Nos. 24-20 & 24-151

IN THE
# Supreme Court of the United States

MIRIAM FULD, ET AL.,

*Petitioners,*

v.

PALESTINE LIBERATION ORGANIZATION, ET AL.,

*Respondents.*

UNITED STATES OF AMERICA

*Petitioner,*

v.

PALESTINE LIBERATION ORGANIZATION, ET AL.,

*Respondents.*

**On Petitions for Writs of Certiorari to the United States Court of Appeals for the Second Circuit**

## BRIEF IN OPPOSITION

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## QUESTION PRESENTED

The Promoting Security and Justice for Victims of Terrorism Act (PSJVTA) mandates that courts shall "deem" that Respondents "have consented" to personal jurisdiction in the United States if they engage in either of two types of predicate conduct: (i) payments relating to Palestinians imprisoned or killed as a result of committing overseas attacks harming American nationals; or (ii) any actions in the United States other than participation in the United Nations, meetings with government officials, and activities "ancillary" thereto.

In prior cases, courts have uniformly held that the payments, which occur entirely outside the United States, do not support personal jurisdiction because they are not connected to the forum or Plaintiffs' claims. For the same reasons, they similarly held that Respondents' alleged U.S. activities cannot support jurisdiction. Latching onto the broad provisions of the PSJVTA, Petitioners assert that Respondents "consented" to personal jurisdiction in the United States by engaging in the same conduct previously held insufficient to support the exercise of jurisdiction as a matter of due process.

The question presented is:

Whether the Second Circuit correctly held that the PSJVTA violates due process by requiring courts to "deem" that Respondents "have consented" to personal jurisdiction based on conduct that cannot support a presumption that Respondents have submitted to jurisdiction in the United States.

## PARTIES TO THE PROCEEDING

Petitioners in case No. 24-20, 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. The United States, which was intervenor-appellant below, is Petitioner in case No. 24-151. 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.

## RELATED PROCEEDINGS

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

*Sokolow v. Palestine Liberation Org.*, No. 04-397 (Dec. 1, 2016)

*Fuld v. Palestine Liberation Org.,* No. 20-3374 (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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## INTRODUCTION

The Second Circuit faithfully applied this Court's decisions in *Bauxites* and *Mallory* to find Respondents' conduct does not meet due process standards for consent-based jurisdiction. That result is hardly surprising, as Respondents have consistently objected to personal jurisdiction for more than a decade. And courts, for almost as long, have held that the same kinds of predicate conduct named in the PSJVTA are insufficient to satisfy the Due Process Clause. To now hold that Respondents "consent" to jurisdiction based on the same constitutionally-insufficient conduct would, as the district court noted, "let fiction get the better of fact and make a mockery of the Due Process Clause." Pet. App. 123a.

To avoid that holding, Plaintiffs broadly claim the Fifth Amendment does not protect an individual liberty interest in personal jurisdiction. That argument was forfeited below, and was not addressed by the court of appeals. The Government similarly seeks a sea change in Fifth Amendment jurisdictional due process. But no court has ever agreed with its theory that the Fifth Amendment requires only a generic "fairness" test uninformed by this Court's prior limitations on personal jurisdiction. Inextricably mired in the Israeli-Palestinian conflict, this case is a particularly poor vehicle for resolving those sweeping constitutional questions. New jurisdictional rules governing all federal question cases and foreign corporations should not be created for a unique statute targeting two *sui generis* entities.

Nor do these cases even raise those issues. Both Petitioners ask whether Congress can <u>impose</u> jurisdiction on Respondents, when the actual text of the PSJVTA raises a different question. That question is whether Respondents can be deemed to

have consented to jurisdiction under this Court's implied-consent cases. Though Petitioners largely ignore those cases, the Second Circuit correctly considered the statute under *Bauxites* and *Mallory*, concluding that Respondents did not submit to jurisdiction by engaging in the same conduct previously held insufficient to satisfy due process. This is a straightforward application of the principle that Congress "does not ... have the power to authorize violations of the Due Process Clause." *Quill Corp. v. North Dakota*, 504 U.S. 298, 305 (1992).

These cases are not suitable vehicles for other reasons as well. The *Fuld* plaintiffs recently obtained a $191 million judgment against other defendants on the inconsistent theory that the same attack was planned by Hamas, executed by a Hamas operative, and intended to undermine Respondents' legitimacy. The *Sokolow* plaintiffs face even greater hurdles—it has been eight years since that case became final, and the last time the court of appeals refused to recall its mandate to preserve finality was five years ago. Other problems stemming from *Sokolow's* decades-old history abound.

Similar cases are making their way through the D.C. and Tenth Circuits. This Court should wait for the law to develop before considering certiorari on the PSJVTA, especially when no court has ever agreed with the bold positions staked out by Petitioners. The petitions accordingly should be denied.

## STATEMENT OF THE CASE

The PA is the domestic government of parts of the West Bank and the Gaza Strip, collectively referred to as "Palestine." Pet. App. 6a.[1] The PA provides conventional government services, including public

[1] Pet. App. refers to the appendix to Plaintiffs' petition.

safety, healthcare, transportation, a judicial system, public schools and education, with over 155,000 government employees. *Id.* at 143-44a. Under the Oslo Accords, the PLO conducts Palestinian foreign affairs, including operating its UN and other foreign missions. *Id.* at 6a.

The United States does not recognize Respondents as sovereign, but "currently assists training of PA security forces," which is "a key partner in efforts to stabilize the West Bank." Gov't Pet. 5 n.2. The United States believes "the future of Gaza must include Palestinian-led governance and the unification of Gaza with the West Bank under the PA." *Id.*

Respondents are currently forbidden from operating in the United States. *See* 22 U.S.C. §§ 5201(b), 5202, 2378b note; *United States v. PLO*, 695 F. Supp. 1456, 1465-68, 1471 (S.D.N.Y. 1988). An invitation from the United Nations affords the sole exception, permitting a Palestinian mission to conduct activities relating to its role as a UN Non-Member State "invitee." Pet. App. 10a n.2. The PLO had a diplomatic mission in Washington, D.C., but that mission closed in 2018, before the PSJVTA became effective. *Id.* Other than the UN Mission, Respondents have no offices or activities in the United States. *Id.* at 28a, 64a.

### A. Courts unanimously agree Respondents are not subject to personal jurisdiction in the United States.

Because Respondents do not maintain any constitutionally-meaningful connection to the United States, federal courts have long held that exercising personal jurisdiction over Respondents for alleged attacks in Israel and Palestine would violate due process. In *Sokolow*, plaintiffs brought Anti-Terrorism Act claims for attacks allegedly assisted by Respondents. *Id.* at 140a. The Second Circuit

dismissed for lack of jurisdiction because Respondents' U.S. activities were not related to the attacks, and the attacks themselves "were not expressly aimed at the United States." *Id.* at 170-78a. That Americans were injured was "random and fortuitous." *Id.* Plaintiffs' own experts confirmed the "killing was indeed random" as the attackers fired "indiscriminately." *Id.* at 170a.[2]

Plaintiffs sought certiorari, raising many of the same arguments as the current petitions regarding the standard for due process under the Fifth Amendment. *Sokolow v. PLO*, No. 16-1071 (Mar. 3, 2017).

The United States, however, recommended against certiorari. Resp. App. 7a. It warned that plaintiffs' Fifth Amendment analysis was "not [] well developed" and that the decision did "not conflict with any decision of this Court, implicate any conflict among the courts of appeals, or otherwise warrant this Court's intervention." *Id.* at 13a, 21-24a ("Petitioners point to no decision adopting their [] theory ... [i]ndeed, the D.C. Circuit concluded that '[n]o court has ever' adopted such an argument."). Notably, the United States flatly rejected the argument that denying jurisdiction harmed anti-terrorism efforts: "[N]othing 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." *Id.* at 24a. This Court denied certiorari. *Sokolow v. PLO*, 584 U.S. 915 (2018).

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[2] The D.C. Circuit reached the same conclusion in look-alike cases. *Livnat v. Palestinian Auth.*, 851 F.3d 45, 58 (D.C. Cir. 2017); *Klieman v. Palestinian Auth.*, 923 F.3d 1115, 1127 (D.C. Cir. 2019); *Shatsky v. PLO*, 955 F.3d 1016, 1037-38 (D.C. Cir. 2020).

### B. Congress tries different approaches to jurisdiction in the ATCA and the PSJVTA.

In response to these decisions, Congress passed the Anti-Terrorism Clarification Act of 2018 ("ATCA"), Pub. L. No. 115-253, 132 Stat. 3183 (2018). The ATCA provided that Respondents "shall be deemed to have consented to personal jurisdiction" if they accepted either of two government benefits: (1) specified U.S. foreign assistance, or (2) maintaining a U.S. office pursuant to an Executive Branch waiver of the statutory prohibitions on Respondents' activities in the United States.

The *Sokolow* plaintiffs sought to revive their case under the ATCA by moving to recall the mandate. The Second Circuit denied their request because Respondents did not accept either of the government benefits specified in the ATCA, and given the interest in judicial finality. Pet. App. 134-35a; *see also Klieman*, 923 F.3d at 1128.

While the *Sokolow* plaintiffs' petition for certiorari in that case was pending, Congress intervened again by enacting the PSJVTA. The PSJVTA requires courts to always "deem" that Respondents "consent" to personal jurisdiction if, after certain dates, they engage in either of two types of conduct: (i) outside the United States, making payments relating to Palestinians imprisoned or killed as a result of committing overseas attacks harming American nationals; or (ii) in the United States, engaging in actions other than UN participation, meetings with government officials, and activities "ancillary" thereto. 18 U.S.C. § 2334(e). The PSJVTA takes the same conduct rejected by the courts of appeals as insufficient to create personal jurisdiction, and

instructs courts to now treat it as "deemed consent" to jurisdiction.

This Court issued a GVR for further consideration in light of the PSJVTA. Pet. App. 13a. The *Fuld* plaintiffs filed a separate case, relying on the PSJVTA as the "sole basis" for jurisdiction. *Id.* [3] The Government intervened in both cases to defend the statute.

### C. The lower courts unanimously hold that applying the PSJVTA would violate due process.

In both *Sokolow* and *Fuld*, the district court held that the PSJVTA's "deemed consent" provisions violated the Fifth Amendment's Due Process Clause. *Id.* at 15a, 60a. The courts reviewed extensive evidence and briefing regarding the factual predicates of the PSJVTA, but declined to decide if the U.S. activities predicate was satisfied. *Id.* at 15a, 67-68a, 74a. Two other district courts also reached the same conclusion, one of which is currently on appeal in the Tenth Circuit. *Shatsky v. PLO*, No. 18-12355, 2022 WL 826409, *5 (S.D.N.Y. Mar. 18, 2022); *Levine v. PLO*, 688 F. Supp. 3d 1001, 1010 (D. Colo. 2023).

The Second Circuit affirmed, holding that the PSJVTA's "deemed consent" scheme "cannot support a fair and reasonable inference of the defendants' voluntary agreement to proceed in a federal forum." Pet. App. 26a. "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." *Id.* at 44a. "This

[3] The *Fuld* plaintiffs waived any argument the attack targeted Americans. Pet. App. 104a n.4.

unprecedented framework for consent-based jurisdiction," the court concluded, "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.'" *Id.*

The Second Circuit also relied on this Court's recent decision in *Mallory v. Norfolk S. Ry. Co.*, 600 U.S. 122 (2023). *Mallory* "underscores" the difference "between the PSJVTA and business registration statutes," because unlike the statute at issue in *Mallory*, 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." Pet. App. 35a. Unlike the corporate defendants in *Mallory*, Respondents did not accept "some in-forum benefit in return for an agreement to be amenable to suit in the United States." *Id.*

The Second Circuit then denied *en banc* review. In a concurrence to that denial, Judge Bianco (a member of the Panel) explained that nothing in the Panel's opinion requires an "exchange of benefits" as the sole basis to infer consent, and that the PSJVTA in any event falls outside the *Mallory* line of "exchange of benefits" cases. *Id.* at 212-15a. Adopting the new "nexus" tests proposed by Petitioners, he explained, "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 voluntary 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." *Id.* at 216a. This "would allow the government to declare conduct to be consent, even if

that conduct could not reasonably be considered to be consent." *Id.*

## REASONS TO DENY THE PETITIONS

### I. The decisions below are faithful to *Bauxites* and *Mallory*.

The Second Circuit scrupulously followed this Court's guidance in *Bauxites* and *Mallory*. Applying that precedent, it held that the PSJVTA's deemed consent provisions fail to create personal jurisdiction because the activities they specify do not "support a fair and reasonable inference of the defendants' voluntary agreement to proceed in a federal forum." *Id.* at 26a. This also followed a unanimous line of decisions holding that Respondents' actions lack sufficient connection to the United States to justify general or specific jurisdiction. *Id.* at 8-9a; *e.g.*, *Shatsky*, 955 F.3d at 1022-23, 1036-37. The court of appeals thus explained that "Congress cannot take conduct otherwise insufficient to support an inference of consent" and "brand it as 'consent.'" Pet. App. 44a. This result flows naturally from established precedent.

#### A. Consent to personal jurisdiction must be based on knowing and voluntary conduct reflecting legal submission to jurisdiction.

"Because the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived." *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982). A party may expressly consent to the court's jurisdiction, or impliedly consent by "signal[ing]" its agreement "through actions rather than words." *Roell v. Withrow*, 538 U.S. 580, 589-91 (2003). *Bauxites* cataloged a "variety of legal arrangements [that] have been taken to represent express or implied consent to

the personal jurisdiction of the court," including submission "by appearance," forum-selection clauses, stipulation, "constructive consent" through "the voluntary use of certain state procedures," and failure to assert a jurisdictional defense. 456 U.S. at 703-04. Each of these "legal arrangements" reflects some "actions of the defendant" that "amount to a legal submission to the jurisdiction of the court." *Id.* at 703-05. *See* Pet. App. 20-21a.

"[W]hether express or implied," however, this Court has "emphasiz[ed]" that a party's consent to jurisdiction must be "knowing and voluntary." *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 685 (2015). An "effective waiver of a constitutional right" generally requires proof of "the 'intentional relinquishment or abandonment of a known right or privilege.'" *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999). Because implied or "constructive" consent "is not a doctrine commonly associated with the surrender of constitutional rights," federal courts "indulge every reasonable presumption against waiver." *Id.* at 681-82.

In some cases, the court below explained, determining whether a defendant knowingly and voluntarily consented to personal jurisdiction is straightforward. Pet. App. 19-20a. A party may expressly agree to litigate in a particular forum. *Id.* Courts may also infer consent to jurisdiction based on actions in the litigation itself that demonstrate submission to jurisdiction. *See, e.g.*, *Roell*, 538 U.S. at 584 (parties who "voluntarily participated in the entire course of proceedings" without objecting to jurisdiction "clearly implied their consent" "by their actions"). These canonical forms of consent are not at issue, however, because Petitioners do not claim that Respondents expressly consented, or took any

litigation action evincing submission to jurisdiction. *See* Pet. App. 25a.

Absent express consent or litigation conduct evincing submission to jurisdiction, determining whether the defendant knowingly and voluntarily consented to personal jurisdiction is more difficult. To establish implied consent, Plaintiffs must demonstrate some "actions of the defendant" that "amount to a legal submission to the jurisdiction of the court." *Bauxites*, 456 U.S. at 704-05. This is "a deeply factbound analysis" that requires the court to determine "whether [defendant's] actions evinced the requisite knowing and voluntary consent." *Wellness Int'l*, 575 U.S. at 685-86. *See* Pet. App. 32a.

In making this determination, this Court distinguishes between inferring a defendant's knowing and voluntary choice to submit to jurisdiction by its own conduct, and "'mere assertions' of power" by the forum to impose jurisdiction on nonconsenting defendants. *Bauxites*, 456 U.S. at 705. *Bauxites* examined whether the defendant's failure to comply with court-ordered jurisdictional discovery could be treated as constructive waiver of its objection to personal jurisdiction. *Bauxites* held that it could, but only because the "preservation of due process was secured by the presumption" that the defendant's specific conduct—its "failure to supply the requested information as to its contacts with [the forum]"—"was but an admission of the want of merit in the asserted defense." *Id.* at 705, 709 (quoting *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 351 (1909)). By refusing to produce the requested materials, the defendant implicitly acknowledged that it did have sufficient contacts with the forum to support personal jurisdiction. *Id.* at 706. The defendant's conduct thus served as a constructive waiver of any objection to jurisdiction. *See id.* ("[T]he sanction is nothing more

than the invocation of a legal presumption, or what is the same thing, the finding of a constructive waiver."); Pet. App. 32a.

To illustrate the "due process limits" that apply to constructive consent, *Bauxites* distinguished *Hovey v. Elliott*, 167 U.S. 409 (1897), "in which the Court held that it did violate due process for a court to take similar action as 'punishment' for failure to obey [a court] order" unrelated to the asserted defense. *Bauxites*, 456 U.S. at 705-06 (emphasis added). The defendant's conduct in that case—failure "to pay into the registry of the court a certain sum of money"—did not support the presumption of a "want of merit" in its asserted defense. *Id.* Subjecting the defendant to the court's jurisdiction, the Court explained, therefore constituted an improper penalty, rather than a valid presumption of constructive waiver drawn from the defendant's own conduct. *See id.* at 706 ("Due process is violated only if the behavior of the defendant will not support the *Hammond Packing* presumption.").

As the court below explained, this Court also distinguished between valid, implied consent to jurisdiction and the improper imposition of jurisdiction in *College Savings Bank*. Pet. App. 39-40a. In that case, plaintiffs argued a state agency waived its immunity and "impliedly" consented to jurisdiction by knowingly and voluntarily engaging in interstate marketing after a federal statute stated that such activity would subject it to jurisdiction. 527 U.S. at 671, 676. Writing for the Court, Justice Scalia rejected this "constructive-waiver" theory based on the difference between a party's waiver of 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. He emphasized that a voluntary decision to waive immunity was different from being "put on notice that

Congress intends to subject" the state to personal jurisdiction. *Id.* The constitutional requirement of consent would mean nothing if Congress had "[the] power to exact constructive waivers" of jurisdictional defenses "through the exercise of Article I powers." *Id.* at 683. Merely providing notice of Congress's intent to subject the defendant to jurisdiction if it "voluntarily" engaged in "federally regulated conduct" was insufficient to establish a constructive waiver. *Id.* at 679-82. *See* Pet. App. 40-41a.

In describing the circumstances in which plaintiffs could demonstrate implied consent to jurisdiction, *College Savings Bank* located valid "consent" in the choice to accept a government benefit or privilege conditioned upon consent. Congress may "condition its grant of [federal] funds to the States" upon their willingness to consent to jurisdiction. 527 U.S. at 686-87. The "acceptance of the funds" by the State would signal its "agreement" to the condition attached. *Id.* Accepting this type of "gift" or "gratuity" conditioned on consent to jurisdiction, however, presents a "fundamentally different" case than the imposition of jurisdiction by legislative fiat. *Id.* In the latter case, "what Congress threatens if the State refuses to agree to its condition is not the denial of a gift or gratuity, but a sanction." *Id.*[4]

This Court has used that same barometer to evaluate other implied consent statutes. Many states, for example, condition the "privilege" of driving on public roads on consent to personal jurisdiction for related lawsuits. Because the state has the antecedent authority "to regulate the use of its

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[4] Although *College Savings Bank* addressed state sovereign immunity, its analysis was based on broader constitutional principles as it relied on the "classic description of an effective waiver of a constitutional right." 527 U.S. at 681-82.

highways" and to "exclude" non-residents from such use, states may also require non-residents to consent to jurisdiction "in advance of the operation of a motor vehicle on its highway." *Hess v. Pawloski*, 274 U.S. 352, 354-57 (1927). By "accept[ing]" the "privilege[]" of driving on public roads, a non-resident defendant implicitly "signifi[es] … his agreement," through his conduct, to consent to personal jurisdiction in the forum. *Id.*

As the court of appeals explained, *Mallory* similarly held that consent may be inferred from a defendant's acceptance of a benefit "with jurisdictional strings attached." 600 U.S. at 145; Pet. App. 32-33a. *Mallory* reaffirmed that *Bauxites* provides the governing standard for implied consent statutes, and requires a court to evaluate whether a defendant's "actions … 'amount to a legal submission to the jurisdiction of [the] court.'" 600 U.S. at 145-46 (plurality op.); *id.* at 147-49 (Jackson, J., concurring); *id.* at 153, 156 (Alito, J., concurring in part); *id.* at 167 (Barrett, J., dissenting) (each citing *Bauxites*). Business registration statutes—under which a corporation "consents" to personal jurisdiction "in exchange 'for access to [a State's] markets'"—are one of the "variety of legal arrangements" that can give rise to valid consent under *Bauxites*. *Id.* at 141 n.8 (emphasis added). *See* Pet. App. 32-35a.

*Mallory*'s discussion of the grounds for inferring valid consent to jurisdiction "underscores" the difference "between the PSJVTA and business registration statutes." Pet. App. 35a. Unlike a business registration statute, 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." *Id.* It also does not offer "some in-forum benefit" for Respondents to

accept "in return for an agreement to be amenable to suit in the United States." *Id*. The PSJVTA thus falls outside the exchange of benefits cases reaffirmed by *Mallory*, which hinge on "accepting an in-[forum] benefit with jurisdictional strings attached." 600 U.S. at 145. The PSJVTA, on the other hand, relies on conduct that courts have repeatedly held cannot constitutionally support personal jurisdiction. Pet. App. 8-9a.

As *College Savings Bank* recognized, if the activity purportedly giving rise to "consent" does not require authorization from the forum, the defendant's choice to engage in the activity does not reflect any implied agreement to submit to jurisdiction because the activity does not depend on any benefit (or "gratuity") conferred by the forum. 527 U.S. at 680-81. In such a case, "there is little reason to assume actual consent based upon the [defendant's] mere presence in a field subject to congressional regulation." *Id*. *See* Pet. App. 109a.

This does not mean, as the court of appeals was careful to explain, that reciprocity or an exchange of benefits is necessary for knowing and voluntary consent. Pet. App. 35a n.13, 212-13a. Consent may also be express, for example, or implied through the failure to comply with procedural rules. *See Bauxites*, 456 U.S. at 703-05. But Petitioners never identified a single case implying consent to jurisdiction based on a defendant's choice to engage in non-litigation-related activities in the absence of some benefit or privilege conferred upon the defendant in exchange for its consent. Pet. App. 43a. As the court below concluded, the PSJVTA's "approach to deemed consent is 'simply unheard of." *Id*.

### B. Respondents did not knowingly and voluntarily submit to jurisdiction.

The court of appeals measured the PSJVTA against those longstanding standards, and unsurprisingly held the statute fails to provide knowing and voluntary consent to personal jurisdiction in this case. Rather than identifying conduct that might actually demonstrate implied consent (such as the acceptance of U.S. foreign aid or another government benefit), Congress "simply declared" that conduct the Second and D.C. Circuits had already held was constitutionally insufficient to support personal jurisdiction "constitute[s] 'consent' to jurisdiction." Pet. App. 38a. "No aspect of these allegedly jurisdiction-triggering activities can reasonably be interpreted as evincing the defendants' 'intention to submit' to the United States courts." *Id*. Those holdings do not warrant this Court's attention.

#### 1. Payments made in Palestine do not reflect submission to jurisdiction in the United States.

The reasoning of the court of appeals is straightforward. The first type of conduct specified by the PSJVTA—payments made in Palestine to families of every person imprisoned or killed in the conflict—has no connection to the United States. *Id.* at 26-27a. The payments at issue occur entirely outside the United States under a uniform Palestinian law, and do not require authorization from the U.S. government or the involvement of any U.S. entity. The payments reflect Respondents' own domestic laws and policies, rather than some implicit agreement to knowingly and voluntarily submit to jurisdiction in the United States. Accordingly, under the framework set forth in *Bauxites*, the payments "do not infer any intention on the part of Defendants to legally submit

to suit in the United States"—as the lower courts correctly recognized. *Id.* at 74a, 27a.

Petitioners conflate federal authority to penalize extraterritorial conduct (so-called "prescriptive" or "legislative" jurisdiction) and federal authority to subject nonresident defendants to personal jurisdiction in U.S. courts (so-called "adjudicative" jurisdiction). Although Congress may legislate that such payments can subject a party to liability (or some other sanction), that prescriptive authority does not answer the separate constitutional question whether Respondents can be forced to adjudicate such claims in U.S. courts. As noted above, courts have already held that the payments fail to establish the constitutionally requisite "connection" between Respondents, Plaintiffs' claims, and the United States to support the exercise of personal jurisdiction.

Petitioners suggest that the payments bear a close "connection" to the ATA claims at issue because they are made by reason of attacks that injured or killed U.S. nationals. *See* Gov't Pet. 17. That assertion overlooks the courts' consistent holdings that the attacks at issue (and thus payments following from such attacks) did not target the United States, and "affected United States citizens only because they were victims of indiscriminate violence that occurred abroad." Pet. App. 168a. Because the attacks were not jurisdictionally connected to the United States, post-attack payments *a fortiori* lack a jurisdictional nexus.

The payments are part of a broader program designed to provide a "social safety net in the face of brutal and oppressive living conditions under Israeli

military occupation."[5] The PA thus provides welfare payments to all families of Palestinians imprisoned or killed for political crimes and security offenses—broad legislation that recognizes that 70% of Palestinian families have at least one relative detained by Israel.[6] Tens of thousands of prisoners and families receive the monthly payments.[7] Given this context, portraying these payments as intended to incentivize terrorism is "wrong and incendiary."[8]

**2. Petitioners failed to argue U.S. activities that could create jurisdiction, and then waived the argument on appeal.**

The court of appeals did not decide whether the PSJVTA's U.S. activities predicate was met, or if facts might someday exist that could justify jurisdiction. Though Respondents created a significant factual record on that predicate before the trial courts, Petitioners made only fleeting references to that record on appeal. Petitioners' claim that the issue was "uncontested" below is seriously wrong and misleading. Pl. Pet. 9-10, 29-30; *see* Gov't Pet. 15 (claiming "[n]or is there any dispute" about the U.S. activities prong).

**a.** Respondents argued below that their sole activity in the United States, Palestine's UN mission, is not,

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[5] Carnegie Endowment for Int'l Peace, *Palestinian Prisoner Payments* (2021), https://carnegieendowment.org/projects/breaking-the-israel-palestine-status-quo-a-rights-based-approach.

[6] *Id.*

[7] *Id.*

[8] Brookings Institution, *Why the discourse about Palestinian payments to prisoners' families is distorted and misleading* (2020), https://www.brookings.edu/blog/order-from-chaos/2020/12/07/why-the-discourse-about-palestinian-payments-to-prisoners-families-is-distorted-and-misleading/.

as a matter of law, an "office or other facility within the jurisdiction of the United States." Pet. App. 133a; *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 51 (2d Cir. 1991); *U.S. v. PLO*, 695 F. Supp. at 1464-71. Respondents also asserted that activities of the Palestinian UN mission "fell within the exceptions for UN-related undertakings and 'ancillary' conduct" under the PSJVTA. Pet. App. 15a n.4, 68a n.7, 220a n.1. "[A]s part of its UN activities," they argued, the mission "participates in the work" of the UN that explicitly includes "the 'political propaganda activities and proselytizing,' press conferences, and Internet and social media posts" claimed by Plaintiffs, which "are all plainly either official UN business or 'ancillary to' such activities." *Id.* at 220a n.1.[9] Respondents provided substantial evidence in support, including depositions of Palestine's UN Ambassadors and others. *Sokolow* D.Ct. Doc. 1066, Ex. 1-3.

Respondents also debunked Plaintiffs' claim of U.S. notarial "certification" services (a claim repeated in their petition, Pl. Pet. 29). In depositions, the state-licensed notaries denied having any authority to act for, or being compensated by, Respondents. *Fuld* D.Ct. Doc. 42 at 22-23 & Doc. 50 at 8-9; *Sokolow* D.Ct. Doc. 1064 at 12-14 (summarizing evidence). In the end, the courts did not decide if the U.S. activities prong was triggered. Pet. App. 15a n.4, 67-68a. But they did hold that even the U.S. activities as alleged were "too thin to support a meaningful inference of consent to jurisdiction." *Id.* at 108a, 74a.

**b.** Before the court of appeals, Petitioners' opening briefs did not meaningfully delve into the facts regarding the U.S. activities. To the contrary,

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[9] Plaintiffs argued Respondents' UN mission would trigger the PSJVTA if its social media posts constituted "propaganda." That position would render the statute unconstitutionally vague.

Plaintiffs expressly requested that the court of appeals not decide the U.S. activities issue. *See Sokolow* C.A. Pl. Reply Doc. 542 at 35 n.3 (asking court of appeals not to decide second factual predicate); *Fuld* C.A. Pl. Reply Doc. 161 at 26 n.7 (same). The Government, for its part, did not dispute that the UN mission was Respondents' only office in the United States. *Fuld* C.A. Gov't Br. Doc. 73 at 7. It also took "no position on whether any of the statute's factual predicates have been satisfied." *Fuld* D.Ct. Doc. 53 at 8 n.5. Respondents, on appeal, affirmed they had no "physical presence" in the U.S. other than their UN mission and did not engage in any "non-UN-related activities in the United States." *Fuld* C.A. Def. Br. Doc. 148 at 23 n.2, 46-47, 48 n.19. Respondents noted their arguments about the UN mission's activities in the trial court. *Id.* at 48 n.20.

Given that Petitioners asked it not to decide the U.S. activities question, the court of appeals unsurprisingly found it "unnecessary to address that question on this appeal." Pet. App. 15a (*Fuld*); *id.* at 68a (*Sokolow*). The court of appeals instead explained that Respondents are "prohibited" from operating in the United States. *Id.* at 28-29a. And that "UN-related conduct and offices … are protected pursuant to international treaty" and, "as set forth in 18 U.S.C. § 2334(e)(3), are exempt from the PSJVTA's second prong." *Id.* Nor could the PSJVTA be read as conferring a benefit, in any case, "because the defendants have not been granted permission to engage in th[e] [prohibited] activities at all." *Id.* The court of appeals made clear that any such permission would have to be granted "formal[ly]" (*id.* at n.9), belying the Government's argument that the "court did not offer a defense of its premise that the government must affirmatively permit the relevant activity through the PSJVTA itself or another statute."

Gov't Pet. 21. For those reasons, 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." Pet. App. 27a.

This Court should not consider whether Respondents triggered the U.S. activities prong as a matter of first impression. *See CRST Van Expedited, Inc. v. EEOC*, 578 U.S. 419, 435 (2016) ("It is not the Court's usual practice to adjudicate either legal or predicate factual questions in the first instance.").

### 3. Unlike the ATCA, the PSJVTA does not rely on benefits conditioned on consent.

The PSJVTA's failure to establish valid, implied consent to jurisdiction is well-illustrated by the contrast with its predecessor statute, the ATCA. The ATCA provided that Respondents "shall be deemed to have consented to personal jurisdiction" if they accepted either of two government benefits: (1) U.S. foreign aid, or (2) the "benefit[]" of a formal "waiver or suspension" of the prohibitions on their activities under the 1987 ATA. 18 U.S.C. § 2334(e)(1) (2018).

Regarding the ATCA, the Government argued that because "the political branches have long imposed conditions on these benefits," it was "reasonable and consistent with the Fifth Amendment" for Congress "to determine that the [PLO's] maintenance of an office in this country after a waiver …, or the [PA's] continued receipt of certain foreign assistance, should be 'deemed' consent to personal jurisdiction." U.S. Brief 12-13, *Klieman v. Palestinian Auth.*, No. 15-7034 (D.C. Cir. Mar. 13, 2019) (emphasis added). The ATCA satisfied due process, in other words, because it grounded "deemed consent" on Respondents' choice to accept or reject benefits conditioned upon consent. Both the Second and D.C. Circuits held that the ATCA

did not create personal jurisdiction because Respondents elected not to accept either benefit. Pet. App. 10-11a; *Klieman*, 923 F.3d at 1128-31.

The PSJVTA, by contrast, does not confer any benefit on Respondents in exchange for their purported "consent." It does not authorize them to engage in activities in the United States prohibited by the 1987 ATA and similar statutes, and does not extend any government benefit (e.g., foreign aid) conditioned upon consent to personal jurisdiction.[10] Nor have Respondents received any benefit because the PSJVTA does not alter preexisting prohibitions on their U.S. activities. The court of appeals expressly left undecided whether the PSJVTA could be constitutional "under different circumstances" (for example, if Respondents began non-UN operations in the United States). Pet. App. 38a; *id.* at 27-29a. But that is a benefit not presently offered by the United States to Respondents.

## II. The petitions fail to raise any circuit split or issue of exceptional importance.

The petitions in this case are exceptional only in that no court has ever agreed with the positions they espouse. The lower courts are unanimous in holding the PSJVTA is unconstitutional in these cases. They are equally unanimous in rejecting Petitioners' arguments that the Fifth Amendment presents fundamentally different protections to individual liberty than the Fourteenth. Nor do these petitions

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[10] Various statutes prohibit Respondents from operating in the U.S., including the 1987 ATA, 22 U.S.C. § 5202 (barring the PLO and, now, its successor-in-part, the PA, from maintaining an office or expending funds in the U.S.), and the 2006 ATA, § 7(a), 22 U.S.C. § 2378b note (making it "unlawful" to operate "at the behest or direction of, or with funds provided by, the Palestinian Authority"). *See* Pet. App. 28a n.9.

present matters hampering U.S. antiterrorism efforts. Nor is the PSJVTA of broad applicability—it only applies to two *sui generis* entities for which the federal courts repeatedly rejected jurisdiction.

### A. The petitions raise no split in authority or disagreement between the circuits.

**1.** Every court to reach the issue agrees the PSJVTA does not create consent to jurisdiction. Plaintiffs in three New York cases used the PSJVTA to claim personal jurisdiction. The trial courts unanimously found that satisfaction of the statute's factual predicates did not demonstrate consent to personal jurisdiction. Pet. App. 94a, 80a, 71a; *Shatsky*, 2022 WL 826409, *4-5. A Colorado district court agreed, finding "that Congress cannot simply legislate that 'any conduct, without regard for its connections to the United States generally … signals a party's intent to submit to the jurisdiction of a United States court.'" *Levine*, 688 F. Supp. 3d at 1010. The Second Circuit agreed. Pet. App. 38a, 69-70a.

In addition to unanimity on the PSJVTA, federal courts agree on the standards for jurisdictional due process under the Fifth Amendment. Every circuit to reach the issue agrees that the minimum contacts and consent standards developed under the Fourteenth Amendment apply under the Fifth Amendment. *See* Pet. App. 49-51a; *Livnat*, 851 F.3d at 54-56; *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. Every court that has considered this point agrees that the standards mirror each other."); *id*. at 238 n.22 (collecting cases from various circuits); *Herederos De Roberto Gomez Cabrera v. Teck Res. Ltd.*, 43 F.4th 1303, 1308 (11th

Cir. 2022) ("the operative language of the Fifth and Fourteenth Amendments is materially identical, and it would be incongruous for the same words to generate markedly different doctrinal analyses"). "To suppose that 'due process of law' meant one thing in the Fifth Amendment and another in the Fourteenth is too frivolous to require elaborate rejection." *Malinski v. New York*, 324 U.S. 401, 415 (1945) (Frankfurter, J., concurring).

Not one case supports Petitioners' views that the due process standards should be abandoned or relaxed under the Fifth Amendment. *See* Pet. App. 45-46a. Courts have long rejected the notion "that federalism's irrelevance in the Fifth Amendment context justifies a 'more lenient' standard for personal jurisdiction." *Id.* at 48a; *Douglass*, 46 F.4th at 239 n.24 (collecting cases from various circuits).

**2.** Petitioners do not defend the PSJVTA on the basis of consent—even though the statutory language depends exclusively on "consent." Instead, Petitioners ask this Court to opine broadly on Congress's power to impose jurisdiction on Respondents.

Petitioners give no more than lip service to the concept of consent, and instead focus on whether Congress can legislatively impose jurisdiction on Respondents if they do not comply with Congress's demands. Gov't Pet. 17-19; Pl. Pet. 23-25. They ask only if it is "fair" or "reasonable" to "assert" personal jurisdiction over Respondents. Gov't Pet. 20-22; Pl. Pet. 20, 24, 26. The amici are similarly adamant in asking this Court to decide that question, rather than addressing consent. Grassley Amicus Br. 17; House Amicus Br. 11; Sofaer Amicus Br. 3. But that is not the question presented by the PSJVTA, which is whether Respondents can be constitutionally deemed to have consented to jurisdiction. This Court should

not accept certiorari to decide if Congress has powers it did not purport to exercise.

The court of appeals correctly considered the statute on its own terms—and through this Court's consent cases—cases that Petitioners largely disregard. Petitioners, instead, rely on minimum contacts cases like *Daimler AG v. Bauman*, 571 U.S. 117, 139 (2014), and *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 (1985). Their reliance on hornbook minimum contacts cases to establish the standard applicable to consent under the PSJVTA highlights the inconsistency at the heart of their petitions.

Petitioners' theories also undermine this Court's due process cases. If Petitioners are correct, Congress could circumvent those cases by enacting statutes declaring that the same activities already held constitutionally insufficient to confer jurisdiction shall be deemed as consent. Under *Daimler*, for example, a California court could not exercise jurisdiction over a foreign car manufacturer and its U.S. subsidiary, which distributed vehicles to California dealerships, but were incorporated and maintained their principal places of business elsewhere. 571 U.S. at 139. Despite achieving "sizable" sales in the state, the Court held that defendants' activities were insufficient for general jurisdiction because they were not "essentially at home" in the forum. *Id.* Under Petitioners' reasoning, Congress could declare that any foreign corporation that distributed vehicles to California dealerships "shall be deemed to have consented to personal jurisdiction" in the state.

### B. The petitions fail to raise an issue of exceptional practical importance.

Not only do the decisions below have no legal importance except to the parties, they also have no broader practical importance. The PSJVTA does not apply to Hamas, Hezbollah, the Islamic State, or any other terrorist groups or state-sponsors of terrorism. As the Government concedes, the decisions apply **only** to two *sui generis* entities over which the courts have repeatedly rejected personal jurisdiction. The facts in these cases also do not raise uniquely American concerns. Respondents are not headquartered here, and the attacks at issue were random attacks, not aimed at Americans.

As the Solicitor General explained earlier in this case, "nothing in the court's opinion calls into question the United States' ability to prosecute defendants under the broader due process principles the courts have recognized in cases involving the application of U.S. criminal laws to conduct affecting U.S. citizens or interests." Resp. App. 24a. The ATA still "permits U.S. courts to exercise jurisdiction over defendants accused of targeting U.S. citizens in an act of international terrorism" or where "the United States was the focal point of the harm caused by the defendant's participation in or support for overseas terrorism." *Id.* The ATA also applies to defendants "conducting activity in the United States, by, for example, making use of U.S. financial institutions to support international terrorism." *Id.* The opinions below do not affect "cases involving the application of U.S. criminal laws to conduct affecting U.S. citizens or interests." *Id.* In sum, ATA jurisdiction is present where attacks are targeted at America or U.S. citizens, or are planned or financed in the United States.

The political branches have a robust arsenal of antiterrorism tools unconstrained by the decisions below, including criminal prosecutions, sanctions, asset freezes, export controls, and the use of force. Congress has recognized that ATA criminal cases more directly advance the government's interests in antiterrorism law enforcement than their civil counterparts. *See* 138 Cong. Rec. S17254-01, S17260, 1992 WL 308152 (daily ed. Oct. 7, 1992); Antiterrorism Act of 1990: Hearing on S. 2465 Before the S. Comm. on the Judiciary, 101st Cong. 46-47 (1990). As such, "adher[ence] to the status quo of personal jurisdiction doctrine" in civil ATA cases "do[es] not diminish any law-enforcement tools that currently exist." *Livnat*, 851 F.3d at 56.

Nor does the result below prevent Plaintiffs from bringing suit in an appropriate forum. Israeli courts allow suits by Americans who are injured in Israel. A court recently awarded damages against Respondents to two Americans injured in a 1985 PLF attack.[11] Israel also allows large damage awards, including a $100 million award against Respondents for injuries during the Second Intifada.[12] Another Israeli court found Respondents liable for welfare payments in

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[11] JNS Wire, *PLO Ordered to Pay Compensation to Achille Lauro Hijacking Victims* (July 26, 2021), https://www.jns.org/wire/plo-ordered-to-pay-compensation-to-achille-lauro-hijacking-victims/; Shurat Hadin, *PLO Ordered to Pay Compensation to 1985 Achille Lauro Hijacking Victims* (July 26, 2021), https://israellawcenter.org/legal_actions/plo-ordered-to-pay-compensation-to-1985-achille-lauro-hijacking-vicitms/.

[12] Jerusalem Post, *Terror victims' families to collect NIS 500 m. from Palestinian Authority* (Apr. 26, 2020), https://www.jpost.com/arab-israeli-conflict/court-orders-collection-of-nis-500-m-from-pa-for-second-intifada-625930; *Norz'its Litbac v. Palestinian Auth*. (Isr.), CivC 2538/00 (Jerusalem).

relation to attacks.[13] Other lawsuits seek to hold Respondents liable for Hamas' horrific attack on October 7, 2023.

## III. This case is a poor vehicle to resolve the constitutionality of the PSJVTA.

Both *Fuld* and *Sokolow* have significant issues preventing this Court from providing the relief Plaintiffs seek. Among other things, Petitioners' hands are tied by estoppel, waiver, and forfeiture. As a result, these cases are poor vehicles, especially since the Court will have future opportunities to address the PSJVTA in cases currently pending in other circuits.

### A. These cases face unique case-specific challenges.

**1.** The *Fuld* plaintiffs are estopped from obtaining relief. They pursued various defendants on inconsistent theories, claiming each was responsible for the same attack. But they recently secured a $191 million judgment on the basis that Iran and Syria aided Hamas, which was "the terror organization that carried out the attack." *Fuld v. Islamic Republic of Iran*, No. 20-2444, 2024 WL 1328790, *1, *4 (D.D.C. Mar. 28, 2024). The court accepted plaintiffs' position, holding the attacker was "recruited to Hamas through his high school," and the attack "was planned and

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[13] Times of Israel, *High Court: PA liable for terrorism due to money it pays attackers; victims can sue* (Apr. 10, 2022), https://www.timesofisrael.com/high-court-pa-liable-for-terrorism-due-to-stipends-to-attackers-victims-can-sue/; *Anon. v. Palestinian Auth.* (Isr.), CivA 2362/19 (Jerusalem 2022); *Mentin v. Palestinian Auth.* (Isr.), CivC 3361/09 (Jerusalem 2017).

carried out by the Al-Qassam Brigades—the Hamas terrorist branch." *Id.* at *4-6.

The plaintiffs also convinced the court that the attack was a stroke against Respondents' legitimacy, intended to mark "the 15th anniversary of the Oslo Accords—an agreement Hamas seeks to eradicate." *Id.* at *5. Respondents are the enemies and "bitter rivals" of Hamas, *id.* at *4, and were recognized or established by the Oslo Accords. The attack, plaintiffs claimed, was "intended to protest against the security cooperation between Israel and Fatah and the Palestinian Authority." *Fuld v. Iran* Doc. 27-3 at 50.

Given that successful position and resulting judgment, it would be illogical and inconsistent for Plaintiffs to also claim that Respondents were actually responsible for the attack. *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) (estoppel prohibits "parties from deliberately changing positions according to the exigencies of the moment").

**2.** *Sokolow* is also a poor vehicle. Filed in 2004, it went through discovery and a jury verdict, but was dismissed for lack of personal jurisdiction in 2016. After it became final, the *Sokolow* plaintiffs asked the court of appeals to recall its mandate. The court, however, held in 2019 that its "interest in finality ... weighs against recalling the mandate." Pet. App. 132-35a. "Recalling the mandate now would offend 'the need to preserve finality in judicial proceedings.'" *Id.* It noted the plaintiffs had another case that would be the appropriate forum for litigating the PSJVTA. *Id.* at 135a n.2. More time has passed, and *Sokolow* has now been final for eight years.

But even if *Sokolow* is resurrected, its jury verdict cannot be. As explained in *Burnham v. Superior Ct. of California*, 495 U.S. 604, 608-09 (1990), the limited nature of the judicial power means that "the judgment

of a court lacking jurisdiction is void." Both "proceedings" and "judgments" made without personal jurisdiction are "not simply erroneous, but absolutely void." *Roman Cath. Archdiocese of San Juan v. Feliciano*, 589 U.S. 57, 64 (2020) (cleaned up). And even if this case were to survive, there are still issues remaining from the original appeal, including improper expert testimony. Pet. App. 141-42a; *see Gilmore v. Palestinian Auth.*, 843 F.3d 958, 972-73 (D.C. Cir. 2016) (affirming judgment for Respondents after excluding one such expert's testimony).

**3.** This Court will have multiple chances to accept certiorari in the future, benefiting from the perspectives of other circuits. The Tenth Circuit case mentioned above is currently set for oral argument on November 19, 2024 (Nos. 23-1286, 23-1335), and another PSJVTA case is pending in D.C. district court (No. 04-1173).

### B. Ever-changing theories of due process and original meaning create waiver problems.

The Petitioners also cannot avoid the results of their prior inconsistent positions. Plaintiffs have forfeited their originalism arguments, and the Government proposes a new and different due process theory before this Court. Plaintiffs' forfeited originalism arguments remain, as might be expected, slapdash, under-developed, and unready for this Court's review.

**1.** Plaintiffs' arguments about due process and original meaning were forfeited. They did not raise arguments about the original understanding at the trial court level in either *Fuld* or *Sokolow*. On appeal, only the *Fuld* plaintiffs raised originalism, and they did so only to argue for a "relaxed" or "nexus" standard under the Fifth Amendment—not the extreme due-process-does-not-include-jurisdiction approach found

for the first time in their petition. *See Fuld* C.A. Pl. Br. Doc. 67 at 49, 61. The Second Circuit, not surprisingly given the forfeiture, did not address originalism.

This Court should decline to review Plaintiffs' new originalism argument as it was doubly forfeited. *See OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 37 (2015) ("[t]hat argument was never presented to any lower court and is therefore forfeited"); *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (dismissing certiorari as improvidently granted when petitioners failed the "burden of showing that the issue was properly presented" below).

The Government has also significantly changed its position on due process. It successfully argued for the established "knowing and voluntary" standard in both trial and appellate courts. *See Fuld* C.A. Gov't Br. Doc. 73 at 21; *Sokolow* C.A. Gov't Br. Doc. 447 at 19. Only after losing under that very same standard did the Government begin to argue for the new fairness-only approach found in its Petition, where consent is just one of the "considerations." Gov't Pet. 16, 21. Below, the Government argued for clear distinctions between consent jurisdiction and imposed jurisdiction. *Fuld* C.A. Gov't Reply Doc. 162 at 5. Here, for the first time, the Government proposes to replace longstanding due process standards for consent jurisdiction with the "flexible" but entirely different standards for procedural due process. Gov't Pet. 14, 20.

**2.** The need for further development of Plaintiffs' originalism arguments is reflected in the many errors in their petition. Plaintiffs cite the Constitution's express grant of extraterritorial jurisdiction in admiralty and maritime cases as evidence of "extraterritorial power" being a "deliberate feature of the constitutional plan." Pl. Pet. 16-17. It is precisely

the opposite; the Constitution expressly confers extraterritorial jurisdiction in limited cases to the exclusion of others. *See* The Federalist No. 80 (federal jurisdiction extends to cases that "originate on the high seas, and are of admiralty or maritime jurisdiction"); Constit., Art. I, Sec. 8, cl. 10; Art. III, Sec. 2, cl. 1. Had the Framers understood federal jurisdiction to be unconstrained by national borders as Plaintiffs contend, these explicit provisions of jurisdiction would be superfluous.

Accordingly, early scholars believed federal courts' jurisdiction was circumscribed by "a sovereign's power [which] was limited to activities occurring within its territory." Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 Harv. L. Rev. 1217, 1224-25 (1992); Joseph Story, *Commentaries on the Conflict of Laws* § 539 (1834) ("[J]urisdiction, to be rightfully exercised, must be founded either upon the person being within the territory, or the thing being within the territory; for, otherwise, there can be no sovereignty exerted."). Indeed, "leading writers on international law who informed the Framers' views ... regarded universal jurisdiction as aberrational or problematic." Eugene Kontorovich, *The 'Define And Punish' Clause And The Limits Of Universal Jurisdiction*, 103 Nw. U.L. Rev. 149, 174 (2009).

Contrary to Plaintiffs' claims, this Court has continually acknowledged limits on jurisdiction over foreign persons. As early as 1808, Chief Justice Marshall recognized that "the legislation of every country is territorial; that beyond its own territory, it can only affect its own subjects or citizens." *Rose v. Himely*, 8 U.S. 241, 279 (1808); *Cohens v. Virginia*, 19 U.S. 264, 295 (1821) ("legislative power has no operation, beyond the territorial limits under its authority"); *see also Picquet v. Swan*, 19 F. Cas. 609,

611-12 (C.C.D. Mass. 1828) ("[N]o sovereignty can extend its process beyond its territorial limits, to subject either persons or property to its judicial decisions.").

"The jurisdiction of courts is a branch of that which is possessed by the nation as an independent sovereign power" and that sovereignty is "incapable of conferring extra-territorial power." *The Schooner Exch. v. McFaddon*, 11 U.S. 116, 136-37 (1812); *The Apollon*, 22 U.S. 362, 370 (1824) ("The laws of no nation can justly extend beyond its own territories, … however general and comprehensive the phrases used in our municipal laws may be, they must always be restricted in construction, to places and persons, upon whom the Legislature have authority and jurisdiction.").

Guided by an academic, Plaintiffs erroneously claim Justice Story held that "the federal courts" would be "bound to follow" any statute imposing jurisdiction on anyone "from the other end of the globe." Pl. Pet. 15, 19 (quoting *Picquet*). But "[e]ven under the act of Congress, judgments must appear to be rendered by courts having jurisdiction of the parties, as well as the cause." *Aspden v. Nixon*, 45 U.S. 467, 484 (1846). *Picquet* is not to the contrary, as it addressed Congress's power to allow a court to attach and execute on property within its territorial jurisdiction. 19 F. Cas. at 615. *Picquet*, in fact, repeatedly warns that jurisdiction could not extend outside national boundaries. *Id.* at 611 ("Even the court of king's bench in England, though a court of general jurisdiction, never imagined, that it could serve process in Scotland, Ireland, or the colonies, to compel an appearance, or justify a judgment against persons residing therein at the time of the commencement of the suit.").

Plaintiffs' loose approach to the Constitution and history underscores the need for further consideration of these issues in the lower courts.

### C. Petitioners fail to address separation of powers.

Though these cases were resolved on due process grounds, Respondents raised separation of powers at every stage. Petitioners fail to address this significant constitutional roadblock.

Congress overstepped its constitutional authority with the PSJVTA by attempting to "usurp a court's power to interpret and apply the law to the circumstances before it." *Bank Markazi v. Peterson*, 578 U.S. 212, 224-28 (2016) (cleaned up); *United States v. Klein*, 80 U.S. 128, 147 (1871) (overturning statute requiring courts to treat pardons of Confederate sympathizers as conclusive evidence of disloyalty). The PSJVTA usurps the judicial function by directing courts to always find consent if its factual predicates are met—regardless of whether constitutional standards for consent are satisfied. Determining the waiver of constitutional rights is a quintessentially judicial question, requiring "application of constitutional principles to the facts as found." *Brewer v. Williams*, 430 U.S. 387, 403 (1977). That is particularly so when consent to jurisdiction requires a "deeply factbound analysis." *Wellness Int'l*, 575 U.S. at 685-86.

The PSJVTA also violates the principle that Congress cannot "legislatively supersede" decisions "interpreting and applying the Constitution." *Dickerson v. United States*, 530 U.S. 428, 437 (2000). The Second and D.C. Circuits previously held that finding personal jurisdiction based on the same course

of conduct alleged here violates due process. Permitting Congress to supersede those holdings by re-labeling that conduct as "consent" would violate separation of powers. *See City of Boerne v. Flores*, 521 U.S. 507, 523-24 (1997) (rejecting Congressional effort to overturn precedent by creating a different constitutional standard). As one judge explained, Congress cannot take "conduct that the Second and D.C. Circuits had held was insufficient to support personal jurisdiction … and declare[] that such conduct 'shall be deemed' to be consent" to jurisdiction. Pet. App. 108a.

## CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted,

October 18, 2024

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# APPENDIX

**APPENDIX TO BRIEF IN OPPOSITION**

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**No. 16-1071**

# In the Supreme Court of the United States

MARK SOKOLOW, ET AL., PETITIONERS

*v.*

PALESTINE LIBERATION ORGANIZATION, ET AL.

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

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**

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**QUESTION PRESENTED**

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

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

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**

## INTEREST OF THE UNITED STATES

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

## STATEMENT

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

international terrorism. 18 U.S.C. 2333(a). Respondents moved to dismiss the claims for lack of personal jurisdiction. See Pet. App. 5a.

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

Respondents moved for reconsideration after this Court "significantly narrowed the general personal jurisdiction test in [*Daimler AG* v. *Bauman*, 134 S. Ct. 746 (2014)]." Pet. App. 14a. The district court denied the motion. *Id.* at 75a-81a. The court stated that respondents were effectively "at home in the United States" because their activities here were "continuous and systematic." *Id.* at 77a. And the court stated that it did not have "any basis to believe" that respondents

were engaged in more continuous or systematic activities in any other country. *Id.* at 77a. Respondents raised their jurisdictional arguments again in seeking summary judgment. *Ibid.* The court denied that motion, rejecting respondents' argument that their contacts with the United States were insufficient to support general jurisdiction under *Daimler*. *Id.* at 82a-87a.

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

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

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

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

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

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

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

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

West Bank and in Gaza. *Id.* at 27a. In contrast, respondents' activities in the United States were more limited and resembled "those rejected as insufficient by the Supreme Court in *Daimler*." *Id.* at 28a.

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

**DISCUSSION**

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

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

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

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

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

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

(2014) (German public stock company); *Goodyear Dunlop Tires Operations, S. A.* v. *Brown*, 564 U.S. 915, 918-920 (2011) (foreign subsidiaries of a U.S. tire manufacturer). Because this Court's existing jurisprudence has set only States of the Union outside of the category of "persons," this Court's decisions do not establish that foreign entities like respondents are barred from invoking due process protections.

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

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

Court had consistently "rejected the notion that 'alien' entities"—such as foreign corporations—"are disqualified from due-process protection." *Id.* at 50.

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

Contrary to petitioners' suggestion (Pet. 24), there is also no conflict between the decision below and *City of East St. Louis* v. *Circuit Court for Twentieth Judicial Circuit*, 986 F.2d 1142, 1144 (7th Cir. 1993), which indicated that municipalities lack due process rights. As *Livnat* observed, *City of East St. Louis* rested on the "principle that municipalities are creatures of a State and therefore lack any constitutional rights against the State." 851 F.3d at 53 (citing *City of East St. Louis*, 986 F.2d at 1144, and discussing cases cited therein, including *City of Newark* v. *New Jersey*, 262 U.S. 192, 196

(1923)). That rationale does not extend to foreign entities like respondents. The court of appeals' treatment of respondents as subject to due process protections therefore does not implicate any conflict.[2]

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

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

or 'that a particular regime is the effective government of a state,'" *Id.* at 2084 (quoting 1 Restatement (Third) of Foreign Relations Law of the United States § 203 cmt. a (1987))—not merely a determination that the United States will "accord [a government] certain benefits," Pet. 26. An approach under which courts would assess the extent to which foreign entities operate as "the effective government of a state" or "possess[] the qualifications for statehood," *Zivotofsky*, 135 S. Ct. at 2084 (citation omitted), risks judicial determinations at odds with Presidential determinations underlying recognition.

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

2. Certiorari is also not warranted to consider petitioners' novel argument that federal courts may exercise personal jurisdiction under the Fifth Amendment whenever "a defendant's conduct interfered with U.S. sovereign interests as set out in a federal statute, and the defendant was validly served with process in the United States pursuant to a nationwide-service-of-process provision." Pet. Reply Br. 11 (emphasis omitted).

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

*Jones*, 465 U.S. 783, 789-790 (1984); see *Walden* v. *Fiore*, 134 S. Ct. 1115, 1123 (2014). But a court may not exercise specific jurisdiction merely because a defendant could foresee that his conduct would have some effect in the forum. *Calder*, 465 U.S. at 789-790.

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

b. The Second Circuit's approach to jurisdiction under the Fifth Amendment also does not conflict with any decision of another court of appeals. Statutes such as the ATA present questions concerning Fifth Amendment jurisdictional limitations because they contain nationwide service-of-process and venue provisions that

permit a federal court to exercise jurisdiction over defendants who would not be subject to suit in the courts of the State in which the federal court is located. See Fed. R. Civ. P. 4(k)(1)(A) and (C) (authorizing service of process on a defendant who is not "subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located" if service is "authorized by a federal statute"); 18 U.S.C. 2334(a) (providing that an ATA defendant "may be served in any district where the defendant resides, is found, or has an agent").

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

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

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

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

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

[4] The cases noted by an amicus curiae (House Amicus Br. 18 n.5) are not to the contrary. In three of the decisions, a federal statute provided for nationwide service of process, and the court held that due process did not require the existence of minimum contacts with any single State under ordinary *International Shoe* analysis. *Klein* v. *Cornelius*, 786 F.3d 1310, 1318-1319 (10th Cir. 2015) (rejecting Texas defendant's challenge to jurisdiction of federal court in Utah in receivership proceedings); *Trustees of the Plumbers & Pipefitters Nat'l Pension Fund* v. *Plumbing Servs., Inc.*, 791 F.3d 436, 443-444 (4th Cir. 2015) (rejecting Alabama corporations' challenge to jurisdiction over an ERISA claim in federal court in Virginia, where the ERISA plan was administered); *Haile* v. *Henderson Nat'l Bank*,

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

d. Review of petitioners' theory is not currently warranted on the ground that application of Fourteenth Amendment-derived jurisdictional principles "leaves the [ATA] a practical nullity" and "would bar most suits under the Act based on overseas attacks." Pet. 17. It is far from clear that the court of appeals' approach will foreclose many claims that would otherwise go forward in federal courts. As the court of appeals explained, its approach permits U.S. courts to exercise jurisdiction over defendants accused of targeting U.S. citizens in an

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657 F.2d 816, 820, 823-824 (6th Cir. 1981) (rejecting Alabama defendants' challenge to jurisdiction of federal court in Tennessee in receivership proceeding), cert. denied, 455 U.S. 949 (1982). The remaining decision similarly stated that aggregation of nationwide contacts under the Fifth Amendment might be permissible when a statute authorizes nationwide service of process, but it found no personal jurisdiction over a foreign defendant because there was no applicable statute of that kind. *Max Daetwyler Corp.* v. *R. Meyer*, 762 F.2d 290, 294 (3d Cir.), cert. denied, 474 U.S. 980 (1985). None of the decisions adopted a standard similar to petitioners' "sovereign interests" theory.

act of international terrorism. Pet. App. 45a; see *Morris* v. *Khadr*, 415 F. Supp. 2d 1323, 1335-1336 (D. Utah 2006). It permits U.S. courts to exercise jurisdiction if the United States was the focal point of the harm caused by the defendant's participation in or support for overseas terrorism. See Pet. App. 40a (discussing *Mwani* v. *Bin Laden*, 417 F.3d 1 (D.C. Cir. 2005) (attack on U.S. embassy)); *id.* at 41a-43a (discussing *In re Terrorist Attacks on Sept. 11, 2001*, 714 F.3d 659 (2d Cir. 2013) (overseas provision of material support expressly aimed at the United States when terrorist organization was known to be targeting the United States), cert. denied, 134 S. Ct. 2870 (2014)). And the court of appeals stated that it would permit U.S. courts to exercise jurisdiction over defendants alleged to have purposefully availed themselves of the privilege of conducting activity in the United States, by, for example, making use of U.S. financial institutions to support international terrorism. See *id.* at 46a-47a (discussing *Licci* v. *Lebanese Canadian Bank, SAL*, 732 F.3d 161 (2d Cir. 2013)). In addition, nothing in the court's opinion calls into question the United States' ability to prosecute defendants under the broader due process principles the courts have recognized in cases involving the application of U.S. criminal laws to conduct affecting U.S. citizens or interests. See *id.* at 44a; accord *Livnat*, 851 F.3d at 56. Under these circumstances, in the absence of any conflict or even a developed body of law addressing petitioners' relatively novel theory, this Court's intervention is not warranted.

3. Finally, certiorari is not warranted to address the court of appeals' factbound application of established specific-jurisdiction principles. See Pet. 30-34. As a

threshold matter, the court of appeals correctly identified those principles. The court analyzed whether "the defendant's suit-related conduct * * * create[d] a substantial connection with the forum State." Pet. App. 32a (quoting *Walden*, 134 S. Ct. at 1121); see *id.* at 33a (framing the inquiry as "whether the defendants' suit-related conduct—their role in the six terror attacks at issue—creates a substantial connection with the forum State pursuant to the ATA"). Petitioners misread the decision below as holding that petitioners could establish specific jurisdiction only if respondents "'specifically targeted' U.S. citizens or territory." Pet. Reply Br. 11 (quoting Pet. App. 45a). The court of appeals stated that respondents had not "specifically targeted United States citizens," Pet. App. 45a, in distinguishing two cases invoked by petitioners, in which the defendants were accused of providing material support or financing to terrorist organizations whose "specific aim" was to "target[] the United States," or to "kill Americans and destroy U.S. property," *id.* at 42a, 45a (citations omitted); see *id.* at 42a-45a (discussing *In re Terrorist Attacks on Sept. 11, 2001*, 714 F.3d 659 (2d Cir. 2013); *United States* v. *al Kassar*, 660 F.3d 108 (2d Cir. 2011), cert. denied, 566 U.S. 986 (2012)). But the court of appeals recognized that specific jurisdiction may exist when "the brunt" or "the focal point" of the harm from an intentional tort is felt in the forum State. *Id.* at 43a (quoting *Calder,* 465 U.S. at 789). The court found petitioners' claims did not meet that standard because Israel, not the United States, was "the focal point of the torts alleged in this litigation." *Ibid.*

Petitioners' remaining disagreements with the decision below amount to disagreements about what petitioners' evidence established. Petitioners argue (Pet.

31-32) that the court erred in applying principles of specific jurisdiction because, in petitioners' view, respondents expressly aimed their conduct at the United States. But the court of appeals found that the record did not establish that proposition. Rather, the court concluded, petitioners' "own evidence establishe[d] the random and fortuitous nature of the terror attacks." Pet. App. 38a. And it observed that it is "insufficient to rely on a defendant's 'random, fortuitous, or attenuated contacts'" "with the forum to establish specific jurisdiction." *Id.* at 37a (quoting *Walden*, 134 S. Ct. at 1123).

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

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 2018