, 143 S. Ct. at 2038, which, in the words of the plurality, established that the type of business registration statute at issue "comport[s] with the Due Process Clause," *id.* at 2033 (plurality opinion). *Pennsylvania Fire* specifically upheld the exercise of personal jurisdiction pursuant to a Missouri state law "requir[ing] any out-of-state insurance company desiring to transact any business in the State to . . . accept service on [a particular state] official as valid in any suit." *Id.* at 2036 (plurality opinion) (internal quotation marks omitted). In that case, "there was 'no doubt' [the out-of-state insurance company] could be sued in Missouri by an out-of-state plaintiff on an out-of-state contract," because the corporation "had agreed to accept service of process in Missouri on any suit as a condition of doing business there." *Id.* (plurality opinion) (quoting *Pennsylvania Fire*, 243 U.S. at 95).

That language — "as a condition of doing business there" — explains why the statutes at issue in both *Pennsylvania Fire* and *Mallory* could support a finding of implied consent to personal jurisdiction. Consent may be fairly inferred when a prospective defendant "voluntarily invoke[s] certain [in-forum] benefits . . . conditioned on submitting to the [forum's] jurisdiction," because the acceptance of the benefit implicitly signals the defendant's agreement to appear in the forum's courts. *Id.* at 2045 (Jackson, J., concurring). Put differently, a defendant may give its consent as part of a bargain: the defendant seeks and obtains a benefit that the forum has to offer, and the defendant agrees to be sued in that jurisdiction in exchange. Thus, the statute at issue in *Mallory* supported a finding of consent to jurisdiction because it "gave the [defendant] the right to do business in-state in return for agreeing to answer any suit against it." 143 S. Ct. at 2041 (plurality opinion). Indeed, in discussing why such statutes count among the "legal arrangements [that] may represent . . . implied consent . . . consistent with due process," both the majority and the plurality referred repeatedly to this sort of "exchange."[12] *Id.* at 2044 n.10 (plurality

[12] *See, e.g., Mallory*, 143 S. Ct. at 2041 n.8 (plurality opinion) ("[T]hese arrangements *can* include state laws requiring consent to suit in exchange for access to a State's markets." (internal quotation marks omitted and alterations adopted)); *see also id.* at 2033 (majority opinion) ("Pennsylvania law . . . requires an out-of-state firm to answer any suits against it in exchange for status as a registered foreign corporation and the benefits that entails."); *id.* at 2037 (majority opinion) (explaining that the registered defendant obtained "both the benefits and burdens shared by domestic corporations — including amenability to suit in state court on any claim," and that the defendant "has agreed to be found in Pennsylvania and answer any suit there"); *id.* at 2035 (plurality opinion) (describing a long history of state statutes "requiring out-of-state corporations to consent to in-state suits in

opinion) (internal quotation marks omitted and alterations adopted); *see also id.* at 2044 (plurality opinion) ("[A]ccepting an in-state benefit with jurisdictional strings attached . . . can carry with [it] profound consequences for personal jurisdiction."). The plurality also stressed the fundamental fairness of *Mallory*'s outcome, given the scale of the defendant's operations in the state. *See id.* at 2041–43. Because the defendant "had taken full advantage of its opportunity to do business" in the forum, the plurality found no due process concern in enforcing its consent to jurisdiction against it. *Id.* at 2041.

Mallory therefore underscores the lack of merit in the appellants' asserted analogy between the PSJVTA and business registration statutes. The PSJVTA does not require that the PLO and the PA consent to jurisdiction as a condition of securing a legal right to do business in the United States, which remains prohibited under current law, or to conduct any other presently unauthorized activity. Indeed, the statute does not offer *any* in-forum benefit, right, or privilege that the PLO and the PA could "voluntarily invoke" in exchange for their submission to the federal courts. *Mallory*, 143 S. Ct. at 2045 (Jackson, J., concurring). The defendants in this case cannot be said to have accepted some in-forum benefit in return for an agreement to be amenable to suit in the United States.[13]

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exchange for the rights to exploit the local market and to receive the full range of benefits enjoyed by in-state corporations").

[13] The plaintiffs contend that we would "break new ground" if we endorsed the "unprecedented" proposition that an in-forum benefit is required to establish a defendant's consent to jurisdiction based on non-litigation conduct. Pls.' July 26, 2023 Supp. Br. at 5, 6. But this argument misses the point. The receipt of a benefit from the forum is not a necessary prerequisite to a finding that a defendant has consented to personal jurisdiction there. Rather, as in *Mallory*, this sort of "arrangement[]" — that is, a defendant's voluntary acceptance of

The appellants' other examples of consent statutes are distinguishable on the same grounds. For example, the plaintiffs point to the state law at issue in *Hess v. Pawloski*, 274 U.S. 352 (1927), which provided that a nonresident motorist's use of the public roads "shall be deemed equivalent" to appointing an agent for service of process in actions "growing out of any accident or collision in which said nonresident may be involved." *Id.* at 354 (internal quotation marks omitted). Such a statute conditions "the use of the highway," an in-state benefit from which states may "exclude" nonresidents, on the nonresident's "consent" to personal jurisdiction. *Id.* at 356–57. Indeed, the statute itself was phrased in those terms: it stated that "[t]he acceptance by a nonresident of the rights and privileges" associated with "operating a motor vehicle . . . on a public way in the [state]" would be a "signification of his agreement" to service. *Id.* at 354 (internal quotation marks omitted). The same logic applies to state statutes providing that state courts, in certain classes of cases, can exercise consent-based jurisdiction over nonresident officers and directors of a business incorporated under that state's laws. *See* Pls.' Br. at 29 (citing *Hazout v. Tsang Mun Ting*, 134 A.3d 274, 289 (Del. 2016)). In "accepting and holding" the position of officer or director, *Hazout*, 134 A.3d at 277, a "privilege" that carries with it

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an in-forum benefit conditioned on amenability to suit — can suffice under the circumstances to "signal consent to jurisdiction." 143 S. Ct. at 2041 n.8 (plurality opinion) (internal quotation marks omitted). In other words, such an exchange can serve as a proxy for consent, from which it may be reasonable and fair to infer an agreement to submit to the forum. There are other means of demonstrating consent, such as certain litigation-related conduct. *See, e.g.*, *Ins. Corp. of Ireland*, 456 U.S. 703–05. But "deemed consent," absent some exchange of benefits, has never been recognized as a means of valid consent to personal jurisdiction

"significant [state-law] benefits and protections," *id.* at 292 n.66 (quoting *Armstrong v. Pomerance*, 423 A.2d 174, 176 (Del. 1980)), a nonresident can be said to have signaled an agreement to the jurisdictional consequences.[14]

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[14] Relying on other cases outside of the personal jurisdiction context, the plaintiffs compare the PSJVTA to "implied consent laws that require motorists . . . to consent to BAC [(blood alcohol content)] testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense." *Missouri v. McNeely*, 569 U.S. 141, 161 (2013) (plurality opinion); *see, e.g.*, *South Dakota v. Neville*, 459 U.S. 553, 559 (1983) (describing one such statute as "declar[ing] that any person operating a vehicle in [the state] is deemed to have consented to a chemical test of the alcoholic content of his blood if arrested for driving while intoxicated"). But these statutes, which implicate the Fourth Amendment's protections against unreasonable searches, *see McNeely*, 569 U.S. at 148– 51, are distinguishable for a variety of reasons, including those set forth above with regard to *Mallory* and *Hess*. Like the service-of-process statute considered in *Hess*, the "implied consent laws" for suspected drunk drivers require a motorist's consent to a particular obligation (specifically, "cooperation with BAC testing") as "a condition of the privilege of driving on state roads." *Birchfield v. North Dakota*, 579 U.S. 438, 447–48 (2016); *see McNeely*, 569 U.S. at 161 (plurality opinion) (noting that "all 50 states" have adopted laws requiring drivers to consent to BAC testing "as a condition of operating a motor vehicle within the State"). That is very different from the statute at issue here, which does not condition the defendants' consent on any in-forum privilege at all.

Further, the Supreme Court has never actually upheld these so-called implied consent laws under a consent theory. Rather, the Court has assessed the constitutionality of these laws on a case-by-case basis, relying on the exigency exception to the probable cause and warrant requirements of the Fourth Amendment. *See Mitchell v. Wisconsin*, 139 S. Ct. 2525, 2532–33 (2019) ("But our decisions have not rested on the idea that these laws . . . create actual consent to all the searches they authorize."); *see also id.* at 2551 (Gorsuch, J., dissenting) (underscoring that the Supreme Court did not address whether implied consent was sufficient to authorize the search). These cases, therefore, shed little light on when a constitutional right may be waived by implied consent.

In short, when a potential defendant accepts a government benefit conditioned on submitting to suit in the forum, such conduct may fairly be understood as consent to jurisdiction there. The same is often true when a defendant engages in litigation conduct related to the existence of personal jurisdiction. But in the PSJVTA, Congress has simply declared that specific activities of the PLO and the PA — namely, certain payments made outside of the United States, and certain operations within the United States (which remain unlawful) — constitute "consent" to jurisdiction. No aspect of these allegedly jurisdiction-triggering activities can reasonably be interpreted as evincing the defendants' "intention to submit" to the United States courts. *J. McIntyre*, 564 U.S. at 881 (plurality opinion). Congress cannot, by legislative fiat, simply "deem" activities to be "consent" when the activities themselves cannot plausibly be construed as such. *Cf. McDonald v. Mabee*, 243 U.S. 90, 91 (1917) (noting that, in "exten[ding] . . . the means of acquiring [personal] jurisdiction," "great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact").

Like the district court, we need not decide whether, "under different circumstances, Congress or a state legislature could constitutionally 'deem' certain conduct to be consent to personal jurisdiction." *Fuld*, 578 F. Supp. 3d at 587. But for such a statute to pass muster, "the predicate conduct would have to be a much closer proxy for actual consent than the predicate conduct at issue" here. *Id.* Because the PSJVTA's predicate activities cannot reasonably be understood as signifying the defendants' consent, the statute does not effect a valid waiver of the defendants' due process protection against the "coercive power" of a foreign forum's courts. *Goodyear*, 564 U.S. at 918; *see Waldman I*, 835 F.3d at 328, 329.

B.

Our conclusion also follows from *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999). That decision concerned a federal statute, the Trademark Remedy Clarification Act ("TRCA"), which provided that states would forgo their Eleventh Amendment immunity from federal Lanham Act litigation if they committed "any violation" of the Lanham Act's prohibitions on false and misleading advertising. *Id.* at 670 (quoting 15 U.S.C. § 1122(b)). As relevant here, the petitioner argued that a state could be said to have "'impliedly' or 'constructively' waived its immunity" upon engaging in the relevant predicate conduct — namely, "the activities regulated by the Lanham Act" — after "being put on notice by the clear language of the TRCA that it would be subject to [suit] for doing so." *Id.* at 669, 676, 680.

The Supreme Court rejected that proposition. It concluded that even with "unambiguous[]" advance notice from Congress, a state's "voluntarily elect[ing] to engage in the federally regulated conduct" at issue would not suffice to render the state suable. *Id.* at 679–81. Such conduct, the Supreme Court explained, supplied no basis "to assume actual consent" to suit in federal court. *Id.* at 680. To hold otherwise would ignore the "fundamental difference between a State's expressing unequivocally that it waives its immunity" (in which case, one can "be certain that the State in fact consents to suit") and "Congress's expressing unequivocally its intention that if the State takes certain action it shall be deemed to have waived that immunity." *Id.* at 680–81. The decision explained:

> In the latter situation, the most that can be said with certainty is that the State has been put on notice that Congress intends to subject it to suits brought by

> individuals. That is very far from concluding that *the State* made an altogether voluntary decision to waive its immunity.

Id. at 681 (emphasis in original) (internal quotation marks omitted). The Supreme Court also saw no merit in the notion that a state could be "deemed to have constructively waived its sovereign immunity" simply because "the asserted basis for [the] waiver [was] conduct that the State realistically could choose to abandon." *Id.* at 679, 684. This fact, the decision noted, "ha[d] no bearing upon the voluntariness of the waiver." *Id.* at 684.

This reasoning underscores the unconstitutionality of the PSJVTA's "deemed consent" provision. The statute purports to extract consent to personal jurisdiction using the very same template that *College Savings Bank* condemned in the sovereign immunity context: it identifies activities that, in Congress's judgment, the PLO and the PA "realistically could choose to abandon," and it "express[es] unequivocally [Congress's] intention that if [either defendant] takes [those] action[s] it shall be deemed to have" consented to a federal court's authority. *Id.* at 681, 684. The appellants repeatedly contend that this statutory framework gives rise to constructive consent because the predicate conduct is itself "voluntary," and the defendants "knowing[ly]" continued such conduct with "notice" of the statute's terms. Pls.' Br. at 19–20; *see* Intervenor Br. at 2–3. But *College Savings Bank* rejected that precise theory of constructive consent, making clear that the ability to "abandon" the relevant predicate conduct "ha[s] no bearing upon the voluntariness of the [asserted] waiver." 527 U.S. at 684. Instead, as *College Savings Bank* explained with regard to the state respondent, "the most that can be said" about the defendants here "is that [each] has been put on notice that Congress intends to subject it to

[certain] suits" in federal court. *Id.* at 681. That is a "very far" cry from an "altogether voluntary decision" on the part of either defendant to submit to a court's jurisdiction. *See* i*d.*

The appellants argue that the logic of *College Savings Bank* is inapplicable here because the decision concerned the "special context" of state sovereign immunity, where the standard for waiver is "particularly strict." Pls.' Br. at 30–31 (internal quotation marks omitted); *see Coll. Sav. Bank*, 527 U.S. at 675 (describing the "test for determining whether a State has waived its immunity" as a "stringent one" (internal quotation marks omitted)). But the relevant aspects of the Supreme Court's reasoning were not so cabined. To the contrary, the decision emphasized that "constructive consent is not a doctrine commonly associated with the surrender of constitutional rights," and it noted that constructive waivers like the one considered there — a close match for the sort of "deemed consent" at issue here — "are simply unheard of in the context of . . . constitutionally protected privileges." 527 U.S. at 681 (internal quotation marks omitted and alteration adopted). The Supreme Court illustrated this point with an analogy to an entirely different constitutional context:

> [I]magine if Congress amended the securities laws to provide with unmistakable clarity that anyone committing fraud in connection with the buying or selling of securities in interstate commerce would not be entitled to a jury in any federal criminal prosecution of such fraud. Would persons engaging in securities fraud after the adoption of such an amendment be deemed to have "constructively waived" their constitutionally protected rights to trial by jury in criminal cases? After all, the trading of securities is not so vital an activity that any one person's decision to trade

> cannot be regarded as a voluntary choice. The answer, of course, is no. The classic description of an effective waiver of a constitutional right is the intentional relinquishment or abandonment of a known right or privilege.

Id. at 681–82 (internal quotation marks and citations omitted, alterations adopted).

This example was pertinent, the Supreme Court explained, because the Eleventh Amendment privilege of "[s]tate sovereign immunity, no less than the [Sixth Amendment] right to trial by jury in criminal cases, is constitutionally protected." *Id.* at 682. The same is true with regard to the "due process right not to be subjected to judgment in [a foreign forum's] courts," *J. McIntyre Mach.*, 564 U.S. at 881 (plurality opinion), which, like the Sixth Amendment jury trial right, is a "legal right protecting the individual," *Ins. Corp. of Ireland*, 456 U.S. at 704. The plaintiffs nevertheless suggest that we should ignore the lessons of *College Savings Bank* because its general statements regarding waivers of constitutional rights are nonbinding "dicta." Pls.' Br. at 13, 30, 32. But "it does not at all follow that we can cavalierly disregard" those statements. *United States v. Bell*, 524 F.2d 202, 206 (2d Cir. 1975). Even if Supreme Court dicta do not constitute established law, we nonetheless accord deference to such dicta where, as here, no change has occurred in the legal landscape. *United States v. Harris*, 838 F.3d 98, 107 (2d Cir. 2016) (citing *Newdow v. Peterson*, 753 F.3d 105, 108 n.3 (2d Cir. 2014)); *Bell*, 524 F.2d at 206 (noting that Supreme Court dicta "must be given considerable weight"). That deference is especially warranted in this case, given the close parallels between the PSJVTA and the statutory framework that *College Savings Bank* rejected.

Indeed, the voluminous briefing in this case makes clear that the PSJVTA's approach to deemed consent is "simply unheard of," *Coll. Sav. Bank*, 527 U.S. at 681, because those papers, while extensive, fail to identify a single case approving a similar constructive waiver of the personal jurisdiction requirement. The briefs instead rely entirely on personal jurisdiction cases that are inapposite or distinguishable, for all of the reasons discussed above.

The appellants also cite various cases involving waivers of other constitutional rights, but those cases do not support the constitutionality of the "deemed consent" imposed in the PSJVTA. For example, in arguing that waiving a constitutional right does not require any exchange of benefits, the appellants point to *United States v. O'Brien*, 926 F.3d 57 (2d Cir. 2019). In *O'Brien*, however, the defendant had expressly consented to the warrantless searches of his properties, in writing, rendering that case a plainly inapt comparison on the question of constructive consent.[15] *Id.* at 77. The appellants' authorities concerning valid waivers of the Fifth Amendment privilege against self-incrimination are similarly far afield. *See Moran v. Burbine*, 475 U.S. 412 (1986); *Oregon v. Elstad*, 470 U.S. 298 (1985). The criminal suspects' actions in those cases, taken upon receiving clear and comprehensive warnings pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), left "no doubt" (in *Moran*) or "no question" (in *Elstad*) that each had knowingly and voluntarily waived his Fifth Amendment protections. *See Moran*, 475 U.S. at 417–18, 421–22 (respondent executed "written form[s]

[15] The Supreme Court's decision in *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), a case that the plaintiffs cited at oral argument, is likewise distinguishable because it focused on an instance of express consent — in particular, to the warrantless search of a vehicle. *See id.* at 220.

acknowledging that he understood his [*Miranda*] right[s]," and then gave a free and uncoerced confession); *Elstad*, 470 U.S. at 314–15, 315 n.4 (respondent gave affirmative verbal responses confirming that he understood his *Miranda* rights, then provided a free and uncoerced description of his offense).

The PSJVTA also finds no support in the plaintiffs' cases concerning implied waivers of a litigant's right to proceed before an Article III court. *See Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665 (2015); *Roell v. Withrow*, 538 U.S. 580 (2003). In these decisions, the Supreme Court explained that such waivers could be fairly inferred based on specific litigation conduct, namely, "voluntarily appear[ing] to try [a] case before [a] non-Article III adjudicator" after "[being] made aware of the need for consent and the right to refuse it." *Wellness Int'l Network*, 575 U.S. at 685 (internal quotation marks omitted) (discussing implied consent to a bankruptcy judge's resolution of certain claims); *Roell*, 538 U.S. at 586 n.3, 591 (discussing implied consent to a magistrate judge's disposition of an action). Those authorities are unlike this case, where the defendants have not engaged in any conduct (litigation-related or otherwise) evincing an "intention of . . . submitting to the court's jurisdiction." *Roell*, 538 U.S. at 586 n.3 (internal quotation marks omitted).

In sum, Congress cannot take conduct otherwise insufficient to support an inference of consent, brand it as "consent," and then decree that a defendant, after some time has passed, is "deemed to have consented" to the loss of a due process right for engaging in that conduct. This unprecedented framework for consent- based jurisdiction, predicated on conduct that is not "of such a nature as to justify the fiction" of consent, cannot be reconciled with "traditional notions of fair play and substantial justice."

Int'l Shoe, 326 U.S. at 316, 318 (internal quotation marks omitted). Thus, the PSJVTA's "deemed consent" provision is incompatible with the Fifth Amendment's Due Process Clause.

C.

The appellants and their *amici* make various other arguments in support of the constitutionality of the PSJVTA and the exercise of personal jurisdiction in this case, none of which is persuasive.

The Government defends the constitutionality of the PSJVTA on the grounds that the predicate conduct at issue is "closely linked to the only claim for which personal jurisdiction is permitted, a civil ATA action concerning attacks on Americans." Intervenor Br. at 30. But the relevant question here is not whether the predicate conduct identified in the statute bears some relation to the activities proscribed under the ATA, or to Congress's interest in remediating the harms that flow from those activities. Rather, the question is whether such conduct demonstrates the defendants' valid consent to the authority of a United States court. No basis exists to conclude that it does.

Also unpersuasive is the Government's contention that Congress, in furtherance of an important legislative purpose, narrowly tailored the PSJVTA to establish jurisdiction over only the PLO, the PA, and their "successors or affiliates." Intervenor Br. at 24. Such singling out does not cure a constitutional deficiency. Where, as here, a statute impinges on constitutional rights, it cannot be salvaged on the basis that it violates the rights of only a handful of subjects.

Relatedly, the Government contends that this Court must defer to Congress's choices in crafting the PSJVTA because the statute is "centrally concerned with matters

of foreign affairs," a realm in which the political branches enjoy "broad authority." Intervenor Br. at 27. Invalidating the statute, the Government argues, would frustrate legislative and executive efforts to give full effect to the ATA's civil liability provisions, which comprise part of the nation's "comprehensive legal response to international terrorism." *Id.* at 22–23 (internal quotation marks omitted). It is true, of course, that when "sensitive interests in national security and foreign affairs [are] at stake," the policy judgments of both Congress and the Executive are "entitled to significant weight." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 36 (2010). But it is equally true that the Government's broad "foreign affairs power . . . , 'like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.'" *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 416 n.9 (2003) (quoting *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936)). Indeed, "[o]ur deference in matters of policy cannot . . . become abdication in matters of law," and "[o]ur respect for Congress's policy judgments . . . can never extend so far as to disavow restraints on federal power that the Constitution carefully constructed." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 538 (2012).

Thus, a statute "cannot create personal jurisdiction where the Constitution forbids it." *In re Terrorist Attacks on Sept. 11, 2001*, 538 F.3d 71, 80 (2d Cir. 2008) (internal quotation marks omitted), *abrogated on other grounds by Samantar v. Yousuf*, 560 U.S. 305 (2010); *accord Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1121 (9th Cir. 2002); *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 95 (D.C. Cir. 2002). Because the PSJVTA purports to provide consent-based jurisdiction in a manner at odds with constitutional due process, the statute cannot stand, notwithstanding the

policy concerns that motivated its enactment. *See Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 538 ("[T]here can be no question that it is the responsibility of th[e] Court to enforce the limits on federal power by striking down acts of Congress that transgress those limits.").

The appellants also urge us to depart from our prior holding that the due process analyses under the Fifth and Fourteenth Amendments parallel one another in civil cases, *see Waldman I*, 835 F.3d at 330, and to embrace instead the view that the Fifth Amendment imposes comparatively looser requirements for the exercise of personal jurisdiction. For its part, the Government argues that Congress, as compared to state legislatures subject to the Fourteenth Amendment, should be permitted under the Fifth Amendment to authorize "a greater scope of personal jurisdiction" where it wishes to facilitate federal adjudication of certain "legal claims." Intervenor Br. at 39–40. As the basis for this position, the Government contends that the Supreme Court "has tied the limitations of its Fourteenth Amendment personal jurisdiction jurisprudence" to interstate federalism concerns, which do not similarly constrain the exercise of Congress's legislative power. *Id.* at 37–38. Under the Government's theory, the Fifth Amendment subjects Congress to a more lenient due process standard, allowing it to enact the sort of "deemed consent" provision featured in the PSJVTA — "[e]ven if," due to their limited sovereignty, "state[s] could not enact similar legislation consistent with the Fourteenth Amendment." *Id.* at 40.

The short answer to this argument is that the panel's opinion in *Waldman I* is the law of the Circuit and cannot be changed unless it is overruled by the Supreme Court or by this Court in an *en banc* or "mini-*en banc*" decision. *See United States v. Peguero*, 34 F.4th 143, 158 & n.9 (2d Cir.

2022). In any event, federalism is not the only constraint on the exercise of personal jurisdiction. *See Douglass v. Nippon Yusen Kabushiki Kaisha*, 46 F.4th 226, 235 (5th Cir. 2022) (en banc), *cert. denied sub nom. Douglass v. Kaisha*, 143 S. Ct. 1021 (2023) (mem.); *Livnat*, 851 F.3d at 55 ("[P]ersonal jurisdiction is not just about federalism."). Fundamentally, the Constitution's personal jurisdiction requirements represent a "restrict[ion] [on] judicial power" — and, as a corollary, a restriction on the legislative ability to expand that power — "not as a matter of sovereignty, but as a matter of individual liberty." *J. McIntyre Mach.*, 564 U.S. at 884 (plurality opinion) (quoting *Ins. Corp. of Ireland*, 456 U.S. at 702). Thus, to the extent that the need for personal jurisdiction operates as a limit on a state's sovereign authority, that effect "must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause." *Ins. Corp. of Ireland*, 456 U.S. at 702 n.10. Relatedly, the Supreme Court's precedents make clear that one of the "vital purpose[s] of personal-jurisdiction standards," whether applied in state or federal court, "is to ensure fairness to the defendant." *Livnat*, 851 F.3d at 55 (internal quotation marks omitted and alteration adopted).

For these very reasons, several courts of appeals, including ours, have rejected the notion that federalism's irrelevance in the Fifth Amendment context justifies a "more lenient" standard for personal jurisdiction. *Waldman I*, 835 F.3d at 329–30; *see, e.g.*, *Livnat*, 851 F.3d at 54–55; *see also Douglass*, 46 F.4th at 236–38 ("Because the Due Process Clauses use the same language and guarantee individual liberty in the same way, it makes sense that the standards developed in the Fourteenth Amendment context must govern under the Fifth Amendment."). No basis exists to conclude that the same argument, rooted in the absence of federalism-related restrictions on national

power, would warrant relaxing due process constraints on Congress's ability to "deem[] certain actions . . . to be consent to personal jurisdiction." Intervenor Br. at 40. Whether premised on contacts or consent, subjecting a nonresident defendant to the power of a particular forum implicates compelling concerns for fairness and individual liberty, and those "strong justifications for personal-jurisdiction limits apply equally in Fifth Amendment cases." *Livnat*, 851 F.3d at 55.[16]

The plaintiffs take a somewhat different approach to this Fifth Amendment issue: they ask us to invoke our "'mini *en banc*' process," overrule *Waldman I* entirely, and embrace the broader Fifth Amendment standard used for personal jurisdiction in criminal cases, so that the district court may assert "specific jurisdiction" over the defendants irrespective of whether the PSJVTA gives rise to valid consent. Pls.' Br. at 16, 49. Together with their *amic*i, the plaintiffs raise a host of historical, structural, and practical considerations, including many of the same federalism-related arguments already rejected above, in an attempt to secure a more permissive interpretation of the Fifth Amendment's due process limits.

These arguments, however, provide no persuasive basis for disturbing a binding decision of this Court, especially where that decision accords with existing Circuit case law and the overwhelming weight of authority from

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[16] Moreover, "[j]urisdictional rules should be 'simple,' 'easily ascertainable,' and 'predictable.'" *Livnat*, 851 F.3d at 56 (alterations adopted) (quoting *Daimler*, 571 U.S. at 137). The Government's proposal meets none of those criteria. While the Government assures us that not every conceivable "deemed consent" provision would pass muster under a relaxed Fifth Amendment standard, it fails to identify any workable limitation on the "greater scope" of jurisdiction that would be permitted. Intervenor Br. at 39.

the other federal courts of appeals.[17] *See Douglass*, 46 F.4th at 235, 239 & n.24 (collecting cases from the Second,

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[17] *See, e.g.*, *Douglass*, 46 F.4th at 235 ("We . . . hold that the Fifth Amendment due process test for personal jurisdiction requires the same 'minimum contacts' with the United States as the Fourteenth Amendment requires with a state. Both Due Process Clauses use the same language and serve the same purpose, protecting individual liberty by guaranteeing limits on personal jurisdiction."); *Herederos de Roberto Gomez Cabrera, LLC v. Teck Res. Ltd.*, 43 F.4th 1303, 1308 (11th Cir. 2022) ("[C]ourts should analyze personal jurisdiction under the Fifth Amendment using the same basic standards and tests that apply under the Fourteenth Amendment."); *Abelesz v. OTP Bank*, 692 F.3d 638, 660 (7th Cir. 2012) (finding "no merit" in the contention that the Fifth Amendment "relaxes the minimum-contacts inquiry"); *Carrier Corp. v. Outokumpu Oyj*, 673 F.3d 430, 449 (6th Cir. 2012) (holding that the Fifth Amendment due process test "parallels" the Fourteenth Amendment analysis); *Deprenyl Animal Health, Inc. v. Univ. of Toronto Innovations Found.*, 297 F.3d 1343, 1350 (Fed. Cir. 2002) (concluding that the Fourteenth Amendment "minimum contacts" standard "articulated in *International Shoe* . . . and its progeny" applies in "Fifth Amendment due process cases"). In contending that several federal courts of appeals have held otherwise, *see* Pls.' Br. at 59–60, the plaintiffs rely on outdated authorities, chief among them a vacated decision of the United States Court of Appeals for the Fifth Circuit, *see Douglass v. Nippon Yusen Kabushiki Kaisha*, 996 F.3d 289 (5th Cir.) (per curiam), *opinion vacated and reh'g en banc granted*, 2 F.4th 525 (5th Cir. 2021) (mem.), which subsequently concluded that the Due Process Clauses of the Fifth and Fourteenth Amendments require the same personal jurisdiction analysis, *see* 46 F.4th 226 (5th Cir. 2022) (en banc). The plaintiffs also misstate the holdings of other cases, which nowhere suggested that the personal jurisdiction requirements of the Fifth Amendment are less stringent than those applicable under the Fourteenth Amendment. *See, e.g.*, *Pinker v. Roche Holdings Ltd.*, 292 F.3d 361, 370–71 & 370 n.2 (3d Cir. 2002) (invoking Fourteenth Amendment due process "minimum contacts" standards where the Fifth Amendment applied); *see also Peay v. BellSouth Med. Assistance Plan*, 205 F.3d 1206, 1211–12 (10th Cir. 2000) (similarly borrowing Fourteenth Amendment standards to conduct a Fifth Amendment inquiry).

Sixth, Seventh, Eleventh, Federal, and D.C. Circuits); *see also Livnat*, 851 F.3d at 54–55 & 55 n.5 (similar). Moreover, *Waldman I* was not the first decision of this Court to apply Fourteenth Amendment due process principles in a Fifth Amendment context; the analysis there followed from prior Circuit precedents that "clearly establish[ed] the congruence of [the] due process analysis under both the Fourteenth and Fifth Amendments." 835 F.3d at 330 (citing, among other authorities, *Chew*, 143 F.3d at 28 n.4, and *In re Terrorist Attacks on Sept. 11, 2001*, 714 F.3d 659, 673–74 (2d Cir. 2013)); *see also Porina v. Marward Shipping Co.*, 521 F.3d 122, 127–29 (2d Cir. 2008). Therefore, we decline the invitation to abandon our prior ruling and upend settled law on the due process standards under the Fifth Amendment.

To the extent the plaintiffs ask us to revisit any other aspect of our decision in *Waldman I*, we decline that invitation as well. After explaining that the Fifth and Fourteenth Amendment due process analyses parallel one another in civil actions, *Waldman I* faithfully applied the Supreme Court's binding due process precedents, including its then-recent decision in *Daimler*, to conclude that the PLO and the PA could not be subjected to general or

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The Supreme Court has never "expressly analyzed whether the Fifth and Fourteenth Amendment standards differ," instead reserving decision on the issue. *Livnat*, 851 F.3d at 54; *see, e.g.*, *Bristol-Meyers*, 582 U.S. at 268–69 ("[S]ince our decision concerns the due process limits on the exercise of specific jurisdiction by a State, we leave open the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court."). Other courts of appeals have observed that on at least one occasion, the Supreme Court appears to have "instinctively relied on its Fourteenth Amendment personal jurisdiction jurisprudence" in the Fifth Amendment context. *Douglass*, 46 F.4th at 239 (citing *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 620 (1992), in turn quoting *Burger King*, 471 U.S. at 475); *accord Livnat*, 851 F.3d at 54.

specific jurisdiction under the circumstances presented. In three separate cases involving similar ATA claims, the D.C. Circuit Court of Appeals agreed. *See Shatsky*, 955 F.3d at 1036–37; *Klieman*, 923 F.3d at 1123–26; *Livnat*, 851 F.3d at 56–57. No aspect of the present dispute affects our decision in *Waldman I* as to what constitutional due process requires.

* * *

We reiterate the district court's closing observation that just "[a]s in *Waldman I*, the killing of Ari Fuld was 'unquestionably horrific' and [the] [p]laintiffs' efforts to seek justice on his and their own behalf are morally compelling." *Fuld*, 578 F. Supp. 3d at 595 (quoting *Waldman I*, 835 F.3d at 344). But "the federal courts cannot exercise jurisdiction in a civil case beyond the limits" of the Due Process Clause, "no matter how horrendous the underlying attacks or morally compelling the plaintiffs' claims." *Id.* at 595–96 (quoting *Waldman I*, 835 F.3d at 344). The PSJVTA provides for personal jurisdiction over the PLO and the PA in a manner that exceeds those constitutional limits. Because the statute violates due process, the defendants cannot be "deemed to have consented" to personal jurisdiction in this case. 18 U.S.C. § 2334(e)(1).

CONCLUSION

We have considered all of the arguments of the parties and their *amici*. To the extent not specifically addressed above, those arguments are either moot or without merit. For the foregoing reasons, we conclude that the PSJVTA's provision regarding "deemed" consent to personal jurisdiction is inconsistent with constitutional due process. Accordingly, the plaintiffs' complaint against the PLO and the PA was properly dismissed for lack of personal jurisdiction, pursuant to Rule 12(b)(2). The judgment of the district court is **AFFIRMED.**

APPENDIX B

15-3135-cv (L)
Waldman v. Palestine Liberation Organization

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2022
Argued: May 3, 2023
Decided: September 8, 2023

Docket Nos. 15-3135-cv (L), 15-3151-cv (XAP),
22-1060-cv (Con)

EVA WALDMAN, REVITAL BAUER, INDIVIDUALLY AND AS NATURAL GUARDIAN OF PLAINTIFFS YEHONATHON BAUER, BINYAMIN BAUER, DANIEL BAUER AND YEHUDA BAUER, SHAUL MANDELKORN, NURIT MANDELKORN, OZ JOSEPH GUETTA, MINOR, BY HIS NEXT FRIEND AND GUARDIAN VARDA GUETTA, VARDA GUETTA, INDIVIDUALLY AND AS NATURAL GUARDIAN OF PLAINTIFF OZ JOSEPH GUETTA, NORMAN GRITZ, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF DAVID GRITZ, MARK I. SOKOLOW, INDIVIDUALLY AND AS A NATURAL GUARDIAN OF PLAINTIFF JAMIE A. SOKOLOW, RENA M. SOKOLOW, INDIVIDUALLY AND AS A NATURAL GUARDIAN OF PLAINTIFF JAIME A. SOKOLOW, JAMIE A. SOKOLOW, MINOR, BY HER NEXT FRIENDS AND GUARDIAN MARK I. SOKOLOW AND RENA M. SOKOLOW, LAUREN M. SOKOLOW, ELANA R. SOKOLOW, SHAYNA EILEEN GOULD, RONALD ALLAN GOULD, ELISE JANET GOULD, JESSICA RINE, SHMUEL WALDMAN, HENNA NOVACK WALDMAN, MORRIS WALDMAN, ALAN J. BAUER, INDIVIDUALLY AND AS NATURAL GUARDIAN OF PLAINTIFFS YEHONATHON BAUER, BINYAMIN BAUER, DANIEL BAUER AND YEHUDA

BAUER, YEHONATHON BAUER, MINOR, BY HIS NEXT FRIEND AND GUARDIANS DR. ALAN J. BAUER AND REVITAL BAUER, BINYAMIN BAUER, MINOR, BY HIS NEXT FRIEND AND GUARDIANS DR. ALAN J. BAUER AND REVITAL BAUER, DANIEL BAUER, MINOR, BY HIS NEXT FRIEND AND GUARDIANS DR. ALAN J. BAUER AND REVITAL BAUER, YEHUDA BAUER, MINOR, BY HIS NEXT FRIEND AND GUARDIANS DR. ALAN J. BAUER AND REVITAL BAUER, RABBI LEONARD MANDELKORN, KATHERINE BAKER, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF BENJAMIN BLUTSTEIN, REBEKAH BLUTSTEIN, RICHARD BLUTSTEIN, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF BENJAMIN BLUTSTEIN, LARRY CARTER, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF DIANE ("DINA") CARTER, SHAUN COFFEL, DIANNE COULTER MILLER, ROBERT L COULTER, JR., ROBERT L. COULTER, SR., INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JANIS RUTH COULTER, CHANA BRACHA GOLDBERG, MINOR, BY HER NEXT FRIEND AND GUARDIAN KAREN GOLDBERG, ELIEZER SIMCHA GOLDBERG, MINOR, BY HER NEXT FRIEND AND GUARDIAN KAREN GOLDBERG, ESTHER ZAHAVA GOLDBERG, MINOR, BY HER NEXT FRIEND AND GUARDIAN KAREN GOLDBERG, KAREN GOLDBERG, INDIVIDUALLY, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF STUART SCOTT GOLDBERG/NATURAL GUARDIAN OF PLAINTIFFS CHANA BRACHA GOLDBERG, ESTHER ZAHAVA GOLDBERG, YITZHAK SHALOM GOLDBERG, SHOSHANA MALKA GOLDBERG, ELIEZER SIMCHA GOLDBERG, YAAKOV MOSHE GOLDBERG, TZVI YEHOSHUA GOLDBERG, SHOSHANA MALKA GOLDBERG, MINOR, BY HER NEXT FRIEND AND GUARDIAN KAREN GOLDBERG, TZVI YEHOSHUA GOLDBERG, MINOR, BY HER NEXT FRIEND AND

GUARDIAN KAREN GOLDBERG, YAAKOV MOSHE GOLDBERG, MINOR, BY HER NEXT FRIEND AND GUARDIAN KAREN GOLDBERG, YITZHAK SHALOM GOLDBERG, MINOR, BY HER NEXT FRIEND AND GUARDIAN KAREN GOLDBERG, NEVENKA GRITZ, SOLE HEIR OF NORMAN GRITZ, DECEASED,

Plaintiffs – Appellants,

UNITED STATES OF AMERICA,

Intervenor – Appellant,

—v.—

PALESTINE LIBERATION ORGANIZATION, PALESTINIAN AUTHORITY, AKA PALESTINIAN INTERIM SELF-GOVERNMENT AUTHORITY AND/OR PALESTINIAN COUNCIL AND/OR PALESTINIAN NATIONAL AUTHORITY,

Defendants – Appellees,

YASSER ARAFAT, MARWIN BIN KHATIB BARGHOUTI, AHMED TALEB MUSTAPHA BARGHOUTI, AKA AL-FARANSI, NASSER MAHMOUD AHMED AWEIS, MAJID AL-MASRI, AKA ABU MOJAHED, MAHMOUD AL-TITI, MOHAMMED ABDEL RAHMAN SALAM MASALAH, AKA ABU SATKHAH, FARAS SADAK MOHAMMED GHANEM, AKA HITAWI, MOHAMMED SAMI IBRAHIM ABDULLAH, ESTATE OF SAID RAMADAN, DECEASED, ABDEL KARIM RATAB YUNIS AWEIS, NASSER JAMAL MOUSA SHAWISH, TOUFIK TIRAWI, HUSSEIN AL-SHAYKH, SANA'A MUHAMMED SHEHADEH, KAIRA SAID ALI SADI, ESTATE OF MOHAMMED HASHAIKA, DECEASED, MUNZAR MAHMOUD KHALIL NOOR, ESTATE OF WAFA IDRIS, DECEASED, ESTATE OF MAZAN FARITACH, DECEASED, ESTATE OF MUHANAD ABU HALAWA, DECEASED, JOHN DOES, 1-99, HASSAN ABDEL RAHMAN,

Defendants.[*]

Before: LEVAL AND BIANCO, *Circuit Judges*, AND KOELTL, *District Judge*.[**]

The plaintiffs, a group of United States citizens injured during terror attacks in Israel and the estates or survivors of United States citizens killed in such attacks, brought this action against the Palestine Liberation Organization ("PLO") and the Palestinian Authority ("PA") pursuant to the Anti-Terrorism Act ("ATA"), 18 U.S.C. § 2333, seeking damages for alleged violations of the ATA related to those attacks. This Court concluded on appeal that the district court lacked both general and specific jurisdiction over the PLO and the PA, and we therefore vacated the judgment entered against the defendants and remanded the action for dismissal. The plaintiffs later moved to recall the mandate in this case based on a new statute, the Anti-Terrorism Clarification Act of 2018, Pub. L. No. 115-253, 132 Stat. 3183. We denied that motion because the statute's prerequisites had not been met.

Congress responded with the statute now at issue, the Promoting Security and Justice for Victims of Terrorism Act of 2019 ("PSJVTA"), Pub. L. No. 116-94, § 903(c), 133 Stat. 2534, 3082. The PSJVTA provides that the PLO and the PA "shall be deemed to have consented to personal jurisdiction" in any civil ATA action if, after a specified time, those entities either (1) make payments, directly or indirectly, to the designees or families of incarcerated or deceased terrorists, respectively, whose acts of terror injured or killed a United States national, or (2) undertake any activities within the United States, subject to limited exceptions. 18 U.S.C. § 2334(e). In light of this new

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[*] The Clerk of Court is directed to amend the official caption as set forth above.

[**] Judge John G. Koeltl, of the United States District Court for the Southern District of New York, sitting by designation.

statute, the Supreme Court vacated and remanded our decision denying the motion to recall the mandate, and we in turn remanded the case to the district court for the limited purpose of considering the PSJVTA. The district court (Daniels, *J.*) concluded that the defendants had engaged in jurisdiction-triggering conduct under the statute, but that the PSJVTA violated constitutional due process requirements. Both the plaintiffs and the Government now dispute the latter conclusion, and the plaintiffs argue generally that the PSJVTA justifies recalling the mandate.

In *Fuld v. Palestine Liberation Organization*, __ F.4th __, No. 22-76 (2d Cir. Sept. 8, 2023), which we also decide today, we conclude that the PSJVTA's provision for "deemed consent" to personal jurisdiction is inconsistent with the Fifth Amendment's Due Process Clause. Thus, no basis exists to recall the mandate in this case, and the plaintiffs' motion to recall the mandate is **DENIED**.

KENT A. YALOWITZ, Arnold & Porter Kaye Scholer LLP, New York, NY (Avishai D. Don, Arnold & Porter Kaye Scholer LLP, New York, NY, Allon Kedem, Dirk C. Phillips, Stephen K. Wirth, Bailey M. Roe, Arnold & Porter Kaye Scholer LLP, Washington, D.C., *on the brief*), *for Plaintiffs-Appellants.*

MITCHELL R. BERGER, Squire Patton Boggs (US) LLP, Washington, D.C. (Gassan A. Baloul, Squire Patton Boggs (US) LLP, Washington, D.C., *on the brief*), *for Defendants-Appellees.*

BENJAMIN H. TORRANCE, Assistant United States Attorney, Of Counsel *for* Damian Williams, United States Attorney for the Southern District of New York, New York, NY (Brian M. Boynton,

Principal Deputy Assistant Attorney General, Sharon Swingle, Attorney, Appellate Staff, Civil Division, U.S. Department of Justice, Washington, D.C., *on the brief*), *for Intervenor-Appellant United States of America.*

Tejinder Singh, Sparacino PLLC, Washington, D.C., *for Amici Curiae Abraham D. Sofaer and Louis J. Freeh in Support of Plaintiffs-Appellants and Intervenor-Appellant.*

J. Carl Cecere, Cecere PC, Dallas, TX, *for Amici Curiae Senators and Representatives Charles E. Grassley, Jerrold Nadler, Richard Blumenthal, James Lankford, Sheldon Whitehouse, Kathleen Rice, Bradley E. Schneider, and Grace Meng in Support of Plaintiffs-Appellants and Intervenor Appellant.*

Joshua E. Abraham, Abraham Esq. PLLC, New York, NY, *for Amici Curiae Constitutional Law Scholars Philip C. Bobbitt, Michael C. Dorf, and H. Jefferson Powell in Support of Plaintiffs-Appellants.*

Dina Gielchinsky, Osen LLC, Hackensack, NJ, *for Amici Curiae Organizations Providing Support to Victims of Terror in Support of Plaintiffs-Appellants.*

Tad Thomas, Jeffrey R. White, American Association for Justice, Washington, D.C., *for Amici Curiae American Association for Justice in Support of Plaintiffs-Appellants.*

PER CURIAM:

The plaintiffs, a group of United States citizens injured during terror attacks in Israel and the estates or survivors of United States citizens killed in such attacks, brought this action against the Palestine Liberation Organization ("PLO") and the Palestinian Authority ("PA") pursuant to the Anti-Terrorism Act ("ATA"), 18 U.S.C. § 2333, seeking damages for alleged violations of the ATA related to those attacks. *See id.* § 2333(a). On appeal from a substantial post-trial judgment entered against the defendants, this Court concluded that the district court lacked both general and specific personal jurisdiction over the PLO and the PA. *See Waldman v. Palestine Liberation Org.*, 835 F.3d 317, 344 (2d Cir. 2016) ("*Waldman I*"), *cert. denied sub nom. Sokolow v. Palestine Liberation Org.*, 138 S. Ct. 1438 (2018) (mem.). We accordingly vacated the judgment and remanded the action for dismissal of the plaintiffs' claims. *Id.* Our mandate issued on November 28, 2016.

Since that time, Congress has twice enacted statutes purporting to establish personal jurisdiction over the PLO and the PA on the basis of consent, which, when validly given, may constitute an independent basis for subjecting a defendant to suit in a forum lacking general and specific jurisdiction. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 & n.14 (1985); *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703–04 (1982); *see also Mallory v. Norfolk S. Ry. Co.*, 143 S. Ct. 2028, 2039 (2023) (plurality opinion). After the passage of the first such statute, the Anti-Terrorism Clarification Act of 2018 ("ATCA"), Pub. L. No. 115-253, 132 Stat. 3183, the plaintiffs moved to recall the mandate in this case. In June 2019, we denied that motion because the ATCA's prerequisites for personal jurisdiction had

not been satisfied. *See Waldman v. Palestine Liberation Org.*, 925 F.3d 570, 574–76 (2d Cir. 2019) ("*Waldman II*") (per curiam), *cert. granted, judgment vacated sub nom. Sokolow v. Palestine Liberation Org.*, 140 S. Ct. 2714 (2020) (mem.).

Congress responded with the enactment of the statute now at issue, the Promoting Security and Justice for Victims of Terrorism Act of 2019 ("PSJVTA"), Pub. L. No. 116-94, § 903(c), 133 Stat. 2534, 3082. The PSJVTA provides that the PLO and the PA "shall be deemed to have consented to personal jurisdiction" in any civil ATA action, irrespective of "the date of the occurrence" of the underlying "act of international terrorism," upon engaging in certain forms of post-enactment conduct, namely (1) making payments, directly or indirectly, to the designees or families of incarcerated or deceased terrorists, respectively, whose acts of terror injured or killed a United States national, or (2) undertaking any activities within the United States, subject to a handful of exceptions. 18 U.S.C. § 2334(e)(1).

The Supreme Court vacated and remanded our decision in *Waldman II* in light of the PSJVTA's enactment, *see Sokolow*, 140 S. Ct. 2714, and we in turn remanded to the district court for the limited purpose of considering the new statute's effect on this case. The district court (Daniels, *J.*) concluded that the defendants had engaged in jurisdiction-triggering conduct under the statute, but that the PSJVTA's "deemed consent" provision violated constitutional due process requirements. The plaintiffs dispute the latter conclusion, and they argue generally that the PSJVTA justifies recalling this Court's mandate. The Government, as intervenor pursuant to 28 U.S.C. § 2403(a) and Federal Rule of Civil Procedure

5.1(c), joins the plaintiffs in defending the PSJVTA's constitutionality.

We address the very same constitutional issue in *Fuld v. Palestine Liberation Organization*, F.4th , No. 22-76 (2d Cir. Sept. 8, 2023), which we also decide today. In *Fuld*, we conclude that the PSJVTA's provision for "deemed consent" to personal jurisdiction is inconsistent with the Due Process Clause of the Fifth Amendment. Thus, the statute cannot be applied to establish personal jurisdiction over the PLO or the PA, and as a result, no basis exists to recall the mandate in this case.

I. BACKGROUND

We assume familiarity with *Waldman I*, *Waldman II*, and our decision today in *Fuld*, which collectively detail the history of this litigation and the relevant statutory background.

The plaintiffs commenced this action against the PLO and the PA in 2004, invoking the ATA's civil damages remedy for "national[s] of the United States injured . . . by reason of an act of international terrorism."[1] 18 U.S.C. § 2333(a). Throughout the pretrial proceedings, the PLO and the PA repeatedly moved to dismiss the claims against them for lack of personal jurisdiction. All of those motions were denied. The district court determined that it could exercise general jurisdiction over the defendants, *see Sokolow v. Palestine Liberation Org.*, No. 04-cv-397, 2011 WL 1345086, at *7 (S.D.N.Y. Mar. 30, 2011), even after the Supreme Court narrowed the applicable test for

[1] As explained in *Fuld*, the PA was established under the 1993 Oslo Accords to serve as the non-sovereign and interim governing body of parts of the Gaza Strip and the West Bank (collectively referred to here as "Palestine"). The PLO, an entity founded in 1964, conducts Palestine's foreign affairs and serves as a Permanent Observer to the United Nations on behalf of the Palestinian people.

general jurisdiction in *Daimler AG v. Bauman*, 571 U.S. 117 (2014).[2] *See Sokolow v. Palestine Liberation Org.*, No. 04-cv-397, 2014 WL 6811395, at *1 (S.D.N.Y. Dec. 1, 2014).

After a seven-week trial beginning in January 2015, a jury found the defendants liable for six of the terror attacks at issue and awarded damages of $218.5 million, an amount automatically trebled to $655.5 million pursuant to the ATA. *See Waldman I*, 835 F.3d at 322, 324; 18 U.S.C. § 2333(a). During the trial and again in post-trial briefing, the defendants unsuccessfully reasserted their argument that the case should be dismissed for lack of personal jurisdiction. The district court rejected those arguments and entered final judgment. The defendants then made the same arguments on appeal to this Court.

In *Waldman I*, this Court agreed with the defendants. The decision explained that the PLO and the PA have a Fifth Amendment due process right not to be sued in a forum with which they have insufficient contacts, *see Waldman I*, 835 F.3d at 329, and that the personal jurisdiction analysis is "basically the same under both the Fifth and Fourteenth Amendments," *id.* at 330. Applying *Daimler*, we determined that the district court lacked general jurisdiction because the PLO and the PA are not "at home" in the United States, but "in Palestine, where these entities are headquartered and from where they are directed." *Id.* at 334 (emphasis omitted) (citing *Daimler*, 571 U.S. at 139 n.20). We also found that the district court could not subject the defendants to specific jurisdiction, given the absence of any "substantial connection" between their "suit-related conduct — their role in the six terror attacks at issue — [and] . . . the forum." *Id.* at 335 (citing *Walden v.*

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[2] For procedural reasons not relevant here, the proceedings before the district court are captioned differently, as *Sokolow v. Palestine Liberation Organization*, No. 04-cv-397 (S.D.N.Y.).

Fiore, 571 U.S. 277, 284 (2014)). Thus, "[t]he district court could not constitutionally exercise either general or specific personal jurisdiction over the defendants." *Id.* at 344. We vacated the judgment of the district court and remanded the action "with instructions to dismiss the case for want of personal jurisdiction."[3] *Id.* at 322.

Our mandate issued on November 28, 2016. *See* Judgment Mandate, No. 15-3135, Doc. No. 248 (2d Cir. Nov. 28, 2016). The plaintiffs then filed a petition for a writ of certiorari, which was denied in April 2018. *See Sokolow*, 138 S. Ct. at 1438.

Congress responded to *Waldman I* and similar decisions with the enactment of the ATCA, Pub. L. No. 115-253, 132 Stat. 3183, a precursor to the statute at issue here. The ATCA amended the ATA to include a new subsection, 18 U.S.C. § 2334(e), which provided that a defendant would "be deemed to have consented to personal jurisdiction in . . . [a civil ATA] action if," following a 120-day period after the ATCA's enactment, the defendant (1) "accept[ed]" certain "form[s] of assistance" from the United States, or (2) "maintain[ed]" an office "within the jurisdiction of the United States" pursuant to a waiver or suspension of 22 U.S.C. § 5202, a provision barring the PLO from

[3] As discussed in *Fuld*, the United States Court of Appeals for the District of Columbia Circuit similarly concluded that federal courts lacked both general and specific jurisdiction over the PLO and the PA in civil ATA cases related to terrorist activity abroad. *See Livnat v. Palestinian Auth.*, 851 F.3d 45, 54–58 (D.C. Cir. 2017) (concluding that exercising general or specific jurisdiction over the PA would not "meet the requirements of the Fifth Amendment's Due Process Clause"), *cert. denied*, 139 S. Ct. 373 (2018) (mem.); *see also Shatsky v. Palestine Liberation Org.*, 955 F.3d 1016, 1036–37 (D.C. Cir. 2020) (same as to both the PLO and the PA); *Est. of Klieman v. Palestinian Auth.*, 923 F.3d 1115, 1123–26 (D.C. Cir. 2019) (same), *judgment vacated on other grounds*, 140 S. Ct. 2713 (2020) (mem.), *opinion reinstated in part*, 820 F. App'x 11 (D.C. Cir. 2020) (mem.).

operating any such office. ATCA § 4, 132 Stat. at 3184. The ATCA took effect on October 3, 2018.

Several days later, on October 8, 2018, the plaintiffs filed a motion to recall the November 2016 mandate issued in this action. The plaintiffs argued that the ATCA established personal jurisdiction over the defendants with regard to the previously dismissed claims. We rejected that contention in *Waldman II*, reasoning that "[t]he plaintiffs ha[d] not shown that either factual predicate . . . of the ATCA [was] satisfied." 925 F.3d at 574. Specifically, the plaintiffs did not dispute that the PLO and the PA were no longer "accept[ing] qualifying assistance" from the United States, and they had failed to show that the defendants were maintaining any offices "within the jurisdiction of the United States" while "benefit[ing] from a waiver or suspension" of 22 U.S.C. § 5202. *Id.* at 574–75. For these reasons, and in light of "[t]his Court's interest in finality," we concluded that the circumstances did not "warrant invoking the extraordinary remedy of recalling a mandate issued two and a half years" earlier. *Id.* at 575–76. Accordingly, on June 3, 2019, the plaintiffs' motion to recall the mandate was denied. *Id.* at 576.

While the plaintiffs' petition for a writ of certiorari from *Waldman II* was pending, Congress acted again, this time enacting the PSJVTA on December 20, 2019. *See* Pub. L. No. 116-94, § 903(c), 133 Stat. 2534, 3082. A detailed description of the PSJVTA is set forth in *Fuld*. Briefly, § 903(c) of the PSJVTA superseded the ATCA provision codified at 18 U.S.C. § 2334(e), resulting in a narrowed definition of the term "defendant," which now refers solely to the PLO, the PA, and any "successor[s]" or "affiliate[s]" thereof.[4] 18 U.S.C. § 2334(e)(5). The PSJVTA

[4] As stated in *Fuld*, the PSJVTA also includes a number of additional provisions, but we do not pass on the constitutionality of any portion

also specified new post-enactment conduct that would be "deemed" to constitute "consent" to personal jurisdiction in civil ATA actions, "regardless of the date of the occurrence of the act of international terrorism upon which such civil action was filed." *Id.* § 2334(e)(1).

These new factual predicates for "deemed consent" are listed in two prongs, subparagraphs (A) and (B) of 18 U.S.C. § 2334(e)(1). The first prong provides that "a defendant shall be deemed to have consented to personal jurisdiction" if, after April 18, 2020, the defendant "makes any payment, directly or indirectly":

> (i) to any payee designated by any individual who, after being fairly tried or pleading guilty, has been imprisoned for committing any act of terrorism that injured or killed a national of the United States, if such payment is made by reason of such imprisonment; or
>
> (ii) to any family member of any individual, following such individual's death while committing an act of terrorism that injured or killed a national of the United States, if such payment is made by reason of the death of such individual.

Id. § 2334(e)(1)(A). Under the second prong, "a defendant shall be deemed to have consented to personal jurisdiction" if, after January 4, 2020, the defendant "continues to maintain," "establishes," or "procures any office, headquarters, premises, or other facilities or establishments in the United States," or otherwise "conducts any activity while physically present in the United States on behalf of the [PLO] or the [PA]." *Id.* § 2334(e)(1)(B). The PSJVTA exempts "certain activities and locations" from the reach of

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of the PSJVTA other than § 903(c). For purposes of clarity, this opinion refers to § 903(c) as the PSJVTA, which is consistent with the opinion in *Fuld*, as well as with the nomenclature used in the district court's decisions and the parties' briefs on appeal.

this second prong, including, among others, conduct related to "official business of the United Nations."[5] *Id.* § 2334(e)(3).

Several months after the PSJVTA's enactment, the Supreme Court granted the plaintiffs' petition for a writ of certiorari, vacated the judgment in *Waldman II*, and remanded the case "for further consideration in light of the [PSJVTA]." *Sokolow*, 140 S. Ct. at 2714. On September 8, 2020, this Court in turn issued an order pursuant to *United States v. Jacobson*, 15 F.3d 19, 22 (2d Cir. 1994), remanding the action to the district court "for the limited purposes of determining the applicability of the PSJVTA to this case, and, if the PSJVTA is determined to apply, any issues regarding its application to this case including its constitutionality," Order, No. 15-3135, Doc. No. 368 (Sept. 8, 2020). We stated that "[a]fter the district court has concluded its consideration, the case will be returned to this Court for further proceedings," and that in the meantime, the plaintiffs' motion to recall the November 2016 mandate would be "held in abeyance." *Id.*

After this limited remand to the district court, the Government intervened in the action to defend the constitutionality of the PSJVTA. *See* 28 U.S.C. § 2403(a); Fed. R. Civ. P. 5.1(c). Several months later, on March 10, 2022, the district court issued a decision related to the questions

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[5] In particular, and as discussed in *Fuld*, the PSJVTA includes exceptions for facilities and activities devoted "exclusively [to] the purpose of conducting official business of the United Nations," *id.* § 2334(e)(3)(A)–(B), specified activities related to engagements with United States officials or legal representation, *id.* § 2334(e)(3)(C)–(E), and any activities "ancillary to [those] listed" in these exceptions, *id.* § 2334(e)(3)(F). Congress also provided that the PSJVTA "shall apply to any case pending on or after August 30, 2016," PSJVTA § 903(d)(2), 133 Stat. at 3085, just one day before this Court's decision in *Waldman I*.

presented in our *Jacobson* remand order. *See Sokolow v. Palestine Liberation Org.*, 590 F. Supp. 3d 589 (S.D.N.Y.), *reconsideration denied*, 607 F. Supp. 3d 323 (S.D.N.Y. 2022). The district court found that the defendants had triggered the PSJVTA's first prong, 18 U.S.C. § 2334(e)(1)(A), because the "[p]laintiffs ha[d] presented sufficient evidence to support the determination that [the] [d]efendants . . . made [qualifying] payments after April 18, 2020."[6] *Id.* at 594. Nonetheless, the district court determined that "[t]he conduct identified in the [first prong] is insufficient to support a finding that [the] [d]efendants have consented to personal jurisdiction," *id.* at 596, and accordingly, the statute "violate[s] [constitutional] due process," *id.* at 597.

On March 24, 2022, we reinstated the proceedings concerning the plaintiffs' motion to recall the mandate. The plaintiffs then moved for reconsideration of the district court's March 10, 2022 decision, specifically requesting that the district court make factual findings under the PSJVTA's second prong and consider its constitutionality. We stayed the proceedings in this Court pending the resolution of that motion.

The district court denied the motion for reconsideration on June 15, 2022. *See Sokolow v. Palestine Liberation Org.*, 607 F. Supp. 3d 323, 324 (S.D.N.Y. 2022). It declined to resolve the parties' factual dispute as to whether the

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[6] Specifically, the district court found that the defendants had made payments "to the families of individuals killed while committing acts of terrorism . . . [that] harmed U.S. nationals," thereby triggering 18 U.S.C. § 2334(e)(1)(A)(ii). *Sokolow*, 590 F. Supp. 3d at 594. The district court did not address whether the defendants had made payments to the designees of incarcerated terrorists, *see* 18 U.S.C. § 2334(e)(1)(A)(i), and it also declined to "reach the issue of whether the factual predicates in . . . 18 U.S.C. § 2334(e)(1)(B)," the PSJVTA's second prong, "ha[d] been met." *Sokolow*, 590 F. Supp. 3d at 595 n.3.

defendants' United States activities were exempt from the PSJVTA's second prong, because "[e]ven accepting [the] [p]laintiffs' argument" that no exception applied, the "types of conduct" at issue did not evince "any intention on the part of [the] [d]efendants to legally submit to suit in the United States."[7] *Id.* at 326. In light of that determination and its March 10, 2022 decision, the district court concluded that "the exercise of [personal] jurisdiction under either of the PSJVTA's two jurisdiction-triggering prongs would violate due process." *Id.* at 327–28.

With the plaintiffs' motion for reconsideration resolved, we lifted the stay on these proceedings concerning the motion to recall the mandate.

II. DISCUSSION

Our principal task is to give "further consideration" to the motion at issue in *Waldman II* — that is, the plaintiffs' October 2018 motion to recall this Court's November 2016 mandate — "in light of the [PSJVTA]." *Sokolow*, 140 S. Ct. at 2714.

"We possess an inherent power to recall a mandate, subject to review for abuse of discretion." *Taylor v. United States*, 822 F.3d 84, 90 (2d Cir. 2016) (internal quotation marks omitted and alteration adopted). However,

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[7] To support their argument that the defendants had engaged in non-exempt activities "while physically present in the United States," 18 U.S.C. § 2334(e)(1)(B)(iii), the plaintiffs pointed to the defendants' "provision of consular services in the United States, their interviews with prominent media and social media activity, and their maintenance of an office in New York." *Sokolow*, 607 F. Supp. 3d at 325. The defendants did "not dispute" that they had engaged in these activities; instead, the defendants argued that all of the conduct in question fell within the PSJVTA's exemptions for UN-related conduct. *Id.* at 325–26; *see* 18 U.S.C. § 2334(e)(3)(A), (F). The district court found that it was unnecessary to resolve this issue, and we need not resolve it on appeal.

"[i]n recognition of the need to preserve finality in judicial proceedings, . . . we exercise [this] authority sparingly and only in exceptional circumstances." *Id.* (internal quotation marks omitted and alteration adopted); *see also Calderon v. Thompson*, 523 U.S. 538, 550 (1998). In some cases, the enactment of a new statute might justify the exercise of our power to recall a previously issued mandate. *Cf. Sargent v. Columbia Forest Prods., Inc.*, 75 F.3d 86, 90 (2d Cir. 1996) (noting that a recall may be warranted where changes in governing law cast serious doubt on a previous judgment). But given today's decision in *Fuld*, this case is not one of them.

The plaintiffs make a variety of arguments in support of their position that "[t]his Court should recall the mandate, apply the PSJVTA in this case, and remand to the district court with instructions to reinstate its original judgment based on the jury's verdict." Pls.' Br. at 2. All of those arguments, however, flow from the premise that the PSJVTA "establishes [consent-based] personal jurisdiction" over the PLO and the PA in a manner consistent with due process. *Id.* at 26. We reach the opposite conclusion today in *Fuld*, and we incorporate the entirety of *Fuld*'s analysis here. Thus, as set forth in *Fuld*, the PSJVTA's provision for "deemed consent" to personal jurisdiction violates the Fifth Amendment's Due Process Clause.

Because we find in *Fuld* that the PSJVTA is unconstitutional, the statute cannot be applied to establish personal jurisdiction over the PLO or the PA in this case. Accordingly, no basis exists to recall the November 2016 mandate that issued after *Waldman I*, where we determined that the plaintiffs' claims had to be "dismiss[ed] . . . for want of personal jurisdiction." 835 F.3d at 322. In view of this conclusion, it is unnecessary to address the parties'

various disputes that assume the constitutionality of the PSJVTA.

We reiterate that the terror attacks at issue in this litigation were "unquestionably horrific." *Id.* at 344. But as we stated in *Waldman I* and reaffirm today in *Fuld*, "the federal courts cannot exercise jurisdiction in a civil case beyond the limits" of the Due Process Clause, "no matter how horrendous the underlying attacks or morally compelling the plaintiffs' claims." *Id.* The PSJVTA's provision for "deemed consent" to personal jurisdiction exceeds those constitutional limits, and accordingly, the statute supplies no basis for taking the extraordinary step of recalling this Court's mandate.

CONCLUSION

We have considered all of the arguments of the parties and their *amici*. To the extent not specifically addressed above, those arguments are either moot or without merit. For the foregoing reasons, the plaintiffs' motion to recall the November 2016 mandate is **DENIED.**

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARK I. SOKOLOW, et al., Plaintiffs, -against- PALESTINE LIBERATION ORGANIZATION and PALESTINIAN AUTHORITY, Defendants.	MEMORANDUM DECISION AND ORDER 04 Civ. 397 (GBD)

GEORGE B. DANIELS, United States District Judge:

Plaintiffs have moved for reconsideration of this Court's earlier ruling on the applicability and constitutionality of the Promoting Security and Justice for Victims of Terrorism Act of 2019, Pub. L. No. 116-94, div. J, tit. IX, § 903, 133 State. 3082, codified at 18 U.S.C. § 2334 (the "PSJVTA"). An exercise of jurisdiction pursuant to the PSJVTA's "U.S. activities" prong 18 U.S.C. § 2334(e)(l)(B)(iii), would breach the limits prescribed by the Due Process Clause. The statute is therefore determined to be unconstitutional. Plaintiffs' motion for reconsideration, (ECF No. 1056), is denied.

BACKGROUND[1]

Plaintiffs brought this action against Defendants in 2004, asserting causes of action for international

[1] The relevant factual and procedural background is set forth in greater detail in this Court's original determination on the applicability and constitutionality of the PSNTA, *see Sokolow v.*

terrorism pursuant to the Anti-Terrorism Act ("ATA"), codified at 18 U.S.C. 2333, and various state law claims. (ECF No. 1.) Defendants moved repeatedly to dismiss the complaint for lack of personal jurisdiction. (ECF Nos. 45, 66, 93.) This Court denied their motions, reasoning that 'the totality of activities in the United States by the PLO and the PA justifies the exercise of general personal jurisdiction." *Sokolow v. Palestine Liberation Org.*, No. 04-CV-397 (GBD), 2011 WL 1345086, at *3 (S.D.N.Y. Mar. 30 2011), *vacated sub nom. Waldman v. Palestine Liberation Org.* 835 F.3d 317,337 (2d Cir. 2016). Following the Supreme Court's decision in *Daimler AG v. Bauman*, 571 U.S. 117 (2014), the Second Circuit vacated this Court's decision and held that exercise of personal jurisdiction over Defendants violated the Due Process Clause of the Fifth Amendment because neither defendant was "at home" in the United States, and the terrorist attacks at issue "were not sufficiently connected to the United States" to support specific personal jurisdiction. *Waldman*, 835 F.3d at 333-34, 337.

In response to the Second Circuit's decision in *Waldman* Congress passed a series of statutes expanding the bases on which a defendant can be deemed to have consented to personal jurisdiction, including, as relevant here, the PSJVTA. Specifically, the PSJVTA states that a defendant is deemed to have consented to personal jurisdiction by (1) making payments to the designees of individuals imprisoned or killed as a result of committing any act of terrorism that injured or killed a U.S. citizen (the PSJVTA's "payments prong"), and (2) maintaining any premises in

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Palestine Liberation Org., No. 04 CIV. 397 (GBD), 2022 WL 719261 (S.D.N.Y. Mar. 10, 2022), and is incorporated by reference herein.

the United States or conducting any activity while physically present in the United States on behalf of the Palestinian Authority or the Palestinian Liberation Organization (the PSJVTA's "U.S. activities prong"). 18 U.S.C.A. § 2334(e)(l). Following the passage of the PSJVTA, the Second Circuit remanded this case to this Court "for the limited purpose of determining the applicability of the PSJVTA to this case, and if the PSJVTA is determined to apply, any issues regarding its application to this case including its constitutionality." (ECF No. 1006, at 3.) On March 10, 2022, this Court issued a Memorandum Decision and Order in which it held that the factual predicate for application of the PSJVTA's payments prong to this case had been established, and that the exercise of personal jurisdiction pursuant to that prong would be unconstitutional. *Sokolow,* 2022 WL 719261 at *2-6. Shortly after entry of this Court's order, Plaintiffs moved for reconsideration, requesting that this Court undertake a similar analysis with respect to the PSJVTA's U.S. activities prong. (ECF No. 1056.) This decision follows.

THE PSJVTA DOES NOT CONSTITUTIONALLY PROVIDE FOR PERSONAL JURISDICTION OVER DEFENDANTS

Plaintiffs point to three categories of conduct they contend meet the PSJVTA's test for consent to jurisdiction based on non-exempt (non-United Nations ("U.N.")) activities in the United States. (ECF No. 1057, at 20.) Specifically, Plaintiffs rely on Defendants' provision of consular services in the United States, their interviews with prominent media and social media activity, and their maintenance of an office in New York. *(Id.* at 20-23, 32.) Defendants do not dispute they have engaged in these types of activities. Rather Defendants

argue that their conduct falls within the PSJVTA's exclusions for official U.N. or U.N.-ancillary activities under 18 U.S.C. § 2334(e)(3). (ECF No. 1064, at 15-26.) Defendants also argue that the factual predicates of the U.S. activities prong of the PSJVTA even if met are not sufficient to support an exercise of personal jurisdiction consistent with the Due Process Clause of the Fifth Amendment. *(Id.* at 6-12.) This Court agrees with Defendants' latter argument, and in doing so, joins two other courts in concluding that an exercise of jurisdiction under either of the PSJVTA's factual predicates is unconstitutional. *See Fuld v. Palestine Liberation Org.*, No. 20-CV-3374 (JMF) 2022 WL 62088 at *7 (S.D.N.Y. Jan. 6 2022); *Shatsky v. Palestine Liberation Org.*, No. 18-CV-12355 (MKV) 2022 WL 826409, at*5 (S.D.N.Y. Mar. 18 2022).[2]

Even accepting Plaintiffs' argument that Defendants' United States activities fall within the ambit of the PSJVTA's U.S. activities prong-a finding this Court need not make in order to resolve the instant motion-these types of conduct do not infer any intention on the part of Defendants to legally submit to suit in the United States.[3] As the Court explained in *Fuld*, in promulgating the PSJVTA, Congress 'simply took conduct in which the PLO and PA had previously engaged—conduct that the Second and

[2] Plaintiffs' claim that "[n]o court has addressed" the U.S. activities prong of the PSJVTA, (ECF No. 1057, at 13), is incorrect. Both the *Fuld* and *Shatsky* Courts specifically considered the U.S. activities prong and ultimately held it unconstitutional.

[3] Both this Court in its March 10, 2022 decision and the *Fuld* Court discuss the history of the jurisprudence on jurisdiction by consent. *Sokolow* 2022 WL 719261, at *2-6; *Fuld*, 2022 WL 62088 at *6. This Court will not belabor the discussion by repeating that history here.

D.C. Circuits had held was insufficient to support personal jurisdiction in *Waldman* I and *Shatsky* I—and declared that such conduct shall be deemed to be consent." *Fuld*, 2022 WL 62088, at *7. But Congress "cannot simply declare anything it wants to be consent." *Id.* at *12. Consent is not "a legal fiction devoid of content" and neither the courts nor Congress may "engag[e] in circular reasoning that premises consent on the presumption that defendants know the law and then define[] the law so that anyone engaging in the defined conduct is deemed to have consented to personal jurisdiction." *M3 USA Corp. v. Qamoum*, No. CV 20-2903 (RDM), 2021 WL 2324753, at *12 (D.D.C. June 7, 2021). Constitutional due process "requires more than notice and the opportunity to conform ones conduct for effective consent to jurisdiction." *Shatsky*, 2022 WL 826409 at *5. The activities at issue here—primarily the notarization of documents and a handful of interactions with the media—are insufficient to support any meaningful consent to jurisdiction by Defendants.[4]

The alternate personal jurisdiction theories Plaintiffs advance do not support their constitutional

[4] Plaintiffs rely on *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 641 (2d Cir. 2016), for their claim that "the Second Circuit has acknowledged the continued vitality of cases holding that 'a defendant may consent to personal jurisdiction without regard to what a due process analysis of its contacts would yield.'" (ECF No. 1057, at 15 (quoting *Brown).) Brown* acknowledged no such theory. To the contrary, the *Brown* Court only noted that other Circuits have so held, and then went on to reject that interpretation: "But as the Supreme Court recognized ... the reach of that coercive power, even when exercised pursuant to a corporation's purported 'consent,' may be limited by the Due Process clause." *Brown*, 814 F.3d at 641.

argument.[5] As Defendants correctly note *Burnham's* tag jurisdiction theory only applies to individuals.[6] *See e.g., Estate of Ungar v. Palestinian Auth.* 400 F.Supp.2d 541 553 (S.D.N.Y. 2005), *aff'd,* 332 P. App'x 643 (2d Cir. 2009) (citing *Burnham,* 495 U.S. 604); *Martinez v. Aero Caribbean,* 764 F.3d 1062, 1064 (9th Cir. 2014). Plaintiffs' secondary suggestion, that Defendants consented to jurisdiction solely by virtue of the fact that Congress permits their presence in the United States, relies heavily on pre-*International Shoe* case law from the nineteenth century that is now obsolete, and in any event, required some transaction of business in the forum that is absent here. *See e.g., Baltimore & Ohio Railroad Co. v. Harris,* 79 U.S. 65, 81 (1870) ("if it does business there, it will be presumed to have assented"); *Hess v. Pawloski,* 274 U.S. 352 355 (1927) ("transaction of business in state" supports "consent to be bound by the process of its courts"); *Washington v. Superior Ct. of Wash.* 289 U.S.

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[5] This Court notes that Plaintiffs could have raised these theories which rely on personal jurisdiction case law long predating the initiation of this suit, in their responses to any of Defendants' several motions to dismiss. Motions for reconsideration are not to reiterate previous arguments or raise new arguments that could have been raised earlier. *See e.g., Wil!iams v. Romarm,* 751 F. App'x 20, 24 (2d Cir. 2018). This Court further notes that several of these theories have already been foreclosed by the Second Circuit's decision in *Waldman. Waldman,* 835 F.3d at 337.

[6] "Tag jurisdiction" refers to a court's exercise of personal jurisdiction over an individual who is served and thus "tagged" while physically present in the forum. *In re Edelman,* 295 F.3d 171, 179 (2d Cir. 2002) (citing *Burnham v. Superior Ct. of Cal.,* 495 U.S. 604 (1990) (plurality opinion)); *see also Kadic v. Karadzic,* 70 F.3d 232, 247 (2d Cir. 1995) ("Fed. R. Civ. P. 4(e)(2) specifically authorizes personal service of a summons and complaint upon an individual physically present within a judicial district of the United States, and such personal service comports with the requirements of due process for the assertion of personal jurisdiction.").

361, 364-65 (1933) (state "need not have admitted the corporation to do business within its borders"). Finally, Plaintiffs' argument that Defendants have consented to jurisdiction in the United States because they "receive substantial benefits" from their U.S. activities is misplaced, because a defendant's receipt of benefits is relevant to the issue of specific jurisdiction, not jurisdiction by consent. *C.f. Fuld*, 2022 WL 62088, at *12, n. 10 ("reciprocity" or receipt of benefits is not a component of the consent analysis) (collecting cases); *see also, Hess*, 274 U.S. at 356 ("the implied consent is limited to proceedings growing out of accidents or collisions on a highway in which the nonresident may be involved."). Even if Defendants reap benefits from their activities in the United States, jurisdiction is still lacking because, as the Second Circuit has already held, the conduct about which Plaintiffs complain in this suit did not involve (and, in fact long predates) the PSJVTA's in-territory activities in which Defendants now engage. *Waldman*, 835 F.3d at 344 (jurisdiction does not exist in this case because the terror attacks at issue were not expressly aimed at the United States, death and injuries suffered by U.S. nationals were random, and lobbying activities regarding American policy toward Israel are insufficiently suit-related).

CONCLUSION

For the reasons set forth above and in this Court's March 10, 2022 decision, *Sokolow*, 2022 WL 719261, at *2-6, the exercise of jurisdiction under either of the PSJVTA's two jurisdiction-triggering prongs would violate due process. The statute is therefore unconstitutional.

The Clerk of the Court is directed to close the open motions at ECF Nos. 1056 and 1068.[7]

Dated: June 15, 2022
New York, New York

SO ORDERED.

George B. Daniels
GEORGE B. DANIELS
United States District Judge

[7] Defendants' request that the Court consider its sur-reply, (ECF No. 1068-1), is granted.

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARK I. SOKOLOW et al., Plaintiffs, -against- PALESTINE LIBERATION ORGANIZATION and PALESTINIAN AUTHORITY, Defendants.	DATE FILED: MAR 10 2022 MEMORANDUM DECISION AND ORDER 04 Civ. 397 (GBD)

GEORGE B. DANIELS, United States District Judge:

This action returns to this Court on remand from the Second Circuit for the "limited purposes of determining the applicability of the Promoting Security and Justice for Victims of Terrorism Act of 2019, Pub. L. No. 116-94, div. J, tit. IX,§ 903, 133 State. 3082 (the "PSJVTA")" and "any issues regarding its application to this case including its constitutionality." (Mandate of the U.S.C.A., ECF No. 1006, at 3.)

Following remand, the parties, submitted briefing concerning: (1) whether the factual predicates for application of the PSJVTA have been met; and (2) whether application of the statute is unconstitutional. On May 19, 2021, this Court heard argument from the parties. After oral argument, the parties filed supplementing briefing. (Defendants' Letter dated June 9, 2021, ECF No. 1031; Plaintiffs Letter dated July 6, 2021, ECF No. 1035.) On September 7, 2021, the Government intervened in this action and filed

a memorandum of law in support of the constitutionality of the *PSNTA*. (Government's Brief in Support of PSJVTA, ECF No. 1043). Defendant responded to the Government's brief. (Defendants' Letter dated September 20, 2021, ECF No. 146.) Having considered the parties' arguments, the Court finds (I) that the factual predicate for application of the PSJVTA to this case has been established, and (2) that the statute is unconstitutional.

I. BACKGROUND[1]

Plaintiffs brought this action against Defendants in 2004, asserting causes of action for international terrorism pursuant to the Anti-Terrorism Act ("ATA"), codified in 18 U.S.C. 2333, and various state law claims. Defendants moved to dismiss the Complaint for lack of personal jurisdiction in July 2007. (Notice of Mot. to Dismiss Complaint, ECF No. 45.) In a memorandum decision and order dated September 30, 2008, Defendants' motion was denied without prejudice; Plaintiffs' cross motion for jurisdictional discovery was granted. (ECF No. 58.) Defendants renewed their motion to dismiss the Complaint on May 29, 2009. (Notice of Renewed Mot. to Dismiss Complaint, ECF No. 66.) In a memorandum decision and order dated March 11, 2010, this Court denied Defendants' motion without prejudice to renew at the close of jurisdictional discovery. (ECF No. 79.) Following the close of jurisdictional discovery in April 2010, Defendants renewed their motion. (Notice of Mot. to Dismiss Complaint, ECF No. 81.) In a memorandum decision and order dated March 30, 2011, Defendants' motion was denied. (ECF No. 87.) Defendant next moved to transfer venue to the District of Columbia or, in the alternative, to dismiss the case for lack of personal jurisdiction. (Notice of Mot. to Transfer

[1] The Court references only the underlying facts and procedural history necessary to explain the Court's decision.

Venue, ECF No. 93.) That motion was denied in an Order dated June 2, 2011. (ECF No. 122.)

Following the Supreme Court's decision in *Daimler AG v. Bauman*, Defendants moved for reconsideration of this Court's March 2011 Memorandum Decision and Order. (Notice of Mot. for Reconsideration, ECF No. 421.) Defendants' motion was denied in an Order dated June 16, 2014. (ECF No. 537.) Defendants moved for summary judgment, arguing that *Daimler* required dismissal for lack of personal jurisdiction. (Notice of Mot. for Summary Judgment, ECF 496.) Defendants' motion for summary judgment was denied. (Memorandum Decision and Order dated December 1, 2014, ECF No. 657.) Defendants petitioned the Second Circuit for expedited review of the decision and for a stay of all district court proceedings pending review, including of the trial scheduled for January l, 2015. (Notice of Motion for Stay of Proceedings, ECF No. 665.) Defendants' petition and motion were denied. (Mandate dated January 28, 2015, ECF No., 777.) Following a seven-week trial, a jury returned a verdict for Plaintiffs. (Judgment, ECF No. 980.) Defendants appealed the verdict. On appeal, the Second Circuit found that Defendants did not have sufficient minimum contacts with the forum to allow the Court to exercise general or specific personal jurisdiction over them. *Waldman v. Palestine Liberation Org.*, 835 F.3d 317,323 (2d Cir. 2016) ("Waldman I"). The Second Circuit vacated the judgment and remanded the case with instructions to dismiss the action for lack of personal jurisdiction "over defendants with respect to the claims in this action." *(Id* at 4.)

In reaction to the Second Circuit's decision in *Waldman*, Congress passed the Anti Terrorism Clarification Act ("ATCA"). Pub. L. No. 115-253, 132 Stat. 3183 (2018). The ATCA amended the ATA, providing that a defendant

is deemed to have consented to personal jurisdiction in a civil action under the ATA (1) by accepting US foreign assistance, or (2) by benefitting from a waiver or suspension of 22 U.S.C. § 5205.[2] After the passage of the law, Plaintiffs petitioned the Second Circuit to recall its mandate in light of the ATCA The Second Circuit denied the petition, finding that the factual predicates of the ATCA had not been satisfied because, at the time of the appeal, Defendants were not accepting U.S. foreign assistance, they were not benefitting from a waiver or suspension of Section 1003 of the ATA, nor were Defendants maintaining an office or facility within the jurisdiction of the United States. *Waldman v. Palestine Liberation Org.,* 925 F.3d 570, 573 (2d Cir. 2019) *("Waldman II").* Plaintiffs appealed Waldman II to the Supreme Court. While the appeal was pending, Congress passed the PSJVTA, expanding the bases on which a defendant can consent to personal jurisdiction. Specifically, the statute states that a defendant may consent to personal jurisdiction in cases under the ATA by (1) making payments to the designees of individuals imprisoned or killed as a result of committing any act of terrorism that injured or killed a U.S. citizen, and (2) maintaining any premises in the United States or conducting any activity while physically present in the United States on behalf of the Palestinian Authority or the Palestinian Liberation Organization. 18 U.S.C.A. *§* 2334(e)(l). Following the passage of the PSJVTA, the Supreme Court vacated and remanded the Second Circuit's decision in *Waldman II* for further consideration in light of the PSJVTA. *Sokolow v. Palestine Liberation Org.,* 140 S. Ct. 2714, 206 L. Ed. 2d 852 (2020).

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[2] Section 5202 forbids the PLO and its successors and agents from expending funds or maintaining facilities within the jurisdiction of the United States.

II. THE PSJVTA APPLIES TO THE CASE

The PSJVTA creates personal jurisdiction over defendants on the basis of deemed consent where a defendant makes payments that trigger the application of the statute, or where a defendant engages in certain activities in the United States. 18 U.S.C. § 2334(e)(1).

Plaintiffs argue that the PSJVTA is applicable to this case under 18 U.S.C § 2334(e)(1)(A)(i) and (ii) because Defendants have made payments after April 18, 2020 to individuals convicted for, or killed while, committing acts of terrorism that harmed U.S. nationals. (Plaintiffs' Memorandum of Law ("Plaintiffs' Brief"), ECF No. 1018, at 8.) Plaintiffs also argue that the statute applies under 18 § 2334(e)(l)(B)(i) and (ii) because Defendants maintained an office in New York City, provided counselor services, held press conferences, and updated social media accounts for "the State of Palestine" after January 4, 2020. *(Id.* at 17-18.)

In their opposition, Defendants argue that the office in New York City is not "in" the United States for the purpose of the statute because it is part of the Palestinian Liberation Organization's ("PLO") Mission to the United Nations ("U.N.") headquartered in New York. (Defendants Memorandum of Law ("Defendants' Opposition"), ECF No. 1021, at 11.) In support, Defendants point to 18 U.S.C. § 2334(e)(3)(B). *(Id)* Defendants also argue that their U.S. activities may not be considered for the purpose of determining applicability of the PSJVTA because their activities have been undertaken exclusively for the purpose of conducting official business of the U.N. or, alternatively, fall under exemptions to the application of the statute in 18 U.S.C. § 2334(e)(3) because their activities are part of official UN business. *(Id* at 13.) With regards to the payment prong of the

statute, Defendants do not contest that they made payments triggering application of the PSJVTA under 18 § 2334(e)(l)(A). (Defendants' Opposition at 2.) Instead, Defendants argue that terrorism convictions that were obtained in Israeli military trials were not "fairly tried," as required for application of the statute based on 18 § 2334(e)(l)(A)(i). (Id.)

The PSJVTA is codified at 18 U.S.C. 2334(e)(l). The statute states that "for the purposes of any civil action under Section 2333 of this title, a defendant shall be deemed to have consented to personal jurisdiction in such civil action if, regardless of the date of the occurrence of the act of international terrorism upon which such civil action was filled," defendant engages in certain conduct. *Id.* The statute has two factual predicates which, if established, triggers applicability. Under the first factual predicate, the statute will apply where a defendant,

> [A]fter the date that is 120 days after the date of enactment of the [PSJVTA], makes any payment directly or indirectly -- (i) to any payee designated by any individual who, after being fairly tried or pleading guilty, has been imprisoned for committing any act of terrorism that injured or killed a national of the United States, if such payment is made by reason of such imprisonment; or (ii) to any family member of any individual, following such individual's death while committing an act of terrorism that injured or killed a national of the United States, if such payment is made by reason of the death of such individual [.]

18 U.S.C. 2334(e)(l)(A). The second factual predicate states that the statute will apply where a defendant,

> [A]fter 15 days after the date of enactment of the [PSJVTA] -- (i) continues to maintain any office, headquarters, premises, or other facilities or establishments in the United States; (ii) establishes or procures any office, headquarters, premises, or other facilities or establishments in the United States; or (iii) conducts any activity while physically present in the United States on behalf of the Palestine Liberation Organization or the Palestinian Authority.

18 U.S.C. 2334(e)(l)(A).

Plaintiffs have presented sufficient evidence to support the determination that Defendants have made payments after April 18, 2020 to the families of individuals killed while committing acts of terrorism, and that those payments were made because the individual engaged in terrorism, and that the terrorism harmed U.S. nationals.

Defendants have a practice of making payments to the families of individuals who died while committing acts of terrorism. The Palestinian Authority ("PA") has administered monthly payments to the families of individuals who died while committing acts of terrorism since at least 1994. (Declaration of Arieh Spitzen ("Spitzen Declaration"), ECF No. 1020, at ¶ 8, 10.) Defendants have control over the payment program and are responsible for its operation. *(Id.* at ¶ 28.) These payments, known as "shahids," are administered by the Institution for Families of Martyrs and the Injured (the "Institution"). *(Id.* at ¶ 12.) Payment of shahids is made pursuant to a "Social Examination" form submitted by the families of the deceased terrorists and reviewed by the Institution's staff. *(Id.* at ¶ 13.)

Defendants have continued making payments to the families of individuals killed while committing acts of terrorism after April 18, 2020. On June 8, 2020, the Prime

Minister of Palestine stated "we continued to pay the prisoner and the families of the martyrs in full." (Middle East Research Institute Special Dispatch dated June 11, 2020, ECF No. 1020-7, at 1.) Additionally, reports from the State Department confirm that Defendants have continued making shahid payments since October 2020. (Article dated October 30, 2020, ECF No 1018-28, at 1.)

Defendants have made shahid payments to the families of individuals killed while committing acts of terrorism because of the death of the individual or "martyrdom." The families of individuals who died in terror attacks would not be eligible for shahid payments from the Institution absent the individual's death. *(Id.* at 12.) To receive shahid payments, the family of deceased terrorists must submit a Social Examination form with information about the deceased, the date, place, and circumstances of their death, and proof of their death. *(Id.* at ¶ 13.) In one such application, which was approved, the Institution staff wrote in a section titled "Department Recommendations" that the deceased "was martyred during a heroic martyrdom operation against the Zionists in the occupied city of Jerusalem" and "[t]herefore, we recommend that she is considered one of the al-Awsa Intifada martyrs according to the regulations." (*Id.* at 5.)

Defendants have made shahid payments on behalf of individuals who died during an act of terrorism that harmed injured U.S. nationals. For example, Wafa Idris died on January 27, 2020 while committing an act of terrorism. (Spitzen Declaration ¶ 45; Declaration of Kent A. Yalowitz ("Yalowitz Declaration"), ECF No. 1018, at ¶ 78.) The attack injured five U.S. nationals: Mark Sokolow, Elana Sokolow, Jamie Sokolow, Lauren Sokolow, and Rena Sokolow. (Yalowitz Declaration at ¶ 77.) An application for shahid was filed by Idris' mother with the

Institution for Families of Martyrs and the Injured. (Wafa Idris Social Examination, ECF No. 1020-13, at 1.) The application was approved. *(Id.* at 5.) A shahid payment of 600 shekels a month was allocated. *(Id.)*

As Plaintiffs presented sufficient evidence to show that Defendants conduct meets the factual predicate in 18 U.S.C. §2334(e)(l)(A)(ii) has been met, the PSJVTA is applicable to this case.[3]

III. THE PSJVTA IS UNCONSTITUTIONAL

The PSJVTA states that Defendants are "deemed to consent to personal jurisdiction" if they meet any of the factual predicates identified in 18 U.S.C. 2334(e)(l)(A) or (B).

Defendant argues that "deemed consent" under the PSJVTA violates the due process clause of the Constitution because it does not reflect a free and voluntary relinquishment of Defendants' right to personal jurisdiction. (Defendants' Supplemental Brief on the PSJVTA in *Fuld et al. v. PLO et al.,* 20 Civ 3374, ECF No. 42, at 5.) Defendants contend that for the conduct identified in the PSJVTA to reflect an agreement to consent to the forum's exercise of personal jurisdiction over it, Defendants must receive a reciprocal benefit in exchange. *(Id.* at 6-7.) Since the statute does not confer any benefit on Defendants, Defendants argue that the PSJVTA represents an unconstitutional imposition of personal jurisdiction. *(Id.* at 7.)

In opposition, Plaintiffs argue that the PSJVTA's deemed consent provision establishes constitutionally valid personal jurisdiction over Defendants on the basis of

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[3] Having determined that the PSJVTA applies under 18 U.S.C. 2334(e)(1)(A)(ii), this Court does not reach the issue of whether the factual predicates in 18 U.S.C. 2334(e)(1)(A)(ii) or 18 U.S.C. 2334(e)(l)(B) have been met.

implied consent. (Plaintiffs' Response to Defs.' Supp. Brief ("Plaintiffs' Response"), ECF No. 1035, at 4.) Plaintiffs argue that the doctrine of implied consent does not require that Defendants receive a reciprocal benefit for the Court's exercise of judicial power to be constitutional. *(Id.* at 6.) Plaintiffs also argue that Defendants' decision to engage in conduct identified by the statute was knowing and voluntary. *(Id.)* Plaintiffs contend that Defendants' decision to engage in the conduct that triggered the application of the PSJVTA amounts to a legal submission that Defendants have impliedly consented to personal jurisdiction. (Plaintiffs' Response at 4.)

Under the due process clause of the Constitution, courts may not exercise judicial power over a defendant where maintenance of the suit offends traditional notions of fair play and substantial justice. *Daimler AG v. Bauman*, 571 U.S. 117, 126 (2014). The requirement that courts have personal jurisdiction over defendants represents a restriction on judicial power as a matter of individual liberty. *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 704 (1982). As an individual right, personal jurisdiction can be waived by a defendant. *(Id.)* A court's exercise of personal jurisdiction over a defendant comports with due process where defendant has sufficient contacts with the forum to support general or specific personal jurisdiction. *Daimler*, 571 U.S. at 126. A court may also exercise personal jurisdiction over a defendant, even absent minimum contacts, where the defendant consents to the court's personal jurisdiction. *Ins. Corp. of Ireland*, 456 U.S. at 704.

The conduct identified in the PSJVTA is insufficient to support a finding that Defendants have consented to personal jurisdiction. A defendant may consent to a court's jurisdiction expressly or by implication. *Id.* at 703-4.

Courts have found that a defendant constructively consents to a court's personal jurisdiction where defendants refuses to comply with discovery orders regarding personal jurisdiction. *Hammond Packing Co. v. State of Ark.*, 212 U.S. 322, 351 (1909). Specifically, where a defendant violates court orders requiring them to produce evidence material to the issue of personal jurisdiction, courts have taken that conduct as a legal submission to support a presumption of the fact that "the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense." *Id.* The *Hammond* Court found that this presumption was like "many other presumptions attached by law to the failure of a party to a cause to specially set up or assert his supposed rights in the mode prescribed by law." *Id.* The presumption did not violate due process because it was based on the "undoubted right of the lawmaking power to create a presumption of fact as to the bad faith and untruth of an answer to be gotten from the suppression or failure to produce the proof ordered, when such proof concerned the rightful decision of the cause." *Id.*

Here, the parties do not dispute that Defendants' conduct m making payments to individuals killed while committing acts of terrorism that killed U.S. Nationals triggers application of the PSJVTA. *(Supra* at II.) This conduct is wholly unrelated to any court order in this litigation. Jurisdictional discovery took place in this case in 2008. Defendants did not violate any discovery orders. Accordingly, Defendants actions in violation of the statute is insufficiently related to the litigation to enable the court to exercise constitutionally valid

personal jurisdiction over Defendants on the basis of constructive or implied consent.[4]

Plaintiffs argue that Defendants' decision to make payments that trigger the application of the *PSNTA* represents a legal submission to this Court that Defendants have impliedly consented to personal jurisdiction. (Plaintiffs' Response at 4.) In support of its argument, Plaintiffs cite *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee.* In *Ins. Corp. of Ireland*, the trial court sanctioned the defendant for violating discovery orders under Rule 37(b)(2)(A) of the Federal Rules of Civil Procedure by taking as established the fact that the defendant in that case had sufficient contacts with the forum to support personal jurisdiction, which is what plaintiff was trying to prove through discovery. *Ins. Corp of Ireland*, 456 U.S. at 705-7. Affirming the trial court, the Supreme Court found that the sanction did not violate due process because the facts of the case supported a *Hammond Packing* presumption, and "the sanction was specifically related to the particular 'claim' at issue in the order to provide discovery." *(Id* at 706.) The conduct Plaintiffs point to, making shahid payments, does not support a

[4] *See also Fuld v. Palestine Liberation Org.*, No. 20-CV-3374 (JMF), 2022 WL 62088, at *7 (S.D.N.Y. Jan. 6, 2022) (finding the PSJVTA did not constitutionally provide for personal jurisdiction over the Palestine Liberation Organization and the Palestinian Authority on the basis of implied consent because "the conduct to which Congress attached jurisdictional consequence in the PSJVTA is not 'of such a nature as to justify the fiction' that [d)efendants actually consented to the jurisdiction of the Court" and inferring consent from 'martyr payments' "that have no direct connection to the United States, let alone litigation in a United States court - would strain the idea of consent beyond its breaking point").

Hammond Packing presumption.[5] The conduct at issue is unrelated to the underlying issues in the litigation, nor would the sanction of finding personal jurisdiction be specifically related to any court order. *Contra Ins. Corp of Ireland,* 456 U.S. at 703-4 (no due process violation where personal jurisdiction is based on a presumption of fact resulting from defendant's refusal to comply with discovery orders). Accordingly, finding that Defendants have impliedly consented to personal jurisdiction based solely on their conduct in violation of the PSJVTA would violate the due process clause of the constitution.[6]

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[5] Nor could this Court make such a finding, as the Second Circuit already held, that there were insufficient contacts to support general or specific jurisdiction in this case. *Waldman I,* 835 F.3d at 344 (finding that general jurisdiction did not exist over defendants because they were not at home in New York; specific jurisdiction did not exist because the terror attacks at issue were not expressly aimed at the United States, deaths and injuries suffered by U.S. nationals were random, and lobbying activities regarding American policy toward Israel are insufficiently suit-related).

[6] In addition to its support for Plaintiffs arguments, in its memorandum of law in intervention, the Government contends that federal courts must accord deference to the PSJVTA because the statute represents an enactment by Congress and the President in the field of foreign affairs. (Govt. Mem ISO PSNTA at 13.) The Government cites *Bank Marzai v. Peterson* in support. In that case, the Supreme Court noted that "[i]n pursuit of foreign policy objectives, the political branches have regulated specific foreign-state assets by, inter alia, blocking them or governing their availability for attachment ... Such measures have never been rejected as invasions of the Article HI judicial power." *Bank Markazi v. Peterson,* 578 U.S. 212, 235(2016). As this Court finds that the PSNTA is unconstitutional for its violation of the due process clause, not for its invasion of the separation of powers, the Government's argument is inapplicable.

IV. CONCLUSION

The PSJVTA of 2019 is applicable to this case. The statute is unconstitutional.

Dated: March 10, 2022
New York, New York

SO ORDERED.

George B. Daniels
GEORGE B. DANIELS
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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MIRIAM FULD et al.,

Plaintiffs, 20-CV-3374(JMF)

-against-

THE PALESTINE LIBERATION ORGANIZATION et al., OPINION AND ORDER

Defendants.

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JESSE M. FURMAN, United States District Judge:

The Due Process Clauses of the Fifth and Fourteenth Amendments have long been interpreted to mean that a party cannot be subjected to the jurisdiction of a forum's courts unless the party has certain minimum contacts with the forum. Courts have recognized three independent bases for such "personal jurisdiction": first, general jurisdiction, when the defendant's affiliations with the forum in which suit is brought are so constant and pervasive as to render it essentially at home in the forum; second, specific jurisdiction, when there is a sufficient connection between the underlying controversy and the forum; and third, a defendant's knowing and voluntary consent, whether express or implied, to suit in the forum.

To date, courts have held that these bases are insufficient to sustain lawsuits brought by family members of American victims of terrorist attacks in Israel and the occupied territories under the Anti-Terrorism Act of 1992 ("ATA"), 18 U.S.C. § 2331 *et seq.*, against the Palestine

Liberation Organization ("PLO") and the Palestinian Authority ("PA"). In 2019, Congress responded to these rulings by enacting the Promoting Security and Justice for Victims of Terrorism Act ("PSJVTA"), Pub. L. No. 116-94, div. J, tit. IX, § 903, 133 Stat. 3082, which includes innovative provisions intended to ensure that such lawsuits are not dismissed for want of personal jurisdiction. Specifically, the statute provides that the PLO and PA would be "deemed to have consented to personal jurisdiction" in any case brought under the ATA if, after a date certain, they engaged in specified conduct — conduct in which they had long engaged.

The novel question presented in this case — brought by the family members of a Jewish American killed in a 2018 terrorist attack in Gush Etzion, a settlement located in the West Bank, against the PLO and the PA for their alleged roles in encouraging and supporting the attack — is whether this "deemed consent" jurisdiction is consistent with the requirements of due process. For the reasons that follow, the Court concludes that it is not. In brief, Congress cannot, consistent with the Constitution, simply decree that any conduct, without regard for its connections to the United States generally or to litigation in the United States specifically, signals a party's intent to submit to the jurisdiction of a United States court. To hold otherwise would effectively mean that there are no constitutional limitations on the exercise of personal jurisdiction as a legislature could simply create such jurisdiction out of whole cloth by deeming any conduct — even, for example, the conduct that gives rise to the cause of action itself — to be "consent." The Court cannot and will not acquiesce in what amounts to a legislative sleight of hand at the expense of a fundamental constitutional right and, thus, is compelled to grant the PLO's and PA's motion to dismiss for lack of personal jurisdiction.

BACKGROUND

Plaintiffs in this case are the wife and four children of Ari Yoel Fuld, an American citizen who, on September 16, 2018, was brutally stabbed to death outside a mall in Gush Etzion, a settlement located in the West Bank. *See* ECF No. 21 ("Am. Compl."), ¶¶ 106-110. Plaintiffs allege, on information and belief, that Khalil Yousef Ali Jabarin, the murderer, targeted Fuld because he was a Jewish American. *See id.* ¶ 107; *see also id.* ¶ 101 (alleging, on information and belief, that Jabarin "decided to become . . . a 'martyr[]' and kill Jews"). In this suit, however, they do not seek relief from Jabarin (who was apprehended by Israeli authorities after the murder). Instead, they seek hundreds of millions of dollars in damages from the PA, which was established by the 1993 Oslo Accords to exercise interim governance authority for the Palestinian people in Gaza and the West Bank, and the PLO, which has been recognized by the United Nations as the representative of the Palestinian people, on the ground that they "encouraged, incentivized, and assisted" the attack on Fuld. *Id.* ¶ 4. They do so principally pursuant to the ATA, as amended by the PSJVTA. *See id.* ¶ 1.

Congress enacted the ATA in 1992 in an effort "to develop a comprehensive legal response to international terrorism." H.R. Rep. No. 102-1040, at 5 (1992) ("1992 House Report"); *see* Pub. L. No. 102-572, § 1003(a), 106 Stat. 4506, 4521-24 (1992) (adding 18 U.S.C. §§ 2331, 2333-2338). The statute created a civil damages remedy for United States nationals harmed by an act of international terrorism committed by a foreign terrorist organization. *See* 18 U.S.C. § 2333(a). To the extent relevant here, it permits such United States nationals to sue "any person who aids and abets, by knowingly providing substantial assistance, or who conspires [to commit] an act of international terrorism." *Id.* § 2333(d)(2). Among other things, it provides

for treble damages plus attorney's fees and costs. *See id.* § 2333(a).

In 2004, a group of eleven American families (the "*Sokolow* plaintiffs") sued the PA and PLO under the ATA for various terrorist attacks in Israel. *See Waldman v. Palestine Liberation Org.*, 835 F.3d 317, 322, 324 (2d Cir. 2016) ("*Waldman I*"). The PA and PLO moved repeatedly to dismiss the *Sokolow* plaintiffs' claims for lack of personal jurisdiction, but the district court denied their motions, reasoning that "the totality of activities in the United States by the PLO and the PA justifies the exercise of general personal jurisdiction." *Sokolow v. Palestine Liberation Org.*, No. 04-CV-397 (GBD), 2011 WL 1345086, at *3 (S.D.N.Y. Mar. 30, 2011), *vacated sub nom. Waldman I*, 835 F.3d 317. After more than a decade of litigation and a seven-week trial, a jury returned a verdict in favor of the *Sokolow* plaintiffs and awarded them more than $650 million pursuant to the ATA's treble damages provision. *See Waldman I*, 835 F.3d at 322, 326.

In the meantime, in *Daimler AG v. Bauman*, 571 U.S. 117 (2014), the Supreme Court clarified that "general" personal jurisdiction is appropriate only in a forum where the defendant is "essentially at home," which, in the case of a non-natural person, is usually limited to its place of incorporation or principal place of business, *see id.* at 136-39. In the wake of *Daimler*, the Second Circuit vacated the judgment in *Sokolow*, holding in *Waldman I* that the district court's exercise of personal jurisdiction over the PA and PLO had violated the Due Process Clause of the Fifth Amendment because neither defendant was "at home" in the United States and the terrorist attacks at issue "were not sufficiently connected to the United States" to support "specific personal jurisdiction." 835 F.3d at 337. In a trio of similar cases against the PA and PLO, the D.C.

Circuit reached the same conclusions. *See Shatsky v. Palestine Liberation Org.*, 955 F.3d 1016, 1036-37 (D.C. Cir. 2020); *Est. of Klieman v. Palestinian Auth.*, 923 F.3d 1115, 1123-24 (D.C. Cir. 2019), *cert. granted, judgment vacated*, 140 S. Ct. 2713 (2020), *and opinion reinstated in part*, No. 15-7034, 2020 WL 5361653 (D.C. Cir. Aug. 18, 2020); *Livnat v. Palestinian Auth.*, 851 F.3d 45, 56-57 (D.C. Cir. 2017).

In 2018, Congress responded to these decisions by enacting the Anti-Terrorism Clarification Act ("ATCA"), Pub. L. No. 115-253, § 4, 132 Stat. 3183, 3184 (adding 18 U.S.C. § 2334(e)). Section 4 of the ATCA provided that, "for purposes of any civil action under [the ATA], a defendant shall be deemed to have consented to personal jurisdiction in such civil action if," after January 31, 2019, the defendant "accepts" certain "form[s] of assistance" from the United States or maintains an office within the United States pursuant to a waiver or suspension of 22 U.S.C. § 5202 (which otherwise prohibits the PLO from maintaining an office in the United States). *Id.* Within days of the ATCA's enactment, the *Sokolow* plaintiffs filed a motion asking the Second Circuit to recall the mandate in *Waldman I*, arguing that Section 4 of the ATCA provided personal jurisdiction over the PA and PLO. *See Waldman v. Palestine Liberation Org.*, 925 F.3d 570, 574 (2d Cir. 2019) (per curiam) ("*Waldman II*"), *cert. granted, judgment vacated sub nom. Sokolow v. Palestine Liberation Org.*, 140 S. Ct. 2714 (2020). The Second Circuit denied their motion, finding that the plaintiffs had failed to show "that either factual predicate of Section 4 of the ACTA ha[d] been satisfied." *Id.* Once again, the D.C. Circuit reached the same conclusions. *See Klieman*, 923 F.3d at 1128.

The plaintiffs in these cases filed petitions for certiorari in the Supreme Court. On December 20, 2019, while

their petitions were pending, Congress intervened again by passing the PSJVTA. To the extent relevant here, the PSJVTA superseded the personal jurisdiction provisions in the ATCA. It amended the definition of "defendant" to specifically include the PA, the PLO, and their affiliates and successors. Pub. L. No. 116-94, div. J, tit. IX, § 903(b)(5), 133 Stat. 3082, 3083. And it provided two new factual predicates for conduct that will be "deemed" consent to personal jurisdiction for civil actions under the ATA. As amended by the PSJVTA, the ATA now provides, first, that a defendant "shall be deemed to have consented to personal jurisdiction" in ATA cases if, after April 18, 2020, it "makes any payment, directly or indirectly," to either (i) a payee designated by someone imprisoned for an act of terrorism that injured or killed an American national "if such payment is made by reason of such imprisonment" or (ii) to a family member of an individual who died while committing an act of terrorism that injured or killed an American national "if such payment is made by reason of the death of such individual." 18 U.S.C. § 2334(e)(1)(A). Second, the Act states that a defendant will be "deemed to have consented to personal jurisdiction" if, after January 4, 2020, it "establishes," "procures," or "continues to maintain any office, headquarters, premises, or other facilities or establishments in the United States," or "conducts any activity while physically present in the United States on behalf of" the PLO or the PA. *Id.* § 2334(e)(1)(B). That subsection is subject to several exceptions, including, most notably, offices or facilities used "exclusively for the purpose of conducting official business of the United Nations" and "ancillary" activities. *Id.* § 2334(e)(3).

On April 27, 2020, the Supreme Court granted certiorari to both the *Sokolow* plaintiffs and the plaintiffs in the D.C. Circuit litigation, vacated the lower court judgments,

and remanded the cases "for further consideration in light of the [PSJVTA]." *Sokolow*, 140 S. Ct. at 2714; *see Klieman*, 140 S. Ct. at 2713. Thereafter, the Second Circuit remanded *Sokolow* to the district court "for the limited purpose of determining the applicability of the PSJVTA to [that] case, and, if the PSJVTA is determined to apply, any issues regarding its application to [that] case including its constitutionality." Mandate, *Waldman v. Palestine Liberation Org.*, No. 15-3135 (2d Cir. Sept. 8, 2020), ECF No. 369. On remand, the parties (and the United States) have briefed both issues. *See Sokolow v. Palestinian Liberation Org.*, No. 04-CV-397 (GBD) (S.D.N.Y. May 13, 2015), ECF Nos. 1015, 1021, 1022, 1043.[1]

In the meantime, Plaintiffs filed this suit on April 30, 2020, three days after the Supreme Court vacated and remanded in *Sokolow*. *See* ECF No. 1. In their Amended Complaint, Plaintiffs allege that both prongs of the PSJVTA's personal jurisdiction provisions are satisfied. First, they allege that, after April 18, 2020, Defendants made payments to the families of deceased terrorists who killed or injured Americans and to the designees of terrorists who pleaded guilty or were fairly convicted of killing or injuring Americans. *See* Am. Compl. ¶¶ 54-57, 59, 60,

[1] The *Shatksy* and *Klieman* plaintiffs are also still pursuing their claims in light of the PSJVTA. In conjunction with their litigation in the D.C. Circuit, the *Shatsky* plaintiffs also filed a "protective action" in this Court. *See Shatsky v. Palestine Liberation Org.*, No. 18-CV-12355 (MKV) (S.D.N.Y. Jan. 30, 2020), ECF No. 21, at 1. In that proceeding, Defendants have also moved to dismiss for lack of personal jurisdiction, and their motion remains pending. *See Shatsky v. Palestine Liberation Org.*, No. 18-CV-12355 (MKV) (S.D.N.Y. Aug. 20, 2021), ECF No. 116. Meanwhile, the *Klieman* plaintiffs are seeking jurisdictional discovery before the United States District Court for the District of Columbia. *See Est. of Klieman v. Palestinian Auth.*, No. 04-CV-1173 (PLF) (D.D.C. Dec. 2, 2020), ECF No. 298.

62-67, 114-115.[2] Second, they allege that, after January 4, 2020, Defendants provided consular services in the United States, and conducted press-conferences, distributed informational materials, and engaged the United States media in order to influence American foreign policy and public opinion. *See id.* ¶¶ 68-90. They further allege that, after January 4, 2020, Defendants maintained offices in the United States that were not used exclusively for the purpose of conducting official United Nations business. *See id.* ¶¶ 75-95.

After Plaintiffs filed their Amended Complaint, the PA and PLO moved to dismiss for lack of personal jurisdiction and for failure to state a claim. *See* ECF No. 24. For reasons not relevant here, the Court directed the parties to file supplemental briefs as to the "application and constitutionality of the PSJVTA." ECF No. 34. Additionally, after confirming that the PA and PLO sought to challenge the constitutionality of the PSJVTA, the Court, pursuant to 28 U.S.C. § 2403(a) and Rule 5.1(b) of the Federal Rules of Civil Procedure, certified the constitutional challenge to the Attorney General of the United States and invited him to intervene. ECF No. 36. The United States subsequently intervened and filed a brief defending the constitutionality of the PSJVTA. ECF No. 52; *see* ECF No. 53 ("U.S. Mem."). Thereafter, both sides submitted supplemental briefs responding to the submission of the United

[2] In fact, Plaintiffs allege, albeit not in the Amended Complaint, that such payments "are a legal entitlement under the PA Prisoners and Ex-Prisoners Law, under which '[t]he PA must give every prisoner a monthly salary . . . [p]risoners' family members shall receive a portion of the prisoners' salary' and '[t]he prisoner shall appoint an agent to collect his monthly salary or what remains of it.'" ECF No. 29, at 8-9 (quoting Law No. 19 of 2004, Art. 7, as translated and admitted into evidence in *Sokolow v. Palestinian Liberation Org.*, No. 04-CV-397 (GBD) (S.D.N.Y. May 13, 2015), ECF No. 909-90).

States. ECF No. 58 ("Defs.' Supp. Mem."); ECF No. 59 ("Pls.' Supp. Mem.").

RULE 12(B)(2) STANDARDS

When responding to a Rule 12(b)(2) motion, a "plaintiff bears the burden of establishing that the court has jurisdiction over the defendant." *DiStefano v. Carozzi N. Am., Inc.*, 286 F.3d 81, 84 (2d Cir. 2001) (per curiam) (internal quotation marks omitted). Where, as here, there has been no discovery or evidentiary hearing, plaintiffs need only make a *prima facie* showing that jurisdiction exists. *See, e.g.*, *Dorchester Fin. Sec., Inc. v. Banco BRJ, S.A.*, 722 F.3d 81, 84-85 (2d Cir. 2013) (per curiam). Such a showing "entails making 'legally sufficient allegations . . . ,' including 'an averment of facts that, if credited[,] would suffice'" to establish that jurisdiction exists. *Penguin Grp. (USA) Inc. v. Am. Buddha*, 609 F.3d 30, 35 (2d Cir. 2010) (quoting *In re Magnetic Audiotape Antitrust Litig.*, 334 F.3d 204, 206 (2d Cir. 2003) (per curiam)). *See generally Dorchester Fin. Sec., Inc.*, 722 F.3d at 84-85. A court must construe "all allegations . . . in the light most favorable to the plaintiff." *Whitaker v. Am. Telecasting, Inc.*, 261 F.3d 196, 208 (2d Cir. 2001).

DISCUSSION

To make a *prima facie* showing of personal jurisdiction, a plaintiff must demonstrate: (1) procedurally proper service of process, (2) "a statutory basis for personal jurisdiction that renders such service of process effective" and (3) that "the exercise of personal jurisdiction . . . comport[s] with constitutional due process principles." *In Re LIBOR-Based Financial Instruments Antitrust Litig.*, — F.4th —, Nos. 17-1569 et al., 2021 WL 6143556, at *11 (2d Cir. Dec. 30, 2021) (internal quotation marks omitted). In this case, Defendants have waived any defenses regarding proper service of process. *See* ECF No. 13. And, at

least for purposes of this motion, Defendants do not dispute Plaintiffs' allegation that they have made payments that trigger the PSJVTA's first "deemed consent" condition. *See* Am. Compl. ¶¶ 63, 66-67.[3] Thus, as in *Waldman I*, whether the exercise of personal jurisdiction over Defendants in this case is proper turns on "whether the third jurisdictional requirement is met — whether jurisdiction over the [D]efendants may be exercised consistent with the Constitution." 835 F.3d at 328.

In general, due process — pursuant to both the Fifth and the Fourteenth Amendments, *see id.* ("[T]he minimum contacts and fairness analysis is the same under the Fifth Amendment and the Fourteenth Amendment in civil cases.") — conditions "a tribunal's authority . . . on the defendant's having such 'contacts' with the forum State that 'the maintenance of the suit' is 'reasonable . . . ,' and 'does not offend traditional notions of fair play and substantial justice.'" *Ford Motor Co.*, 141 S. Ct. at 1024 (quoting *Int'l*

[3] In fact, Defendants all but concede that they did in fact make such payments. *See* ECF No. 42 ("Defs.' Mem."), at 11 (describing Defendants' "decision to continue engaging in . . . conduct" described by the PSJVTA's factual prongs); *id.* at 21 ("Because personal jurisdiction based on *either* PSJVTA prong would violate due process, there is no need for the Court to determine wither Plaintiffs can satisfy the disjunctive 'U.S. conduct' PSJVTA prong in addition to the 'payment' prong." (citations omitted)); Defendants' Brief Concerning Application of the PSJVTA, *Sokolow v. Palestine Liberation Org.*, No. 04-CV-397 (GBD) (S.D.N.Y. Jan. 8, 2021), ECF No. 1021, at 2 n.1 ("[T]he Court can assume, without deciding, that Defendants have made at least one payment implicating the PSJVTA's payments provision."); *see also* ECF No. 31, at 3 (Defendants stating that they "incorporate by reference" their brief filed in *Sokolow*). By contrast, Defendants do contest Plaintiffs' allegations that the PSJVTA's second "deemed consent" prong has been met. *See, e.g.*, Defs.' Mem. 21-25; ECF No. 50 ("Defs.' Reply"), at 7-10. Because the Court concludes that the PSJVTA's first prong has been met, it need not decide whether Defendants' conduct also implicates the second prong.

Shoe Co. v. Washington, 326 U.S. 310, 316-17 (1945)). More specifically, there are three traditional bases for personal jurisdiction that comport with constitutional due process principles. First, a court may exercise "general jurisdiction" over a foreign defendant "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." *Waldman I*, 835 F.3d at 331 (cleaned up). In such cases, jurisdiction encompasses "any and all claims against that defendant." *Id.* Second, a court may exercise "specific or conduct-linked jurisdiction" where there is a sufficient "affiliation between the forum and the underlying controversy, principally, activity or an occurrence that takes place in the forum state and is therefore subject to the State's regulation." *Sonera Holding B.V. v. Cukurova Holding A.S.*, 750 F.3d 221, 225 (2d Cir. 2014) (cleaned up). In other words, "to exercise jurisdiction consistent with due process, the defendant's suit-related conduct must create a substantial connection with the forum." *Walden v. Fiore*, 134 S. Ct. 1115, 1122 (2014).

In this case, Plaintiffs make no argument for general or specific jurisdiction, and for good reasons: Any such argument would be foreclosed by the Second Circuit's decision in *Waldman I*. First, to the extent relevant here, the Second Circuit held in *Waldman I* that the neither the PA nor the PLO can be fairly regarded as "at home" in the United States for purposes of general jurisdiction; instead, both "are 'at home' in *Palestine*, where these entities are headquartered and from where they are directed." *See Waldman I*, 835 F.3d at 332-34; *see also Shatsky*, 955 F.3d at 1036 ("The Palestinian Authority and the PLO are not subject to general jurisdiction because neither one is 'at home' in the District of Columbia within the meaning of *Daimler*."). Second, the *Waldman I* Court held that the alleged tortious actions by the PA and the PLO, "as

heinous as they were, were not sufficiently connected to the United States to provide specific personal jurisdiction in the United States. There is no basis to conclude that the defendants 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." 835 F.3d at 337. These conclusions apply, with equal force, to this case.[4] It follows that the Court cannot "constitutionally exercise either general or specific personal jurisdiction over the defendants in this case." *Id.* at 344.

Instead of relying on general or specific jurisdiction, Plaintiffs here rely entirely on the third traditional basis for personal jurisdiction: consent. *See, e.g.*, *J. McIntyre Mach., Ltd. v. Nicasto*, 564 U.S. 873, 880 (2011) (plurality opinion); *Nat'l Equip. Rental, Ltd. v. Szukhent*, 375 U.S.

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[4] An argument could be made — although, conspicuously, Plaintiffs do not make it — that this case is distinguishable from *Waldman I* because here the Amended Complaint alleges, on information and belief, that the attacker specifically "targeted" the victim "because he was a Jewish American." Am. Compl. ¶ 107; *cf. Waldman I*, 835 F.3d at 343-44 (holding that there was no specific jurisdiction in part "because the terror attacks in Israel at issue . . . were not expressly aimed at the United States and because the deaths and injuries suffered by the American plaintiffs in these attacks were random and fortuitous" (internal quotation marks omitted)). But the sole factual basis for the allegation — namely, that Jabarin "deduced" Fuld "was a Jew and an American" on the basis of the latter's "skullcap" having "bold English lettering on it," Am. Compl. ¶ 107 — is too "conclusory and insufficient for specific personal jurisdiction purposes," *In re Terrorist Attacks on Sept. 11, 2001*, 714 F.3d 659, 676 (2d Cir. 2013); *see also Waldman I*, 835 F.3d at 338 (rejecting the argument that "Defendants intended to hit American citizens" on that ground that "it would be impermissible to speculate based on scant evidence what the terrorists intended to do" (emphasis omitted)). In any event, Plaintiffs have forfeited any argument in favor of specific jurisdiction. *See, e.g.*, *Delgado v. Villanueva*, No. 12-CV-3113 (JMF), 2013 WL 3009649, at *2 n.2 (S.D.N.Y. June 18, 2013).

311, 315-16 (1964); *D.H. Blair & Co. v. Gottdiener*, 462 F.3d 95, 103 (2d Cir. 2006); *Knowlton v. Allied Van Lines, Inc.*, 900 F.2d 1196, 1199 (8th Cir. 1990).[5] Unlike subject-matter jurisdiction, "personal jurisdiction represents . . . an individual right," which "can, like other such rights, be waived." *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982) ("*Bauxites*"). Thus, the Supreme Court has acknowledged "[a] variety of legal arrangements" that "have been taken to represent express or implied consent to the personal jurisdiction of the court." *Id.* The archetypal example of express consent occurs when "parties to a contract . . . agree in advance to submit to the jurisdiction of a given court." *Id.* at 704 (internal quotation marks omitted). Examples of "legal arrangements" that constitute "implied" consent are (1) a party's agreement to arbitrate, *see id.* (citing *Victory Transp. Inc. v. Comisaria Gen. de Abastecimientos y Transportes*, 336 F.2d 354, 363 (2d Cir. 1964) ("By agreeing to arbitrate in New York, where the United States Arbitration Act makes such agreements specifically enforceable, [the respondent] must be deemed to have consented to the jurisdiction of the court that could compel the arbitration proceeding in New York.")); and (2) "state procedures which find constructive consent to the personal jurisdiction of the state court in the voluntary use of certain state procedures," *id.* (citing *Adam v. Saenger*, 303 U.S. 59, 67 (1938) ("There is nothing in the Fourteenth Amendment to prevent a state from adopting a procedure by which a judgment in personam may be rendered in a cross-

[5] Separately, Plaintiffs dispute the proposition that the PLO and PA even have due process rights. *See* ECF No. 46 ("Pls.' Mem."), at 13 n.4. But they acknowledge that that argument is foreclosed by *Waldman I* and make it only to preserve the issue "for appellate consideration." *Id.* Thus, the Court need not and does not address the issue here.

action against a plaintiff in its courts.")). Additionally, the Federal Rules of Civil Procedure provide that a defendant waives any defense based on lack of personal jurisdiction — and, in that sense, "consents" to personal jurisdiction — by failing to raise the issue either in an answer or in an initial motion. *See* Fed. R. Civ. P. 12(h)(1); *see Bauxites*, 456 U.S. at 704.

Significantly, the reason that consent suffices to support personal jurisdiction is rooted in the fact that "personal jurisdiction flows from the Due Process Clause." *Id.* at 694. "The personal jurisdiction requirement recognizes and protects an individual liberty interest." *Id.* at 702. If a party consents to appear in a particular forum, whether explicitly or implicitly, it follows that "maintenance of the suit" in that forum does "not offend traditional notions of fair play and substantial justice." *Id.* (cleaned up). "The actions of the defendant . . . amount to a legal submission to the jurisdiction of the court." *Id.* at 704-05. After all, "[c]onsent, by its very nature, constitutes 'approval' or 'acceptance.'" *WorldCare Corp. v. World Ins. Co.*, 767 F. Supp. 2d 341, 355 (D. Conn. 2011) (quoting *Black's Law Dictionary* definition of "consent" as "[a]greement, approval, or permission as to some act or purpose, esp. given voluntarily by a competent person; legally effective assent"). Put differently, like presence in a forum that is sufficient to support general jurisdiction, consent "reveals circumstances . . . from which it is proper to infer an intention to benefit from and *thus an intention to submit to the laws of the forum*." *J. McIntyre Mach.*, 564 U.S. at 881 (plurality opinion) (emphasis added); *see also, e.g.*, *Shaffer v. Heitner*, 433 U.S. 186, 203-04 (1977) (describing cases in which the Court "purported . . . to identify circumstances under which . . . consent [could] be attributed to [a foreign defendant]" as an "attempt[] to ascertain what *dealings*

make it just to subject a foreign corporation to local suit" (emphasis added) (internal quotation marks omitted)).

That inference is reasonable, however, only where the defendant's statements or conduct actually signal approval or acceptance. That, in turn, requires the "consent" to meet certain minimum requirements. Thus, the law generally requires the party's consent to be "knowing and voluntary" before it is treated as effective. *See, e.g.*, *In re Asbestos Prods. Liab. Litig. (No. VI)*, 384 F. Supp. 3d 532, 538 (E.D. Pa. 2019) ("It is axiomatic . . . that consent is only valid if it is given both knowingly and voluntarily."). After all, if a party giving consent does not understand the consequences of its actions or lacks the ability to withhold consent, it cannot be said that its "consent" signals anything, let alone "an intention to submit to the laws of the forum." *J. McIntyre Mach.*, 564 U.S. at 881 (plurality opinion). Relatedly, courts may not enforce a party's express consent to personal jurisdiction where doing so "would be unreasonable and unjust," *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972), or where the agreement was affected by "fraud, undue influence, or overweening bargaining power," *id.* at 13; *see also id.* at 10-11 (noting that these limits are "merely the other side of the proposition . . . that in federal courts a party may validly consent to be sued in a jurisdiction where he cannot be found"). And for conduct to imply consent, the conduct must be "of such a nature as to justify the fiction" that the party actually consented to submit itself to the jurisdiction of the court. *Int'l Shoe*, 326 U.S. at 318. Put simply, for waiver of personal jurisdiction through consent to satisfy the requirements of due process, it "must be willful, thoughtful, and fair. 'Extorted actual consent' and 'equally unwilling implied consent' are not the stuff of due process." *Leonard v. USA Petroleum Corp.*, 829 F. Supp. 882, 889 (S.D. Tex. 1993).

Measured against these standards, the PSJVTA does not constitutionally provide for personal jurisdiction over Defendants in this case. Congress simply took conduct in which the PLO and PA had previously engaged — conduct that the Second and D.C. Circuits had held was insufficient to support personal jurisdiction in *Waldman I*, *Livnat*, *Shatsky*, and *Klieman* — and declared that such conduct "shall be deemed" to be consent. 18 U.S.C. § 2334(e)(1); *see, e.g.*, *Shatsky*, 955 F.3d at 1022-23, 1037 (holding that alleged "martyr payments" did not confer specific jurisdiction over Defendants). But the conduct to which Congress attached jurisdictional consequence in the PSJVTA is not "of such a nature as to justify the fiction" that Defendants actually consented to the jurisdiction of the Court. *Int'l Shoe*, 326 U.S. at 318. Inferring consent to jurisdiction in the United States from the first prong of the "deemed consent provision" — for "martyr payments," 18 U.S.C. § 2334(e)(1)(A), that have no direct connection to the United States, let alone to litigation in a United States court — would strain the idea of consent beyond its breaking point. And while the second prong — relating to offices or other facilities in the United States and activities "while physically present in the United States," *id.* § 2334(e)(1)(B) — does relate to conduct in the United States, the conduct (at least as alleged in this case) is too thin to support a meaningful inference of consent to jurisdiction in this country. Neither form of conduct, as alleged in this case, even remotely signals approval or acceptance of the Court's jurisdiction. Nor do they support an inference that Defendants intended "to submit to the laws of the [United States]" or to the jurisdiction of an American court. *J. McIntyre Mach.*, 564 U.S. at 881 (plurality opinion). It may be that, under different circumstances, Congress or a state legislature could constitutionally "deem" certain conduct to be consent to personal jurisdiction.

(The Court need not and does not decide that question here.) To pass muster, however, the predicate conduct would have to be a much closer proxy for actual consent than the predicate conduct at issue is here. To be blunt: The PSJVTA is too cute by half to satisfy the requirements of due process here.

That conclusion finds strong support in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999). The question there was whether a state could be deemed to have waived its Eleventh Amendment immunity from suit merely by engaging in conduct that violated federal law. The Supreme Court held that it could not because "there is little reason to assume actual consent based upon the State's mere presence in a field subject to congressional regulation." *Id.* at 680. "There is a fundamental difference," the Court observed, "between a State's expressing unequivocally that it waives its immunity and Congress's expressing unequivocally its intention that if the State takes certain action it shall be deemed to have waived that immunity." *Id.* at 680-81. In the former situation, the state has voluntarily consented to suit. "In the latter situation, the most that can be said with certainty is that the State has been put on notice that Congress intends to subject it to suits brought by individuals. That is very far from concluding that *the State* made an altogether voluntary decision to waive its immunity." *Id.* at 681. The fact that "the asserted basis for constructive waiver" was "conduct that the State realistically could choose to abandon," the Court declared, had "no bearing on the voluntariness of the waiver." *Id.* at 684.

To be sure, *College Savings Bank* involved the Eleventh Amendment, not the Due Process Clause of either the Fifth or Fourteenth Amendments, and there are differences between the two contexts. Significantly, however,

the Court's reasoning was not specific to any particular constitutional right. To the contrary, the Court explicitly noted that constructive — i.e., "deemed" — consents were "simply unheard of in the context of *other* constitutionally protected privileges. . . . *Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights*." *Id.* (cleaned up) (latter emphasis added). Underscoring the point, the Court then offered an example involving a very different constitutional right, the Sixth Amendment right to trial by jury:

> [I]magine if Congress amended the securities laws to provide with unmistakable clarity that anyone committing fraud in connection with the buying or selling of securities in interstate commerce would not be entitled to a jury in any federal criminal prosecution of such fraud. Would persons engaging in securities fraud after the adoption of such an amendment be deemed to have "constructively waived" their constitutionally protected rights to trial by jury in criminal cases? After all, the trading of securities is not so vital an activity that any one person's decision to trade cannot be regarded as a voluntary choice. The answer, of course, is no. The classic description of an effective waiver of a constitutional right is the intentional relinquishment or abandonment of a known right or privilege. Courts indulge every reasonable presumption against waiver of fundamental constitutional rights.

Id. at 681-82 (cleaned up). In short, the principles underlying *College Savings Bank* are not specific to the Eleventh Amendment, but rather apply to constitutional rights broadly. And there is no reason to believe that they apply any less forcefully to the constitutional right at issue here — the due process right not to be subjected to suit absent

sufficient "'contacts' with the forum," *Ford Motor Co.*, 141 S. Ct. at 1024 — than they do to the Sixth Amendment jury trial right.

Thus, *College Savings Bank* all but compels the conclusion that personal jurisdiction is lacking here. Yes, Congress "express[ed] unequivocally its intention that if" either the PLO or PA "takes certain action it shall be deemed to have" consented to suit in an American court. 527 U.S. at 680-81. From that fact, however, "the most that can be said with certainty is that" the PLO and PA have "been put on notice that Congress intends to subject [them] to suits" in the United States. *Id.* at 681. "That is very far from concluding that" either *the PLO or the PA* "made an altogether voluntary decision to" submit to such suits. *Id.* Moreover, the fact that "the asserted basis for" deemed consent jurisdiction in the PSJVTA is "conduct that" the PLO and PA "realistically could choose to abandon" is of no moment. *Id.* at 684. That fact simply has "no bearing on the voluntariness of the waiver." *Id.*

That would be enough, but a pair of recent Second Circuit decisions concerning business registration statutes provides additional support for the Court's conclusion that the exercise of jurisdiction over Defendants here would violate due process. *See Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 639-41 (2d Cir. 2016); *Chen v. Dunkin' Brands, Inc.*, 954 F.3d 492, 498-99 (2d Cir. 2020). In *Brown*, the Court rejected the plaintiff's argument that by registering to do business in Connecticut and appointing an agent for service of process as required by Connecticut statute, the defendant had "consented to the jurisdiction of Connecticut courts for all purposes." 814 F.3d at 630. In *Chen*, the Court held the same with respect to registration under New York law. *See* 954 F.3d at 499. Most relevant here, the Court did so in part because giving "broader

effect" to the registration statutes "would implicate Due Process and other constitutional concerns." *Brown*, 814 F.3d at 626; *accord Chen*, 954 F.3d at 498-99. "If mere registration and the accompanying appointment of an in-state agent — without an express consent to general jurisdiction — nonetheless sufficed to confer general jurisdiction by implicit consent," the Court reasoned, "every corporation would be subject to general jurisdiction in every state in which it registered, and *Daimler*'s ruling would be robbed of meaning by a back- door thief." *Brown*, 814 F.3d at 640; *accord Chen*, 954 F.3d at 499.

Admittedly, *Brown* and *Chen* do not speak directly to the constitutionality of the PSJVTA. The plaintiffs in both cases argued that the statutes at issue gave rise to general jurisdiction. Here, by contrast, Plaintiffs and the United States make no such argument, as the PSJVTA's jurisdictional provisions are specific to claims against Defendants under the ATA. Moreover, the statutes at issue in *Brown* and *Chen* were not explicit in deeming registration to be consent. The PSJVTA, of course, is. In point of fact, *Brown* and *Chen* explicitly left open the possibility "that a carefully drawn state statute that *expressly* required consent to general jurisdiction as a condition on a foreign corporation's doing business in the state, at least in cases brought by state residents, might well be constitutional," *Brown*, 814 F.3d at 641 (emphasis added), and ultimately did not reach the question squarely presented here, namely whether a court's assertion of jurisdiction over a foreign defendant, "even when exercised pursuant to [the defendant's] purported 'consent,' [is] limited by the Due Process clause," *id.*[6] But the decisions strongly suggest —

[6] The *Brown* Court noted that Pennsylvania's registration statute "more plainly advise[d] the registrant that enrolling in the state as a foreign corporation and transacting business will vest the local courts

even if they do not hold — that "deemed consent" jurisdiction is limited by the Due Process Clause and that allowing Congress by legislative fiat to simply "deem" conduct that would otherwise not support personal jurisdiction in the United States to be "consent," as it tried to do here, would "rob[]" the case law conditioning personal jurisdiction on sufficient contacts with the forum "of meaning by a backdoor thief." *Id.* at 640.

Notably, in arguing that the PSJVTA passes constitutional muster, Plaintiffs and the United States do not dispute that a statute "deeming" certain conduct to be "consent" to personal jurisdiction must be consistent with due process. *See* U.S. Mem. 7-9; Pls.' Mem. 13. In their view, however, to comply with due process, a "deemed consent"

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with general jurisdiction over the corporation," 814 F.3d at 640 (citing 42 Pa. Cons. Stat. § 5301(a)(2)(i)-(ii)), and that the Third Circuit had held that the statute was consistent with due process, *see id.* (citing *Bane v. Netlink, Inc.*, 925 F.2d 637, 640 (3d Cir. 1991)). (The Pennsylvania statute is apparently the only registration statute in the country that is explicit in deeming registration to be consent. *See Asbestos Prods. Liab. Litig.*, 384 F. Supp. 3d at 539.) Notably, however, the Pennsylvania Supreme Court recently held that, following *Daimler*, the statutory scheme could *not* be squared with the Due Process Clause. *See Mallory v. Norfolk S. Rwy. Co.*, — A.3d —, 2021 WL 6067172, at *14-21 (Pa. Dec. 22, 2021). The Court acknowledged that the state's business registration statute put foreign corporations on notice that registration would be deemed consent, but concluded that such "notice . . . does not render the consent voluntary." *Id.* at *19. (In so holding, the Court rested in part on the "unconstitutional conditions doctrine." *See id.* at *20. Defendants here advert to that doctrine, but only in a footnote. *See* Defs.' Mem. 14 n.3. Accordingly, the Court deems any argument with respect to the doctrine to have been abandoned. *See, e.g.*, *Fieldcamp v. City of New York*, 242 F. Supp. 2d 388, 391 (S.D.N.Y. 2003) ("[T]he failure to provide argument on a point at issue constitutes abandonment of the issue."); *accord Wilmington Tr., N.A. v. 115 Owner LLC*, No. 20-CV-2157 (JMF), 2021 WL 5086368, at *1 n.1 (S.D.N.Y. Nov. 2, 2021).)

statute need only give defendants "fair warning about what conduct will subject them to personal jurisdiction with respect to a particular class of claims, and a reasonable period to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." U.S. Mem. 9 (internal quotation marks omitted); *see* Pls.' Mem. 13.[7] If a statute does so, they argue, a defendant who thereafter engages in the predicate conduct has "knowingly" and "voluntarily" consented to jurisdiction and the exercise of jurisdiction over such a defendant comports with due process. As applied here, Plaintiffs and the United States argue that Defendants knowingly and voluntarily "consented" because they "knew" the activities that would "be deemed consent" to jurisdiction and were given "the opportunity to 'voluntarily' choose whether or not to continue such activities and thereby consent to jurisdiction in the courts of the United States." U.S. Mem. 10; *see* Pls.' Supp. Mem. 5. In short, in their view, nothing more than fair notice and an opportunity to conform is required for "deemed consent" to satisfy due process.

The Court cannot agree. Separate and apart from the fact that the argument of Plaintiffs and the United States is the very one rejected by the Supreme Court in *College*

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[7] Plaintiffs add that, to pass muster under the Due Process Clause, a deemed consent statute also has to serve a "legitimate governmental objective" so as to "avoid[] the arbitrary or irrational exercise of power." Pls.' Mem. 13-16 (citing *Sacramento v. Lewis*, 523 U.S. 833, 846 (1998)). True enough: "The touchstone of due process is protection of the individual against arbitrary action of government." *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974). But this additional prong adds little to Plaintiffs' proposed test (and is easily satisfied here in any event), as "only the most egregious official conduct can be said to be arbitrary in the constitutional sense and therefore unconstitutional." *Tenenbaum v. Williams*, 193 F.3d 581, 600 (2d Cir. 1999) (cleaned up). Thus, the Court need not and does not address it further.

Savings Bank, to accept it would effectively mean that there are *no* due process limitations on the exercise of personal jurisdiction. Congress or a state legislature could provide for jurisdiction over *any* defendant for *any* conduct so long as the conduct post-dated enactment of the law at issue. That is, Congress or the legislature could simply "deem" a substantive violation of the law at issue to be "consent" and, on that basis, subject any defendant who later committed a violation to jurisdiction without regard for its "contacts, ties, or relations" with the forum. *Int'l Shoe*, 326 U.S. at 319. Congress, for example, could simply "deem" a substantive violation of the ATA to mean that a defendant had "consented" to jurisdiction. Or, perhaps more revealingly, a state legislature could pass a statute declaring that any foreign corporation that distributed vehicles to in-state dealerships would be "deemed" to have consented to personal jurisdiction in that state — circumventing the Supreme Court's holding in *Daimler*. 571 U.S. at 136; *cf. Coll. Savings Bank*, 527 U.S. at 683 ("Recognizing a congressional power to exact constructive waivers of sovereign immunity through the exercise of Article I powers would also, as a practical matter, permit Congress to circumvent the antiabrogation holding of *Seminole Tribe* [*of Florida v. Florida*, 517 U.S. 44 (1996)]."). In short, to hold that fair notice and an opportunity to conform one's behavior are the only requirements for "deemed consent" jurisdiction to comport with due process would be to hold that personal jurisdiction is limited only by reach of the legislative imagination — which is to say, that there are no constitutional limits at all.

Congress should not be permitted to circumvent fundamental constitutional rights through such sleight of hand. *See Frost & Frost Trucking Co. v. R.R. Comm'n*, 271 U.S. 583, 593 (1926) ("[C]onstitutional guarantees, so carefully safeguarded against direct assault, [should not

be] open to destruction by the indirect but no less effective process of requiring a surrender which, though in form voluntary, in fact lacks none of the elements of compulsion."). Indeed, to give such power to a legislature would be to violate the longstanding proposition that "it was not left to the legislative power to enact any process which might be devised" and that due process "cannot be so construed as to leave Congress free to make any process 'due process of law,' by its mere will." *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 276 (1856); *see Quill Corp. v. N. Dakota*, 504 U.S. 298, 305 (1992) (noting that Congress does not "have the power to authorize violations of the Due Process Clause"), *overruled on other grounds by S. Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018). More directly on point, it would offend the fundamental principle that a statute "cannot create personal jurisdiction where the Constitution forbids it." *In re Terrorist Attacks on Sept. 11, 2001*, 538 F.3d 71, 80 (2d Cir. 2008) (internal quotation marks omitted), *abrogated on other grounds by Samantar v. Yousuf*, 560 U.S. 305 (2010); *see Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 95 (D.C. Cir. 2002) ("[I]t is well-settled that a statute cannot grant personal jurisdiction where the Constitution forbids it." (internal quotation marks omitted)). Or as the Second Circuit put it in *Waldman I* (when rejecting the plaintiffs' argument that the PLO and the PA had consented to personal jurisdiction through their appointment of an agent for service of process in Washington): A *statute* cannot itself "answer the *constitutional* question of whether due process is satisfied." 835 F.3d at 343 (emphasis added).

Moreover, as the Supreme Court's reference to the jury trial right in *College Savings Bank* makes plain, to accept the argument advanced by Plaintiffs and the United States could (and likely would) have staggering

implications beyond the realm of personal jurisdiction. After all, the concepts of consent and waiver have legal significance with respect to a host of individual constitutional rights. Law enforcement may conduct a warrantless search on consent. *See, e.g.*, *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). A defendant cannot be prosecuted for a felony absent an indictment unless he waives the right to be indicted by a grant jury. *See, e.g.*, *Matthews v. United States*, 622 F.3d 99, 101 (2d Cir. 2010). Parties entitled to a civil jury trial under the Seventh Amendment can consent to a bench trial. *See, e.g.*, *Texas v. Penguin Grp. (USA) Inc.*, No. 11-MD-2293 (DLC), 2013 WL 1759567, at *6-7 (S.D.N.Y. Apr. 24, 2013). Parties in a federal civil case are entitled to litigate their claims before an Article III judicial officer absent consent to proceed by other means. *See, e.g.*, *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 674-78 (2015). And so on. To accept that fair notice and an opportunity to alter conduct are all that is required for a legislature to "deem" conduct to be "consent" is to accept that the rights underlying these doctrines are subject to mere legislative whim. Congress could simply say that a person who is arrested on probable cause with a cellphone is "deemed" to have "consented" to a search of the phone, *cf. Riley v. California*, 573 U.S. 373, 386 (2014) (holding that law enforcement officers "must generally secure a warrant" before searching a cellphone seized incident to an arrest); that by merely filing or answering a lawsuit in federal court, a party is "deemed" to have "consented" to a bench trial or to have "consented" to the jurisdiction of a Magistrate Judge; and so on. Constitutional rights are not so fickle.

Conspicuously, Plaintiffs and the United States do not cite any case suggesting, let alone holding, that a legislature may simply "deem" conduct unrelated to actual consent to be consent, in the personal jurisdiction context or

otherwise.[8] The closest they come is the Supreme Court's decision in *Bauxites*, but *Bauxites* does not bear the weight they put on it. In *Bauxites*, the district court found that the petitioners had violated various discovery orders relating the question of personal jurisdiction. Exercising its authority under Rule 37(b)(2)(A) of the Federal Rules of Civil Procedure, the district court sanctioned the petitioners by deeming the facts that formed the basis for personal jurisdiction to be established. On appeal, the petitioners argued that this violated due process because a court "may not create" personal jurisdiction "by judicial fiat." 456 U.S. at 695. The Supreme Court rejected the argument, holding that application of Rule 37(b)(2) supported the presumption, established in *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 351 (1909), "that the refusal to produce evidence material to the administration of

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[8] Plaintiffs and the United States both rely on *Wellness International Network* and *Roell v. Withrow*, 538 U.S. 580 (2003), *see* U.S. Mem. 13-14; Pls.' Mem. 14, but neither case provides support for their cause. In each case, the Court blessed the concept of implied consent (in *Wellness International Network*, for consent to the jurisdiction of a bankruptcy judge and in *Roell*, for consent to the jurisdiction of a magistrate judge) and stressed that "consent — whether express or implied — must still be knowing and voluntary." *Wellness Int'l Network*, 575 U.S. at 685. But neither case identified a standard for determining what conduct constitutes implied consent, let alone addressed whether or when a legislature can simply "deem" conduct to be consent. If anything, the decisions support the proposition that conduct constitutes consent only where the party's actual acquiescence can be inferred, as they held that a party's consent to a non-Article III adjudicator turns on whether it "voluntarily appeared" before that adjudicator. *Id.* at 685; *Roell*, 538 U.S. at 590. "Appearance" is defined, in turn, as "the overt act by which a party *submits* himself to the court's jurisdiction. An appearance may be expressly made . . . or it may be implied from some act done *with the intention of appearing and submitting* to the court's jurisdiction." *Roell*, 538 U.S. at 586 n.3 (emphases added).

due process was but an admission of the want of merit in the asserted defense." 456 U.S. at 705-06. "The sanction," the Court concluded, "took as established the facts — contacts with Pennsylvania — that [the respondent] was seeking to establish through discovery. That a particular legal consequence — personal jurisdiction of the court over the defendants — follows from this, does not in any way affect the appropriateness of the sanction." *Id.* at 709.

Bauxites, therefore, stands for the straightforward proposition that where a defendant voluntarily submits to the jurisdiction of a court for purposes of disputing jurisdiction and then violates orders with respect to jurisdictional discovery, it does not offend due process to deem the facts supporting personal jurisdiction to be established. Critically, however, the petitioners' conduct was related to the litigation itself — in which petitioners had voluntarily appeared (albeit for the limited purpose of disputing jurisdiction). *See id.* at 706 ("A defendant is always free to ignore the judicial proceedings, risk a default judgment, and then challenge that judgment on jurisdictional grounds in a collateral proceeding. By submitting to the jurisdiction of the court for the limited purpose of challenging jurisdiction, the defendant agrees to abide by that court's determination on the issue of jurisdiction." (citation omitted)). Moreover, the petitioners were not deemed to have consented to the court's jurisdiction through their conduct; indeed, the Court made clear that such a direct sanction would indeed have violated due process. *See* 456 U.S. at 706 (citing *Hovey v. Elliott*, 167 U.S. 409 (1897)).

Instead, the petitioners' conduct in *Bauxites* was sufficient to support a presumption of *fact* — namely, that they had contacts with Pennsylvania — that, in turn, had the *legal* consequence of establishing personal jurisdiction. In

other words, the Court blessed a legal fiction, but only because the fiction was not so far detached from fact. *See id.* at 701 (quoting Justice Holmes's opinion in *McDonald v. Mabee*, 243 U.S. 90, 91 (1917), for the proposition that "'great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact'"). Additionally, the Court took pains to state that its holding "does not alter the requirement that there be 'minimum contacts' between the nonresident defendant and the forum Rather, our holding deals with how the facts needed to show those 'minimum contacts' can be established when a defendant fails to comply with court-ordered discovery." *Id.* at 703 n.10. If anything, therefore, *Bauxites* supports the conclusion that a court may not exercise personal jurisdiction over a defendant, based on purported consent or otherwise, unless the defendant has sufficient "contacts, ties, or relations" with the forum "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe*, 326 U.S. at 316, 319 (internal quotation marks omitted).[9]

Separately, Plaintiffs and the United States fall back on the deference that courts owe to the political branches with respect to matters of foreign affairs and national security. *See* U.S. Mem. 10-13, 19; Pls.' Mem. 14-16. But their argument is unavailing for several reasons. First,

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[9] To be sure, *Bauxites* does state that "[t]he actions of the defendant may amount to a legal submission to the jurisdiction of the court, *whether voluntary or not*." 456 U.S. at 704-05 (emphasis added). Read in context, however, the phrase "or not" plainly refers to situations other than consent in which a defendant's actions nevertheless legally amount to submission to the jurisdiction of a court. To read it otherwise would violate the fundamental proposition — endorsed, of course, by Plaintiffs and the United States themselves — that consent must be knowing and voluntary in order to be valid.

although courts should grant deference to the political branches when it comes to such matters in light of their constitutionally derived powers and expertise, "concerns of national security and foreign relations do not warrant abdication of the judicial role. . . . [T]he Government's authority and expertise in these matters do not automatically trump the Court's own obligation to secure the protection that the Constitution grants to individuals." *Holder v. Humanitarian L. Project*, 561 U.S. 1, 34 (2010) (internal quotation marks omitted); *see Open Soc'y Just. Initiative v. Dep't of Def.*, No. 20-CV-5096 (JMF), 2021 WL 3038528, at *7 (S.D.N.Y. July 15, 2021) ("Judicial deference in the area of national security is certainly warranted. But deference is not equivalent to acquiescence." (internal quotation marks omitted)). Indeed, the courts' "respect for Congress's policy judgments" cannot "disavow restraints on federal power that the Constitution carefully constructed" because courts "enforce the limits on federal power by striking down acts of Congress that transgress those limits." *NFIB v. Sebelius*, 567 U.S. 519, 538 (2012). As Justice Souter once put it: "Even Justice Sutherland's reading of the National Government's 'inherent' foreign affairs power . . . contained the caveat that the power, 'like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.'" *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 417 n.9 (2003) (quoting *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936)).

The constitutional limits on the political branches' exercise of the treaty power underscore the point. The Constitution explicitly grants the President the "Power, by and with the Advice and Consent of the Senate to make Treaties." U.S. Const. art. II, § 2. And treaties, by definition, implicate foreign relations. Yet, the law is pellucid that "the treaty power cannot override constitutional

limitations respecting individual rights." *Oneida Indian Nation of N.Y. v. State of N.Y.*, 860 F.2d 1145, 1163 (2d Cir. 1988) (citing *Reid v. Covert*, 354 U.S. 1, 16-17 (1957) (plurality opinion)); *see Am. Ins. Ass'n*, 539 U.S. at 416 & n.9 ("[Treaties are s]ubject . . . to the Constitution's guarantees of individual rights."); *In re Premises Located at 840 140th Ave. NE, Bellevue, Wash.*, 634 F.3d 557, 571 (9th Cir. 2011) ("Treaties, like statutes, are subject to constitutional limits, including the separation of powers and the guarantee of due process."). If the political branches cannot use the treaty power — despite its explicit constitutional provenance and the fact that it is wielded, by definition, in the realm of foreign affairs — to override an individual's due process rights, they surely cannot do so here either.

Second, and in any event, Plaintiffs and the United States do not cite, and the Court has not found, any authority for the proposition that the test for personal jurisdiction — which, again, is an individual constitutional right — varies by context or by the nature of a plaintiff's claim. *See Livnat*, 851 F.3d at 56 ("[A]lthough congressional interests may be relevant to whether personal jurisdiction comports with due-process standards, they cannot change the standards themselves." (citation omitted)); *see also Waldman I*, 835 F.3d at 329-30 & n.10 (holding that personal jurisdiction standards are the same under the Fifth and Fourteenth Amendments, citing cases against foreign defendants and involving terrorism, and specifically rejecting the argument that there is "'universal' — or limitless — personal jurisdiction in terrorism cases"). And finally, such an "expansive view" of Congress's authority to create personal jurisdiction where it otherwise would not exist, even if limited to the context of foreign affairs, would pay insufficient "heed to the risks to international comity." *Daimler*, 571 U.S. at 141. "Considerations of international

rapport thus reinforce" the Court's "determination that subjecting" foreign parties to jurisdiction based on conduct that has no direct contact with the United States, let alone nexus with litigation in the United States, "would not accord with the 'fair play and substantial justice' due process demands." *Id.* (quoting *Int'l Shoe*, 326 U.S. at 316).

In the final analysis, the Court cannot acquiesce in Congress's legislative sleight of hand and exercise jurisdiction over Defendants here pursuant to the PSVJTA. A defendant's knowing and voluntary consent is a valid basis to subject it to the jurisdiction of a court, but Congress cannot simply declare anything it wants to be consent. To hold otherwise would let fiction get the better of fact and make a mockery of the Due Process Clause. *See McDonald*, 243 U.S. at 91 (Holmes, J.) ("[G]reat caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact"); *M3 USA Corp. v. Qamoum*, No. CV 20-2903 (RDM), 2021 WL 2324753, at *12 (D.D.C. June 7, 2021) ("[T]he Court must avoid treating 'consent' as simply a 'legal fiction' devoid of content or engaging in 'circular' reasoning that premises 'consent' on the presumption that defendants know the law and then defines the law so that anyone engaging in the defined conduct is deemed to have consented to personal jurisdiction."). That is not to say that "deemed consent" jurisdiction in all its forms would necessarily be unconstitutional.[10]

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[10] Nor is it to say that Defendants are correct in arguing that "'deemed' consent to jurisdiction cannot be squared with Due Process unless there is *reciprocity*," which they define as "an express or implied exchange by which a defendant impliedly agrees to jurisdiction in return for a benefit conferred by the forum," Defs.' Mem. 1 (emphasis added). Although there are cases holding that a defendant's receipt of a benefit can be deemed to be consent, *see, e.g.*, *Hess v. Pawloski*, 274 U.S. 352, 356-57 (1927); *cf. J. McIntyre Mach.*, 564 U.S. at 881 (plurality opinion) (describing "circumstances, or a course of

If the underlying conduct were a closer proxy for actual consent, perhaps a statute deeming the conduct to be consent would pass muster. The Court leaves that question for another day. For today's purposes, it suffices to say that the provisions of the PSVJTA at issue push the concept of consent well beyond its breaking point and that the predicate conduct alleged here is not "of such a nature as to justify the fiction" of consent. *Int'l Shoe*, 326 U.S. at 318. It follows that exercising jurisdiction under the facts of this case does not comport with due process and Defendants' motion must be granted.

CONCLUSION

As in *Waldman I*, the killing of Ari Fuld was "unquestionably horrific" and Plaintiffs' efforts to seek justice on his and their own behalf are morally compelling. 835 F.3d at 344. "But," as the Second Circuit emphasized in its decision, "the federal courts cannot exercise jurisdiction in a civil case beyond the limits prescribed by the due process clause of the Constitution, no matter how horrendous the underlying attacks or morally compelling the plaintiffs' claims." *Id.* at 344. For the reasons discussed above, the Court concludes that exercising jurisdiction here would indeed go beyond the limits prescribed by the Due Process Clause. Accordingly, and for the reasons discussed above,

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conduct, from which it is proper to infer an intention to benefit from and thus an intention to submit to the laws of the forum State"); *Coll. Savings Bank*, 527 U.S. at 686 ("Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and that acceptance of the funds entails an agreement to the actions."), Defendants do not cite, and the Court has not found, any case holding that such receipt of a benefit is a necessary condition. *See also, e.g.*, *Sun Forest Corp. v. Shvili*, 152 F. Supp. 2d 367, 380 (S.D.N.Y. 2001) (Lynch, J.) ("[V]oluntary consent to jurisdiction need not be supported by consideration.").

the Court concludes that Defendants' motion to dismiss for lack of personal jurisdiction must be and is GRANTED. As a result, the Court need not and does not reach Defendants' other arguments for dismissal.

The Clerk of Court is directed to terminate ECF No. 24, to close this case, and to enter judgment for Defendants.

SO ORDERED.

Dated: January 6, 2022
New York, New York

JESSE M. FURMAN
United States District Judge

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Case Argued: April 12, 2016
Case Decided: August 31, 2016
Motion Filed: October 8, 2018
Motion Decided: June 3, 2019

Docket Nos. 15-3135-cv (Lead); 15-3151-cv (XAP)

EVA WALDMAN, REVITAL BAUER, INDIVIDUALLY AND AS NATURAL GUARDIAN OF PLAINTIFFS YEHONATHON BAUER, BINYAMIN BAUER, DANIEL BAUER AND YEHUDA BAUER, SHAUL MANDELKORN, NURIT MANDELKORN, OZ JOSEPH GUETTA, MINOR, BY HIS NEXT FRIEND AND GUARDIAN VARDA GUETTA, VARDA GUETTA, INDIVIDUALLY AND AS NATURAL GUARDIAN OF PLAINTIFF OZ JOSEPH GUETTA, NORMAN GRITZ, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF DAVID GRITZ, MARK I. SOKOLOW, INDIVIDUALLY AND AS A NATURAL GUARDIAN OF PLAINTIFF JAMIE A. SOKOLOW, RENA M. SOKOLOW, INDIVIDUALLY AND AS A NATURAL GUARDIAN OF PLAINTIFF JAIME A. SOKOLOW, JAMIE A. SOKOLOW, MINOR, BY HER NEXT FRIENDS AND GUARDIAN MARK I. SOKOLOW AND RENA M. SOKOLOW, LAUREN M. SOKOLOW, ELANA R. SOKOLOW, SHAYNA EILEEN GOULD, RONALD ALLAN GOULD, ELISE JANET GOULD, JESSICA RINE, SHMUEL WALDMAN, HENNA NOVACK WALDMAN, MORRIS WALDMAN, ALAN J. BAUER, INDIVIDUALLY AND AS NATURAL GUARDIAN OF PLAINTIFFS YEHONATHON BAUER, BINYAMIN BAUER, DANIEL BAUER AND YEHUDA BAUER, YEHONATHON BAUER, MINOR, BY HIS NEXT FRIEND AND GUARDIANS DR. ALAN J. BAUER AND REVITAL BAUER, BINYAMIN BAUER, MINOR, BY HIS NEXT

FRIEND AND GUARDIANS DR. ALAN J. BAUER AND REVITAL BAUER, DANIEL BAUER, MINOR, BY HIS NEXT FRIEND AND GUARDIANS DR. ALAN J. BAUER AND REVITAL BAUER, YEHUDA BAUER, MINOR, BY HIS NEXT FRIEND AND GUARDIANS DR. ALAN J. BAUER AND REVITAL BAUER, RABBI LEONARD MANDELKORN, KATHERINE BAKER, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF BENJAMIN BLUTSTEIN, REBEKAH BLUTSTEIN, RICHARD BLUTSTEIN, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF BENJAMIN BLUTSTEIN, LARRY CARTER, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF DIANE ("DINA") CARTER, SHAUN COFFEL, DIANNE COULTER MILLER, ROBERT L COULTER, JR., ROBERT L. COULTER, SR., INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JANIS RUTH COULTER, CHANA BRACHA GOLDBERG, MINOR, BY HER NEXT FRIEND AND GUARDIAN KAREN GOLDBERG, ELIEZER SIMCHA GOLDBERG, MINOR, BY HER NEXT FRIEND AND GUARDIAN KAREN GOLDBERG, ESTHER ZAHAVA GOLDBERG, MINOR, BY HER NEXT FRIEND AND GUARDIAN KAREN GOLDBERG, KAREN GOLDBERG, INDIVIDUALLY, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF STUART SCOTT GOLDBERG/NATURAL GUARDIAN OF PLAINTIFFS CHANA BRACHA GOLDBERG, ESTHER ZAHAVA GOLDBERG, YITZHAK SHALOM GOLDBERG, SHOSHANA MALKA GOLDBERG, ELIEZER SIMCHA GOLDBERG, YAAKOV MOSHE GOLDBERG, TZVI YEHOSHUA GOLDBERG, SHOSHANA MALKA GOLDBERG, MINOR, BY HER NEXT FRIEND AND GUARDIAN KAREN GOLDBERG, TZVI YEHOSHUA GOLDBERG, MINOR, BY HER NEXT FRIEND AND GUARDIAN KAREN GOLDBERG, YAAKOV MOSHE GOLDBERG, MINOR, BY HER NEXT FRIEND AND GUARDIAN KAREN GOLDBERG, YITZHAK SHALOM GOLDBERG,

MINOR, BY HER NEXT FRIEND AND GUARDIAN KAREN GOLDBERG, NEVENKA GRITZ, SOLE HEIR OF NORMAN GRITZ, DECEASED,

Plaintiffs – Appellees – Cross-Appellants,

—v.—

PALESTINE LIBERATION ORGANIZATION, PALESTINIAN AUTHORITY, AKA PALESTINIAN INTERIM SELF-GOVERNMENT AUTHORITY AND OR PALESTINIAN COUNCIL AND OR PALESTINIAN NATIONAL AUTHORITY,

Defendants – Appellants – Cross-Appellees,

YASSER ARAFAT, MARWIN BIN KHATIB BARGHOUTI, AHMED TALEB MUSTAPHA BARGHOUTI, AKA AL-FARANSI, NASSER MAHMOUD AHMED AWEIS, MAJID AL-MASRI, AKA ABU MOJAHED, MAHMOUD AL-TITI, MOHAMMED ABDEL RAHMAN SALAM MASALAH, AKA ABU SATKHAH, FARAS SADAK MOHAMMED GHANEM, AKA HITAWI, MOHAMMED SAMI IBRAHIM ABDULLAH, ESTATE OF SAID RAMADAN, DECEASED, ABDEL KARIM RATAB YUNIS AWEIS, NASSER JAMAL MOUSA SHAWISH, TOUFIK TIRAWI, HUSSEIN AL-SHAYKH, SANA'A MUHAMMED SHEHADEH, KAIRA SAID ALI SADI, ESTATE OF MOHAMMED HASHAIKA, DECEASED, MUNZAR MAHMOUD KHALIL NOOR, ESTATE OF WAFA IDRIS, DECEASED, ESTATE OF MAZAN FARITACH, DECEASED, ESTATE OF MUHANAD ABU HALAWA, DECEASED, JOHN DOES, 1-99, HASSAN ABDEL RAHMAN,

Defendants.

Before: LEVAL AND DRONEY, *Circuit Judges*, AND KOELTL, *District Judge*.[*]

On October 8, 2018, shortly after Congress enacted the Anti-Terrorism Clarification Act ("ATCA"), the plaintiffs-appellees-cross-appellants ("plaintiffs") moved this Court to recall the mandate issued after this Court's decision holding that the federal courts lacked personal jurisdiction over the Palestine Liberation Organization and the Palestinian Authority – the defendants-appellants-cross-appellees ("defendants") – with respect to the plaintiffs' claims. The plaintiffs contend that the newly enacted ATCA provides federal courts with jurisdiction over the defendants in this case and thus the mandate should be recalled. The extraordinary remedy of recalling a mandate is not warranted in this case, and the plaintiffs' motion is accordingly **DENIED**.

KENT A. YALOWITZ AND DAVID C. RUSSELL (Baruch Weiss, Dirk C. Phillips, John Robinson, Avishai D. Don, *on the brief*), Arnold & Porter Kaye Scholer LLP, *for Plaintiffs-Appellees-Cross-Appellants.*

GASSAN A. BALOUL (Mitchell R. Berger, Alexandra E. Chopin, Aaron W. Knights, *on the brief*), Squire Patton Boggs (US) LLP, *for Defendants-Appellants-Cross-Appellees.*

PER CURIAM:

In this case, eleven American families sued the defendants, the Palestine Liberation Organization ("PLO") and the Palestinian Authority ("PA"), under the Anti-Terrorism Act ("ATA"), 18 U.S.C. § 2333(a), for various terror

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[*] Judge John G. Koeltl, of the United States District Court for the Southern District of New York, sitting by designation.

attacks in Israel that killed or wounded the plaintiffs or their family members. After a seven-week trial, the jury awarded the plaintiffs damages which, after trebling, amounted to $655.5 million. On appeal, this Court held that the federal courts lacked personal jurisdiction over the defendants with respect to the plaintiffs' claims. This Court vacated the judgment of the district court and remanded the case with instructions to dismiss the action. The mandate issued on November 28, 2016, and the Supreme Court denied the plaintiffs' petition for a writ of certiorari on April 2, 2018. The plaintiffs have now moved to recall the mandate based on the recently enacted Anti-Terrorism Clarification Act ("ATCA").

The ATCA became law on October 3, 2018. Pub. L. No. 115-253, 132 Stat 3183 (2018). Section 4 of the ATCA, which added a subsection (e) to 18 U.S.C. § 2334, specifies activities by which certain parties shall be deemed to have consented to personal jurisdiction. The provision states that "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," a defendant shall be deemed to have consented to personal jurisdiction in such action if the defendant either (a) accepts any of three specified forms of assistance after the date that is 120 days after Section 4 of the ATCA was enacted or (b) is "benefiting from a waiver or suspension of section 1003 of the [ATA]" and, after the date that is 120 days after Section 4 of the ATCA was enacted, establishes or continues to maintain "any office, headquarters, premises, or other facilities or establishments within the jurisdiction of the United States."[1] 18 U.S.C. § 2334(e)(1).

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[1] Section 1003 of the ATA provides that:

> It shall be unlawful, if the purpose be to further the interests of the Palestine Liberation Organization or any of its constituent groups, any successor to any of those, or any agents thereof . . .

On October 8, 2018, the plaintiffs filed the present motion to recall the mandate issued in this case. They argue that Section 4 of the ATCA provides the federal courts with jurisdiction over the defendants with respect to the plaintiffs' claims. The defendants counter that the plaintiffs have failed to show circumstances that warrant the extraordinary remedy of recalling the mandate and that, in any event, Section 4 of the ATCA does not apply retroactively to closed cases.

I.

The federal courts of appeals "possess an inherent power to recall [a] mandate, subject to review for abuse of discretion." *Taylor v. United States*, 822 F.3d 84, 90 (2d

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(1) to receive anything of value except informational material from the PLO or any of its constituent groups, any successor thereto, or any agents thereof;

(2) to expend funds from the PLO or any of its constituent groups, any successor thereto, or any agents thereof; or

(3) notwithstanding any provision of law to the contrary, to establish or maintain an office, headquarters, premises, or other facilities or establishments within the jurisdiction of the United States at the behest or direction of, or with funds provided by the Palestine Liberation Organization or any of its constituent groups, any successor to any of those, or any agents thereof.

22 U.S.C. § 5202. The President of the United States may waive this provision

if the President determines and certifies in writing to the Speaker of the House of Representatives, the President pro tempore of the Senate, and the appropriate congressional committees that the Palestinians have not, after the date of enactment of this Act [either (1) taken certain steps at the U.N. or (2) taken certain actions vis-à-vis the International Criminal Court].

Klieman v. Palestinian Auth., --- F.3d ----, 2019 WL 2093018, at *12 (D.C. Cir. May 14, 2019) (alteration and emphasis in Klieman) (quoting Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242, 2780 (2015)).

Cir. 2016) (quotation marks omitted, alteration in original). Recalling a mandate is an extraordinary remedy to be used "sparing[ly]." *Calderon v. Thompson*, 523 U.S. 538, 550 (1998); *Taylor*, 822 F.3d at 90. Courts are reluctant to recall a mandate because of "the need to preserve finality in judicial proceedings." *Sargent v. Columbia Forest Prod., Inc.*, 75 F.3d 86, 89 (2d Cir. 1996). Although the passage of a new law might warrant recalling a mandate in some circumstances, this is not such a case.

II.

A.

The plaintiffs have not shown that either factual predicate of Section 4 of the ATCA has been satisfied. As to the first factual predicate, acceptance of a qualifying form of United States assistance, the plaintiffs state only that the defendants have accepted qualifying assistance in the past; they do not contend that the defendants currently do so. Meanwhile, in *Klieman v. Palestinian Authority*, which was decided on May 14, 2019, the Court of Appeals for the District of Columbia Circuit accepted the representation the Department of Justice made in an amicus curiae brief that neither the PLO nor the PA accept United States assistance. --- F.3d ----, 2019 WL 2093018, at *10 (D.C. Cir. May 14, 2019). The papers the plaintiffs filed in connection with this motion do not provide any reason to doubt the Department of Justice's representation or the *Klieman* court's adoption of that representation.

The plaintiffs also fail to show that, in accordance with Section 4's second factual predicate, the defendants benefit from a waiver or suspension of Section 1003 of the ATA and have established or continued to maintain an office or other facility "within the jurisdiction of the United States." Both conditions are necessary under Section 4's second factual predicate. *Klieman*, 2019 WL 2093018 at *10.

As to the first condition, the plaintiffs have not established that the defendants benefit from an express waiver or suspension under Section 1003 of the ATA. The plaintiffs contend that an express waiver is not required by Section 4 of the ATCA, and that the President impliedly suspended Section 1003 of the ATA with respect to the defendants by permitting the defendants to engage in conduct allowed only if Section 1003 were suspended. But the *Klieman* court persuasively rejected a similar argument, reasoning that allowing implied waivers to qualify under Section 4 of the ATCA would "neglect the actual language of the legal authorization to issue waivers under [ATA] § 1003, . . . which creates legal consequences when the President 'certifies in writing' that a waiver is to be issued." 2019 WL 2093018 at *12. The plaintiffs in this case have not put forth anything that could qualify as, or substitute for, an express waiver or suspension under Section 1003 of the ATA.

Moreover, the plaintiffs in this case have not shown that the defendants have established or continued to maintain an office or other facility within the jurisdiction of the United States. Although the PLO maintains its United Nations Observer Mission in New York, the prohibitions of Section 1003 of the ATA do not apply to that office. *Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro*, 937 F.2d 44, 46 (2d Cir. 1991); *see United States v. Palestine Liberation Org.*, 695 F. Supp. 1456, 1465 (S.D.N.Y. 1988) (finding the ATA inapplicable to the PLO Observer Mission). The Observer Mission is not considered to be within the jurisdiction of the United States. *See Klinghoffer*, 937 F.2d at 51 ("[T]he PLO's participation in the UN is dependent on the legal fiction that the UN Headquarters is not really United States territory at all, but is rather neutral ground over which the United States has ceded control.").

The plaintiffs point out that, according to *Klinghoffer*, "activities not conducted in furtherance of the PLO's observer status may properly be considered as a basis of jurisdiction." *Id.* at 51. But this statement was made in reference to determining whether such activities conferred personal jurisdiction over the PLO under § 301 of the New York Civil Practice Laws and Rules. Nothing in *Klinghoffer* suggests that the PLO's engaging in activities unrelated to its observer status transforms the PLO's Observer Mission into an office or other facility for the PLO "within the jurisdiction of the United States."

In sum, the plaintiffs have provided no basis to conclude that a factual predicate of Section 4 of the ATCA has been met in this case.

B.

This Court's interest in finality also weighs against recalling the mandate. When its factual predicates are met, Section 4 provides jurisdiction over a defendant "regardless of the date of the occurrence of the act of international terrorism upon which [the relevant] civil action was filed," 18 U.S.C. § 2334(e)(1), providing that the defendant subsequently commits certain acts. But irrespective of whether this language suggests that Section 4 applies retroactively to pending cases, such as the appeal in *Klieman*, it does not suggest that courts should reopen cases that are no longer pending. Legislation applies prospectively unless Congress explicitly provides for retroactive application. *Vartelas v. Holder*, 566 U.S. 257, 265–66 (2012); *see Landgraf v. USI Film Prods.*, 511 U.S. 244, 272–73 (1994). And it is well-established that retroactive laws generally do not affect valid, final judgments. *See Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1323 (2016) ("Congress . . . may not 'retroactively comman[d] the federal courts to reopen final judgments.'" (quoting *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995) (alteration in original))). The

mandate in this case was issued two and a half years ago, and the Supreme Court denied the plaintiffs' petition for a writ of certiorari more than six months before the plaintiffs filed their motion to recall the mandate. The ATCA does not provide explicitly or implicitly that closed cases can be reopened. Recalling the mandate now would offend "the need to preserve finality in judicial proceedings." *Taylor*, 822 F.3d at 90 (quotation marks omitted).[2]

CONCLUSION

This case does not warrant invoking the extraordinary remedy of recalling a mandate issued two and a half years ago. The Court has considered all the arguments of the parties. To the extent not specifically addressed, they are either moot or without merit. For the reasons explained above, the plaintiffs' motion to recall the mandate is **DENIED**.

[2] The plaintiffs in this case have filed a new complaint in the Southern District of New York. *Sokolow v. Palestine Liberation Organization*, No. 18cv12213 (S.D.N.Y.). To the extent that there are any developments in the activities of the PA or the PLO that may subject them to personal jurisdiction under the ATCA, they can be raised in that case.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Case Argued: April 12, 2016
Case Decided: August 31, 2016
Motion Filed: October 8, 2018
Motion Decided: June 3, 2019

Docket Nos. 15-3135-cv (Lead); 15-3151-cv (XAP)

EVA WALDMAN, REVITAL BAUER, INDIVIDUALLY AND AS NATURAL GUARDIAN OF PLAINTIFFS YEHONATHON BAUER, BINYAMIN BAUER, DANIEL BAUER AND YEHUDA BAUER, SHAUL MANDELKORN, NURIT MANDELKORN, OZ JOSEPH GUETTA, MINOR, BY HIS NEXT FRIEND AND GUARDIAN VARDA GUETTA, VARDA GUETTA, INDIVIDUALLY AND AS NATURAL GUARDIAN OF PLAINTIFF OZ JOSEPH GUETTA, NORMAN GRITZ, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF DAVID GRITZ, MARK I. SOKOLOW, INDIVIDUALLY AND AS A NATURAL GUARDIAN OF PLAINTIFF JAMIE A. SOKOLOW, RENA M. SOKOLOW, INDIVIDUALLY AND AS A NATURAL GUARDIAN OF PLAINTIFF JAIME A. SOKOLOW, JAMIE A. SOKOLOW, MINOR, BY HER NEXT FRIENDS AND GUARDIAN MARK I. SOKOLOW AND RENA M. SOKOLOW, LAUREN M. SOKOLOW, ELANA R. SOKOLOW, SHAYNA EILEEN GOULD, RONALD ALLAN GOULD, ELISE JANET GOULD, JESSICA RINE, SHMUEL WALDMAN, HENNA NOVACK WALDMAN, MORRIS WALDMAN, ALAN J. BAUER, INDIVIDUALLY AND AS NATURAL GUARDIAN OF PLAINTIFFS YEHONATHON BAUER, BINYAMIN BAUER, DANIEL BAUER AND YEHUDA BAUER, YEHONATHON BAUER, MINOR, BY HIS NEXT FRIEND AND GUARDIANS DR. ALAN J. BAUER AND REVITAL BAUER, BINYAMIN BAUER, MINOR, BY HIS NEXT

FRIEND AND GUARDIANS DR. ALAN J. BAUER AND REVITAL BAUER, DANIEL BAUER, MINOR, BY HIS NEXT FRIEND AND GUARDIANS DR. ALAN J. BAUER AND REVITAL BAUER, YEHUDA BAUER, MINOR, BY HIS NEXT FRIEND AND GUARDIANS DR. ALAN J. BAUER AND REVITAL BAUER, RABBI LEONARD MANDELKORN, KATHERINE BAKER, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF BENJAMIN BLUTSTEIN, REBEKAH BLUTSTEIN, RICHARD BLUTSTEIN, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF BENJAMIN BLUTSTEIN, LARRY CARTER, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF DIANE ("DINA") CARTER, SHAUN COFFEL, DIANNE COULTER MILLER, ROBERT L COULTER, JR., ROBERT L. COULTER, SR., INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JANIS RUTH COULTER, CHANA BRACHA GOLDBERG, MINOR, BY HER NEXT FRIEND AND GUARDIAN KAREN GOLDBERG, ELIEZER SIMCHA GOLDBERG, MINOR, BY HER NEXT FRIEND AND GUARDIAN KAREN GOLDBERG, ESTHER ZAHAVA GOLDBERG, MINOR, BY HER NEXT FRIEND AND GUARDIAN KAREN GOLDBERG, KAREN GOLDBERG, INDIVIDUALLY, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF STUART SCOTT GOLDBERG/NATURAL GUARDIAN OF PLAINTIFFS CHANA BRACHA GOLDBERG, ESTHER ZAHAVA GOLDBERG, YITZHAK SHALOM GOLDBERG, SHOSHANA MALKA GOLDBERG, ELIEZER SIMCHA GOLDBERG, YAAKOV MOSHE GOLDBERG, TZVI YEHOSHUA GOLDBERG, SHOSHANA MALKA GOLDBERG, MINOR, BY HER NEXT FRIEND AND GUARDIAN KAREN GOLDBERG, TZVI YEHOSHUA GOLDBERG, MINOR, BY HER NEXT FRIEND AND GUARDIAN KAREN GOLDBERG, YAAKOV MOSHE GOLDBERG, MINOR, BY HER NEXT FRIEND AND GUARDIAN KAREN GOLDBERG, YITZHAK SHALOM GOLDBERG,

MINOR, BY HER NEXT FRIEND AND GUARDIAN KAREN GOLDBERG, NEVENKA GRITZ, SOLE HEIR OF NORMAN GRITZ, DECEASED,

Plaintiffs – Appellees – Cross-Appellants,

—v.—

PALESTINE LIBERATION ORGANIZATION, PALESTINIAN AUTHORITY, AKA PALESTINIAN INTERIM SELF-GOVERNMENT AUTHORITY AND OR PALESTINIAN COUNCIL AND OR PALESTINIAN NATIONAL AUTHORITY,

Defendants – Appellants – Cross-Appellees,

YASSER ARAFAT, MARWIN BIN KHATIB BARGHOUTI, AHMED TALEB MUSTAPHA BARGHOUTI, AKA AL-FARANSI, NASSER MAHMOUD AHMED AWEIS, MAJID AL-MASRI, AKA ABU MOJAHED, MAHMOUD AL-TITI, MOHAMMED ABDEL RAHMAN SALAM MASALAH, AKA ABU SATKHAH, FARAS SADAK MOHAMMED GHANEM, AKA HITAWI, MOHAMMED SAMI IBRAHIM ABDULLAH, ESTATE OF SAID RAMADAN, DECEASED, ABDEL KARIM RATAB YUNIS AWEIS, NASSER JAMAL MOUSA SHAWISH, TOUFIK TIRAWI, HUSSEIN AL-SHAYKH, SANA'A MUHAMMED SHEHADEH, KAIRA SAID ALI SADI, ESTATE OF MOHAMMED HASHAIKA, DECEASED, MUNZAR MAHMOUD KHALIL NOOR, ESTATE OF WAFA IDRIS, DECEASED, ESTATE OF MAZAN FARITACH, DECEASED, ESTATE OF MUHANAD ABU HALAWA, DECEASED, JOHN DOES, 1-99, HASSAN ABDEL RAHMAN,

Defendants.

Before: LEVAL AND DRONEY, *Circuit Judges*, AND KOELTL, *District Judge*.*

The defendants-appellants-cross-appellees ("defendants") appeal from a judgment of the United States District Court for the Southern District of New York (Daniels, *J*.) in favor of the plaintiffs-appellees-cross-appellants ("plaintiffs"). A jury found the defendants---the Palestine Liberation Organization and the Palestinian Authority---liable under the Anti-Terrorism Act ("ATA"), 18 U.S.C. § 2333(a), for various terror attacks in Israel that killed or wounded United States citizens. The jury awarded the plaintiffs damages of $218.5 million, an amount that was trebled automatically pursuant to the ATA, 18 U.S.C. § 2333(a), bringing the total award to $655.5 million. The defendants appeal, arguing that the district court lacked general and specific personal jurisdiction over the defendants, and, in the alternative, seek a new trial because the district court abused its discretion by allowing certain testimony by two expert witnesses. The plaintiffs cross-appeal, asking this Court to reinstate claims the district court dismissed.

We vacate the judgment of the district court and remand the case with instructions to dismiss the action because the federal courts lack personal jurisdiction over the defendants with respect to the claims in this action. We do not reach the remaining issues.

KENT A. YALOWITZ, Arnold & Porter, LLP, *for Plaintiffs-Appellees-Cross-Appellants.*

GASSAN A. BALOUL (Mitchell R. Berger, Pierre H. Bergeron, John A. Burlingame, Alexandra E. Chopin, *on*

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* Judge John G. Koeltl, of the United States District Court for the Southern District of New York, sitting by designation.

the brief), Squire Patton Boggs (US), LLP, *for Defendants-Appellants-Cross-Appellees.*

David A. Reiser, Zuckerman Spaeder, LLP, and Peter Raven-Hansen, George Washington University Law School, *on the brief* for Amici Curiae Former Federal Officials in Support of *Plaintiffs-Appellees-Cross-Appellants.*

James P. Bonner, Stone, Bonner & Rocco, LLP, and Steven R. Perles, Perles Law Firm, *on the brief* for Amici Curiae Arthur Barry Sotloff, Shirley Goldie Pulwer, Lauren Sotloff, and the Estate of Steven Joel Sotloff in Support of *Plaintiffs-Appellees-Cross-Appellants.*

John G. Koeltl, District Judge:

In this case, eleven American families sued the Palestine Liberation Organization ("PLO") and the Palestinian Authority ("PA") (collectively, "defendants")[1] under the Anti-Terrorism Act ("ATA"), 18 U.S.C. § 2333(a), for various terror attacks in Israel that killed or wounded the plaintiffs-appellees-cross-appellants ("plaintiffs") or their family members.[2]

The defendants repeatedly argued before the District Court for the Southern District of New York that the court lacked personal jurisdiction over them in light of their minimal presence in, and the lack of any nexus between the facts underlying the plaintiffs' claims and the United States. The district court (Daniels, *J.*) concluded that it

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[1] While other defendants, such as Yasser Arafat, were named as defendants in the case, they did not appear, and the Judgment was entered only against the PLO and the PA.

[2] The plaintiffs are United States citizens, and the guardians, family members, and personal representatives of the estates of United States citizens, who were killed or injured in the terrorist attacks.

had general personal jurisdiction over the defendants, even after the Supreme Court narrowed the test for general jurisdiction in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014). *See Sokolow v. Palestine Liberation Org.*, No. 04-cv-397 (GBD), 2014 WL 6811395, at *2 (S.D.N.Y. Dec. 1, 2014); *see also Sokolow v. Palestine Liberation Org.*, No. 04-cv-397 (GBD), 2011 WL 1345086, at *7 (S.D.N.Y. Mar. 30, 2011).

After a seven-week trial, a jury found that the defendants, acting through their employees, perpetrated the attacks and that the defendants knowingly provided material support to organizations designated by the United States State Department as foreign terrorist organizations. The jury awarded the plaintiffs damages of $218.5 million, an amount that was trebled automatically pursuant to the ATA, 18 U.S.C. § 2333(a), bringing the total award to $655.5 million.

On appeal, the defendants seek to overturn the jury's verdict by arguing that the United States Constitution precludes the exercise of personal jurisdiction over them. In the alternative, the defendants seek a new trial, arguing that the district court abused its discretion by allowing certain testimony by two expert witnesses. The plaintiffs cross-appeal, asking this Court to reinstate non-federal claims that the district court dismissed, and reinstate the claims of two plaintiffs for which the district court found insufficient evidence to submit to the jury.

We conclude that the district court erred when it concluded it had personal jurisdiction over the defendants with respect to the claims at issue in this action. Therefore, we VACATE the judgment of the district court and REMAND the case to the district court with instructions to DISMISS the case for want of personal jurisdiction. Accordingly, we do not consider the defendants' other

arguments on appeal or the plaintiffs' cross-appeal, all of which are now moot.

I.

A.

The PA was established by the 1993 Oslo Accords as the interim and non-sovereign government of parts of the West Bank and the Gaza Strip (collectively referred to here as "Palestine"). The PA is headquartered in the city of Ramallah in the West Bank, where the Palestinian President and the PA's ministers reside.

The PLO was founded in 1964. At all relevant times, the PLO was headquartered in Ramallah, the Gaza Strip, and Amman, Jordan. Because the Oslo Accords limit the PA's authority to Palestine, the PLO conducts Palestine's foreign affairs.

During the relevant time period for this action, the PLO maintained over 75 embassies, missions, and delegations around the world. The PLO is registered with the United States Government as a foreign agent. The PLO has two diplomatic offices in the United States: a mission to the United States in Washington, D.C. and a mission to the United Nations in New York City. The Washington, D.C. mission had fourteen employees between 2002 and 2004, including two employees of the PA, although not all at the same time.[3] The Washington, D.C. and New York missions engaged in diplomatic activities during the relevant period. The Washington, D.C. mission "had a substantial commercial presence in the United States." *Sokolow*, 2011 WL 1345086, at *4. It used dozens of telephone numbers, purchased office supplies, paid for certain living expenses for Hassan Abdel Rahman, the chief PLO

[3] The district court concluded that "the weight of the evidence indicates that the D.C. office simultaneously served as an office for the PLO and the PA." *Sokolow*, 2011 WL 1345086, at *3.

and PA representative in the United States, and engaged in other transactions. *Id.* The PLO also retained a consulting and lobbying firm through a multi-year, multi-million-dollar contract for services from about 1999 to 2004. *Id.* The Washington, D.C. mission also promoted the Palestinian cause in speeches and media appearances. *Id.*

Courts have repeatedly held that neither the PA nor the PLO is a "state" under United States or international law. *See Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 47-48 (2d Cir. 1991) (holding the PLO, which had no defined territory or permanent population and did not have capacity to enter into genuine formal relations with other nations, was not a "state" for purposes of the Foreign Sovereign Immunities Act); *Estates of Ungar v. Palestinian Auth.*, 315 F. Supp. 2d 164, 178-86 (D.R.I. 2004) (holding that neither the PA nor the PLO is a state entitled to sovereign immunity under the Foreign Sovereign Immunities Act because neither entity has a defined territory with a permanent population controlled by a government that has the capacity to enter into foreign relations); *see also Knox v. Palestine Liberation Org.*, 306 F. Supp. 2d 424, 431 (S.D.N.Y. 2004) (holding that neither the PLO nor the PA was a "state" for purposes of the Foreign Sovereign Immunities Act).

While the United States does not recognize Palestine or the PA as a sovereign government, *see Sokolow v. Palestine Liberation Org.*, 583 F. Supp. 2d 451, 457-58 (S.D.N.Y. 2008) ("Palestine, whose statehood is not recognized by the United States, does not meet the definition of a 'state,' under United States and international law . . . .") (collecting cases), the PA is the governing authority in Palestine and employs tens of thousands of security personnel in Palestine. According to the PA's Minister of Finance, the "PA funds conventional government services, including developing infrastructure; public safety and the judicial system; health care; public schools and education;

foreign affairs; economic development initiatives in agriculture, energy, public works, and public housing; the payment of more than 155,000 government employee salaries and related pension funds; transportation; and, communications and information technology services."

B.

The plaintiffs sued the defendants in 2004, alleging violations of the ATA for seven terror attacks committed during a wave of violence known as "the al Aqsa Intifada," by nonparties who the plaintiffs alleged were affiliated with the defendants. The jury found the plaintiffs liable for six of the attacks.[4] At trial, the plaintiffs presented evidence of the following attacks.

i. January 22, 2002: Jaffa Road Shooting

On January 22, 2002, a PA police officer opened fire on a pedestrian mall in Jerusalem. He shot "indiscriminately at the people who were on Jaffa Street," at a nearby bus stop and aboard a bus that was at the stop, and at people in the stores nearby "with the aim of causing the death of as many people as possible." The shooter killed two individuals and wounded forty-five others before he was killed by police. The attack was carried out, according to trial evidence, by six members of the PA police force who planned the shooting. Two of the plaintiffs were injured.

ii. January 27, 2002: Jaffa Road Bombing

On January 27, 2002, a PA intelligence informant named Wafa Idris detonated a suicide bomb on Jaffa Road in Jerusalem, killing herself and an Israeli man and

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[4] The district court found claims relating to an attack on January 8, 2001 that wounded Oz Guetta speculative and did not allow those claims to proceed to the jury. The plaintiffs argue that this Court should reinstate the Guetta claims. Because we conclude that there is no personal jurisdiction over the defendants for the ATA claims, it is unnecessary to reach this issue.

seriously wounding four of the plaintiffs, including two children. Evidence presented at trial showed that the bombing was planned by a PA intelligence officer who encouraged the assailant to conduct the suicide bombing, even after the assailant had doubts about doing so.

iii. March 21, 2002: King George Street Bombing

On March 21, 2002, Mohammed Hashaika, a former PA police officer, detonated a suicide bomb on King George Street in Jerusalem. Hashaika's co-conspirators chose the location because it was "full of people during the afternoon." Hashaika set-off the explosion while in a crowd "with the aim of causing the deaths of as many civilians as possible." Two plaintiffs were grievously wounded, including a seven-year-old American boy. Evidence presented at trial showed that a PA intelligence officer named Abdel Karim Aweis orchestrated the attack.

iv. June 19, 2002: French Hill Bombing

On June 19, 2002, a seventeen-year-old Palestinian man named Sa'id Awada detonated a suicide bomb at a bus stop in the French Hill neighborhood of Jerusalem. Awada was a member of a militant faction of the PLO's Fatah party called the Al Aqsa Martyr Brigades ("AAMB"), which the United States Department of State had designated as a "foreign terrorist organization" ("FTO"). The bombing killed several people and wounded dozens, including an eighteen-year-old plaintiff who was stepping off a bus when the bomb exploded.

v. July 31, 2002: Hebrew University Bombing

On July 31, 2002, military operatives of Hamas---a United States-designated FTO---detonated a bomb hidden in a black cloth bag that was packed with hardware nuts in a café at Hebrew University in Jerusalem. The explosion killed nine, including four United States citizens, whose estates bring suit here.

vi. January 29, 2004: Bus No. 19 Bombing

On January 29, 2004, in an AAMB attack, a PA police officer named Ali Al-Ja'ara detonated a suicide vest on a crowded bus, Bus No. 19 traveling from Malha Mall toward Paris Square in central Jerusalem. The suicide bombing killed eleven people, including one of the plaintiffs. The bomber's aim, according to evidence submitted at trial, was to "caus[e] the deaths of a large number of individuals."

C.

In 2004, the plaintiffs filed suit in the Southern District of New York. The defendants first moved to dismiss the claims for lack of personal jurisdiction in July 2007. The district court denied the motion, subject to renewal after jurisdictional discovery. After the close of jurisdictional discovery, the district court denied the defendants' renewed motion, holding that the court had general personal jurisdiction over the defendants. *See Sokolow*, 2011 WL 1345086, at *7.

The district court concluded, as an initial matter, that the service of process was properly effected by serving the Chief Representative of the PLO and the PA, Hassan Abdel Rahman, at his home in Virginia, pursuant to Federal Rule of Civil Procedure 4(h)(1)(B) (providing that a foreign association "must be served[ ] . . . in a judicial district of the United States . . . by delivering a copy of the summons and of the complaint to an officer, a managing or general agent . . . ."); *see also* 18 U.S.C. § 2334(a) (providing for nationwide service of process and venue under the ATA); *Sokolow*, 2011 WL 1345086, at *2.

The district court then engaged in a two-part analysis to determine whether the exercise of personal jurisdiction comported with the due process protections of the United States Constitution. First, it determined whether the defendants had sufficient minimum contacts with the forum

such that the maintenance of the action did not offend traditional notions of fair play and substantial justice. *Sokolow*, 2011 WL 1345086, at *2 (citing *Frontera Res. Azerbaijan Corp. v. State Oil Co. of Azerbaijan Republic*, 582 F.3d 393, 396 (2d Cir. 2009)).

The district court distinguished between specific and general personal jurisdiction---specific jurisdiction applies where the defendants' contacts are related to the litigation and general jurisdiction applies where the defendants' contacts are so substantial that the defendants could be sued on all claims, even those unrelated to contacts with the forum---and found that the district court had general jurisdiction over the defendants. *Id.* at *3. The court considered what it deemed the defendants' "substantial commercial presence in the United States," in particular "a fully and continuously functional office in Washington, D.C.," bank accounts and commercial contracts, and "a substantial promotional presence in the United States, with the D.C. office having been permanently dedicated to promoting the interests of the PLO and the PA." *Id.* at *4.

The district court concluded that activities involving the defendants' New York office were exempt from jurisdictional analysis under an exception for United Nations' related activity articulated in *Klinghoffer*, 937 F.2d at 51-52 (UN participation not properly considered basis for jurisdiction); *see Sokolow*, 2011 WL 1345086, at *5. The district court held that the activities involving the Washington, D.C. mission were not exempt from analysis and provided "a sufficient basis to exercise general jurisdiction over the Defendants." *Id.* at *6 ("The PLO and the PA were continuously and systematically present in the United States by virtue of their extensive public relations activities.").

Next, the district court considered "'whether the assertion of personal jurisdiction comports with "traditional

notions of fair play and substantial justice"---that is, whether it is reasonable under the circumstances of the particular case.'" *Id.* (quoting *Metro. Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 568 (2d Cir. 1996)). The court found that the exercise of jurisdiction did not offend "traditional notions of fair play and substantial justice," pursuant to the standard articulated by *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945), and its progeny. *See Sokolow*, 2011 WL 1345086, at *6-7. The district court concluded that "[t]here is a strong inherent interest of the United States and Plaintiffs in litigating ATA claims in the United States," and that the defendants "failed to identify an alternative forum where Plaintiffs' claims could be brought, and where the foreign court could grant a substantially similar remedy." *Id.* at *7.

In January 2014, after the Supreme Court had significantly narrowed the general personal jurisdiction test in *Daimler*, 134 S. Ct. 746, the defendants moved for reconsideration of the denial of their motion to dismiss.

On April 11, 2014, the district court denied the defendants' motions for reconsideration, ruling that *Daimler* did not compel dismissal. The district court also denied the defendants' motions to certify the jurisdictional issue for an interlocutory appeal. *See Sokolow*, 2014 WL 6811395, at *1. The defendants renewed their jurisdictional argument in their motions for summary judgment, arguing that this Court's decision in *Gucci America, Inc. v. Weixing Li*, 768 F.3d 122 (2d Cir. 2014), altered the controlling precedent in this Circuit, requiring dismissal of the case. *See Sokolow*, 2014 WL 6811395, at *1. The district court concluded that it still had general personal jurisdiction over the defendants, describing the action as presenting "'an exceptional case,'" *id.* at *2, of the kind discussed in *Daimler*, 134 S. Ct. at 761 n.19, and *Gucci*, 768 F.3d at 135.

The district court held that "[u]nder both *Daimler* and *Gucci*, the PA and PLO's continuous and systematic business and commercial contacts within the United States are sufficient to support the exercise of general jurisdiction," and that the record before the court was "insufficient to conclude that either defendant is 'at home' in a particular jurisdiction other than the United States." *Sokolow*, 2014 WL 6811395, at *2.

Following the summary judgment ruling, the defendants sought *mandamus* on the personal jurisdiction issue. This Court denied the defendants' petition. *See In re Palestine Liberation Org., Palestinian Authority*, No. 14-4449 (2d Cir. Jan. 6, 2015) (summary order).

The case proceeded to trial in January 2015. During the trial, the defendants introduced evidence about the PA's and PLO's home in Palestine. The trial evidence showed that the terrorist attacks occurred in the vicinity of Jerusalem. The plaintiffs did not allege or submit evidence that the plaintiffs were targeted in any of the six attacks at issue because of their United States citizenship or that the defendants engaged in conduct in the United States related to the attacks.

At the conclusion of plaintiffs' case in chief, the defendants moved for judgment as a matter of law under Federal Rule of Civil Procedure 50(a), arguing, among other grounds, that the district court lacked personal jurisdiction over the defendants. The Court denied the motion. The defendants renewed that motion at the close of all the evidence and again asserted that the court lacked personal jurisdiction.

During and immediately after trial, the District Court for the District of Columbia issued three separate decisions dismissing similar suits for lack of personal jurisdiction by similar plaintiffs in cases against the PA and the PLO. *See Estate of Klieman v. Palestinian Auth.*, 82 F.

Supp. 3d 237, 245¬46 (D.D.C. 2015), *appeal docketed*, No. 15-7034 (D.C. Cir. Apr. 8, 2015); *Livnat v. Palestinian Auth.*, 82 F. Supp. 3d 19, 30 (D.D.C. 2015), *appeal docketed*, No. 15-7024 (D.C. Cir. Mar. 18, 2015); *Safra v. Palestinian Auth.*, 82 F. Supp. 3d 37, 47-48 (D.D.C. 2015), *appeal docketed*, No. 15-7025 (D.C. Cir. Mar. 18, 2015).

In light of these cases, on May 1, 2015, the defendants renewed their motion to dismiss for lack of both general and specific personal jurisdiction. The defendants also moved, in the alternative, for judgment as a matter of law or for a new trial pursuant to Federal Rules of Civil Procedure 50(b) and 59. The district court reviewed the decisions by the District Court for the District of Columbia, but, for the reasons articulated in its 2014 decision and at oral argument, concluded that the district court had general personal jurisdiction over the defendants. The district court did not rule explicitly on whether it had specific personal jurisdiction over the defendants.

The jury found the defendants liable for all six attacks and awarded the plaintiffs damages of $218.5 million, an amount that was trebled automatically pursuant to the ATA, 18 U.S.C. § 2333(a), bringing the total award to $655.5 million.

The parties engaged in post-trial motion practice not relevant here, the defendants timely appealed, and the plaintiffs cross-appealed.

II.

A.

"We review a district court's assertion of personal jurisdiction *de novo*." *Dynegy Midstream Servs. v. Trammochem*, 451 F.3d 89, 94 (2d Cir. 2006).[5]

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[5] The standard of review in this case is complicated because the issue of personal jurisdiction was raised initially on a motion to dismiss, both before and after discovery, and as a basis for Rule 50 motions at

To exercise personal jurisdiction lawfully, three requirements must be met. "First, the plaintiff's service of process upon the defendant must have been procedurally proper. Second, there must be a statutory basis for personal jurisdiction that renders such service of process effective. . . . Third, the exercise of personal jurisdiction must comport with constitutional due process principles." *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 673 F.3d 50, 59-60 (2d Cir. 2012) (footnotes and internal citations omitted), certified question accepted *sub nom. Licci v. Lebanese Canadian Bank*, 967 N.E.2d 697 (N.Y. 2012), *and certified question answered sub nom. Licci v. Lebanese Canadian Bank*, 984 N.E.2d 893 (N.Y. 2012).

Constitutional due process assures that an individual will only be subjected to the jurisdiction of a court where the maintenance of a lawsuit does not offend "traditional notions of fair play and substantial justice." *Int'l Shoe*, 326 U.S. at 316 (internal quotation marks omitted). Personal jurisdiction is "a matter of individual liberty" because due process protects the individual's right to be subject only to lawful power. *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 884 (2011) (plurality opinion) (quoting *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982)).

The ATA provides that process "may be served in any district where the defendant resides, is found, or has an

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the conclusion of the plaintiffs' case and after all the evidence was presented. This Court typically reviews factual findings in a district court's decision on personal jurisdiction for clear error and its legal conclusions *de novo*. *See Frontera Res.*, 582 F.3d at 395. In this case, the parties agree that this Court should review *de novo* whether the district court's exercise of personal jurisdiction was constitutional. *See* Pls.' Br. at 27; Defs.' Br. at 23. In any event, the issues relating to general jurisdiction are essentially legal questions that should be reviewed *de novo*. Assuming without deciding the question, we review the district court's assertion of personal jurisdiction *de novo*.

agent . . . . " 18 U.S.C § 2334(a). The district court found that the plaintiffs properly served the defendants because they served the complaint, pursuant to Federal Rule of Civil Procedure 4(h)(1)(B) (providing that service on an unincorporated association is proper if the complaint is served on a "general agent" of the entity), on Hassan Abdel Rahman, who "based upon the overwhelming competent evidence produced by Plaintiffs, was the Chief Representative of the PLO and the PA in the United States at the time of service." *Sokolow*, 2011 WL 1345086, at *2.[6]

The defendants have not disputed that service was proper and that there was a statutory basis pursuant to the ATA for that service of process. Therefore, the only question before the Court is whether the third jurisdictional requirement is met---whether jurisdiction over the defendants may be exercised consistent with the Constitution.

B.

Before we reach the analysis of constitutional due process, the plaintiffs raise three threshold issues: First, whether the defendants waived their objections to personal jurisdiction; second, whether the defendants have due process rights at all; and third, whether the due process clause of the Fifth Amendment to the Constitution and not the Fourteenth Amendment controls the personal jurisdiction analysis in this case.

First, the plaintiffs argue that the defendants waived their argument that the district court lacked personal jurisdiction over them. The plaintiffs contend that the defendants could have argued that they were not subject to general jurisdiction under the "at home" test before

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[6] The district court found that the defendants are "unincorporated associations." *See Sokolow v. Palestine Liberation Org.*, 60 F. Supp. 3d 509, 523-24 (S.D.N.Y. 2014).

Daimler was decided because the "at home" general jurisdiction test existed after *Goodyear Dunlop Tire Operations, S.A. v. Brown*, 564 U.S. 915 (2011). This argument is unavailing because this Court in *Gucci* looked to the test in *Daimler* as the appropriate test for general jurisdiction over a corporate entity. *See Gucci*, 768 F.3d at 135-36. The defendants did not waive or forfeit their objection to personal jurisdiction because they repeatedly and consistently objected to personal jurisdiction and invoked *Daimler* after this Court's decision in *Gucci*. Furthermore, the district court explicitly noted that the "Defendants' motions asserting lack of personal jurisdiction are not denied based on a theory of waiver." *Sokolow*, 2014 WL 6811395, at *2 n.2 (emphasis added).

Second, the plaintiffs argue that the defendants have no due process rights because the defendants are foreign governments and share many of the attributes typically associated with a sovereign government. Foreign sovereign states do not have due process rights but receive the protection of the Foreign Sovereign Immunities Act. *See Frontera Res.*, 582 F.3d at 396-400. The plaintiffs argue that entities, like the defendants, lack due process rights, because they do not view themselves as part of a sovereign and are treated as a foreign government in other contexts. The plaintiffs do not cite any cases indicating that a non-sovereign entity with governmental attributes lacks due process rights. All the cases cited by the plaintiffs stand for the proposition that *sovereign* governments lack due process rights, and these cases have not been extended beyond the scope of entities that are separate sovereigns, recognized by the United States government as sovereigns, and therefore enjoy foreign sovereign immunity.

While sovereign states are not entitled to due process protection, *see id.* at 399, neither the PLO nor the PA is recognized by the United States as a sovereign state, and the executive's determination of such a matter is

conclusive. *See Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2088 (2015); *see also Ungar*, 315 F. Supp. 2d at 177 ("The PA and PLO's argument must fail because Palestine does not satisfy the four criteria for statehood and is not a State under prevailing international legal standards."); *Knox*, 306 F. Supp. 2d at 431 ("[T]here does not exist a state of Palestine which meets the legal criteria for statehood. . . ."); *accord Klinghoffer*, 937 F.2d at 47 ("It is quite clear that the PLO meets none of those requirements [for a state]."). Because neither defendant is a state, the defendants have due process rights. *See O'Neill v. Asat Trust Reg. (In re Terrorist Attacks on Sept. 11, 2001)*, 714 F.3d 659, 681-82 (2d Cir. 2013) ("*O'Neill*") (dismissing for lack of personal jurisdiction claims against charities, financial institutions, and other individuals who are alleged to have provided support to Osama Bin Laden and al Qaeda); *Livnat*, 82 F. Supp. 3d at 26 (due process clause applies to the PA (collecting cases)).

Third, the plaintiffs and *amici curiae* Former Federal Officials argue that the restrictive Fourteenth Amendment due process standards cannot be imported into the Fifth Amendment and that the due process clause of the Fifth Amendment to the Constitution,[7] and not the Fourteenth Amendment,[8] applies to the ATA and controls the analysis in this case. The argument is particularly important in this case because the defendants rely on the standard for personal jurisdiction set out in *Daimler* and the *Daimler* Court explained that it was interpreting the

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[7] The Fifth Amendment states in relevant part: ". . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V.

[8] The Fourteenth Amendment states in relevant part: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV., § 1.

due process clause of the Fourteenth Amendment. *Daimler*, 134 S. Ct. at 751.

The plaintiffs and amici argue that the Fourteenth Amendment due process clause restricts state power but the Fifth Amendment should be applied to the exercise of federal power. Their argument is that the Fourteenth Amendment imposes stricter limits on the personal jurisdiction that courts can exercise because that Amendment, grounded in concepts of federalism, was intended to referee jurisdictional conflicts among the sovereign States. The Fifth Amendment, by contrast, imposes more lenient restrictions because it contemplates disputes with foreign nations, which, unlike States, do not follow reciprocal rules and are not subject to our constitutional system. *See, e.g.*, *J. McIntyre Mach.*, 564 U.S. at 884 (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. This is consistent with the premises and unique genius of our Constitution."). To conflate the due process requirements of the Fourteenth and Fifth Amendments, the plaintiffs and *amici* argue, would impose 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.[9]

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[9] The plaintiffs also point to the brief filed by the United States Solicitor General in *Daimler* to support their argument that the due process standards for the Fifth and Fourteenth Amendments vary. However, the United States never advocated that the Fourteenth Amendment standard would be inapplicable to Fifth Amendment cases and, instead, urged the Court not to reach the issue. *See* Brief for the United States as Amicus Curaie Supporting Petitioner, *DaimlerChrysler AG v. Bauman*, 134 S. Ct. 746 (2014) (No. 11-965), 2013 WL 3377321, at *3 n.1 ("This Court has consistently reserved the question whether its Fourteenth Amendment personal jurisdiction

This Court's precedents clearly establish the congruence of due process analysis under both the Fourteenth and Fifth Amendments. This Court has explained: "[T]he due process analysis [for purposes of the court's *in personam* jurisdiction] is basically the same under both the Fifth and Fourteenth Amendments. The principal difference 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." *Chew v. Dietrich*, 143 F.3d 24, 28 n.4 (2d Cir. 1998).

Indeed, this Court has already applied Fourteenth Amendment principles to Fifth Amendment civil terrorism cases. For example, in *O'Neill*, 714 F.3d at 673-74, this Court applied Fourteenth Amendment due process cases to terrorism claims brought pursuant to the ATA in federal court. *See In re Terrorist Attacks on Sept. 11, 2001*, 538 F.3d 71, 93 (2d Cir. 2008), *abrogated on other grounds by Samantar v. Yousuf*, 560 U.S. 305 (2010); *see also Tex. Trading & Milling Corp. v. Fed. Republic of Nigeria*, 647 F.2d 300, 315 n.37 (2d Cir. 1981) (declining to apply different due-process standards in a case governed by the Fifth Amendment compared to one governed by the Fourteenth Amendment), *overruled on other grounds by Frontera Res.*, 582 F.3d at 400; *GSS Grp. Ltd v. Nat'l Port Auth.*, 680 F.3d 805, 816-17 (D.C. Cir. 2012) (applying Fourteenth Amendment case law when considering minimum contacts under the Fifth Amendment).

Amici Federal Officials concede that our precedents settle the issue, but they argue those cases were wrongly

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precedents would apply in a case governed by the Fifth Amendment, and it should do so here.").

decided and urge us not to follow them. We decline the invitation to upend settled law.[10]

Accordingly, we conclude that the minimum contacts and fairness analysis is the same under the Fifth Amendment and the Fourteenth Amendment in civil cases and proceed to analyze the jurisdictional question.

III.

Pursuant to the due process clauses of the Fifth and Fourteenth Amendments, there are two parts to the due process test for personal jurisdiction as established by *International Shoe*, 326 U.S. 310, and its progeny: the "minimum contacts" inquiry and the "reasonableness" inquiry. *See Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 305 F.3d 120, 127 (2d Cir. 2002) (Sotomayor, J.). The minimum contacts inquiry requires that the court determine whether a defendant has sufficient minimum contacts with the forum to justify the court's exercise of personal jurisdiction over the defendant. *See Daimler*, 134 S. Ct. at 754; *Calder v. Jones*, 465 U.S. 783, 788 (1984); *Int'l Shoe*, 326 U.S. at 316; *Metro. Life Ins.*, 84 F.3d at 567-68. The reasonableness inquiry requires the court to determine whether the assertion of personal jurisdiction over the defendant comports with "'traditional notions of fair play and substantial justice'" under the circumstances of the particular case. *Daimler*, 134 S. Ct. at 754 (quoting *Goodyear*, 564 U.S. at 923); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476-78 (1985).

International Shoe distinguished between two exercises of personal jurisdiction: general jurisdiction and

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[10] *Amici* argue for "universal"---or limitless---personal jurisdiction in terrorism cases. This Court has already rejected that suggestion. *See United States v. Yousef*, 327 F.3d 56, 107-08 (2d Cir. 2003) (per curiam) ("[T]errorism---unlike piracy, war crimes, and crimes against humanity---does not provide a basis for universal jurisdiction.").

specific jurisdiction. The district court in this case ruled only on the issue of general jurisdiction. We conclude that general jurisdiction is absent; the question remains whether the court may nonetheless assert its jurisdiction under the doctrine of specific jurisdiction.

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.'" *Daimler*, 134 S. Ct. at 751 (quoting *Goodyear*, 564 U.S. at 919); *see also Goodyear*, 564 U.S. at 924. "Since *International Shoe*, 'specific jurisdiction has become the centerpiece of modern jurisdiction theory, while general jurisdiction [has played] a reduced rule.'" *Daimler*, 134 S. Ct. at 755 (quoting *Goodyear*, 564 U.S. at 925). Accordingly, there are "few" Supreme Court opinions over the past half-century that deal with general jurisdiction. *Id.*

"Specific jurisdiction, on the other hand, depends on an affiliation between the forum and the underlying controversy, principally, activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation." *Goodyear*, 564 U.S. at 919 (alterations, internal quotation marks, and citation omitted). The exercise of specific jurisdiction depends on in-state activity that "*gave rise to the episode-in-suit*." *Id.* at 923 (quoting *Int'l Shoe*, 326 U.S. at 317) (emphasis in original). In certain circumstances, the "commission of certain 'single or occasional acts' in a State may be sufficient to render a corporation answerable in that State with respect to those acts, though not with respect to matters unrelated to the forum connections." *Id.* (quoting *Int'l Shoe*, 326 U.S. at 318).

A.

The district court concluded that it had general jurisdiction over the defendants; however, that conclusion relies on a misreading of the Supreme Court's decision in *Daimler*.

In *Daimler*, the plaintiffs asserted claims under the Alien Tort Statute and the Torture Victim Protection Act of 1991, *see* 28 U.S.C. §§ 1350 & note, as well as other claims, arising from alleged torture that was committed in Argentina by the Argentinian government with the collaboration of an Argentina-based subsidiary of the German corporate defendant. *See Daimler*, 134 S. Ct. at 750-52. The Supreme Court rejected the argument that the California federal court could exercise general personal jurisdiction over the German corporation based on the continuous activities in California of the German corporation's indirect United States subsidiary. *See id.* at 751. *Daimler* concluded that the German corporate parent, which was not incorporated in California and did not have its principal place of business in California, could not be considered to be "at home in California" and subject to general jurisdiction there. *Id.* at 762.

Daimler analogized its "at-home test" to that of an individual's domicile. "[F]or a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home. With respect to a corporation, the place of incorporation and principal place of business are paradigm bases for general jurisdiction." *Id.* at 760 (alterations, internal quotation marks, and citations omitted).

As an initial matter, while *Daimler* involved corporations, and neither the PA nor the PLO is a corporation---the PA is a non-sovereign government and the PLO is a foreign agent, and both are unincorporated associations, *see* Part I.A---*Daimler*'s reasoning was based on an analogy to general jurisdiction over individuals, and there is no

reason to invent a different test for general personal jurisdiction depending on whether the defendant is an individual, a corporation, or another entity. Indeed, in *Gucci* this Court relied on *Daimler* when it found there was no general personal jurisdiction over the Bank of China, a nonparty bank that was incorporated and headquartered in China and owned by the Chinese government. The Court described the Daimler test as applicable to "entities." "General, all-purpose jurisdiction permits a court to hear 'any and all claims' against an *entity*." *Gucci*, 768 F.3d at 134 (emphasis added); *see id.* at 134 n.13 ("The essence of general personal jurisdiction is the ability to entertain 'any and all claims' against an entity based solely on the entity's activities in the forum, rather than on the particulars of the case before the court."). Consequently, we consider the PLO and the PA entities subject to the *Daimler* test for general jurisdiction. *See Klieman*, 82 F. Supp. 3d at 245-46; *Livnat*, 82 F. Supp. 3d at 28; *Safra*, 82 F. Supp. 3d at 46.

Pursuant to *Daimler*, the question becomes, where are the PA and PLO "'fairly regarded as at home'"? 134 S. Ct. at 761 (quoting *Goodyear*, 564 U.S. at 924). The overwhelming evidence shows that the defendants are "at home" in Palestine, where they govern. Palestine is the central seat of government for the PA and PLO. The PA's authority is limited to the West Bank and Gaza, and it has no independently operated offices anywhere else. All PA governmental ministries, the Palestinian president, the Parliament, and the Palestinian security services reside in Palestine.

As the District Court for the District of Columbia observed, "[i]t is common sense that the single ascertainable place where a government such a[s] the Palestinian Authority should be amenable to suit for all purposes is the place where it governs. Here, that place is the West Bank, not the United States." *Livnat*, 82 F. Supp. 3d at 30; *see*

also Safra, 82 F. Supp. 3d at 48. The same analysis applies equally to the PLO, which during the relevant period maintained its headquarters in Palestine and Amman, Jordan. *See Klieman*, 82 F. Supp. 3d at 245 ("Defendants' alleged contacts . . . do not suffice to render the PA and the PLO 'essentially at home' in the United States.")

The activities of the defendants' mission in Washington, D.C.---which the district court concluded simultaneously served as an office for the PLO and the PA, *see Sokolow*, 2011 WL 1345086, at *3---were limited to maintaining an office in Washington, promoting the Palestinian cause in speeches and media appearances, and retaining a lobbying firm. *See id.* at *4.

These contacts with the United States do not render the PA and the PLO "essentially at home" in the United States. *See Daimler*, 134 S. Ct. at 754. The commercial contacts that the district court found supported general jurisdiction are like those rejected as insufficient by the Supreme Court in *Daimler*. In *Daimler*, the Supreme Court held as "unacceptably grasping" a formulation that allowed for "the exercise of general jurisdiction in every State in which a corporation 'engages in a substantial, continuous, and systematic course of business.'" 134 S. Ct. at 761. The Supreme Court found that a court in California could not exercise general personal jurisdiction over the German parent company even though that company's indirect subsidiary was the largest supplier of luxury vehicles to the California market. *Id.* at 752. The Supreme Court deemed Daimler's contacts with California "slim" and concluded that they would "hardly render it at home" in California. *Id.* at 760.

Daimler's contacts with California were substantially greater than the defendants' contacts with the United States in this case. But still the Supreme Court rejected the proposition that Daimler should be subjected to

general personal jurisdiction in California for events that occurred anywhere in the world. Such a regime would allow entities to be sued in many jurisdictions, not just the jurisdictions where the entities were centered, for worldwide events unrelated to the jurisdiction where suit was brought. The Supreme Court found such a conception of general personal jurisdiction to be incompatible with due process. The Supreme Court explained:

> General jurisdiction . . . calls for an appraisal of a corporation's activities in their entirety, nationwide and worldwide. A corporation that operates in many places can scarcely be deemed at home in all of them. Otherwise, "at home" would be synonymous with "doing business" tests framed before specific jurisdiction evolved in the United States. Nothing in *International Shoe* and its progeny suggests that "a particular quantum of local activity" should give a State authority over a "far larger quantum of . . . activity" having no connection to any in-state activity.

Id. at 762 n.20 (internal citations omitted). Regardless of the commercial contacts occasioned by the defendants' Washington, D.C. mission, there is no doubt that the "far larger quantum" of the defendants' activities took place in Palestine.

The district court held that the record before it was "insufficient to conclude that either defendant is 'at home' in a particular jurisdiction other than the United States." *Sokolow*, 2014 WL 6811395, at *2. That conclusion is not supported by the record. The evidence demonstrates that the defendants are "at home" in *Palestine*, where these

entities are headquartered and from where they are directed. *See Daimler*, 134 S. Ct. at 762 n.20.[11]

The district court also erred in placing the burden on the defendants to prove that there exists "an alternative forum where Plaintiffs' claims could be brought, and where the foreign court could grant a substantially similar remedy." *Sokolow*, 2011 WL 1345086, at *7. *Daimler* imposes no such burden. In fact, it is the plaintiff's burden to establish that the court has personal jurisdiction over the defendants. *See Koehler v. Bank of Bermuda Ltd.*, 101 F.3d 863, 865 (2d Cir. 1996) ("[T]he plaintiff bears the ultimate burden of establishing jurisdiction over the defendant by a preponderance of evidence . . . ."); *Metro. Life Ins.*, 84 F.3d at 566-67; *see also Klieman*, 82 F. Supp. 3d at 243; *Livnat*, 82 F. Supp. 3d at 30; *Safra*, 82 F. Supp. 3d at 49.[12]

Finally, the district court did not dispute the defendants' ties to Palestine but concluded that the court had general jurisdiction pursuant to an "exception" that the Supreme Court alluded to in a footnote in *Daimler*. In *Daimler*, the Supreme Court did not "foreclose the possibility that in an exceptional case, a corporation's operations in a forum other than its formal place of

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[11] It appears that the district court, when considering where the defendants were "at home," limited its inquiry to areas that are within a sovereign nation. We see no basis in precedent for this limitation.

[12] The district court's focus on the importance of identifying an alternative forum may have been borrowed inappositely from *forum non conveniens* jurisprudence, pursuant to which a court considers (1) the degree of deference to be afforded to the plaintiff's choice of forum; (2) whether there is an adequate alternative forum for adjudicating the dispute; and (3) whether the balance of private and public interests tips in favor of adjudication in one forum or the other. *See Norex Petroleum Ltd. v. Access Indus., Inc.*, 416 F.3d 146, 153 (2d Cir. 2005). However, that is not the test for general jurisdiction under *Daimler*, 134 S. Ct. at 762 n.20.

incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State." 134 S. Ct. at 761 n.19 (citing *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 447-48 (1952)).

Daimler analyzed the 1952 *Perkins* case, "'the textbook case of general jurisdiction appropriately exercised over a foreign corporation that has not consented to suit in the forum.'" *Id.* at 755-56 (quoting *Goodyear*, 564 U.S. at 928). The defendant in *Perkins* was a company, Benguet Consolidated Mining Company ("Benguet"), which was incorporated under the laws of the Philippines, where it operated gold and silver mines. During World War II, the Japanese occupied the Philippines, and Benguet's president relocated to Ohio, where he kept an office, maintained the company's files, and oversaw the company's activities. *Perkins*, 342 U.S. at 447-48. The plaintiff, a nonresident of Ohio, sued Benguet in a state court in Ohio on a claim that neither arose in Ohio nor related to the corporation's activities in Ohio, but the Supreme Court nevertheless held that the Ohio courts could constitutionally exercise general personal jurisdiction over the defendant. *Id.* at 438, 440. As the Supreme Court later observed: "'Ohio was the corporation's principal, if temporary, place of business.'" *Daimler*, 134 S. Ct. at 756 (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 780 n.11 (1984)).

Such exceptional circumstances did not exist in Daimler, *id.* at 761 n.19, or in *Gucci*. In *Gucci*, this Court held that, while a nonparty bank had branch offices in the forum, it was not an "exceptional case" in which to exercise general personal jurisdiction where the bank was incorporated and headquartered elsewhere, and its contacts were not "'so continuous and systematic as to render [it] essentially at home in the forum.'" 768 F.3d at 135 (quoting *Daimler*, 134 S. Ct. at 761 n.19).

The defendants' activities in this case, as with those of the defendants in *Daimler* and *Gucci*, "plainly do not approach" the required level of contact to qualify as "exceptional." *Daimler*, 134 S. Ct. at 761 & n.19. The PLO and PA have not transported their principle "home" to the United States, even temporarily, as the defendant had in *Perkins*. *See Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 628-30 (2d Cir. 2016).

Accordingly, pursuant to the Supreme Court's recent decision in *Daimler*, the district court could not properly exercise general personal jurisdiction over the defendants.

B.

The district court did not rule explicitly on whether it had specific personal jurisdiction over the defendants, but the question was sufficiently briefed and argued to allow us to reach that issue.

"The inquiry whether a forum State may assert specific jurisdiction over a nonresident defendant focuses on the relationship among the defendant, the forum, and the litigation. For a State to exercise jurisdiction consistent with due process, the defendant's suit-related conduct must create a substantial connection with the forum State." *Walden v. Fiore*, 134 S. Ct. 1115, 1121 (2014) (internal quotation marks and citations omitted). The relationship between the defendant and the forum "must arise out of contacts that the 'defendant *himself*' creates with the forum." *Id.* at 1122 (citing *Burger King*, 471 U.S. at 475) (emphasis in original). The "'minimum contacts' analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there." *Id.* And the "same principles apply when intentional torts are involved." *Id.* at 1123.

The question in this case is 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. The relevant "suit-related conduct" by the defendants was the conduct that could have subjected them to liability under the ATA. On its face, the conduct in this case did not involve the defendants' conduct in the United States in violation of the ATA. While the plaintiff-victims were United States citizens, the terrorist attacks occurred in and around Jerusalem, and the defendants' activities in violation of the ATA occurred outside the United States.

The ATA provides:

> Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees.

18 U.S.C. § 2333(a).

To prevail under the ATA, a plaintiff must prove "three formal elements: unlawful *action*, the requisite *mental state*, and *causation*." *Sokolow*, 60 F. Supp. 3d at 514 (quoting *Gill v. Arab Bank, PLC*, 893 F. Supp. 2d 542, 553 (E.D.N.Y. 2012)) (emphasis in original).

To establish an "unlawful action," the plaintiffs must show that their injuries resulted from an act of "international terrorism." The ATA defines "international terrorism" as activities that, among other things, "involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State." 18 U.S.C. § 2331(1)(A). The acts must also appear to be intended "(i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or

coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping." 18 U.S.C. § 2331(1)(B)(i)-(iii).

The plaintiffs asserted that the defendants were responsible on a *respondeat superior* theory for a variety of predicate acts, including murder and attempted murder, 18 U.S.C. §§ 1111, 2332, use of a destructive device on a mass transportation vehicle, 18 U.S.C. § 1992, detonating an explosive device on a public transportation system, 18 U.S.C. § 2332f, and conspiracy to commit those acts, 18 U.S.C. § 371. *See Sokolow*, 60 F. Supp. 3d at 515. They also asserted that the defendants directly violated federal and state antiterrorism laws, including 18 U.S.C. § 2339B, by providing material support to FTO-designated groups (the AAMB and Hamas) and by harboring persons whom the defendants knew or had reasonable grounds to believe committed or were about to commit an offense relating to terrorism, *see* 18 U.S.C. § 2339 *et seq.*; *see also Sokolow*, 60 F. Supp. 3d at 520-21, 523.

The ATA further limits international terrorism to activities that "occur *primarily outside* the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum." 18 U.S.C. § 2331(1)(C) (emphasis added).

The bombings and shootings here occurred *entirely* outside the territorial jurisdiction of the United States. Thus, the question becomes: What other constitutionally sufficient connection did the commission of these torts by these defendants have to this jurisdiction?

The jury found in a special verdict that the PA and the PLO were liable for the attacks under several theories. In all of the attacks, the jury found that the PA and the PLO were liable for providing material support or resources

that were used in preparation for, or in carrying out, each attack.

In addition, the jury found that in five of the attacks---the January 22, 2002 Jaffa Road Shooting, the January 27, 2002 Jaffa Road Bombing, the March 21, 2002 King George Street Bombing, the July 31, 2002 Hebrew University Bombing, and the January 29, 2004 Bus No. 19 Bombing---the PA was liable because an employee of the PA, acting within the scope of the employee's employment and in furtherance of the activities of the PA, either carried out, or knowingly provided material support or resources that were used in preparation for, or in carrying out, the attack.

The jury also found that in one of the attacks---the July 31, 2002 Hebrew University Bombing---the PLO and the PA harbored or concealed a person who the organizations knew, or had reasonable grounds to believe, committed or was about to commit the attack.

Finally, the jury found that in three attacks---the June 19, 2002 French Hill Bombing, the July 31, 2002 Hebrew University Bombing, and the January 29, 2004 Bus No. 19 Bombing---the PA and PLO knowingly provided material support to an FTO-designated group (the AAMB or Hamas).

But these actions, as heinous as they were, were not sufficiently connected to the United States to provide specific personal jurisdiction in the United States. There is no basis to conclude that the defendants 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.

In short, the defendants were liable for tortious activities that occurred outside the United States and affected United States citizens only because they were victims of indiscriminate violence that occurred abroad. The

residence or citizenship of the plaintiffs is an insufficient basis for specific jurisdiction over the defendants. A focus on the relationship of the defendants, the forum, and the defendants' suit-related conduct points to the conclusion that there is no specific personal jurisdiction over the defendants for the torts in this case. *See Walden*, 134 S. Ct. at 1121; *see also Goodyear*, 564 U.S. at 923.

In the absence of such a relationship, the plaintiffs argue on appeal that the Court has specific jurisdiction for three reasons. First, the plaintiffs argue that, under the "effects test," a defendant acting entirely outside the United States is subject to jurisdiction "if the defendant expressly aimed its conduct" at the United States. *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 732 F.3d 161, 173 (2d Cir. 2013). The plaintiffs point to the jury verdict that found that the defendants provided material support to designated FTOs---the AAMB and Hamas---and that the defendants' employees, acting within the scope of their employment, killed and injured United States citizens. They also argue that the defendants' terror attacks were intended to influence United States policy to favor the defendants' political goals. Second, the plaintiffs argue that the defendants purposefully availed themselves of the forum by establishing a continuous presence in the United States and pressuring United States government policy by conducting terror attacks in Israel and threatening further terrorism unless Israel withdrew from Gaza and the West Bank. *See Banks Brussels Lambert*, 305 F.3d at 128. Third, the plaintiffs argue that the defendants consented to personal jurisdiction under the ATA by appointing an agent to accept process.

Walden forecloses the plaintiffs' arguments. First, with regard to the effects test, the defendant must "expressly aim[]" his conduct at the United States. *See Licci*, 732 F. 3d at 173. Pursuant to *Walden*, it is "insufficient to rely on a defendant's 'random, fortuitous, or attenuated

contacts' or on the 'unilateral activity' of a plaintiff" with the forum to establish specific jurisdiction. *Walden*, 134 S. Ct. at 1123 (quoting *Burger King*, 471 U.S. at 475). While the killings and related acts of terrorism are the kind of activities that the ATA proscribes, those acts were unconnected to the forum and were not expressly aimed at the United States. And "[a] forum State's exercise of jurisdiction over an out-of-state intentional tortfeasor must be based on intentional conduct by the defendant that creates the necessary contacts with the forum." *Id.* That is not the case here.

The plaintiffs argue that United States citizens were targets of these attacks, but their own evidence establishes the random and fortuitous nature of the terror attacks. For example, at trial, the plaintiffs emphasized how the "killing was indeed random" and targeted "Christians and Jews, Israelis, Americans, people from all over the world." J.A. 3836. Evidence at trial showed that the shooters fired "indiscriminately," J.A. 3944, and chose sites for their suicide bomb attacks that were "full of people," J.A. 4030-31, because they sought to kill "as many people as possible," J.A. 3944; *see also* J.A. 4031.

The plaintiffs argue that "[i]t is a fair inference that Defendants *intended* to hit American citizens by continuing a terror campaign that continuously hit Americans . . . ." Pls.' Br. at 37 (emphasis in original). But the Constitution requires much more purposefully directed contact with the forum. For example, the Supreme Court has "upheld the assertion of jurisdiction over defendants who have purposefully 'reach[ed] out beyond' their State and into another by, for example, entering a contractual relationship that 'envisioned continuing and wide-reaching contacts' in the forum State," *Walden*, 134 S. Ct. at 1122 (alteration in original) (quoting *Burger King*, 472 U.S. at 479-80), or "by circulating magazines to 'deliberately exploi[t]' a market in the forum State." *Id.* (alteration in

original) (quoting *Keeton*, 465 U.S. at 781). But there was no such purposeful connection to the forum in this case, and it would be impermissible to speculate based on scant evidence what the terrorists intended to do.

Furthermore, the facts of *Walden* also suggest that a defendant's mere knowledge that a plaintiff resides in a specific jurisdiction would be insufficient to subject a defendant to specific jurisdiction in that jurisdiction if the defendant does nothing in connection with the tort in that jurisdiction. In *Walden*, the petitioner was a police officer in Georgia who was working as a deputized Drug Enforcement Administration ("DEA") agent at the Atlanta airport. He was informed that the respondents, Gina Fiore and Keith Gipson, were flying from San Juan, Puerto Rico through Atlanta en route to their final destination in Las Vegas, Nevada. *See* Joint Appendix, *Walden v. Fiore*, 2013 WL 2390248, *41-42 (U.S.) (Decl. of Anthony Walden). Walden and his DEA team stopped the respondents and searched their bags in Atlanta and examined their California drivers' licenses. *Id.*; *Walden*, 134 S. Ct. at 1119. Walden found almost $100,000 in cash in the respondents' carry-on bag and seized it, giving rise to a claim for an unconstitutional search under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). *See Walden*, 134 S. Ct. at 1119-20. The Supreme Court found that the petitioner's contacts with Nevada were insufficient to establish personal jurisdiction over the petitioner in a Nevada federal court, even though Walden knew that the respondents were destined for Nevada. *See id.* at 1119.

In this case, the plaintiffs point us to no evidence that these indiscriminate terrorist attacks were specifically targeted against United States citizens, and the mere knowledge that United States citizens might be wronged in a foreign country goes beyond the jurisdictional limit set forth in *Walden*.

The plaintiffs cite to several cases to support their argument that specific jurisdiction is warranted under an "effects test." Those cases are easily distinguishable from this case. Indeed, they point to the kinds of circumstances that would give rise to specific jurisdiction under the ATA, which are not present here.

For example, in *Mwani v. Bin Laden*, 417 F.3d 1 (D.C. Cir. 2005), the Court of Appeals for the District of Columbia Circuit found that specific personal jurisdiction over Osama Bin Laden and al Qaeda was supported by allegations that they "orchestrated the bombing of the *American* embassy in Nairobi, not only to kill both American and Kenyan employees inside the building, but to cause pain and sow terror in the embassy's home country, *the United States*," as well as allegations of "an ongoing conspiracy to attack the United States, with overt acts occurring *within* this country's borders." *Id.* at 13 (emphasis added). The plaintiffs pointed to the 1993 World Trade Center bombing, as well as the plot to bomb the United Nations, Federal Plaza, and the Lincoln and Holland Tunnels in New York. *Id.* Furthermore, the Court of Appeals found that bin Laden and al Qaeda "'purposefully directed' [their] activities at residents" of the United States, and that the case "result[ed] from injuries to the plaintiffs 'that arise out of or relate to those activities,'" *id.* (quoting *Burger King*, 471 U.S. at 472).

"[E]xercising specific jurisdiction because the victim of a foreign attack happened to be an American would run afoul of the Supreme Court's holding that '[d]ue process requires that a defendant be haled into court in a forum State based on his own affiliation with the State, not based on the "random, fortuitous, or attenuated" contacts he makes by interacting with other persons affiliated with the State.'" *Klieman*, 82 F. Supp. 3d at 248 (quoting *Walden*, 134 S. Ct. at 1123); *see Safra*, 82 F. Supp. 3d at 52 (distinguishing *Mwani*); *see also In re Terrorist Attacks on Sept.*

11, 2001, 538 F.3d at 95-96 (holding that even if Saudi princes could and did foresee that Muslim charities would use their donations to finance the September 11 attacks, providing indirect funding to an organization that was openly hostile to the United States did not constitute the type of intentional conduct necessary to constitute purposeful direction of activities at the forum); *Livnat*, 82 F. Supp. 3d at 33.

The plaintiffs also rely on *O'Neill*, 714 F.3d at 659, which related to the September 11 attacks. In that case, this Court first clarified that "specific personal jurisdiction properly exists where the defendant took 'intentional, and allegedly tortious, actions . . . expressly aimed' at the forum." *Id.* at 674 (quoting *Calder*, 465 U.S. at 789). This Court also noted that, "the fact that harm in the forum is foreseeable . . . is insufficient for the purpose of establishing specific personal jurisdiction over a defendant." *Id.* This Court then held that the plaintiffs' allegations were insufficient to establish personal jurisdiction over about two dozen defendants, but that jurisdictional discovery was warranted for twelve other defendants whose "alleged support of al Qaeda [was] more direct." *Id.* at 678; *see also id.* at 656-66. Those defendants "allegedly controlled and managed some of [the front] 'charitable organizations' and, through their positions of control, they allegedly sent financial and other material support directly to al Qaeda when al Qaeda allegedly was known to be *targeting the United States*." *Id.* (second emphasis added).

The plaintiffs argue that this Court should likewise find jurisdiction because the defendants' "direct, knowing provision of material support to designated FTOs [in this case, Hamas and the AAMB] is enough---standing alone---to sustain specific jurisdiction because they knowingly aimed their conduct at U.S. interests." Pls.' Br. at 36. But that argument misreads *O'Neill*. In *O'Neill*, this Court emphasized that the mere "fact that harm in the forum is

foreseeable" was "insufficient for the purpose of establishing specific personal jurisdiction over a defendant," 714 F.3d at 674, and the Court did not end its inquiry when it concluded that the defendants may have provided support to terror organizations. Indeed, the Court held that "factual issues persist with respect to whether this support was 'expressly aimed' at the United States," warranting jurisdictional discovery. *Id.* at 678-79. The Court looked at the specific aim of the group receiving support---particularly that al Qaeda was "known to be targeting the United States"---and not simply that it and other defendants were "terrorist organizations." *Id.* at 678.[13]

The plaintiffs also cite *Calder v. Jones*, 465 U.S. at 783. In that case, a California actress brought a libel suit in California state court against a reporter and an editor, both of whom worked for a tabloid at the tabloid's Florida headquarters. *Id.* at 784. The plaintiff's claims were based on an article written and edited by the defendants in Florida for the tabloid, which had a California circulation of about 600,000. *Id.* at 784-86. The Supreme Court held that California's assertion of personal jurisdiction over the defendants for a libel action was proper based on the effects of the defendants' conduct in California. *Id.* at 788. "The article was drawn from California sources, and the brunt of the harm, in terms both of respondent's emotional distress and the injury to her professional reputation, was suffered in California," the Supreme Court held. *Id.* at 788-89. "In

[13] Furthermore, the mere designation of a group as an FTO does not reflect that the organization has aimed its conduct at the United States. The Secretary of State may "designate an organization as a foreign terrorist organization" if the Secretary finds "the organization is a foreign organization," "the organization engages in terrorist activity," "or retains the capability and intent to engage in terrorist activity or terrorism," and "the terrorist activity or terrorism of the organization threatens the security of United States nationals or the national security of the United States." 8 U.S.C. § 1189(a)(1)(A)-(C).

sum, California is the *focal point* both of the story and of the harm suffered." *Id.* at 789 (emphasis added); *see also Walden*, 134 S. Ct. at 1123 (describing the contacts identified in *Calder* as "ample" to support specific jurisdiction). As the Supreme Court explained in *Walden*, the jurisdictional inquiry in *Calder* focused on the relationship among the defendant, the forum, and the litigation. *Walden*, 134 S. Ct. at 1123.

Unlike in *Calder*, it cannot be said that the United States is the focal point of the torts alleged in this litigation. In this case, the United States is not the nucleus of the harm---Israel is. *See Safra*, 82 F. Supp. 3d at 51.

Finally, the plaintiffs rely on two criminal cases, *United States v. Yousef*, 327 F.3d 56 (2d Cir. 2003) (per curiam), and *United States v. Al Kassar*, 660 F.3d 108 (2d Cir. 2011), for their argument that the "effects test" supports jurisdiction. In both cases, this Court applied the due process test for asserting jurisdiction over extraterritorial criminal conduct, which differs from the test applicable in this civil case, *see Al Kassar*, 660 F.3d at 118; *Yousef*, 327 F.3d at 111-12, and does not require a nexus between the specific criminal conduct and harm within the United States. *See also United States v. Murillo, No. 15-4235, 2016 WL 3257016, at *3 (4th Cir. June 14, 2016)*("[I]t is not arbitrary to prosecute a defendant in the United States if his actions affected significant American interests---even if the defendant did not mean to affect those interests." (internal citation and quotation marks omitted)). In order to apply a federal criminal statute to a defendant extraterritorially consistent with due process, "'there must be a sufficient nexus between the defendant and the United States, so that such application would not be arbitrary or fundamentally unfair.' For non-citizens acting entirely abroad, a jurisdictional nexus exists when the aim of that activity is to cause harm inside the United States or to U.S. citizens or interests." *Al Kassar*, 660

F.3d 108, 118 (emphasis added) (quoting *Yousef*, 327 F.3d at 111).

In a civil action, as *Walden* makes clear, "the defendant's suit-related conduct must create a substantial connection with the forum State." 134 S. Ct. at 1121.

Even setting aside the fact that both *Yousef* and *Al Kassar* applied the more expansive due process test in criminal cases, the defendants in both cases had more substantial connections with the United States than the defendants have in the current litigation. *Yousef* involved a criminal prosecution for the bombing of an airplane traveling from the Philippines to Japan. *See* 327 F.3d at 79. The *Yousef* defendants "conspired to attack a dozen United States-flag aircraft in an effort to inflict injury on this country and its people and influence American foreign policy, and their attack on the Philippine Airlines flight was a 'test-run' in furtherance of this conspiracy." *Id.* at 112.

In *Al Kassar*, several defendants were convicted of conspiring to kill United States officers, to acquire and export anti-aircraft missiles, and knowingly to provide material support to a terrorist organization; two were also convicted of conspiring to kill United States citizens and of money laundering. 660 F.3d at 115. On appeal, the defendants challenged their convictions on a number of grounds, including that the defendants' Fifth Amendment due process rights were violated by prosecuting them for activities that occurred abroad. *Id.* at 117-18. This Court rejected that argument because the defendants conspired to sell arms to a group "with the understanding that they would be used to kill Americans and destroy U.S. property; the aim therefore was to harm U.S. citizens and interests and to threaten the security of the United States." *Id.* at 118.

In this case, the defendants undertook terror attacks within Israel, and there is no evidence the attacks specifically targeted United States citizens. *See Safra*, 82 F. Supp. 3d at 53-54; *see also Livnat*, 82 F. Supp. 3d at 34.

Accordingly, in the present case, specific jurisdiction is not appropriate under the "effects test."

Second, *Walden* undermines the plaintiffs' arguments that the defendants met the "purposeful availment" test by establishing a continuous presence in the United States and pressuring United States government policy. The emphasis on the defendants' Washington, D.C. mission confuses the issue: *Walden* requires that the "suit-related conduct"---here, the terror attacks in Israel---have a "substantial connection with the forum." 134 S. Ct. at 1121. The defendants' Washington mission and its associated lobbying efforts do not support specific personal jurisdiction on the ATA claims. The defendants cannot be made to answer in this forum "with respect to matters unrelated to the forum connections." *Goodyear*, 564 U.S. at 923; *see also Klieman*, 82 F. Supp. 3d at 247 ("Courts typically require that the plaintiff show some sort of causal relationship between a defendant's U.S. contacts and the episode in suit.").

The plaintiffs argue on appeal that the defendants intended their terror campaign to influence not just Israel, but also the United States. They point to trial evidence---specifically pamphlets published by the PA---that, the plaintiffs argue, shows that the defendants were attempting to influence United States policy toward the Israel-Palestinian conflict. The exhibits themselves speak in broad terms of how United States interests in the region are in danger and how the United States and Europe should exert pressure on Israel to change its practices toward the Palestinians. It is insufficient for purposes of due process to rely on evidence that a political organization

sought to influence United States policy, without some other connection among the activities underlying the litigation, the defendants, and the forum. Such attenuated activity is insufficient under *Walden*.

The plaintiffs cite *Licci*, 732 F.3d 161, to support their argument that the defendants meet the purposeful availment test. But the circumstances of that case are distinguishable and illustrate why the defendants here do not meet that test. In *Licci*, American, Canadian, and Israeli citizens who were injured or whose family members were killed in a series of terrorist rocket attacks by Hizbollah in Israel brought an action under the ATA and other laws against the Lebanese Canadian Bank, SAL ("LCB"), which allegedly facilitated Hizbollah's acts by using correspondent banking accounts at a defendant New York bank (American Express Bank Ltd.) to effectuate wire transfers totaling several million dollars on Hizbollah's behalf. *Id.* at 164-66. This Court concluded that the exercise of personal jurisdiction over the defendants was constitutional because of the defendants' "repeated use of New York's banking system, as an instrument for accomplishing the alleged wrongs for which the plaintiffs seek redress." *Id.* at 171. These contacts constituted "'purposeful[] avail[ment] . . . of the privilege of doing business in [New York],' so as to permit the subjecting of LCB to specific jurisdiction within the Southern District of New York . . . ." *Id.* (quoting *Bank Brussels Lambert*, 305 F.3d at 127).

"It should hardly be unforeseeable to a bank that selects and makes use of a particular forum's banking system that it might be subject to the burden of a lawsuit in that forum for wrongs *related to, and arising from, that use*." *Id.* at 171-72 (emphasis added) (footnote omitted).

In *Licci*, this Court also distinguished the "effects test" theory of personal jurisdiction which is "typically

invoked where (*unlike here*) the conduct that forms the basis for the controversy occurs entirely out-of-forum, and the only relevant jurisdictional contacts with the forum are therefore in-forum effects harmful to the plaintiff." *Id.* at 173 (emphasis added) (footnote omitted). The Court held that the effects test was inappropriate because "the constitutional exercise of personal jurisdiction over a foreign defendant" turned on conduct that "occur[ed] *within* the forum," *id.* (emphasis in original), namely the repeated use of bank accounts in New York to support the alleged wrongs for which the plaintiffs sued.

In this case, there is no such connection between the conduct on which the alleged personal jurisdiction is based and the forum. And the connections the defendants do have with the United States---the Washington, D.C. and New York missions---revolve around lobbying activities that are not proscribed by the ATA and are not connected to the wrongs for which the plaintiffs here seek redress.

At a hearing before the district court, the plaintiffs also cited *Bank Brussels Lambert*, 305 F.3d 120, as their "best case" for their purposeful availment argument. *See* J.A. 1128. But that case, too, is distinguishable. There, a client bank sued its lawyers for legal malpractice that occurred in Puerto Rico. *Bank Brussels Lambert*, 305 F.3d at 123. This Court held that the Puerto Rican law firm defendant had sufficient minimum contacts with the New York forum and purposely availed itself of the privilege of doing business in New York, because, although the law firm did not solicit the bank as a client in New York, the firm maintained an apartment in New York partially for the purpose of better servicing its New York clients, the firm faxed newsletters regarding Puerto Rican legal developments to persons in New York, the firm had numerous New York clients, and its marketing materials touted the firm's close relationship with the Federal Reserve Bank of New York. *Id.* at 127-29. "The engagement which

gave rise to the dispute here is not simply one of a string of fortunate coincidences for the firm. Rather, the picture which emerges from the above facts is that of a law firm which seeks to be known in the New York legal market, makes efforts to promote and maintain a client base there, and profits substantially therefrom." *Id.* at 128. This Court held that there was "nothing fundamentally unfair about requiring the firm to defend itself in the New York courts when a dispute arises from its representation of a New York client---a representation which developed in a market it had deliberately cultivated and which, after all, the firm voluntarily undertook." *Id.* at 129. In short, the defendants' contacts with the forum were sufficiently related to the malpractice claims that were at issue in the suit.

That is not the case here. The plaintiffs' claims did not arise from the defendants' purposeful contacts with the forum. And where the defendant in *Bank Brussels Lambert* purposefully and repeatedly reached into New York to obtain New York clients---and as a result of those activities, it obtained a representation for which it was sued---in this case, the plaintiffs' claims did not arise from any activity by the defendants in this forum.

Thus, in this case, unlike in *Licci* and *Bank Brussels Lambert*, the defendants are not subject to specific personal jurisdiction based on a "purposeful availment" theory because the plaintiffs' claims do not arise from the defendants' activity in the forum.

Third, the plaintiffs argue that the defendants consented to personal jurisdiction under the ATA by appointing an agent to accept process. It is clear that the ATA permitted service of process on the representative of the PLO and PA in Washington. *See* 18 U.S.C. § 2334(a). However, the statute does not answer the constitutional question of whether due process is satisfied.

The plaintiffs contend that under *United States v. Scophony Corp. of America*, 333 U.S. 795 (1948), meeting the statutory requirement for service of process suffices to establish personal jurisdiction. But *Scophony* does not stand for that proposition. The defendant in *Scophony* "was 'transacting business' of a substantial character in the New York district at the times of service, so as to establish venue there," and so that "such a ruling presents no conceivable element of offense to 'traditional notions of fair play and substantial justice.'" *Id.* at 818 (quoting *Int'l Shoe*, 326 U.S. at 316). Thus, *Scophony* affirms the understanding, echoed by this Court in *Licci*, 673 F.3d at 60, and *O'Neill*, 714 F.3d at 673-74, that due process analysis---considerations of minimum contacts and reasonableness---applies even when federal service-of-process statutes are satisfied. Simply put, "the exercise of personal jurisdiction must comport with constitutional due process principles." *Licci*, 673 F.3d at 60; *see also Brown*, 814 F.3d at 641. As explained above, due process is not satisfied in this case, and the courts have neither general nor specific personal jurisdiction over the defendants, regardless of the service-of-process statute.

In sum, because the terror attacks in Israel at issue here were not expressly aimed at the United States and because the deaths and injuries suffered by the American plaintiffs in these attacks were "random [and] fortuitous" and because lobbying activities regarding American policy toward Israel are insufficiently "suit-related conduct" to support specific jurisdiction, the Court lacks specific jurisdiction over these defendants. *Walden*, 134 S. Ct. at 1121, 1123.

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The terror machine gun attacks and suicide bombings that triggered this suit and victimized these plaintiffs were unquestionably horrific. But the federal courts cannot

exercise jurisdiction in a civil case beyond the limits prescribed by the due process clause of the Constitution, no matter how horrendous the underlying attacks or morally compelling the plaintiffs' claims.

The district court could not constitutionally exercise either general or specific personal jurisdiction over the defendants in this case. Accordingly, this case must be dismissed.

CONCLUSION

We have considered all of the arguments of the parties. To the extent not specifically addressed above, they are either moot or without merit. For the reasons explained above, we **VACATE** the judgment of the district court and **REMAND** the case to the district court with instructions to **DISMISS** the case for want of jurisdiction.

APPENDIX H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---------- X

MARK I. SOKOLOW, individually and as a natural guardian of plaintiff Jamie A. Sokolow; RENA M. SOKOLOW, individually and as a natural guardian of plaintiff Jamie A. Sokolow; JAMIE A. SOKOLOW, minor, by her next friends and guardian Mark I. Sokolow and Rena M. Sokolow; LAUREN M. SOKOLOW; ELANA R. SOKOLOW; SHAYNA EILEEN GOULD; ELISE JANET GOULD; JESSICA RINE; SHMUEL WALDMAN; HENNA NOVACK WALDMAN; MORRIS WALDMAN; EVA WALDMAN; DR. ALAN J. BAUER, individually and as a natural guardian of plaintiffs Yehonathon Bauer, Binyamin Bauer, Daniel Bauer, and Yehuda Bauer; REVITAL BAUER, individually and as a natural guardian of plaintiffs Yehonathon Bauer, Binyamin Bauer, Daniel Bauer, and Yehuda Bauer;

DATE FILED: 30 MAR 2011

MEMORANDUM DECISION AND OPINION

04 CV 00397 (GBD)

YEHONATHON BAUER, :
minor, by his next friend and :
guardians Dr. Alan J. Bauer :
and Revital Bauer; :
BINYAMIN BAUER, minor, :
by his next friend and :
guardians Dr. Alan J. Bauer :
and Revital Bauer; DANIEL :
BAUER, minor, by his next :
friend and guardians Dr. Alan :
J. Bauer and Revital Bauer; :
YEHUDA BAUER, minor, by :
his next friend and guardians :
Dr. Alan J. Bauer and Revital :
Bauer; RABBI LEONARD :
MANDELKORN; SHAUL :
MANDELKORN; NURIT :
MANDELKORN; OZ :
JOSEPH GUETTA, minor, by :
his next friend and guardian :
Varda Guetta; VARDA :
GUETTA, individually and as :
natural guardian of plaintiff :
Oz Joseph Guetta; DR. :
KATHERINE BAKER, :
individually and as personal :
representative of the Estate of :
Benjamin Blutstein; :
REBEKAH BLUSTEIN, DR. :
RICHARD BLUSTEIN, :
individually and as personal :
representative of the Estate of :
Benjamin Blutstein; DR. :
LARRY CARTER, :
individually and as personal :

representative of the Estate of :
Diane ("Dina") Carter; :
SHAUN COFFEL; DIANNE :
COULTER MILLER; :
ROBERT L. COULTER, JR.; :
ROBERT L. COULTER, SR., :
individually and as personal :
representative of the Estate of :
Janis Ruth Coulter; CHANA :
BRACHA GOLDBERG, :
minor, by her next friend and :
guardian Karen Goldberg; :
ELIZER SIMCHA :
GOLDBERG, minor, by her :
next friend and guardian :
Karen Goldberg; ESTHER :
ZAHAVA GOLDBERG, :
minor, by her next friend and :
guardian Karen Goldberg; :
KAREN GOLDBERG, :
individually, as pers. rep. of :
the Est. of Stuart Scott :
Goldberg/ nat. guard. of pltffs :
Chana Bracha Goldberg, :
Esther Zahava Goldberg, :
Yitzhak Shalom Goldberg, :
Shoshana Malka Goldberg, :
Eliezer Simcha Goldberg, :
Yaakov Moshe Goldberg, Tzvi :
Yehoshua Goldberg; :
SHOSHANA MALKA :
GOLDBERG, minor, by her :
next friend and guardian :
Karen Goldberg; TZVI :
YEHOSHUA GOLDBERG, :

minor, by her next friend and guardian Karen Goldberg; YAAKOV MOSHE GOLDBERG, minor, by her next friend and guardian Karen Goldberg, YITZHAK SHALOM GOLDBERG, minor, by her next friend and guardian Karen Goldberg; NEVENKA GRITZ, individually and as personal representative of the Estate of David Gritz; NORMAN GRITZ, individually and as personal representative of the Estate of David Gritz,	:
Plaintiffs,	:
v.	:
PALESTINE LIBERATION ORGANIZATION; and PALESTINE AUTHORITY, also known as Palestine Interim Self-Government Authority and/or Palestine Council and/or Palestinian National Authority,	:
Defendants.	:
----------	X

GEORGE B. DANIELS, District Judge:

In the above-captioned action brought under the Antiterrorism Act of 1991, 18 U.S.C. § 2331 *et. seq.* ("ATA"), United States citizens and guardians, family members,

and personal representatives of the estates of United States citizens, are suing the Palestine Liberation Organization ("PLO") and the Palestinian Authority[1] ("PA") for injuries and death allegedly suffered as a result of a series of seven terrorist attacks occurring over a three year period in or near Jerusalem from January 8, 2001, to January 29, 2004. See Complaint ¶¶ 54-125. Plaintiffs assert causes of action for international terrorism, pursuant to 18 U.S.C. § 2333,[2] and various state law claims including wrongful death, pain and suffering, battery, assault, loss of consortium, negligence, and infliction of emotional distress. Defendants move to dismiss the Amended Complaint for lack of personal jurisdiction pursuant to Fed. R. Civ. P. 12(b)(2). Defendants' motion is DENIED.

PROCEDURAL HISTORY

In response to Plaintiff's motion for a default judgment pursuant to Fed. R. Civ. P. 56, Defendants moved to dismiss the Amended Complaint for lack of subject matter and personal jurisdiction, pursuant to Fed. R. Civ. P. 12(b)(1) and (2), and to dismiss the pendant state law causes of action for failure to state a claim, pursuant to Fed. R. Civ. P. 12(b)(6). *See* Docket ## 22, 45. Plaintiffs opposed Defendants' prior motion to dismiss for lack of personal jurisdiction, and, in the alternative, sought jurisdictional discovery. *See* Docket # 50. This Court denied Defendants' motion to dismiss for lack of subject matter jurisdiction with prejudice, and denied their motion to

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[1] The Palestinian Authority is also known as "The Palestinian Interim Self-Government Authority," "The Palestinian Council" and "The Palestinian National Authority."

[2] Section 2333 is the civil provision of the ATA, which provides that "[a]ny national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors or heirs may sue therefore . . ." 18 U.S.C.§ 2333(a).

dismiss for lack of personal jurisdiction and failure to state a claim without prejudice to renew after limited jurisdictional discovery. *See Sololow v. Palestine Liberation Org.*, 583 F. Supp. 2d 451 (S.D.N.Y. 2008), *available at* Docket # 58.

The parties engaged in jurisdictional discovery under the supervision of Magistrate Judge Ronald L. Ellis. *See* Docket # 61. Defendants prematurely renewed their motion to dismiss for lack of personal jurisdiction pursuant to Fed. R. Civ. P. 12(b)(2) during jurisdictional discovery, and this Court denied the motion without prejudice to renew after the completion of jurisdictional discovery. *See* Docket ## 66, 79. After the Magistrate Judge declared discovery complete, Defendants properly filed the instant motion to dismiss. *See* Docket ## 80, 67.

STANDARD OF REVIEW

To withstand a 12(b)(2) motion to dismiss, the plaintiff "bears the burden of showing [by a preponderance of the evidence] that the court has jurisdiction over the defendant." *In re Magnetic Audiotape Antitrust Lithog.*, 334 F.3d 204, 206 (2d Cir. 2003); *Landoil Resources Corp. v. Alexander & Alexander Servs., Inc.*, 918 F.2d 1039, 1043 (2d Cir. 1990). The showing necessary to satisfy this burden is more demanding when, as is the case here, the parties have completed jurisdictional discovery.[3] Whereas legally sufficient allegations are alone sufficient to make a prima facie showing where no evidentiary hearing has been held, or when the parties have not engaged in jurisdictional discovery, "[a]fter discovery, the plaintiff's prima facie showing . . . must include an averment of facts that, if credited by the trier, would suffice to establish

[3] It is appropriate to apply the higher burden in the present case regardless of how dissatisfied Plaintiffs may be with Defendants' productions. The appropriate time to seek relief for such grievances has expired now that jurisdictional discovery is complete.

jurisdiction over the defendant."[4] *Ball v. Metallurgic Hoboken — Overpelt S.A.*, 902 F.2d 194, 197 (2d Cir. 1990); *see also Chloe v. Queen Bee of Beverly Hills, LLC*, 616 F.3d 158, 163 (2d Cir. 2010). The Court is to accept all averments of jurisdictional facts as true, and construe the pleadings, affidavits, and any doubts in plaintiff's favor. *See In re Magnetic Audiotape*, 334 F.3d at 206; *PDK Labs. Inc. v. Friedlander*, 103 F.3d 1105, 1108 (2d Cir. 1997); *see also Whitaker v. American Telecasting Inc.*, 261 F.3d 196, 208 (2d Cir. 2001) (quoting *A.I. Trade Fin., Inc. v. Petra Bank*, 989 F.2d 76, 79-80 (2d Cir. 1993)).

GENERAL JURISDICTION

In the context of ATA litigation, a plaintiff makes a prima facie showing of personal jurisdiction if: (1) service of process was properly effected as to the defendant, *see* Fed. R. Civ. P. 4(k)(1)(C) ("Serving a summons . . . establishes personal jurisdiction over a defendant . . . when authorized by a federal statute"); 18 U.S.C. § 2334(a) (providing for nationwide service of process and venue); and (2) the defendant has sufficient minimum contacts with the United States as a whole to satisfy a traditional due process analysis. *See Estates of Ungar v. Palestinian Auth.*, 153 F. Supp. 2d 76, 87, 95 (D.R.I. 2001); *see also In re Terrorist Attacks on September 11, 2001*, 392 F. Supp. 2d 539, 556-58 (S.D.N.Y. 2005); *Burnett v. Al Baraka Inv. & Dev. Corp.*, 349 F. Supp. 2d 765, 806-07 (S.D.N.Y. 2005); *Biton v. Palestinian Interim Self-Gov't Auth.*, 310 F. Supp. 2d 172, 179 (D.D.C. 2004).

Here, Defendants do not assert that service was defective. Defendants do not even dispute that, during the

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[4] Plaintiffs have not provided an exhaustive list of the facts that they believe confer jurisdiction over the Defendants. However, Plaintiffs have provided all of the materials submitted in *Estates of Ungar v. Palestinian Auth.*, 325 F. Supp. 2d 15 (D.R.I. 2004), as well as additional materials relevant to post-2002 activities.

relevant time period, they maintained sufficient contacts with the United States to satisfy the traditional due process analysis for general jurisdiction. Rather, Defendants contend that their contacts with the United States qualify as jurisdictional exceptions and may not be relied upon to support the exercise of general jurisdiction over them. They contend that any remaining contacts are insubstantial.

A. SERVICE

Plaintiffs' properly served the PLO and the PLA. Fed. R. Civ. P. 4(h)(1)(B) provides that a foreign association "must be served[] . . . in a judicial district of the United States . . . by delivering a copy of the summons and of the complaint to an officer, a managing or general agent." Here, Plaintiffs personally served Hassan Abdel Rahman at his home in Virginia. *See* Pls.' Opposition Memo, Ex. B ("Affidavit of Service"). Rahman, based upon the overwhelming competent evidence produced by Plaintiffs,[5] was the Chief Representative of the PLO and the PA in the United States at the time of service. Rahman was thus a valid agent for service of process on the PLO and the PA.[6]

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[5] *See* Pls.' Opp. Mem., Exs. C (business card identifying him as "Chief Representative" to the "Palestine Liberation Organization" and the "Palestine National Authority"), D (letter written by him to Congressman Abercrombie in which he identifies himself as "Chief Representative of the PLO and PNA"), E (letter sent to him by Richard C. Massey of the United States Department of State identifying him as "Chief Representative PLO & PNA), M (10/30/2003 Senate Hearing Transcript identifying Rahman as "chief representative of the PLO and the PA in the United States" at 13 and speaking on behalf of "[w]e, the Palestinian Authority" at 28); *see also* Declaration of David J. Strachman, Ex. 1 (reproducing evidence of Rahman's dual agency from *Unger*, 325 F.Supp.2d at 55-59).

[6] This finding is consistent with other federal courts. *See, e.g.*, *Kliman v. Palestine Authority*, 547 F.Supp.2d 8, 13-14 (D.D.C. 2008)

B. SERVICE

To determine whether the exercise of jurisdiction comports with due process, the Court must engage in a two part analysis: "the 'minimum contacts' inquiry and the 'reasonableness' inquiry." *Chloe v. Queen Bee of Beverly Hills. LLC*, 616 F.3d 158, 171 (2d Cir. 2010). The court must first determine whether a defendant has minimum contacts with the forum such that maintenance of the action does not offend traditional notions of fair play and substantial justice. *See State Oil Co. of Azerbaijan Republic v. Frontera*, 582 F.3d 393, 396 (2d Cir. 2009) (citation omitted). The court must then determine whether it would be reasonable, under the circumstances of the particular case, to exercise jurisdiction over the defendant. *See Metro. Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 568 (2d Cir. 1996).

1. Minimum Contacts[7]

The minimal contacts inquiry necessitates "a distinction . . . between 'specific' jurisdiction and 'general' jurisdiction." *Chloe*, 616 F.3d at 165. Whereas specific

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(considering Haman's successor); *Ungar*, 325 F. Supp. 2d at 55-59 (considering Haman); *Biton*, 310 F. Supp. 2d at 179-190 (same).

[7] This Court conducts a *de novo* review of the minimal contacts of the PLO and the PA. Upon first considering the issue of personal jurisdiction in the above-captioned action, this Court recognized that "[a] number of federal courts [had already] concluded that both the PA and PLO have sufficient minimum contacts with the United States to justify the exercise of personal jurisdiction under the Due Process Clause." *Sololow*, 583 F. Supp. 2d at 460 (citations omitted). This Court, nevertheless, held that "[p]ersonal jurisdiction must be determined on a case-by-case basis because it is dependent upon the defendants' contacts with the [United States] at the time the lawsuit was commenced." *Id.* at 460. This Court thus declined to entertain Plaintiffs' arguments that the principles of collateral estoppel and/or the presumption of continuity preclude or otherwise limit Defendants' litigation of the personal jurisdiction issue.

jurisdiction applies where a defendant's contacts are related to the litigation, general jurisdiction applies where they are unrelated, and involves a more stringent minimal contacts test. *See Helicopteros Nacionales de Columbia., S.A. v. Hall*, 466 U.S. 408, 414, 415 n.9; see also Metro Life, 84 F.3d at 568. General jurisdiction requires that each[8] defendant's contacts with the forum are continuous and systematic. Id. In determining the strength of those contacts, the court is to examine the totality of the defendant's contacts with the forum over a period of time that is reasonable under the circumstances, up to and including the date the suit was filed.[9] *See Chloe*, 616 F.3d at 164; *Porina v. Marward Shipping Co.*, 521 F.3d 122, 128 (2d Cir. 2008) (citation omitted). Additionally, the defendant must be found to have purposely availed himself of the privilege of conducting activities in the forum. *See Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

a. Traditional Jurisdictional Analysis

After carefully reviewing the competent evidence produced, this Court finds that Plaintiffs have gone beyond the allegations in the Amended Complaint to demonstrate by a preponderance of the evidence that the PLO and the PA purposely engaged in numerous activities that resulted in both entities having a continuous and systematic

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[8] "Each defendant's contacts with the [United States] must be assessed individually," and "jurisdiction cannot be implied or imputed from one defendant to another." *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n.13 (1984); *Langenberg v. Sofair*, 2006 U.S. Dist. LEXIS 65276, at *21 (S.D.N.Y. Sept. 11, 2006); *see also Rush v. Savchuk*, 444 U.S. 320, 331-32 (1980).

[9] For the purpose of discovery, the parties agreed that the relevant time period was the six-year period preceding the filing of the complaint, i.e. January 16, 1998, to January 16, 2004. *See* Pls. Opp. Mem., at 5; Defs. Opening Mem., at 7-8. Such periods have been found to be reasonable by the Second Circuit. *See Metro Life*, 84 F.3d at 569-70 (collecting cases).

presence within the United States. Therefore, this Court agrees with every federal court to have considered the issue that the totality of activities in the United States by the PLO and the PA justifies the exercise of general personal jurisdiction.[10]

It is undisputed that the PLO maintained an office in Washington, D.C., during the relevant period. *See* Defs.' Opening Mem., at 8-9; Pls.' Opp. Mem., at 10; *see also* Strachman Declaration, Ex. 1 Part 5 ("Revised Notice"), Ex. KK (3/10/1998 Registration Statement Pursuant to the Foreign Agents Registration Act of 1938, as amended ("FARA"), by "PLO Washington Office"); *id.*, Exs. 2-12 (FARA Supplemental Statements filed by the PLO from September 1998 to September 2003). It is also undisputed that most of the individuals who worked in the D.C. office were PLO employees. *See* Defs.' Opening Mem., Ex. 3 (Interrogatories) (listing twelve employees during the

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[10] *See, e.g.*, *Knox v. PLO*, 248 F.R.D. 420, 427 (S.D.N.Y. 2008); *Estate of Klieman v. Palestinian Auth.*, 467 F. Supp. 2d 107, 113 (D.D.C. 2006); *Ungar*, 325 F. Supp. 2d at 59; *Biton v. Palestinian Authority*, 310 F. Supp. 2d at 179; *Estates of Ungar v. Palestinian Auth.*, 153 F. Supp. 2d 76, 88 (D.R.I. 2001); *Klinghoffer v. S.N.C. Achille Lauro*, 795 F. Supp. 112, 114 (S.D.N.Y. 1992); *United States v. Palestine Liberation Organization*, 695 F. Supp. 1456, 1471 (S.D.N.Y. 1988); *cf. Knox*, 229 F.R.D. at 67-70; *Mohamad v. Rajoub*, 2008 U.S. Dist. LEXIS 117400 (S.D.N.Y. Sept. 29, 2008) (finding jurisdictional discovery against the PA and PLO in Washington, D.C. would be unnecessary and cause undue delay and expense as previous courts in Washington, D.C. have reviewed at length the PA and PLO's Washington, D.C. contacts); *Estate of Esther Klieman v. Palestinian Auth.*, 547 F. Supp. 2d 8, 15 (D.D.C. 2008) (Defendants moved to dismiss for lack of personal jurisdiction due to insufficient service of process); *Gilmore v. Palestinian Interim Self-Government Auth.*, 422 F. Supp. 2d 96, 102 n.4 (D.D.C. 2006) ("Defendants did not move to dismiss the PLO and the PA from this action for lack of personal jurisdiction.").

relevant period), at 5-6.[11] The evidence suggests that the majority of the twelve employees were present for the entirety of the relevant period. *See id.*, Ex. 3, at 9.

The parties disagree over whether the PA maintained an office in Washington, D.C.; however the weight of the evidence indicates that the D.C. office simultaneously served as an office for the PLO and the PA.[12] The initial registration statement states that "[t]he PLO offices in Washington, D.C. shall represent the PLO and the Palestinian Authority in the United States" and that "[t]he PLO and the Palestinian Authority will pay for the expenses of the office and salaries of its employees." Strachman Declaration, Ex. 1 Part 5, Ex. KK. Rahman, the Chief Representative of the PLO and the PA, used and was contacted at a single address – that of the D.C. office. *See* Pls.' Opp. Mem., Exs. C-E. The PA entered into a substantial commercial contract that repeatedly described the D.C. office as an office of the PA. *See id.*, F (retainer agreement for 1999-2002). Finally, the PA's Ministry of Finance – rather than the PLO Headquarters in Gaza – provided the vast

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[11] Defendants did not provide precise dates of employment. Construing all facts in a light favorable to Plaintiffs, the lack of duplication amongst the titles and job descriptions of the PLO employees suggests that the majority of the twelve employees were present for the entirety of the relevant period. *See* Defs.' Opening Mem., Ex. 3, at 9.

[12] Defendants' argument that only the PLO had the authority to conduct foreign affairs is unpersuasive. The fact that the PA should not have been operating an office in the United States does not mean that it did not or could not have done so. Moreover, even if Defendants' are right, "there is nothing in the Oslo Accords . . . prohibit[ing] the PA from conducting other non-diplomatic activities (such as commercial, public relations, lobbying, or educational activities) through its representatives, officers and agents abroad." *Unger*, 325 F.Supp.2d at 54. Also the fact that only 2 of the 14 employees at the D.C. office were employed by the PA does not demonstrate that D.C. office was not working on behalf of the PA. *See* Defs.' Opening Mem., Ex. 3 (Interrogatories), at 6, 10-11.

majority of the D.C. office's income. See Strachman Declaration, Exs. 2-12. Accordingly, the activities of the D.C. office are attributable to both the PLO and the PA.[13]

The Defendants, through the D.C. office, had a substantial commercial presence in the United States. The Defendants operated a fully and continuously functional office in Washington, D.C., during the relevant period. Defendants had thirty-five land line telephone and cell phone numbers and two bank accounts from 2002-2004.[14] *See* Defs.' Opening Mem., Ex. 3, at 20-22. The Defendants had a CD account as late as January 2003. *Id.*, Ex. 3, at 20. Defendants also had ongoing commercial contracts and transactions with numerous U.S.-based businesses, including for office supplies and equipment, postage/shipping, new services/subscriptions, telecommunications/internet, IT support, accountant and legal services, and credit cards. *See id.*, Ex. 4 ("Document Requests"), at 9-10. Defendants even paid for certain living expenses of Rahman. *See id.*, Ex. 4, at 10.

Furthermore, the PA retained a consulting and lobbying firm through a multi-year, multimillion dollar contract. *See* Pls.' Opp. Mem., Ex. F. That contract resulted in the performance of services from November 1999 to at least April 2004. *See id.*, Ex G. (11/29/1999 FARA Registration Statement filed by Firm for services to the PA); *id.*, Ex. H-L (FARA Supplemental Statements filed by Firm from April 2000 to April 2004) (indicating that services were continuous and continued after 2002). In particular, these American agents engaged in numerous political activities on behalf of the PA such as office and lunch meetings with

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[13] Defendants have not offered any evidence or other basis to attribute particular D.C. office activities to a single entity.

[14] The D.C. office does not have telephone or bank records for 1998-2001.

various U.S. government officials and departments.[15] *Id.*, Exs. H-L (listing each of the activities during every six month period). These agents also promoted the PA's interests through television and radio appearances on occasion,[16] and pursuant to the Retainer Agreement, provided the PA with consulting and public relations services that would not have been disclosed in the required public filings as such. *Id.*, Ex. F. This included the preparation of "weekly memoranda on developments in Washington which are relevant to the Palestinian Authority" and "[r]egular contacts . . . between personnel of the Firm and the Washington Office of the Palestinian Authority." *Id.*, Ex. F, ¶¶ 3-4.

The Defendants also had a substantial promotional presence in the United States, with the D.C. office having been permanently dedicated to promoting the interests of the PLO and the PA. Based upon required disclosures to federal authorities, the D.C. office engaged in extensive public relations activities throughout the United States, ranging from interviews and speeches to attending and participating in various public events. *See* Stachman Declaration, Exs. 2-12. Defendants not only participated in a

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[15] Approximate total are as follows: 36 activities in the six month period ending April 2000. *See* Pls.' Opp. Mem., Ex. H Part 1. 46 activities in the six month period ending October 2000. *Id.*, Ex. H Part 2. 30 activities in the six month period ending April 2001. *Id.*, Ex. I Part 1. 35 activities in the six month period ending October 2001. *Id.*, Ex. I Part 2. 29 activities in the six month period ending April 2002. *Id.*, Ex. J Part 1. 37 activities in the six month period ending October 2002. *Id.*, Ex. J Part 2. 33 activities in the six month period ending April 2003. *Id.*, Ex. K Part 1. 50 activities in the six month period ending October 2003. *Id.*, Ex. K Part 2. 33 activities in the six month period ending April 2004. *Id.*, Ex. L

[16] 17 activities in the six month period ending October 2000. *See id.*, Ex. H Part 2.

substantial number of events,[17] but also Defendants expended substantial amounts of money – often exceeding $200K every six months – on these activities. *See id.*, Exs. 2-12; *see also Unger*, 325 F.Supp.2d at 4950 (summarizing the millions of dollars spend on media and public relations activities from 1999-2001). Rahman, the Chief Representative of the PLO and the PA in the United States, participated in at least 158 public interviews and media appearances between January 1998 and January 2004.[18] *See* Stachman Declaration ¶ 18 (listing events); *id.*, Ex. 13 (providing transcripts). Most were broadcasted on major national news networks such as CNN, Fox News Channel, ABC, and MSNBC.

c. Jurisdictional Exceptions

Certain activities fall under jurisdictional exceptions and may not be properly considered as a basis of jurisdiction. *See Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione*, 937 F.2d 44, 51 n.7 (2d Cir. 1991) (noting examples). However, there is not a presumption that a jurisdictional exception applies where a dispute exists over excluding particular contacts. A plaintiff is not required to disprove the applicability of a jurisdictional exception simply because one is asserted by a defendant. A

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[17] Approximate total are as follows: 14 events in the six month period ending September 1998. *See* Strachman Declaration, Ex. 2. 13 events in the six month period ending March 1999. *Id.*, Ex. 3. 20 events in the six month period ending September 1999. *Id.*, Ex. 4. 15 events in the six month period ending March 2000. *Id.*, Ex. 5. 19 events in the six month period ending September 2000. *Id.*, Ex. 6. 27 events in the six month period ending March 2001. *Id.*, Ex. 7. 18 events in the six month period ending September 2001. *Id.*, Ex. 8. 23 events in the six month period ending September 2002. *Id.*, Ex. 10. 10 events in the six month period ending March 2003. *Id.*, Ex. 11. 21 events in the six month period ending September 2003. *Id.*, Ex. 12.

[18] Many of these events do not appear to have been disclosed in the required filings.

defendant bears the burden of demonstrating that it is entitled to the benefits of a jurisdictional exception, triggering a re-assessment of the sufficiency of a plaintiff's prima facie case. Unsupported allegations and assertions are simply insufficient after the parties have engaged in jurisdictional discovery.

With respect to foreign entities such as the PLO and the PA engaging in activities in the United States, two exceptions may be applicable. First, jurisdiction in the District of Columbia over a person or entity may not be grounded on the defendant's "contacts with a federal instrumentality," including where contacts only consist of "lobbying activity before federal agencies to secure their own proprietary interests." *Bechtel & Cole v. Graceland Broadcasting*, 1994 U.S. App. LEXIS 4468, at *3 (D.C. Cir. Mar. 9, 1994) (citing *Environmental Research Intl, Inc. v. Lockwood Greene Engineers, Inc.*, 355 A.2d 808, 813 (D.C. 1976) (en banc)); *id.* (citing *Naartex Consulting Corp. v. Watt*, 232 U.S. App. D.C. 293, 722 F.2d 779, 787 (D.C. Cir. 1983) (citing *Rose v. Silver*, 394 A.2d 1368, 1373-74 (D.C. 1978))).[19] The "government contacts" exception does not apply where the defendant is engaged in substantial activity beyond lobbying the federal government.

The Second Circuit has also held that participation in the United Nation's affairs by a "foreign organization" may not properly be considered as a basis of jurisdiction in New York. *See Klinghoffer*, 937 F.2d at 51-52. With respect to the PLO's New York office, the parties have produced little evidence, but no factual dispute appears to exist. The PLO operated and owned an office in New York

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[19] *See also Klinghoffer*, 937 F.2d at 51 (noting that the government contacts exception covers non-resident's "getting information from or giving information to the government, or getting the government's permission to do something.") (quoting *Investment Co. Inst. v. United States*, 550 F. Supp. 1213, 1216-17 (D.D.C 1982)).

City during the relevant period, in addition to the residence used by the Permanent Observer Mission of Palestine to the United Nations. *See* Dfs.' Opening Mem., Ex. 3, at 19-20. The PLO employed twenty employees at the New York office for all or a portion of the relevant period, and the PA employed one. *Id.*, Ex. 3, at 6. The New York office had a checking account and at least two telephone lines. *Id.*, Ex. 3, at 20, 22. Finally, Nasser Al-Kidwa, the ambassador during the relevant period, participated on behalf of the PLO in at least 73 media appearances and interviews between 2000 and 2003 on a mix of major national news networks and local stations. *See* Strachman Declaration ¶ 20 (listing events); *id.*, Ex. 14 (transcripts).

Defendants assert that none of the contacts associated with the D.C. and New York offices can be considered for purposes of establishing personal jurisdiction pursuant to the aforementioned exceptions. Defendants do not, however, provide any evidence demonstrating that either office exclusively and solely dealt with the federal government or the UN. Nor have Defendants made an effort to demonstrate that their activities in Washington, D.C., and New York were commensurate with their special diplomatic need for being present in those cities. *See, e.g.*, *Fandel v. Arabian American Oil Co.*, 345 F.2d 87, 89 (D.C. Cir. 1965). With respect to the activities involving the New York office, Defendants are entitled to the *Klinghoffer* jurisdictional exception. Plaintiffs have failed to identify any contacts that raise a dispute over the exclusivity of the activities conducted from the New York office, and, in any event, the evidence indicates that the activities were primarily related to the PLO's UN affairs.

With respect to the activities involving the D.C. office, Defendants have failed to demonstrate by a preponderance of the evidence that any of the contacts should be excluded by either jurisdictional exception. The *Klinghoffer* jurisdictional exception is inapplicable because there is no

evidence that the D.C.-based activities involved UN affairs,[20] and because the exception does not provide for a blanket immunization of all contacts in the United States. Defendants have failed to demonstrate by a preponderance of the evidence that their activities from the Washington, D.C. office exclusively involved contacting some branch of the federal government. Outside of New York, Defendants are no different than any other political organization based in Washington, D.C.,[21] and yet the record contains overwhelming evidence that Defendants were primarily in Washington, D.C. pursuing their political interest, but were not solely conducting diplomatic activities with our government.

Nevertheless, even after excluding activities conducted in furtherance of the PLO's observer status and contacts with the federal government, the remaining

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[20] Defendants never assert that they were conducting UN affairs from the D.C. office. In fact, the evidence – namely, the deposition testimony of Said M. Hamad, Deputy Chief in the D.C. office – indicates that they had no involvement with UN activities.

> Q: And the office in New York, are you involved with that office at all? Do you communicate with them?
>
> A No.;
>
> Q Why is that?
>
> A Because they have their own business at U.N. Q And you don't coordinate any activities?
>
> A Well, there's no activities to coordinate. They have their own business. Their mission is the United States. We have nothing to do with them, they have nothing to do with us, except hello and all.

See Strachman Declaration, Ex. N, at 31.

[21] Palestine, as discussed in this Court's 9/30/2008 Memorandum Decision and Order, is not recognized, under United States law, as a 'foreign state.'" *Sokolow*, 583 F. Supp. 2d at 458. "[D]efendants cannot derivatively secure sovereign immunity as agencies and/or instrumentalities of Palestine," and "the PA is [not] . . . entitled to immunity as a political subdivision of Israel." *Id.*

contacts would still provide a sufficient basis to exercise general jurisdiction over the Defendants. *See, e.g.*, *Unger*, 325 F. Supp. 2d at 53; *see also Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione etc.*, 795 F. Supp. 112, 114 (S.D.N.Y. 1992). The PLO and the PA were continuously and systematically present in the United States by virtue of their extensive public relations activities. Whether characterized as diplomatic public-speaking or proselytizing, the forums and audiences clearly indicate that the vast majority of these appearances were not directly communicating to or sponsored by the federal government or the United Nations General Assembly. These appearances were separate from Defendants' diplomatic foreign affairs functions in the United States, such as the PLO's right to speak at the United Nations General Assembly meetings, or the PLO or the PA's efforts to petition the United States government. This alone is a sufficient basis to decline to ignore the entire physical presence, commercial transactions, and other activities of the D.C. office. Thus, as found in Unger, "even if the court excludes from its consideration contacts by the Washington Office of the PLO with the federal government [or by the New York office with the UN], the other activities of that office are sufficient to allow this court to find minimum contacts." 325 F. Supp. 2d at 53; see also Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione, 795 F. Supp. 112, 114 (S.D.N.Y. 1992).

3. Reasonableness

The second part of the jurisdictional analysis asks "whether the assertion of personal jurisdiction comports with 'traditional notions of fair play and substantial justice' – that is, whether it is reasonable under the circumstances of the particular case." *Metro. Life*, 84 F.3d at 568 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 95, 66 S. Ct. 154 (1945)). Where a plaintiff makes the threshold showing of the minimum contacts required

to meet the first test, a defendant must present "a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Id.* (quoting *Burger King*, 471 U.S. at 477). Courts are to consider five factors in evaluating reasonableness: "(1) the burden that the exercise of jurisdiction will impose on the defendant; (2) the interests of the forum state in adjudicating the case; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of the controversy; and (5) the shared interest of the states in furthering substantive social policies." *Id.* at 568 (citing *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113-14 (1987); *Burger King*, 471 U.S. at 476-47)).

Here, neither the PLO nor the PA has presented a compelling case that exercising jurisdiction over them in the present action will offend the Constitution or federal law. The reality is that ATA litigation often involves foreign individuals and entities, and thereby, a statutory cause of action for international terrorism exists. There is a strong inherent interest of the United States and Plaintiffs in litigating ATA claims in the United States. The Defendants have not demonstrated that this case would impose a more significant burden than can typically be expected, particularly in light of the fact that they have vigorously engaged in such litigation several times before. The Defendants have also failed to identify an alternative forum where Plaintiffs' claims could be brought, and where the foreign court could grant a substantially similar remedy.

CONCLUSION

Defendants' motion to dismiss for lack of personal jurisdiction is DENIED.

Dated: New York, New York
March 30, 2011

SO ORDERED.

George B. Daniels
GEORGE B. DANIELS
United States District Judge

APPENDIX I

22-76 (L); 15-3135 (L)
Fuld v. PLO, et al.; Waldman v. PLO, et al.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 10th day of May, two thousand twenty-four.

Present:

DEBRA ANN LIVINGSTON,
Chief Judge,
RAYMOND J. LOHIER, JR.,
RICHARD J. SULLIVAN,
JOSEPH F. BIANCO,
MICHAEL H. PARK,
WILLIAM J. NARDINI,
STEVEN J. MENASHI,
EUNICE C. LEE,
BETH ROBINSON,
MYRNA PÉREZ,
SARAH A. L. MERRIAM,
MARIA ARAÚJO KAHN
Circuit Judges.

Docket Nos. 22-76-cv (L), 22-496-cv (Con),
15-3135-cv (L), 15-3151-cv (XAP), 22-1060-cv (Con)

MIRIAM FULD, INDIVIDUALLY, AS PERSONAL REPRESENTATIVE AND ADMINISTRATOR OF THE ESTATE

OF ARI YOEL FULD, DECEASED, AND AS NATURAL GUARDIAN OF PLAINTIFF NATAN SHAI FULD, NATAN SHAI FULD, MINOR, BY HIS NEXT FRIEND AND GUARDIAN MIRIAM FULD, NAOMI FULD, TAMAR GILA FULD, AND ELIEZER YAKIR FULD,

Plaintiffs – Appellants,

UNITED STATES OF AMERICA,

Intervenor – Appellant,

—v.—

THE PALESTINE LIBERATION ORGANIZATION AND THE PALESTINIAN AUTHORITY (A/K/A "THE PALESTINIAN INTERIM SELF-GOVERNMENT AUTHORITY," AND/OR "THE PALESTINIAN COUNCIL," AND/OR "THE PALESTINIAN NATIONAL AUTHORITY"),

Defendants – Appellees.

EVA WALDMAN, REVITAL BAUER, INDIVIDUALLY AND AS NATURAL GUARDIAN OF PLAINTIFFS YEHONATHON BAUER, BINYAMIN BAUER, DANIEL BAUER AND YEHUDA BAUER, SHAUL MANDELKORN, NURIT MANDELKORN, OZ JOSEPH GUETTA, MINOR, BY HIS NEXT FRIEND AND GUARDIAN VARDA GUETTA, VARDA GUETTA, INDIVIDUALLY AND AS NATURAL GUARDIAN OF PLAINTIFF OZ JOSEPH GUETTA, NORMAN GRITZ, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF DAVID GRITZ, MARK I. SOKOLOW, INDIVIDUALLY AND AS A NATURAL GUARDIAN OF PLAINTIFF JAMIE A. SOKOLOW, RENA M. SOKOLOW, INDIVIDUALLY AND AS A NATURAL GUARDIAN OF PLAINTIFF JAIME A. SOKOLOW, JAMIE A. SOKOLOW, MINOR, BY HER NEXT FRIENDS AND GUARDIAN MARK I. SOKOLOW AND RENA M. SOKOLOW, LAUREN M.

SOKOLOW, ELANA R. SOKOLOW, SHAYNA EILEEN GOULD, RONALD ALLAN GOULD, ELISE JANET GOULD, JESSICA RINE, SHMUEL WALDMAN, HENNA NOVACK WALDMAN, MORRIS WALDMAN, ALAN J. BAUER, INDIVIDUALLY AND AS NATURAL GUARDIAN OF PLAINTIFFS YEHONATHON BAUER, BINYAMIN BAUER, DANIEL BAUER AND YEHUDA BAUER, YEHONATHON BAUER, MINOR, BY HIS NEXT FRIEND AND GUARDIANS DR. ALAN J. BAUER AND REVITAL BAUER, BINYAMIN BAUER, MINOR, BY HIS NEXT FRIEND AND GUARDIANS DR. ALAN J. BAUER AND REVITAL BAUER, DANIEL BAUER, MINOR, BY HIS NEXT FRIEND AND GUARDIANS DR. ALAN J. BAUER AND REVITAL BAUER, YEHUDA BAUER, MINOR, BY HIS NEXT FRIEND AND GUARDIANS DR. ALAN J. BAUER AND REVITAL BAUER, RABBI LEONARD MANDELKORN, KATHERINE BAKER, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF BENJAMIN BLUTSTEIN, REBEKAH BLUTSTEIN, RICHARD BLUTSTEIN, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF BENJAMIN BLUTSTEIN, LARRY CARTER, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF DIANE ("DINA") CARTER, SHAUN COFFEL, DIANNE COULTER MILLER, ROBERT L. COULTER, JR., ROBERT L. COULTER, SR., INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JANIS RUTH COULTER, CHANA BRACHA GOLDBERG, MINOR, BY HER NEXT FRIEND AND GUARDIAN KAREN GOLDBERG, ELIEZER SIMCHA GOLDBERG, MINOR, BY HER NEXT FRIEND AND GUARDIAN KAREN GOLDBERG, ESTHER ZAHAVA GOLDBERG, MINOR, BY HER NEXT FRIEND AND GUARDIAN KAREN GOLDBERG, KAREN GOLDBERG, INDIVIDUALLY, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF STUART SCOTT GOLDBERG/NATURAL GUARDIAN OF PLAINTIFFS CHANA BRACHA GOLDBERG, ESTHER ZAHAVA GOLDBERG,

YITZHAK SHALOM GOLDBERG, SHOSHANA MALKA GOLDBERG, ELIEZER SIMCHA GOLDBERG, YAAKOV MOSHE GOLDBERG, TZVI YEHOSHUA GOLDBERG, SHOSHANA MALKA GOLDBERG, MINOR, BY HER NEXT FRIEND AND GUARDIAN KAREN GOLDBERG, TZVI YEHOSHUA GOLDBERG, MINOR, BY HER NEXT FRIEND AND GUARDIAN KAREN GOLDBERG, YAAKOV MOSHE GOLDBERG, MINOR, BY HER NEXT FRIEND AND GUARDIAN KAREN GOLDBERG, YITZHAK SHALOM GOLDBERG, MINOR, BY HER NEXT FRIEND AND GUARDIAN KAREN GOLDBERG, NEVENKA GRITZ, SOLE HEIR OF NORMAN GRITZ, DECEASED,

Plaintiffs – Appellants,

UNITED STATES OF AMERICA,

Intervenor – Appellant,

—v.—

PALESTINE LIBERATION ORGANIZATION, PALESTINIAN AUTHORITY, AKA PALESTINIAN INTERIM SELF-GOVERNMENT AUTHORITY AND/OR PALESTINIAN COUNCIL AND/OR PALESTINIAN NATIONAL AUTHORITY,

Defendants – Appellees,

YASSER ARAFAT, MARWIN BIN KHATIB BARGHOUTI, AHMED TALEB MUSTAPHA BARGHOUTI, AKA AL-FARANSI, NASSER MAHMOUD AHMED AWEIS, MAJID AL-MASRI, AKA ABU MOJAHED, MAHMOUD AL-TITI, MOHAMMED ABDEL RAHMAN SALAM MASALAH, AKA ABU SATKHAH, FARAS SADAK MOHAMMED GHANEM, AKA HITAWI, MOHAMMED SAMI IBRAHIM ABDULLAH, ESTATE OF SAID RAMADAN, DECEASED, ABDEL KARIM RATAB YUNIS AWEIS, NASSER JAMAL MOUSA SHAWISH, TOUFIK TIRAWI, HUSSEIN AL-SHAYKH, SANA'A MUHAMMED SHEHADEH, KAIRA SAID ALI SADI, ESTATE

OF MOHAMMED HASHAIKA, DECEASED, MUNZAR MAHMOUD KHALIL NOOR, ESTATE OF WAFA IDRIS, DECEASED, ESTATE OF MAZAN FARITACH, DECEASED, ESTATE OF MUHANAD ABU HALAWA, DECEASED, JOHN DOES, 1-99, HASSAN ABDEL RAHMAN,

Defendants.

The above appeals are consolidated for the purposes of this order. Following disposition of the appeals in these cases on September 8, 2023, Plaintiffs- Appellants and Intervenor-Appellant filed petitions for rehearing *en banc* and an active judge of the Court thereafter requested a poll on whether to rehear the case *en banc*. A poll having been conducted and there being no majority favoring *en banc* review, the petition for rehearing *en banc* is hereby **DENIED**.

Joseph F. Bianco, *Circuit Judge*, concurs by opinion in the denial of rehearing *en banc*.

Steven J. Menashi, *Circuit Judge*, joined by Debra Ann Livingston, *Chief Judge*, Michael H. Park, *Circuit Judge*, and joined in Part I by Richard J. Sullivan, *Circuit Judge*, dissents by opinion from the denial of rehearing *en banc*.

Pierre N. Leval, *Circuit Judge*, filed a statement with respect to the denial of rehearing *en banc*.

Alison J. Nathan, *Circuit Judge*, took no part in the consideration or decision of the petition.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

JOSEPH F. BIANCO, *Circuit Judge*, concurring in the order denying rehearing *en banc*:

I concur in the denial of the petition for rehearing *en banc* and, as a member of the unanimous panel issuing the opinions that are the subject of the petition, write to explain my disagreement with the views expressed by the dissent.

As discussed in the panel opinions in these cases, and discussed in greater detail below, although these appeals involved the question of personal jurisdiction in the context of a novel statutory structure, the analysis in both opinions followed clear precedent from the Supreme Court and did not articulate any new legal rule. In contrast, the dissent proposes a new rule of "deemed consent" or "constructive consent" for purposes of personal jurisdiction, which has never been recognized by the Supreme Court nor by any other court and is fundamentally incompatible with existing precedent for determining consent to waive a constitutional right. Moreover, the dissent's proposed holding that the Due Process Clause of the Fifth Amendment does not limit the exercise of personal jurisdiction by federal courts in the same way as the Due Process Clause of the Fourteenth Amendment is not only contrary to our well-settled precedent, but also has been rejected by each of the other six sister circuits who has addressed that issue. There is no persuasive reason to depart from the principles of *stare decisis* and create a new rule that could have far-reaching ramifications for the entire body of personal jurisdiction jurisprudence beyond these two particular cases.

The principle that a court must have personal jurisdiction over a defendant "recognizes and protects an individual liberty interest" flowing from the Constitution's guarantees of due process. *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). The

Supreme Court has recognized three bases for exercising personal jurisdiction over an out-of-forum defendant in accordance with the dictates of due process: general jurisdiction, specific jurisdiction, and consent. *See, e.g.*, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472–73 (1985). Consent to personal jurisdiction is a voluntary agreement on the part of a defendant to proceed in a particular forum. *See Nat'l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 316 (1964); *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 880–81 (2011) (plurality opinion).

The plaintiffs in these cases relied on a theory of deemed consent or constructive consent to justify personal jurisdiction in federal court. More particularly, the plaintiffs in these cases are the victims or relatives of victims of terrorist attacks in the West Bank or Israel. They sued the Palestine Liberation Organization ("PLO") and the Palestinian Authority ("PA"), seeking damages for alleged violations of the Anti-Terrorism Act ("ATA"), 18 U.S.C. § 2333, related to those attacks. In both cases, it was undisputed that the district court did not have general jurisdiction over the PLO and the PA because those organizations were not "at home" in the United States. It was also undisputed that there was no specific jurisdiction over the PLO and the PA because the activities at issue occurred abroad and were random acts of terror, rather than acts directed against United States citizens.

The only asserted basis for personal jurisdiction over the PLO and the PA was the Promoting Security and Justice for Victims of Terrorism Act of 2019 ("PSJVTA"), in which Congress provided that the PLO and the PA "shall be deemed to have consented to personal jurisdiction" in any civil ATA action upon engaging in certain forms of post-enactment conduct, namely (1) making payments, directly or indirectly, to the designees or families of

incarcerated or deceased terrorists, respectively, whose acts of terror injured or killed a United States national, or (2) undertaking any activities within the United States, subject to a handful of exceptions. *See* 18 U.S.C. § 2334(e)(1). These activities within the United States remained unlawful, but Congress made them a basis for personal jurisdiction over the PLO and the PA.

In both *Fuld v. Palestine Liberation Organization*, 578 F. Supp. 3d 577, 580 (S.D.N.Y. 2022), and *Sokolow v. Palestine Liberation Organization*, 590 F. Supp. 3d 589, 595–97 (S.D.N.Y. 2022), the district courts held that the PSJVTA was unconstitutional because it was not a valid basis for finding that the PLO and the PA had consented to personal jurisdiction in a federal court. In both cases, this Court agreed. *See Fuld v. Palestine Liberation Org.*, 82 F.4th 74, 97–98 (2d Cir. 2023) ("*Fuld*"); *Waldman v. Palestine Liberation Org.*, 82 F.4th 64, 73–74 (2d Cir. 2023) ("*Waldman III*"), *aff'g Sokolow*, 590 F. Supp. 3d 589. Thereafter, a majority of the active judges of this Court voted to deny the petition for rehearing *en banc*.

The purpose of this concurrence is not to reprise all of the arguments and analyses in *Fuld* and *Waldman III*. Those unanimous decisions explain at length the history of these cases and why the PSJVTA is unconstitutional. Instead, the purpose of this concurrence is to respond to the criticisms raised in the dissent from the denial of rehearing *en banc*. The dissent contends that the panel's decisions in *Fuld* and *Waldman III* erred in three ways: (1) by imposing a new requirement that consent to personal jurisdiction must be based on "reciprocal bargains"; (2) by failing to find that the alleged unlawful activities of the PLO and the PA are a basis to find they had consented to civil jurisdiction in United States courts; and (3) by holding that the Due Process Clause of the Fifth Amendment

imposes the same limits on personal jurisdiction as the Due Process Clause of the Fourteenth Amendment, except that the minimum contacts under the Fourteenth Amendment must be with a state and the minimum contacts under the Fifth Amendment are with the nation. I respectfully disagree with these arguments and will address them in turn.

I.

As an initial matter, the dissent contends that the government could simply recognize the PA as a state and thereby eliminate its constitutional rights. *See post*, Menashi, *J.*, dissenting from denial of rehearing *en banc*, at 10. However, we addressed that issue in *Waldman v. Palestine Liberation Organization*, 835 F.3d 317, 329 (2d Cir. 2016) ("*Waldman I*"), *cert. denied sub nom. Sokolow v. Palestine Liberation Org.*, 584 U.S. 915 (2018), explaining that if the government were to recognize the PA or the PLO as a state, they would receive the protection of sovereign immunity. These cases would then have to be considered under the Foreign Sovereign Immunities Act ("FSIA"). *See id.* Moreover, as discussed in *Waldman I* and in *Fuld*, the Oslo Accords limit the PA's authority to parts of the West Bank and Gaza Strip, and for that reason, the PLO conducts foreign affairs. *Waldman I*, 835 F.3d at 322–23; *see also Fuld*, 82 F.4th at 80. Neither the PA nor the PLO is a sovereign government, and there is no dispute that they are entitled to constitutional due process. *See Waldman I*, 835 F.3d at 329.

Turning to the merits, the dissent argues that "the panel incorrectly held that Congress may deem a foreign entity to have consented to personal jurisdiction based on its conduct only if the foreign entity receives a reciprocal benefit." *Post* at 2. However, *Fuld* created no such requirement. Instead, *Fuld* described in detail numerous

circumstances that the Supreme Court found "manifested" consent— including "reciprocal bargains" but also "litigation-related activities" and others— and found that the PSJVTA did not satisfy any of these circumstances. *See* 82 F.4th at 88–90 (citing, *inter alia*, *Mallory v. Norfolk S. Ry. Co.*, 600 U.S. 122 (2023)). *Fuld* then distinguished *Mallory* and other cases involving business registration statutes on the ground that such statutes, unlike the PSJVTA, involved reciprocal bargains, but *Fuld* did not say that consent to jurisdiction can only be found if there is a reciprocal bargain. *See* 82 F.4th at 94–96.

Moreover, contrary to the dissent's suggestion, the facts in *Mallory* offer no support for the deemed consent provision of the PSJVTA. The PLO and the PA never registered to do business in the United States and received no benefit for such an action. Congress simply declared that continuing to make certain payments outside the United States and conducting certain activities in the United States that were otherwise illegal were sufficient to deem the PLO and the PA to have consented to jurisdiction in United States courts. Nothing in *Mallory* supports that contention.

Relying primarily on language in plurality opinions in *Mallory*, the dissent extrapolates a general principle that "deemed consent statutes are consistent with the Constitution" and that the "consent of the foreign entity must only be knowing and voluntary and involve some nexus to the forum such that requiring consent would not be 'unfair.'" *Post* at 15–16 (citing *Mallory*, 600 U.S. at 141 (plurality opinion); *id.* at 153–54 (Alito, *J.*, concurring)). However, that formulation overlooks that the railway company in *Mallory* had registered to do business in Pennsylvania and, as a condition of doing business, had thereby

consented to jurisdiction to be sued in the state. Justice Alito's concurrence framed the question as follows:

> The sole question before us is whether the Due Process Clause of the Fourteenth Amendment is violated when a large out-of-state corporation with substantial operations in a State complies with a registration requirement that conditions the right to do business in that State on the registrant's submission to personal jurisdiction in any suits that are brought there.

Mallory, 600 U.S. at 150. Justice Alito concluded that the Due Process Clause was not violated by requiring the railway to be subjected to suit in Pennsylvania, explaining:

> Requiring Norfolk Southern to defend against Mallory's suit in Pennsylvania . . . is not so deeply unfair that it violates the railroad's constitutional right to due process. The company has extensive operations in Pennsylvania; has availed itself of the Pennsylvania courts on countless occasions; and had clear notice that Pennsylvania considered its registration as consent to general jurisdiction. Norfolk Southern's conduct and connection with Pennsylvania are such that it should reasonably anticipate being haled into court there.

Id. at 153 (alterations adopted) (internal quotation marks and citations omitted). Thus, the business registration statute at issue in *Mallory* bears no reasonable resemblance to the deemed consent provisions of the PSJVTA.

The dissent asserts that the panel opinions impose additional requirements beyond that required by principles of fundamental fairness, highlighting language in the district court opinion in *Fuld* that "[d]efendants do not cite, and the Court has not found, any case holding that . . . receipt of a benefit is a necessary condition." *Post* at 17

(quoting *Fuld*, 578 F. Supp. 3d at 595 n.10). Like the district court, the panel did not adopt the defendants' argument that the receipt of a benefit is a necessary condition for consent. *See Fuld*, 82 F.4th at 96 n.13; *Fuld*, 578 F. Supp. 3d at 595 n.10. Instead, this Court noted that an exchange of benefits was an important part of the justification for the consent to jurisdiction in business registration statutes, such as the statute at issue in *Mallory*, but was not required in all cases of consent. *See Fuld*, 82 F.4th at 96 n.13 ("The receipt of a benefit from the forum is not a necessary prerequisite to a finding that a defendant has consented to personal jurisdiction there. . . . There are other means of demonstrating consent, such as certain litigation-related conduct."). The district court ultimately rejected the constitutionality of the PSJVTA for reasons similar to those discussed by the panel:

> In the final analysis, the Court cannot acquiesce in Congress's legislative sleight of hand and exercise jurisdiction over Defendants here pursuant to the PSJVTA. A defendant's knowing and voluntary consent is a valid basis to subject it to the jurisdiction of a court, but Congress cannot simply declare anything it wants to be consent. To hold otherwise would let fiction get the better of fact and make a mockery of the Due Process Clause. . . . For today's purposes, it suffices to say that the provisions of the PSJVTA at issue push the concept of consent well beyond its breaking point and that the predicate conduct alleged here is not "of such a nature as to justify the fiction" of consent. It follows that exercising jurisdiction under the facts of this case does not comport with due process . . . .

Fuld, 578 F. Supp. 3d at 595 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945)).

The dissent replaces the carefully balanced legal landscape of constitutional due process with a new standard, claiming that "the Supreme Court has made clear[] [that] consent based on conduct need only be knowing and voluntary and have a nexus to the forum." *Post* at 3. *Mallory*, however, did not establish such a test and does not even use the term "nexus." Nor does any other Supreme Court decision impute consent to jurisdiction based simply on an undefined nexus to the forum. *Cf., Ins. Corp. of Ir.*, 456 U.S. at 704; *Pa. Fire Ins. Co. v. Gold Issue Mining & 22 Milling Co.*, 243 U.S. 93, 94–95 (1917). Instead, the dissent appears to use the word "nexus" as an umbrella term for any activity that Congress might declare subjects a defendant to the jurisdiction of United States courts. In so reasoning, the dissent substitutes the well-established requirement that *consent* be knowing and voluntary with the concept that all that is necessary is that a person's *conduct* be knowing and voluntary, and that the conduct have some relation to the forum, irrespective of whether the conduct reflects consent to jurisdiction in the forum. Adopting the dissent's interpretation would allow the government to declare conduct to be consent, even if that conduct could not reasonably be considered to be consent. Indeed, the dissent's new test would allow Congress to subject any foreign entity to personal jurisdiction in the United States, even in the absence of any contacts with the United States, if that entity knowingly and voluntarily engages in any conduct around the world (with some undefined nexus to the United States) after Congress enacts legislation deeming the continuation of that conduct to constitute consent to personal jurisdiction in the United States courts.

The dissent's test is contrary to the Supreme Court's admonition against the "deemed waiver" of constitutional rights in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999).

In that case, the question presented was whether the Trademark Remedy Clarification Act ("TRCA"), 106 Stat. 3567, subjects states to suits brought under Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a). *See Coll. Sav. Bank*, 527 U.S. at 668–69. Like the PSJVTA, the TRCA purported to identify conduct that the targeted actors—the states—could "choose to abandon." *See id.* at 684. The states were then deemed to have "constructively waived" their sovereign immunity by engaging in those specified activities. *See id.* at 683–84. The Supreme Court held that Congress could not extract "constructive waivers" of state sovereign immunity in this manner, *see id.* at 683, and that sovereign immunity was not abrogated or waived by a state's participation in interstate commerce, *see id.* at 691.

In *College Savings Bank*, the Supreme Court did not limit its analysis to issues of sovereign immunity. *See Fuld*, 82 F.4th at 99 (citing *Coll. Sav. Bank*, 527 U.S. at 681–82). To the contrary, Justice Scalia, writing for the majority, analogized the Eleventh Amendment privilege of state sovereign immunity to the Sixth Amendment right to trial by jury in criminal cases—concluding that the principle of "constructive waiver" would not apply in either circumstance, and that constructive waivers "are simply unheard of" in the context of other constitutionally protected privileges. *See Coll. Sav. Bank*, 527 U.S. at 681–82. In addition, because "'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights," *id.* at 682 (alteration omitted) (quoting *Aetna Ins. Co. v. Kennedy ex rel. Bogash*, 301 U.S. 389, 393 (1937)), the Supreme Court concluded that the waiver of state sovereign immunity could not be implied, *see id.* (citing *United States v. King*, 395 U.S. 1, 4 (1969)).

The PSJVTA's approach to deemed consent is likewise "unheard of" in the context of a waiver of the constitutional

right to due process. *See Fuld*, 82 F.4th at 100 (quoting *Coll. Sav. Bank*, 527 U.S. at 681). Indeed, neither the dissent nor the plaintiffs in these cases have cited any case involving constructive or deemed consent to personal jurisdiction under circumstances similar to those in these actions.

The dissent cites *Pennsylvania Fire Insurance Company of Philadelphia*, 243 U.S. 93 (1917), but that case, which *Mallory* found to be controlling, involved a Missouri business registration statute, like the Pennsylvania business registration statute at issue in *Mallory*. Justice Gorsuch described *Pennsylvania Fire* as holding that: "Pennsylvania Fire could be sued in Missouri by an out-of-state plaintiff on an out- of-state contract because it had agreed to accept service of process in Missouri on any suit as a condition of doing business there." *Mallory*, 600 U.S. at 133 (citing *Pa. Fire*, 243 U.S. at 95). There is no similar exchange of benefits in the PSJVTA.

The dissent attempts to justify the deemed consent provision in this case as "simply the adaptation of tag jurisdiction to artificial persons and works the same way." *Post* at 20. Tag jurisdiction recognizes the lawfulness of jurisdiction based on the service of process on an individual physically present in the jurisdiction. *See Burnham v. Super. Ct. of Cal., County of Marin*, 495 U.S. 604, 610 (1990). The Supreme Court has accepted tag jurisdiction as a "continuing tradition[] of our legal system," *id.* at 619, but it is difficult to see that this analogy to tag jurisdiction is akin to or can form the basis for imputing the waiver of a constitutional right.

In *Burnham*, the Supreme Court affirmed the constitutionality of tag jurisdiction as a "time-honored approach," which "dates back to the adoption of the Fourteenth Amendment." *Id.* at 622. However, the Court then

made clear: "For new procedures, hitherto unknown, the Due Process Clause requires analysis to determine whether 'traditional notions of fair play and substantial justice' have been offended." *Id.* (quoting *Int'l Shoe Co.*, 326 U.S. at 316). This Court in *Waldman III* and *Fuld* conducted an analysis consistent with *International Shoe*, and for the reasons discussed at length in our opinions, concluded that the PSJVTA's provision for deemed consent to personal jurisdiction was inconsistent with the requirements of constitutional due process. *See Waldman III*, 82 F.4th at 69.

As we explained in *Fuld*, in a civil case, "[c]onsent to personal jurisdiction is a voluntary agreement on the part of a defendant to proceed in a particular forum." 82 F.4th at 87. But neither basis for deemed consent in the PSJVTA reflects such an agreement. The first prong—making payments outside the United States to the designees or families of incarcerated or deceased terrorists—has nothing to do with any alleged agreement by the PLO or the PA to be sued in United States courts. Similarly, the second prong of the deemed consent provision—conducting certain activities in the United States—does not reflect an agreement to be sued in United States courts. Indeed, the activities that Congress described in the PSJVTA are unlawful in the United States. *See Fuld*, 82 F.4th at 93 n.10. Accordingly, for the reasons explained in *Fuld*, the "declaration of purported consent, predicated on conduct lacking any of the indicia of valid consent previously recognized in the case law, fails to satisfy constitutional due process." *Id.* at 91.

II.

The dissent insists that it is "strange" that the alleged conduct of the PLO and the PA in violation of federal restrictions would be an insufficient basis to find that they

had not received a benefit in the forum so as to confer jurisdiction. *See post* at 22. There is, however, nothing "strange" about that result. Any office other than that maintained pursuant to the United Nations ("UN") Headquarters Agreement is unlawful, *see Fuld*, 82 F.4th at 82 n.2, and so the defendants have not received *any* benefit from the forum, much less one "even greater" than a foreign actor whose domestic activities are not restricted.[1] *Post* at 22; *see, e.g.*, 22 U.S.C. § 5203(a) (authorizing the Attorney General to take "the necessary steps"— including "the necessary legal action"—to enforce restrictions against the PLO). The dissent maintains that, in any event, the Executive Branch has essentially conferred a benefit onto the defendants by historically allowing certain activities "as a matter of grace." *Post* at 22 (quoting

[1] Although the dissent correctly notes that the defendants do not argue on appeal that their offices and activities in the United States do not meet the second statutory prong of the PSJVTA, it is important to emphasize that the failure to make that argument on appeal should not be viewed as a concession by the defendants that they are engaged in any illegal conduct in the United States. Instead, as they explained, the district court did not reach that issue. *See* Appellees' *Fuld* Br. at 48 n.20; Appellees' *Waldman* Br. at 50 n.24. Moreover, the defendants did argue below that their alleged activities in the United States are exempt from consideration under the PSJVTA as part of their UN mission and UN- related activities, and "any personal or official activities conducted ancillary" thereto. 18 U.S.C. § 2334(e)(3); *see also Fuld*, 82 F.4th at 85 n.4. In particular, as explained in their appellate briefs, the defendants argued in the district court that, "[a]s part of its UN activities, the Palestinian Mission participates in the work of the UN Committee on the Exercise of the Inalienable Rights of the Palestinian People ('CEIRPP'). In light of the CEIRPP's work, the 'political propaganda activities and proselytizing,' press conferences, and Internet and social media posts alleged in the Amended Complaint are all plainly either official UN business or 'ancillary to' such activities under 18 U.S.C. § 2334(e)(3)." Appellees' *Fuld* Br. at 48 n.20 (citations omitted); *see also* Appellees' *Waldman* Br. at 50 n.24.

Fuld, 82 F. 4th 93 at n.10). As an initial matter, the dissent cites no case law to support the proposition that executive nonenforcement, the result of political considerations, should impact the Court's constitutional due process analysis. Moreover, "federal law has long prohibited the defendants from engaging in any activities or maintaining any offices in the United States, absent specific executive or statutory waivers." *Fuld*, 82 F.4th at 92. "The PSJVTA does not purport to relax or override these prohibitions," and the parties did not identify "any other change in existing law (for example, a statutory or executive waiver) that would otherwise authorize the restricted conduct."[2] *Id.*

So long as the PLO and the PA are prohibited from conducting business in the United States other than as allowed by the UN Headquarters Agreement, to establish deemed consent to jurisdiction based on those activities is to use the denial of a due process right as a penalty for unlawful conduct. The Supreme Court has specifically cautioned against that result. *See Fuld*, 82 F.4th at 94. In *Insurance Corp. of Ireland*, the Supreme Court held that a discovery sanction against the defendant establishing the facts of jurisdiction did not violate due process because there was a presumption that the evidence that was wrongfully withheld established personal jurisdiction. 456 U.S. at 705–06. The Supreme Court made clear that "the personal jurisdiction requirement recognizes and protects an individual liberty interest." *Id.* at 702. The Supreme Court found that it did not violate due process to invoke a presumption that the refusal to produce evidence material

[2] To the extent that the dissent suggests that specific jurisdiction might lie where a nonresident defendant "harms" the forum by engaging in illicit activities in the forum, *see post* at 22, this suggestion has no bearing on the Court's analysis regarding the consent theory of jurisdiction, which is the only theory of jurisdiction being litigated in these cases.

to the administration of due process was an admission of the lack of merit of that defense. *Id.* at 705. However, the Court distinguished that presumption from the situation in *Hovey v. Elliott*, 167 U.S. 409 (1897), in which the Court held that it "violate[d] due process for a court to take similar action as 'punishment' for failure to obey an order to pay into the registry of the court a certain sum of money." *Ins. Corp. of Ir.*, 456 U.S. at 706.

In this case, establishing deemed-consent jurisdiction based on the alleged unlawful activities undertaken by the PLO and the PA in the United States would be nothing more than "punishment" for such conduct.[3] And nothing about that conduct suggests that the PLO and the PA have consented to be sued in United States courts. Instead, as we explained in *Fuld*, "the [PSJVTA] subjects the defendants to the authority of the federal courts for engaging in conduct with no connection to the establishment of personal jurisdiction, and indeed with no connection to litigation in the United States at all." 82 F.4th at 94.

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[3] The dissent suggests that the second prong of the PSJVTA is not a penalty for unlawful conduct, but rather "simply subjects each defendant to the jurisdiction of the federal courts by virtue of its conduct in the forum." *Post* at 24. However, it is uncontroverted that the alleged illegal conduct that would create jurisdiction under the second prong is wholly unrelated to the alleged activities giving rise to liability in the underlying lawsuits. The dissent's analysis blurs the requirements for exercising personal jurisdiction through specific jurisdiction and the requirements for exercising personal jurisdiction through consent. In the proceedings before the district court in *Fuld*, the plaintiffs never contended that the court had specific jurisdiction over the PLO and the PA. *See* 82 F.4th at 87. Moreover, this Court in *Waldman I* concluded that there was no specific jurisdiction over the PLO and the PA. *See* 835 F.3d at 335–37. The underlying acts of terrorism occurred outside the United States and were not targeted against United States nationals.

In sum, under the consent theory of jurisdiction chosen by Congress, there is no principled way to deny the PLO and the PA the due process rights they have consistently asserted.[4]

III.

Finally, the dissent urges that the standard for determining the constitutionality of exercising personal jurisdiction under the Fifth Amendment should not be the same as under the Fourteenth Amendment. *See post* at 26–34. Recognizing that the Supreme Court has "reserved judgment" on this question, *id.* at 26 (citing *Bristol-Myers Squibb Co. v. Super. Ct. of Cal.*, 582 U.S. 255, 269 (2017)), the dissent contends that "the facts of these cases" require this Court to overturn its previous decisions, *see id.* at 35. As we noted in *Waldman I*, for over forty years, this Court has repeatedly held that there is a "congruence of due process analysis under both the Fourteenth and Fifth Amendments," and "has applied Fourteenth Amendment principles to Fifth Amendment civil terrorism cases." 835 F.3d at 330 (collecting cases).

The dissent seeks to overturn our well-established law based on some scholarship to the effect that "outside of the limits imposed by service of process, a federal court's writ may run as far as Congress, within its enumerated powers, would have it go." *Post* at 28 (alteration adopted) (internal quotation marks and citation omitted). However, the

[4] Although the dissent states that the "concurrence believes it would be improper for Congress to punish the unlawful conduct of the PLO and the PA," *post* at 24, I reach no such conclusion, nor did the panel opinions. Instead, the panel opinions narrowly held that Congress could not use this particular jurisdictional mechanism under these circumstances to bypass the due process rights that otherwise exist in this civil context. As discussed *infra*, many tools are available under the broad powers of Congress to address alleged unlawful conduct of this nature.

scholarship cited in the dissent is insufficient to explain why actions in federal courts implicate individual liberty interests any less than those in state courts. As the Supreme Court has emphasized:

> The requirement that a court have personal jurisdiction flows not from Art. III, but from the Due Process Clause. The personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty.

Ins. Corp. of Ir., 456 U.S. at 702. In my view, especially in the absence of any intervening applicable Supreme Court decision, the recent scholarship cited by the dissent does not provide a sufficient basis, under principles of *stare decisis*, to depart from a constitutional rule that has existed in our Circuit for over forty years and has been reaffirmed numerous times without intervention by our *en banc* Court. *See, e.g.*, *United States v. Bailey*, 36 F.3d 106, 110 (D.C. Cir. 2013) (*en banc*) ("[B]ecause [our precedent] represents the established law of the circuit, a due regard for the value of stability in the law requires that we have good and sufficient reason to reject it at this late date."); *Robert Bosch, LLC v. Pylon Mfg. Corp.*, 719 F.3d 1305, 1316–17 (Fed. Cir. 2013) (*en banc*) (emphasizing the importance of *stare decisis* when an *en banc* court considers adopting a position contrary to longstanding panel precedent); *United States v. Heredia*, 483 F.3d 913, 918 (9th Cir. 2007) ("Overturning a long-standing precedent is never to be done lightly "); *accord Al-Sharif v. U.S. Citizenship and Immig. Servs.*, 734 F.3d 207, 212 (3d Cir. 2013) (*en banc*).

Indeed, this Court's decisions, in both *Waldman I* and *Fuld*, which followed clear and longstanding precedent

from this Court, are consistent with the conclusion reached by each of the six other federal courts of appeals that has addressed this specific question. *Fuld*, 82 F.4th at 103–04, 104 n.17 (collecting cases); *Waldman I*, 835 F.3d at 330; *see also Douglass v. Nippon Yusen Kabushiki Kaisha*, 46 F.4th 226, 235 (5th Cir. 2022) (*en banc*) ("Both Due Process Clauses use the same language and serve the same purpose, protecting individual liberty by guaranteeing limits on personal jurisdiction."), *cert. denied sub nom. Douglass v. Kaisha*, 143 S. Ct. 1021 (2023); *Livnat v. Palestinian Auth.*, 851 F.3d 45, 54–55 (D.C. Cir. 2017) (noting that the Second, Sixth, Seventh, Eleventh, and Federal Circuits have expressly analyzed whether the Fifth and Fourteenth Amendment standards differ and "all agree that there is no meaningful difference in the level of contacts required for personal jurisdiction").

Moreover, it is unclear from the dissent whether the entire body of Fourteenth Amendment personal jurisdiction jurisprudence would be jettisoned in Fifth Amendment cases, and if so, what would replace it. Would all defendants in federal courts, irrespective of the nature of the lawsuits against them, be denied the right to assert that haling them into federal court is unreasonable? *See Burger King*, 471 U.S. at 472 ("[T]he Due Process Clause 'gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'" (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980))). It is precisely this type of uncertainty that the dissent's proposed approach would engender across the personal jurisdiction landscape that strongly counsels against *en banc* review to eliminate our longstanding precedent in the absence of any intervening Supreme Court decision or guidance from the highest

court in the land as to what the new constitutional parameters would be.

Finally, the dissent suggests that our holding in these cases "leaves Congress powerless to afford relief to American victims of international terrorism." *Post* at 38–39. I respectfully disagree. In fact, the United States Department of Justice, in *opposing* the plaintiffs' petition to the Supreme Court for a writ of certiorari in *Waldman I*, also disagreed with any such suggestion. More specifically, in the certiorari petition, plaintiffs urged the Supreme Court to review our decision in *Waldman I* because, *inter alia*, the application of Fourteenth Amendment personal- jurisdiction standards in cases governed by the Fifth Amendment purportedly "imperil[ed] Congress's ability to protect Americans from international terrorism and other unlawful acts abroad." Petition for Writ of Certiorari at 34, *Sokolow v. Palestine Liberation Org.*, No. 16-1071 (Mar. 3, 2017), 2017 WL 913120, at *34. The Department of Justice, however, disagreed with that assessment and plaintiffs' corresponding effort to overturn our approach to personal jurisdiction under the Fifth Amendment (and that of six of our sister circuits), explaining:

> 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. 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. 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. 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. 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.

Brief for the United States as Amicus Curiae at 17–18, *Sokolow v. Palestine Liberation Org.*, No. 16-1071 (Feb. 22, 2018), 2018 WL 1251857, at *17–18 (citations omitted).[5]

* * *

The dissent warns that "[i]nvalidating an act of Congress is 'the gravest and most delicate duty that [a federal court] is called on to perform.'" *Post* at 1–2 (quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, *J.*)). But it is equally true that it is the responsibility of federal courts to enforce the Constitution, including when disfavored litigants are the target of government action. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 538 (2012) ("[T]here can be no question that it is the

[5] Although the Department of Justice now seeks to have the *en banc* Court re-consider this longstanding holding regarding the scope of the Fifth Amendment, it does not explain the reason for its change in position or even suggest that our holding would undermine this panoply of legislative tools, which still remain available to Congress, to address the alleged conduct at issue here. *See* Intervenor-Appellant's Petition for Rehearing En Banc at 14–17.

responsibility of th[e] Court to enforce the limits on federal power by striking down acts of Congress that transgress those limits."). At bottom, these appeals are not about whether Congress has the constitutional and statutory authority to punish foreign entities who are engaged in alleged conduct that is illegal and/or contrary to the national security interests of the United States, including through monetary sanctions, and to use such sanctions to compensate victims of that conduct. Instead, the question is whether Congress can seek to accomplish those important objectives through one particular jurisdictional mechanism—namely, by attempting to twist the doctrine of deemed consent, for purposes of establishing personal jurisdiction over foreign entities in civil cases, beyond recognition under the current due process jurisprudence of this Court and the Supreme Court. After careful consideration, the unanimous decisions in *Fuld* and *Waldman III* correctly recognized that "Congress cannot, by legislative fiat, simply deem activities to be consent when the activities themselves cannot plausibly be construed as such." *Fuld*, 82 F.4th at 97 (internal quotation marks omitted). Accordingly, I concur in the denial of rehearing *en banc*.

MENASHI, *Circuit Judge*, joined by LIVINGSTON, *Chief Judge*, and PARK, *Circuit Judge*, and joined as to Part I by SULLIVAN, *Circuit Judge*, dissenting from the denial of rehearing *en banc*:

The panel in these cases invalidated a federal statute that provides that when the Palestine Liberation Organization ("PLO") and the Palestinian Authority ("PA") engage in certain conduct— specifically (1) compensating terrorists who have killed or injured Americans or (2) maintaining premises or engaging in official activities in the United States—those organizations are deemed to have consented to personal jurisdiction in the federal courts.[1] The panel determined that it would be a violation of the Due Process Clause of the Fifth Amendment to subject the PLO and the PA to personal jurisdiction despite having engaged in such conduct, so the panel dismissed the plaintiffs' lawsuit. The plaintiffs had alleged pursuant to the Anti-Terrorism Act of 1992 ("ATA") that the PLO and the PA "encouraged, incentivized, and assisted" terrorists who killed or injured the plaintiffs and their family members. *Fuld*, 82 F.4th at 80 (quoting Fuld Am. Compl. ¶ 4). In one of these cases, a trial convinced a jury that the plaintiffs were right, and the plaintiffs obtained an award

[1] The PLO and the PA "do not dispute that they 'made payments'" to compensate terrorists "sufficient to satisfy the PSJVTA's first statutory prong for 'deemed consent,'" *Fuld v. PLO*, 82 F.4th 74, 86 n.5 (2d Cir. 2023) (quoting *Fuld v. PLO*, 578 F. Supp. 3d 577, 583 (S.D.N.Y. 2022)), and have not argued on appeal that their offices and activities in the United States do not meet the second statutory prong. The panel did not question the plaintiffs' plausible allegations that the statutory predicates have been met.

of $655.5 million. *Waldman v. PLO* (*Waldman I*), 835 F.3d 317, 324 (2d Cir. 2016).

Invalidating an act of Congress is "the gravest and most delicate duty that [a federal court] is called on to perform." *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J.). In these cases, Congress adopted and the President signed the legislation "in furtherance of their stance on a matter of foreign policy," and "[a]ction in that realm warrants respectful review by courts." *Bank Markazi v. Peterson*, 578 U.S. 212, 215 (2016). Not only that, but the legislation was enacted specifically to overcome the panel's *two* prior dismissals of the plaintiffs' lawsuit for lack of personal jurisdiction. *See Waldman I*, 835 F.3d 317; *Waldman v. PLO* (*Waldman II*), 925 F.3d 570 (2d Cir. 2019). Congress has now deliberately and unequivo cally authorized the federal courts to entertain this lawsuit, but the panel dismissed it for a third time.

According to the panel, Congress may "require submission to federal courts' jurisdiction" only "in exchange for, or as a condition of, receiving some in-forum benefit or privilege." *Fuld*, 82 F.4th at 91. The PLO and the PA knew that supporting terrorists who killed or injured Americans and maintaining an office and conducting activities in the United States would subject them to the jurisdiction of the federal courts; the organizations knowingly and voluntarily engaged in that conduct anyway. But the panel nevertheless concluded that subjecting the PLO and the PA to federal court jurisdiction "cannot be reconciled with 'traditional notions of fair play and substantial justice.'" *Id.* at 101 (quoting *Int'l Shoe Co. v. State of Wash., Off. of Unemployment Comp. & Placement*, 326 U.S. 310, 316 (1945)).

The panel's decision lacks a basis in the Constitution and cannot be reconciled with Supreme Court precedent on personal jurisdiction. The decision rests on three legal

errors. First, the panel incorrectly held that Congress may deem a foreign entity to have consented to personal jurisdiction based on its conduct only if the foreign entity receives a reciprocal benefit. *Id.* at 91. No law requires Congress to extend a benefit to those over whom it authorizes personal jurisdiction. Instead, as the Supreme Court has made clear, consent based on conduct need only be knowing and voluntary and have a nexus to the forum. In *Mallory v. Norfolk Southern Railway Co.*, the Supreme Court held that Pennsylvania may deem, via statute, an out-of-state corporation's registration to do business to be consent to personal jurisdiction in Pennsylvania. 600 U.S. 122, 127 (2023). "Having made the choice to register and do business in Pennsylvania, despite the jurisdictional consequences (and having thereby voluntarily relinquished the due process rights our general- jurisdiction precedents afford), Norfolk Southern cannot be heard to complain that its due process rights are violated by having to defend itself in Pennsylvania's courts." *Id.* at 149 (Jackson, J., concurring). The PLO and the PA similarly chose to take actions with a nexus to the United States knowing the jurisdictional consequences.

Second, even if the panel were correct that the Due Process Clause required a reciprocal benefit, the statute here involves such a benefit because the defendants are deemed to have consented based on the privilege of residing and conducting business in the United States—not to mention furthering their political goals at the expense of American lives. The panel claimed that the conduct of business by the PLO and the PA in the United States does not amount to a benefit because "federal law has long prohibited the defendants from engaging in any activities or maintaining any offices in the United States, absent specific executive or statutory waivers." *Fuld*, 82 F.4th at 92. But it is perverse to suggest that a foreign entity may

unlawfully extract a benefit from the forum and receive constitutional protection from personal jurisdiction while a foreign entity conducting *lawful* activities in the forum does not receive such protection.

Third, the panel held that the Due Process Clause of the Fifth Amendment imposes the same limits on the jurisdiction of the federal courts that the Due Process Clause of the Fourteenth Amendment imposes on the jurisdiction of the state courts. *Id.* at 102-05. The Supreme Court has expressly left "open the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court" as the Fourteenth Amendment imposes on a state court. *Bristol-Myers Squibb Co. v. Superior Ct. of Cal.*, 582 U.S. 255, 269 (2017).[2] I would hold that the federal government is not similarly situated to the state governments in the extraterritorial reach of its courts. For that reason, the due process standards limiting the exercise of personal jurisdiction are not the same.

These cases involve a "question of exceptional importance," Fed. R. App. P. 35(a)(2), because Congress has adopted legislation making clear the policy of the federal government that the PLO and the PA should be subject to

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[2] The Supreme Court has not reached the issue of the Fifth Amendment Due Process Clause—even though it has considered the reach of personal jurisdiction in the federal courts—because the Federal Rules of Civil Procedure generally limit personal jurisdiction in the federal courts "to the jurisdiction of a court of general jurisdiction in the state where the district is located." Fed. R. Civ. P. 4(k)(1)(A). For that reason, the case law regarding personal jurisdiction in the federal courts applies the Fourteenth Amendment standards applicable to the states. *See, e.g.*, *Daimler AG v. Bauman*, 571 U.S. 117, 125 (2014) ("Federal courts ordinarily follow state law in determining the bounds of their jurisdiction over persons."). It is important to note, however, that the federal rules also allow personal jurisdiction to be established "when authorized by a federal statute." Fed. R. Civ. P. 4(k)(1)(C).

personal jurisdiction in the federal courts. The panel, however, held that the Constitution prohibits Congress from pursuing that policy. Invaliding an act of Congress would entail a question of exceptional importance on its own.[3] But these cases also involve (1) significant questions about constitutional limits on the jurisdiction of the federal courts, (2) judicial deference to the political branches in the realm of foreign affairs, and (3) the invalidation of a jury verdict and award under the ATA. We should have reheard these cases *en banc*.

BACKGROUND

The panel decision in these cases resulted from an extended back-and-forth between the panel and Congress. The plaintiffs brought suit under the ATA—which provides a remedy against "any person who aids and abets" a terrorist attack "by knowingly providing substantial assistance" to the perpetrator, 18 U.S.C. § 2333(d)(2)—and sought damages from the PLO and the PA for terrorist attacks that killed or wounded themselves or their family members. *Waldman I*, 835 F.3d at 322. The

[3] The invalidation of a federal statute is a primary reason for the Supreme Court to grant a petition for certiorari. *See, e.g.*, *Allen v. Cooper*, 589 U.S. 248, 254 (2020) ("Because the Court of Appeals held a federal statute invalid, this Court granted certiorari."); *Iancu v. Brunetti*, 588 U.S. 388, 392 (2019) ("As usual when a lower court has invalidated a federal statute, we granted certiorari."); *United States v. Kebodeaux*, 570 U.S. 387, 391 (2013) ("[I]n light of the fact that a Federal Court of Appeals has held a federal statute unconstitutional, we granted the petition."); *United States v. Morrison*, 529 U.S. 598, 605 (2000) ("Because the Court of Appeals invalidated a federal statute on constitutional grounds, we granted certiorari."); *United States v. Edge Broad. Co.*, 509 U.S. 418, 425 (1993) ("Because the court below declared a federal statute unconstitutional and applied reasoning that was questionable under our cases … we granted certiorari."); *see also* Tejas N. Narechania, *Certiorari in Important Cases*, 122 Colum. L. Rev. 923, 927-28 (2022).

district court held that it had personal jurisdiction over the defendants, and after a trial "a jury found that the defendants, acting through their employees, perpetrated the attacks and that the defendants knowingly provided material support to organizations designated by the United States State Department as foreign terrorist organizations." *Id.* The jury awarded damages of $218.5 million, trebled pursuant to the ATA to $655.5 million. *Id.*[4]

The panel overturned the jury verdict and dismissed the case in 2016, holding that the district court lacked personal jurisdiction over the PLO and the PA. *Waldman I*, 835 F.3d at 337. The panel concluded that the test for personal jurisdiction "is the same under the Fifth Amendment and the Fourteenth Amendment in civil cases" and applied the traditional Fourteenth Amendment personal jurisdiction test to the reach of the federal courts. *Id.* at 331. The panel held that the district court lacked general personal jurisdiction because the PLO and the PA were "fairly regarded as at home" in the Palestinian territories and not in New York, *id.* at 332 (quoting *Daimler*, 571 U.S. at 137), and that there was no specific personal jurisdiction

[4] The jury made findings regarding the defendants' involvement in several different terrorist attacks. For example, with respect to Hamas's bombing of the Hebrew University in Jerusalem on July 31, 2002, the jury found that the defendants "knowingly provided material support or resources that were used in preparation for or in carrying out this attack"; that "an employee of the PA, acting within the scope of his employment and in furtherance of the activities of the PA, either carried out, or knowingly provided material support," for the attack; that both the PLO and the PA knowingly provided material support to Hamas following its designation as a foreign terrorist organization; and that both defendants "harbored or concealed a person who the [defendants] knew, or had reasonable grounds to believe, committed or was about to commit this attack." Jury Verdict Form at 5-6, *Sokolow v. PLO*, No. 04-CV-00397 (S.D.N.Y. Feb. 25, 2015), ECF No. 825.

because the terrorist attacks "were not sufficiently connected to the United States," *id.* at 337.[5]

In response to *Waldman I*, Congress enacted the Anti-Terrorism Clarification Act of 2018 ("ATCA"), which provided that a defendant will be "deemed to have consented to personal jurisdiction" if, after 120 days, it receives certain forms of American assistance or has its headquarters or office under United States jurisdiction. Pub. L. No. 115-253, § 4(a). The plaintiffs requested that the panel recall the *Waldman I* mandate given the new statute, but the panel rejected that request because the plaintiffs had "not shown that either factual predicate of Section 4 of the ATCA has been satisfied" with respect to the PLO or the PA. *Waldman II*, 925 F.3d at 574.

In response to *Waldman II*, Congress acted again. Congress enacted, and the President signed, the Promoting Security and Justice for Victims of Terrorism Act of 2019 ("PSJVTA"). The PSJVTA, codified in relevant part at 18 U.S.C. § 2334(e), left no ambiguity that Congress intended to subject the PLO and the PA to the jurisdiction of the federal courts based on voluntary contacts with the United States. The statute expressly defines "defendant"

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[5] The district court's decision on personal jurisdiction occurred prior to *Daimler*, 571 U.S. 117, and *Walden v. Fiore*, 571 U.S. 277 (2014), which limited general personal jurisdiction over foreign corporations under the Due Process Clause of the Fourteenth Amendment. Prior to these cases, federal courts exercised personal jurisdiction in terrorism cases such as these. *See, e.g.*, *Est. of Klieman v. Palestinian Auth.*, 82 F. Supp. 3d 237, 239 (D.D.C. 2015) ("In 2006, the Court determined that it could exercise general personal jurisdiction over the PA and PLO based on their 'continuous and systematic' contacts with the United States."); *Mwani v. bin Laden*, 417 F.3d 1, 14 (D.C. Cir. 2005). The *Waldman I* panel relied on *Daimler* to reject this earlier consensus. Neither *Daimler* nor *Walden*, however, involved the Fifth Amendment or a congressional enactment expressly authorizing personal jurisdiction.

to include the PLO, the PA, or any successor or affiliate of these entities. 18 U.S.C. § 2334(e)(5). It also provides new factual predicates that are considered consent to personal jurisdiction in American courts for ATA suits. Any "defendant"—that is, the PLO or the PA—"shall be deemed to have consented to personal jurisdiction … if … the defendant":

> (A) [after 120 days following enactment] makes any payment, directly or indirectly—
>
> > (i) to any payee designated by any individual who, after being fairly tried or pleading guilty, has been imprisoned for committing any act of terrorism that injured or killed a national of the United States, if such payment is made by reason of such imprisonment; or
> >
> > (ii) to any family member of any individual, following such individual's death while committing an act of terrorism that injured or killed a national of the United States, if such payment is made by reason of the death of such individual; or
>
> (B) after 15 days [following enactment]—
>
> > (i) continues to maintain any office, headquarters, premises, or other facilities or establishments in the United States;
> >
> > (ii) establishes or procures any office, headquarters, premises, or other facilities or establishments in the United States; or
> >
> > (iii) conducts any activity while physically present in the United States on behalf of the Palestine Liberation Organization or the Palestinian Authority.

Id. § 2334(e)(1).[6] The statute provides that engaging in either of these two conduct predicates—payments for terrorism or premises or activities in the United States—qualifies as consent to personal jurisdiction.

The plaintiffs allege that both prongs of § 2334(e)(1) are met. The PLO and the PA continued past the 120-day notice period to make payments to both the designees and family members of terrorists who committed acts of terrorism that killed or injured American nationals. Fuld Am. Compl. ¶¶ 31-67; *Fuld*, 82 F.4th at 84; *Fuld*, 578 F. Supp. 3d at 583 n.3 ("Defendants all but concede that they did in fact make such payments."). The PLO and the PA also used their offices in the United States for non-UN business and engaged in other activities when physically present. Fuld Am. Compl. ¶¶ 68-95; *Fuld*, 82 F.4th at 84. In these appeals, neither the defendants nor the panel disputed that the PLO and the PA engaged in the relevant conduct to be covered by the PSJVTA. *Fuld*, 82 F.4th at 85-86.[7]

The panel nevertheless affirmed the district court's dismissal of the plaintiffs' suit for lack of personal jurisdiction and held that both prongs of § 2334(e) are unconstitutional because the statute violates the Due Process Clause of the Fifth Amendment. *Fuld*, 82 F.4th at 101.

DISCUSSION

The panel opinion invokes the purportedly fundamental "liberty interest" of the PLO and the PA that "flow[s] from the Constitution's guarantees of due process" and "ensures that a court will exercise personal jurisdiction

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[6] The statute exempts activities such as the conduct of business at the United Nations. 18 U.S.C. § 2334(e)(3).

[7] In any event, on a motion to dismiss for lack of personal jurisdiction, we must "construe the pleadings … in the light most favorable to [the plaintiffs], resolving all doubts in [their] favor." *DiStefano v. Carozzi N. Am., Inc.*, 286 F.3d 81, 84 (2d Cir. 2001).

over a defendant only if the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Id.* at 86 (internal quotation marks omitted). But in these cases, the defendants are sophisticated international organizations with billion-dollar budgets, Fuld Am. Compl. ¶ 44, that govern a territory recognized as a sovereign state by many other countries.[8] We have held that "foreign states are not 'persons' entitled to rights under the Due Process Clause." *Frontera Res. Azerbaijan Corp. v. State Oil Co. of Azerbaijan Republic*, 582 F.3d 393, 400 (2d Cir. 2009). So if tomorrow the Department of State recognized the PA as the sovereign government of "Palestine"—as the defendants believe it is—then there would be no question at all that the PSJVTA is constitutional and that the Due Process Clause is not implicated.[9] Fundamental constitutional rights are not typically so contingent.[10]

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[8] *See* Permanent Observer Mission of the State of Palestine to the United Nations, *Diplomatic Relations*, https://perma.cc/E5JB-SLZK.

[9] *Cf.* Barak Ravid, *State Department Reviewing Options for Possible Recognition of Palestinian State*, Axios (Jan. 31, 2024), https://perma.cc/RM2M-H9JV.

[10] The concurrence suggests that a sovereign state would "receive the protection of sovereign immunity." *Ante* at 5. But "foreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution. Accordingly, [the Supreme] Court consistently has deferred to the decisions of the political branches … on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983). Because "it remains Congress' prerogative to alter a foreign state's immunity," sovereign immunity would not be an obstacle to exercising the jurisdiction Congress authorized in the PSJVTA. *Bank Markazi*, 578 U.S. at 236; *see* 18 U.S.C. § 2334(e)(5)(D) (applying the PSJVTA

The due process right implicated here is ostensibly the interest of "the defendant against the burdens of litigating in a distant or inconvenient forum." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980). But the defendants lawfully maintain an office in the United States located at 115 East 65th Street in Manhattan. Fuld Am. Compl. ¶ 92. The Chief Representative of the PLO and the PA was served with process at his home in the United States. *Waldman I*, 835 F.3d at 325; *see* Fed. R. Civ. P. 4(h)(1)(B). The litigation burden entailed travel of approximately four miles from the defendants' office in Manhattan to the courthouse downtown.

In adopting the PSJVTA, Congress declared that defendants that engage in certain conduct affecting the United States after a future date would be considered to have consented to personal jurisdiction. Each defendant here, with "clear notice that [the United States] considered its [actions] as consent to [personal] jurisdiction," engaged in that conduct. *Mallory*, 600 U.S. at 153 (Alito, J., concurring in part and concurring in the judgment). Specifically, the PLO and the PA compensated the designees and family members of terrorists who killed or injured American nationals and used their Manhattan office for extensive, non-UN-related activities in the United States. Fuld Am. Compl. ¶¶ 31-95. The panel opinion insists that it conflicts "with 'traditional notions of fair play and substantial justice'" to require the officials of organizations that engaged in this conduct—and were found to have supported terrorists who killed and injured Americans—to endure the burden of travel from East 65th Street to Pearl Street to answer for violations of the ATA. *Fuld*, 82 F.4th at 101

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to any successor or affiliate of the PA that "holds itself out to be … the 'State of Palestine'").

(quoting *Int'l Shoe*, 326 U.S. at 316). I do not see how it does.

To correct the errors of the panel opinion, I would hold that

(1) under the Fourteenth Amendment standards for personal jurisdiction, a legislature does not need to provide a reciprocal benefit to a foreign entity to subject that entity to personal jurisdiction based on knowing and voluntary conduct with a nexus to the forum,

(2) even if there were a reciprocal benefit requirement, the PLO and the PA benefited from conducting business in the United States, and

(3) the Due Process Clause of the Fifth Amendment does not impose the same limits on the jurisdiction of the federal courts that the Due Process Clause of the Fourteenth Amendment imposes on the state courts. Given any one of these conclusions, the district court may exercise personal jurisdiction over the PLO and the PA in these cases.

I

There is no requirement that a statutory provision that deems certain conduct to signify consent to personal jurisdiction must be based on "reciprocal bargains." *Fuld*, 82 F.4th at 90.[11] Even assuming that constitutional due

[11] The concurrence denies that the panel opinion created a reciprocal- bargain requirement—even though it simultaneously distinguishes *Mallory* on the ground that it "involved reciprocal bargains" and explains that the PSJVTA is unconstitutional because the PLO and the PA "received no benefit," "have not received *any* benefit in the forum," and participated in "no similar exchange of benefits." *Ante* at 6, 13, 15. The purported denial is simply the observation that consent to personal jurisdiction may be achieved through other means not relevant here, such as "litigation-related activities." *Id.* at 6. No one disputes that point. But the panel opinion clearly invented a new requirement that applies when Congress or a state legislature

process limits the ability of federal courts to exercise personal jurisdiction, the PSJVTA does not conflict with due process because it establishes personal jurisdiction if a defendant knowingly and voluntarily undertakes actions with a nexus to the forum. The panel erred in concluding otherwise.

A

The Supreme Court recently decided *Mallory v. Norfolk Southern Railway Co.*, in which the Court considered "whether the Due Process Clause of the Fourteenth Amendment prohibits a State from requiring an out-of-state corporation to consent to personal jurisdiction to do business there," as Pennsylvania had done. 600 U.S. at 127. The Supreme Court said that the Pennsylvania statute was constitutional. Five justices noted that the case was controlled by earlier precedent in which the Court had said that "there was 'no doubt'" a company "could be sued in Missouri by an out-of-state plaintiff on an out-of- state contract because it had agreed to accept service of process in Missouri on any suit as a condition of doing business there." *Id.* at 133 (plurality opinion) (quoting *Pa. Fire Ins. Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93, 95 (1917)). Those five justices agreed that consent was an independent basis for jurisdiction; because the requirements of *International Shoe* apply only to "an out-of-state corporation that *has not* consented to in-state suits," those requirements were inapplicable. *Id.* at 138 (plurality opinion); *accord id.* at 152 (Alito, J.) ("[T]he *International Shoe* line of cases … involve[s] constitutional limits on jurisdiction over *non-consenting* corporations.").

"Both at the time of the founding and the Fourteenth Amendment's adoption, the Anglo-American legal

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attempts to extend personal jurisdiction through a deemed- consent statute such as the PSJVTA or the statute in *Mallory*.

tradition recognized that a tribunal's competence was generally constrained only by the 'territorial limits' of the sovereign that created it." *Id.* at 128 (plurality opinion) (quoting Joseph Story, Commentaries on the Conflict of Laws § 539, at 450-51 (1834)). Tag jurisdiction was permissible because "an *in personam* suit against an individual 'for injuries that might have happened any where' was generally considered a '*transitory*' action that followed the individual," which "meant that a suit could be maintained by anyone on any claim in any place the defendant could be found." *Id.* (quoting 3 William Blackstone, Commentaries on the Laws of England 294 (1768)). Deemed-consent statutes—such as Pennsylvania's—sought "to adapt the traditional rule about transitory actions for individuals to artificial persons created by law" by ensuring that corporate defendants would always be deemed "found" in the state. *Id.* at 129-30.[12]

The Supreme Court in *Mallory* stressed that "under our precedents a variety of 'actions of the defendant' that may seem like technicalities nonetheless can 'amount to a legal submission to the jurisdiction of a court,'" 600 U.S. at 146 (plurality opinion) (quoting *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 704-05 (1982)), and indeed "a variety of legal arrangements have

[12] Justice Alito, in a separate concurrence, recognized that *Pennsylvania Fire* remained good law and that there was no due process problem because "the defendant had consented to jurisdiction in the forum State." *Mallory*, 600 U.S. at 156 (Alito, J.). He wrote separately to raise the concern that a "State's assertion of jurisdiction over lawsuits with no real connection to the State" may undermine "the federal system that the Constitution created." *Id.* at 150. Justice Alito observed that "the most appropriate home for these principles is the so-called dormant Commerce Clause" rather than the Due Process Clause. *Id.* These concerns about federalism and the dormant Commerce Clause do not apply to a federal statute extending the reach of the federal courts.

been taken to represent express or implied consent to personal jurisdiction consistent with due process," *id.* at 136 n.5 (majority opinion) (internal quotation marks and alteration omitted). The defendant need not specifically intend to consent to jurisdiction but need only take a "voluntary act" that the law treats as consent. *Pa. Fire*, 243 U.S. at 96.[13] The "precedents approving other forms of consent to personal jurisdiction have [n]ever imposed some sort of 'magic words' requirement" or required a particular formula. *Mallory*, 600 U.S. at 136 n.5 (majority opinion).

The Supreme Court has thus explained that deemed-consent statutes are consistent with the Constitution and limited only by the sovereign reach of the forum state, as illustrated by the analogy to tag jurisdiction. The panel, however, artificially constrained the power of a legislature to adopt such a statute to two narrow circumstances: (1) "litigation-related conduct" or (2) "where a defendant accepts a benefit from the forum in exchange for its amenability to suit in the forum's courts." *Fuld*, 82 F.4th at 88. Limiting the power of Congress or a state legislature to these stylized circumstances conflicts with *Mallory*.

The consent of the foreign entity must only be knowing and voluntary and involve some nexus to the forum such

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[13] *See Smolik v. Phila. & Reading Coal & Iron Co.*, 222 F. 148, 151 (S.D.N.Y. 1915) (L. Hand, J.) ("When it is said that a foreign corporation will be taken to have consented to the appointment of an agent to accept service, the court does not mean that as a fact it has consented at all, because the corporation does not in fact consent; but the court, for purposes of justice, treats it as if it had. It is true that the consequences so imputed to it lie within its own control, since it need not do business within the state, but that is not equivalent to a consent; actually it might have refused to appoint, and yet its refusal would make no difference. The court, in the interests of justice, imputes results to the voluntary act of doing business within the foreign state, quite independently of any intent.").

that requiring consent would not be "unfair." *Mallory*, 600 U.S. at 141 (plurality opinion); *id.* at 153-54 (Alito, J.). The Pennsylvania law at issue in *Mallory* did not involve an actual bargain or a "voluntary agreement," *Fuld*, 82 F.4th at 87, between the state and each company. Rather, Norfolk Southern was deemed to have consented to personal jurisdiction from the fact of it having registered under 15 Pa. Stat. § 411(a). That is because a *separate* statute treats "'qualification as a foreign corporation' to be a 'sufficient basis' for Pennsylvania courts 'to exercise general personal jurisdiction' over an out-of-state company." *Mallory*, 600 U.S. at 151 (Alito, J.) (quoting 42 Pa. Stat. § 5301(a)(2)(i) (2019)). Neither statute indicated that personal jurisdiction was being *exchanged* for the benefit of operating in Pennsylvania; the statutes did not even reference each other.[14] Instead, like the PSJVTA, the statute "simply declared that specific activities" such as registering to do business in the state sufficed to establish personal jurisdiction. *Fuld*, 82 F.4th at 97. In this way, contrary to the suggestion of the concurrence, the statute bears a "reasonable resemblance to the deemed consent provisions of the PSJVTA." *Ante* at 8.

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[14] It is true that the *Mallory* opinions mention an "exchange." 600 U.S. at 130 (plurality opinion); *id.* at 151 (Alito, J.). But the Court did not hold that such an exchange was required, and the description of deemed-consent statutes as analogous to tag jurisdiction demonstrates that it was not. The Court referenced the notion of exchange only to respond to the argument of Norfolk Southern that enforcing Pennsylvania's statute would be "unfair." *Id.* at 141-43 (plurality opinion); *id.* at 153 (Alito, J.). The plurality said: "[I]f fairness is what Norfolk Southern seeks, pause for a moment to measure this suit against that standard." *Id.* at 141 (plurality opinion). The circumstances of this case similarly evince no unfairness to the PLO and the PA in requiring travel from the offices those entities maintain in the United States to answer for violations of the Anti-Terrorism Act.

"Norfolk Southern is a sophisticated entity, and we may 'presume' that it 'acted with knowledge' of state law when it registered" and, consequently, "by registering, it consented to all valid conditions imposed by state law." *Mallory*, 600 U.S. at 151 (Alito, J.) (alteration omitted) (quoting *Com. Mut. Accident Co. v. Davis*, 213 U.S. 245, 254 (1909)). Norfolk Southern consented to general personal jurisdiction by taking a voluntary action in connection with the forum with knowledge that state law deemed the action to be consent. The PLO and the PA each also acted voluntarily with knowledge that its actions would subject it to the jurisdiction of the federal courts.

In neither case was there an actual "voluntary agreement on the part of a defendant to proceed in a particular forum." *Fuld*, 82 F.4th at 87. But that is not required. The district court was correct that "Defendants do not cite, and the Court has not found, any case holding that … receipt of a benefit is a necessary condition." *Fuld*, 578 F. Supp. 3d at 595 n.10. Rather, the cases emphasize the knowing and voluntary nature of the conduct. *See Pa. Fire*, 243 U.S. at 96 (describing consent via "the defendant's voluntary act"); *see also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n.14 (1985) (explaining that enforcement of "forum-selection provisions" that are "obtained through freely negotiated agreements and are not unreasonable and unjust" does not offend due process) (internal quotation marks omitted); *Petrowski v. Hawkeye-Security Ins. Co.*, 350 U.S. 495, 496 (1956) (recognizing consent when the parties "voluntarily submit[ted] to the jurisdiction" of the court); *Ins. Corp. of Ir.*, 456 U.S. at 704 ("[T]he Court has upheld state procedures which find constructive consent to the

personal jurisdiction of the state court in the voluntary use of certain state procedures.").[15]

The PSJVTA establishes consent to personal jurisdiction based on knowing and voluntary conduct with a nexus to the United States, and the complaint in *Fuld* alleges such conduct. Knowing that it would be deemed consent to the jurisdiction of the federal courts, the PLO and the PA continued making covered payments after the 120- day period specified in the PSJVTA. There is a nexus to the forum because the payments compensated terrorists for attacks that killed or injured American nationals. Fuld Am. Compl. ¶ 44.[16] It is not "unfair" for Congress to require a foreign entity to consent to the jurisdiction of the federal courts when the entity compensated terrorists who killed Americans with the knowledge that such compensation would be considered consent to jurisdiction. *Mallory*, 600 U.S. at 141 (plurality opinion).

The second prong of the PSJVTA is even more clearly permissible because it parallels the statute upheld in *Mallory.* Congress may require consent to jurisdiction as a condition of maintaining offices and conducting

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[15] *See also Adam v. Saenger*, 303 U.S. 59, 67-68 (1938) ("The plaintiff having, by his voluntary act in demanding justice from the defendant, submitted himself to the jurisdiction of the court, there is nothing arbitrary or unreasonable in treating him as being there for all purposes for which justice to the defendant requires his presence."); *Leman v. Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 451 (1932) (noting that by bringing suit, the plaintiff "submitted itself to the jurisdiction of the court with respect to … the counterclaim of the defendants").

[16] The PLO and the PA are aware that the United States opposes these payments. Prior to 2018, the United States gave the PLO and the PA hundreds of millions of dollars, but starting in 2018, pursuant to the Taylor Force Act, the United States ended such assistance unless the PLO and the PA terminated the payments. The PLO and the PA continued the payments despite the loss of funding. Fuld Am. Compl. ¶¶ 46-54.

activities in the United States. The PLO and the PA, as "sophisticated entit[ies]," understood that such conduct would be treated as consent to jurisdiction. *Id.* at 151 (Alito, J.). The Constitution does not excuse such sophisticated entities from the consequences of their informed choices.

B

To avoid this conclusion, the panel analogized personal jurisdiction to other constitutional rights, such as the Sixth Amendment right to a jury trial and the states' sovereign immunity from suit. *Fuld*, 82 F.4th at 98-100. The concurrence relies on the same comparisons. *See ante* at 11-12. But the analogies do not work. Imagine the statute the Supreme Court upheld in *Mallory* applied to the Sixth Amendment right to a jury trial. The statute would read: "[A]ny foreign corporation that registers to do business in Pennsylvania automatically consents to waive its Sixth Amendment right to trial by jury." Or apply it to state sovereign immunity: "[A]ny state whose agent operates in Pennsylvania automatically waives its state sovereign immunity." These statutes would not be upheld as easily as the *Mallory* statute.[17]

A "tribunal's competence" to exercise personal jurisdiction has been "generally constrained only by the 'territorial limits' of the sovereign that created it." *Mallory*, 600 U.S. at 128 (plurality opinion) (quoting Story, *supra*, § 539, at 450-51). Personal jurisdiction therefore depends on the powers assigned to the state and federal governments. Neither an enumerated right nor sovereign immunity works the same way. This becomes obvious when we

[17] Nor would a state be able to deprive a defendant of the right to trial by jury if the defendant takes "some act by which [it] purposefully avails itself of the privilege of conducting activities within the forum State." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

consider tag jurisdiction. There is no question that if an individual official of the PLO and the PA visited the United States, he could be served personally with process and thereby subjected to the jurisdiction of American courts. A deemed-consent statute such as the PSJVTA is simply the adaptation of tag jurisdiction to artificial persons and works the same way.[18] By contrast, no statute could deem mere presence in the United States to be a waiver of the right to trial by jury.

II

Even if the panel were correct that the Constitution requires a deemed-consent statute to be based on a benefit to a defendant in exchange for jurisdiction, there still would be jurisdiction over the PLO and the PA in these cases.

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The complaint alleges that the PLO and the PA maintained premises and engaged in official activities in the United States knowing that such conduct in the United States would result in the exercise of personal jurisdiction. Fuld Am. Compl. ¶¶ 68-95. In other words, the

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[18] The concurrence finds it "difficult to see" the relevance of tag jurisdiction to a deemed-consent statute. *Ante* at 13. That is because the concurrence fails to appreciate the explanation in *Mallory* that deemed-consent statutes "adapt the traditional rule about transitory actions for individuals to artificial persons created by law." *Mallory*, 600 U.S. at 129 (plurality opinion); *see also id.* at 139-40 & n.7 (explaining that "we have already turned aside arguments very much like Norfolk Southern's" in *Burnham v. Superior Ct. of Cal.*, 495 U.S. 604 (1990), in which the Court held that *International Shoe* "did nothing to displace" the "traditional tag rule" or other "traditional practice[s] like consent-based jurisdiction"); *id.* at 171 (Barrett, J., dissenting) ("The plurality claims that registration jurisdiction for a corporation is just as valid as the 'tag jurisdiction' that we approved in *Burnham*.").

defendants consented to personal jurisdiction by "maintain[ing]" an "office, headquarters, premises, or other facilities or establishments in the United States" and "conduct[ing] any activity while physically present in the United States." 18 U.S.C. § 2334(e)(1)(B). The PLO and the PA faced a choice between (1) refraining from maintaining an office and engaging in covered activity within the United States and thereby avoiding personal jurisdiction and (2) maintaining an office and engaging in covered activity and thereby consenting to personal jurisdiction. The defendants knowingly and voluntarily opted for the benefits of residing and acting in the United States.

The panel, however, reasoned that "the statute does not provide the PLO or the PA with any such benefit or permission" because "federal law has long prohibited the defendants from engaging in any activities or maintaining any offices in the United States, absent specific executive or statutory waivers." *Fuld*, 82 F.4th at 92. The fact that the PLO and the PA extracted a benefit from the United States in violation of the law—and additionally benefited from the federal government's nonenforcement of the law—does not alter the fact that those organizations received the benefit from the forum that the statute envisions. *See Pa. Fire*, 243 U.S. at 96 (noting that a corporation "would be presumed to have assented" to jurisdiction based on "a mere fiction, justified by holding the corporation estopped to set up its own wrong as a defense").

The panel insisted that "[t]urning a blind eye to prohibited conduct that remains subject to sanction or curtailment is not the same as authorizing such conduct," suggesting that a party can obtain a benefit from a forum only if the forum state affirmatively blesses its conduct. *Fuld*, 82 F.4th at 93 n.10. This argument is strange. It means that the Constitution protects a foreign entity from the

jurisdiction of the federal courts if the entity conducts *illegal* activities in the United States but does not extend such protection to foreign entities that act *legally* in the United States. Yet a foreign actor that conducts *unauthorized* business in the United States has obtained an even greater benefit from the forum than the foreign actor that complies with American law. The unauthorized actor has extracted a benefit at the expense of the policy underlying the forum state's laws while the authorized actor has not benefited from such harm to the forum. *Cf. Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 926 (2011) (noting that personal jurisdiction over "a nonresident defendant" may be based on it causing "harm *inside* the forum").

In any event, the conduct of business by the PLO and the PA in the United States was not unauthorized because the federal government followed a nonenforcement policy with respect to its activities, "permit[ing] certain activities as 'a matter of grace.'" *Fuld*, 82 F.4th at 93 n.10 (quoting Plaintiffs' Reply Br. 25). There is no reason for the federal courts to be policing the distinction between a benefit conferred by the executive branch's enforcement discretion and a benefit conferred by the legislative branch's enactment of legislation. The federal government deals with foreign entities through a variety of means, and no law privileges legislatively conferred benefits over those conferred by the executive branch, especially in the field of foreign relations.[19]

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[19] *Cf. United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936) (noting that the "exclusive power of the President as the sole organ of the federal government in the field of international relations" is "a power which does not require as a basis for its exercise an act of Congress").

Additionally, the PSJVTA bases personal jurisdiction on "conduct[ing] any activity while physically present in the United States on behalf of … the Palestinian Authority." 18 U.S.C. § 2334(e)(1)(B). At least with respect to the PA, most such activities do not appear to be prohibited. While it is "unlawful to establish or maintain an office, headquarters, premises, or other facilities or establishments within the jurisdiction of the United States at the behest or direction of, or with funds provided by, the Palestinian Authority" absent certain certifications,[20] the plaintiffs allege other activities in the United States on behalf of the PA besides maintaining a facility.[21] The restrictions on activity in the United States on behalf of the PLO are broader.[22]

B

The concurrence admits that the panel opinion holds that "the alleged conduct of the PLO and the PA in violation of federal restrictions would be an insufficient basis … to confer jurisdiction." *Ante* at 15. The concurrence insists that this result is required because "establishing deemed-consent jurisdiction based on the alleged unlawful activities undertaken by the PLO and the PA in the United States would be nothing more than 'punishment'

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[20] Palestinian Anti-Terrorism Act of 2006, Pub. L. No. 109-446, § 7(a), 120 Stat. 3318, 3324 (codified at 22 U.S.C. § 2378b note).

[21] *See, e.g.*, Fuld. Am. Compl. ¶ 75 ("[W]hile physically in the United States, Defendants have conducted press conferences and created and distributed informational materials."); *id.* ¶ 76 (alleging "communications made while physically in the United States"); *id.* ¶ 85 ("Defendants have updated their website and/or their United States-based social-media accounts while physically inside the United States."); *id.* ¶ 88 (alleging social media updates "done by persons and/or on computers that were physically present in the United States").

[22] *See* Anti-Terrorism Act of 1987, Pub. L. No. 100-204, tit. X, §§ 1002-05, 101 Stat. 1331, 1406-07 (codified at 22 U.S.C. §§ 5201-03).

for such conduct." *Ante* at 18. The concurrence believes it would be improper for Congress to punish the unlawful conduct of the PLO and the PA. But Congress often creates civil liability to penalize unlawful conduct. The whole premise of *specific* personal jurisdiction is that wrongful conduct in the forum gives the forum an interest in subjecting the bad actor to the jurisdiction of its courts. *See, e.g.*, *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 592 U.S. 351, 355 (2021). And tag jurisdiction, the analogue of deemed-consent statutes, has never been limited only to those *lawfully* present in the forum. *See Burnham*, 495 U.S. at 610-11.

In any event, the PSJVTA simply subjects each defendant to the jurisdiction of the federal courts by virtue of its conduct in the forum. That is not a penalty for unlawful conduct; it merely extends jurisdiction over parties engaged in conduct in the forum. The connection to the forum, rather than the unlawfulness of the conduct, is what establishes jurisdiction.

The concurrence purports to find its novel principle about punishment in the Supreme Court's gloss on the nineteenth-century decision *Hovey v. Elliott*, 167 U.S. 409 (1897). *See ante* at 17; *see also Fuld*, 82 F.4th at 94 (discussing *Hovey*). According to the concurrence, in *Insurance Corp. of Ireland*, the Supreme Court distinguished the case before it from *Hovey*, "in which the Court held that it 'violated due process for a court to take similar action as punishment for failure to obey an order to pay into the registry of the court a certain sum of money.'" *Ante* at 17 (internal quotation marks and alteration omitted) (quoting *Ins. Corp. of Ir.*, 456 U.S. at 706). In *Hovey*, as punishment for contempt for failure to comply with the court-ordered payment, the supreme court of the District of Columbia struck the defendant's entire answer from the record

and ordered "that this cause do proceed as if no answer herein had been interposed." 167 U.S. at 411. The U.S. Supreme Court rejected the notion that "courts have inherent power to deny all right to defend an action, and to render decrees without any hearing whatever." *Id.* at 414. It disapproved of the D.C. court's action as inconsistent with due process because "[a]t common law no man was condemned without being afforded opportunity to be heard," *id.* at 415, and because it cannot be "doubted that due process of law signifies a right to be heard in one's defense," *id.* at 417.

In *Insurance Corp. of Ireland*, the Supreme Court cited *Hovey* for the proposition that it would violate due process "to create a presumption of fact" regarding personal jurisdiction as a punishment without affording the defendant the opportunity to be heard, unless that presumption was based on the principle that "refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense." 456 U.S. at 705-06 (quoting *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 350-51 (1909)).

The idea expressed in *Hovey* and *Insurance Corp. of Ireland*—that it would violate the Due Process Clause to deny a defendant the opportunity to be heard in its own defense—is well established. But it has nothing to do with the constitutionality of the PSJVTA. The PLO and the PA have not been denied the opportunity to dispute either the facts on which personal jurisdiction is based or the facts on which liability is based. There has been no denial of the defendants' rights to notice and an opportunity to be heard, nor did the district court assert personal jurisdiction over the defendants as a penalty for non- compliance with court orders. Neither *Hovey* nor *Insurance Corp. of Ireland* establishes a general principle that a defendant cannot be made subject to suit—about which the

defendant receives notice and an opportunity to be heard—when that defendant engages in unlawful conduct.

Based on that dubious principle, however, the panel has added two requirements on top of the Supreme Court's straightforward rule for establishing consent-based jurisdiction: First, the consent must be granted in exchange for the extension of a benefit to the foreign actor. Second, the benefit must be affirmatively authorized by a statute. These requirements are not rooted in the Constitution, and the additional complexity creates needless confusion and absurd results.

III

For the foregoing reasons, even accepting the panel's premise that the Fifth Amendment imposes the same restrictions on the jurisdiction of the federal courts as the Fourteenth Amendment imposes on the state courts, the PSJVTA still would be constitutional. But the premise is incorrect. The Supreme Court has reserved judgment on "whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court" as the Fourteenth Amendment does on a state court. *Bristol-Myers Squibb*, 582 U.S. at 269. Recent scholarship has shown that the Fifth Amendment does not impose such limits. *See* Brief for Constitutional Law Scholars Philip C. Bobbitt, Michael C. Dorf, and H. Jefferson Powell as Amici Curiae in Support of Plaintiffs-Appellants, *Fuld v. PLO*, 82 F.4th 74 (2023) (Nos. 22-76, 22-496), ECF No. 72; *see also* Max Crema & Lawrence B. Solum, *The Original Meaning of "Due Process of Law" in the Fifth Amendment*, 108 Va. L. Rev. 447 (2022); Stephen E. Sachs, *The Unlimited Jurisdiction of the Federal Courts*, 106 Va. L. Rev. 1703 (2020).

Our court has acknowledged that "[r]ecent scholarship suggests that we err in viewing due process as an

independent constraint on a court's exercise of personal jurisdiction." *Gater Assets Ltd. v. AO Moldovagaz*, 2 F.4th 42, 66 n.23 (2d Cir. 2021). And other judges have argued that the Due Process Clause of the Fifth Amendment does not limit the exercise of personal jurisdiction by the federal courts. *See Lewis v. Mutond*, 62 F.4th 587, 598 (D.C. Cir. 2023) (Rao, J., concurring) ("There is little (or no) evidence that courts and commentators in the Founding Era understood the Fifth Amendment's Due Process Clause to impose a minimum contacts requirement. On the contrary, the widespread assumption was that Congress could extend federal personal jurisdiction by statute."); *Douglass v. Nippon Ysen Kabushiki Kaisha*, 46 F.4th 226, 255 (5th Cir. 2022) (*en banc*) (Elrod, J., dissenting) ("The text, history, and structural implications of the Fifth Amendment Due Process Clause suggest that its original public meaning imposed few (if any) barriers to federal court personal jurisdiction."); *id.* at 282 (Higginson, J., dissenting) ("[B]y importing Fourteenth Amendment constraints on personal jurisdiction, born out of federalism concerns, into process due to foreign corporations in global disputes, where those concerns don't exist, our court makes several mistakes."); *id.* at 284 (Oldham, J., dissenting) ("[A]s originally understood, the Fifth Amendment did not impose any limits on the personal jurisdiction of the federal courts. Instead, it was up to Congress to impose such limits by statute."); *see also Devas Multimedia Private Ltd. v. Antrix Corp. Ltd.*, 91 F.4th 1340, 1352 (9th Cir. 2024) (Bumatay, J., dissenting from the denial of rehearing *en banc*) ("Justice Story opined that foreign-based defendants were owed no more than service authorized by Congress before being haled into our federal courts.").

That view is correct, and I would adopt it.

A

From the founding to the Civil War, no one suggested that the Due Process Clause of the Fifth Amendment limited the exercise of personal jurisdiction by the federal courts. *See* Sachs, *supra*, at 1704. The Clause required only that "deprivations of life, liberty, or property must be preceded by process of law in th[e] narrow and technical legal sense" of legitimate service of process that could ensure notice and an opportunity to be heard. Crema & Solum, *supra*, at 451-52. After the Fifth Amendment was ratified, federal courts continued to follow general law principles according to which tag jurisdiction allowed anyone served with process in the forum to be subject to personal jurisdiction there. *Mallory*, 600 U.S. at 128; *Massie v. Watts*, 10 U.S. (6 Cranch) 148, 162-63 (1810). "[N]ot until the Civil War did a single court, state or federal, hold a personal-jurisdiction statute invalid on due process grounds." Sachs, *supra*, at 1712.

The history demonstrates that, outside of the limits imposed by service of process, "[a] federal court's writ may run as far as Congress, within its enumerated powers, would have it go." *Id.* at 1704. In the early republic, the limitations on the federal courts' exercise of personal jurisdiction derived from general and international law—not from the Fifth Amendment—and Congress could always override those limitations. Just as states had limited power to reach outside their "territorial limits," Story, *supra*, § 539, at 450, the general law of nations limited the power of the national government to exercise jurisdiction over persons located abroad, Sachs, *supra*, at 1708-17. However, Congress could depart from the default rules

of international law by a clearly worded statute, and the Supreme Court said it would honor such laws.[23]

In 1828, while riding circuit, Justice Story considered a case in which an alien sued a non-resident American citizen in federal court. *Picquet v. Swan*, 19 F. Cas. 609 (C.C.D. Mass. 1828). Story acknowledged that under "the principles of common law," "in the contemplation of the framers of the judiciary act of 1789, … *independent of some positive provision to the contrary*, no judgment could be rendered in the circuit court against any person, upon whom process could not be personally served within the district." *Id.* at 613 (emphasis added). Story recognized that because "a general jurisdiction is given [under Article III] in cases, where an alien is party," even if the alien "is not an inhabitant of the United States, and has not any property within it … still he is amenable to the jurisdiction of any circuit court." *Id.* If Congress authorized it, "a subject of England, or France, or Russia, having a controversy with one of our own citizens, may be summoned from the other end of the globe to obey our process, and submit to the judgment of our courts." *Id.* While such an extension of jurisdiction might be "repugnant to the general rights and sovereignty of other nations," "[i]f congress had

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[23] *See, e.g.*, *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815) ("If it be the will of the government to apply to Spain any rule respecting captures which Spain is supposed to apply to us, the government will manifest that will by passing an act for the purpose. Till such an act be passed, the Court is bound by the law of nations which is a part of the law of the land."); *see also Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations *if any other possible construction remains*.") (emphasis added); *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 43 (1801) ("[T]he laws of the United States ought not, *if it be avoidable*, so to be construed as to infract the common principles and usages of nations.") (emphasis added).

prescribed such a rule, the court would certainly be bound to follow it, and proceed upon the law." *Id.* at 613-15.

The Supreme Court later embraced that reasoning. *See Toland v. Sprague*, 37 U.S. (12 Pet.) 300, 328 (1838). In *Toland*, an American plaintiff attached the American property of a defendant domiciled abroad. *Id.* at 302. The Supreme Court decided that the exercise of jurisdiction in such a case would be "unjust" and that Congress had not authorized such jurisdiction by statute. *Id.* at 328-29. However, the Court recognized that Story's analysis in *Picquet* had "great force." *Id.* at 328. The Court explained that "Congress might have authorized civil process from any circuit court, to have run into any state of the Union," including as to "persons in a foreign jurisdiction," but the Court would not exercise such jurisdiction "independently of positive legislation." *Id.* at 330. In this way, the early cases show both that the Fifth Amendment did not limit the exercise of personal jurisdiction and that Congress was understood to be able to extend such jurisdiction by statute.

B

Personal jurisdiction "perform[s] two related, but distinguishable, functions." *World-Wide Volkswagen*, 444 U.S. at 291-92. First, it guards against infringements on federalism—that is, "it acts 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." *Id.* at 292. Second, it protects an individual liberty interest of "the defendant against the burdens of litigating in a distant or inconvenient forum." *Id.* These interests are not implicated to the same extent by the federal government as by state governments, so there is no reason to expect the Constitution to impose the same restrictions on the federal and state courts in the

exercise of personal jurisdiction. Indeed, "personal 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).

The clearest difference is that federalism does not impose the same restrictions on the federal government as it does on state governments. "[P]ersonal jurisdiction cases have discussed the federalism implications of one State's assertion of jurisdiction over the corporate residents of another," *Mallory*, 600 U.S. at 144 (plurality opinion), and the Supreme Court has said that "this federalism interest may be decisive" in the due process analysis when considering personal jurisdiction. *Bristol-Myers Squibb*, 582 U.S. at 263. That is because the Due Process Clause of the Fourteenth Amendment is "an instrument of interstate federalism." *Id.* (quoting *World-Wide Volkswagen*, 444 U.S. at 294). Because "[t]he sovereignty of each State … implie[s] a limitation on the sovereignty of all its sister States," the Constitution must ensure that states do not exceed "the limits imposed on them by their status as coequal sovereigns in a federal system." *World-Wide Volkswagen*, 444 U.S. at 292.

The Due Process Clause of the Fifth Amendment, by contrast, is *not* an instrument of interstate federalism. While states may not intrude on each other's or the federal government's prerogatives, Congress *may* decide to intrude on foreign governments' prerogatives. *See, e.g.*, *United States v. Yousef*, 327 F.3d 56, 86 (2d Cir. 2003) ("If it chooses to do so, [Congress] may legislate with respect to conduct outside the United States, in excess of the limits posed by international law.") (quoting *United States v. Pinto-Mejia*, 720 F.2d 248, 259 (2d Cir. 1983)). "[W]hether a judicial judgment is lawful depends on whether the sovereign has authority to render it," and the federal and

state governments have different authorities. *Nicastro*, 564 U.S. at 884.

The panel nonetheless concluded that the Fifth Amendment must impose the same limits as the Fourteenth Amendment because "the Constitution's personal jurisdiction requirements represent a 'restriction on judicial power' … 'not as a matter of sovereignty, but as a matter of individual liberty.'" *Fuld*, 82 F.4th at 103 (alterations omitted) (quoting *Nicastro*, 564 U.S. at 884). However, the liberty interest in avoiding inconvenient litigation is also dramatically different in the context of the federal courts. Because "due process protects the individual's right to be subject only to lawful power," *Nicastro*, 564 U.S. at 884, the Supreme Court has emphasized the liberty interest in avoiding compulsory process that exceeds "'territorial limitations' on state power," *Mallory*, 600 U.S. at 156 (Alito, J.) (quoting *Hanson*, 357 U.S. at 251). The burden on a defendant's liberty interest encompasses "the practical problems resulting from litigating in the forum, but it also encompasses the more abstract matter of submitting to the coercive power of a State that may have little legitimate interest in the claims in question." *Bristol-Myers Squibb*, 582 U.S. at 263. A defendant in one state generally does not have "fair warning that a particular activity may subject [it] to the jurisdiction of a foreign sovereign," *Burger King*, 471 U.S. at 472 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 218 (1977) (Stevens, J., concurring in the judgment)), because a state does not normally regulate activity beyond its borders. So "the Due Process Clause 'gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'" *Id.* (quoting *World-Wide Volkswagen*, 444 U.S. at 297).

The same limitations do not apply to the federal courts.[24] In contrast to state legislatures, "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). In the context of taxing extraterritorial property, the Supreme Court has observed that while the "limits of jurisdiction" of states must "be ascertained in each case with appropriate regard to … the view of the relation of the states to each other in the Federal Union," there is no basis in the Due Process Clause to "construct[] an imaginary constitutional barrier around the exterior confines of the United States for the purpose of shutting that government off from the exertion of powers which inherently belong to it by virtue of its sovereignty." *Burnet v. Brooks*, 288 U.S. 378, 401, 404-05 (1933). The authority of Congress to assert legislative power extraterritorially means that the federal courts must have a corresponding power to adjudicate disputes concerning its laws. "If there are such things as political axioms, the propriety of the judicial power of a government being co-extensive with its legislative, may be ranked

[24] *Cf. Dennis v. IDT Corp.*, 343 F. Supp. 3d 1363, 1367 (N.D. Ga. 2018) ("The concerns regarding a state overreaching its status as a coequal sovereign simply do[] not exist in a nationwide class action in federal court."); *Sloan v. Gen. Motors LLC*, 287 F. Supp. 3d 840, 858 (N.D. Cal. 2018) (noting that "the due process analysis encompasses the question of state sovereignty," so "the due process analysis differs fundamentally when a case is pending in federal court and no such concerns are raised"); *In re Chinese- Manufactured Drywall Prod. Liab. Litig.*, No. MDL-09-2047, 2017 WL 5971622, at *20 (E.D. La. Nov. 30, 2017) (noting that "federalism concerns" about "limiting a state court's jurisdiction when it tried to reach out-of-state defendants" are "inapplicable to nationwide class actions in federal court").

among the number." The Federalist No. 80, at 476 (Alexander Hamilton) (Clinton Rossiter ed., 1961).[25]

Contemporary international law recognizes that a state may adjudicate a foreign person's foreign conduct "having a substantial, direct, and foreseeable effect within the state." Restatement (Third) of Foreign Relations Law § 421(2)(j). A foreign entity is not similarly situated to the United States as a Wyoming resident is to Florida because the foreign entity is on notice that foreign conduct affecting the United States may subject it to American law. It does not violate "fair play and substantial justice" to apply those laws Congress intended to apply to foreign actors. *Int'l Shoe*, 326 U.S. at 316.[26]

C

The Constitution entrusts "the field of foreign affairs … to the President and the Congress." *Zschernig v.*

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[25] *See also* 3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 532 (James Madison) (Jonathan Elliot ed., 2d ed. 1836) ("With respect to the laws of the Union, it is so necessary and expedient that the judicial power should correspond with the legislative, that it has not been objected to."); 2 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 469 (James Wilson) (Jonathan Elliot ed., 2d ed. 1836) ("I believe they ought to be coëxtensive; otherwise, laws would be framed that could not be executed. Certainly, therefore, the executive and judicial departments ought to have power commensurate to the extent of the laws; for, as I have already asked, are we to give power to make laws, and no power to carry them into effect?").

[26] The concurrence says it does not see a principled reason for the limits on federal courts to diverge from the limits on state courts. *Ante* at 19-20. But, tellingly, the concurrence does not even mention "federalism" in its analysis. The Supreme Court, however, has told us that the due process limitations on personal jurisdiction in the state courts reflect the states' "status as coequal sovereigns in a federal system," *World-Wide Volkswagen*, 444 U.S. at 292, and that "this federalism interest may be decisive" in determining the reach of the state courts, *Bristol-Myers Squibb*, 582 U.S. at 263.

Miller, 389 U.S. 429, 432 (1968). When Congress legislates on foreign affairs matters that "implicate[] sensitive and weighty interests of national security," as in these cases, its judgments are "entitled to deference." *Holder v. Humanitarian L. Project*, 561 U.S. 1, 33-34 (2010). "Congress and the Executive are uniquely positioned to make principled distinctions between activities that will further terrorist conduct and undermine United States foreign policy, and those that will not." *Id.* at 35.

The facts of these cases illustrate the point. The federal government has broad authority to respond to terrorist attacks against Americans that foreign entities support. The states do not have the same authority to respond to such attacks abroad. Generally, state criminal law is territorially limited. *See, e.g.*, Model Penal Code § 1.03. The United States, by contrast, may criminalize extraterritorial conduct pursuant to its power to "define and punish Piracies and Felonies committed on the high seas, and Offences against the Law of Nations," as well as its power to make laws necessary and proper for regulating foreign commerce. U.S. Const. art. I, § 8, cls. 3, 10, 18. The extraterritorial application of American criminal law requires only "a sufficient nexus between the defendant and the United States, so that such application would not be arbitrary or unfair." *United States v. Epskamp*, 832 F.3d 154, 168 (2d Cir. 2016). Accordingly, Congress could criminalize the conduct described in the PSJVTA, 18 U.S.C. § 2334(e)(1)(A). Providing compensation and incentive payments to those who kill or injure Americans—especially after the United States repeatedly raised concerns about such payments—involves "a sufficient nexus" to the United States. *Epskamp*, 832 F.3d at 168.[27] The federal

[27] The federal government already criminalizes similar conduct. *See, e.g.*, 18 U.S.C. § 2332(c)(2) (criminalizing physical violence outside the

government can also impose sanctions on terrorist groups and their supporters,[28] given its power—denied to the states—to regulate foreign commerce. U.S. Const. art. I, § 8, cl. 3; *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 453-54 (1979) (invalidating a state tax as applied because the tax "results in multiple taxation of the instrumentalities of foreign commerce, and because it prevents the Federal Government from 'speaking with one voice' in international trade," and was therefore "inconsistent with Congress' power to 'regulate Commerce with foreign Nations'").[29] The United States may also authorize the use

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United States "with the result that serious bodily injury is caused to a national of the United States"); 18 U.S.C. § 2339B (criminalizing the provision of material support or resources to a foreign terrorist organization, with extraterritorial application to offenses affecting foreign commerce or when the offender is brought into or found in the United States); 18 U.S.C. § 2339C(a)(1), (b)(2)(C)(iii) (criminalizing the knowing provision of funds to be used in terrorism that results in an attack on American nationals abroad).

[28] *See, e.g.*, International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-06; Hizballah International Financing Prevention Act of 2015, Pub. L. No. 114-102, 129 Stat. 2205 (2015); Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism, Exec. Order 13224, 66 Fed. Reg. 49079 (Sept. 23, 2001); Modernizing Sanctions To Combat Terrorism, Exec. Order 13886, 84 Fed. Reg. 48041 (Sept. 9, 2019).

[29] The ATA falls within Congress's power to "regulate Commerce with foreign Nations." Congress found that international terrorism affects the "foreign commerce of the United States by harming international trade and market stability, and limiting international travel by United States citizens as well as foreign visitors to the United States." Justice Against Sponsors of Terrorism Act, Pub. L. No. 114-222, § 2(a)(2), 130 Stat. 852, 852 (2016). Just as Congress's expansive authority in foreign affairs is rooted in its commerce power, the "federalism concerns" that underlie the personal jurisdiction standards developed for state courts under the Due Process Clause of the Fourteenth Amendment may "fall more naturally within the scope of the Commerce Clause." *Mallory*, 600 U.S. at 157 (Alito, J.).

of military force against terrorist organizations that kill Americans and against states supporting such entities.[30] States cannot do that. *See* U.S. Const. art. I, § 10, cl. 3. It does not make sense to conclude that the PLO and the PA have no constitutional right to be free from prosecution, sanctions, or war in response to supporting terrorism but have an inviolable liberty interest in avoiding a civil suit in federal court on the same basis.

The concurrence quotes a six-year-old amicus brief from the Justice Department in an earlier case for the proposition that the panel's earlier holding on personal jurisdiction might have allowed *some* Americans injured by international terrorism to seek relief in *other* hypothetical cases—even though the panel opinion forecloses such relief in *these* cases. *See ante* at 23-24. The Justice Department intervened here, however, to defend the constitutionality of the PSJVTA, which Congress adopted "[t]o ensure American victims of international terrorism are able to seek redress in U.S. courts." Intervenor-Appellant's Petition for Rehearing *En Banc* at 1, *Fuld v. PLO*, Nos. 22-76 & 22-496 (2d Cir. Nov. 22, 2023), ECF No. 245. The Justice Department seeks rehearing because "[a] panel of this [c]ourt erroneously held the PSJVTA's jurisdictional provision is inconsistent with due process." *Id.* The Justice Department argues that "the Fifth Amendment permits federal courts to assert personal jurisdiction over a foreign defendant in certain circumstances that have no analogue for a state court exercising personal jurisdiction under the Fourteenth Amendment" and that "the

[30] *See, e.g.*, Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001); Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (2002).

Fourteenth Amendment's limitations should not be adopted reflexively into the Fifth Amendment." *Id.* at 14-16.[31]

The Justice Department is correct. Although due process might protect persons from being subject to extraterritorial adjudication in states whose power the Constitution generally limits territorially, the same limitations do not apply to courts established by a sovereign authority with sweeping extraterritorial power. Accordingly, the Fifth Amendment does not preclude the exercise of personal jurisdiction in these cases.

* * *

I would rehear these cases *en banc* to establish three propositions. First, deemed-consent statutes do not require an exchange of benefits as long as consent is knowing and voluntary and the conduct has a nexus to the forum. Second, even if reciprocity were required, the PSJVTA involves such reciprocity because the PLO and the PA received benefits by operating in the United States, regardless of whether such operations were lawful. Third, the Due Process Clause of the Fifth Amendment does not limit the exercise of personal jurisdiction by the federal courts in the same way as the Fourteenth Amendment restricts the state courts. In these cases, the Fifth Amendment does not leave Congress powerless to afford relief to

[31] Members of Congress who adopted the PSJVTA similarly do not share the concurrence's confidence that the panel opinion does not undermine the ability of Congress to allow American victims of international terrorism to seek redress. *See, e.g.*, Brief for Richard Blumenthal, Theodore E. Deutch, Charles E. Grassley, James Lankford, Grace Meng, Jerrold Nadler, Kathleen Rice, Marco Rubio, Bradley E. Schneider, Claudia Tenny, and Lee Zeldin, *Fuld v. PLO*, 82 F.4th 74 (2d Cir. 2023) (Nos. 22-76, 22-496), ECF No. 120.

American victims of international terrorism. I dissent from the denial of rehearing *en banc*.

PIERRE N. LEVAL, *Circuit Judge*, Statement of Views in Support of the Denial of Rehearing *En Banc*:

As a senior judge, I have no vote as to whether the case is reheard *en banc*. Fed. R. App. P. 35(a). As a member of the panel that decided the case that is the subject of the *en banc* order, however, I may file a statement of views. I wholeheartedly endorse the opinion of Judge Joseph F. Bianco concurring in the denial of the *en banc* hearing.

APPENDIX J

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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MIRIAM FULD et al.,

Plaintiffs, 20 CIV 3374(JMF)

-against- **JUDGMENT**

THE PALESTINE LIBERATION ORGANIZATION et al.,

Defendants.

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It is hereby **ORDERED, ADJUDGED AND DECREED:** That for the reasons stated in the Court's Opinion and Order dated January 6, 2022, and as in *Waldman I*, the killing of Ari Fuld was "unquestionably horrific" and Plaintiffs' efforts to seek justice on his and their own behalf are morally compelling. 835 F.3d at 344. "But," as the Second Circuit emphasized in its decision, "the federal courts cannot exercise jurisdiction in a civil case beyond the limits prescribed by the due process clause of the Constitution, no matter how horrendous the underlying attacks or morally compelling the plaintiffs' claims." *Id.* at 344. The Court concludes that exercising jurisdiction here would indeed go beyond the limits prescribed by the Due Process Clause.

Accordingly, the Court concludes that Defendants' motion to dismiss for lack of personal jurisdiction must be and is GRANTED. As a result, the Court need not and does not reach Defendants' other arguments for dismissal; accordingly, the case is closed.

Dated: New York, New York
January 7, 2022

RUBY J. KRAJICK
Clerk of Court
By: *K. Mango*
Deputy Clerk

APPENDIX K

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARK I. SOKOLOW, et al., Plaintiffs, -against- THE PALESTINE LIBERATION ORGANIZATION and THE PALESTINIAN AUTHORITY, Defendants.	:	DATE FILED: OCT 01 2015 04 **CIVIL** 00397 (GBD) **JUDGMENT**

ORDER

A Jury Trial before the Honorable George B. Daniels, United States District Judge, began on January 14, 2015, and at the conclusion of the trial, on February 23, 2015, the jury rendered a verdict in favor of each Plaintiff and against both Defendants the Pales- tine Liberation Organization and the Palestinian Authority resulting in the following judgment:

I. JANUARY 22, 2002 - JAFFA ROAD SHOOTING:

1. A jury verdict in favor of Plaintiff Elise Gould in the amount of $3,000,000.00, which is trebled automatically pursuant to the Antiterrorism Act, 18 U.S.C. § 2333(a), for a total award of **$9 million**;
2. A jury verdict in favor of Plaintiff Ronald Gould in the amount of $3,000,000.00, which is trebled automatically pursuant to the Antiterrorism Act, 18 U.S.C. § 2333(a), for a total award of **$9 million**;

3. A jury verdict in favor of Plaintiff Shayna Gould in the amount of $20,000,000.00, which is trebled automatically pursuant to the Antiterrorism Act, 18 U.S.C. § 2333(a), for a total award of **$60 million**;
4. A jury verdict in favor of Plaintiff Jessica Rine in the amount of $3,000,000.00, which is trebled automatically pursuant to the Antiterrorism Act, 18 U.S.C. § 2333(a), for a total award of **$9 million**;
5. A jury verdict in favor of Plaintiff Henna Novack Waldman in the amount of $2,500,000.00, which is trebled automatically pursuant to the Antiterrorism Act, 18 U.S.C. § 2333(a), for a total award of **$7.5 million**;
6. A jury verdict in favor of Plaintiff Morris Waldman in the amount of $2,500,000.00, which is trebled automatically pursuant to the Antiterrorism Act, 18 U.S.C. § 2333(a), for a total award of **$7.5 million**;
7. A jury verdict in favor of Plaintiff Shmuel Waldman in the amount of $7,500,000.00, which is trebled automatically pursuant to the Antiterrorism Act, 18 U.S.C. § 2333(a), for a total award of **$22.5 million**;

II. JANUARY 27, 2002 - JAFFA ROAD BOMBING:

1. A jury verdict in favor of Plaintiff Elana Sokolow in the amount of $2,500,000.00, which is trebled automatically pursuant to the Antiterrorism Act, 18 U.S.C. § 2333(a), for a total award of **$7.5 million**;
2. A jury verdict in favor of Plaintiff Jamie Sokolow in the amount of $6,500,000.00, which is trebled automatically pursuant to the Antiterrorism Act,

18 U.S.C. § 2333(a), for a total award of **$19.5 million**;

3. A jury verdict in favor of Plaintiff Lauren Sokolow in the amount of $5,000,000.00, which is trebled automatically pursuant to the Antiterrorism Act, 18 U.S.C. § 2333(a), for a total award of **$15 million**;
4. A jury verdict in favor of Plaintiff Mark Sokolow in the amount of $5,000,000.00, which is trebled automatically pursuant to the Antiterrorism Act, 18 U.S.C. § 2333(a), for a total award of **$15 million**;
5. A jury verdict in favor of Plaintiff Rena Sokolow in the amount of $7,500,000.00, which is trebled automatically pursuant to the Antiterrorism Act, 18 U.S.C. § 2333(a), for a total award of **$22.5 million**;

III. MARCH 21, 2002 - KING GEORGE STREET BOMBING:

1. A jury verdict in favor of Plaintiff Alan Bauer in the amount of $7,000,000.00, which is trebled automatically pursuant to the Antiterrorism Act, 18 U.S.C. § 2333(a), for a total award of **$21 million**;
2. A jury verdict in favor of Plaintiff Binyamin Bauer in the amount of $1,000,000.00, which is trebled automatically pursuant to the Antiterrorism Act, 18 U.S.C. § 2333(a), for a total award of **$3 million**;
3. A jury verdict in favor of Plaintiff Daniel Baur in the amount of $1,000,000.00, which is trebled automatically pursuant to the Antiterrorism Act, 18 U.S.C. § 2333(a), for a total award of **$3 million**;

4. A jury verdict in favor of Plaintiff Yehonathon Bauer in the amount of $25,000,000.00, which is trebled automatically pursuant to the Antiterrorism Act, 18 U.S.C. § 2333(a), for a total award of **$75 million**;
5. A jury verdict in favor of Plaintiff Yehuda Bauer in the amount of $1,000,000.00, which is trebled automatically pursuant to the Antiterrorism Act, 18 U.S.C. § 2333(a), for a total award of **$3 million**;

IV. JUNE 19, 2002 - FRENCH HILL BOMBING:

1. A jury verdict in favor of Plaintiff Leonard Mandelkorn in the amount of $10,000,000.00, which is trebled automatically pursuant to the Antiterrorism Act, 18 U.S.C. § 2333(a), for a total award of **$30 million**;

V. JULY 31, 2002 HEBREW UNIVERSITY BOMBING:

1. A jury verdict in favor of Plaintiff Katherine Baker in the amount of $6,000,000.00, which is trebled automatically pursuant to the Antiterrorism Act, 18 U.S.C. § 2333(a), for a total award of **$18 million**;
2. A jury verdict in favor of Plaintiff Benjamin Blutstein in the amount of $2,500,000.00, which is trebled automatically pursuant to the Antiterrorism Act, 18 U.S.C. § 2333(a), for a total award of **$7.5 million**;
3. A jury verdict in favor of Plaintiff Rebekah Blutstein in the amount of $4,000,000.00, which is trebled automatically pursuant to the Antiterrorism Act, 18 U.S.C. § 2333(a), for a total award of **$12 million**;

4. A jury verdict in favor of Plaintiff Richard Blutstein in the amount of $6,000,000.00, which is trebled automatically pursuant to the Antiterrorism Act, 18 U.S.C. § 2333(a), for a total award of **$18 million**;
5. A jury verdict in favor of Plaintiff Diane Carter in the amount of $1,000,000.00, which is trebled automatically pursuant to the Anti-terrorism Act, 18 U.S.C. § 2333(a), for a total award of **$3 million**;
6. A jury verdict in favor of Plaintiff Larry Carter in the amount of $6,500,000.00, which is trebled automatically pursuant to the Anti-terrorism Act, 18 U.S.C. § 2333(a), for a total award of **$19.5 million**;
7. A jury verdict in favor of Plaintiff Shaun Choffel in the amount of $1,500,000.00, which is trebled automatically pursuant to the Antiterrorism Act, 18 U.S.C. § 2333(a), for a total award of **$4.5 million**;
8. A jury verdict in favor of Plaintiff Robert L. Coulter Jr. in the amount of $3,000,000.00, which is trebled automatically pursuant to the Antiterrorism Act, 18 U.S.C. § 2333(a), for a total award of **$9 million**;
9. A jury verdict in favor of Plaintiff Diane Coulter Miller in the amount of $3,000,000.00, which is trebled automatically pursuant to the Antiterrorism Act, 18 U.S.C. § 2333(a), for a total award of **$9 million**;
10. A jury verdict in favor of Plaintiff Robert L. Coulter Sr. in the amount of $7,500,000.00, which is trebled automatically pursuant to the

Antiterrorism Act, 18 U.S.C. § 2333(a), for a total award of **$22.5 million**;

11. A jury verdict in favor of Plaintiff Janis Ruth Coulter in the amount of $2,500,000.00, which is trebled automatically pursuant to the Antiterrorism Act, 18 U.S.C. § 2333(a), for a total award of **$7.5 million**;
12. A jury verdict in favor of Plaintiff David Gritz in the amount of $2,500,000.00, which is trebled automatically pursuant to the Antiterrorism Act, 18 U.S.C. § 2333(a), for a total award of **$7.5 million**;
13. A jury verdict in favor of Plaintiff Nevenka Gritz in the amount of $10,000,000.00, which is trebled automatically pursuant to the Anti-terrorism Act, 18 U.S.C. § 2333(a), for a total award of **$30 million**;
14. A jury verdict in favor of Plaintiff Nevenka Gritz, as successor to Norman Gritz, in the amount of $2,500,000.00, which is trebled automatically pursuant to the Antiterrorism Act, 18 U.S.C. § 2333(a), for a total award of **$7.5 million**;

VI. JANUARY 29, 2004 - BUS NO. 19 BOMBING:

1. A jury verdict in favor of Plaintiff Chana Goldberg in the amount of $8,000,000.00, which is trebled automatically pursuant to the Antiterrorism Act, 18 U.S.C. § 2333(a), for a total award **of $24 million**;
2. A jury verdict in favor of Plaintiff Eliezer Goldberg in the amount of $4,000,000.00, which is trebled automatically pursuant to the Antiterrorism Act, 18 U.S.C. § 2333(a), for a total award of **$12 million**;

3. A jury verdict in favor of Plaintiff Esther Goldberg in the amount of $8,000,000.00, which is trebled automatically pursuant to the Antiterrorism Act, 18 U.S.C. § 2333(a), for a total award of **$24 million**;
4. A jury verdict in favor of Plaintiff Karen Goldberg in the amount of $13,000,000.00, which is trebled automatically pursuant to the Antiterrorism Act, 18 U.S.C. § 2333(a), for a total award of **$39 million**;
5. A jury verdict in favor of Plaintiff Shoshana Goldberg in the amount of $4,000,000.00, which is trebled automatically pursuant to the Antiterrorism Act, 18 U.S.C. § 2333(a), for a total award of **$12 million**;
6. A jury verdict in favor of Plaintiff Tzvi Gold- berg in the amount of $2,000,000.00, which is trebled automatically pursuant to the Antiterrorism Act, 18 U.S.C. § 2333(a), for a total award of **$6 million**;
7. A jury verdict in favor of Plaintiff Yaakov Goldberg in the amount of $2,000,000.00, which is trebled automatically pursuant to the Antiterrorism Act, 18 U.S.C. § 2333(a), for a total award of **$6 million**;
8. A jury verdict in favor of Plaintiff Yitzhak Goldberg in the amount of $6,000,000.00, which is trebled automatically pursuant to the Antiterrorism Act, 18 U.S.C. § 2333(a), for a total award of **$18 million**.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED: That Plaintiffs have a judgment as against Defendants the Palestine Liberation Organization and the Palestinian Authority jointly and severally in the amounts

specified above for a total jury verdict of $218.5 million, trebled automatically pursuant to the Antiterrorism Act, 18 U.S.C. § 2333(a), for a total award of $655.5 million.

DATED: New York, New York
October 1, 2015

So Ordered:

s/ George B. Daniels
U.S.D.J.

APPENDIX L

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ELISE GOULD, RONALD GOULD, SHAYNA GOULD, JESSICA RINE, HENNA NOVACK WALDMAN, MORRIS WALDMAN, SHMUEL WALDMAN, Plaintiffs, v. THE PALESTINE LIBERATION ORGANIZATION (PLO) and THE PALESTINIAN AUTHORITY (PA), Defendants.	:	FEB 25 2015 **Jury Verdict Form** 04 Civ. 00397 (GBD)

LIABILITY

I. JANUARY 22, 2002 - JAFFA ROAD SHOOTING

1. Did Plaintiffs prove by a preponderance of the evidence that **Defendant PLO** is liable for the **January 22, 2002** attack because the **PLO** knowingly provided material support or resources that were used in preparation for or in carrying out this attack?

✓ **YES** _____ **NO**

2. Did Plaintiffs prove by a preponderance of the evidence that **Defendant PA** is liable for the **January 22, 2002** attack because the **PA** knowingly provided material support or resources that were used in preparation for or in carrying out this attack?

✓ **YES** _____ **NO**

3. Did Plaintiffs prove by a preponderance of the evidence that **Defendant PA** is liable for the **January 22, 2002** attack because an employee of the **PA**, acting within the scope of his employment and in furtherance of the activities of the **PA**, either carried out, or knowingly provided material support or resources that were used in preparation for or in carrying out, this attack?

✓ **YES** _____ **NO**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ELANA SOKOLOW, JAMIE SOKOLOW, LAUREN SOKOLOW, MARK SOKOLOW, RENA SOKOLOW,	:	
Plaintiffs,	:	**Jury Verdict Form**
v.	:	04 Civ. 00397 (GBD)
THE PALESTINE LIBERATION ORGANIZATION (PLO) and THE PALESTINIAN AUTHORITY (PA),	:	
Defendants.	:	

LIABILITY

II. JANUARY 27, 2002 - JAFFA ROAD BOMBING

1. Did Plaintiffs prove by a preponderance of the evidence that **Defendant PLO** is liable for the **January 27, 2002** attack because the **PLO** knowingly provided material support or resources that were used in preparation for or in carrying out this attack?

✓ **YES** _____ **NO**

2. Did Plaintiffs prove by a preponderance of the evidence that **Defendant PA** is liable for the **January 27, 2002** attack because the **PA** knowingly provided material support or resources that were

used in preparation for or in carrying out this attack?

✓ **YES** _____ **NO**

3. Did Plaintiffs prove by a preponderance of the evidence that **Defendant PA** is liable for the **January 27, 2002** attack because an employee of the **PA**, acting within the scope of his employment and in furtherance of the activities of the **PA**, either carried out, or knowingly provided material support or resources that were used in preparation for or in carrying out, this attack?

✓ **YES** _____ **NO**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALAN BAUER, BINYAMIN BAUER, DANIEL BAUER, YEHONATHON BAUER, YEHUDA BAUER,	:	
Plaintiffs,	:	**Jury Verdict Form**
v.	:	
	:	04 Civ. 00397 (GBD)
THE PALESTINE LIBERATION ORGANIZATION (PLO) and THE PALESTINIAN AUTHORITY (PA),	:	
Defendants.	:	

LIABILITY

III. MARCH 21, 2002 - KING GEORGE STREET BOMBING

1. Did Plaintiffs prove by a preponderance of the evidence that **Defendant PLO** is liable for the **March 21, 2002** attack because the **PLO** knowingly provided material support or resources that were used in preparation for or in carrying out this attack?

✓ **YES** _____ **NO**

2. Did Plaintiffs prove by a preponderance of the evidence that **Defendant PA** is liable for the **March 21, 2002** attack because the **PA** knowingly provided material support or resources that were

used in preparation for or in carrying out this attack?

✓ **YES** _____ **NO**

3. Did Plaintiffs prove by a preponderance of the evidence that **Defendant PA** is liable for the **March 21, 2002** attack because an employee of the **PA**, acting within the scope of his employment and in furtherance of the activities of the **PA**, either carried out, or knowingly provided material support or resources that were used in preparation for or in carrying out, this attack?

✓ **YES** _____ **NO**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LEONARD MANDEL-KORN,	:	
Plaintiff,	:	
	:	**Jury Verdict**
v.	:	**Form**
THE PALESTINE LIBERATION ORGANIZATION (PLO) and THE PALESTINIAN AUTHORITY (PA),	:	04 Civ. 00397 (GBD)
Defendants.	:	

LIABILITY

IV. JUNE 19, 2002 - FRENCH HILL BOMBING

1. Did Plaintiffs prove by a preponderance of the evidence that **Defendant PLO** is liable for the **June 19, 2002** attack because the **PLO** knowingly provided material support or resources that were used in preparation for or in carrying out this attack?

✓ **YES** _____ **NO**

2. Did Plaintiffs prove by a preponderance of the evidence that **Defendant PA** is liable for the **June 19, 2002** attack because the **PA** knowingly provided material support or resources that were used in preparation for or in carrying out this attack?

✓ **YES** _____ **NO**

3. Did Plaintiffs prove by a preponderance of the evidence that **Defendant PLO** is liable for the **June 19, 2002** attack because the **PLO** knowingly provided to the al-Aqsa Martyrs' Brigade, after its designation as a Foreign Terrorist Organization, material support or resources that were used in preparation for or in carrying out this attack?

✓ **YES** _____ **NO**

4. Did Plaintiffs prove by a preponderance of the evidence that **Defendant PA** is liable for the **June 19, 2002** attack because the **PA** knowingly provided to the al-Aqsa Martyrs' Brigade, after its designation as a Foreign Terrorist Organization, material support or re-sources that were used in preparation for or in carrying out this attack?

✓ **YES** _____ **NO**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KATHERINE BAKER, ESTATE OF BENJAMIN BLUTSTEIN, REBEKAH BLUTSTEIN, RICHARD BLUTSTEIN, ESTATE OF DIANE CARTER, LARRY CARTER, SHAUN CHOFFEL, ROBERT L. COULTER JR., DIANE COULTER MILLER, ROBERT L. COULTER SR., ESTATE OF JANIS RUTH COULTER, ESTATE OF DAVID GRITZ, NEVENKA GRITZ (on behalf of herself and as successor to NORMAN GRITZ),	:	**Jury Verdict Form**
Plaintiff,	:	04 Civ. 00397 (GBD)
v.	:	
THE PALESTINE LIBERATION ORGANIZATION (PLO) and THE PALESTINIAN AUTHORITY (PA),	:	
Defendants.	:	

LIABILITY

V. July 31, 2002 - HEBREW UNIVERSITY BOMBING

1. Did Plaintiffs prove by a preponderance of the evidence that **Defendant PLO** is liable for the **July 31, 2002** attack because the **PLO** knowingly provided material support or resources that were used in preparation for or in carrying out this attack?

   ✓ **YES** _____ **NO**

2. Did Plaintiffs prove by a preponderance of the evidence that **Defendant PA** is liable for the **July 31, 2002** attack because the **PA** knowingly provided material support or resources that were used in preparation for or in carrying out this attack?

   ✓ **YES** _____ **NO**

3. Did Plaintiffs prove by a preponderance of the evidence that **Defendant PA** is liable for the **July 31, 2002** attack because an employee of the **PA**, acting within the scope of his employment and in furtherance of the activities of the **PA**, either carried out, or knowingly provided material support or resources that were used in preparation for or in carrying out, this attack?

   ✓ **YES** _____ **NO**

4. Did Plaintiffs prove by a preponderance of the evidence that **Defendant PLO** is liable for the **July 31, 2002** attack because the **PLO** knowingly provided to Hamas, after its designation as a Foreign Terrorist Organization, material support or

resources that were used in preparation for or in carrying out this attack?

✓ **YES** _____ **NO**

5. Did Plaintiffs prove by a preponderance of the evidence that **Defendant PA** is liable for the **July 31, 2002** attack because the **PA** knowingly provided to Hamas, after its designation as a Foreign Terrorist Organization, material support or resources that were used in preparation for or in carrying out this attack?

✓ **YES** _____ **NO**

6. Did Plaintiffs prove by a preponderance of the evidence that **Defendant PLO** is liable for the **July 31, 2002** attack because the **PLO** harbored or concealed a person who the **PLO** knew, or had reasonable grounds to believe, committed or was about to commit this attack?

✓ **YES** _____ **NO**

7. Did Plaintiffs prove by a preponderance of the evidence that **Defendant PA** is liable for the **July 31, 2002** attack because the **PA** harbored or concealed a person who the **PA** knew, or had reasonable grounds to believe, committed or was about to commit this attack?

✓ **YES** _____ **NO**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHANA GOLDBERG, ELIEZER GOLDBERG, ESTHER GOLDBERG, KAREN GOLDBERG, SHOSHANA GOLDBERG, TZVI GOLDBERG, YAAKOV GOLDBERG, YITZHAK GOLDBERG, Plaintiff, v. THE PALESTINE LIBERATION ORGANIZATION (PLO) and THE PALESTINIAN AUTHORITY (PA), Defendants.	:	**Jury Verdict Form** 04 Civ. 00397 (GBD)

LIABILITY

VI. JANUARY 29, 2004 - BUS NO. 19 BOMBING

1. Did Plaintiffs prove by a preponderance of the evidence that **Defendant PLO** is liable for the **January 29, 2004** attack because the **PLO** knowingly provided material support or resources that were used in preparation for or in carrying out this attack?

✓ **YES** _____ **NO**

2. Did Plaintiffs prove by a preponderance of the evidence that **Defendant PA** is liable for the **January 29, 2004** attack because the **PA** knowingly provided material support or resources that were used in preparation for or in carrying out this attack?

✓ **YES** _____ **NO**

3. Did Plaintiffs prove by a preponderance of the evidence that **Defendant PA** is liable for the **January 29, 2004** attack because an employee of the **PA**, acting within the scope of his employment and in furtherance of the activities of the **PA**, either carried out, or knowingly provided material support or resources that were used in preparation for or in carrying out, this attack?

✓ **YES** _____ **NO**

4. Did Plaintiffs prove by a preponderance of the evidence that **Defendant PLO** is liable for the **January 29, 2004** attack because the **PLO** knowingly provided to the al-Aqsa Martyrs' Brigade, after its designation as a Foreign Terrorist Organization, material support or resources that were used in preparation for or in carrying out this attack?

✓ **YES** _____ **NO**

5. Did Plaintiffs prove by a preponderance of the evidence that **Defendant PA** is liable for the **January 29, 2004** attack because the **PA** knowingly provided to the al-Aqsa Martyrs' Brigade, after its designation as a Foreign Terrorist Organization, material support or resources that were used in preparation for or in carrying out this attack?

✓ **YES** _____ **NO**

IF YOU ANSWERED "YES" IN RESPONSE TO AT LEAST ONE PREVIOUS QUESTION, PLEASE PROCEED TO ANSWER THE RELATED DAMAGES QUESTIONS BEGINNING ON PAGE 10. IF YOU ANSWERED "NO" IN RESPONSE TO EVERY PREVIOUS QUESTION, YOU SHOULD PROCEED NO FURTHER.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ELISE GOULD, RONALD GOULD, SHAYNA GOULD, JESSICA RINE, HENNA NOVACK WALDMAN, MORRIS WALDMAN, SHMUEL WALDMAN,	:	**Jury Verdict Form**
Plaintiffs,	:	
v.	:	04 Civ. 00397 (GBD)
THE PALESTINE LIBERATION ORGANIZATION (PLO) and THE PALESTINIAN AUTHORITY (PA),	:	
Defendants.	:	

DAMAGES

I. JANUARY 22, 2002 - JAFFA ROAD SHOOTING

1. What amount of damages, if any, do you award as compensation for Plaintiff **Elise Gould's** injuries that you determine were caused by the **January 22, 2002** terrorist attack?

$3,000,000.00

2. What amount of damages, if any, do you award as compensation for Plaintiff **Ronald Gould's** injuries that you determine were caused by the **January 22, 2002** terrorist attack?

$3,000,000.00

3. What amount of damages, if any, do you award as compensation for Plaintiff **Shayna Gould's** injuries that you determine were caused by the **January 22, 2002** terrorist attack?

$20,000,000.00

4. What amount of damages, if any, do you award as compensation for Plaintiff **Jessica Rine's** injuries that you determine were caused by the **January 22, 2002** terrorist attack?

$3,000,000.00

5. What amount of damages, if any, do you award as compensation for Plaintiff **Henna Novack Waldman's** injuries that you determine were caused by the **January 22, 2002** terrorist attack?

$2,500,000.00

6. What amount of damages, if any, do you award as compensation for Plaintiff **Morris Waldman's** injuries that you determine were caused by the **January 22, 2002** terrorist attack?

$2,500,000.00

7. What amount of damages, if any, do you award as compensation for Plaintiff **Shmuel Waldman's** injuries that you determine were caused by the **January 22, 2002** terrorist attack?

$7,500,000.00

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ELANA SOKOLOW, JAMIE SOKOLOW, LAUREN SOKOLOW, MARK SOKOLOW, RENA SOKOLOW,	:	**Jury Verdict Form**
Plaintiffs,	:	
v.	:	04 Civ. 00397 (GBD)
THE PALESTINE LIBERATION ORGANIZATION (PLO) and THE PALESTINIAN AUTHORITY (PA),	:	
Defendants.	:	

DAMAGES

II. JANUARY 27, 2002 - JAFFA ROAD BOMBING

1. What amount of damages, if any, do you award as compensation for Plaintiff **Elana Sokolow's** injuries that you determine were caused by the **January 27, 2002** terrorist attack?

$2,500,000.00

2. What amount of damages, if any, do you award as compensation for Plaintiff **Jamie Sokolow's** injuries that you determine were caused by the **January 27, 2002** terrorist attack?

$6,500,000.00

3. What amount of damages, if any, do you award as compensation for Plaintiff **Lauren Sokolow's** injuries that you determine were caused by the **January 27, 2002** terrorist attack?

$5,000,000.00

4. What amount of damages, if any, do you award as compensation for Plaintiff **Mark Sokolow's** injuries that you determine were caused by the **January 27, 2002** terrorist attack?

$5,000,000.00

5. What amount of damages, if any, do you award as compensation for Plaintiff **Rena Sokolow's** injuries that you determine were caused by the **January 27, 2002** terrorist attack?

$7,500,000.00

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALAN BAUER, BINYAMIN BAUER, DANIEL BAUER, YEHONATHON BAUER, YEHUDA BAUER,	:	**Jury Verdict Form**
Plaintiffs,	:	
v.	:	04 Civ. 00397 (GBD)
THE PALESTINE LIBERATION ORGANIZATION (PLO) and THE PALESTINIAN AUTHORITY (PA),	:	
Defendants.	:	

DAMAGES

III. MARCH 21, 2002 - KING GEORGE STREET BOMBING

1. What amount of damages, if any, do you award as compensation for Plaintiff **Alan Bauer's** injuries that you determine were caused by the **March 21, 2002** terrorist attack?

$7,000,000.00

2. What amount of damages, if any, do you award as compensation for Plaintiff **Binyamin Bauer's** injuries that you determine were caused by the **March 21, 2002** terrorist attack?

$1,000,000.00

3. What amount of damages, if any, do you award as compensation for Plaintiff **Daniel Bauer's** injuries that you determine were caused by the **March 21, 2002** terrorist attack?

$1,000,000.00

4. What amount of damages, if any, do you award as compensation for Plaintiff **Yehonathon Bauer's** injuries that you determine were caused by the **March 21, 2002** terrorist attack?

$25,000,000.00

5. What amount of damages, if any, do you award as compensation for Plaintiff **Yehuda Bauer's** injuries that you determine were caused by the **March 21, 2002** terrorist attack?

$1,000,000.00

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LEONARD MANDEL-KORN,	:	
Plaintiff,	:	**Jury Verdict Form**
v.	:	
	:	04 Civ. 00397
THE PALESTINE LIBERATION ORGANIZATION (PLO) and THE PALESTINIAN AUTHORITY (PA),	:	(GBD)
Defendants.	:	

DAMAGES

IV. JUNE 19, 2002 - FRENCH HILL BOMBING

1. What amount of damages, if any, do you award as compensation for Plaintiff **Leonard Mandelkorn's** injuries that you determine were caused by the **June 19, 2002** terrorist attack?

$10,000,000.00

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KATHERINE BAKER, ESTATE OF BENJAMIN BLUTSTEIN, REBEKAH BLUTSTEIN, RICHARD BLUTSTEIN, ESTATE OF DIANE CARTER, LARRY CARTER, SHAUN CHOFFEL, ROBERT L. COULTER JR., DIANE COULTER MILLER, ROBERT L. COULTER SR., ESTATE OF JANIS RUTH COULTER, ESTATE OF DAVID GRITZ, NEVENKA GRITZ (on behalf of herself and as successor to NORMAN GRITZ),	:	**Jury Verdict Form**
Plaintiff,	:	04 Civ. 00397 (GBD)
v.	:	
THE PALESTINE LIBERATION ORGANIZATION (PLO) and THE PALESTINIAN AUTHORITY (PA),	:	
Defendants.	:	

DAMAGES

V. July 31, 2002 - HEBREW UNIVERSITY BOMBING

1. What amount of damages, if any, do you award as compensation for Plaintiff **Katherine Baker's** injuries that you determine were caused by the **July 31, 2002** terrorist attack?

$6,000,000.00

2. What amount of damages, if any, do you award as compensation for Plaintiff **Benjamin Blutstein's** injuries that you determine were caused by the **July 31, 2002** terrorist attack?

$2,500,000.00

3. What amount of damages, if any, do you award as compensation for Plaintiff **Rebekah Blutstein's** injuries that you determine were caused by the **July 31, 2002** terrorist attack?

$4,000,000.00

4. What amount of damages, if any, do you award as compensation for Plaintiff **Richard Blutstein's** injuries that you determine were caused by the **July 31, 2002** terrorist attack?

$6,000,000.00

5. What amount of damages, if any, do you award as compensation for Plaintiff **Diane Carter's** injuries that you determine were caused by the **July 31, 2002** terrorist attack?

$1,000,000.00

6. What amount of damages, if any, do you award as compensation for Plaintiff **Larry Carter's** injuries

that you determine were caused by the **July 31, 2002** terrorist attack?

$6,500,000.00

7. What amount of damages, if any, do you award as compensation for Plaintiff **Shaun Choffel's** injuries that you determine were caused by the **July 31, 2002** terrorist attack?

$1,500,000.00

8. What amount of damages, if any, do you award as compensation for Plaintiff **Robert L. Coulter Jr.'s** injuries that you determine were caused by the **July 31, 2002** terrorist attack?

$3,000,000.00

9. What amount of damages, if any, do you award as compensation for Plaintiff **Diane Coulter Miller's** injuries that you determine were caused by the **July 31, 2002** terrorist attack?

$3,000,000.00

10. What amount of damages, if any, do you award as compensation for Plaintiff **Robert L. Coulter Sr.'s** injuries that you determine were caused by the **July 31, 2002** terrorist attack?

$7,500,000.00

11. What amount of damages, if any, do you award as compensation for Plaintiff **Janis Ruth Coulter's** injuries that you determine were caused by the **July 31, 2002** terrorist attack?

$2,500,000.00

12. What amount of damages, if any, do you award as compensation for Plaintiff **David Gritz's** injuries

that you determine were caused by the **July 31, 2002** terrorist attack?

$2,500,000.00

13. What amount of damages, if any, do you award as compensation for Plaintiff **Nevenka Gritz's** injuries that you determine were caused by the **July 31, 2002** terrorist attack?

$10,000,000.00

14. What amount of damages, if any, do you award to Plaintiff **Nevenka Gritz as successor to Norman Gritz** as compensation for Plaintiff **Norman Gritz's** injuries that you determine were caused by the **July 31, 2002** terrorist attack?

$2,500,000.00

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHANA GOLDBERG, ELIEZER GOLDBERG, ESTHER GOLDBERG, KAREN GOLDBERG, SHOSHANA GOLDBERG, TZVI GOLDBERG, YAAKOV GOLDBERG, YITZHAK GOLDBERG, Plaintiff, v. THE PALESTINE LIBERATION ORGANIZATION (PLO) and THE PALESTINIAN AUTHORITY (PA), Defendants.	:	**Jury Verdict Form** 04 Civ. 00397 (GBD)

LIABILITY

VI. JANUARY 29, 2004 - BUS NO. 19 BOMBING

1. What amount of damages, if any, do you award as compensation for Plaintiff **Chana Goldberg's** injuries that you determine were caused by the **January 29, 2004** terrorist attack?

$8,000,000.00

2. What amount of damages, if any, do you award as compensation for Plaintiff **Eliezer Goldberg's**

injuries that you determine were caused by the **January 29, 2004** terrorist attack?

$4,000,000.00

3. What amount of damages, if any, do you award as compensation for Plaintiff **Esther Goldberg's** injuries that you determine were caused by the **January 29, 2004** terrorist attack?

$8,000,000.00

4. What amount of damages, if any, do you award as compensation for Plaintiff **Karen Goldberg's** injuries that you determine were caused by the **January 29, 2004** terrorist attack?

$13,000,000.00

5. What amount of damages, if any, do you award as compensation for Plaintiff **Shoshana Goldberg's** injuries that you determine were caused by the **January 29, 2004** terrorist attack?

$4,000,000.00

6. What amount of damages, if any, do you award as compensation for Plaintiff **Tzvi Goldberg's** injuries that you determine were caused by the **January 29, 2004** terrorist attack?

$2,000,000.00

7. What amount of damages, if any, do you award as compensation for Plaintiff **Yaakov Goldberg's** injuries that you determine were caused by the **January 29, 2004** terrorist attack?

$2,000,000.00

8. What amount of damages, if any, do you award as compensation for Plaintiff **Yitzhak Goldberg's**

injuries that you determine were caused by the **January 29, 2004** terrorist attack?

$6,000,000.00

APPENDIX M

1. Amendment V of the Constitution provides, in part, that no person shall "be deprived of life, liberty, or property, without due process of law."

2. The Anti-Terrorism Act of 1987, Public Law 100-204 (22 U.S.C. § 5202), provides, in part:

§ 1002. Findings; determinations

(a) Findings

The Congress finds that—

* * *

(2) the Palestine Liberation Organization (hereafter in this chapter referred to as the "PLO") was directly responsible for the murder of an American citizen on the Achille Lauro cruise liner in 1985, and a member of the PLO's Executive Committee is under indictment in the United States for the murder of that American citizen;

(3) the head of the PLO has been implicated in the murder of a United States Ambassador overseas;

(4) the PLO and its constituent groups have taken credit for, and been implicated in, the murders of dozens of American citizens abroad; * * *

(b) Determinations

Therefore, the Congress determines that the PLO and its affiliates are a terrorist organization and a threat to the interests of the United States, its allies, and to international law and should not benefit from operating in the United States.

§ 1003. Prohibitions regarding PLO

It shall be unlawful, if the purpose be to further the interests of the Palestine Liberation Organization or any of its constituent groups, any successor to any of those, or

any agents thereof, on or after the effective date of this chapter—

(1) to receive anything of value except informational material from the PLO or any of its constituent groups, any successor thereto, or any agents thereof;

(2) to expend funds from the PLO or any of its constituent groups, any successor thereto, or any agents thereof; or

(3) notwithstanding any provision of law to the contrary, to establish or maintain an office, headquarters, premises, or other facilities or establishments within the jurisdiction of the United States at the behest or direction of, or with funds provided by the Palestine Liberation Organization or any of its constituent groups, any successor to any of those, or any agents thereof.

3. The Anti-Terrorism Act of 1992, Title X of Pub. L. 102-572, added the following provisions to Title 18 of the United States Code:

§ 2331. Definitions

As used in this chapter—

(1) the term "international terrorism" means activities that—

(A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;

(B) appear to be intended—

(i) to intimidate or coerce a civilian population;

(ii) to influence the policy of a government by intimidation or coercion; or

(iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and

(C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum; * * *

§ 2333. Civil Remedies

(a) ACTION AND JURISDICTION.—Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees. * * *

§ 2334. Jurisdiction and Venue

(a) GENERAL VENUE.—Any civil action under section 2333 of this title against any person may be instituted in the district court of the United States for any district where any plaintiff resides or where any defendant resides or is served, or has an agent. Process in such a civil action may be served in any district where the defendant resides, is found, or has an agent. * * *

4. The Anti-Terrorism Clarification Act of 2018, Pub. L. 115-253, added the following provision to Section 2334 of Title 18 of the United States Code:

(e) Consent of Certain Parties to Personal Jurisdiction.—

(1) In general.—Except as provided in paragraph (2), for purposes of any civil action under section 2333 of this title, a defendant shall be deemed to have consented to personal jurisdiction in such civil action if, regardless of

the date of the occurrence of the act of international terrorism upon which such civil action was filed, the defendant— * * *

(B) in the case of a defendant benefiting from a waiver or suspension of section 1003 of the Anti-Terrorism Act of 1987 (22 U.S.C. 5202) after the date that is 120 days after the date of enactment of this subsection—

(i) continues to maintain any office, headquarters, premises, or other facilities or establishments within the jurisdiction of the United States; or

(ii) establishes or procures any office, headquarters, premises, or other facilities or establishments within the jurisdiction of the United States. * * *

5. The Promoting Security and Justice for Victims of Terrorism Act of 2019 (PSJVTA), Pub. L. No. 116–94, div. J, tit. IX, § 903, 133 Stat. 3082-3085, provides:

(a) SHORT TITLE.—This section may be cited as the Promoting Security and Justice for Victims of Terrorism Act of 2019.

(b) FACILITATION OF THE SETTLEMENT OF TERRORISM-RELATED CLAIMS OF NATIONALS OF THE UNITED STATES.—

(1) COMPREHENSIVE PROCESS TO FACILITATE THE RESOLUTION OF ANTI-TERRORISM ACT CLAIMS.—The Secretary of State, in consultation with the Attorney General, shall, not later than 30 days after the date of enactment of this Act, develop and initiate a comprehensive process for the Department of State to facilitate the resolution and settlement of covered claims.

(2) ELEMENTS OF COMPREHENSIVE PROCESS.—The comprehensive process developed under paragraph (1) shall include, at a minimum, the following:

(A) Not later than 45 days after the date of enactment of this Act, the Department of State shall publish a notice in the Federal Register identifying the method by which a national of the United States, or a representative of a national of the United States, who has a covered claim, may contact the Department of State to give notice of the covered claim.

(B) Not later than 120 days after the date of enactment of this Act, the Secretary of State, or a designee of the Secretary, shall meet (and make every effort to continue to meet on a regular basis thereafter) with any national of the United States, or a representative of a national of the United States, who has a covered claim and has informed the Department of State of the covered claim using the method established pursuant to subparagraph (A) to discuss the status of the covered claim, including the status of any settlement discussions with the Palestinian Authority or the Palestine Liberation Organization.

(C) Not later than 180 days after the date of enactment of this Act, the Secretary of State, or a designee of the Secretary, shall make every effort to meet (and make every effort to continue to meet on a regular basis thereafter) with representatives of the Palestinian Authority and the Palestine Liberation Organization to discuss the covered claims identified pursuant to subparagraph (A) and potential settlement of the covered claims.

(3) REPORT TO CONGRESS.—The Secretary of State shall, not later than 240 days after the date of enactment of this Act, and annually thereafter for 5

years, submit to the Committee on the Judiciary and the Committee on Foreign Relations of the Senate and the Committee on the Judiciary and the Committee on Foreign Affairs of the House of Representatives a report describing activities that the Department of State has undertaken to comply with this subsection, including specific updates regarding subparagraphs (B) and (C) of paragraph (2).

(4) SENSE OF CONGRESS.—It is the sense of Congress that—

(A) covered claims should be resolved in a manner that provides just compensation to the victims;

(B) covered claims should be resolved and settled in favor of the victim to the fullest extent possible and without subjecting victims to unnecessary or protracted litigation;

(C) the United States Government should take all practicable steps to facilitate the resolution and settlement of all covered claims, including engaging directly with the victims or their representatives and the Palestinian Authority and the Palestine Liberation Organization; and

(D) the United States Government should strongly urge the Palestinian Authority and the Palestine Liberation Organization to commit to good-faith negotiations to resolve and settle all covered claims.

(5) DEFINITION.—In this subsection, the term "covered claim" means any pending action by, or final judgment in favor of, a national of the United States, or any action by a national of the United States dismissed for lack of personal jurisdiction, under section 2333 of title 18, United States Code, against the

Palestinian Authority or the Palestine Liberation Organization.

(c) JURISDICTIONAL AMENDMENTS TO FACILITATE RESOLUTION OF TERRORISM-RELATED CLAIMS OF NATIONALS OF THE UNITED STATES.

(1) IN GENERAL.—Section 2334(e) of title 18, United States Code, is amended—

(A) by striking paragraph (1) and inserting the following:

"(1) IN GENERAL.—Except as provided in paragraph (2), for purposes of any civil action under section 2333 of this title, a defendant shall be deemed to have consented to personal jurisdiction in such civil action if, regardless of the date of the occurrence of the act of international terrorism upon which such civil action was filed, the defendant—

"(A) after the date that is 120 days after the date of the enactment of the Promoting Security and Justice for Victims of Terrorism Act of 2019, makes any payment, directly or indirectly—

"(i) to any payee designated by any individual who, after being fairly tried or pleading guilty, has been imprisoned for committing any act of terrorism that injured or killed a national of the United States, if such payment is made by reason of such imprisonment; or

"(ii) to any family member of any individual, following such individual's death while committing an act of terrorism that injured or killed a national of the United States, if such payment is made by reason of the death of such individual; or

"(B) after 15 days after the date of enactment of the Promoting Security and Justice for Victims of Terrorism Act of 2019—

"(i) continues to maintain any office, headquarters, premises, or other facilities or establishments in the United States;

"(ii) establishes or procures any office, headquarters, premises, or other facilities or establishments in the United States; or

"(iii) conducts any activity while physically present in the United States on behalf of the Palestine Liberation Organization or the Palestinian Authority.";

(B) in paragraph (2), by adding at the end the following: "Except with respect to payments described in paragraph (1)(A), no court may consider the receipt of any assistance by a nongovernmental organization, whether direct or indirect, as a basis for consent to jurisdiction by a defendant."; and

(C) by adding at the end the following:

"(3) EXCEPTION FOR CERTAIN ACTIVITIES AND LOCATIONS.—In determining whether a defendant shall be deemed to have consented to personal jurisdiction under paragraph (1)(B), no court may consider—

"(A) any office, headquarters, premises, or other facility or establishment used exclusively for the purpose of conducting official business of the United Nations;

"(B) any activity undertaken exclusively for the purpose of conducting official business of the United Nations;

"(C) any activity involving officials of the United States that the Secretary of State determines is in the national interest of the United States if the Secretary reports to the appropriate congressional committees annually on the use of the authority under this subparagraph;

"(D) any activity undertaken exclusively for the purpose of meetings with officials of the United States or other foreign governments, or participation in training and related activities funded or arranged by the United States Government;

"(E) any activity related to legal representation—

"(i) for matters related to activities described in this paragraph;

"(ii) for the purpose of adjudicating or resolving claims filed in courts of the United States; or

"(iii) to comply with this subsection; or

"(F) any personal or official activities conducted ancillary to activities listed under this paragraph.

"(4) RULE OF CONSTRUCTION.—Notwithstanding any other law (including any treaty), any office, headquarters, premises, or other facility or establishment within the territory of the United States that is not specifically exempted by paragraph (3)(A) shall be considered to be in the United States for purposes of paragraph (1)(B).

"(5) DEFINED TERM.—In this subsection, the term 'defendant' means—

"(A) the Palestinian Authority;

"(B) the Palestine Liberation Organization;

"(C) any organization or other entity that is a successor to or affiliated with the Palestinian Authority or the Palestine Liberation Organization; or

"(D) any organization or other entity that—

"(i) is identified in subparagraph (A), (B), or (C); and

"(ii) self identifies as, holds itself out to be, or carries out conduct in the name of, the 'State of Palestine' or 'Palestine' in connection with official business of the United Nations.".

(2) PRIOR CONSENT NOT ABROGATED.—The amendments made by this subsection shall not abrogate any consent deemed to have been given under SECTION 2334(e) of title 18, United States Code, as in effect on the day before the date of enactment of this Act.

(d) RULES OF CONSTRUCTION; APPLICABILITY; SEVERABILITY.—

(1) RULES OF CONSTRUCTION.—

(A) IN GENERAL.—This section, and the amendments made by this section, should be liberally construed to carry out the purposes of Congress to provide relief for victims of terrorism.

(B) CASES AGAINST OTHER PERSONS.—Nothing in this section may be construed to affect any law or authority, as in effect on the day before the date of enactment of this Act, relating to a case brought under section 2333(a) of title 18, United States Code, against a person who is not a defendant, as defined in paragraph (5) of section

2334(e) of title 18, United States Code, as added by subsection (c)(1) of this section.

(2) APPLICABILITY.—This section, and the amendments made by this section, shall apply to any case pending on or after August 30, 2016.

(3) SEVERABILITY.—If any provision of this section, an amendment made by this section, or the application of such provision or amendment to any person or circumstance is held to be unconstitutional, the remainder of this section, the amendments made by this section, and the application of such provisions to any person or circumstance shall not be affected thereby.