22-76(L)

22-496(CON)

To Be Argued By:
BENJAMIN H. TORRANCE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 22-76(L), 22-496(CON)

MIRIAM FULD, individually, as natural guardian of plaintiff Natan Shai Fuld, as personal representative and administrator of the Estate of Ari Yoel Fuld, deceased, NATAN SHAI FULD, minor, by his next friend and guardian Miriam Fuld, NAOMI FULD, TAMAR GILA FULD, ELIEZER YAKIR FULD,

Plaintiffs-Appellants,

UNITED STATES OF AMERICA,

Intervenor-Appellant,

(*Caption continued on inside cover*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR INTERVENOR-APPELLANT

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—v.—

PALESTINE LIBERATION ORGANIZATION, PALESTINIAN AUTHORITY, aka Palestinian Interim Self-Government Authority and/or Palestinian Council and/or Palestinian National Authority,

Defendants-Appellees.

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Docket No. 22-76(L), 22-496(con)

MIRIAM FULD, INDIVIDUALLY, AS NATURAL GUARDIAN OF PLAINTIFF NATAN SHAI FULD, AS PERSONAL REPRESENTATIVE AND ADMINISTRATOR OF THE ESTATE OF ARI YOEL FULD, DECEASED, NATAN SHAI FULD, MINOR, BY HIS NEXT FRIEND AND GUARDIAN MIRIAM FULD, NAOMI FULD, TAMAR GILA FULD, ELIEZER YAKIR FULD,

Plaintiffs-Appellants,

UNITED STATES OF AMERICA,

Intervenor-Appellant,

—v.—

PALESTINE LIBERATION ORGANIZATION, PALESTINIAN AUTHORITY, AKA PALESTINIAN INTERIM SELF-GOVERNMENT AUTHORITY AND/OR PALESTINIAN COUNCIL AND/OR PALESTINIAN NATIONAL AUTHORITY

Defendants-Appellees.

BRIEF FOR INTERVENOR-APPELLANT

Preliminary Statement

Over the past four decades, Congress has acted repeatedly to ensure that United States nationals harmed by acts of international terrorism can vindicate their interests in United States courts and receive just compensation for their injuries. This appeal concerns an action brought by the family of a U.S. victim of a terrorist attack in the West Bank under the Anti-Terrorism Act of 1992 ("ATA"), which provides civil damages remedies to U.S. nationals injured by terrorist acts abroad. In order to make the ATA's remedies function effectively—and in light of findings in other cases that the defendants in this case, the Palestinian Authority ("PA") and the Palestine Liberation Organization ("PLO"), were not subject to personal jurisdiction in U.S. courts—Congress has enacted the Promoting Security and Justice for Victims of Terrorism Act of 2019 ("PSJVTA"). The PSJVTA specifies that if the PA and PLO engage in certain activities, they will be deemed to have consented to personal jurisdiction in civil cases brought under the ATA.

The district court held that the deemed-consent provisions of the PSJVTA do not comply with the limits of due process, but that judgment should be reversed. Consent is undeniably a valid basis for personal jurisdiction, and the Supreme Court and this Court have held that a defendant may subject itself to the authority of the courts through a variety of means, expressly or implicitly, constructively, or even through inadvertence. In this case, Congress clearly stated what knowing and voluntary activities would be deemed to be consent to personal jurisdiction and gave

defendants the opportunity to cease those activities before they could be haled into court. And Congress narrowly limited that consent to ATA actions for acts of terrorism that harmed U.S. nationals, where the defendants are the PA, the PLO, and their affiliates or successor entities. Moreover, the knowing and voluntary actions that will be deemed consent to jurisdiction —payments made to family members or designees of those who injure or kill Americans in terrorist attacks, or certain activities of the PA or PLO in the United States—are closely linked to the ATA claims that may be asserted against them. Congress's enactment was in accordance with its broad power to act in the field of foreign affairs, a power it has repeatedly invoked in addressing the relationship of the United States with the PA and PLO, and in addressing issues of international terrorism. Given the limits on the deemed-consent provisions, the authority of Congress and the Executive Branch in conducting foreign affairs and the deference the courts owe the political branches in that area, and the strong national interest in vindicating the interests of U.S. victims of terrorism and providing them just compensation, the PSJVTA's deemed-consent provisions should be upheld as consistent with due process.

Jurisdictional Statement

The district court had subject matter jurisdiction over this action under 28 U.S.C. § 1331, as the claims arise under the laws of the United States. The district court entered final judgment on January 7, 2022. (Joint Appendix ("JA") 95). Plaintiffs filed a timely notice of appeal on January 13, 2022 (JA 96), and the

government, which intervened in the district court, filed a timely notice of appeal on March 8, 2022 (JA 97). This Court has jurisdiction over the appeal under 28 U.S.C. § 1291.

Issue Presented

Whether the provisions of the PSJVTA, stating that certain activities by the PA, PLO, or affiliates or successor entities will be deemed consent to a district court's exercise of personal jurisdiction over those defendants in civil ATA actions, are consistent with the Due Process Clause of the Fifth Amendment.

Statement of the Case

A. Procedural History

Plaintiffs filed their complaint in this action on April 30, 2020, and amended their complaint on September 18, 2020. (JA 3, 6, 13). Defendants moved to dismiss the action for lack of personal jurisdiction and failure to state a claim. (JA 6). The district court (Jesse M. Furman, J.) certified to the Attorney General that defendants' motion called into question the constitutionality of a federal statute (JA 8); the United States then intervened to argue in favor of the PSJVTA's constitutionality (JA 10); *see* 28 U.S.C. § 2403(a); Fed. R. Civ. P. 5.1. By order dated January 6, 2022, the district court granted the motion to dismiss for lack of personal jurisdiction, holding that the provisions of the PSJVTA under which plaintiffs asserted personal jurisdiction were unconstitutional. (JA 66); __ F. Supp. 3d __, 2022 WL 62088 (S.D.N.Y.). Judgment was entered the next day. (JA 95).

B. Statutory Background

In 1992, in order "to develop a comprehensive legal response to international terrorism," Congress enacted the ATA, which creates a civil damages remedy for United States nationals injured by an act of international terrorism. H.R. Rep. No. 102-1040, at 5 (1992) ("1992 House Report"); *see* Pub. L. No. 102-572, § 1003(a), 106 Stat. 4506, 4521–24 (1992) (adding 18 U.S.C. §§ 2331, 2333–2338). Where the act of international terrorism was "committed, planned, or authorized by an organization that had been designated as a foreign terrorist organization under [8 U.S.C. § 1189]," "liability may be asserted as to any person who aids and abets, by knowingly providing substantial assistance, or who conspires with the person who committed such an act of international terrorism." 18 U.S.C. § 2333(d)(2).

In the years that followed, courts regularly exercised personal jurisdiction in ATA cases against the PLO and the PA,[1] holding that "the totality of

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[1] The PLO has been recognized by the United Nations as the representative of the Palestinian people; the PA was created pursuant to the 1993 Oslo Accords to exercise interim governance authority for the Palestinian people in Gaza and the West Bank. The United States does not recognize either the PA or PLO as a sovereign government. As a matter of historical practice, Congress and the Executive Branch have worked together closely to determine U.S. policies with respect to those entities. At present, the United States is cooperating on training of PA security forces, a key

activities in the United States by the PLO and the PA justifies the exercise of general personal jurisdiction." *Sokolow v. PLO*, No. 04 Civ. 397, 2011 WL 1345086, at *3 (S.D.N.Y. Mar. 30, 2011), *vacated sub nom. Waldman v. PLO*, 835 F.3d 317 (2d Cir. 2016); *accord, e.g.*, *Knox v. PLO*, 248 F.R.D. 420, 427 (S.D.N.Y. 2008); *Estate of Klieman v. PA*, 467 F. Supp. 2d 107, 113 (D.D.C. 2006).

In 2014, the Supreme Court clarified that a state could exercise general personal jurisdiction over a nonresident defendant under the Fourteenth Amendment's Due Process Clause only when the defendant was "essentially at home in the forum," and explained that for non-natural persons that was usually limited to the place of incorporation or principal place of business. *Daimler AG v. Bauman*, 571 U.S. 117, 139 (2014) (quotation marks omitted). Courts (including this Court) applied the *Daimler* standards to pending ATA cases and concluded that the PA and PLO were not "at home" in the United States and thus not subject to general jurisdiction. *Waldman*, 835 F.3d at 337; *Livnat v. PA*, 851 F.3d 45, 48–52 (D.C. Cir. 2017); *Klieman v. PA*, 82 F. Supp. 3d 237, 246 (D.D.C. 2015). Those courts also declined to exercise specific personal jurisdiction (arising out of the nonresident defendant's

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partner of the United States and Israel in stabilizing the West Bank and combating terrorism. The United States is also engaged with the PA in serious discussions on how to reform or end the prisoner and "martyr" payment system that underlies one of the bases for deemed personal jurisdiction under the PSJVTA.

contacts with the forum) because "these [terrorist] actions, as heinous as they were, were not sufficiently connected to the United States to provide specific personal jurisdiction in the United States." *Waldman,* 835 F.3d at 337; *accord Livnat*, 851 F.3d at 57; *Klieman*, 82 F. Supp. 3d at 248–49.

Congress responded in 2018 by enacting the Anti-Terrorism Clarification Act ("ATCA"). Section 4 of the ATCA provides that "for purposes of any civil action" under the ATA, "a defendant shall be deemed to have consented to personal jurisdiction in such civil action if," after January 31, 2019, it either accepts specified forms of foreign assistance or maintains an office within the United States pursuant to a waiver or suspension of 22 U.S.C. § 5202 (which prohibits the PLO from maintaining an office in the United States). Pub. L. No. 115-253, § 4, 132 Stat. 3183, 3184 (2018) (adding 18 U.S.C. § 2334(e)).

After the ATCA's enactment, the PA and PLO structured their affairs to avoid consenting to jurisdiction. On December 26, 2018, the PA informed the Secretary of State that it was declining to accept the forms of foreign assistance listed in the ATCA. The PLO does not receive U.S. foreign assistance. The PLO continues to occupy its United Nations Observer Mission in New York, but that office does not require any waiver or suspension of 22 U.S.C. § 5202. *See Klinghoffer v. SNC Achille Lauro Ed Altri-Gestione Motonave Achille Lauro*, 937 F.2d 44, 46 (2d Cir. 1991). Nor has the PLO operated any other office in the United States pursuant to a waiver or suspension of 22 U.S.C. § 5202 since before the ATCA's enactment.

Because the ATCA's factual predicates were not satisfied, this Court and the D.C. Circuit continued to hold that U.S. courts could not exercise personal jurisdiction over the PA and PLO in the cases in question. *Waldman v. PLO*, 925 F.3d 570, 575 (2d Cir. 2019), *vacated*, 140 S. Ct. 2714 (2020); *Klieman v. PA*, 923 F.3d 1115, 1128 (D.C. Cir. 2019), *vacated*, 140 S. Ct. 2713 (2020). Concluding that "[t]he plaintiffs have not shown that either factual predicate of Section 4 of the ATCA has been satisfied," those courts did not analyze the constitutionality of the ATCA's provisions governing personal jurisdiction. *Waldman*, 925 F.3d at 574; *accord Klieman*, 923 F.3d at 1128.

The plaintiffs filed petitions for certiorari in the Supreme Court. While those petitions were pending, Congress enacted the PSJVTA. Pub. L. No. 116-94, § 903, 133 Stat. 2534, 3082 (2019). Among other things,[2] the PSJVTA supersedes the personal jurisdiction provisions in the ATCA. The Act defines "defendant" to mean "the Palestinian Authority," "the Palestine Liberation Organization," and their successors or affiliates. *Id.* § 903(c)(1)(A). The Act also removed the

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[2] The PSJVTA included a number of provisions that are not at issue here, aimed at facilitating the resolution of ATA claims. *Id.* § 903(b). The portion of the PSJVTA challenged in this action is limited to the jurisdictional amendments contained in § 903(c), which, for ease of reference, this brief refers to as the PSJVTA.

condition that accepting specified foreign assistance would constitute consent.

In addition, the PSJVTA provides new factual predicates for the conduct that will be deemed to constitute consent to personal jurisdiction for civil actions under the ATA. The Act first focuses on the "Palestinian Authority's practice of paying salaries to terrorists serving in Israeli prisons, as well as to the families of deceased terrorists," which Congress had previously condemned.[3] The PSJVTA provides that a defendant "shall be deemed to have consented to personal jurisdiction" in civil ATA cases if, after 120 days following the date of enactment of the PSJVTA (i.e., after April 18, 2020), it "makes any payment, directly or indirectly —

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

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[3] Taylor Force Act, Pub. L. No. 115-141, § 1002 (Findings), 132 Stat. 348, 1143 (2018). That Act is separate legislation relating specifically to assistance for the West Bank and Gaza that directly benefits the PA, where Congress further found that the PA's practice of making such payments "is an incentive to commit acts of terror."

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

18 U.S.C. § 2334(e)(1)(A).

Second, the PSJVTA provides that the PA and PLO will be deemed to have consented to personal jurisdiction in ATA civil actions if they undertake certain activities in the United States. Specifically, the Act provides that a defendant "shall be deemed to have consented to personal jurisdiction" if, after fifteen days following the date of enactment of the PSJVTA (i.e., after January 4, 2020), it maintains, establishes, or procures any office in the United States or "conducts any activity while physically present in the United States on behalf of the Palestine Liberation Organization or the Palestinian Authority," with the exception of certain business at the United Nations, activities involving government officials, participation in training or related activities funded or arranged by the United States government, or legal representation. 18 U.S.C. § 2334(e)(1)(B)(i)–(iii), (e)(3). As the PSJVTA's lead sponsor explained, the Act "allow[s] the PA/PLO to conduct a very narrow scope of activities on U.S. soil—such as activities pertaining to official business at the United Nations, engagements with U.S. officials necessary to our national interest, and legal expenses related to adjudicating or resolving claims filed in U.S. courts—without consenting to personal jurisdiction in

civil ATA cases." 165 Cong. Rec. S7182 (Dec. 19, 2019) (Sen. Lankford).

Congress provided that the PSJVTA's personal jurisdiction provisions "apply to any case pending on or after August 30, 2016." PSJVTA § 903(d)(2). Activities that are deemed consent to personal jurisdiction following the PSJVTA's enactment are thus a basis for exercising jurisdiction over an ATA action "regardless of the date of the occurrence of the act of international terrorism upon which such civil action was filed." 18 U.S.C. § 2334(e)(1). As Senator Grassley explained, the PSJVTA "sends a clear signal that Congress intends to empower courts to restore jurisdiction in cases previously dismissed." 165 Cong. Rec. S7183.

Following the PSJVTA's enactment, the Supreme Court granted the pending petitions for certiorari in *Sokolow*/*Waldman* and *Klieman*, vacated the decisions of the courts of appeals, and remanded for consideration of the matters in light of the PSJVTA. 140 S. Ct. 2713–14 (2020).

C. The Present Action and the District Court's Opinion

Plaintiffs commenced this action in April 2020. According to their complaint, plaintiffs are the wife and surviving children of Ari Yoel Fuld, a U.S. citizen who was murdered in the West Bank in 2018. (JA 15–16, 51–52). Plaintiffs allege that the murderer targeted Fuld because he was a Jewish American. And they allege that the PA and PLO "encouraged, incentivized, and assisted" the attack on Fuld. (JA 15). They accordingly seek damages against the PA and PLO under the

ATA. (JA 54–64). Plaintiffs have asserted that the district court has personal jurisdiction over the PA and PLO under both prongs of the PSJVTA: they allege that after April 18, 2020, defendants made payments to the families of deceased terrorists who killed or injured U.S. nationals and to the designees of terrorists who pleaded guilty or were fairly convicted of killing or injuring U.S. nationals, *see* 18 U.S.C. § 2334(e)(1)(A); and that after January 4, 2020, defendants provided consular services in the United States and conducted press conferences, distributed informational materials, and engaged the United States media in order to influence U.S. foreign policy and public opinion, and also maintained offices in the United States that were not used exclusively for conducting official United Nations business, *see id.* § 2334(e)(1)(B). (JA 14–15, 21–47).

The defendants moved to dismiss for lack of personal jurisdiction. They did not dispute, for purposes of their motion, that they had made payments to families or designees of terrorists that would come within 18 U.S.C. § 2334(e)(1)(A). They did dispute that they had engaged in activities in the United States that would come within 18 U.S.C. § 2334(e)(1)(B). The defendants challenged the constitutionality of exercising personal jurisdiction over them under the PSJVTA's deemed consent provisions. Following the United States' intervention to defend the constitutionality of the statute, the district court ruled in favor of defendants and dismissed the action.

The district court held that the PSJVTA cannot support personal jurisdiction in this case consistent

with the Fifth Amendment's Due Process Clause. (JA 66–94). The court observed that due process "conditions 'a tribunal's authority . . . on the defendant's having such "contacts" with the forum State that "the maintenance of the suit" is "reasonable . . ." and "does not offend traditional notions of fair play and substantial justice"' " (JA 74 (quoting *Ford Motor Co. v. Montana Eighth Judicial District Court*, 141 S. Ct. 1017, 1024 (2021), in turn quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316–17 (1945))), and held that the standard was the same under both the Fifth and Fourteenth Amendments (JA 74). The district court also recognized that personal jurisdiction obtained through a party's consent does not offend traditional notions of fair play and substantial justice, as it constitutes a defendant's submission to the jurisdiction of the court, and identified examples of express and implied consent to personal jurisdiction. (JA 77–78). But the court stated that the defendant's consent must be knowing and voluntary, and must actually signal approval or acceptance of jurisdiction. (JA 78). In short, the district court stated that consent to personal jurisdiction must be willful, thoughtful, and fair. (JA 79).

The PSJVTA, the district court held, does not satisfy that standard. "Congress simply took conduct in which the PLO and PA had previously engaged," which had already been held insufficient to support general or specific personal jurisdiction by two courts of appeals, "and declared that such conduct 'shall be deemed' to be consent." (JA 79). The court ruled that neither prong of the deemed-consent provision can support an inference of actual consent. The court

reasoned that the "martyr payments" that satisfy the first prong of the PSJVTA "have no direct connection to the United States, let alone to litigation in a United States court." (JA 79). And although the second prong of the PSJVTA did involve "conduct in the United States," the district court considered that conduct, as least as alleged in this case, "too thin to support a meaningful inference of consent to jurisdiction in this country." (JA 79–80). Neither type of conduct, the district court concluded, "even remotely signals approval or acceptance of the Court's jurisdiction." (JA 80). To support deemed consent, the court held, predicate conduct must "be a much closer proxy for actual consent" than the PSJVTA provides. (JA 80). In short, "[t]he PSJVTA is too cute by half to satisfy the requirements of due process here." (JA 80).

The district court relied on *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999), to bolster that conclusion. The Supreme Court there held that a state's waiver of Eleventh Amendment immunity required "actual consent," which could not be inferred based on a state's merely being put on notice of activities Congress deemed to be a waiver, combined with the ability to cease those activities. (JA 80–81). The district court concluded that the same analysis applies to due process rights, pointing to the Supreme Court's statement that "[c]onstructive consent is not a doctrine commonly associated with the surrender of constitutional rights," and its criticism of utilizing that concept to infer a waiver of the right to a jury trial. (JA 81 (quotation marks and emphasis omitted)). Under that analysis, the district court reasoned, *College Savings* "compels

the conclusion that personal jurisdiction is lacking here." (JA 82).

As further support, the district court pointed to two decisions of this Court, *Brown v. Lockheed Martin Corp.*, 814 F.3d 619 (2d Cir. 2016), and *Chen v. Dunkin' Brands, Inc.*, 954 F.3d 492 (2d Cir. 2020). Both cases rejected claims to general jurisdiction based on consent inferred from a business's complying with a state's statutory requirement that it must register and consent to service, construing the states' statutes more narrowly in light of due process concerns. (JA 82–83). While noting the differences between the general jurisdiction in those cases and the ATA-specific deemed consent under the PSJVTA as well as the PSJVTA's more explicit consent language, the district court concluded that those decisions suggest that "'deemed consent' jurisdiction is limited by the Due Process Clause" and that "legislative fiat" deeming consent based on conduct that does not otherwise support personal jurisdiction would deprive defendants of the protections of due process. (JA 83–84).

The district court further reasoned that if fair notice and an opportunity to conform are sufficient for deemed consent to be knowing and voluntary, there would be "*no* due process limitations on the exercise of personal jurisdiction," as a legislature could provide for jurisdiction over any defendant for any conduct post-dating the statute. (JA 85). That would include, the court observed, deeming the substantive violation of a law to be consent and then involuntarily subjecting the defendant to a court's jurisdiction without regard to its contacts with the forum. (JA 85–87). The

district court also reasoned that a similar approach to consent could apply more broadly, diminishing other constitutional rights. (JA 87–88). The district court distinguished *Insurance Corporation of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982), where the Supreme Court upheld a ruling that a party's refusal to comply with discovery orders regarding personal jurisdiction was an admission of the facts supporting personal jurisdiction, on the ground that the conduct there was related to the litigation in which the party had appeared to contest jurisdiction, and the sanction of deeming the facts admitted (and then reaching the legal conclusion that jurisdiction was present) was different from deeming the party to have consented to jurisdiction in the first instance. (JA 88–90).

The district court then addressed the government's contention that courts owe deference to the political branches in matters of foreign affairs, but concluded that deference cannot override the court's obligation to uphold constitutional rights. (JA 90–92). The district court also reasoned that the test for personal jurisdiction does not vary by context, relying on concerns for "international comity" identified in *Daimler* to reject "an 'expansive view' of Congress's authority to create personal jurisdiction" in "the context of foreign affairs." (JA 92).[4]

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[4] Shortly after the district court's decision in this case, two other judges of the same district court reached similar conclusions. In *Sokolow v. PLO*—on remand from the *Sokolow*/*Waldman* decisions

Summary of Argument

In the PSJVTA, Congress specified activities that will be deemed consent to personal jurisdiction, by a limited class of defendants, for purposes of civil actions under the ATA. That is consistent with the constitutional requirements of due process under the Fifth Amendment. A defendant's consent has long been recognized as a basis for a court to exercise personal jurisdiction over it, and that consent may take many forms within the limits of the principles of fair play and substantial justice that define the due process inquiry. The PSJVTA provides the PA, the PLO, and closely related entities with advance notice of the specific types of conduct that will confer authority on the courts to consider cases against them under the civil liability provisions of the ATA, and a fair opportunity to cease engaging in that activity. By continuing the

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described above—the district court concluded that "[t]he conduct identified in the PSJVTA is insufficient to support a finding that [the PLO and PA] have consented to personal jurisdiction." __ F. Supp. 3d __, No. 04 Civ. 397, 2022 WL 719261, at *5 (S.D.N.Y. Mar. 10, 2022), *appeals pending*, Nos. 15-3135, 22-1060 (2d Cir.). In *Shatsky v. PLO*, the district court similarly concluded that "it is not reasonable to infer an intention to consent to suit in U.S. courts from the factual predicates in the PSJVTA," although it questioned whether the PLO and PA were entitled to due process protection. No. 18 Civ. 12355, 2022 WL 826409, at *5 (S.D.N.Y. Mar. 18, 2022), *appeals pending*, Nos. 22-791, 22-1138 (2d Cir.).

specified conduct, defendants have knowingly and voluntarily consented to personal jurisdiction. *See infra* Point A.

Critically, the fairness and reasonableness of the PSJVTA must be assessed in the context of Congress's exercise of its foreign-affairs power, to which the courts owe deference. The statute furthers crucial interests of the federal government in responding to terrorism and protecting U.S. nationals from terrorist acts. It applies only to the PA, PLO, and their affiliates or successors—unique, non-sovereign foreign entities that have historically been the subject of conditions placed by Congress and the Executive Branch on their presence and activities in the United States. The PA and PLO activities that are deemed consent to personal jurisdiction by the PSJVTA are linked to Congress's and the Executive Branch's interests in incentivizing the PA and PLO's commitment to renounce terrorism and in deterring international terrorism, in particular where it injures U.S. nationals. In light of those circumstances, the deemed-consent provisions are constitutional. *See infra* Point B.

The district court erred in concluding otherwise. It applied a test under which a defendant must intentionally consent to personal jurisdiction, but that is not consistent with the case law, under which a defendant may constructively consent. The district court incorrectly held that the standards for waiver of other constitutional rights must apply here, but the Supreme Court has made clear that not all rights are the same for the purpose of determining if they are waived. *See infra* Point C.

Finally, although the Court's precedent holds to the contrary, the Fifth Amendment allows a more expansive assertion of personal jurisdiction than the Fourteenth Amendment, and permits the deemed-consent provisions of the PSJVTA even if states could not impose similar provisions through state law. The limitations on personal jurisdiction imposed by the Fourteenth Amendment are tied to states' limited territorial sovereignty, and the need to ensure against states' incursion onto the sovereignty of other states of the Union or of foreign states. But in contrast, the federal government's powers extend both nationally and outside its borders, and include authority over matters of foreign affairs and foreign commerce. In these circumstances, and where the federal foreign-affairs interests in deterring international terrorism against U.S. nationals abroad and in vindicating their rights are strong, the narrow assertion of personal jurisdiction over these foreign defendants is within the federal government's authority under the Fifth Amendment. *See infra* Point D.

Accordingly, the judgment of the district court should be reversed.

ARGUMENT

The PSJVTA Is Consistent with Constitutional Requirements of Due Process

The PSJVTA is the most recent of Congress's efforts to "open[] the courthouse door to victims of

international terrorism."[5] In passing the statute, Congress acted to better realize the civil damages remedy of the ATA, a critical component of the United States' efforts against terrorism, by ensuring that U.S. courts could exercise personal jurisdiction in ATA actions in a manner consistent with due process under the Fifth Amendment. But the personal jurisdiction permitted under the PSJVTA is narrow: limited to civil ATA claims for acts of terrorism injuring U.S. nationals, brought against the PA, PLO, and related entities. And the activities that are deemed consent to personal jurisdiction are closely linked to terrorist acts against U.S. nationals or to the activities in the United States of the PA and PLO themselves. Congress enacted the deemed-consent provisions in furtherance of its broad authority over foreign affairs—indeed, the PSJVTA is a part of a long history of terrorism-related conditions Congress and the Executive Branch have placed on the presence and activities of the PA and PLO in the United States. Considered under all these circumstances, the PSJVTA's deemed-consent provisions are consistent with the Fifth Amendment Due Process Clause's principles of fair play and substantial justice.

A. The PSJVTA Establishes Personal Jurisdiction Based on Defendants' Knowing and Voluntary Consent

This Court has held that the PA and PLO are entitled to due process rights, and therefore the Fifth Amendment requires a federal court to establish

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[5] S. Rep. 102-342, at 45 (1992).

personal jurisdiction over those entities. *Waldman*, 835 F.3d at 329. "[T]he test for personal jurisdiction requires that 'the maintenance of the suit not offend traditional notions of fair play and substantial justice.'" *Bauxites*, 456 U.S. at 702–03 (quoting *International Shoe*, 326 U.S. at 316–17 (some quotation marks omitted)); *accord Ford Motor Co.*, 141 S. Ct. at 1024; *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476–77 (1985).

But "[b]ecause the requirement of personal jurisdiction represents first of all an individual right," it "can, like other such rights, be waived." *Bauxites*, 456 U.S. at 703. Specifically, a defendant may consent to a court's exercise of personal jurisdiction through a "variety of legal arrangements." *Id.*; *accord Burger King*, 471 U.S. at 472 n.14; *Brown*, 814 F.3d at 625 ("a party may simply consent to a court's exercise of personal jurisdiction . . . notwithstanding the remoteness from the state of its operations and organization"). As long as a defendant's consent is "knowing and voluntary," the court's exercise of jurisdiction is permissible and consistent with due process, *Wellness Int'l Network v. Sharif*, 575 U.S. 665, 685 (2015)—and personal jurisdiction based on such consent "does not offend due process" as long as the consent was not "unreasonable and unjust," *Burger King*, 471 U.S. at 472 n.14 (quotation marks omitted); *accord Dorchester Financial Securities, Inc. v. Banco BRJ, S.A.*, 722 F.3d 81, 85 (2d Cir. 2013).

Consistent with those principles, the PSJVTA sets out a reasonable "legal arrangement[ ]" through which Congress specified the conduct by which the PA and

PLO may, knowingly and voluntarily, constructively consent to personal jurisdiction to ATA claims, *Bauxites*, 456 U.S. at 703, and gives the PA and PLO "fair warning that a particular activity may subject [them] to the jurisdiction" of U.S. courts, *Burger King*, 471 U.S. at 472 (quotation marks omitted). The statute expressly describes what actions will cause the PA and PLO to be "deemed to have consented to personal jurisdiction" in ATA cases in U.S. courts. 18 U.S.C. § 2334(e)(1). And it provides a 120-day implementation period before consent will be deemed based on the payments prong, *id.* § 2334(e)(1)(A), and a fifteen-day period before consent will be deemed from non-excepted activities in the United States, *id.* § 2334(e)(1)(B). Thus, the PA and PLO were given a reasonable period to "'structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'" *Daimler*, 571 U.S. at 139 (quoting *Burger King*, 471 U.S. at 472).

B. The PSJVTA, as an Enactment in the Field of Foreign Affairs, Must Be Accorded Deference

Furthermore, whether an assertion of personal jurisdiction comports with fair play and substantial justice depends on "the circumstances of the particular case." *Waldman*, 835 F.3d at 331. Here, a critical circumstance is the fact that the PSJVTA was enacted "on a matter of foreign policy," and therefore "warrants respectful review by courts." *Bank Markazi v. Peterson*, 578 U.S. 212, 215 (2016). Specifically, Congress enacted, and the President signed into law, the PSJVTA to facilitate providing a meaningful response

to international terrorism, and the political branches acted against an extensive backdrop of statutes concerning the PLO and PA. And the narrow limits of the consent to personal jurisdiction required by the PSJVTA—only *sui generis* foreign entities, sued under the ATA for claims related to acts of international terrorism that injure U.S. victims, are deemed to have consented, 18 U.S.C. § 2334(e)(1), (5)—underscore that the deemed-consent provision is a reasonable exercise of Congress's foreign-affairs powers.

The ATA's civil-liability provision is intended "to develop a comprehensive legal response to international terrorism." 1992 House Report at 5. Congress found in the ATCA, however, that because courts had determined that the PA and PLO were not subject to general personal jurisdiction in the United States, the ATA's goals were not being realized. *See* H.R. Rep. No. 115-858, at 6. Congress thus determined that it was necessary to enact the ATCA so the ATA's civil-liability provision could function effectively to "halt, deter, and disrupt international terrorism." *Id.* at 7–8; *see also id.* at 2–3. In amending the ATCA's deemed-consent provisions through the PSJVTA, Congress acted with the same purpose. *See* 166 Cong. Rec. S627 (Jan. 28, 2020) (Sen. Leahy) ("Congress is committed to pursuing justice for American victims of terrorism while ensuring appropriate standards regarding the ability of foreign missions to conduct official business in the United States."); 165 Cong. Rec. S7182 (Dec. 19, 2019) (Sen. Lankford) (bill "strike[s] a balance between Congress's desire to provide a path forward for American victims of terror to have their day in court and the toleration by the Members of this body to allow

the PA/PLO to conduct a very narrow scope of activities on U.S. soil"); *id.* (Sen. Grassley) ("these lawsuits disrupt and deter the financial support of terrorist organizations. By cutting terrorists' financial lifelines, the ATA is a key part of the U.S. arsenal in fighting terrorism and protecting American citizens.").

Congress's framework for deemed consent under the PSJVTA is consistent with this legislative purpose. First, the only defendants that may be deemed to have consented to personal jurisdiction are the PA, PLO, and their successors or affiliates. 18 U.S.C. § 2334(e)(5). And one of the two prongs of the deemed-consent provision directly concerns those entities' presence and activities in the United States. *Id.* § 2334(e)(1)(B). Conditioning permission for the PA and PLO to operate in the United States on their consent to personal jurisdiction in ATA actions is both reasonable and proportional, and arises from a long history of congressional and Executive actions. The 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 government premised on their renunciation of terrorism and commitment to peace in the Middle East. Their ability to operate within the United States is dependent on the judgments of the political branches, which have long imposed restrictions on their U.S. activities and operations based in part on the same concerns that motivated enactment of the ATCA and PSJVTA—namely, concerns about their historical support for acts of terrorism. *See* 22 U.S.C. § 5201 (enacted 1987; determining "that the PLO and its

affiliates are a terrorist organization and a threat to the interests of the United States, its allies, and to international law and should not benefit from operating in the United States"); *id.* § 5202 (prohibiting PLO from maintaining an office in the United States); Middle East Peace Facilitation Act of 1993, Pub. L. No. 103-125, § 3(b)(2), (d)(2), 107 Stat. 1309, 1310 (authorizing temporary waiver of that prohibition if the President certifies that "it is in the national interest of the United States" and "the Palestine Liberation Organization continues to abide by" its Oslo Accords commitments); Department of State, Foreign Operations, and Related Programs Appropriations Act, 2022, Pub. L. No. 117-103, div. K, § 7041(*l*)(3)(B), 136 Stat. 49, 641 (authorizing temporary waiver of that prohibition if President determines the Palestinians have not obtained United Nations membership status as a state and have not "actively supported an [International Criminal Court] investigation against Israeli nationals for alleged crimes against Palestinians"); *see also* Palestinian Anti-Terrorism Act of 2006, Pub. L. No. 109-446, § 7, 22 U.S.C. § 2378b note, 120 Stat. 3318 (prohibiting the establishment or maintenance in the United States of any office of the PA during any period for which it is effectively controlled by or unduly influenced by Hamas, in the absence of a statutory waiver).

Similarly, in deeming payments to designees and family members of persons imprisoned for or killed while committing acts of terrorism that kill or injure U.S. nationals to constitute consent to personal jurisdiction, Congress furthered critical interests in national security and foreign affairs by acting to discourage support for violence harming U.S. nationals

abroad. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 8–10 (2010) (discussing national security interests in deterring support for terrorism); *Center for Constitutional Rights v. CIA*, 765 F.3d 161, 169 (2d Cir. 2014) ("incit[ing] violence against American interests at home and abroad [will cause] damage to the national security"); Taylor Force Act, Pub. L. No. 115-141, § 1002 (Findings), 132 Stat. 348, 1143 (22 U.S.C. § 2378c-1 note) (Mar. 23, 2018). Congress specifically tied the qualifying payments to acts of terrorism that injure U.S. nationals, thus implicating the vital duty of the Executive and Legislative Branches to protect Americans abroad. *See Haig v. Agee*, 453 U.S. 280, 299 (1981); *United States v. Wong Kim Ark*, 169 U.S. 649, 692 (1898); *Durand v. Hollins*, 8 F. Cas. 111, 112 (C.C.S.D.N.Y. 1860) (Nelson, Circuit Justice). The link between the payments prong and opening the courts to vindicate the claims of U.S. terrorism victims is obvious: Congress has found that such payments by the PA/PLO incentivize the very type of terrorism Congress sought to combat in creating a civil action under the ATA. *See* Taylor Force Act, Pub. L. No. 115-141, § 1002(1) (Findings) (22 U.S.C. § 2378c-1 note).

In this context, it was reasonable and consistent with the Fifth Amendment for Congress and the Executive Branch to determine that the PLO's or PA's voluntarily and knowingly engaging in specified activities in the United States, or making payments by reason of terrorist acts injuring or killing U.S. nationals, should be "deemed" consent to personal jurisdiction in ATA civil cases—the very purpose of which is to deter terrorism. *See* H.R. Rep. No. 115-858, at 7 (2018) (committee report in support of ATCA) (explaining that

"Congress has repeatedly tied [the PA's and PLO's] continued receipt of these privileges [including presence in the United States] to their adherence to their commitment to renounce terrorism," and that it is appropriate to deem the continued acceptance of these benefits to be "consent to jurisdiction in cases in which a person's terrorist acts injure or kill U.S. nationals").

Because the PSJVTA is centrally concerned with matters of foreign affairs, it requires deferential consideration by the Judicial Branch. But nothing about that principle implies that the courts must "abdicat[e]" their responsibility to protect constitutional rights, or adopt a novel due process test in this case, as the district court suggested. (JA 90–92); *cf. ACLU v. Department of Defense*, 901 F.3d 125, 136 (2d Cir. 2018) ("Judges do not abdicate their judicial role by acknowledging their limitations and deferring to an agency's logical and plausible justification in the context of national security; they fulfill it."). Whether an exercise of personal jurisdiction is permissible turns on the question of whether it is " 'reasonable, in the context of our federal system of government,' and 'does not offend traditional notions of fair play and substantial justice.' " *Ford Motor Co.*, 141 S. Ct. at 1024 (quoting *International Shoe*, 326 U.S. at 316–17). Congress's and the Executive's broad authority to act in matters of foreign affairs, and the courts' relative lack of competence in those matters, are important factors in the balancing of interests that will ultimately determine the reasonableness of an assertion of personal jurisdiction. *Cf. United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 272 (2010) (in assessing service of process, due process depends on "all the circumstances" (quotation

marks omitted)); *Snyder v. Massachusetts*, 291 U.S. 97, 117 (1934) (Cardozo, J.) (in due process analysis, "[w]hat is fair in one set of circumstances may be an act of tyranny in others"), *overruled on other grounds by Malloy v. Hogan*, 378 U.S. 1 (1964). That balancing, and the deference courts must afford in foreign-affairs matters, are fully consistent with the Supreme Court's established tests for considering the due process limits of personal jurisdiction.

In sum, the PSJVTA's provisions deeming certain actions by the PLO and PA to be consent to personal jurisdiction—limited to specified foreign entities, applicable only to ATA claims, and in furtherance of U.S. foreign policy—must be seen in light of the federal government's constitutional responsibilities for, and broad authority over, international relations and the protection of U.S. nationals abroad. And those important government interests are closely linked to the two prongs of the PSJVTA's deemed-consent provisions. In this context, requiring the PA and PLO to answer civil suits in U.S. courts for any alleged role in specific acts of terrorism that injure U.S. nationals is reasonable, just, and in accordance with due process.

C. The District Court Erroneously Applied an Unduly Stringent Consent Standard

In concluding that "the PSJVTA does not constitutionally provide for personal jurisdiction over Defendants in this case," the district court misconstrued the requirements of due process, and the conditions that make a party's waiver of due process protections fair and reasonable. Bounded by the specific limitations

described above, the PSJVTA's deemed-consent provisions meet the Fifth Amendment's standards.[6]

The district court began by stating that for consent to support personal jurisdiction, a defendant must intend to submit to the laws of the forum and the jurisdiction of the forum's courts. (JA 77–78 (citing *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 881 (2011) (plurality opinion)). But that contradicts *Bauxites*, where the Supreme Court recognized that "the requirement of personal jurisdiction may be intentionally waived," but in the alternative, "for various

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[6] In the district court, the PA/PLO's primary argument was that they must receive some benefit in return for their "deemed" consent to be constitutionally valid. The district court correctly rejected that contention, observing that it runs contrary to case law. (JA 93 n.10). Indeed, no appellate court has held that a waiver of personal jurisdiction requires a benefit to the party waiving, and other cases addressing consent to waive constitutional rights do not require any kind of reciprocity or consideration. *See, e.g.*, *Wellness Int'l*, 575 U.S. at 683–85; *Roell v. Withrow*, 538 U.S. 580, 590 (2003); *Moran v. Burbine*, 475 U.S. 412, 421 (1986) (waiver of *Miranda* rights); *Oregon v. Elstad*, 470 U.S. 298, 302 (1985) (waiver of privilege against self-incrimination); *United States v. O'Brien*, 926 F.3d 57, 76 (2d Cir. 2019) (consent to search); *United States v. Velez*, 354 F.3d 190, 196 (2d Cir. 2004) (waiver of inadmissibility of statements made during plea discussions). Thus, consent can be valid even where the person consenting receives no benefit in return.

reasons a defendant may be estopped from raising the issue." 456 U.S. at 704–05. Put differently, "[t]he actions of the defendant may amount to a legal submission to the jurisdiction of the court, *whether voluntary or not*." *Id.* (emphasis added). A "constructive waiver" may support personal jurisdiction, *id.* at 706; similarly, the personal jurisdiction requirement can be "inadvertently forfeited," *City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 133 (2d Cir. 2011). The premise of the district court's ruling—that a defendant must have "actually consented," or engaged in conduct that is a "close[ ] proxy for actual consent," to the forum court's jurisdiction (JA 79–80)—was therefore erroneous.

To be sure, it would not be consistent with "traditional notions of fair play and substantial justice," *International Shoe*, 326 U.S. at 316–17 (quotation marks omitted), for Congress to "deem" a defendant to have consented to personal jurisdiction based on conduct entirely unrelated to the forum or to the lawsuit. (JA 85 (rejecting interpretation that would allow "jurisdiction over *any* defendant for *any* conduct so long as the conduct post-dated enactment of the law at issue")). But as explained above, that is not what the PSJVTA does: the activities that are deemed consent to personal jurisdiction are closely linked to the only claim for which personal jurisdiction is permitted, a civil ATA action concerning attacks on Americans, brought against two specified defendants (and related entities) whose conduct has historically been the subject of foreign-policy concern by the Executive and Legislative Branches, in an area where Congress and the Executive have wide latitude to act. Whether a

defendant has consented to personal jurisdiction must be determined under "all of the relevant circumstances." *Mattel, Inc. v. Barbie-Club.com*, 310 F.3d 293, 307 (2d Cir. 2002) (quotation marks omitted). And here, the circumstances—particularly the actions that are deemed consent, the circumscribed class of cases in which that deemed consent applies, and the nature of the political branches' authority over foreign affairs—demonstrate the reasonableness of personal jurisdiction under the PSJVTA.[7]

The district court also erred in relying on *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*. (JA 80–81 (citing 527 U.S. 666 (1999))). In that case, the Supreme Court held that a state's waiver of its Eleventh Amendment immunity against suit must be "express" and "unequivocal," and could not be based merely on taking certain actions

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[7] It is also irrelevant, contrary to the district court's suggestion, if the PA and PLO had "previously engaged" in the conduct that the PSJVTA deems to be consent going forward. (JA 79). Congress certainly has the authority to attach new legal consequences to conduct that an entity has undertaken in the past and may repeat after the statutory change. *Cf. Landgraf v. USI Film Products*, 511 U.S. 244, 269–70 (1994). What matters is not what the defendants did previously, or even how Congress selected the predicates for deeming consent to personal jurisdiction; rather, the issue is whether deeming consent on that basis is reasonable under the circumstances and comports with due process notions of fair play and substantial justice.

that Congress had "deemed" to be a waiver. 527 U.S. at 680–81. The district court broadened that principle to extend to this case, reasoning that "constructive—i.e., 'deemed'—consents" are "'simply unheard of in the context of *other* constitutionally protected privileges,'" and noting that the *College Saving Bank* Court, as an example, dismissed the idea that a constructive waiver of the right to a jury trial based on statutorily specified conduct would be valid. (JA 81 (quoting 527 U.S. at 681)).

But that ignores significant differences between the rights at issue, differences that affect how a waiver of those rights will be determined. In fact, the Supreme Court has expressly held that waiver standards will be different depending on the constitutional right at stake. The Court has applied a particularly "stringent" test for waivers of Eleventh Amendment rights, because the competing interests and governmental obligations of two sovereigns are involved. *College Savings Bank*, 527 U.S. at 675 (quotation marks omitted); *see id.* at 678 ("there is no place for the doctrine of constructive waiver *in our sovereign-immunity jurisprudence*" (emphasis added; quotation marks omitted)). Similarly, the *College Savings Bank* Court compared that waiver to waiver of a defendant's right to a jury trial, where a comparable "strict standard of an intentional relinquishment of a 'known' right" is required. *Schneckloth v. Bustamonte*, 412 U.S. 218, 238 (1973). In contrast, the Court has held that due to the "vast difference between those rights that protect a fair criminal trial and the rights guaranteed under the Fourth Amendment," the stringent standard for waiver of trial rights does not apply "to the

constitutional guarantee against unreasonable searches and seizures." *Id.* at 241.

In other constitutional contexts, the Supreme Court has recognized more flexible standards—for instance, consent by conduct. *See Wellness Int'l*, 575 U.S. at 674–85 (implied consent to bankruptcy judge waives Article III rights); *Roell v. Withrow*, 538 U.S. 580, 585–91 (2003) (consent to magistrate judge inferred from conduct); *Williams v. Bartlett*, 44 F.3d 95, 100 (2d Cir. 1994) ("Once asserted, however, the right to self-representation may be waived through conduct indicating that one is vacillating on the issue or has abandoned one's request altogether."). And most relevant here, the Supreme Court and this Court have specifically stated that personal jurisdiction can be waived or forfeited by constructive waiver or inadvertence, a rule that cannot be squared with the district court's conclusion that "the principles underlying *College Savings Bank* are not specific to the Eleventh Amendment, but rather apply to constitutional rights broadly." (JA 81; *see* JA 87 (suggesting that waiver principles would be the same regarding other constitutional rights, with "staggering implications")).

Finally, the district court relied on *Brown* and *Chen*, two cases that concerned whether an out-of-state defendant consented to general personal jurisdiction in a state's courts by registering to do business in the state and appointing an in-state agent to accept service, in accordance with a statutory requirement.

Brown, 814 F.3d at 622; *Chen*, 954 F.3d at 496.[8] This Court construed the state statutes as not "embodying actual consent . . . to the state's exercise of general jurisdiction." *Brown*, 814 F.3d at 626, 636–37; *accord Chen*, 954 F.3d at 499.[9] But while the Court "caution[ed]" that "to accord a broader effect [to the state registration statutes] would implicate Due Process and other constitutional concerns," *Brown*, 814 F.3d at 626, it did not opine on the due process limits of consent to personal jurisdiction achieved by satisfying statutory conditions. Instead, the Court merely rejected the "expansive" view that it should "infer from an ambiguous statute" that a corporation's registration and appointment of an agent alone constitute consent to the state's exercise of general jurisdiction over the corporation—that is, "the power to adjudicate any matter concerning any registered corporation, no

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[8] The Supreme Court recently granted certiorari to review the question of whether a state can constitutionally require a corporation to consent to general personal jurisdiction as a condition of doing business in the state. *Mallory v. Norfolk Southern Railway Co.*, No. 21-1168. The government takes no position here on that question.

[9] The New York Court of Appeals recently concluded that "a foreign corporation does not consent to general jurisdiction in this state merely by complying with the Business Corporation Law's registration provisions," the same registration statute at issue in *Chen*. *Aybar v. Aybar*, 37 N.Y.3d 274, 290 (2021).

matter where the matter arose and no matter how limited the state's interest in the dispute." *Id.* at 622, 640.

That is far afield from the PSJVTA. This Court recognized in *Brown* that "a carefully drawn . . . statute that expressly required consent to general jurisdiction . . . might well be constitutional" under the Due Process Clause of the Fourteenth Amendment. *Id.* at 641. The PSJVTA expressly states that the PA, the PLO, and their affiliates or successors are deemed to have consented to personal jurisdiction in U.S. courts for claims that they materially assisted terrorist attacks injuring U.S. nationals, only if they engage in specifically enumerated activities in the United States or with a nexus to terrorism injuring U.S. nationals, and in an area in which the political branches have long imposed restrictions on the PA and the PLO to effectuate foreign policy. Thus, in contrast to the general jurisdiction statutes at issue in *Brown* and *Chen*, the PSJVTA grants jurisdiction only over specified civil actions under a single federal statute—the ATA—with a clear link to the activities that will be deemed consent to personal jurisdiction. The PSJVTA is therefore substantially different from state consent-by-registration statutes, and *Brown* and *Chen* shed no light on its constitutionality under the Fifth Amendment.

D. Due Process Standards of the Fifth Amendment, Not the Fourteenth Amendment, Apply to the PSJVTA

Lastly, the constitutionality of the PSJVTA should be assessed under the due process standards of the Fifth Amendment—standards that allow federal

courts to assert personal jurisdiction over a foreign defendant in ways that have no analogue for a state court exercising personal jurisdiction under the Fourteenth Amendment. In *Waldman*, this Court reiterated its prior holding that "'the due process analysis for purposes of the court's *in personam* jurisdiction is basically the same under both the Fifth and Fourteenth Amendments.'" 835 F.3d at 330 (quoting *Chew v. Dietrich*, 143 F.3d 24, 28 n.4 (2d Cir. 1998) (alterations omitted)).[10] The government recognizes that this panel is bound by that holding.[11] But the Court's conclusion, reached with little analysis in either *Waldman* or *Chew*, disregards important differences between the competences of federal and state sovereigns under our Constitution's allocation of authorities, and should be reconsidered.

The Supreme Court has never held that the analysis that applies to a federal statute establishing personal jurisdiction under the Fifth Amendment is the same analysis that applies to a state long-arm statute under the Fourteenth Amendment. *See Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1784

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[10] The District of Columbia Circuit has reached a similar conclusion. *Livnat*, 851 F.3d at 54–55.

[11] The government did not raise this issue in the district court. But "parties are not required to raise arguments directly contrary to controlling precedent to avoid waiving them." *In re Vivendi, S.A. Securities Litigation*, 838 F.3d 223, 264 (2d Cir. 2016) (quotation marks omitted).

(2017) ("[W]e leave open the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court."). But members of the Court have observed that "personal jurisdiction requires a forum-by-forum, or sovereign-by-sovereign, analysis," and "[b]ecause the United States is a distinct sovereign, a defendant may in principle be subject to the jurisdiction of the courts of the United States but not of any particular State." *J. McIntyre Machinery*, 564 U.S. at 884 (plurality opinion). Moreover, the Court has tied the limitations of its Fourteenth Amendment personal jurisdiction jurisprudence to principles of states' sovereignty in a federal system. The "concept of minimum contacts" serves "two related, but distinguishable, functions": to protect defendants from litigating in distant forums, but also "to ensure that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291–92 (1980). Thus, because "[t]he sovereignty of each State . . . implie[s] a limitation on the sovereignty of all of its sister States," the Fourteenth Amendment's Due Process Clause "act[s] as an instrument of interstate federalism" and limits the jurisdictional reach of state courts. *Id.* at 293–94; *accord Bristol-Myers Squibb*, 137 S. Ct. at 1780–81 ("at times, this federalism interest may be decisive"); *J. McIntyre Machinery*, 564 U.S. at 884 (plurality opinion) ("if another State were to assert jurisdiction in an inappropriate case, it would upset the federal balance, which posits that each State has a sovereignty that is not subject to unlawful intrusion by other States").

But those federalism concerns do not apply to the federal government. Unlike a state, which is subject to "territorial limitations" on its power, *World-Wide Volkswagen*, 444 U.S. at 294 (quotation marks omitted), the United States has authority "to enforce its laws beyond [its] territorial boundaries," *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991), *superseded by statute on other grounds*. And rather than the limited and mutually exclusive sovereignty of the several states, the federal government's sovereignty includes authority over foreign commerce and foreign affairs. Indeed, the United States' "powers of external sovereignty" and its ability to conduct its relationships with foreign actors are grounded in the United States' status in international law as an independent state. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936); *see Burnet v. Brooks*, 288 U.S. 378, 396 (1933) ("As a nation with all the attributes of sovereignty, the United States is vested with all the powers of government necessary to maintain an effective control of international relations."); *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812); *Kleindienst v. Mandel*, 408 U.S. 753, 765–66 (1972) (political branches of federal government have powers "inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers" (quotation marks omitted)).[12]

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[12] In *Livnat*, the D.C. Circuit cited "the sovereign concerns of other nations" and "risks to international

Thus, the United States' constitutional powers and special competence in matters of foreign affairs and international commerce, in contrast to the limited and geographically cabined sovereignty of each of the several states, permit the exercise of federal judicial power in certain ways that are not analogous to the state level. *See Douglass v. Nippon Yusen Kabushiki Kaisha*, 996 F.3d 289, 293–96 (5th Cir.) (finding it "persuasive" that because "federalism concerns are not present in the Fifth Amendment context," and due to "the limited constitutional rights of foreign defendants," "the bounds of Fifth Amendment due process are likely not wholly defined by modern Fourteenth Amendment caselaw," though ultimately concluding court was compelled by precedent to apply Fourteenth Amendment test), *vacated and reh'g en banc granted*, 2 F.4th 525 (5th Cir. 2021). In particular, the Fifth Amendment permits a greater scope of personal jurisdiction for legal claims that Congress has determined can be adjudicated in federal courts than the Fourteenth Amendment allows for claims that the states authorize for their courts. In this case, Congress has made just such a determination—it has enacted

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comity" as reasons to conclude the Fifth Amendment personal jurisdiction test mirrors the Fourteenth Amendment's. 851 F.3d at 55 (quotation marks omitted). The district court echoed those concerns here. (JA 92). But those "delicate judgments[ ] involv[e] a balance that it is the prerogative of the political branches to make." *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1408 (2018).

numerous laws, including the ATA, combating acts of international terrorism outside the United States that affect U.S. persons and interests. And Congress has sought to make that legislation effective by putting the PA and PLO on reasonable notice that engaging in certain related activities will subject them to the adjudicative authority of U.S. courts for purposes of these specific causes of action. Even if a state could not enact similar legislation consistent with the Fourteenth Amendment, the Fifth Amendment does not prohibit the United States government from deeming certain actions of the PA and PLO to be consent to personal jurisdiction in the United States in these limited circumstances—where the activities that are deemed consent to personal jurisdiction are closely linked to the only claim for which personal jurisdiction is established, the suits concern terrorist attacks injuring Americans and are brought against two specified defendants (and related entities) whose conduct has historically been the subject of foreign-policy concern by the Executive and Legislative Branches, and those Branches have acted in an area where the Constitution affords them broad latitude.

CONCLUSION

The judgment of the district court should be reversed.

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June 21, 2022

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of the Federal Rules of Appellate Procedure and this Court's Local Rules. As measured by the word processing system used to prepare this brief, there are 9743 words in this brief.

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