Nos. 24-20, 24-151

IN THE

Supreme Court of the United States

MIRIAM FULD, *et al.*,

Petitioners,

v.

PALESTINE LIBERATION ORGANIZATION, *et al.*,

Respondents.

UNITED STATES,

Petitioner,

v.

PALESTINE LIBERATION ORGANIZATION, *et al.*,

Respondents.

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

BRIEF OF *AMICI* SCHOLARS OF CIVIL PROCEDURE AND CONFLICT OF LAWS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

Amici are professors of law who have taught and written about civil procedure and conflict of laws. They have an interest in the sound development of the Court's doctrine in these fields. A list of *amici* and their academic positions is set forth in the Appendix.[1]

SUMMARY OF THE ARGUMENT

This Court reaffirmed in *Mallory* v. *Norfolk Southern Railway Co.* that "express or implied consent" remains a constitutionally sound basis for establishing personal jurisdiction over a defendant, and that consent may be given "by word *or deed*." 600 U.S. 122, 138 (2023) (plurality) (emphasis added); see also *id.* at 153 (Alito, J., concurring in part and concurring in the judgment); see generally Robin J. Effron & Aaron D. Simowitz, *The Long Arm of Consent*, 80 N.Y.U. Ann. Surv. Am. L. 179 (2024). In the decision below, the Second Circuit nonetheless held that the conduct deemed to constitute consent under the PSJVTA "cannot support a fair and reasonable inference of the defendants' voluntary agreement to proceed in a federal forum," and "lack[s] any of the indicia of valid consent previously recognized in the case law." Pet. App. 26a.

In so holding, the Second Circuit effectively concluded that, although a party may validly consent to personal jurisdiction in a given forum by

[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than amicus or his counsel funded its preparation or submission. Sup. Ct. R. 37.6.

purchasing a cruise ship ticket with a forum-selection clause tucked into three pages of fine print on the ticket's back, *Carnival Cruise Lines, Inc.* v. *Shute*, 499 U.S. 585 (1991), engaging in discovery abuses, *Ins. Corp. of Ireland Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982), or mistakenly entering a general appearance, *York* v. *Texas*, 137 U.S. 15 (1890), the same result does not obtain for sophisticated, well-counseled entities fully apprised of the consequences of their actions. As a result, the decision below gives more protection to defendants that the elected branches concluded should be suable under the Anti-Terrorism Act than it does to users of Google products who are required to adjudicate their disputes in California, regardless of where their disputes arose.[2] Such a result cannot be reconciled with this Court's precedents.

To that end, the Court does not need to analyze how the Fifth and Fourteenth Amendments' Due Process Clauses might impose different limitations on the exercise of personal jurisdiction; instead, *Mallory* and basic, already settled propositions about the Fifth Amendment control the outcome of this case. *Mallory* sets the standard for personal jurisdiction under the Fourteenth Amendment, and all agree that the Fifth Amendment is at least as generous to plaintiffs as the

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[2] See Google Terms of Service, https://policies.google.com/terms?hl=en-US (last accessed February 3, 2025) ("[A]ll disputes arising out of or relating to these terms . . . will be resolved exclusively in the federal or state courts of Santa Clara County, California, USA, and you and Google consent to personal jurisdiction in those courts."); see also *TradeComet.com LLC* v. *Google, Inc.*, 647 F.3d 472 (2d Cir. 2011).

Fourteenth Amendment in that context. Therefore, because the PSJVTA satisfies *Mallory*, assertions of personal jurisdiction under the Act must satisfy the Fifth Amendment. The Court need go no further in reversing the decision below.

Separately, the Court has every reason to defer to the decision of the elected branches in matters implicating foreign affairs and the regulation of terrorism, in which judicial deference is at its zenith, especially where the action of the elected branches came in direct response to prior judicial decisions in this case. The Second Circuit's jurisdictional decision undercut Congress's authority in this area and, in doing so, ignored law that already polices Congress's power to regulate international terrorism. In this case, separation of powers principles warrant heightened deference to the elected branches, not the heightened skepticism with which the Second Circuit viewed the PSJVTA.

ARGUMENT

I. The Decision Below Misconstrues This Court's "Consent" Precedents

As the *Mallory* plurality explained, under this Court's precedents "a variety of 'actions of the defendant' that may seem like technicalities nonetheless can 'amount to a legal submission to the jurisdiction of the court.'" 600 U.S. at 145 (plurality) (quoting *Bauxites*, 456 U.S. at 704–05) (offering as examples "[f]ailing to comply with certain pre-trial orders, signing a contract with a forum selection

clause, [and] accepting an in-state benefit with jurisdictional strings attached"). The PSJVTA fits comfortably within these parameters of consent-based jurisdiction.

A. The Court's consent-based personal-jurisdiction precedents have not always been decided on constitutional grounds. For instance, in *Shute*, which analyzed the enforceability of a forum selection clause, the Court invoked the canon of constitutional avoidance and concluded that, because the forum-selection clause was "dispositive . . . , we need not consider petitioner's constitutional argument as to personal jurisdiction." 499 U.S. at 589–90; see also *M/S Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 10–11 (1972) (forum selection clauses "should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances").

Following *Shute*, consent-based personal-jurisdiction has been viewed through a maximalist lens, with courts commonly upholding forum-selection clauses against parties "who have 'consented' to the forum via a boilerplate agreement that they may neither read nor comprehend." John F. Coyle & Robin J. Effron, *Forum Selection Clauses, Non-Signatories, and Personal Jurisdiction*, 97 Notre Dame L. Rev. 187, 230 (2021). Shrinkwrap, clickwrap, and end user license agreements containing forum-selection clauses have multiplied exponentially, yet their "reasonableness" is almost always upheld. John F. Coyle, *"Contractually Valid" Forum Selection Clauses*, 108 Iowa L. Rev. 127, 155–56 (2022).

The decision below dismissed *Shute* as a case "enforc[ing] the express jurisdiction-conferring language of a contract after accounting for considerations of notice and fundamental fairness," rather than one involving the "inference" of consent. Pet. App. 25a. But many post-*Shute* lower-court decisions simply dispense with the need to conduct *any* constitutional due process analysis when presented with an enforceable forum selection clause. See Coyle & Effron, *supra*, at 232–34 (collecting cases). Either way, treating forum-selection clauses as the Second Circuit did—as merely another contract provision to be enforced—fails to recognize the significant constitutional assumptions embedded in their enforceability.

In that regard, the Second Circuit wrongly rejected the *Fuld* Petitioners' argument that the constitutionality of the PSJVTA follows *a fortiori* from *Shute*. Millions of Americans "consent" to jurisdiction every day by dint of continuing to use products and services whose terms and conditions contain forum-selection clauses. A consumer's continued use of such products or services is a continued manifestation of consent to personal jurisdiction by deed; and it is her intentional conduct of continued use that gives rise to consent rather than any affirmative act with respect to the forum-selection clause generally. If such boilerplate provisions satisfy constitutional due process, then a *federal statute* giving notice to sophisticated, well-counseled defendants that their engagement in specified conduct will be deemed

consent to personal jurisdiction must be constitutional as well.

B. The decision below went equally astray in drawing an artificial distinction between "deemed consent," which it determined required "some exchange of benefits," and "certain litigation-related conduct," which it described vaguely as "[an]other means of demonstrating consent." Pet. App. 36a n.13. In so doing, it ignored the central principle that "[t]he actions of the defendant may amount to a legal submission to the jurisdiction of the court, *whether voluntary or not*." *Bauxites*, 456 U.S. at 704–05 (emphasis added). In *Bauxites*, the Court held that due process under the Fourteenth Amendment is not violated when courts equate the failure to comply with jurisdictional discovery orders with a "an admission of the want of merit in the asserted defense" of personal jurisdiction. 456 U.S. at 705. In that sense, adverse inferences arising from litigation conduct fit comfortably within the consent regime approved by the Court in *Mallory*, and it is unsurprising that *Mallory* drew so extensively on *Bauxites* to drive home the point that "'actions of the defendant' that may seem like technicalities nonetheless can 'amount to a legal submission to the jurisdiction of a court.'" *Mallory*, 600 U.S. at 146 (quoting *Bauxites*, 456 U.S. at 704–05)); *id.* at 148 (Jackson, J., concurring) (discussing *Bauxites*).[3]

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[3] The distinction drawn by the Second Circuit between conduct within litigation and conduct without (Pet. App. 32a–

II. The Reasoning of *Mallory* Answers This Case

Despite the Second Circuit's disavowal of *Mallory*, see Pet. App. 32a–35a, the Court can decide the instant case on the authority of *Mallory* and basic, undisputed assumptions about the Fifth Amendment.

A. As *Mallory* instructs, "'express or implied consent' can continue to ground personal jurisdiction—and consent may be manifested in various ways by word *or deed*." 600 U.S. at 138 (2023) (plurality) (emphasis added); see *id.* at 153 (Alito, J., concurring in part and concurring in the judgment). This case differs from *Mallory* in the sense that it addresses consent by deed, not word, and that the law is an act of Congress, not a state legislature; otherwise, there is not much daylight between the two statutes.

The Second Circuit's attempt to wave away *Mallory* makes no sense: "The Pennsylvania law at issue in *Mallory* did not involve an actual bargain or a 'voluntary agreement,' . . . between the state and each company," because Norfolk Southern was *deemed* to have consented to personal jurisdiction; its

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36a) is difficult to understand except as an attempt to mitigate the Second Circuit's difficulty with reconciling its top-line conclusion with *Bauxites*. See *infra* at 8. Consent deemed ex ante—especially as to sophisticated parties closely tracking the enactment of the PSJVTA—provides clear and unambiguous notice, whereas consent deemed by litigation conduct may well rest with the broad discretion of a trial court. See, *e.g.*, *Bauxites*, 456 U.S. at 707. The former approach is far more consistent with the ordinary meaning of "consent."

registration to do business in Pennsylvania pursuant to one statute brought it within the ambit of a separate statute deeming registration as a foreign corporation a "sufficient basis" for the exercise of general personal jurisdiction. Pet. App. 244a (Menashi, J., dissenting from denial of rehearing en banc).

To that end, the "reciprocal benefit" rationale set forth in the decision below cannot be reconciled with this Court's decision in *Bauxites* (among others), requiring the Second Circuit to invent the separate category of "litigation-related conduct." See *supra* at 6. But nothing in *Mallory* suggests that courts should awkwardly parse different categories of consent. Indeed, the disagreement among the Second Circuit is evidence enough that this Court should not insert itself into determining whether consent is the product of a sufficiently "reciprocal" "bargain" or whether a particular statute, forum-selection clause, or discovery abuse manifests "a reasonable inference of consent."

B. The PSJVTA satisfies the *Mallory* standard. Indeed, the Act presents an *easier* constitutional question, because it does not implicate concerns present in cases in which personal jurisdiction is being exercised pursuant to *state* (rather than federal) law. In this case, there are no dormant commerce clause or other federalism concerns. Cf. *Mallory*, 600 U.S. at 157 (Alito, J., concurring in part and concurring in the judgment). Likewise, unlike the Pennsylvania statute at issue in *Mallory*, the PSJTVA

does not provide for general, "all purpose" jurisdiction over defendants. Cf. *Daimler AG* v. *Bauman*, 571 U.S. 117 (2014). On the contrary, the PSJTVA restricts its application to claims (i) brought under the Anti-Terrorism Act (ii) by U.S. nationals (iii) against specifically named defendants who (iv) continue to engage in conduct specified by the statute.[4] It does not resurrect a "blanket claim of authority over controversies with no connection to the [United States]." *Mallory*, 600 U.S. at 170 (Barrett, J., dissenting).

Nor does the PSJTVA prompt international comity concerns that have commanded attention in other situations. See, *e.g.*, *Daimler*, 571 U.S. at 140–42. International law clearly recognizes a state's prerogative to prescribe law governing terrorism, "even if no specific connection exists between the state and the persons or conduct being regulated." Restatement (Fourth) of Foreign Relations Law § 413.

III. Deference To The Elected Branches And Constitutional Departmentalism Require Reversal

Should the Court consider it necessary to analyze differences between the Due Process Clauses of the Fifth and Fourteenth Amendments, the proper frame of reference is constitutional deference to the elected branches. The decision below erred in this fundamental respect, showing disdain for the

[4] The constitutionality of "special" legislation in the context of federal statutes giving relief to victims of terrorism is settled. *Bank Markazi* v. *Peterson*, 578 U.S. 212 (2016).

judgment of the elected branches in a case implicating foreign affairs, an area in which deference to the elected branches is ordinarily at its zenith. *E.g.*, *Ziglar* v. *Abbasi*, 582 U.S. 120, 142 (2017); *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 33–34 (2010).

A. "[T]he Second Circuit's decision does not merely ignore that the elected branches interpret the Constitution. The Court's decision rejects the notion that the elected branches' judgment is even relevant." *Long Arm of Consent* at 247. In holding that "[a] prospective defendant's activities do not signify consent to personal jurisdiction simply because Congress has labeled them as such," Pet. App. 21a, the Second Circuit treated the PSJVTA as a sort of legislative aggrandizement of what it saw as the judicial branch's exclusive authority to define the limits of personal jurisdiction. This was error.

Both the *Mallory* plurality and dissent treated Justice Scalia's opinion in *Burnham* v. *Super. Ct. of Cal.*, 495 U.S. 604 (1990)—the plurality opinion as well as Parts II.D and III—as the appropriate frame for analyzing consent and other traditional bases of jurisdiction. See *Mallory*, 600 U.S. at 139–41 (plurality); *id.* at 171–76 (Barrett, J., dissenting). In *Burnham*, Justice Scalia suggested that the "desirability or fairness of the prevailing in-state service rule" should be left to the "judgment [of] the legislatures that are free to amend it," characterizing due process as "that process which American society . . . , which expresses its judgments in the laws of self-interested States—has traditionally considered

'due.'" 495 U.S. at 621, 627 n.5. (opinion of Scalia, J.). That deference to legislative judgment was carried forward by the *Mallory* plurality and dissent alike. See *Long Arm of Consent* at 214.

A fortiori, "[t]he federal legislature has an even stronger claim to interpret the U.S. Constitution when it enacts federal consent-to-jurisdiction statutes." *Id.* at 185. Congress's "interpretations are entitled to independent weight under theories of constitutional departmentalism," which, however they may differ in their details, contend that "the constitutional interpretive authority of the federal elected branches is at its height when (i) the federal elected branches have engaged in actual, explicit constitutional reasoning and (ii) where the nature of the underlying right is unsettled." *Id.* at 248–49. With the Court having explicitly reserved the question whether the constraints on personal jurisdiction are coterminous under the Fifth and Fourteenth Amendments in *Bristol-Myers Squibb Co.* v. *Super. Ct. of Cal.*, 582 U.S. 255, 268–69 (2017), the detailed findings of Congress in enacting the PSJVTA are entitled to substantial deference.

B. Similar weight should be accorded the judgment of Congress in passing the PSJVTA in explicit response to decisions dismissing the *Fuld* and *Sokolow* cases for want of personal jurisdiction, just as an earlier Congress passed the Antiterrorism Clarification Act (ATCA) in response to *Waldman* v. *Palestine Liberation Org.*, 835 F.3d 317 (2d Cir. 2016),

cert denied sub nom. Sokolow v. *Palestine Liberation Org.*, 584 U.S. 915 (2018).

This Court has often looked to the judgment of the elected branches when considering traditional bases of jurisdiction. For instance, two great pre-*Mallory* precedents, *Shaffer* v. *Heitner*, 433 U.S. 186 (1977), and *Burnham* took different approaches, but plainly agreed that the judgment of the elected branches matters. See *Long Arm of Consent* at 217–20. *Shaffer* was careful to note that its result might have differed if Delaware had "enacted a statute that treats acceptance of a directorship as consent to jurisdiction in the State." 433 U.S. at 216. And the Delaware General Assembly enacted just such a statute within two weeks of the *Shaffer* decision, see 10 Del. C. § 3114(a), which has consistently survived constitutional scrutiny. See Aaron D. Simowitz, *Jurisdiction as Dialogue*, 52 N.Y.U. J. Int'l L. & Pol. 485, 511–13 (2020). Though Justice Scalia's plurality in *Burnham* turned away from some aspects of *Shaffer*, it also placed great weight on the unanimous judgment of state legislatures not to remove "tag jurisdiction" from their long-arm statutes. 495 U.S. at 627.

Congress's response to generally applicable judicially created limitations on personal jurisdiction, in the form of statutes like the ATCA and the PSJVTA, may be best characterized as a prime example of the elected branches engaged in an ongoing dialogue with the judicial branch as to legislative priorities that require courts to engage

with the elected branches' own claims to interpreting the Constitution. See *Jurisdiction as Dialogue* at 527–31; *id.* at 528 ("[T]here is good reason to think that [the regulatory priorities of the elected branches] should inform the underlying structure of jurisdiction.").

Yet the decision below refused to engage with these considerations at all—a point not lost on the elected branches. See No. 24-20, Brief Amici Curiae of Sen. Charles Grassley, et al. in Support of Certiorari, at 23 ("In the end, the lower court's constitutional analysis amounts to little else beyond a disagreement between one circuit court and Congress itself on complex questions of foreign policy—including the proper way to conduct an anti-terror campaign[.]"); No. 24-20, Brief Amicus Curiae of Secretary Mike Pompeo in Support of Certiorari, at 3 ("The decision below—invalidating [an antiterrorism policy] created in coordination with the State Department and enacted with bipartisan support—frustrates the political branches' considered attempt to minimize the terror risk overseas."); cf. No. 24-20, Brief Amicus Curiae of the U.S. House of Representatives in Support of Certiorari, at 8 ("If the Fifth Amendment's Due Process Clause precludes Congress from providing American victims of international terrorism an effective civil remedy in most circumstances, this Court should be the one to say so.").

Given these considerations, one need not take a maximalist view of the Fifth Amendment's Due Process Clause to appreciate that the Second Circuit

went astray in holding it coterminous with that of the Fourteenth Amendment. Cf. Stephen E. Sachs, *The Unlimited Jurisdiction of the Federal Courts*, 106 Va. L. Rev. 1703, 1710 (2020) ("[A]s to the scope of the courts' territorial jurisdiction, the [Fifth Amendment's Due Process] Clause has nothing to say."). Although the judicial branch has long served as an arbiter of interstate federalism and state assertions of jurisdiction, it is not the "arbiter of foreign relations." Aaron D. Simowitz, *Federal Personal Jurisdiction and Constitutional Authority*, 56 N.Y.U. J. Int'l L. & Pol. 345, 362 (2024).

Taken together, the institutional competence of the elected branches to make decisions in the field of foreign relations, the deference owed those decisions, and appreciation for the elected branches' exercise of constitutional interpretation require that the elected branches of the federal government should generally be competent to authorize personal jurisdiction without the need for judicial scrutiny under the Due Process Clause of the Fifth Amendment. See *id.* at 363. To the extent the Court does not consider the Second Circuit's misapplication of *Mallory* and this Court's other consent-based personal jurisdiction caselaw conclusive, proper consideration of the elected branches' interpretive and structural authority favors the constitutionality of the PSJVTA.

CONCLUSION

The decisions below should be reversed.

Respectfully submitted,

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February 4, 2025

APPENDIX

TABLE OF APPENDICES

APPENDIX A—LIST OF *AMICI CURIAE* 1a

APPENDIX A—LIST OF *AMICI CURIAE*[*]

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