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

REPLY BRIEF FOR PETITIONERS MIRIAM FULD, ET AL.

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TABLE OF CONTENTS

Page

Argument 3

I. The PSJVTA Satisfies Fifth Amendment Standards 3

  A. The PSJVTA Comports With The Original Public Meaning Of The Due Process Clause 3

  B. The PSJVTA Comports With This Court's Fifth Amendment Precedents 8

II. The PSJVTA Satisfies Fourteenth Amendment Standards 12

  A. Respondents' Proposed Legal Standard Is Incorrect 12

  B. Respondents' U.S. Activities Meet Their Own Test 19

III. Respondents' Alternative Grounds For Affirmance Are Meritless 20

Conclusion 21

Appendix: List of Cases Holding That The Exercise Of Personal Jurisdiction Would Violate the Fourteenth Amendment 1a

TABLE OF AUTHORITIES

Cases Page(s)

Bank Markazi v. *Peterson*,
578 U.S. 212 (2016) 20, 21

Birchfield v. *North Dakota*,
579 U.S. 438 (2016) 17

Bristol-Myers Squibb Co. v. *Superior Ct. of Cal.*,
582 U.S. 255 (2017) 8, 12

Burnet v. *Brooks*,
288 U.S. 378 (1933) 8

Calder v. *Bull*,
3 U.S. (3 Dall.) 386 (1798) 5

Carnival Cruise Lines, Inc. v. *Shute*,
499 U.S. 585 (1991) 15

City of Boerne v. *Flores*,
521 U.S. 507 (1997) 20

Cleveland Bd. of Educ. v. *LaFleur*,
414 U.S. 632 (1974) 16

Cohens v. *Virginia*,
19 U.S. (6 Wheat.) 264 (1821) 8

College Savings Bank v. *Fla. Prepaid Postsecondary Educ. Expense Bd.*,
527 U.S. 666 (1999) 18, 19

Cook v. *Tait*,
265 U.S. 47 (1924) 8

Cnty. of Sacramento v. *Lewis*,
523 U.S. 833 (1998) 12

Crosby v. *United States*,
506 U.S. 255 (1993) 10

Cutter v. *Wilkinson*,
544 U.S. 709 (2005) 20, 21

Cases—Continued Page(s)

Daimler AG v. *Bauman*,
571 U.S. 117 (2014) 13

DeMore v. *Kim*,
538 U.S. 510 (2003) 16

Dickerson v. *United States*,
530 U.S. 428 (2000) 20

Douglass v. *Nippon Yusen Kabushiki Kaisha*, 46
F.4th 226 (5th Cir. 2022) 9

Ford Motor Co. v. *Mont. Eighth Jud. Dist. Ct.*,
592 U.S. 351 (2021) 2, 12

Gamble v. *United States*,
587 U.S. 678 (2019) 13

Hammond Packing Co. v. *Arkansas*,
212 U.S. 322 (1909) 18

Hanson v. *Denckla*,
357 U.S. 235 (1958) 8

Herederos De Roberto Gomez Cabrera, LLC v.
Teck Res. Ltd.,
43 F.4th 1303 (11th Cir. 2022) 9

Hovey v. *Elliott*,
167 U.S. 409 (1897) 18

Ins. Corp. of Ireland v. *Compagnie des Bauxites de Guinee*,
456 U.S. 694 (1982) 2, 15, 18

J. McIntyre Mach., Ltd. v. *Nicastro*,
564 U.S. 873 (2011) 2

Jesner v. *Arab Bank, PLC*,
584 U.S. 241 (2018) 11

Logan v. *Zimmerman Brush Co.*,
455 U.S. 422 (1982) 18

Cases—Continued Page(s)

Mallory v. *Norfolk S. Ry. Co.*,
600 U.S. 122 (2023) 2, 14, 15, 16, 19

Michael H. v. *Gerald D.*,
491 U.S. 110 (1989) 16

Mills v. *Duryee*,
11 U.S. (7 Cranch) 481 (1813) 7

Morrison v. *Nat'l Australia Bank, Ltd.*,
561 U.S. 247 (2010) 3, 16

Murray's Lessee v. *Hoboken Land & Imp. Co.*, 59
U.S. (18 How.) 272 (1856) 4

Nat'l Equip. Rental, Ltd. v. *Szukhent*,
375 U.S. 311 (1964) 15

Palestine Info. Off. v. *Shultz*,
853 F.2d 932 (D.C. Cir. 1988) 13

Picquet v. *Swan*,
19 F. Cas. 609 (C.C.D. Mass. 1828) 5, 6, 7

Republic of Austria v. *Altmann*,
541 U.S. 677 (2004) 11

RJR Nabisco v. *Eur. Cmty.*,
579 U.S. 325 (2016) 9

Rose v. *Himely*,
8 U.S. (4 Cranch) 241 (1808) 5

Schooner Exchange v. *McFaddon*,
11 U.S. (7 Cranch) 116 (1812) 8

South Dakota v. *Neville*,
459 U.S. 553 (1983) 17

Turkiye Halk Bankasi A.S. v. *United States*, 598
U.S. 264 (2023) 10

United States v. *Bennett*,
232 U.S. 299 (1914) 8

Cases—Continued Page(s)

United States v. *Epskamp*,
832 F.3d 154 (2d Cir. 2016) 10

United States v. *Murillo*,
826 F.3d 152 (4th Cir. 2016) 10

Village of Willowbrook v. *Olech*,
528 U.S. 562 (2000) 5

Weinberger v. *Salfi*,
422 U.S. 749 (1975) 16, 17

Wellness Int'l Network, Ltd. v. *Sharif*,
575 U.S. 665 (2015) 1

Rules

Federal Rules of Criminal Procedure
Rule 4(c)(3)(D)(ii) 10
Rule 4 (2016 Amendment) 10
Rule 43(b)(1) 10

Statutes

18 U.S.C.
§ 2334(e)(2) 13
§ 2334(e)(3)(B) 21

28 U.S.C. § 1605B 11

31 U.S.C. § 5318(k)(3) 14

Judiciary Act of 1789, Ch. 20, § 11, 1 Stat. 79 6

Other Authorities

International Convention for the Suppression of the Financing of Terrorism (1999), Arts. 5, 7(2)(a), S. Treaty Doc. No. 106-49, 2178 U.N.T.S. 232 11

Moore's Federal Practice—Civil (2020) 20

Palestinian 'Pay-for-Slay' Rises Again, Wall St. J. (Feb. 26, 2025) 13

Other Authorities—Continued Page(s)

Joseph Story, *Commentaries on the Conflict of Laws* (1834) 5

Wright & Miller's Fed. Prac. & Proc. (4th ed.) 20

REPLY BRIEF FOR PETITIONERS MIRIAM FULD, ET AL.

The PSJVTA provided respondents with a choice: either end their odious terror-payment practices and eliminate their non-exempt activities in the United States, or be deemed to have consented to personal jurisdiction in civil actions brought under the Anti-Terrorism Act.

Conduct can be deemed consent to submit to a court's jurisdiction if it is "knowing and voluntary." *Wellness Int'l Network, Ltd.* v. *Sharif*, 575 U.S. 665, 685 (2015). Here, respondents *knew* what the PSJVTA said. Their payments to terrorists who attacked Americans and their U.S.-based activities were *voluntary*. No one forced them to make the payments or conduct the activities.

The Second Circuit did not apply the "knowing and voluntary" standard, or any other standard endorsed by this Court. Instead, it invented a *new* due process test. It said that a defendant can be deemed to have consented to personal jurisdiction in only two contexts: "[1] a defendant's litigation-related conduct, or [2] a defendant's acceptance of some in-forum benefit conditioned on amenability to suit in the forum's courts." Pet. App. 30a. Respondents wisely abandon this test, conceding (at 27) that neither condition is "necessary."

Instead, they argue (at 24, 28) that a deemed-consent statute is permissible only if the relevant conduct "signifies" or "signals" the defendant's "approval or acceptance of personal jurisdiction." The Court should reject this unprecedented and illogical theory. If conduct could be deemed to be consent only if it "signals" consent in the absence of a statute, then there would be no need for the statute in the first place: The conduct alone would suffice. Other conduct traditionally deemed to be consent—such as filing a business-registration form, missing a Rule 12(b)

deadline, or making a general appearance in litigation—does not inherently "signify" consent. Such conduct is deemed as consent because a statute or rule makes it so.

The PSJVTA satisfies traditional due process requirements. It gave respondents "fair warning" and advances governmental objectives that are "reasonable, in the context of our federal system of government." *Ford Motor Co.* v. *Mont. Eighth Jud. Dist. Ct.*, 592 U.S. 351, 358, 360 (2021) (citations omitted). Nothing more is required here. There is nothing "unique about the requirement of personal jurisdiction" that "prevents it from being established or waived like other rights." *Ins. Corp. of Ireland* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 706 (1982).

For a number of reasons, this is an easier case than *Mallory* v. *Norfolk Southern Railway Co.*, 600 U.S. 122 (2023). Most obviously, in *Mallory* the Court divided on whether horizontal federalism constrained the Pennsylvania consent-to-jurisdiction statute. But there is no such constraint here, because the United States is not situated within our federal system the same way that States are situated vis-à-vis their fellow States. Because "personal jurisdiction requires a forum-by-forum, or sovereign-by-sovereign, analysis," *J. McIntyre Mach., Ltd.* v. *Nicastro*, 564 U.S. 873, 884 (2011) (plurality opinion), even if the Fifth and Fourteenth Amendment standards were identical, the distinct federal interests here—and the lack of any countervailing interest of another sovereign within our constitutional framework—would make this case different from all other personal-jurisdiction cases this Court has encountered.

But the standards are *not* identical. This Court has repeatedly taught that the Fifth Amendment does not impose the kinds of extraterritorial restrictions on federal power that the Fourteenth Amendment imposes on State power.

Respondents nevertheless insist that the exercise of extraterritorial jurisdiction was unconstitutional at the founding: "The Framers," they say (at 3-4), "never imagined that Congress would have power to create jurisdiction over foreign actors for conduct not within the territorial limits of, and not directed at, the United States." The Framers did not have to *imagine* such cases. They saw them with their own eyes. The First Congress expressly authorized jurisdiction in extraterritorial cases, and the inaugural members of this Court adjudicated them. Rarely has there been such unequivocal and authoritative evidence of the original public understanding of a provision of the Bill of Rights.

ARGUMENT

I. THE PSJVTA SATISFIES FIFTH AMENDMENT STANDARDS

A. The PSJVTA Comports With The Original Public Meaning Of The Due Process Clause

1. Respondents concede almost every relevant element of plaintiffs' originalism argument.[1] Most fundamentally, respondents do not dispute that "[a]t the Founding, the federal Judiciary's power to adjudicate disputes was understood to be coextensive with Congress's power to legislate." *Fuld* Pet. Br. 16. That principle resolves this case: The Constitution grants Congress authority to impose liability for extraterritorial conduct, see *Morrison* v. *Nat'l Australia Bank, Ltd.*, 561 U.S. 247, 255 (2010), and thus to establish jurisdiction in cases arising from such conduct.

Indeed, as respondents concede (at 64-66), the Constitution expressly grants Congress authority to impose

[1] Respondents assert (at 55) that plaintiffs "failed to raise" this argument below. Incorrect. See *Fuld* Pls. C.A. Br. 52-54 ("*Waldman* is Inconsistent with the Original Public Understanding of the Fifth Amendment.").

extraterritorial liability in cases of piracy and capture, and to establish jurisdiction in such cases under Article III's grant of "admiralty and maritime" jurisdiction. Respondents describe (at 65) these cases as "exceptions to the pre-existing jurisdictional limits." But if the Due Process Clause forbade extraterritorial jurisdiction, as respondents say, piracy and capture cases would be forbidden no less than other types of Article III cases. The Due Process Clause applies to *all* deprivations of life, liberty, or property. It has no "piracy-or-capture" exception. Respondents also say (at 59) that the early cases involved local service of process, but local service occurred in these cases, too. See *Fuld* Pet. Br. 22.

Respondents also do not contest that scholars and jurists have identified three possible meanings of "due process of law" as of 1791. See *Fuld* Pet. Br. 20-23. Indeed, respondents embrace one, saying that due process operates as "a restraint on the legislative powers of the government." Resp. Br. 56, 58 (quoting *Murray's Lessee* v. *Hoboken Land & Imp. Co.*, 59 U.S. (18 How.) 272, 276 (1856)) (ellipsis omitted). But they ignore the *substance* of this rule: Due process requires "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. The PSJVTA does not deprive respondents of those basic safeguards. See *Fuld* Pet. Br. 22.

2. Rules of personal jurisdiction existed at the Founding, but they were "rules of general and international law," which "Congress could supplant" by statute. Sachs *Amicus* Br. 5; *Fuld* Pet. Br. 23-24. Respondents offer (at 56-58) a revisionist theory that the Due Process Clause was originally understood to protect "natural rights," including a "customary due process right" of constitutional dimension. It is unclear what respondents mean, since they concede (at 63) that *no* court "started locating personal jurisdiction in the Due Process Clause" until "the

mid-nineteenth century." More fundamentally, they are incorrect in asserting that this Court arrogated to itself the power to strike down legislation as inconsistent with "natural rights." As Justice Iredell explained, "the Court cannot pronounce [a law] to be void, merely because it is, in their judgment, contrary to the principles of natural justice." *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386, 399 (1798).[2]

Respondents invoke Justice Story's observation that "American courts" adopted "English limits on jurisdiction over persons that were not physically 'present' 'within the jurisdiction.'" Resp. Br. 58 (quoting Joseph Story, *Commentaries on the Conflict of Laws* § 545 (1834)). But they ignore his further observation that, in practice, exercising such jurisdiction was "not an uncommon course for a nation." Story § 546. As he explained, "[t]he effects of all such proceedings are purely local; and, elsewhere, they will be held as nullities." *Ibid.* Here, the question is "purely local": No issue is presented on whether the exercise of jurisdiction by a U.S. court will be given effect "beyond its own territory." *Rose* v. *Himely*, 8 U.S. (4 Cranch) 241, 279 (1808).

3. Respondents misread the relevant case law. Begin with Justice Story's opinion in *Picquet* v. *Swan*, 19 F. Cas. 609 (C.C.D. Mass. 1828). According to respondents (at 59), *Picquet* stands for the proposition that rules concerning personal jurisdiction were "an inherent due process limitation on sovereignty." Nonsense.

Picquet was a statutory-interpretation case; the words "due process" are not in the decision. At issue was

[2] Respondents argue (at 66-67) that the PSJVTA violates a natural-law principle that statutes must afford "equality of treatment." Equal protection forbids differential treatment for those "similarly situated," where "there is no rational basis for the difference in treatment." *Village of Willowbrook* v. *Olech*, 528 U.S. 562, 564 (2000). Respondents' unique status and massive terror-reward infrastructure makes their unique treatment constitutional.

the effect under federal law of a state statute allowing substituted service on an absent defendant with property in the state. 19 F. Cas. at 610 (discussing Mass. Act 1798 c. 5). The statute was potentially applicable because Congress had then adopted state procedures for use in federal court. *Id.* at 611.

Justice Story set the stage by reiterating "general principles of law," recognized "in universal jurisprudence," which forbid a sovereign to extend service of process "beyond its territorial limits." *Id.* at 612. Judgments running afoul of this rule could have "binding efficacy" locally, but would elsewhere be "utterly void, as an usurpation of general sovereignty over independent nations." *Ibid.* The Massachusetts statute, by providing for substituted service, would lead to a judgment effective in Massachusetts, but not elsewhere.

The question was whether the statute applied in federal cases. Justice Story said "no," construing three federal statutes. First, the Judiciary Act of 1789 provided that "no civil suit shall be brought" in a U.S. court "against an inhabitant of the United States," except by service of process in the district where the defendant "is an inhabitant, or in which he shall be found." Ch. 20, § 11, 1 Stat. 79. Justice Story held that the statute's silence about *non*-inhabitants could not be read to permit by implication what it expressly forbade for inhabitants: substituted service on an agent. 19 F. Cas. at 613. In doing so, he applied the now-familiar presumption against violating international law absent an express statement by Congress: International-law rules "must necessarily have been in the contemplation of the framers of the judiciary act of 1789," he explained, lest "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. Such an intention [by Congress], so repugnant to the general

rights and sovereignty of other nations, ought not to be presumed, unless it is established by irresistible proof." *Ibid.* In other words, no personal jurisdiction in such cases unless Congress says so expressly.

Turning to the Process Acts of 1789 and 1792, Justice Story similarly held that their "general phraseology" did not support reading them as implicitly overriding international law. *Id.* at 614. Again, he emphasized, he was applying an interpretive presumption: "If congress had prescribed such a rule, the court would certainly be bound to follow it, and proceed upon the law. The point of difficulty is, whether such a rule ought to be inferred from so general a legislation as congress has adopted, not necessarily leading to the conclusion, that such was the intent." *Id.* at 615. Thus, respondents err (at 59-61) in attempting to construe *Picquet* as constitutionalizing international law and in insisting that its reasoning is confined to *in rem* jurisdiction.

Even worse is respondents' treatment of Justice Johnson's dissent in *Mills* v. *Duryee*, 11 U.S. (7 Cranch) 481 (1813), which they quote (at 57-58) for the general principle that "jurisdiction cannot be justly exercised by a state over property not within the reach of its process, or over persons not owing them allegiance or not subjected to their jurisdiction by being found within their limits." 11 U.S. (7 Cranch) at 486. In quoting the sentence calling these rules "eternal principles of justice," Resp. Br. 57, respondents leave out a key qualifier: "eternal principles of justice which never ought to be dispensed with, and which Courts of justice never can dispense with *but when compelled by positive statute*." 11 U.S. (7 Cranch) at 486 (emphasis added). Surely "eternal principles of justice" are not constitutional limits if Congress can override them "by positive statute."

Finally, respondents quote this Court as stating that "all sovereignty is strictly local, and cannot be exercised

beyond the territorial limits." Resp. Br. 59 (quoting *Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch) 116, 126-127 (1812)). But this quotation is from an argument that *counsel* made in urging non-recognition of France's sovereign immunity within the United States. The Court rejected that argument. 11 U.S. (7 Cranch) at 137.[3]

B. The PSJVTA Comports With This Court's Fifth Amendment Precedents

This Court has never held that an exercise of personal jurisdiction runs afoul of the Due Process Clause of the Fifth Amendment. In contrast, it has done so at least 25 times in cases implicating the Fourteenth Amendment. See App., *infra*, 1a-2a. That disparity is no coincidence: It reflects the role of personal jurisdiction in preserving "territorial limitations on the power of the respective States." *Hanson* v. *Denckla*, 357 U.S. 235, 251 (1958). Those limits do not apply to the national sovereign.

1. Seeking the benefit of the Fourteenth Amendment cases, respondents urge (at 46-54) the Court to hold that the Fifth and Fourteenth Amendments impose "the same due process standards." But this Court has based its personal-jurisdiction rulings under the Fourteenth Amendment on a "federalism interest" that is often "decisive." *Bristol-Myers Squibb Co.* v. *Superior Ct. of Cal.*, 582 U.S. 255, 263 (2017). Conversely, the Court has held 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); accord *Burnet* v. *Brooks*, 288 U.S. 378, 403-405 (1933); *Cook* v. *Tait*, 265 U.S. 47, 55-56 (1924). Respondents do not even

[3] Respondents make the same mistake with *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264 (1821). See Resp. Br. 62 (quoting counsel).

cite those decisions, much less distinguish them. More recently, this Court reaffirmed that it will enforce an expressly extraterritorial statute "regardless of whether the particular statute regulates conduct, affords relief, *or merely confers jurisdiction*." *RJR Nabisco* v. *Eur. Cmty.*, 579 U.S. 325, 326 (2016) (emphasis added). Respondents ignore that case, too.

Respondents instead present a string cite of recent cases that, they say (at 50), show the Court "consistently assumes the minimum contacts due process analysis applies" to cases arising under federal law. But those cases, which concern the scope of extraterritorial statutes, never mention "minimum contacts." And they certainly do not suggest that *Congress* is precluded from establishing reasonable jurisdictional parameters.[4]

2. Respondents do not dispute that under their rule, the Due Process Clause would allow *criminal* prosecution of them for the terror attacks at issue in these cases, but not a civil action for the same conduct. See *Fuld* Pet. Br. 32-33. Respondents counter (at 52-53) that the due process test applied in criminal cases "is entirely irrelevant to personal jurisdiction" because in criminal cases, "[p]hysical presence is required." That is incorrect.

[4] The circuit cases respondents cite (at 48-49) do not help them. In *Douglass* v. *Nippon Yusen Kabushiki Kaisha*, 46 F.4th 226 (5th Cir. 2022) (en banc), the majority refrained from deciding whether "*Congress* could pass a law to subject foreign defendants to American federal court jurisdiction for any injuries inflicted on American citizens or claims arising abroad." *Id.* at 232 n.8. The judges who addressed that issue voted 5-2 against respondents' position. See *id.* at 249-287 (dissents of Elrod, Higginson, Oldham, JJ.). And *Herederos De Roberto Gomez Cabrera, LLC* v. *Teck Res. Ltd.*, 43 F.4th 1303, 1308-1310 (11th Cir. 2022), rested on circuit precedent, without considering this Court's Fifth Amendment cases or original public meaning.

A criminal defendant's physical presence at trial is not a matter of jurisdictional power, but of personal right, secured by the Confrontation Clause and the Federal Rules of Criminal Procedure. See *Crosby* v. *United States*, 506 U.S. 255, 262 (1993). The physical presence of an *organizational* defendant is not required at any stage of a criminal case, so long as the "organization [is] represented by counsel who is present." Fed. R. Crim. P. 43(b)(1). Indeed, the "realities of today's global economy" mean that even organizations with no place of business within the United States (unlike respondents) may be charged with federal crimes. Advisory Committee Note to Fed. R. Crim. P. 4 (2016 Amendment); see, *e.g.*, *Turkiye Halk Bankasi A.S.* v. *United States*, 598 U.S. 264 (2023). Federal courts obtain jurisdiction over such defendants by delivery of a summons under the law of a foreign jurisdiction or "by any other means that gives notice." Fed. R. Crim. P. 4(c)(3)(D)(ii).

To determine whether it violates the Due Process Clause to prosecute a defendant in the United States for extraterritorial conduct, courts do not ask whether the defendant is or will be physically present, but rather whether there is a "sufficient nexus between the defendant and the United States, so that [prosecution] would not be arbitrary or fundamentally unfair." *United States* v. *Epskamp*, 832 F.3d 154, 168 (2d Cir. 2016). Such prosecution is not arbitrary or unfair if the defendant affected U.S. "interest[s]" and had "fair warning" that the conduct was unlawful. *Id.* at 169; see *United States* v. *Murillo*, 826 F.3d 152, 157 (4th Cir. 2016) ("[I]t is not arbitrary to prosecute a defendant in the United States if his actions affected significant American interests—*even if the defendant did not mean to affect those interests.*") (emphasis added).

The indefensible incongruity of treating defendants more favorably when facing civil liability than criminal liability thus remains.

3. Respondents' unique status as aspiring sovereigns means the political branches could strip them of whatever due process rights they have by recognizing them. Respondents acknowledge as much, but say that if they were recognized as sovereigns, they "would receive the protection of sovereign immunity." Resp. Br. 43 (quoting Pet. App. 212a). But sovereign immunity "is a matter of grace and comity rather than a constitutional requirement." *Republic of Austria* v. *Altmann*, 541 U.S. 677, 689 (2004). Congress may abrogate it at will. *E.g.*, 28 U.S.C. § 1605B. The political branches should have no less power over the PLO and PA than they have over foreign sovereigns.

4. Recognizing Congress's plenary authority over federal jurisdiction in this case would pose no risk that "other countries [might] assert blanket jurisdiction over U.S. nationals." U.S. Br. 47-48. Virtually every member of the UN (190 of 193) has confirmed a nation-state's right to exercise criminal and civil jurisdiction over terror-related offenses carried out "against a national of that State." International Convention for the Suppression of the Financing of Terrorism (1999), Arts. 5, 7(2)(a), S. Treaty Doc. No. 106-49, 2178 U.N.T.S. 232.

But even when the political branches go *against* the international consensus, concerns about reciprocity must be directed to Congress, not this Court. The courts below erred by conscripting the Due Process Clause as a proxy for international comity when Congress and the President have made contrary judgments. The job of "navigating foreign policy disputes belongs to the political branches," which are "answerable to the people." *Jesner* v. *Arab Bank, PLC*, 584 U.S. 241, 281, 292 (2018) (Gorsuch, J., concurring).

II. THE PSJVTA SATISFIES FOURTEENTH AMENDMENT STANDARDS

A. Respondents' Proposed Legal Standard Is Incorrect

1. Even if respondents were correct that due process standards developed under the Fourteenth Amendment govern this case, the PSJVTA easily meets them, not only by virtue of *Mallory*, but also because it provides "fair warning" and advances legitimate governmental objectives in a way that is "reasonable, in the context of our federal system of government." *Ford Motor*, 592 U.S. at 358, 360 (citations omitted).

Respondents object (at 39-46) that evaluating the PSJVTA under this standard would "undermin[e]" and "eviscerate due process protections." Not so. This Court rejects exercises of personal jurisdiction that would involve "submitting to the coercive power of a State that may have little legitimate interest in the claims in question." *Bristol-Myers*, 582 U.S. at 263. This standard parallels its traditional view that the Due Process Clause protects individuals from "the exercise of power without any reasonable justification in the service of a legitimate governmental objective." *Cnty. of Sacramento* v. *Lewis*, 523 U.S. 833, 846 (1998).

There can be no serious debate that the PSJVTA reasonably advances the United States' legitimate governmental objectives. The payments prong reasonably advances U.S. interests because ending respondents' odious practice of rewarding terrorism has long been a U.S. foreign-policy objective, and the statute creates a substantial incentive to further that goal. *Fuld* Pet. Br. 22-23; U.S. Br. 29, 35-36; Sofaer *Amici* Br. 8-21; Grassley *Amici* Br. 5-17. Respondents contend (at 31-33) that their pay-for-slay programs are "social welfare," but that is false. A Palestinian imprisoned by Israel for ordinary street-crime does not qualify. J.A. 159. Only those who commit attacks for political reasons are eligible. J.A. 156; see

Agudath Israel *Amici* Br. 6-19; Pompeo *Amicus* Br. 6-18. Congress could legitimately conclude that respondents' adherence to these programs after the PSJVTA's effective date harms American interests, even if, as respondents assert (at 1, 5, 31) the record does not show that the terrorists trained their weapons on plaintiffs' loved ones specifically *because* they were Americans. "The murder of a U.S. national is an offense to the United States" no matter where it occurs, and holding the perpetrators—or their principals—accountable "serves key national interests." *Gamble* v. *United States*, 587 U.S. 678, 687 (2019).[5]

The PSJVTA's U.S.-activities prong also reasonably advances the United States' legitimate governmental objectives. Indeed, the courts have upheld the Executive's determination that simply *excluding* respondents from the United States furthered valid governmental interests, "based on U.S. concern over terrorism committed and supported by individuals and organizations affiliated with the PLO, and as an expression of our overall policy condemning terrorism." *Palestine Info. Off.* v. *Shultz*, 853 F.2d 932, 936 (D.C. Cir. 1988).

Respondents claim (at 41-42) that plaintiffs' test would allow Congress to circumvent *Daimler AG* v. *Bauman*, 571 U.S. 117 (2014), by treating a foreign corporation's decision to do business within a State as consent to

[5] Respondents' claim (at 11) that they have "ended" the pay-for-slay program is irrelevant and untrue. The PSJVTA applies until they have ceased to engage in non-exempt conduct for "5 consecutive calendar years." 18 U.S.C. § 2334(e)(2). And PLO Chairman/PA President Abbas has already indicated that the "termination" announcement was just a public-relations gimmick. See *Palestinian 'Pay-for-Slay' Rises Again*, Wall St. J. (Feb. 26, 2025), https://www.wsj.com/opinion/mahmoud-abbas-palestinian-authority-pay-for-slay-israel-gaza-hamas-71e98349. Even if the PSJVTA eventually succeeds in ending the noxious program, that will only underscore that it advanced legitimate U.S. interests.

general personal jurisdiction there. That argument echoes the one rejected in *Mallory*. See 600 U.S. at 166 (Barrett, J., dissenting) (under deemed-consent statutes, "*Daimler*'s ruling would be robbed of meaning by a backdoor thief") (citation omitted). Even if the federal statute hypothesized by respondents were equally aggressive, it would be tested against the traditional due process standard: Does it reasonably advance legitimate federal objectives? Congress has, in fact, enacted consent statutes that condition access to portions of the U.S. economy upon an agreement to answer for conduct anywhere in the world. For example, 31 U.S.C. § 5318(k)(3) requires a foreign bank maintaining a U.S. correspondent account to accept service of a subpoena and provide records concerning "any account at the foreign bank, including records maintained outside of the United States" unrelated to the correspondent account. Such statutes are constitutional when they advance legitimate federal interests.

If anything, the hypothesized statute highlights just how reasonable the PSJVTA is. It subjects respondents—who have no constitutional right to do *anything* in the United States—to jurisdiction in a *single* forum (U.S. courts), for a *single* type of claim that lies at the heartland of federal concern (the ATA), brought to redress harm to *U.S.* nationals, and only where respondents engage in *further* conduct affecting U.S. interests (payments to terrorists who harm U.S. nationals or in-forum activities).

2. Rather than evaluate the PSJVTA under traditional due process standards, respondents focus on whether their jurisdiction-triggering conduct would "signify" or "signal" consent to jurisdiction in the absence of the deemed-consent statute. See Resp. Br. 10, 23-24, 26-29, 34, 41, 51. That is the wrong question. If a deemed-consent statute could validly be triggered only by "actions that could be understood as submission to personal jurisdiction" *without* the statute, *id.* at 2, then there would be

no need for the statute: The actions themselves would suffice. Indeed, in arguing (at 21) that "a permissible inference of consent" is allowed only where "the defendant's conduct was material to jurisdiction," respondents essentially seek to replicate specific jurisdiction—erasing constructive consent entirely.

As this Court has explained, the conduct deemed to constitute consent need not signify a *desire* to face jurisdiction in the forum, as evidenced by the "legion of precedents that attach jurisdictional consequences to what some might dismiss as mere formalities." *Mallory*, 600 U.S. at 145 (plurality opinion). Nothing about filing a business-registration certificate, *ibid.*, or missing a deadline imposed by Rule 12(b), *Bauxites*, 456 U.S. at 705, sends a subjective "signal" of consent. Such conduct "amount[s] to a legal submission to the jurisdiction of the court, *whether voluntary or not.*" *Id.* at 704-705 (emphasis added).

Respondents' argument attempts to infuse a subjective inquiry into constructive consent. But in *Mallory*, the Court rejected the argument that the defendant "ha[d] not *really* submitted" to the State's jurisdiction. 600 U.S. at 144 (plurality opinion). Indeed, this Court has found consent in far more attenuated circumstances than those presented here, such as fine print in adhesion contracts. In those cases, the Court rejected dissenters' assertions that inferred consent was "too weak an imitation of a genuine agreement," *Nat'l Equip. Rental, Ltd.* v. *Szukhent*, 375 U.S. 311, 332 (1964) (Black, J., dissenting), or should be "deemed as wanting in the element of voluntary assent," *Carnival Cruise Lines, Inc.* v. *Shute*, 499 U.S. 585, 598 (1991) (Stevens, J., dissenting).

This case follows *a fortiori* from those. Respondents, advised by sophisticated counsel, were well aware of the conduct that Congress specified would be deemed consent to personal jurisdiction in ATA cases. They made a knowing and voluntary decision to engage in that conduct.

This case follows *a fortiori* from *Mallory* in other respects. There, it was questionable whether "the Constitution permits Pennsylvania to impose ... a submission-to-jurisdiction requirement" as a condition to operating a railroad in the State. 600 U.S. at 150 (Alito, J., concurring). Here, the United States indisputably has plenary authority over respondents' activities in the United States and their practice of rewarding terrorists who attack Americans. Respondents argue (at 28-29) that because "[t]he payments at issue occurred entirely outside the United States, under Palestinian law, [they] were not within the power of the U.S. government to permit"—and hence outside its power to regulate. That is wrong. The Constitution places no "limit upon Congress's power to legislate" regarding extraterritorial conduct affecting American interests. *Morrison*, 561 U.S. at 255. Further, if respondents have any due process protections at all, they are weaker than Norfolk Southern's, because "Congress may make rules as to aliens that would be unacceptable if applied to citizens." *DeMore* v. *Kim*, 538 U.S. 510, 522 (2003).

3. Respondents complain (at i, 2, 10) that the PSJVTA's language—"shall be deemed to have consented"—creates a *presumption* of consent. But even irrebuttable presumptions do not violate the Due Process Clause unless they are "wholly arbitrary and irrational." *Cleveland Bd. of Educ.* v. *LaFleur*, 414 U.S. 632, 644, 650 (1974); see *Michael H.* v. *Gerald D.,* 491 U.S. 110, 120-121 (1989) (plurality opinion) (Scalia, J.). In *Weinberger* v. *Salfi*, 422 U.S. 749 (1975), this Court upheld Congress's "conclusive presumption" that a marriage occurring less than nine months before a wage-earner's death was a disqualifying "sham marriage" for purposes of determining survivor benefits, explaining that the Due Process Clause requires only that the statutory presumption be

"rationally related to a legitimate legislative objective." *Id.* at 772.

The Court has evaluated deemed-consent statutes under the same standard. In *South Dakota* v. *Neville*, 459 U.S. 553 (1983), the Court rejected a due process challenge to a statute providing that "any person operating a vehicle in South Dakota is deemed to have consented" to a test of blood alcohol concentration (BAC), and that refusal to take the test upon request by a police officer would lead to a one-year revocation of the suspect's driver's license. *Id.* at 559-560. The Court emphasized that the State had "warned" drivers about the consequences of refusing the test, and "these warnings comported with the fundamental fairness required by due process." *Id.* at 566.

In *Birchfield* v. *North Dakota*, 579 U.S. 438, 477 (2016), the Court evaluated a challenge under the Fourth Amendment, but said the relevant analysis "does not differ in substance" from the Fifth Amendment test, because "reasonableness is always the touchstone." The Court approved of "implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply" with BAC tests. *Id.* at 476-477. The Court held that *criminal* penalties for refusal to submit to a blood draw could not be justified as "consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads." *Id.* at 477. Even so, the Court cautioned, "nothing we say here should be read to cast doubt" on "implied-consent laws that impose *civil* penalties and evidentiary consequences on motorists who refuse" to agree to blood draws. *Ibid.* (emphasis added).

In all these cases, the Court evaluated the legislation by determining whether it reasonably served legitimate governmental objectives—not by asking whether those affected had received a benefit. Respondents' claim (at 10,

23) that receiving a benefit is a necessary "barometer" of consent is incorrect.

4. Respondents rely (at 20-21) on *Bauxites* to argue that inferred consent to personal jurisdiction is an unconstitutional "punishment" unless the conduct would signify consent to personal jurisdiction in the statute's absence. That is incorrect. The cited passage concerned whether a finding of personal jurisdiction could be entered as a sanction under Rule 37 consistent with procedural due process protections articulated in *Hovey* v. *Elliott*, 167 U.S. 409 (1897). See 456 U.S. at 704-705. *Hovey* did not concern personal jurisdiction. It held that a court may not dispose of an action "without affording a party the opportunity for a hearing on the merits." *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982) (quotation marks omitted) (citing *Hovey*); see *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322, 350 (1909) (*Hovey* "involved a denial of all right to defend as a mere punishment"). *Hovey* was implicated in *Bauxites* because the district court imposed sanctions, not because an inference of consent is an improper "punishment" in the absence of conduct independently signifying subjective consent.

Respondents are also wrong to rely (at 21-24) on *College Savings Bank* v. *Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999), to argue that objections to personal jurisdiction may not be waived implicitly. The sovereign-immunity context was critical in that case, because "there is no place for the doctrine of constructive waiver in our sovereign-immunity jurisprudence." *Id.* at 678 (quotation marks omitted). That conclusion was grounded directly in concerns about allowing a State implicitly to waive its right to engage in sovereign conduct: "[W]here the constitutionally guaranteed protection of the States' sovereign immunity is involved . . . the voluntariness of waiver [is] destroyed . . . when what is attached to the refusal to waive is the exclusion of the State

from otherwise lawful activity." *Id.* at 687. *College Savings* has no application to personal jurisdiction.

B. Respondents' U.S. Activities Meet Their Own Test

Respondents concede that conditioning acceptance of an in-forum benefit is a legitimate method of obtaining consent. This presents a conundrum for them, since they *did* conduct activities in the United States following the PSJVTA's trigger date. These included, for example, meeting at Seton Hall University and with community groups in Michigan; posting on public social-media accounts on U.S.-based platforms; and attesting to documents for use in territories administered by the PA. See J.A. 137-152, 282-288.[6] As the case comes to this Court, these activities are assumed to satisfy the statute. Pet. App. 15a, 67a-68a & n.7. If an in-forum benefit were required, respondents received one.

Respondents say (at 36) that *the PSJVTA* does not provide a benefit to them, but they offer no sound reason why their test should require benefits conferred by a *piece of legislation*, rather than by a *sovereign*. In *Mallory*, this Court's rejection of the railroad's "fairness" argument flowed from the entirety of its in-state operations, 600 U.S. at 141-142 (plurality opinion), *not* from whether the *jurisdictional statute itself*—which was separate from the registration statute—provided a benefit. See Pet. App. 244a. The deemed-consent statutes upheld in *Neville* and *Birchfield* provided motorists with no benefit, either.

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[6] Respondents correctly abandon the Second Circuit's erroneous assertion (Pet. App. 28a) that this conduct was prohibited by federal law.

III. Respondents' Alternative Grounds For Affirmance Are Meritless

A. Respondents argue that the PSJVTA violates the separation of powers, under the theory that "Congress cannot 'legislatively supersede' decisions 'interpreting and applying the Constitution.'" Resp. Br. 68-69 (quoting *Dickerson* v. *United States*, 530 U.S. 428, 437 (2000), and citing *City of Boerne* v. *Flores*, 521 U.S. 507, 529 (1997)). But those decisions involved Congress's attempts to "define its own powers by altering the . . . meaning" of particular constitutional provisions. *City of Boerne*, 521 U.S. at 529; see *Dickerson*, 530 U.S. at 432 (exclusionary rule of *Miranda* was "a constitutional decision of this Court," which "may not be in effect overruled by an Act of Congress").

That principle has no application here. Congress was not purporting to overrule the Second Circuit's decision that general and specific jurisdiction was lacking, but to use a well-accepted alternative: "Consent is a traditional basis of jurisdiction that may be upheld even in the absence of minimum contacts between the defendant and the forum state." 16 *Moore's Federal Practice—Civil* § 108.53 (2020) (citation omitted); see 4 *Wright & Miller's Fed. Prac. & Proc.* § 1067.3 (4th ed.) (similar). No separation-of-powers principle prevents Congress from achieving a legitimate objective through means not addressed in a prior constitutional decision. Thus, after this Court struck down the Religious Freedom Restoration Act in *City of Boerne* as exceeding Congress's § 5 powers, Congress enacted the Religious Land Use and Institutionalized Persons Act, which the Court upheld. *Cutter* v. *Wilkinson*, 544 U.S. 709, 719-726 (2005).

B. Respondents argue (at 69-70) that the PSJVTA is unconstitutional because it applies only to them. But there is nothing wrong with "particularized legislative action." *Bank Markazi* v. *Peterson*, 578 U.S. 212, 233 (2016). "This

Court and lower courts have upheld as a valid exercise of Congress' legislative power diverse laws that governed one or a very small number of specific subjects." *Id.* at 234.

C. Respondents assert (at 70-77) that all their U.S. activities fall within one of the narrow statutory exceptions to the U.S.-activities prong, principally for "any activity undertaken exclusively for the purpose of conducting official business of the United Nations." 18 U.S.C. § 2334(e)(3)(B). That argument is irrelevant to the question presented: The Second Circuit struck down the PSJVTA facially, without considering whether respondents' conduct met any statutory exception. Pet. App. 15a n.4, 68a n.7. This Court should not express the "first view" on that fact-intensive question. *Cutter*, 544 U.S. at 718 n.7.

Respondents contend (at 76) that plaintiffs forfeited their U.S.-activities arguments. Incorrect. Plaintiffs presented extensive evidence of non-exempt U.S. activities to the district court, J.A. 229-316; see *Sokolow* C.A. Doc. 397, and explained to the Second Circuit that if it adopted respondents' "benefit" theory, application of the U.S.-activities prong would have to be addressed on remand. *Fuld* Pls. Supp. C.A. Br. 6; *Sokolow* Pls. Supp. C.A. Br. 6. Respondents concede (at 77) that "[r]esolution of these open issues would require a remand" if the Court agrees with their "benefit" theory. There is no need to address them here.

CONCLUSION

The judgments of the court of appeals should be reversed and the cases remanded for further proceedings consistent with the Court's opinion.

Respectfully submitted.

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MARCH 2025

APPENDIX

TABLE OF CONTENTS

Page

List of Cases Holding That The Exercise Of Personal Jurisdiction Would Violate the Fourteenth Amendment 1a

1. *Bristol-Myers Squibb Co.* v. *Superior Court*, 582 U.S. 255 (2017)
2. *BNSF Ry. Co.* v. *Tyrrell*, 581 U.S. 402 (2017)
3. *Walden* v. *Fiore*, 571 U.S. 277 (2014)
4. *Daimler AG* v. *Bauman*, 571 U.S. 117 (2014)
5. *Goodyear Dunlop Tires Operations, S.A.* v. *Brown*, 564 U.S. 915 (2011)
6. *J. McIntyre Mach., Ltd.* v. *Nicastro*, 564 U.S. 873 (2011)
7. *Asahi Metal Indus. Co.* v. *Superior Court*, 480 U.S. 102 (1987)
8. *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408 (1984)
9. *Rush* v. *Savchuk*, 444 U.S. 320 (1980)
10. *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980)
11. *Kulko* v. *Superior Court*, 436 U.S. 84 (1978)
12. *Shaffer* v. *Heitner*, 433 U.S. 186 (1977)
13. *Hanson* v. *Denckla*, 357 U.S. 235 (1958)
14. *Minnesota Com. Men's Ass'n* v. *Benn*, 261 U.S. 140 (1923)
15. *Philadelphia & Reading Ry. Co.* v. *McKibbin*, 243 U.S. 264 (1917)
16. *McDonald* v. *Mabee*, 243 U.S. 90 (1917)
17. *Baker* v. *Baker, Eccles & Co.*, 242 U.S. 394 (1917)
18. *Riverside & Dan River Cotton Mills* v. *Menefee*, 237 U.S. 189 (1915)
19. *Simon* v. *S. Ry. Co.*, 236 U.S. 115 (1915)
20. *Bigelow* v. *Old Dominion Copper Mining & Smelting Co.*, 225 U.S. 111 (1912)

21. *Wetmore* v. *Karrick*, 205 U.S. 141 (1907)
22. *Old Wayne Mut. Life Ass'n* v. *McDonough*, 204 U.S. 8 (1907)
23. *Haddock* v. *Haddock*, 201 U.S. 562 (1906)
24. *Dewey* v. *City of Des Moines*, 173 U.S. 193 (1899)
25. *Pennoyer* v. *Neff*, 95 U.S. 714 (1878)