Nos. 24-20 & 24-151

In the Supreme Court of the United States

MIRIAM FULD, ET AL., PETITIONERS,

v.

PALESTINE LIBERATION ORGANIZATION, ET AL.

UNITED STATES, PETITIONER,

v.

PALESTINE LIBERATION ORGANIZATION, ET AL.

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

BRIEF FOR PETITIONERS MIRIAM FULD, ET AL.

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QUESTION PRESENTED

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

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

The PLO and PA engaged in both categories of conduct after the 2020 trigger dates. But in the decisions below, the Second Circuit facially invalidated the PSJVTA. The court held that the Fifth Amendment forbids Congress from specifying conduct that triggers a defendant's consent to federal jurisdiction unless the statute provides the defendant with "reciprocal bargains" in return, and that the PLO and PA had not received any such reciprocal bargain.

The question presented is:

Whether the PSJVTA violates the Fifth Amendment.

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OPINIONS BELOW

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

[1] In the Second Circuit, *Sokolow* was captioned as *Waldman* v. *Palestine Liberation Organization*.

JURISDICTION

The court of appeals entered judgment on September 8, 2023, Pet. App. 1a-52a, and denied timely rehearing petitions on May 10, 2024, *id.* at 204a-268a. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant constitutional and statutory provisions are reproduced in the Appendix.

STATEMENT

The Anti-Terrorism Act of 1992, 18 U.S.C. § 2331 *et seq.* (ATA), provides a private right of action for U.S. nationals and their families harmed by international terrorism. 18 U.S.C. § 2333(a). For 25 years, the ATA worked as intended, enabling victims to hold terrorists and their sponsors accountable in civil actions in U.S. courts. But in 2016, the Second Circuit held that the Due Process Clause of the Fifth Amendment forbids the exercise of personal jurisdiction in civil cases if the defendant's liability-creating conduct occurs "outside the United States." Pet. App. 154a-157a, 168a-169a.

In response to that decision and others in its wake, Congress twice amended the ATA, providing that certain conduct by the Palestine Liberation Organization (PLO) and its affiliate, the Palestinian Authority (PA), would be deemed consent to personal jurisdiction in ATA cases. The most-recent enactment, the Promoting Security and Justice for Victims of Terrorism Act (PSJVTA), Pub. L. No. 116-94, div. J, tit. IX, § 903, 133 Stat. 3082-3085, provides that the PLO and PA are deemed to consent to personal jurisdiction in ATA cases if they (a) pay terrorists who were killed in or imprisoned for terror attacks against Americans, and they make such payments "by reason of" the terrorists' death or imprisonment arising from such attacks; or (b) conduct "any activity while physically present in the United States," with certain exceptions. 18 U.S.C. § 2334(e)(1).

Congress passed the law so that ATA suits could be "resolved in a manner that provides just compensation to the victims." PSJVTA § 903(b)(4)(A), 133 Stat. 3083, note following 18 U.S.C. § 2333. Congress also included a rule of construction requiring that the statute "be liberally construed to carry out the purposes of Congress to provide relief for victims of terrorism." *Id.* § 903(d)(1)(A).

The question here is whether this statute, enacted to "provide relief for victims of terrorism," *ibid.*, violates the Due Process Clause of the Fifth Amendment. When measured against the original public meaning of "due process of law" in 1791, this is an easy case. At the Founding, the Fifth Amendment was not understood to prohibit the adjudication of cases arising from conduct outside the United States. Restrictions on personal jurisdiction arose not from anything in the Constitution, but rather from the law of nations, which Congress was free to override. See *Picquet* v. *Swan*, 19 F. Cas. 609, 613 (C.C.D. Mass. 1828) (No. 11,134) (Story, J.); *Ex parte Graham*, 10 F. Cas. 911, 912 (No. 5,657) (C.C.E.D. Pa. 1818) (Washington, J.).

This is also an easy case under the Court's Fifth Amendment precedents. The Court has repeatedly taught that federal courts *can* adjudicate federal cases arising from extraterritorial conduct when Congress so provides, and that the Fourteenth Amendment's "interstate federalism" restrictions do not affect the sovereign prerogatives of the national government. The PSJVTA amply satisfies the basic due process requirements of fair warning and non-arbitrariness established in this Court's precedents: It advances the Federal Government's legitimate foreign policy and national security interests by deterring and disrupting terrorism, protecting and compensating Americans, and incentivizing the PLO and PA to end their official program of financially rewarding terrorism.

The Second Circuit nevertheless facially invalidated the PSJVTA, based on several errors.

First, the court began by asserting the "due process analysis in the personal jurisdiction context is basically the same under both the Fifth and Fourteenth Amendments." Pet. App. 7a (quotation marks omitted). That is incorrect. The Fourteenth Amendment, "acting as an instrument of *interstate federalism*, may sometimes act to divest the State of its power to render a valid judgment."

World-Wide Volkswagen Corp. v. *Woodson*, 444 U.S. 286, 294 (1980) (emphasis added). The Fifth Amendment, by contrast, is not and never has been an instrument of *international* federalism—for there is no such thing.

Second, the court of appeals invented a novel test for judging consent-to-jurisdiction statutes, requiring such statutes to be based on "reciprocal bargains" between the forum's sovereign and the defendant. Pet. App. 24a. Yet this Court recently upheld a state consent-to-jurisdiction law in *Mallory* v. *Norfolk Southern Railway Co.*, 600 U.S. 122 (2023), without suggesting that due process requires any reciprocal bargain. Instead, the Court emphasized that "a legion of precedents … attach jurisdictional consequences to what some might dismiss as mere formalities," and it rejected the defendant's request to look behind those formalities to determine whether it had "*really* submitted" to jurisdiction. *Id.* at 144-145 (plurality opinion).

Third, the court of appeals misapplied its own test by holding that that the PLO and PA received no meaningful "benefit" from engaging in conduct while present in the United States because their conduct was *unlawful*. As Judge Menashi explained in dissenting from denial of rehearing, that conclusion was "perverse": A visitor who unlawfully "extract[s] a benefit" from the United States should not be rewarded by *heightened* due process protection that is unavailable to law-abiding guests. Pet. App. 231a-232a.

In enacting the PSJVTA, Congress gave the PLO and the PA a choice: Either refrain from paying terrorists for murdering and maiming Americans, and cease all but a handful of U.S. activities, or else submit to the jurisdiction of U.S. courts in ATA actions. They may not have relished that choice, but they made it freely and with full knowledge of the consequences. Striking down the statute will significantly curtail the political branches' ability to combat terrorism and will restrict the power of Congress

in other contexts—a step that would be a sharp departure from this Court's traditional deference to the decisions of the political branches in matters of jurisdiction over foreign governments, foreign affairs, and national security.

A. Legal Background

1. The Anti-Terrorism Act provides a private right of action to U.S. nationals and their families to recover for death and injuries sustained by reason of acts of international terrorism. 18 U.S.C. § 2333(a). The law was inspired by a civil suit brought against the PLO for the 1985 murder of Leon Klinghoffer, a wheelchair-bound American cruise-ship passenger who was shot in the face and thrown into the open sea by PLO hijackers.

Klinghoffer's family was able to hold the PLO accountable for the murder only because federal admiralty jurisdiction happened to be available. H.R. Rep. No. 102-1040, at 5 (1992). In advancing the ATA, the Senate Judiciary Committee explained that it would "open[] the courthouse door to victims of international terrorism," by "extend[ing] the same jurisdictional structure that undergirds the reach of American criminal law to the civil remedies that it defines." S. Rep. No. 102-342, at 45 (1992). President Bush signed the law to "ensure that…a remedy will be available for Americans injured abroad by senseless acts of terrorism." *Statement by President George Bush Upon Signing S. 1569*, 28 Weekly Comp. Pres. Docs. 2112 (Oct. 29, 1992).

The ATA provides for nationwide service of process and exclusive federal jurisdiction. 18 U.S.C. §§ 2334(a), 2338. The Attorney General may intervene in such actions, *id.* § 2336(c), and may obtain a civil forfeiture of "[a]ll assets, foreign or domestic, of any individual, entity, or organization engaged in planning or perpetrating any Federal crime of terrorism against the United States,

citizens or residents of the United States, or their property," *id.* § 981(a)(1)(G)(i) (cleaned up).

For nearly 25 years, federal courts exercised general personal jurisdiction over the PLO and the PA in civil ATA cases based on the organizations' systematic and continuous presence in the United States. Pet. App. 193a n.10 (collecting cases). In 2016, however, the court of appeals in this case held that U.S. courts could no longer do so because this Court had "narrowed the test for general jurisdiction" in *Daimler AG* v. *Bauman*, 571 U.S. 117 (2014). Pet. App. 140-141a. It also held that specific jurisdiction over the PLO and PA was absent because the "conduct that could have subjected them to liability under the ATA" occurred "outside the United States." *Id.* at 166a.

2. Congress responded to that decision by enacting the Anti-Terrorism Clarification Act of 2018 (ATCA), which invoked another traditional basis for the exercise of personal jurisdiction: consent. Under the ATCA, any defendant "benefiting from a waiver or suspension" of 22 U.S.C. § 5202—which forbids the PLO and its affiliates from maintaining an office or spending money in the United States—"shall be deemed to have consented to personal jurisdiction" in civil ATA cases if the defendant maintains "any office … within the jurisdiction of the United States" after January 31, 2019, "regardless of the date of the occurrence of the act of international terrorism." Pub. L. No. 115-253, § 4, 132 Stat. 3184, codified as amended, 18 U.S.C. § 2334(e)(1)(B). The House Judiciary Committee explained: "It is eminently reasonable to condition" the PLO and PA's "continued presence in the United States on [their] consent to jurisdiction…, as Congress has repeatedly tied their continued receipt of these privileges to their adherence to their commitment to renounce terrorism." H.R. Rep. No. 115-858, at 7 (2018).

The court of appeals in this case then held that the ATCA's factual predicates had not been met. Pet. App.

10a-11a. In response, Congress again amended the ATA by enacting the PSJVTA. Pub. L. No. 116-94, div. J, tit. IX, § 903, 133 Stat. 308, codified at 18 U.S.C. § 2334(e). The PSJVTA has two operative prongs:

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

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

B. Factual and Procedural Background

1. These cases arose out of a series of terror attacks in Israel that killed and injured dozens of U.S. nationals. Alan Bauer and his seven-year-old son were walking down a crowded street when a suicide bomber directed by a lieutenant in the PA intelligence service blew himself up, sending shrapnel through the boy's brain. The damage was permanent. A bomb tore through Scott Goldberg's

body on a city bus while he was on his way to work; he left a widow and seven children. The suicide bomber was a PA police officer—recruited and directed by a team of other PA officers. The PA gave him a hero's funeral. Four plaintiffs were killed by a massive bomb detonated in a university cafeteria at lunchtime. Their parents learned about the attack while at home in the United States—some by recognizing the bodies or personal effects of their children on the television news. See *Sokolow* C.A. App. 4072-4076, 4084-4086, 4948-4994, 5288, 5543-5574, 6450, 6454, 6487-6489, 6697, 6700, 6852, 7014-7015.

A terrorist stabbed Ari Fuld, an American citizen and father of four, just hours after Mahmoud Abbas, the Chairman of the PLO and President of the PA, falsely claimed that the Israeli Government was planning to establish Jewish prayer zones inside the al-Aqsa Mosque, one of Islam's holiest sites. J.A. 420.

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

In *Sokolow*, after a seven-week trial with testimony from 50 witnesses, the jury found that the PLO and PA, acting through their employees, perpetrated the six attacks at issue and that the PLO and PA knowingly provided material support to organizations designated by the State Department as foreign terrorist organizations. Pet. App. 141a. The jury awarded plaintiffs $218.5 million in damages, which was automatically trebled under the ATA to $655.5 million. *Ibid.*

On appeal, the Second Circuit vacated the judgment for lack of personal jurisdiction. *Ibid.* The court rejected plaintiffs' argument that governmental entities like the PLO and PA were not "persons" under the Due Process Clause, holding that the PLO and PA enjoy due process rights precisely because "neither the PLO nor the PA is recognized by the United States as a sovereign state." *Id.* at 153a. It also held that the test for personal jurisdiction

is "the same under both the Fifth and Fourteenth Amendments." *Id.* at 156a. Applying Fourteenth Amendment standards, the court of appeals held that U.S. courts could not exercise general jurisdiction because the PLO and PA were "at home" in "Palestine," *id.* at 160a, and could not exercise specific jurisdiction because the conduct giving rise to liability "occurred *entirely* outside the territorial jurisdiction of the United States," *id.* at 167a. This Court denied review. 138 S. Ct. 1438 (2018).

Bipartisan sponsors introduced the ATCA in Congress a few weeks later. 164 Cong. Rec. S2926 (May 24, 2018). They explained that "recent Federal court decisions" had "severely undermined the ability of American victims to bring terrorists to justice." 164 Cong. Rec. S5103-01 (July 19, 2018) (Sen. Grassley); see 164 Cong. Rec. H6617-18 (July 23, 2018) (Rep. Nadler). The House Judiciary Committee explained that the bill's "purpose" was "to better ensure that victims of international terrorism can obtain justice in United States courts." H.R. Rep. No. 115-858, at 2 (2018). President Trump signed the bill into law. Pub. L. No. 115-253, § 4, 132 Stat. 3183, 3184.

The *Sokolow* plaintiffs then moved to recall the Second Circuit's mandate in light of the ATCA. The court denied the motion, finding that the ATCA's factual predicates had not been satisfied. Pet. App. 133a. The *Sokolow* plaintiffs again sought this Court's review. While their petition was pending, Congress enacted the PSJVTA. This Court granted the petition, vacated the judgment below, and remanded in light of the new statute. 140 S. Ct. 2714 (2020). The Second Circuit in turn remanded to the district court.

3. On remand in *Sokolow*, and on a Rule 12(b)(2) motion in *Fuld*, the PLO and PA challenged the PSJVTA on the ground that it facially violated the Fifth Amendment's Due Process Clause. The United States intervened in both cases.

a. In *Sokolow*, the district court determined that the PLO and PA engaged in conduct meeting the pay-for-slay prong, 18 U.S.C. § 2334(e)(1)(A), finding that they "made payments after April 18, 2020 to the families of individuals killed while committing acts of terrorism, that the payments were made because the individuals engaged in terrorism, and that the terrorism harmed U.S. nationals." Pet. App. 85a. Ample evidence supported the findings: Consistent with their long history of supporting and glorifying terrorism, the PLO and PA have an official policy of rewarding terrorists (or their next of kin) for attacking Jews. J.A. 156-157. These payments "are not social welfare or charity to the needy." *Ibid.* They are provided to "rich and poor alike," without regard to financial condition. *Ibid.* They are unavailable to those who commit "ordinary" crimes. *Id.* at 159. The PLO and PA made payments for at least 175 Palestinian individuals killed while or imprisoned for committing terror attacks that killed or injured Americans. J.A. 69-135; *Sokolow* D. Ct. Doc. 1015-1. The payees included perpetrators of the attacks at issue in *Sokolow*. See *Sokolow* D. Ct. Doc. 1015, at 11.

The *Sokolow* plaintiffs asked the district court to make factual findings that the PLO and PA engaged in conduct meeting the U.S.-activities prong, by engaging in "activit[ies] while physically present in the United States" that did not fall within any statutory exemption, 18 U.S.C. § 2334(e)(1)(B)(iii). Plaintiffs offered evidence that, after the PSJVTA's trigger date, PLO and PA officials disseminated public-relations material in the United States urging supporters to lobby the U.S. Government and public in support of their political agenda; gave speeches at U.S. universities and local venues; and authorized PA-deputized notaries in the United States to certify documents for use in territories administered by the PA. See J.A. 149-152, 275, 282-285, 616-913. The district court observed that the PLO and PA "do not dispute they have engaged

in these types of activities," but declined to determine whether they fell within any statutory exemption. Pet. App. 73a-75a.

The *Fuld* district court assumed without deciding that both prongs had been satisfied. *Id.* at 101a-102a & n.3.

b. Both district courts held the law facially unconstitutional under the Due Process Clause of the Fifth Amendment. *Id.* at 74a-77a, 87a-92a, 108a-125a. In their view, this Court's decision in *Daimler* had rendered "obsolete" consent-to-jurisdiction cases decided under pre-*International Shoe* precedents. *Id.* at 76a, 112a n.6.

4. The Second Circuit heard the cases in tandem and affirmed. *Id.* at 1a-70a.

a. Like the district courts, the court of appeals accepted that the PLO and PA had engaged in consent-manifesting conduct by paying terrorists who had murdered Americans, and it assumed that they had conducted non-exempt activities within the United States. *Id.* at 38a, 68a n.7. The Second Circuit also did not dispute that the PSJVTA meets "minimum due process requirements," by providing fair warning to the defendants and by reasonably advancing legitimate governmental interests. *Id.* at 29a-30a.

The Second Circuit nevertheless held the PSJVTA unconstitutional on its face. In the court's view, under the Fifth Amendment's Due Process Clause, a defendant's consent to jurisdiction must be based on a "reciprocal bargain" with the government or else must derive from "litigation-related conduct." *Id.* at 24a-26a. The court also held that the PLO and PA's permission to be present in the United States and to engage in activities here does *not* count as a constitutionally cognizable "benefit" because their consent-manifesting conduct was "prohibited" by law. *Id.* at 28a.

b. Plaintiffs and the United States sought rehearing en banc. The Second Circuit denied the petitions. *Id.* at 208a. Judge Menashi dissented, joined in full or part by Chief Judge Livingston and Judges Sullivan and Park. *Id.* at 229a-267a. In Judge Menashi's view, "[t]he panel's decision lacks a basis in the Constitution and cannot be reconciled with Supreme Court precedent on personal jurisdiction." *Id.* at 230a.

SUMMARY OF ARGUMENT

I. The PSJVTA satisfies Fifth Amendment standards.

A. As the Fifth Amendment was understood when ratified, the guarantee of "due process of law" did not prohibit the adjudication of conduct arising outside U.S. territory. Cases arising outside the United States were common in the Revolutionary Era, and Article III was framed by lawyers and judges who had been deeply involved in many such cases. The Constitution expressly permits the adjudication of extraterritorial cases, and the Framers explained that congruence between the reach of the legislative and judicial powers was intentional. The First Congress authorized extraterritorial jurisdiction in the Judiciary Act of 1789 and the Crimes Act of 1790.

When the Due Process Clause was ratified, no one understood it to disturb prior practice. Although scholars have adopted different views about its original meaning, no evidence suggests that anyone in 1791 thought the Clause would limit adjudication of extraterritorial conduct.

B. The PSJVTA also satisfies Fifth Amendment due process standards under this Court's precedents. In the years following ratification, the Court repeatedly confirmed that the judicial power of the United States extends to cases involving conduct occurring outside the Nation's borders. Jurisdictional limits *did* exist, but they

were supplied by the law of nations, which Congress could override by a clear command.

Over time, this Court came to impose territorial limits on *the States* under the Due Process Clause of the Fourteenth Amendment. But even as it did so, the Court continued to approve adjudication of *federal* cases arising extraterritorially. Because the PSJVTA reflects express congressional authorization to adjudicate disputes under U.S. law based on extraterritorial conduct, and because it is not arbitrary or fundamentally unfair, it does not run afoul of this Court's precedents applying the Fifth Amendment.

C. The Second Circuit held that personal jurisdiction in civil cases under the Fifth Amendment is governed by rules developed under the Fourteenth Amendment. But those rules serve interstate federalism, preventing a State from infringing other States' sovereignty by adjudicating disputes with little connection to the forum. Such concerns do not apply to the Federal Government.

The Second Circuit also erred by imposing a stricter standard for civil cases than for criminal ones. Federal cases—whether civil or criminal—should be governed by a single Fifth Amendment standard. It makes no sense to allow federal courts to impose criminal penalties (imprisonment or death) but not civil penalties (money damages) for the same extraterritorial conduct.

II. Even if Fourteenth Amendment standards applied, the PSJVTA would satisfy them.

A. In *Mallory* v. *Norfolk Southern Railway Co.*, 600 U.S. 122 (2023), this Court upheld Pennsylvania's consent-to-jurisdiction statute against a Fourteenth Amendment challenge. The Second Circuit attempted to distinguish *Mallory* on the theory that the defendant there received a "reciprocal bargain" from Pennsylvania, but the decision did not rest on that ground. Rather, the Court

explained that accepting an in-state benefit with jurisdictional strings attached was merely one means of constructively consenting to personal jurisdiction; another is by engaging in conduct specified by law as constituting submission to jurisdiction, as happened here. This case follows *a fortiori* from *Mallory*, because the Federal Government has a vital interest in the adjudication of anti-terrorism cases involving American victims. In contrast, as the Pennsylvania Supreme Court observed, the statute in *Mallory* advanced no legitimate state interest.

B. The PLO and PA's consent was knowing and voluntary, because they had fair warning of the conduct that would subject them to jurisdiction, which they engaged in volitionally. The PSJVTA also meets the traditional due process standard of reasonableness within the context of our federal system.

C. Even if the Second Circuit's "reciprocal bargains" test were valid, it would be satisfied here. The PLO and PA *have* received a "benefit" from the United States by exercising "the privilege of residing and conducting business in the United States—not to mention furthering their political goals at the expense of American lives." Pet. App. 231a (Menashi, J., dissenting). Their U.S. activities include notarizing documents for official use in their home territories, posting on U.S.-based social media platforms to raise public awareness and bring attention to their cause, and meeting with local groups to encourage them to lobby Congress to support that cause.

The Second Circuit denied the relevance of those U.S. activities on the ground that they were all unlawful. That assertion is legally incorrect: The PLO and PA are not legally barred from conducting any activities in the United States. The court's reasoning is also illogical: Someone who conducts illegal activities in the forum obviously extracts a benefit from the forum. A contrary rule would

perversely give law-breakers due process protections unavailable to law-abiding persons.

ARGUMENT

I. THE PSJVTA SATISFIES FIFTH AMENDMENT STANDARDS

At the Founding, the federal Judiciary's power to adjudicate disputes was understood to be coextensive with Congress's power to legislate—which included matters arising abroad. Indeed, the Fifth Amendment's Due Process Clause was not seen as a constraint on congressional power over personal jurisdiction *at all*: "If Congress wanted to exercise exorbitant [personal] jurisdiction … a federal court 'would certainly be bound to follow it, and proceed upon the law.'" Stephen E. Sachs, *The Unlimited Jurisdiction of the Federal Courts*, 106 Va. L. Rev. 1703, 1706 (2020) (quoting *Picquet*, 19 F. Cas. at 615) (Sachs).

The decision below, by subjecting Congress to the same jurisdictional limitations that apply to the States, improperly "takes the Fourteenth Amendment as given, and remakes the Fifth Amendment in its image." *Id.* at 1705. Such "reverse incorporation" of Fourteenth Amendment standards into the Fifth Amendment is contrary to this Court's precedents. Although the Court has long restricted *the States'* jurisdiction over disputes arising outside their boundaries, it has consistently permitted extraterritorial cases to go forward in the federal courts, explaining that such cases lie within Congress's power to authorize. Accepting the Second Circuit's reasoning would result in an upside-down regime in which unrecognized foreign governments enjoy due process protection unavailable to States of the Union, and defendants in *civil* cases enjoy greater due process protections than defendants in *criminal* cases arising out of the exact same conduct.

A. The Fifth Amendment's Original Public Meaning Imposed No Limit On Personal Jurisdiction

The Constitution expressly authorizes adjudication of cases arising from extraterritorial conduct. This power was an intentional feature of the constitutional plan, reflecting common practice during the Revolutionary Era, including in cases tried and adjudicated by the Framers themselves. Ratification of the Due Process Clause did not alter that feature. To the contrary, the most authoritative interpreters of the Bill of Rights—the First Congress and this Court—continued the pre-constitutional practice of permitting adjudication of claims against foreign defendants arising from conduct abroad.

1. Before The Fifth Amendment, Extraterritorial Cases Were Permitted

The Constitution's text expressly vests Congress and the Judiciary with extraterritorial powers. Most obviously, Congress may "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations" and "make Rules concerning Captures on Land and Water." U.S. Const. Art. I, § 8, Cls. 10, 11. And what Congress can legislate, the Judiciary can adjudicate: "The judicial Power shall extend to *all Cases*, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made … under their Authority." *Id.* Art. III, § 2, Cl. 1 (emphasis added). The Constitution empowers the Judiciary to adjudicate cases arising extraterritorially in other respects, too, including "all Cases of admiralty and maritime Jurisdiction," *ibid.*, and "all Crimes … not committed within any State," *id.* § 2, Cl. 3.

Judicial power commensurate with extraterritorial legislative power was a deliberate feature of the constitutional plan. At the Philadelphia Convention, leading delegates explained that judicial power should be coextensive

with legislative power. For example, James Madison explained that "[a]n effective Judiciary establishment commensurate to the legislative authority, was essential." 1 *Records of the Federal Convention* 124 (Max Farrand ed., 1911) (Farrand). James Wilson agreed: "the Judicial should be commensurate to the legislative and Executive Authority." *Id.* at 237 n.18. In The Federalist, Hamilton observed that "[i]f there are such things as political axioms, the propriety of the judicial power of a government being co-extensive with its legislative, may be ranked among the number." The Federalist No. 80, at 588 (Hamilton ed. 1864). Madison, Wilson, and other Founders also expressed this view at the ratifying conventions. In Pennsylvania, for instance, Wilson explained that without such parity, the Federal Government would be "give[n] power to make laws, and no power to carry them into effect." 2 *Debates on the Federal Constitution* 469 (Jonathan Elliot, 2d ed. 1836) (Elliott); see 3 Elliot at 532 (Madison); *id.* at 517 (Pendelton in Virginia); 4 Elliot at 156-158 (Davie in North Carolina).

Permitting adjudication of cases arising from extraterritorial conduct had a strong antecedent in practice. Courts in the newly independent United States adjudicated thousands of "prize" and "capture" cases. See Henry J. Bourguignon, *The First Federal Court: The Federal Appellate Prize Court of the American Revolution 1775-1787*, at 75-77 (1977) (Bourguignon). Such cases generally arose from extraterritorial events. *E.g.*, *Darby* v. *Brig Erstern*, 2 U.S. (2 Dall.) 34, 35 (Fed. Ct. App. 1782); *Miller* v. *The Resolution*, 2 U.S. (2 Dall.) 19, 20-21 (Fed. Ct. App. 1781). Leading delegates arrived at the Philadelphia Convention with extensive experience as lawyers and judges in those very cases. See Deirdre Mask & Paul MacMahon, *The Revolutionary War Prize Cases and the Origins of Diversity Jurisdiction*, 63 Buff. L. Rev. 477 (2015); Bourguignon at 328-329; see also Letter

from E. Randolph to J. Madison (Apr. 19, 1782), bit.ly/40i7aUC; Letter from J. Madison to E. Randolph (May 1, 1782), bit.ly/3DWIY2F.

After ratification, the First Congress exercised its authority to prescribe extraterritorial jurisdiction. The Judiciary Act of 1789 granted the federal courts jurisdiction over "civil causes of admiralty and maritime jurisdiction" arising "upon the high seas," and over crimes committed "upon the high seas." Ch. 20, § 9, 1 Stat. 76-77. The Crimes Act of 1790 similarly authorized prosecution of crimes committed "upon the high seas." Ch. 9, §§ 8-13, 1 Stat. 113-115. This Court has "often looked to laws enacted by [the First] Congress as evidence of the original understanding of the meaning of [the Bill of Rights]." *Collins* v. *Virginia*, 584 U.S. 586, 613 n.3 (2018) (Alito, J., dissenting) (collecting cases).

Leading Framers confirmed that extraterritorial jurisdiction was intended. During deliberations on the Judiciary Act, Madison—who earlier that summer had drafted and introduced the Bill of Rights—reiterated his view that the judicial power "ought to be commensurate with the other branches of the Government." 1 *Annals of Cong.* 843 (Aug. 29, 1789). And the following year, Edmund Randolph prepared a report in which he concluded that the federal courts had the exclusive power "to decide all causes arising wholly on the sea, and not within the precincts of any county." Edmund Randolph, *Report from the Attorney General on the Judiciary System of the United States* (Dec. 31, 1790), reprinted in 1 *American State Papers, Miscellaneous* 22 (1834).[2]

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[2] Before serving as the first Attorney General, Randolph was a member of the Committee on Detail at the Philadelphia Convention, and the "first draft" of the Constitution is in his handwriting. See William Ewald, *The Committee of Detail*, 28 Const. Commentary 197, 220 (2012).

2. The Fifth Amendment Did Not Change The Jurisdictional Baseline

The Fifth Amendment's text and history provide no indication that it was understood to change the pre-ratification baseline. Indeed, scholarship confirms that no one in 1791 understood the Due Process Clause to restrict the judicial power of the United States *at all*, much less to limit federal jurisdiction to the adjudication of cases arising within the Nation's borders. Rather, three principal schools of thought have emerged about the meaning of the words "due process of law"—and none of them involves personal jurisdiction.

One view of the phrase's original public meaning was that a deprivation of rights had to be *judicial*, that is, "preceded by certain procedural protections characteristic of judicial process." Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 Yale L.J. 1672, 1679 (2012) (Chapman & McConnell); see *United States* v. *Vaello Madero*, 596 U.S. 159, 168 (2022) (Thomas, J., concurring); *United States* v. *Arthrex, Inc.*, 594 U.S. 1, 36 (2021) (Gorsuch, J., concurring). This view draws support from early state practice, most prominently New York's 1787 statutory bill of rights and an oft-cited speech by Alexander Hamilton, both of which reference "due process of law." See Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 Yale L.J. 408, 441-443 (2010) (Williams); see also *id.* at 437-445; Chapman & McConnell at 1703-1717. Consistent with this view, this Court in *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18. How.) 272 (1856), held that Congress may not deprive a person of property except under "settled usages and modes of proceeding," which give the defendant the benefit of a judge ("*judex*"), as well as "regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings." *Id.* at 277, 280.

An alternative originalist view emphasizes a narrower sense of the word "process," as "writs or precepts duly issued (usually by a court) or arising by operation of law." Max Crema & Lawrence B. Solum, *The Original Meaning of "Due Process of Law" in the Fifth Amendment*, 108 Va. L. Rev. 447, 462 (2022). Proponents of this view note that, in Founding-era legal documents, the narrower sense of the word "process" was much more commonly used than the broader (though still procedural) "course of proceedings" sense, which was more often expressed as "due course of law." *Id.* at 488-508. They also suggest that the records of the ratifying convention of New York—the only State to include the phrase "due process" in its proposed amendments—show an evolution of the proposal from "Law of the Land" to "Due Course of Law" and then to "Due Process of Law." *Id.* at 508 & n.257 (citation omitted).

This Court's traditional view of the Due Process Clause has been that it embodies a "substantive" aspect "intended to secure the individual from the arbitrary exercise of the powers of government." *Albright* v. *Oliver*, 510 U.S. 266, 272 (1994) (plurality opinion) (quotation marks omitted). This Court has scrutinized federal statutes under that standard to ensure that they are "supported by a legitimate legislative purpose furthered by rational means." *United States* v. *Carlton*, 512 U.S. 26, 30-31 (1994); see *Chapman* v. *United States*, 500 U.S. 453, 465 (1991). Under this view, "[t]he party asserting a Fifth Amendment due process violation must overcome a presumption of constitutionality and establish that the legislature has acted in an arbitrary and irrational way." *Nat'l R.R. Passenger Corp.* v. *Atchison Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 472 (1985) (quotation marks omitted). Scholars debate whether this view took root in American law before or after ratification of the Fifth Amendment. Compare Crema & Solum at 513-518; Williams at 428-454;

Chapman & McConnell at 1676 n.5; with Chapman & McConnell at 1676-1677 n.6.

3. The PSJVTA Does Not Deprive The PLO And PA Of Any Due Process Right Recognized At The Founding

Measuring the PSJVTA's constitutionality against the original public meaning of the Fifth Amendment, this is an easy case regardless of which view one accepts. Nothing in the statute interferes with the PLO and PA's ability to defend themselves before a court of law applying "settled usages and modes of proceeding." *Denezpi* v. *United States*, 596 U.S. 591, 617 (2022) (Gorsuch, J., dissenting) (quoting *Murray's Lessee*, 59 U.S. (18 How.) at 277). The statute does not deprive them of the benefit of an independent judge, or of "regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings." *Murray's Lessee*, 59 U.S. (18 How.) at 280. And in both *Fuld* and *Sokolow*, the PLO and PA were served with a writ (*i.e.*, a summons) in the United States, as authorized by 18 U.S.C. § 2334(a). See *Sokolow* D. Ct. Doc. 2; *Fuld* D. Ct. Doc. 8, 9.

This Court's substantive due process precedents require no more. Nothing about the PSJVTA is "arbitrary and irrational." *Nat'l R.R. Passenger*, 470 U.S. at 472 (quotation marks omitted). It reasonably advances vital interests of the United States. It disrupts and deters support for terrorism, which is "an urgent objective of the highest order." *Holder* v. *Humanitarian L. Project*, 561 U.S. 1, 28 (2010). It advances the protection of U.S. citizens abroad. See *Gamble* v. *United States*, 587 U.S. 678, 687 (2019) ("special protection [abroad] for U.S. nationals serves key national interests"). It promotes the Federal Government's interest in ensuring "fair compensation for American victims of terrorism from those responsible for their losses." J.A. 68. And it furthers U.S. foreign policy objectives, because the PLO and PA's pay-for-slay

policies "threaten prospects for peace, pushing the chance for a Palestinian state further and further out of reach." 163 Cong. Rec. H9650 (daily ed. Dec. 5, 2017) (Rep. Engel).

B. This Court Has Never Blocked Congress From Authorizing Personal Jurisdiction Over Conduct Arising Abroad

In the years immediately following ratification of the Fifth Amendment, this Court confirmed that the judicial power of the United States extends to cases involving conduct occurring outside the Nation's borders. Later, even as this Court imposed territorial limits on the States under the Due Process Clause of the Fourteenth Amendment, it repeatedly rejected the imposition of such limitations on the Federal Government.

1. Before The Lochner *Era, This Court Never Struck Down Any Jurisdictional Statute On Due Process Grounds*

"For the first 150 years of the Republic, today's conventional view of personal jurisdiction wasn't so conventional…. Jurisdictional limits have always been with us, but Fifth Amendment limits are a recent innovation." Sachs at 1706, 1708.

Originally, extraterritorial jurisdiction was governed by the law of nations, which included rules for determining the circumstances under which "one state's judgments [should] be received or rejected in another's courts." *Id.* at 1718. In some cases, the law of nations permitted extraterritorial jurisdiction. In *Penhallow* v. *Doane's Administrators*, 3 U.S. (3 Dall.) 54 (1795), this Court enforced resolutions adopted by the Continental Congress providing for trials and appeals in cases of the capture of enemy ships on the high seas. *Id.* at 80-81 (opinion of Patterson, J.). The power to provide for adjudication in such cases, the Court explained, was an incident of the Nation's

inherent "external sovereignty." *Id.* at 91 (opinion of Iredell, J.). And in *Talbot* v. *Janson*, 3 U.S. (3 Dall.) 133 (1795), the Court unanimously affirmed the exercise of jurisdiction over a civil claim for damages arising out of an incident on the high seas. As Justice Iredell explained, "trespasses committed against the general law of nations, are enquirable, and may be proceeded against, in any nation where no special exemption can be maintained, either by the general law of nations, or by some treaty which forbids or restrains it." *Id.* at 159-160.[3] Thus, the availability of extraterritorial jurisdiction *ordinarily* followed background legal principles established under the law of nations.

However, Congress could override the law of nations by a clear command. See *Murray* v. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). Thus Justice Washington explained that federal courts had no "general" authority "to issue process into another district, *except in cases where such authority has been specially bestowed, by some law of the United States.*" *Ex parte Graham*, 10 F. Cas. at 912 (emphasis added). If it was "the will of congress to vest in the courts of the United States an extra-territorial jurisdiction in prize causes, over persons and things found in a district other than that from which the process issued," then the courts would be bound to follow Congress's instruction. *Id.* at 913; see *ibid.* ("the exercise of jurisdiction over persons not inhabitants of, or found within the district where the suit is brought" presents "difficulties, which, in the opinion of the court, nothing but an act of congress can remove").

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[3] Of the seven members of the Court who participated in one or both of these cases, four (Rutledge, Wilson, Blair, and Patterson) served as delegates at the Philadelphia Convention. 1 Farrand 1-2. The other three served in their respective States' ratifying conventions. 2 Elliott 178 (Cushing); *id.* at 206 (Jay); 4 Elliott 1 (Iredell).

Under federal legislation, exercising jurisdiction in cases arising outside of U.S. territory became established practice. "The prosecution and punishment of extraterritorial crimes, including crimes committed by aliens, was one of the federal government's top priorities" in the decades following ratification, and "the federal government principally used two enforcement mechanisms—punishment after criminal trial, and civil forfeiture after a condemnation by a federal court sitting in admiralty." Nathan S. Chapman, *Due Process Abroad*, 112 Nw. U. L. Rev. 377, 409 (2017) (Chapman). "Americans appeared to believe that both enforcement mechanisms were consistent with due process of law." *Id.* at 410. Treatises of the era similarly confirm that the federal courts could properly exercise jurisdiction over extraterritorial conduct. See, *e.g.,* 1 James Kent, *Commentaries on American Law* 186 (6th ed. 1826) ("It is of no importance, for the purpose of giving jurisdiction, *on whom* or *where* a piratical offence has been committed.").

Perhaps the clearest articulation of Congress's power to create jurisdiction over foreign conduct—even in the face of general principles of the law of nations to the contrary—is *Picquet* v. *Swan*. There, Justice Story explained that Congress could enact a law providing that "a subject of England, or France, or Russia, having a controversy with one of our own citizens, may be summoned from the other end of the globe to obey our process, and submit to the judgment of our courts." 19 F. Cas. at 613. And though such a law might be "repugnant to the general rights and sovereignty of other nations," yet "[i]f congress had prescribed such a rule, the court would certainly be bound to follow it, and proceed upon the law." *Id.* at 613, 615.

This Court endorsed *Picquet*'s reasoning in *Toland* v. *Sprague*, 37 U.S. (12 Pet.) 300 (1838), explaining that "positive legislation" would be necessary to authorize federal courts to hear cases involving "persons in a foreign

jurisdiction." *Id.* at 330. And in *The Marianna Flora*, 24 U.S. (11 Wheat.) 1 (1826) (Story, J.), the Court held that even though, as a general matter, "foreign ships are not to be governed by our municipal regulations," still Congress could direct that a ship captured on the high seas be brought to the United States for adjudication "in our Courts." *Id.* at 18. "[W]hatever may be the responsibility incurred by the nation to foreign powers, in executing such laws," the Court explained, "there can be no doubt that Courts of justice are bound to obey and administer them." *Ibid.*; see *ibid.* ("[T]he act of Congress is decisive on this subject.").[4]

Congress also had the power to override the law of nations with respect to *a State's* recognition of "foreign" (*i.e.*, out-of-state) judgments. In *D'Arcy* v. *Ketchum*, 52 U.S. (11 How.) 165 (1851), this Court noted Congress's authority to "alter[] the rule" regarding when the judgments of one State's courts must be recognized by those of another. *Id.* at 174-175. There, a 1790 law required the States to afford "faith and credit" to the judicial proceedings of other States. *Ibid.*; see Act of May 26, 1790, ch. 11, 1 Stat. 122, codified as amended, 28 U.S.C. § 1738 (2012). The question was whether that law required recognition of a judgment even "when the defendant had not been served with process or voluntarily made defence," despite the fact that such a proceeding would violate "the international law as it existed among the States in 1790." *D'Arcy*, 52 U.S. (11 How.) at 176. The Court ultimately concluded

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[4] See also *United States* v. *Palmer*, 16 U.S. (3 Wheat.) 610, 631 (1818) ("The constitution having conferred on congress the power of defining and punishing piracy, there can be no doubt of the right of the legislature to enact laws punishing pirates, although they may be foreigners, and may have committed no particular offence against the United States."); *United States* v. *Smith*, 18 U.S. (5 Wheat.) 153, 158-160 (1820) (broadly construing the constitutional grant to Congress).

that "Congress did not intend to overthrow the old rule by the enactment," but the Court did not question—indeed, it presumed—that Congress had authority "to declare a new rule." *Ibid.*

In sum, the exercise of extraterritorial jurisdiction was understood to be proper if it comported with the law of nations or if Congress so provided. No case went the other way: "[N]ot until the Civil War did a single court, state or federal, hold a personal-jurisdiction statute invalid on due process grounds." Sachs at 1712; accord Chapman at 442.

2. After This Court Began Restricting State Power Under The Fourteenth Amendment, It Rejected Analogous Restrictions Under The Fifth

Territorial restrictions on the exercise of personal jurisdiction emerged during the *Lochner* era, when this Court began invoking due process to restrict *state* authority to adjudicate cases involving conduct occurring in other States. See, *e.g.*, *Baker* v. *Baker, Eccles & Co.,* 242 U.S. 394, 403 (1917); *Riverside & Dan River Cotton Mills* v. *Menefee*, 237 U.S. 189, 194-195 (1915); see generally Stephen E. Sachs, Pennoyer *Was Right*, 95 Tex. L. Rev. 1249, 1252 (2017); Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From* Pennoyer *to* Burnham *and Back Again*, 24 U.C. Davis L. Rev. 19, 43-51 (1990). These decisions were grounded in concerns about the division of power among the States, and in particular the impermissibility of "attempt[ing] to extend the authority and control of a state beyond its own territory." *Baker*, 242 U.S. at 403.

During the same era, however, this Court repeatedly reaffirmed that the Fifth Amendment affords "no ground for constructing an imaginary constitutional barrier around the exterior confines of *the United States* for the purposes of shutting [the federal] government off from

the exertion of powers which inherently belong to it by virtue of its sovereignty." *United States* v. *Bennett*, 232 U.S. 299, 306 (1914) (emphasis added); see *Burnet* v. *Brooks*, 288 U.S. 378, 403-405 (1933) (same); *Cook* v. *Tait*, 265 U.S. 47, 55-56 (1924) (same). "[T]he limitations of the Constitution are barriers bordering the states and preventing them from transcending the limits of their authority, and thus destroying the rights of other states," the Court explained, but such interstate-federalism concerns have no application to the national sovereign. *Bennett*, 232 U.S. at 306.[5]

Following its pathmarking decision in *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), this Court has continued to restrict state-court personal jurisdiction as "a consequence of territorial limitations on the power of the respective States." *Hanson* v. *Denckla*, 357 U.S. 235, 251 (1958). Yet the Court has been careful to make clear it was *not* holding that "the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court." *Bristol-Myers Squibb Co.* v. *Superior Ct. of Cal.*, 582 U.S. 255, 269 (2017). Moreover, the Court has consistently expressed an *expansive* view about the territorial competence of the national government: "If Congress has provided an unmistakable instruction that the provision is extraterritorial, then claims alleging exclusively foreign conduct may proceed," *Abitron Austria GmbH* v. *Hetronic Int'l, Inc.*, 600 U.S. 412, 418

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[5] In admiralty cases, which raise no interstate-federalism concerns, the Court continued to apply the longstanding rule that "the bare circumstance of where the cause of action arose [has not] been treated as determinative of the power of the court to exercise discretion whether to take jurisdiction." *Canada Malting Co.* v. *Patterson S.S.*, 285 U.S. 413, 422 (1932); *Charter Shipping Co.* v. *Bowring, Jones & Tidy*, 281 U.S. 515, 517 (1930); *Panama R.R. Co.* v. *Napier Shipping Co.*, 166 U.S. 280, 285 (1897); *The Belgenland*, 114 U.S. 355, 358-359 (1885).

(2023), a principle that remains true "regardless of whether the particular statute regulates conduct, affords relief, or merely confers jurisdiction," *RJR Nabisco, Inc.* v. *Eur. Cmty.*, 579 U.S. 325, 326 (2016).

In sum, this Court has consistently permitted extraterritorial jurisdiction where Congress so provides and has consistently declined to extend Fourteenth Amendment limits to the Federal Government. The PSJVTA fits comfortably within its precedents.

C. The Second Circuit's Reasoning Was Unsound

The Second Circuit held that "the 'due process analysis' in the personal jurisdiction context 'is basically the same under both the Fifth and Fourteenth Amendments,'" Pet. App. 7a (quoting Pet. App. 156a), and that "the [Fifth Amendment] due process test for asserting jurisdiction over extraterritorial *criminal* conduct…differs from the test applicable in this *civil* case," *id.* at 175a (emphasis added; citation omitted). The court accordingly refused to apply to the PSJVTA "the broader [*i.e.*, less-restrictive] Fifth Amendment standard used for personal jurisdiction in criminal cases." *Id.* at 49a.

That reasoning was doubly unsound. Federal cases are not governed by the Fourteenth Amendment standard, which protects interstate federalism. Instead, federal cases—not only criminal cases but also civil cases—are governed by a single Fifth Amendment standard.

1. The Second Circuit's Conflation Of Fifth And Fourteenth Amendment Standards Disregards Interstate Federalism

Principles of interstate federalism limit a State's assertion of personal jurisdiction "to ensure that States with 'little legitimate interest' in a suit do not encroach on States more affected by the controversy." *Ford Motor Co.* v. *Mont. Eighth Jud. Dist. Ct.*, 592 U.S. 351, 360 (2021) (quoting *Bristol-Myers Squibb*, 582 U.S. at 263). Thus, in

World-Wide Volkswagen, the Court explained that such restrictions "ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system" and held that "the Due Process Clause, acting as an instrument of interstate federalism, may … divest the State of its power to render a valid judgment." 444 U.S. at 292, 294. The Court has emphasized that allowing a State to assert jurisdiction "in an inappropriate case … would upset the federal balance, which posits that each State has a sovereignty that is not subject to unlawful intrusion by other States." *J. McIntyre Mach., Ltd.* v. *Nicastro*, 564 U.S. 873, 884 (2011) (plurality opinion). And the Court has reiterated that "[t]he sovereignty of each State implies a limitation on the sovereignty of all its sister States," and insofar as personal jurisdiction is concerned, "this federalism interest may be decisive." *Bristol-Myers*, 582 U.S. at 263 (cleaned up).

This case is different. It concerns federal claims regarding attacks on American nationals that must be adjudicated in federal court under federal law. Congress created these claims to further federal interests in national security and foreign affairs. The Constitution allocates power over such matters exclusively to the national government. See *Arizona* v. *United States*, 567 U.S. 387, 395 (2012). "Power over external affairs is not shared by the States," but instead "is vested in the national government exclusively." *United States* v. *Pink*, 315 U.S. 203, 233 (1942); see Wendy Perdue, *Aliens, the Internet, and "Purposeful Availment,": A Reassessment of Fifth Amendment Limits On Personal Jurisdiction*, 98 Nw. U. L. Rev. 455, 461 (2004) ("States are situated within the United States quite differently than is the United States within the international community.").

Whereas federalism limitations on the individual States inhere in the "constitutional plan," a "foreign State

lies outside the structure of the Union." *Principality of Monaco* v. *Mississippi*, 292 U.S. 313, 330 (1934). The Constitution limits each State's extraterritorial regulatory powers because they necessarily conflict with the regulatory interests of other States. See *Healy* v. *Beer Inst., Inc.*, 491 U.S. 324, 336 (1989). In contrast, "Congress has the authority to enforce its laws beyond the territorial boundaries of the United States." *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991); see *Gamble*, 587 U.S. at 687 ("[M]urder of a U.S. national is an offense to the United States as much as it is to the country where the murder occurred.").

The foreign-relations context here highlights the imprudence of imposing interstate-federalism limitations on Congress. Congress's judgments in the foreign-relations context merit "special respect" because they involve "a balance that it is the prerogative of the political branches to make." *Jesner* v. *Arab Bank PLC*, 584 U.S. 241, 273 (2018). "Congress has the undisputed power to decide, as a matter of federal law, whether and under what circumstances foreign nations should be amenable to suit in the United States," *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 493 (1983), and the Court should be reluctant to strip Congress of that power when it comes to non-sovereign governments. The PLO and PA are foreign political entities that aspire to international statehood; as such, their amenability to suit in federal court should lie solely in the hands of the political branches, not the Judiciary. As the Office of Legal Counsel put it, "[b]ecause the PLO purports to be an independent sovereign entity, we have little difficulty concluding that it falls into [the] category" of entities that "exist outside the constitutional compact and have no rights or responsibilities under it." *Constitutionality of Closing the Palestine Information Office, an Affiliate of the Palestine Liberation Organization*, 11 Op. O.L.C. 104, 105 (1987).

The Second Circuit got this backwards, holding that the PLO and PA have due process rights *because* they are not "recognized by the United States as a sovereign state." Pet. App. 94a, 153a. According to the court, allowing the political branches to subject the PLO and PA to suit would infringe their "fundamental rights." *Id.* at 30a n.11. Judge Menashi explained why this was wrong:

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

Id. at 238a (citation omitted).

2. The Second Circuit Incorrectly Applied A Stricter Standard To Civil Cases Than To Criminal Cases

The Second Circuit acknowledged that the PSJVTA satisfies "basic principles of due process." Pet. App. 30a. It also acknowledged that, in the context of criminal prosecutions against foreign defendants, the Fifth Amendment permits the exercise of jurisdiction over a defendant who harms American nationals or interests abroad. See *United States* v. *Epskamp*, 832 F.3d 154, 168 (2d Cir. 2016).[6] The court nevertheless held that, in the context of a *civil* dispute, Congress must do more than merely satisfy these "minimum due process requirements."

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[6] Every Circuit to have considered the issue agrees. See *United States* v. *Murillo*, 826 F.3d 152, 156-157 (4th Cir. 2016); *United States* v. *Rafoi*, 60 F.4th 982, 995 (5th Cir. 2023); *United States* v. *Iossifov*, 45 F.4th 899, 914 (6th Cir. 2022); *United States* v. *Perlaza*, 439 F.3d 1149, 1162 (9th Cir. 2006).

Pet. App. 30a. The Second Circuit's position is thus that the United States may imprison or impose the death penalty on a foreign person for extraterritorial conduct, but it crosses a red line for the United States to allow a *civil* claim for money damages against the same person for the same conduct.

That makes no sense. As Judge Elrod put it in a case concerning the same issue: "It is nonsense on stilts to hold that allowing a civil lawsuit against a foreign defendant for foreign conduct violates due process but that a criminal prosecution against the *same* defendant for the *same* foreign conduct does not." *Douglass* v. *Nippon Yusen Kabushiki Kaisha*, 46 F.4th 226, 270 (5th Cir. 2022) (en banc) (dissenting).

Outside the context of personal jurisdiction, this Court has sometimes required a stricter due process standard in criminal cases than in civil cases. See, *e.g.*, *Turner* v. *Rogers*, 564 U.S. 431, 442 (2011); *Addington* v. *Texas*, 441 U.S. 418, 429-432 (1979). But it has never suggested that the inverse should be true: that a stricter standard applies in civil cases than in criminal cases. It would be incongruous to make it *harder* to deprive a defendant of property in a *civil* case than to deprive a defendant of liberty (or even life) in a *criminal* case arising out of the same facts. Nothing in the Fifth Amendment—which contains only a single Due Process Clause, applicable to civil and criminal cases alike—supports such a rule.

II. THE PSJVTA WOULD SATISFY FOURTEENTH AMENDMENT STANDARDS

Even if the Court were to import Fourteenth Amendment due process standards for the exercise of personal jurisdiction in civil cases into the Fifth Amendment, the PSJVTA easily satisfies those standards. That conclusion follows *a fortiori* from *Mallory* v. *Norfolk Southern Railway Co.*, 600 U.S. 122 (2023), which upheld a State's

authority to deem registration to do business in the state as signifying consent to be sued there. The United States may likewise deem the PLO and PA's payments to terrorists who murdered or maimed U.S. nationals and U.S. activities as signifying their consent to suit in federal anti-terrorism cases involving U.S. victims.

Like the statute in *Mallory*, the PSJVTA provided the PLO and PA with advance notice of the conduct that would subject them to jurisdiction in United States courts. Moreover, the PSJVTA unquestionably serves legitimate governmental interests—which the statute in *Mallory* did not.

Even if this Court were to adopt the Second Circuit's new rule that consent to suit must be part of a "reciprocal bargain" in order to be valid, the PSJVTA would pass that test too: The PLO and PA obtain valuable benefits from engaging in activities within the United States.

A. This Is A Stronger Case For Jurisdiction Than *Mallory*

For more than a century and a half—and as recently as two Terms ago—this Court has consistently held that a State has the right to deem specified conduct as constituting consent to personal jurisdiction, including by treating presence as consent to be sued there. The United States, as the national sovereign, is at least equally entitled to treat specified conduct, including entry into its territory, as consent to suit on federal claims in federal courts.

1. "Both at the time of the founding and the Fourteenth Amendment's adoption, the Anglo-American legal tradition recognized that a tribunal's competence was generally constrained only by the 'territorial limits' of the sovereign that created it." *Mallory*, 600 U.S. at 128 (plurality opinion) (quoting Joseph Story, *Commentaries on the Conflict of Laws* § 539, pp. 450-451 (1834)). As a result,

"an *in personam* suit…could be maintained by anyone on any claim in any place…'wherever the [defendant] may be found.'" *Id.* at 128-129 (quoting *Massie* v. *Watts*, 10 U.S. (6 Cranch) 148, 158 (1810)). Even a defendant's transitory presence within the jurisdiction sufficed upon service of process there. See *Burnham* v. *Superior Ct. of Cal.*, 495 U.S. 604 (1990).

"As the use of the corporate form proliferated in the 19th century, the question arose how to adapt the traditional rule about transitory actions for individuals to artificial persons created by law." *Mallory*, 600 U.S. at 129. In many States, the answer was to treat an artificial entity's presence within the State as constructive consent to be sued there. *Id.* at 129-130. While many of those statutes limited such consent to suits "by in-state plaintiffs," others required foreign entities "to defend themselves there against any manner of suit." *Id.* at 130.

This Court consistently upheld such statutes against due process challenges. In *St. Clair* v. *Cox*, 106 U.S. 350 (1882), for instance, the Court upheld a Michigan statute that implied consent to service of process—and thus to personal jurisdiction—"as a condition upon which a foreign corporation shall be permitted to do business within her limits." *Id.* at 356. So long as the state's jurisdictional interest was "reasonable" and the defendant had actual "notice of [the] suit," due process imposed no barrier. *Ibid.* And in *Pennsylvania Fire Insurance Co.* v. *Gold Issue Mining Co.*, 243 U.S. 93 (1917), the Court held that Missouri, by construing its consent-to-jurisdiction statute as permitting general jurisdiction upon the (required) appointment of the superintendent of insurance to receive process, "did not deprive the defendant of due process of law even if it took the defendant by surprise." *Id.* at 95.

2. This Court recently confirmed the continuing vitality of consent-to-jurisdiction statutes in *Mallory*. There, a Virginia-headquartered railroad corporation registered

with the Pennsylvania Department of State as a condition of doing business within the State. See 15 Pa. Cons. Stat. § 411(a). Under a separate statute, such "qualification as a foreign corporation" was deemed consent to appear in the courts of the State on "any cause of action." 42 Pa. Cons. Stat. § 5301(a)(2)(i), (b). Based on such deemed consent, a former employee sued the railroad in Pennsylvania for injuries stemming from activities in Virginia and Ohio.

This Court held that the railroad's consent was a valid basis for suit under the Fourteenth Amendment. Writing for a four-Justice plurality, Justice Gorsuch explained that the railroad had "agreed to be found in Pennsylvania and answer any suit there," even if its contacts with the State did not support general or specific jurisdiction. 600 U.S. at 135. Such consent was sufficient, he explained, because "personal jurisdiction is a *personal* defense that may be waived or forfeited." *Id.* at 144. And waiver may occur by operation of law, just as readily as by any express statement: Business-registration statutes are among the "'variety of legal arrangements [that] have been taken to represent express or implied consent' to personal jurisdiction consistent with due process." *Id.* at 136 n.5 (quoting *Insurance Corp. of Ireland* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703-704 (1982)) (cleaned up).

Justice Alito agreed on this point to form a majority. "Consent is a separate basis for personal jurisdiction," he explained, and the railroad "had clear notice that Pennsylvania considered its registration as consent to general jurisdiction." *Id.* at 153. Justice Alito nevertheless expressed doubt that "the Constitution permits a State to impose such a submission-to-jurisdiction requirement." *Id.* at 150. That kind of state law, he explained, creates serious tensions with "the very nature of the federal system that the Constitution created and in numerous provisions that bear on States' interactions with one another."

Id. at 154. However, Justice Alito concluded that limits imposed by interstate federalism would be better seated somewhere other than the Fourteenth Amendment's Due Process Clause. *Id.* at 150.

Mallory controls here. Like the Pennsylvania statute at issue there, the PSJVTA clearly specifies in advance, and gives fair warning of, the conduct by which "a defendant shall be deemed to have consented to personal jurisdiction." 18 U.S.C. § 2334(e)(1).

Indeed, in important respects, this is a far easier case than *Mallory*. There, the Pennsylvania Supreme Court held that the State had "no legitimate interest in a controversy with no connection to the Commonwealth that was filed by a non-resident against a foreign corporation that is not at home here." *Mallory* v. *Norfolk S. Ry. Co.*, 266 A.3d 542, 567 (Pa. 2021). Here, by contrast, the PSJVTA applies only to cases involving terrorism against *American* victims and their families, a topic of preeminent federal concern. Moreover, unlike Pennsylvania's business-registration statute, which required a foreign corporation to submit to *general* jurisdiction—including in suits under non-Pennsylvania causes of action—the PSJVTA applies only to a single category of *federal* cases. And whereas Pennsylvania's practical and legal right to exclude from the State a railroad engaged in interstate commerce was suspect, the United States undoubtedly has authority to exclude the PLO and PA from its territory.

3. The Second Circuit read *Mallory* as being limited to circumstances where the defendant "accepted a government benefit from the forum, in return for which the defendant [was] required to submit itself to suit in the forum." Pet. App. 23a-24a. According to the court, consent-

to-jurisdiction statutes *must* be based on "reciprocal bargains" to pass constitutional muster. *Id.* at 24a.[7]

This reciprocal-bargains theory was novel. As Judge Menashi explained, the Second Circuit simply "invented a new requirement that applies when Congress or a state legislature attempts to extend personal jurisdiction through a deemed-consent statute." Pet. App. 240a-241a n.11. "Although there are cases holding that a defendant's receipt of a benefit *can be* deemed to be consent," there does not appear to be "any case holding that such receipt of a benefit is a *necessary* condition." *Id.* at 123a n.10 (Furman, J.) (citations omitted; emphasis added).

The court of appeals' reciprocal-bargain test reflects a basic logic error. While "accepting an in-state benefit with jurisdictional strings attached" is *one* way for a state to provide for consent to personal jurisdiction, *Mallory*, 600 U.S. at 145 (plurality opinion), it is not the *only* way. To the contrary, even a "trivial thing" like taking "one step" across an "invisible state line" can lead to "jurisdictional consequences [that] are immediate and serious." *Ibid.* Or as Justice Jackson explained, a defendant may consent to jurisdiction "more than one way," including: (1) "explicitly or implicitly consenting," by engaging in conduct deemed consent under law; (2) by "fail[ing] to follow specific procedural rules"; or (3) by "voluntarily invoking certain benefits from a State that are conditioned on submitting to the State's jurisdiction." *Id.* at 147-148. The Second Circuit simply erased the first category. As Justice Jackson summarized:

> Regardless of whether a defendant relinquishes its personal-jurisdiction rights expressly or

[7] The court carved out an exception from its government-benefit rule for "litigation-related activities," *id.* at 22a-24a, but did not explain why such activities are sufficient without "reciprocal bargains."

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

Id. at 148 (quoting *Bauxites*, 456 U.S. at 704-705) (brackets in original).

The Second Circuit rested its holding on the rationale that the "predicate conduct" deemed to manifest consent to jurisdiction under the PSJVTA is not a sufficiently close "proxy for *actual* consent." Pet. App. 38a (emphasis added). That echoes the railroad's argument in *Mallory*: It asserted that the statue was a "coercive assertion of jurisdiction," such that its consent was not "true consent." Resp. Br. at 3, 7, *Mallory* v. *Norfolk Southern Railway Co.*, 600 U.S. 122 (2023) (No. 21-1168). The railroad thus argued it had "not *really* submitted" to jurisdiction. 600 U.S. at 144 (plurality opinion).

This Court rejected the argument. "[A] legion of precedents … attach jurisdictional consequences to what some might dismiss as mere formalities." *Id.* at 145. "[U]nder [those] precedents a variety of 'actions of the defendant' that may seem like technicalities nonetheless can 'amount to a legal submission to the jurisdiction of a court.' That was so before *International Shoe*, and it remains so today." *Id.* at 146 (quoting *Bauxites*, 456 U.S. at 704-705) (citation omitted). Justice Alito agreed: There was no due process violation because the defendant "acted with knowledge of state law when it registered," such that the Court may "presume that by registering, it consented to all valid conditions imposed by state law." *Id.* at 151 (cleaned up).

B. The PSJVTA Also Satisfies Traditional Due Process Standards

This Court's rules for personal jurisdiction require that the defendant receive "fair warning" and that maintenance of the suit must be "reasonable, in the context of our federal system of government." *Ford Motor*, 592 U.S. at 358 (citations omitted). The PSJVTA easily satisfies both requirements.

1. The requirement of "fair warning" ensures that "[a] defendant can … structure its primary conduct to lessen or avoid exposure to a given State's courts." *Id.* at 360 (cleaned up). In the context of implied consent, that means the conduct that will subject the defendant to the court's jurisdiction must be "knowing and voluntary." *Wellness Int'l Network, Ltd.* v. *Sharif*, 575 U.S. 665, 685 (2015). Here, the PLO and PA knowingly and voluntarily consented to federal jurisdiction under the PSJVTA.

Their consent was *knowing* because the PSJVTA describes, in advance, exactly what actions would be deemed consent to personal jurisdiction in civil cases under the ATA. Indeed, the PLO and PA received actual notice of the PSJVTA: Before the law took effect, they represented to the D.C. Circuit that they "might never make covered payments." *Shatsky* v. *Palestine Liberation Org.*, 955 F.3d 1016, 1038 (D.C. Cir. 2020). Thus, when they later made pay-for-slay payments, they did so knowing that it would vest U.S. courts with jurisdiction over them.

Their conduct was also *voluntary*. Actions are "voluntary within the meaning of the Due Process Clause" if they are the product of "a free and unconstrained will." *Oregon* v. *Elstad*, 470 U.S. 298, 304 (1985) (citation omitted). Conduct is "involuntary," by contrast, only if it arises from "coercive activity of the State." *Colorado* v. *Connelly*, 479 U.S. 157, 165 (1986).

The PSJVTA gave the PLO and PA a clear and voluntary choice: either cease engaging in the conduct specified in the law, or submit to jurisdiction in the United States. That was not coercion. In *North Carolina* v. *Alford*, 400 U.S. 25 (1970), a criminal defendant argued that his guilty plea to a murder charge was not "voluntary," in the sense required by the Due Process Clause, because the evidence against him presented a serious risk that the State would put him to death if he went to trial. *Id.* at 27-28. This Court rejected his claim, holding that even the high risk of a death sentence did not make the defendant's plea a product of "fear and coercion." *Id.* at 29, 37. If Henry Alford's plea was voluntary, so were the PLO and PA's decisions to pay terrorists and their families for murdering Americans and to engage in non-U.N. activities within the United States. Cf. *Corbitt* v. *New Jersey*, 439 U.S. 212, 219 n.8 (1978) ("the legal system is replete with situations requiring the making of difficult judgments as to which course to follow," but that does not make those choices involuntary) (cleaned up).

The Second Circuit questioned whether constructive waivers of constitutional rights are *ever* truly "voluntary." See Pet. App. 39a-43a. Relying on dicta from *College Savings Bank* v. *Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999), the court stated that constitutional rights cannot be waived by constructive consent, and that a person's "ability to 'abandon' the relevant predicate conduct 'has no bearing upon the voluntariness of the asserted waiver.'" Pet. App. 40a (quoting 527 U.S. at 684) (brackets omitted). That reading of *College Savings* is mistaken.

In *College Savings*, the question was whether a State, by engaging in trademark-related activities regulated by the Lanham Act, could be deemed as having implicitly waived its immunity from suit under that Act. 527 U.S. at 669. The Court held that it could not, and that Congress

did not have authority "to exact constructive waivers of sovereign immunity through the exercise of Article I powers." *Id.* at 683. The Court stated in dicta that constructive waivers are "simply unheard of in the context of *other* constitutionally protected privileges," *id.* at 681, and that Congress's clear notice of the conduct giving rise to constructive consent could "have no bearing upon the voluntariness of the waiver" of State sovereign immunity, *id.* at 684.

The dicta in *College Savings* is uninstructive here. Sovereign immunity and personal jurisdiction differ in relevant ways. A State's immunity is a fundamental aspect of the sovereignty that the States enjoyed before the ratification of the Constitution; as such, it goes to the very heart of our federal system. Personal jurisdiction, by contrast, is a matter of "individual liberty" that can "be waived" through "express or implied consent." *Bauxites*, 456 U.S. at 702-703. And this Court has specifically rejected the argument that "there is something unique about the requirement of personal jurisdiction, which prevents it from being established or waived like other rights." *Id.* at 706; accord *Mallory*, 600 U.S. at 149 (Jackson, J., concurring).[8]

2. The PSJVTA is also "reasonable, in the context of our federal system of government." *Ford Motor*, 592 U.S. at 358 (citation omitted). Making this assessment requires "a forum-by-forum, or sovereign-by-sovereign, analysis." *J. McIntyre*, 564 U.S. at 884 (plurality opinion).

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[8] This Court has upheld constructive waivers of constitutional rights by statute in other contexts as well. See, *e.g.*, *Birchfield* v. *North Dakota*, 579 U.S. 438 (2016) (Fourth Amendment); *South Dakota* v. *Neville*, 459 U.S. 553 (1983) (Fifth Amendment); *Bank of Columbia* v. *Okely*, 17 U.S. (4 Wheat.) 235 (1819) (Seventh Amendment).

In *Ford Motor*, this Court found that "principles of 'interstate federalism' support[ed jurisdiction" in the plaintiffs' home states, which had "significant interests at stake" in "providing their residents with a convenient forum for redressing injuries inflicted by out-of-state actors, as well as enforcing their own safety regulations." 592 U.S. at 368 (cleaned up). Here, the "interests at stake" are those of the national sovereign. As discussed above, the PSJVTA advances national security and foreign policy interests distinct to the United States. See pp. 22-23, 30-31, *supra*. The United States is the *only* forum where American victims of international terrorism (and their families) can obtain redress under the ATA. And adjudication of such suits does not encroach on the sovereignty of another body in our constitutional system.

C. Even If A Reciprocal Benefit Was Required, The PLO and PA Received One

Even if receipt of some "benefit" was required, the PLO and PA have received one: They have obtained "the privilege of residing and conducting business in the United States—not to mention furthering their political goals at the expense of American lives." Pet. App. 231a (Menashi, J., dissenting).

As an initial matter, the United States has the absolute power to exclude the PLO and PA from its territory—as it did for many years. J.A. 276-279.[9] The power to exclude includes the lesser power to admit on condition of consent to personal jurisdiction. See *Washington ex rel. Bond & Goodwin & Tucker* v. *Superior Ct. of Wash.*, 289 U.S. 361, 364-365 (1933) ("qualification of a foreign corporation in accordance with the statutes permitting its entry

[9] The United States could exclude the PLO and PA even if doing so would violate our treaty obligations to the United Nations. *United States* v. *Palestine Liberation Org.*, 695 F. Supp. 1456, 1463-1465, 1468-1471 (S.D.N.Y. 1988).

into the state constitutes an assent on its part to all the reasonable conditions imposed," including consent to jurisdiction); *Hess* v. *Pawlowski*, 274 U.S. 352, 356 (1927) (similar); *St. Clair*, 106 U.S. at 356 (similar); *Baltimore & Ohio R.R. Co.* v. *Harris*, 79 U.S. (12 Wall.) 65, 81 (1871) (similar).

The PLO and PA have benefitted from their presence in the United States, including by engaging in activities other than those "undertaken exclusively for the purpose of conducting official business of the United Nations." 18 U.S.C. § 2334(e)(3)(B). It is uncontested that after the statutory trigger date, their U.S.-based officers, employees, and agents met with U.S.-based groups to encourage them to "lobby[] the government, lobby[] Congress" to support "justice for the Palestinian people"; used U.S.-based social media platforms to "raise public awareness" and "bring attention" to their cause; and notarized documents in the United States for use in Palestinian territories. J.A. 282-288. In *Sokolow*, the district court observed that the PLO and PA "do not dispute they have engaged in these types of activities." Pet. App. 73a.[10] Their ability to engage in these activities while physically present in the United States was a meaningful benefit. *Cf. Burnham*, 495 U.S. at 637 (Brennan, J., concurring) (defendant received "significant benefits" by visiting forum State for three days).

The Second Circuit dismissed all of these U.S. activities as irrelevant. According to the court, "federal law has long prohibited [the PLO and PA] from engaging in any

[10] Opposing certiorari, the PLO and PA contended that petitioners forfeited the argument that their U.S. activities meet the PSJVTA's terms. Br. in Opp. 17-18. That is false. Petitioners told the court of appeals that "remands would be required [to consider the U.S.-activities prong] if this Court adopts Defendants' unprecedented 'benefit' theory." *Fuld* Pls. Supp. C.A. Br. 6; *Sokolow* Pls. Supp. C.A. Br. 6.

activities or maintaining any offices in the United States." Pet. App. 28a. As a result, the court concluded, the PSJVTA "exacts 'deemed' consent…without conferring any rights or benefits on [them] in return." *Id.* at 29a. That reasoning is both legally and logically flawed.

As a legal matter, the court was incorrect that all the PLO and PA's activities in the United States were prohibited by federal law. The relevant statute merely forbids them to "expend funds" or maintain an office in the United States (other than their U.N. mission). 22 U.S.C. § 5202; see *Application of Anti-Terrorism Act of 1987 to Diplomatic Visit of Palestinian Delegation*, 46 Op. O.L.C. __, at 2 (slip op. Oct. 28, 2022). Their non-expenditure activities—including notarizing documents, holding meetings with community groups, public speaking, publishing, and issuing political statements on social-media—are not forbidden by § 5202.[11]

As a logical matter, the court was incorrect that if all their activities had been unlawful, the PLO and PA would have received no benefit from conducting activities within the United States. The legality or illegality of their activities has no bearing on the question whether they *benefited* from the society, economy, and governmental protection of the United States. Indeed, if Congress were to prohibit them from engaging in *any* U.S. activities, and if they were to flout that law, that would only make the PSJVTA *more* reasonable, not less. As Judge Menashi explained, "a foreign actor that conducts *unauthorized* business in the United States has obtained an even greater benefit from the forum than the foreign actor that complies with American law," Pet. App. 250a, and it would be "perverse"

[11] The court also cited (Pet. App. 28a n.9) Section 7(b) of the Palestinian Anti-Terrorism Act of 2006, Pub. L. No. 109-446. But that statute is inapplicable at this time, because no ministry, agency, or instrumentality of the PA is controlled by Hamas. See *ibid.* (incorporating 22 U.S.C. § 2378b).

to give the law-breaker protection that a law-abiding foreigner lacks, *id.* at 231a.

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

CONCLUSION

The judgments of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

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Amendment V of the Constitution provides, in part, that no person shall "be deprived of life, liberty, or property, without due process of law."

* * *

The Anti-Terrorism Act of 1987, Pub. L. 100-204, tit. X, 101 Stat. 1406, codified at 22 U.S.C. §§ 5201-5202, provides, in part:

§ 1002. Findings; determinations

(a) Findings

The Congress finds that—

* * *

(2) the Palestine Liberation Organization (hereafter in this chapter referred to as the "PLO") was directly responsible for the murder of an American citizen on the Achille Lauro cruise liner in 1985, and a member of the PLO's Executive Committee is under indictment in the United States for the murder of that American citizen;

(3) the head of the PLO has been implicated in the murder of a United States Ambassador overseas;

(4) the PLO and its constituent groups have taken credit for, and been implicated in, the murders of dozens of American citizens abroad; * * *

(b) Determinations

Therefore, the Congress determines that the PLO and its affiliates are a terrorist organization and a threat to the interests of the United States, its allies, and to international law and should not benefit from operating in the United States.

§ 1003. Prohibitions regarding PLO

It shall be unlawful, if the purpose be to further the interests of the Palestine Liberation Organization or any of its constituent groups, any successor to any of those, or any agents thereof, on or after the effective date of this chapter—

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

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

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

* * *

The Anti-Terrorism Act of 1992, Pub. L. 102-527, Title X, § 1003, 106 Stat. 4521, added the following provisions to Title 18 of the United States Code:

§ 2331. Definitions

As used in this chapter—

(1) the term "international terrorism" means activities that—

(A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;

(B) appear to be intended—

(i) to intimidate or coerce a civilian population;

(ii) to influence the policy of a government by intimidation or coercion; or

(iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and

(C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum; * * *

§ 2333. Civil Remedies

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

§ 2334. Jurisdiction and Venue

(a) GENERAL VENUE.—Any civil action under section 2333 of this title against any person may be instituted in the district court of the United States for any district where any plaintiff resides or where any defendant resides or is served, or has an agent. Process in such a civil action may be served in any district where the defendant resides, is found, or has an agent. * * *

* * *

The Anti-Terrorism Clarification Act of 2018, Pub. L. 115-253, § 4, 132 Stat. 3183, added the following provision to Section 2334 of Title 18 of the United States Code:

(e) Consent of Certain Parties to Personal Jurisdiction.—

(1) In general.—Except as provided in paragraph (2), for purposes of any civil action under section 2333 of this title, a defendant shall be deemed to have consented to personal jurisdiction in such civil action if, regardless of the date of the occurrence of the act of international terrorism upon which such civil action was filed, the defendant— * * *

(B) in the case of a defendant benefiting from a waiver or suspension of section 1003 of the Anti-Terrorism Act of 1987 (22 U.S.C. 5202) after the date that is 120 days after the date of enactment of this subsection—

(i) continues to maintain any office, headquarters, premises, or other facilities or establishments within the jurisdiction of the United States; or

(ii) establishes or procures any office, headquarters, premises, or other facilities or establishments within the jurisdiction of the United States. * * *

* * *

The Promoting Security and Justice for Victims of Terrorism Act of 2019 (PSJVTA), Pub. L. No. 116–94, div. J, tit. IX, § 903, 133 Stat. 3082-3085, provides:

(a) SHORT TITLE.—This section may be cited as the Promoting Security and Justice for Victims of Terrorism Act of 2019.

(b) FACILITATION OF THE SETTLEMENT OF TERRORISM-RELATED CLAIMS OF NATIONALS OF THE UNITED STATES.—

(1) COMPREHENSIVE PROCESS TO FACILITATE THE RESOLUTION OF ANTI-TERRORISM ACT CLAIMS.—The Secretary of State, in consultation with the Attorney General, shall, not later than 30 days after the date of enactment of this Act, develop and initiate a comprehensive process for the Department of State to facilitate the resolution and settlement of covered claims.

(2) ELEMENTS OF COMPREHENSIVE PROCESS.—The comprehensive process developed under paragraph (1) shall include, at a minimum, the following:

(A) Not later than 45 days after the date of enactment of this Act, the Department of State shall publish a notice in the Federal Register identifying the method by which a national of the United States, or a representative of a national of the United States, who has a covered claim, may contact the Department of State to give notice of the covered claim.

(B) Not later than 120 days after the date of enactment of this Act, the Secretary of State, or a designee of the Secretary, shall meet (and make every effort to continue to meet on a regular basis thereafter) with any national of the United States, or a representative of a national of the United States, who has a covered claim and has informed the Department of State of the covered claim using the method established pursuant to subparagraph (A) to discuss the status of the covered claim, including the status of any settlement discussions with the Palestinian Authority or the Palestine Liberation Organization.

(C) Not later than 180 days after the date of enactment of this Act, the Secretary of State, or a designee of the Secretary, shall make every effort to meet (and make every effort to continue to meet on a regular basis thereafter) with representatives of the Palestinian Authority and the Palestine Liberation Organization to discuss the covered claims identified pursuant to subparagraph (A) and potential settlement of the covered claims.

(3) REPORT TO CONGRESS.—The Secretary of State shall, not later than 240 days after the date of enactment of this Act, and annually thereafter for 5 years, submit to the Committee on the Judiciary and the Committee on Foreign Relations of the Senate and the Committee on the Judiciary and the Committee on Foreign Affairs of the House of Representatives a report describing activities that the Department of State has undertaken to comply with this subsection, including specific updates regarding subparagraphs (B) and (C) of paragraph (2).

(4) SENSE OF CONGRESS.—It is the sense of Congress that—

(A) covered claims should be resolved in a manner that provides just compensation to the victims;

(B) covered claims should be resolved and settled in favor of the victim to the fullest extent possible and without subjecting victims to unnecessary or protracted litigation;

(C) the United States Government should take all practicable steps to facilitate the resolution and settlement of all covered claims, including engaging directly with the victims or their

representatives and the Palestinian Authority and the Palestine Liberation Organization; and

(D) the United States Government should strongly urge the Palestinian Authority and the Palestine Liberation Organization to commit to good-faith negotiations to resolve and settle all covered claims.

(5) DEFINITION.—In this subsection, the term "covered claim" means any pending action by, or final judgment in favor of, a national of the United States, or any action by a national of the United States dismissed for lack of personal jurisdiction, under section 2333 of title 18, United States Code, against the Palestinian Authority or the Palestine Liberation Organization.

(c) JURISDICTIONAL AMENDMENTS TO FACILITATE RESOLUTION OF TERRORISM-RELATED CLAIMS OF NATIONALS OF THE UNITED STATES.

(1) IN GENERAL.—Section 2334(e) of title 18, United States Code, is amended—

(A) by striking paragraph (1) and inserting the following:

"(1) IN GENERAL.—Except as provided in paragraph (2), for purposes of any civil action under section 2333 of this title, a defendant shall be deemed to have consented to personal jurisdiction in such civil action if, regardless of the date of the occurrence of the act of international terrorism upon which such civil action was filed, the defendant—

"(A) after the date that is 120 days after the date of the enactment of the Promoting Security and Justice for Victims of Terrorism Act of 2019, makes any payment, directly or indirectly—

"(i) to any payee designated by any individual who, after being fairly tried or pleading guilty, has been imprisoned for committing any act of terrorism that injured or killed a national of the United States, if such payment is made by reason of such imprisonment; or

"(ii) to any family member of any individual, following such individual's death while committing an act of terrorism that injured or killed a national of the United States, if such payment is made by reason of the death of such individual; or

"(B) after 15 days after the date of enactment of the Promoting Security and Justice for Victims of Terrorism Act of 2019—

"(i) continues to maintain any office, headquarters, premises, or other facilities or establishments in the United States;

"(ii) establishes or procures any office, headquarters, premises, or other facilities or establishments in the United States; or

"(iii) conducts any activity while physically present in the United States on behalf of the Palestine Liberation Organization or the Palestinian Authority.";

(B) in paragraph (2), by adding at the end the following: "Except with respect to payments described in paragraph (1)(A), no court may consider the receipt of any assistance by a nongovernmental organization, whether direct or indirect, as a basis for consent to jurisdiction by a defendant."; and

(C) by adding at the end the following:

"(3) EXCEPTION FOR CERTAIN ACTIVITIES AND LOCATIONS.—In determining whether a defendant shall be deemed to have consented to personal jurisdiction under paragraph (1)(B), no court may consider—

"(A) any office, headquarters, premises, or other facility or establishment used exclusively for the purpose of conducting official business of the United Nations;

"(B) any activity undertaken exclusively for the purpose of conducting official business of the United Nations;

"(C) any activity involving officials of the United States that the Secretary of State determines is in the national interest of the United States if the Secretary reports to the appropriate congressional committees annually on the use of the authority under this subparagraph;

"(D) any activity undertaken exclusively for the purpose of meetings with officials of the United States or other foreign governments, or participation in training and related activities funded or arranged by the United States Government;

"(E) any activity related to legal representation—

"(i) for matters related to activities described in this paragraph;

"(ii) for the purpose of adjudicating or resolving claims filed in courts of the United States; or

"(iii) to comply with this subsection; or

"(F) any personal or official activities conducted ancillary to activities listed under this paragraph.

"(4) RULE OF CONSTRUCTION.—Notwithstanding any other law (including any treaty), any office, headquarters, premises, or other facility or establishment within the territory of the United States that is not specifically exempted by paragraph (3)(A) shall be considered to be in the United States for purposes of paragraph (1)(B).

"(5) DEFINED TERM.—In this subsection, the term 'defendant' means—

"(A) the Palestinian Authority;

"(B) the Palestine Liberation Organization;

"(C) any organization or other entity that is a successor to or affiliated with the Palestinian Authority or the Palestine Liberation Organization; or

"(D) any organization or other entity that—

"(i) is identified in subparagraph (A), (B), or (C); and

"(ii) self identifies as, holds itself out to be, or carries out conduct in the name of, the 'State of Palestine' or 'Palestine' in connection with official business of the United Nations.".

(2) PRIOR CONSENT NOT ABROGATED.—The amendments made by this subsection shall not abrogate any consent deemed to have been given under SECTION 2334(e) of title 18, United States Code, as in effect on the day before the date of enactment of this Act.

(d) RULES OF CONSTRUCTION; APPLICABILITY; SEVERABILITY.—

(1) RULES OF CONSTRUCTION.—

(A) IN GENERAL.—This section, and the amendments made by this section, should be liberally construed to carry out the purposes of Congress to provide relief for victims of terrorism.

(B) CASES AGAINST OTHER PERSONS.—Nothing in this section may be construed to affect any law or authority, as in effect on the day before the date of enactment of this Act, relating to a case brought under section 2333(a) of title 18, United States Code, against a person who is not a defendant, as defined in paragraph (5) of section 2334(e) of title 18, United States Code, as added by subsection (c)(1) of this section.

(2) APPLICABILITY.—This section, and the amendments made by this section, shall apply to any case pending on or after August 30, 2016.

(3) SEVERABILITY.—If any provision of this section, an amendment made by this section, or the application of such provision or amendment to any person or circumstance is held to be unconstitutional, the remainder of this section, the amendments made by this section, and the application of such provisions to any person or circumstance shall not be affected thereby.