Nos. 24-20 and 24-151

In the Supreme Court of the United States

MIRIAM FULD, ET AL., PETITIONERS

v.

PALESTINE LIBERATION ORGANIZATION, ET AL.

UNITED STATES OF AMERICA, PETITIONER

v.

PALESTINE LIBERATION ORGANIZATION, ET AL.

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

REPLY BRIEF FOR THE FEDERAL PETITIONER

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Although the Fourteenth Amendment constrains the States' exercise of personal jurisdiction, a party's constructive consent is a proper ground for exercising that jurisdiction where, as here, it is based on voluntary conduct and is otherwise fair and not exorbitant. This Court can decide this case by applying that Fourteenth Amendment standard to the Act of Congress at issue here. But in addition, the Constitution, including the Fifth Amendment, at a minimum affords Congress broader power and greater flexibility to provide for the exercise of personal jurisdiction by federal courts, par-

ticularly in contexts implicating foreign affairs and national security.

Congress passed and the President signed the Promoting Security and Justice for Victims of Terrorism Act of 2019 (Act), Pub. L. No. 116-94, Div. J, Tit. IX, § 903, 133 Stat. 3082, in accordance with those constitutional principles, to further the Nation's foreign policy, protect national security, and provide a means to seek compensation for U.S. victims of terrorism in which respondents played a role. The Act provides that respondents, the Palestine Liberation Organization (PLO) and the Palestinian Authority (PA), can continue to avoid victims' lawsuits under the Antiterrorism Act of 1990 (ATA), Pub. L. No. 101-519, § 132, 104 Stat. 2250 (18 U.S.C. 2331 *et seq.*), if they (a) cease making so-called "martyr payments" for Palestinian terrorists who injured or killed Americans, and (b) forgo any operations on U.S. soil, except for those necessary for their role at the United Nations or for specific interactions, such as with U.S. officials. See 18 U.S.C. 2334(e).* Otherwise, respondents would be deemed to consent to personal jurisdiction in ATA suits.

Respondents did not conform their actions to those conditions, despite having promptly done so in response to conditions in a predecessor statute, the Anti-Terrorism Clarification Act of 2018 (ATCA), Pub. L. No. 115-253, 132 Stat. 3183. See U.S. Br. 10-11. Respondents indisputably continued to make the covered payments, and they allegedly continued to engage in nonexempt activities in the United States. So the plaintiffs in these

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* As in our opening brief, all citations of 18 U.S.C. 2334(e) in this brief refer to the statute as set forth in Supplement IV (2022) of the United States Code, and all references to "Pet. App." are to the petition appendix in No. 24-20.

cases, terrorism victims and their families, properly invoked the Act as a basis for personal jurisdiction over respondents.

Respondents are wrong in contending that the Act is unconstitutional under the Fifth Amendment's Due Process Clause, which they mistakenly view as imposing schematic and rigid restrictions on personal jurisdiction they purport to find in Fourteenth Amendment case law. The Act provides a fair and reasonable basis for establishing personal jurisdiction by deeming specified actions having a U.S. nexus as submission to the jurisdiction of U.S. courts. The Act's constitutionality is especially clear in light of respondents' unique status as non-sovereign foreign entities that exercise governmental functions and have been the subject of a distinctive and multifaceted U.S. policy for decades. If due process permits a State to deem any registered business to consent to suit on *any* claim, see *Mallory* v. *Norfolk S. Ry. Co.*, 600 U.S. 122 (2023), then surely this far more narrowly focused Act of Congress is constitutional.

Respondents' approach to personal jurisdiction essentially ignores the foregoing features and principles supporting the Act. Instead, respondents offer differing accounts of when a party may be deemed to consent to personal jurisdiction under the Fourteenth Amendment. But in the end, their due process claim reduces to the mere assertion (Resp. Br. 2, 41) that their actions did not signify actual "submission to personal jurisdiction in the United States" or "support a presumption" of actual submission. They seemingly contend that a party cannot be deemed to consent to personal jurisdiction based on conduct that is insufficient to establish "general" or "specific" jurisdiction—a thesis this Court

has rejected in a long line of precedents accepting constructive consent as a separate basis for personal jurisdiction, most recently in *Mallory*. Most fundamentally, however, respondents wrongly treat the Act like an aberrant state law, rather than an Act of Congress that is subject to distinct constitutional analysis under the Fifth Amendment and rests on sensitive determinations of foreign policy and national security by the political Branches, to which the courts owe great deference. The judgments of the court of appeals should be reversed.

A. The Act Fairly And Reasonably Deems Respondents To Consent To Personal Jurisdiction

First and foremost, this Court could reverse the judgments below on narrow grounds. Even assuming *arguendo* that the same general due process standards govern personal jurisdiction under the Fifth Amendment as under the Fourteenth Amendment, the Act passes muster. By any measure, the Act comports with "traditional notions of fair play and substantial justice." *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316 (1945) (citation omitted). Respondents make no meaningful argument that the Act is unfair, and for good reason: any such assertion would fail.

1. Respondents misunderstand this Court's constructive-consent precedents

a. Respondents accept that a "variety of legal arrangements" can support actual or constructive consent to personal jurisdiction under the Due Process Clause of the Fourteenth Amendment. *Insurance Corp. of Ir., Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982); see Resp. Br. 27. As we have explained (U.S. Br. 24-26), constructive consent is consistent with due process if it is based on a voluntary act and is not

unfair or exorbitant—for example, where the voluntary act relates to the forum and implicates its interests. While actual consent is not required, a State may not deem any action whatsoever to constitute submission to the jurisdiction of the forum. *Ibid.* Respondents thus attack a strawman in arguing (Br. 3, 27, 41-42) that constructive consent cannot be decreed at the lawmaker's whim.

Respondents object that the constitutional standard we submit is applicable in this case—that constructive consent is consistent with due process if based on a voluntary act and is not unfair or exorbitant—is "ad hoc" and "'flexible.'" Br. 39 (citation omitted). But due process, both in general and as applied to personal jurisdiction, resists "mechanical or quantitative" analysis. *International Shoe*, 326 U.S. at 319; see *Jennings* v. *Rodriguez*, 583 U.S. 281, 314 (2018). No inflexible standard would encompass all the various bases for personal jurisdiction, and the different forms of constructive consent in particular, that this Court has upheld under the Fourteenth Amendment. It is the basic requirements of fairness and absence of exorbitance in the particular context that undergirds them all.

Accordingly, the same sorts of fairness factors that this Court has considered in non-consent "minimum contacts" cases also inform the due process inquiry in consent cases, contra Resp. Br. 40. Whether a party may be deemed to submit to the court's jurisdiction by not complying with jurisdictional discovery orders, for example, can depend on considerations like the extent to which the party was warned of the jurisdictional consequence and the reasonableness of that consequence. See *Insurance Corp.*, 456 U.S. at 707-708; cf. *Hovey* v. *Elliott*, 167 U.S. 409, 444 (1897) (entering judgment as

"punish[ment]" for contempt violated due process). Whether a visiting motorist may be deemed to consent to personal jurisdiction in the courts of a State by driving on its public highways can depend on whether the consent statute ensures adequate notice of any suit. See *Wuchter* v. *Pizzutti*, 276 U.S. 13, 18-19 (1928) (distinguishing *Hess* v. *Pawloski*, 274 U.S. 352 (1927), on that basis). The question is whether, under the circumstances, a finding of constructive consent to personal jurisdiction in the forum is "so deeply unfair that it violates the [defendant's] constitutional right to due process." *Mallory*, 600 U.S. at 153 (Alito, J., concurring in part and concurring in the judgment); see *id.* at 146 n.11 (plurality opinion).

b. Respondents offer no plausible alternative standard for distinguishing valid constructive consent to personal jurisdiction from an unconstitutional "mere assertion" of judicial power over a foreign defendant. *Chicago Life Ins. Co.* v. *Cherry*, 244 U.S. 25, 29 (1917); see *id.* at 29-30 ("what acts of the defendant shall be deemed a submission to [a court's] power is a matter upon which States may differ").

Rather, respondents repeatedly imply that constructive consent is not a viable basis for personal jurisdiction *at all*, despite the "legion of precedents" to the contrary. *Mallory*, 600 U.S. at 145 (plurality opinion). They recurringly posit (Resp. Br. 1, 29, 33-35, 38-39, 68-69) that consent cannot be premised on conduct that has been found insufficient for general or specific personal jurisdiction under a minimum-contacts theory (see U.S. Br. 22). That is clearly wrong. This Court has recognized consent as an independent basis for personal jurisdiction from the start. See *Mallory*, 600 U.S. at 138,

145 (plurality opinion) (citing, *e.g.*, *York* v. *Texas*, 137 U.S. 15, 19-21 (1890)); *id.* at 167 (Barrett, J., dissenting).

Nor, contrary to respondents' contention, may a defendant be deemed to submit to the jurisdiction of the forum's courts only if it harbors an actual "intention to submit." Br. 29 (citation omitted). Constructive consent does not require the defendant to have "*really* submitted to proceedings" in the forum State—that is what makes the consent constructive. *Mallory*, 600 U.S. at 144 (plurality opinion). In suggesting otherwise, respondents rely on an inapplicable decision addressing state sovereign immunity, *College Savings Bank* v. *Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999). Resp. Br. 10, 12, 21-23 & n.7, 41; cf. U.S. Br. 39-40. But while constructive consent may not be "commonly associated" with many other constitutional protections, such as state sovereign immunity, Resp. Br. 23 n.7 (quoting *College Sav. Bank*, 527 U.S. at 681), it *has* been associated with the one at issue here—due process constraints on personal jurisdiction—for more than a century. See, *e.g.*, *Pennsylvania Fire Ins. Co.* v. *Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917).

When respondents do acknowledge the possibility of constructive consent to personal jurisdiction, they initially gesture toward the categories that the Second Circuit recognized below. They thus suggest that consent can be grounded only in the defendant's "actions in the litigation itself" or its "acceptance of a government benefit or privilege." Resp. Br. 19, 22-23; cf. Pet. App. 24a ("litigation-related activities or reciprocal bargains"). But, like the court of appeals, they never explain what unites those categories to the exclusion of others. See U.S. Br. 39.

Any such effort would be unavailing. The reason why certain litigation conduct and reciprocal bargains can be deemed consent to personal jurisdiction is because the consent is based on voluntary action and it is fundamentally fair in the circumstances to establish personal jurisdiction as a consequence. For instance, consent based on a defendant's voluntary litigation conduct can be effective when the conduct itself suggests the defendant lacks a sound defense to personal jurisdiction. See Resp. Br. 20-21 (discussing *Insurance Corp.*, 456 U.S. at 705). But other forms of litigation activity can suffice too, despite the absence of any similar inference, because consent is grounded in voluntary action that is fairly regarded as submission to the court's jurisdiction. See *Adam* v. *Saenger*, 303 U.S. 59, 67-68 (1938) (filing suit in state court was validly deemed consent to jurisdiction on a counterclaim).

In the end, however, respondents appear to agree that "other conduct" besides litigation activity and exchanges of benefits may "'amount[] to a legal submission to the jurisdiction of the court,'" consistent with due process. Br. 27 (quoting *Insurance Corp.*, 456 U.S. at 704-705). The Fourteenth Amendment requires only that such conduct be voluntary and the exercise of personal jurisdiction not be unfair or exorbitant.

2. The Act is consistent with Fourteenth Amendment due process principles

a. The Act comfortably satisfies that standard. No one disputes that the conduct giving rise to consent under the statute's "payments" and "activities" prongs is voluntary. 18 U.S.C. 2334(e)(1)(A) and (B); see U.S. Br. 27. And the Act is eminently fair and reasonable. Respondents are sophisticated entities that exercise governmental functions and operate on the international

plane, and they have had a long, distinctive, and multifaceted relationship with the United States. U.S. Br. 28-30. That course of dealing has entailed reciprocal undertakings and substantial benefits conferred and conditions imposed by the United States on respondents, and engagement on respondents' relation to acts of terrorism affecting U.S. nationals has been a central concern of the United States for many years. Respondents have also long had a presence in the United States, and they have litigated numerous ATA cases here. Importantly, the actions triggering consent *and* the narrow set of cases covered by the Act involve U.S. territory or nationals, and the Act serves vital U.S. interests. Cf. *Mallory*, 600 U.S. at 164 (Barrett, J., dissenting) (consent statute extended to cases "with no connection whatsoever to the forum"). Respondents were made fully aware of the conduct that would be deemed consent under the Act, concededly engaged in covered conduct, and thereby submitted to federal-court jurisdiction under the Act's tailored terms.

Tellingly, respondents do not complain of any lack of notice or contend that litigating these cases in the United States would force them to bear an unfair or unmanageable burden. And respondents recognize that if they were natural persons, mere service of process in this country would establish "tag" jurisdiction over them; their only response (Br. 50) is that they are not natural persons, but rather entities that act through "ambassador[s]" and other agents. Respondents do not explain why that distinction should be dispositive, or why this consequence of their rigid and restrictive due process theory does not seriously undermine that theory. See Pet. App. 239a, 247a-248a (Menashi, J., dissenting from denial of rehearing en banc).

Respondents also do not dispute (Br. 43) that if the United States recognized them as sovereigns, they would not have constitutional due process rights at all. Respondents just note that they would then possess sovereign immunity under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. 1330, 1441(d), 1602 *et seq.* But the scope of that immunity is defined by the FSIA, with due regard for the United States' obligations to the community of nations. See *Republic of Iraq* v. *Beaty*, 556 U.S. 848, 856-857 (2009). Respondents' rejoinder does not support their claim to a *constitutional* right to avoid jurisdiction in these cases. It would be bizarre to afford such a right to respondents based on their natural-person and non-sovereign status, but not to other parties that are similarly situated in relevant respects.

b. Respondents nevertheless maintain (Br. 28) that neither of the two forms of "predicate conduct" triggering constructive consent under the Act "provides a valid basis for 'deeming' that Respondents have 'consented' to jurisdiction." Respondents are wrong.

i. Consider the Act's payments prong, 18 U.S.C. 2334(e)(1)(A). Besides insisting that the payments for terrorists do not suffice for specific jurisdiction—which is beside the point, see pp. 6-7, *supra*—respondents emphasize (Br. 28-30) that those payments do not require the United States' authorization. That is beside the point as well. The defendant in *Hess* v. *Pawloski*, for example, did not need Massachusetts' permission to drive on its highways. 274 U.S. at 353; see *United States* v. *Guest*, 383 U.S. 745, 757 (1966) (describing "[t]he constitutional right to travel from one State to another, and necessarily to use the highways and other instrumentalities of interstate commerce in doing so"). That did not mean

the Commonwealth violated due process by enacting a law deeming visiting motorists to consent to personal jurisdiction. See *Hess*, 274 U.S. at 356-357. Moreover, respondents seem to concede (Br. 30) that Congress could enact legislation *penalizing* the covered payments by respondents. It would be a strange constitutional rule that nonetheless barred Congress from attaching consequences to those payments in the manner it chose here.

Respondents also claim (Br. 31) to have "formally revoked" the payments program last month. Whether the revocation is a matter of form or substance remains to be seen. See Adam Rasgon & Aaron Boxerman, *Palestinian Leader Ends Payments to Prisoners Jailed by Israel*, N.Y. Times, Feb. 12, 2025, at A8 ("Both U.S. and Israeli officials will closely monitor the implementation of the new policy to see whether it leads to a genuine shift."). More to the point, respondents concede that they persisted in making covered payments after the payments prong's effective date. Pet. App. 16a n.5. The program's purported revocation could only matter if respondents sustained it for five years. See 18 U.S.C. 2334(e)(1)(A) and (2). For present purposes, then, this development is relevant only insofar as it reinforces the voluntariness of the payments and supports the political Branches' judgment that the Act is an effective means of discouraging payments that incentivize terrorism—a longstanding foreign-policy and national-security priority of the United States. See U.S. Br. 29, 35-37.

ii. Respondents take much the same flawed approach to the activities prong, 18 U.S.C. 2334(e)(1)(B). They note that the covered activities do not render respondents "at home" and subject to general jurisdiction

in the United States for any claim, Br. 33, 35, 38-39, even though no one at this point suggests otherwise.

Then, following the Second Circuit's lead, respondents contend that the Act does not embody a valid exchange of benefits—which is not required in any event, see pp. 7-8, *supra*—because the Act itself "does not authorize Respondents to enter the United States, or to conduct any activities here." Br. 36; see Pet. App. 28a-29a. But they concede (Br. 38) that the Act's predecessor, the ATCA, was constitutional, even though that law likewise did not itself authorize any activities in the United States. The ATCA referred to possible authorization through other legal means: it deemed respondents to consent to personal jurisdiction if they engaged in certain U.S. activities while "benefiting from a waiver or suspension of section 1003 of the Anti-Terrorism Act of 1987," § 4(a), 132 Stat. 3184, which largely prohibits the PLO from operating in the United States. Respondents do not explain why it matters under the Due Process Clause whether the covered activities are permitted in the United States via a formal "waiver or suspension," *ibid.*; lawful by virtue of limits on statutory restrictions governing respondents' U.S. activities, see U.S. Br. 42 (discussing the Palestinian Anti-Terrorism Act of 2006, Pub. L. No. 109-446, § 7, 120 Stat. 3324 (22 U.S.C. 2378b note)); allowed as a matter of enforcement discretion, *id.* at 42-43; or are not authorized at all, Pet. App. 249a-250a (Menashi, J., dissenting from denial of rehearing en banc). Even if an exchange were required in this context, the Act contemplates one.

Respondents dispute at length (Br. 34, 70-77) the plaintiffs' allegations that respondents triggered the activities prong. That issue is not properly before this Court because the court of appeals held the Act facially

unconstitutional, without determining whether the activities prong was satisfied. U.S. Br. 14-15; see *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (this Court is one "of review, not of first view"). But respondents' effort to minimize the extent of their U.S. activities does highlight a basic flaw in the court of appeals' reasoning. Under the court's logic, respondents would be constitutionally entitled to avoid ATA suits—and potential accountability for involvement in acts of terror that injured or killed Americans—even if respondents engaged in extensive activities on U.S. soil. Due process does not demand such a bizarre and inequitable result.

B. Congress In Any Event Has Broader Authority Than A State To Provide For Personal Jurisdiction

The Act would be constitutional even if it did not satisfy due process limits on personal jurisdiction as articulated under the Fourteenth Amendment in cases involving state courts' exercises of personal jurisdiction. This case arises in a starkly different context: It involves an Act of Congress providing for personal jurisdiction over sui generis foreign entities in federal cases affecting U.S. nationals and involving vital interests of the Nation as a whole. The political Branches have broad constitutional power in the realms of foreign relations and national security, and their judgment concerning appropriate measures to be taken in those realms and the interests of foreign parties affected are entitled to great weight. *Hernandez* v. *Mesa*, 589 U.S. 93, 103-104 (2020). Congress also has unquestioned authority to regulate the jurisdiction of the federal courts, including personal jurisdiction. See, *e.g.*, *In re Sealed Case*, 932 F.3d 915, 925 (D.C. Cir. 2019) (collecting federal statutes authorizing nationwide service of process). Particularly in the context presented here, but more

generally too, the Fifth Amendment affords Congress greater flexibility to provide for personal jurisdiction than the Fourteenth Amendment affords the States. The court of appeals erred in holding otherwise.

1. The Fifth and Fourteenth Amendments do not restrict personal jurisdiction in parallel

a. As we have noted (U.S. Br. 21-22), this Court has repeatedly reserved the question whether the Fifth and Fourteenth Amendments impose the same limits on federal and state courts' exercise of personal jurisdiction. But it is hard to see how they could. A central purpose of Fourteenth Amendment "jurisdictional due process" is safeguarding federalism, by ensuring that States do not exceed territorial limits on their sovereignty and adjudicate disputes that, in our federal system, are not properly their business. See *Ford Motor Co.* v. *Montana Eighth Jud. Dist. Ct.*, 592 U.S. 351, 360 (2021); *Bristol-Meyers Squibb Co.* v. *Superior Ct.*, 582 U.S. 255, 263 (2017). The personal rights of litigants as against a particular State's assertion of jurisdiction must be understood in light of our constitutional structure of separate States functioning under reciprocal territorial limitations. Thus, like the court of appeals, see Pet. App. 48a, respondents overread (Br. 15) statements in *Insurance Corp.*, 456 U.S. at 702 & n.10, that downplay—contrary to many other precedents, like *Ford Motor* and *Bristol-Myers Squibb*—the role that federalism plays in the due process inquiry under the Fourteenth Amendment. See 4 Charles Alan Wright et al., *Federal Practice and Procedure* § 1067.1, at 381 (4th ed. 2015) (Wright) (noting that "it does not seem plausible" to read federalism out of the analysis).

Federalism concerns, of course, are inapplicable when Congress provides for the exercise of personal ju-

risdiction over foreign defendants in federal court. See U.S. Br. 31-34. The Second Circuit nevertheless held that "the due process analyses under the Fifth and Fourteenth Amendments parallel one another in civil cases." Pet. App. 47a.

Respondents' defense of that holding is unpersuasive. Indeed, they initially defend it (Br. 47-48) only for "*consent* statute[s]," principally citing Justice Alito's opinion in *Mallory* for the notion that federalism concerns "play no role" in the consent context. But Justice Alito's opinion did not endorse that proposition. He merely concluded that "the most appropriate home" for federalism concerns in consent cases is the "dormant Commerce Clause." *Mallory*, 600 U.S. at 150 (Alito, J., concurring in part and concurring in the judgment); see *id.* at 154-163.

Nor is respondents' proposition tenable. To be sure, an individual defendant's actual consent to suit may pose little threat to the integrity of the Union's federal structure, just as an individual defendant's waiver of his right to counsel does not threaten the vitality of the Sixth Amendment. But some state laws deeming parties to constructively consent to personal jurisdiction could pose an obvious risk of "subvert[ing] interstate federalism." U.S. Amicus Br. at 4, *Mallory*, *supra* (No. 21-1168). Federal statutes like the Act in this case present no such danger, and Congress thus enjoys broader authority than a State to provide for constructive consent to personal jurisdiction by foreign defendants. Which "particular constitutional provision" embodies these principles is not of paramount importance, *Attorney Gen.* v. *Soto-Lopez*, 476 U.S. 898, 902-903 (1986) (plurality opinion), as respondents elsewhere agree, Br. 63.

In the alternative, respondents endorse (Br. 48-50) the more categorical view, held by the Second Circuit in this case and several of its sister circuits, that the Fifth and Fourteenth Amendment rules for personal jurisdiction are the same across the board. But neither the textual parallels between the Due Process Clauses nor individual-liberty interests support that simplistic understanding. See U.S. Br. 31-32, 45-46. This Court's repeated indications that Fifth and Fourteenth Amendment due process may differ foreshadowed cases like this. As the Court noted in *French* v. *Barber Asphalt Paving Co.*, 181 U.S. 324 (1901), the two Due Process Clauses "were ingrafted upon the Constitution at different times and in widely different circumstances of our national life," so "it may be that questions may arise in which different constructions and applications of their provisions may be proper." *Id.* at 328.

b. Respondents' concerns (Br. 42-43) about potentially limitless congressional power to provide for personal jurisdiction over foreign defendants are unfounded. Congress has always enjoyed broad authority "to impose jurisdiction over *domestic* defendants" in "federal question case[s]" because, as the courts of appeals agree, the Fifth Amendment at most requires the defendant to have minimum contacts with the United States as a whole, which domestic defendants have by definition. Resp. Br. 42 (emphasis added); see 4 Wright § 1068.1, at 691-692, 734-737 & n.92.

Respondents' concerns are overstated as to foreign defendants too. Because the Act here is narrowly drawn, this case can be decided without any need to identify the outer limits of the Fifth Amendment regarding other classes of foreign defendants. U.S. Br. 34, 47; contra Resp. Br. 42. At the same time and for similar reasons,

the Court also need not address the plaintiffs' contrary assertion (24-20 Pet. Br. 16-29) that the Fifth Amendment, as a matter of original meaning, has nothing to say on the subject of personal jurisdiction. The main academic proponent of that theory agrees. See Sachs Amicus Br. 6 ("The Court may uphold [the Act] while leaving open the outer limits of what the Fifth Amendment might permit, just as it has for the last two hundred years.").

This Court should certainly not accept respondents' historical arguments, which theorize (Br. 58-64, 66-68) that due process originally confined courts to exercising personal jurisdiction over parties within their territorial jurisdiction and barred personal-jurisdiction statutes that were not generally applicable. As the plaintiffs explain (24-20 Pet. Br. 20-23), however, there is scant Founding-era evidence regarding due process limits on personal jurisdiction. And respondents' contention would perversely subject the federal government to *greater* constitutional constraints than the States, which—as shown by *Mallory* and other precedents—may provide for personal jurisdiction over defendants located beyond their borders in some circumstances. See *Burnham* v. *Superior Ct.*, 495 U.S. 604, 618 (1990) (plurality opinion) ("Due process does not necessarily *require* the States to adhere to the unbending territorial limits on jurisdiction set forth in *Pennoyer* [v. *Neff*, 95 U.S. 714 (1878)]."). No authority supports respondents' restrictive theory of due process under the Fifth Amendment, and this Court should reject it.

2. The political Branches' foreign-policy and national-security judgments carry great weight

a. Respondents' contention would also deprive the political Branches of an important means of exercising

their constitutional authorities in the realms of foreign affairs and national security. U.S. Br. 36-37. Respondents are sui generis foreign non-sovereign entities that exercise governmental functions and engage officially with countries around the world. Resp. Br. 46. The Act is an important component of a decades-long, multifaceted effort by the United States, through numerous legislative and executive actions, to induce respondents to cease supporting terrorism—"an urgent objective of the highest order," *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 28 (2010). See U.S. Br. 34-38; see also *id.* at 6-13 (canvassing history of U.S. relations with respondents). Under the Act, respondents must either stop making payments for terrorists who harm Americans and refrain from U.S.-based activities, or else be deemed to submit to federal-court jurisdiction in ATA suits. Both routes offer important benefits to U.S. national security and foreign policy, and due process does not place either one off-limits.

The Act's importance is unaffected by the Solicitor General's observation at an earlier stage of the *Sokolow* litigation that the United States also has other means of pursuing its antiterrorism objectives, such as bringing criminal prosecutions for acts of terrorism. See Resp. Br. 6. ATA suits are an important complement to those tools, as Congress recognized in enacting and strengthening the ATA. See, *e.g.*, Justice Against Sponsors of Terrorism Act, Pub. L. No. 114-222, § 4, 130 Stat. 854 (2016). The United States thus has always maintained that "[p]rivate actions under the Anti-Terrorism Act are an important means of fighting terrorism and providing redress for victims of terrorist attacks and their families." U.S. Amicus Br. at 7, *Sokolow* v. *Palestine Liberation Org.*, No. 16-1071 (Feb. 22, 2018).

Since 2018, Congress, with the President's approval, has strongly reinforced that position by enacting the ATCA and then replacing it with the law at issue here. And in statutes like the Taylor Force Act, Pub. L. No. 115-141, Div. S, Tit. X, 132 Stat. 1143 (22 U.S.C. 2378c-1 note), the political Branches have likewise reaffirmed the United States' strong interest in using all appropriate means to address respondents' support for terrorism. U.S. Br. 8.

By contrast, given the territorial limits on state authority, a State could not enact an extraterritorial statute like the ATA. U.S. Br. 33. And by virtue of the federal government's "broad authority over foreign affairs," *Toll* v. *Moreno*, 458 U.S. 1, 10 (1982), no State could engage with foreign actors like respondents in the way that the United States has done. Those critical differences necessitate a different due process analysis of this Act of Congress as compared to a state personal-jurisdiction law.

b. Respondents essentially concede (Br. 45-46, 51) that they have a unique status and relationship with the United States involving a long-running exchange of undertakings, restrictions, concessions, and other commitments. But they deny the significance of that context. At the threshold, respondents claim (Br. 52) that the government "waived" this point, even though it plainly made the argument below. See, *e.g.*, *Fuld* Gov't C.A. Br. 24 (emphasizing that "[t]he PA and PLO are *sui generis* foreign entities that exercise governmental power but have not been recognized as a sovereign government by the Executive Branch, and that have a unique relationship with the United States"); *Sokolow* Gov't C.A. Br. 22 (same).

On the merits, respondents contend (Br. 43-44, 69-70) that the Act's careful tailoring to cover only respondents and their successors and affiliates, 18 U.S.C. 2334(e)(5), is not a virtue, but a due process flaw. That contention is without merit. "While legislatures usually act through laws of general applicability, that is by no means their only legitimate mode of action." *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 239 n.9 (1995). This Court has regularly "upheld as a valid exercise of Congress' legislative power diverse laws that governed one or a very small number of specific subjects." *Bank Markazi* v. *Peterson*, 578 U.S. 212, 234 (2016); see *ibid.* (collecting cases); see also, *e.g.*, *TikTok Inc.* v. *Garland*, 145 S. Ct. 57 (2025). Respondents' position is also impossible to square with their acceptance (Br. 37-38) of the constitutionality of the ATCA, which was also narrowly scoped.

Although narrow laws may raise constitutional concerns "if arbitrary or inadequately justified," *Bank Markazi*, 578 U.S. at 234 n.27, respondents do not attempt such a showing with respect to this Act. Nor could they. Respondents' history of relations with and activities in the United States, their frequent litigation under the ATA (the enactment of which was prompted by PLO terrorist activities, see U.S. Br. 8), their presence at the United Nations and prominence in the international arena, and other distinctive factors made it reasonable for Congress to limit the Act's scope to respondents. Other foreign entities involved in terrorism—such as Hamas, Hezbollah, and the Islamic State—are not valid comparators in these respects, contra Resp. Br. 46. That Congress has chosen different methods to address their threats to U.S. interests, see, *e.g.*, 22 U.S.C. 9402(b)(5) (requiring an Executive Branch assessment

of Iran's support for Hezbollah, Hamas, et al.), does not pose any constitutional issue, much less one fit for judicial resolution.

c. The Second Circuit nevertheless engaged in the same kind of second-guessing of the political Branches urged by respondents, ignoring that "[t]he political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns." *Hernandez*, 589 U.S. at 103-104. The court of appeals deprecated the Act's payments prong, for instance, by noting that "Congress has a variety of other tools at its disposal for discouraging the payments in question." Pet. App. 27a. And it backhandedly acknowledged the sensitive questions of foreign and national-security policy that underlie the Act only after already deeming the statute invalid—having assessed its constitutionality under precedents predominantly involving state courts' assertion of personal jurisdiction over garden-variety domestic entities (or cases not involving personal jurisdiction at all, like *College Savings Bank*). *Id.* at 45a-46a; see *id.* at 16a-24a.

As "an exercise of congressional authority regarding foreign affairs, a domain in which the controlling role of the political branches is both necessary and proper," the Act "warrants respectful review by courts." *Bank Markazi*, 578 U.S. at 215, 234; accord *TikTok*, 145 S. Ct. at 70 (affording "substantial respect" to "the Government's 'informed judgment'" in matters of national security and foreign policy) (citation omitted). That does not mean "abdication of the judicial role." See *Humanitarian Law Project*, 561 U.S. at 34. But it does mean the Second Circuit erred by treating the Act as equivalent to a state personal-jurisdiction law and by assigning no discernible weight to the political Branches'

judgments in their proper constitutional domain. The Act satisfies the Fifth Amendment.

C. Separation-of-Powers Principles Support Reversal

Respondents also contend (Br. 68-70), principally relying on *Bank Markazi*, *supra*, that the Act offends the separation of powers by directing courts to find consent based on actions that do not independently establish personal jurisdiction. As we have noted, however, see pp. 6-7, *supra*, constructive consent is a long-recognized and independent basis for personal jurisdiction. Any constructive-consent statute will provide for courts to deem certain conduct, if they find it occurred, as submission to the jurisdiction of the courts.

The Act comports with the separation of powers for much the same reason as did the statute the Court upheld in *Bank Markazi* (which likewise involved civil terrorism suits against foreign actors): it creates "a new legal standard" for courts to apply, rather than usurping the judicial function by simply directing a result under existing law. 578 U.S. at 230. Indeed, the law in *Bank Markazi* rendered specific assets available to satisfy judgments in specific proceedings identified by district-court docket number. *Id.* at 215; see 22 U.S.C. 8772. By contrast, the Act here covers ATA suits against respondents as a class; sets a prospective legal standard that would or would not be triggered; and provides a basis for exercising jurisdiction with full notice to respondents of the actions that would trigger it. 18 U.S.C. 2334(e). That is a quintessentially legislative provision, not an adjudicative measure falling outside of Congress's constitutional remit.

It is respondents' and the court of appeals' position that raises separation-of-powers concerns. The Constitution vests Congress with authority to establish infe-

rior federal courts and to regulate their jurisdiction. See U.S. Const. Art. I, § 8, Cl. 9; Art. III, § 1; *Lockerty* v. *Phillips*, 319 U.S. 182, 187-188 (1943). Congress's exercises of that authority, like its other enactments, are entitled to a presumption of constitutionality. *United States* v. *Morrison*, 529 U.S. 598, 607 (2000). And that presumption carries particular weight when the political Branches act, as here, in the realm of foreign affairs, where their "controlling role * * * is both necessary and proper" under our constitutional structure. *Bank Markazi*, 578 U.S. at 234. In holding the Act unconstitutional, the court of appeals disregarded those fundamental principles.

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For the foregoing reasons and those stated in our opening brief, the judgments of the court of appeals should be reversed.

Respectfully submitted.

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