Nos. 24-20 and 24-151

In the Supreme Court of the United States

MIRIAM FULD, ET AL., PETITIONERS

v.

PALESTINE LIBERATION ORGANIZATION, ET AL.

UNITED STATES OF AMERICA, PETITIONER

v.

PALESTINE LIBERATION ORGANIZATION, ET AL.

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

BRIEF FOR THE FEDERAL PETITIONER

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QUESTION PRESENTED

In the Promoting Security and Justice for Victims of Terrorism Act of 2019, Pub. L. No. 116-94, Div. J, Tit. IX, § 903, 133 Stat. 3082, Congress provided that the Palestine Liberation Organization and the Palestinian Authority "shall be deemed to have consented to personal jurisdiction" in certain terrorism-related civil suits if they took specified actions in the future: (a) made payments to designees or family members of terrorists who injured or killed U.S. nationals, or (b) maintained certain premises or conducted particular activities in the United States. 18 U.S.C. 2334(e)(1) (Supp. IV 2022). The question presented is whether the Act's means of establishing personal jurisdiction complies with the Due Process Clause of the Fifth Amendment.

PARTIES TO THE PROCEEDING

In No. 24-20, petitioners (plaintiffs-appellants below) are Miriam Fuld, individually, as personal representative and administrator of the estate of Ari Yoel Fuld, deceased, and as natural guardian of plaintiff Natan Shai Fuld; Natan Shai Fuld, minor, by his next friend and guardian Miriam Fuld; Naomi Fuld; Tamar Gila Fuld; Eliezer Yakir Fuld; Eva Waldman; Revital Bauer, individually and as natural guardian of plaintiffs Yehonathon Bauer, Binyamin Bauer, Daniel Bauer, and Yehuda Bauer; Shaul Mandelkorn; Nurit Mandelkorn; Oz Joseph Guetta, minor, by his next friend and guardian Varda Guetta; Varda Guetta, individually and as natural guardian of plaintiff Oz Joseph Guetta; Norman Gritz, individually and as personal representative of the estate of David Gritz; Mark I. Sokolow, individually and as natural guardian of plaintiff Jamie A. Sokolow; Rena M. Sokolow, individually and as a natural guardian of plaintiff Jamie A. Sokolow; Jamie A. Sokolow, minor, by her next friends and guardians Mark I. Sokolow and Rena M. Sokolow; Lauren M. Sokolow; Elana R. Sokolow; Shayna Eileen Gould; Ronald Allan Gould; Elise Janet Gould; Jessica Rine; Shmuel Waldman; Henna Novack Waldman; Morris Waldman; Alan J. Bauer, individually and as natural guardian of plaintiffs Yehonathon Bauer, Binyamin Bauer, Daniel Bauer, and Yehuda Bauer; Yehonathon Bauer, minor, by his next friends and guardians Dr. Alan J. Bauer and Revital Bauer; Binyamin Bauer, minor, by his next friends and guardians Dr. Alan J. Bauer and Revital Bauer; Daniel Bauer, minor, by his next friends and guardians Dr. Alan J. Bauer and Revital Bauer; Yehuda Bauer, minor, by his next friends and guardians Dr. Alan J. Bauer and Revital Bauer; Rabbi Leonard Mandelkorn; Katherine

Baker, individually and as personal representative of the estate of Benjamin Blutstein; Rebekah Blutstein; Richard Blutstein, individually and as personal representative of the estate of Benjamin Blutstein; Larry Carter, individually and as personal representative of the estate of Diane (Dina) Carter; Shaun Coffel; Dianne Coulter Miller; Robert L. Coulter, Jr.; Robert L. Coulter, Sr., individually and as personal representative of the estate of Janis Ruth Coulter; Chana Bracha Goldberg, minor, by her next friend and guardian Karen Goldberg; Eliezer Simcha Goldberg, minor, by his next friend and guardian Karen Goldberg; Esther Zahava Goldberg, minor, by her next friend and guardian Karen Goldberg; Karen Goldberg, individually, as personal representative of the estate of Stuart Scott Goldberg and as natural guardian of plaintiffs Chana Bracha Goldberg, Esther Zahava Goldberg, Yitzhak Shalom Goldberg, Shoshana Malka Goldberg, Eliezer Simcha Goldberg, Yaakov Moshe Goldberg, and Tzvi Yehoshua Goldberg; Shoshana Malka Goldberg, minor, by her next friend and guardian Karen Goldberg; Tzvi Yehoshua Goldberg, minor, by his next friend and guardian Karen Goldberg; Yaakov Moshe Goldberg, minor, by his next friend and guardian Karen Goldberg; Yitzhak Shalom Goldberg, minor, by his next friend and guardian Karen Goldberg; and Nevenka Gritz, sole heir of Norman Gritz, deceased.

In No. 24-151, petitioner (intervenor-appellant below) is the United States of America.

Respondents (defendants-appellees below) are the Palestine Liberation Organization and the Palestinian Authority (a.k.a. the Palestinian Interim Self-Government Authority, and/or the Palestinian Council, and/or the Palestinian National Authority).

RELATED PROCEEDINGS

United States District Court (S.D.N.Y.):

Sokolow v. *Palestine Liberation Organization*, No. 04-cv-397 (Mar. 30, 2011) (denying motion to dismiss)

Sokolow v. *Palestine Liberation Organization*, No. 04-cv-397 (Oct. 1, 2015) (judgment)

Fuld v. *Palestine Liberation Organization*, No. 20-cv-3374 (Jan. 6, 2022) (granting motion to dismiss)

Sokolow v. *Palestine Liberation Organization*, No. 04-cv-397 (Mar. 10, 2022) (granting motion to dismiss)

Sokolow v. *Palestine Liberation Organization*, No. 04-cv-397 (June 15, 2022) (denying reconsideration)

United States Court of Appeals (2d Cir.):

Waldman v. *Palestine Liberation Organization*, No. 15-3135 (Aug. 31, 2016) (first panel decision)

Waldman v. *Palestine Liberation Organization*, No. 15-3135 (June 3, 2019) (second panel decision)

Waldman v. *Palestine Liberation Organization*, No. 15-3135 (Sept. 8, 2023) (third panel decision)

Fuld v. *Palestine Liberation Organization*, No. 22-76 (Sept. 8, 2023) (panel decision)

Fuld v. *Palestine Liberation Organization*, No. 22-76 (May 10, 2024) (denying rehearing)

Supreme Court of the United States:

Sokolow v. *Palestine Liberation Organization*, No. 16-1071 (Apr. 2, 2018) (denying first petition for writ of certiorari)

Sokolow v. *Palestine Liberation Organization*, No. 19-764 (Apr. 27, 2020) (granting second petition

for writ of certiorari, vacating judgment, and remanding to court of appeals)

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OPINIONS BELOW

The opinion of the court of appeals in *Fuld* v. *Palestine Liberation Organization* (Pet. App. 1a-52a) is reported at 82 F.4th 74.[1] The opinion of the court of appeals in *Waldman* v. *Palestine Liberation Organization* (Pet. App. 53a-70a) is reported at 82 F.4th 64. The order of the court of appeals denying rehearing en banc in both cases and opinions respecting that order (Pet. App. 204a-268a) are reported at 101 F.4th 190. Prior

[1] All references to "Pet. App." are to the petition appendix in No. 24-20.

opinions of the court of appeals in *Waldman* (Pet. App. 126a-135a, 136a-182a) are reported at 925 F.3d 570 and 835 F.3d 317.[2]

The order of the district court granting the defendants' motion to dismiss in *Fuld* (Pet. App. 93a-125a) is reported at 578 F. Supp. 3d 577. The order of the district court granting the defendants' motion to dismiss in *Sokolow* v. *Palestine Liberation Organization* (Pet. App. 79a-92a) is reported at 590 F. Supp. 3d 589, and an order denying reconsideration (Pet. App. 71a-78a) is reported at 607 F. Supp. 3d 323.

JURISDICTION

The judgments of the court of appeals were entered on September 8, 2023. Petitions for rehearing were denied on May 10, 2024 (Pet. App. 204a-268a). The petitions for writs of certiorari were filed on July 3, 2024, and August 8, 2024, and granted on December 6, 2024. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant constitutional and statutory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-5a.

INTRODUCTION

The Palestine Liberation Organization (PLO) and the Palestinian Authority (PA) are two non-sovereign foreign organizations that exercise governmental functions. This case concerns whether Congress can provide that if these entities pay terrorists who harmed Americans, or exceed restrictions on their activities in

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[2] *Waldman* was captioned as *Sokolow* v. *Palestine Liberation Organization* in the district court and in this Court (Nos. 16-1071, 19-764), so the rest of this brief refers to that case as *Sokolow*.

the United States, they will be deemed to have consented to suits in federal court for terrorism-related claims. The answer is plain: the Due Process Clause of the Fifth Amendment does not bar such regulation. Engrafting such a limitation into the Due Process Clause would deprive the political Branches of a key foreign-policy and national-security tool.

The United States has never recognized the PLO or PA as foreign sovereigns. Pet. App. 153a. But other countries have, and the PLO maintains "embassies, missions, and delegations around the world." *Id.* at 142a. And the PLO's office of its mission to the United Nations (UN) in New York City lets the PLO participate in UN proceedings. *Id.* at 238a-239a (Menashi, J., dissenting from denial of rehearing en banc).

Because the PLO historically pursued its aims through acts of terrorism—many of which killed or injured U.S. citizens—Congress has heavily restricted respondents' activities on U.S. soil and has sought to hold respondents accountable for facilitating terrorism. At the same time, the Executive Branch has long engaged with respondents, particularly in service of advancing peace between Israel and the Palestinians.

For years, respondents have faced federal-court suits under the Antiterrorism Act of 1990 (ATA), Pub. L. No. 101-519, § 132, 104 Stat. 2250 (18 U.S.C. 2331 *et seq.*), alleging their facilitation of acts of terrorism that injured or killed U.S. citizens. In the past decade, however, several courts have concluded that they lack personal jurisdiction over respondents.

Congress therefore enacted the Promoting Security and Justice for Victims of Terrorism Act of 2019 (Act), Pub. L. No. 116-94, Div. J, Tit. IX, § 903, 133 Stat. 3082. Applying only to respondents and their successors and

affiliates, the Act presented respondents with a choice tailored to their unique status and vital U.S. foreign-policy and national-security interests. Respondents could cease paying terrorists who harmed Americans. And respondents could cease U.S. activities that exceed what is necessary for their UN or legal representation or approved interactions with government officials. Or, if respondents opted to persist in such conduct after specified dates, they would be deemed to have consented to federal courts' exercise of personal jurisdiction in ATA cases involving their alleged facilitation of terrorist acts harming U.S. citizens. 18 U.S.C. 2334(e).

Respondents knowingly chose the latter option. They continued after the specified date to pay terrorists who killed or injured Americans. And, as this case comes to the Court, respondents are assumed to have continued engaging in covered activities on U.S. soil—for instance, providing consular services, holding press conferences, and distributing informational materials. Having engaged in the very acts that Congress specified would trigger jurisdiction, respondents now face federal-court jurisdiction, limited to ATA claims.

The Second Circuit nevertheless held that the Act facially violates the Fifth Amendment's Due Process Clause. Drawing principally from Fourteenth Amendment cases involving private, domestic defendants, the court reasoned that respondents can consent to federal jurisdiction only via contract, through litigation-related activity, or by accepting some unidentified form of benefits. Pet. App. 21a-24a; see *id.* at 30a, 35a n.13.

That holding is wrong for multiple reasons. Even under the line of constructive-consent cases that the Second Circuit invoked, the Act is constitutional. The Act gave respondents clear notice of the actions that would

be deemed consent: making payments to terrorists who have injured or killed U.S. nationals, and engaging in covered activities in the United States. Respondents have full, voluntary control over those actions, both of which have a nexus to the United States. And there is nothing fundamentally unfair about deeming respondents to have consented to limited personal jurisdiction in federal court for ATA claims as a result.

More broadly, the Second Circuit erred in holding that the same limits on personal jurisdiction in *state* courts under the Fourteenth Amendment's Due Process Clause apply to personal jurisdiction in *federal* courts under the Fifth Amendment's Due Process Clause. The Fifth Amendment gives Congress greater leeway over federal-court jurisdiction because the federal government is not subject to the same territorial concerns that limit States' sovereign power.

Further, the Second Circuit incorrectly assumed that respondents could invoke the same extent of due process limitations as any other defendant. Pet. App. 45a. But, as this Court has recognized, due process is a flexible concept, and the process due depends on the type of actor involved. The Fifth Amendment does not apply at all to foreign sovereigns. And, like foreign sovereigns, respondents engage in diplomatic activities and face foreign-relations-related restrictions on their activities. Insofar as respondents and other non-sovereign foreign entities have due process rights, those rights are far more limited than what domestic defendants could invoke. Treating respondents as on par with any private domestic actor for due process purposes risks stripping Congress of a critical foreign-policy tool: relying on the prospect of federal-court damages ac-

tions to deter actors like respondents from acting contrary to U.S. interests. This Court should reverse.

STATEMENT

A. Legal And Factual Background

1. Respondents, the PLO and PA, are non-sovereign foreign entities that exercise governmental functions and have long engaged in diplomatic and other activities with the United States. The PLO, founded in 1964, is the representative of the Palestinian people internationally. Pet. App. 6a. The PA was established pursuant to the 1993 Oslo Accords to exercise interim governance authority in Gaza and the West Bank. See *ibid.* Though the United States has never recognized either entity as a foreign sovereign, in the 1970s, the UN General Assembly "granted the PLO the status of an observer in its proceedings" in New York, prompting the PLO to open a UN mission there to conduct UN-related diplomatic activities. *Statutory Restrictions on the PLO's Washington Office*, 42 Op. O.L.C. 108, 110 (2018) (*PLO Office*). The PLO also opened an "information office" in Washington, D.C., "to act as 'the "voice" of the PLO in the United States.'" *Ibid.* (citation omitted).

As foreign non-sovereign entities, respondents exercise governance functions in portions of the West Bank and engage internationally, including with the UN and the United States. They maintain consular facilities and diplomatic missions around the world, seek to become formally recognized as representatives of the "State of Palestine," and have participated in countless diplomatic negotiations and international exchanges.

But, "[f]or several decades" after its formation, "the PLO pursued [its] aims through acts of violence, often directed against civilians in Israel and the rest of the world." *PLO Office*, 42 Op. O.L.C. at 110. Respondents'

history of support for terrorism has prompted Congress and the Executive Branch to extensively limit respondents' contacts with the United States for foreign-policy and national-security reasons.

Congress first restricted the PLO's activities in the United States in the Anti-Terrorism Act of 1987, Pub. L. No. 100-204, Tit. X, 101 Stat. 1406 (22 U.S.C. 5201 *et seq.*). Findings by Congress linked the PLO to "the murders of dozens of American citizens abroad" and deemed it "directly responsible" for the 1985 murder of an elderly Jewish-American cruise-ship passenger, Leon Klinghoffer. 22 U.S.C. 5201(a)(2) and (4); see *Klinghoffer* v. *S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria*, 937 F.2d 44, 47 (2d Cir. 1991).

The 1987 statute prohibits anyone from "receiv[ing] anything of value except informational material from the PLO," "expend[ing] funds from the PLO," or "establish[ing] or maintain[ing] an office, headquarters, premises, or other facilities or establishments" at the behest of or with funds furnished by the PLO. 22 U.S.C. 5202. Those restrictions have been understood not to affect the PLO's UN mission, see *Klinghoffer*, 937 F.2d at 51, and as provided by statute, Presidents "routinely" waived the restrictions between 1994 and 2017, *PLO Office*, 42 Op. O.L.C. at 112; see *id.* at 112-113 & nn.3 and 5. Congress also imposed similar restrictions on the PA's ability to open or maintain an office in the United States in the Palestinian Anti-Terrorism Act of 2006, Pub. L. No. 109-446, § 7, 120 Stat. 3324 (22 U.S.C. 2378b note). And Congress conditioned waivers of the PLO restrictions on, for example, the PLO's abiding by its commitments under the Oslo Accords or remaining in

nonmember status at the UN. *PLO Office*, 42 Op. O.L.C. at 112 n.3.

Congress has also limited aid and other assistance to the Palestinians in response to respondents' support for terrorism. Since fiscal year 2015, federal law has limited foreign assistance directly benefiting the PA in response to the PA's "practice of paying salaries to terrorists serving in Israeli prisons, as well as to the families of deceased terrorists," which Congress found to be "an incentive to commit acts of terror." Taylor Force Act, Pub. L. No. 115-141, Div. S, Tit. X, § 1002(1), 132 Stat. 1143 (2018) (22 U.S.C. 2378c-1 note); see §§ 1002(4) and 1004, 132 Stat. 1143-1146; *Shatsky* v. *PLO*, 955 F.3d 1016, 1022-1023 (D.C. Cir. 2020) (discussing the PA's "martyr payments").

2. The Antiterrorism Act of 1990, 104 Stat. 2250, established a treble-damages cause of action in federal district court for "[a]ny national of the United States injured * * * by reason of an act of international terrorism, or his or her estate, survivors, or heirs." 18 U.S.C. 2333(a); see *Twitter, Inc.* v. *Taamneh*, 598 U.S. 471, 482-483 (2023). Prompted in part by the Klinghoffer case, Congress enacted the ATA "to develop a comprehensive legal response to international terrorism." H.R. Rep. No. 1040, 102d Cong., 2d Sess. 5 (1992).

Over the ensuing years, numerous ATA suits were filed against respondents, which resisted litigating them on personal-jurisdiction and other grounds. District courts consistently found respondents subject to "general" personal jurisdiction, see *Daimler AG* v. *Bauman*, 571 U.S. 117, 122 (2014), based on their "continuous and systematic" activities in the United States, Pet. App. 192a; see *id.* at 192a-193a & n.10, and entered default judgments against them when they did not ap-

pear, see, *e.g.*, *Ungar* v. *PLO*, 402 F.3d 274, 279 (1st Cir.), cert. denied, 546 U.S. 1034 (2005); *Gilmore* v. *Palestinian Interim Self-Gov't Auth.*, 675 F. Supp. 2d 104, 107-108 (D.D.C. 2009).

In 2007, at the urging of the Secretary of State, respondents "modif[ied] their previously-held legal strategies by committing to good faith and timely defenses to the ATA claims brought against them in United States courts." *Knox* v. *PLO*, 248 F.R.D. 420, 424-425 (S.D.N.Y. 2008). They moved for relief from default judgments, citing among other things their new leadership's "desire[] to take a different approach to litigation pending in the federal courts" and "the delicate nature of [the United States'] foreign relations in the Middle East." *Ungar* v. *PLO*, 599 F.3d 79, 82-83 (1st Cir. 2010); compare, *e.g.*, *Biton* v. *Palestinian Interim Self-Gov't Auth.*, 252 F.R.D. 1, 2 (D.D.C. 2008) (refusing to vacate default), with *Knox*, 248 F.R.D. at 424 (vacating default). Respondents have thus treated their responses to these ATA claims as bound up with their broader diplomatic strategy vis-à-vis the United States.

B. Procedural History

1. The Sokolow *litigation and the Anti-Terrorism Clarification Act*

a. In 2004, "a group of United States citizens injured during terror[ist] attacks in Israel and the estates or survivors of United States citizens killed in such attacks" sued respondents under the ATA in the United States District Court for the Southern District of New York. Pet. App. 59a; see J.A. 1-52 (amended complaint in *Sokolow* v. *PLO*). The district court denied respondents' motion to dismiss for lack of personal jurisdiction, finding, like the other courts mentioned above, general

jurisdiction over them. After a trial in 2015, a jury awarded the plaintiffs $218.5 million in damages, which the ATA trebled to $655.5 million. Pet. App. 62a.

By that time, however, this Court had clarified the limits on general jurisdiction in *Daimler*, *supra*. *Daimler* held that a foreign corporation is subject to general jurisdiction only where it is "essentially at home," not wherever its activities can be said to be "continuous and systematic." 571 U.S. at 138-139 (citation omitted). The Second Circuit therefore reversed the judgment in *Sokolow*. Pet. App. 136a-182a. The court rejected the argument that respondents lack due process rights entirely. *Id.* at 153a-154a. The court held that general jurisdiction over respondents was lacking because, under *Daimler*, respondents were not "essentially at home" in the United States. *Id.* at 161a (quoting *Daimler*, 571 U.S. at 127). And the court held that "specific" jurisdiction was unavailable as an alternative basis for personal jurisdiction because the terrorist attacks in question took place in Israel and did not "specifically target[] United States citizens." *Id.* at 177a. This Court denied review. 584 U.S. 915 (No. 16-1071).

b. Congress then enacted the Anti-Terrorism Clarification Act of 2018 (ATCA), Pub. L. No. 115-253, 132 Stat. 3183. The ATCA provided in pertinent part that respondents would be "deemed to have consented to personal jurisdiction" in ATA cases if, more than 120 days after the ATCA's enactment, they (a) accepted certain forms of assistance from the United States, or (b) continued, while benefiting from a waiver or suspension of certain restrictions on the PLO's activities in the United States, to establish or maintain premises in the United States. § 4(a), 132 Stat. 3184.

Those provisions, the House Report explained, would further the United States' efforts "to halt, deter, and disrupt international terrorism and to compensate U.S. victims of international terrorism" by conditioning the "covered benefits" of "U.S. foreign assistance and continued presence in the United States on consent to jurisdiction in cases in which a person's terrorist acts injure or kill U.S. nationals." H.R. Rep. No. 858, 115th Cong., 2d Sess. 7-8 (2018) (ATCA House Report); see *id.* at 3-4.

The ATCA prompted the *Sokolow* plaintiffs to move the Second Circuit to recall its mandate directing dismissal of their case. Pet. App. 130a-131a. But before the ATCA's 120-day notice period expired, respondents "formally terminated their acceptance of any relevant assistance from the United States, and the PLO shuttered its diplomatic mission in Washington, D.C.—its only office operating in the United States pursuant to a [statutory] waiver." *Id.* at 10a. The Second Circuit, finding neither of the ATCA's factual predicates satisfied, declined to recall its mandate. *Id.* at 132a-135a. The plaintiffs filed another petition for a writ of certiorari (No. 19-764).

2. *The Promoting Security and Justice for Victims of Terrorism Act and the* Fuld *suit*

While the certiorari petition in *Sokolow* was pending, the legal framework shifted again. In 2019, Congress enacted the law at issue here, the Promoting Security and Justice for Victims of Terrorism Act, 133 Stat. 3082. Section 903(b) of the Act directed the Secretary of State to, among other things, pursue resolution of pending or closed ATA suits against respondents through engagement with respondents' representatives. *Id.* at 3082-3083. Section 903(c), subtitled "Jurisdictional Amend-

ments to Facilitate Resolution of Terrorism-Related Claims of Nationals of the United States," superseded the ATCA's personal-jurisdiction provisions. *Id.* at 3083-3085 (capitalization altered).

As amended by the Act, 18 U.S.C. 2334(e)(1) now provides that each respondent (the PA or the PLO) "shall be deemed to have consented to personal jurisdiction" in an ATA suit if it:

> (A) after the date that is 120 days after the date of the enactment of the [Act], makes any payment, directly or indirectly—
>
> > (i) to any payee designated by any individual who, after being fairly tried or pleading guilty, has been imprisoned for committing any act of terrorism that injured or killed a national of the United States, if such payment is made by reason of such imprisonment; or
> >
> > (ii) to any family member of any individual, following such individual's death while committing an act of terrorism that injured or killed a national of the United States, if such payment is made by reason of the death of such individual; or
>
> (B) after 15 days after the date of enactment of the [Act]—
>
> > (i) continues to maintain any office, headquarters, premises, or other facilities or establishments in the United States;
> >
> > (ii) establishes or procures any office, headquarters, premises, or other facilities or establishments in the United States; or

> (iii) conducts any activity while physically present in the United States on behalf of [respondents].

18 U.S.C. 2334(e)(1).[3] The Act exempts "any defendant who ceases to engage in the [jurisdiction-triggering] conduct * * * for 5 consecutive calendar years," 18 U.S.C. 2334(e)(2), and excludes from paragraph (1)(B) various activities, including those related to UN business or "activity involving officials of the United States that the Secretary of State determines is in the national interest of the United States," 18 U.S.C. 2334(e)(3).

In April 2020, this Court granted the *Sokolow* plaintiffs' pending petition for a writ of certiorari, vacated the Second Circuit's judgment, and remanded the case for further consideration in light of the Act. 140 S. Ct. 2714. The Second Circuit remanded the *Sokolow* case to the district court. Pet. App. 57a. Three days after this Court's GVR in *Sokolow*, the family of a U.S. citizen who was murdered during a terrorist attack in the West Bank in 2018 filed suit against respondents under the ATA in the Southern District of New York, invoking the Act as the basis for personal jurisdiction. *Id.* at 6a, 13a; see J.A. 383-439 (amended complaint in *Fuld* v. *PLO*).

3. District court proceedings under the Act

a. In the district court, the plaintiffs in *Sokolow* and *Fuld* alleged that respondents had triggered both the "payments" and "activities" prongs for establishing personal jurisdiction under the Act, 18 U.S.C. 2334(e)(1)(A) and (B). As to payments, they cited media reports, statements by PA officials, evidence from the *Sokolow* trial, and other sources indicating that respondents had

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[3] All citations of 18 U.S.C. 2334(e) in this brief refer to the statute as set forth in Supplement IV (2022) of the United States Code.

made covered payments for individuals who committed terrorist acts that injured or killed Americans. See, *e.g.*, J.A. 392-407. As to activities, the plaintiffs alleged that respondents had "provided consular services," "conducted press-conferences, distributed informational materials, and engaged" the media in the United States, and that they had used their New York office for non-UN business. Pet. App. 100a; see, *e.g.*, J.A. 407-419.

Respondents challenged the Act as violating the Due Process Clause of the Fifth Amendment. The United States intervened in both cases to defend the Act's constitutionality. Pet. App. 79a-80a, 100a; see 28 U.S.C. 2403(a).

b. The district courts held the relevant provisions of the Act unconstitutional and dismissed the cases for lack of personal jurisdiction. Pet. App. 71a-125a. In *Fuld*, the court found that respondents had triggered the statute's payments prong, and thus declined to resolve whether they had also triggered the activities prong. *Id.* at 101a-102a & n.3. In *Sokolow*, the court likewise found the payments prong satisfied and assumed without deciding that the activities prong was satisfied too. *Id.* at 74a, 84a-87a. But the courts concluded that neither category of conduct could constitutionally be treated as constructive consent to personal jurisdiction. *Id.* at 77a, 87a-91a, 124a.

4. Court of appeals proceedings under the Act

The court of appeals affirmed. Pet. App. 1a-70a.

a. In *Fuld*, the court of appeals began by noting that respondents "did 'not dispute' the plaintiffs' allegation that they had made" terrorist-related payments "triggering the [Act's] first 'deemed consent' prong." Pet. App. 15a (citation omitted); see *id.* at 16a n.5; 18 U.S.C. 2334(e)(1)(A). Nor did respondents "argue on appeal

that their offices and activities in the United States [did] not meet the second statutory prong." Pet. App. 220a n.1 (Bianco, J., concurring in denial of rehearing en banc); see 18 U.S.C. 2334(e)(1)(B).

But the court concluded that the Act's jurisdictional provisions are facially unconstitutional under the Fifth Amendment's Due Process Clause, and cannot provide a basis for exercising personal jurisdiction over respondents. The court reaffirmed circuit precedent holding that "the due process analyses" for personal jurisdiction "under the Fifth and Fourteenth Amendments parallel one another in civil cases." Pet. App. 47a. Specifically, the court held, respondents' payments and activities did not qualify as consent to personal jurisdiction because the "jurisdiction-triggering activities" under the Act could not "reasonably be interpreted as evincing the defendants' 'intention to submit' to the United States courts." *Id.* at 38a (citation omitted).

In the panel's view, valid consent requires a reciprocal exchange of benefits or some form of litigation activity. Pet. App. 21a-24a; see *id.* at 30a, 35a n.13. The panel arrived at that conclusion based on other means that this Court has recognized constitute valid consent to personal jurisdiction under the Fourteenth Amendment: an explicit contractual provision, *id.* at 21a-22a, 25a (discussing *Carnival Cruise Lines, Inc.* v. *Shute*, 499 U.S. 585 (1991)); "litigation-related conduct," *id.* at 20a-22a, 31a-32a (discussing *Insurance Corp. of Ir., Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982)); and "reciprocal bargains," *id.* at 24a; see *id.* at 20a-24a, 32a-37a (discussing *Mallory* v. *Norfolk S. Ry. Co.*, 600 U.S. 122 (2023)). The court also drew an analogy (*id.* at 39a-43a) to the state sovereign immunity context, where the Court has held that States do not construc-

tively waive immunity from Lanham Act suits just by violating certain provisions of that act. *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 691 (1999). Although the government argued that the Act here is "centrally concerned with matters of foreign affairs" and that the political Branches' judgments in that area are "entitled to significant weight," the court concluded that those considerations could not save an unconstitutional statute. Pet. App. 45a-46a (citations omitted).

In *Sokolow*, decided the same day, the court of appeals again declined to recall its earlier mandate directing dismissal of the suit, relying on its conclusion in *Fuld* that the Act is unconstitutional. Pet. App. 53a-70a.

b. The court of appeals denied rehearing en banc over the dissent of four judges. Pet. App. 204a-268a.

Judge Bianco, a member of the panel in *Fuld* and *Sokolow*, filed an opinion concurring in the denial of rehearing en banc that elaborated on the panel's reasoning. Pet. App. 209a-228a. Judge Leval, another member of the panel, filed a statement agreeing with Judge Bianco's views. *Id.* at 268a.

Judge Menashi, joined by Chief Judge Livingston, Judge Park, and in part by Judge Sullivan, dissented from the denial of rehearing en banc. Pet. App. 229a-267a. In his view, "consent [to personal jurisdiction] based on conduct need only be knowing and voluntary and have a nexus to the forum," so he rejected the panel's conclusion that valid consent requires a reciprocal exchange of benefits between the forum and the defendant. *Id.* at 231a; see *id.* at 240a-248a. Even were such an exchange required, Judge Menashi added, respondents received a benefit under the Act's activities prong, 18 U.S.C. 2334(e)(1)(B), insofar as the United

States permitted them to carry out the covered activities in this country. Pet. App. 248a-251a. Judge Menashi also rejected the view that equivalent tests govern personal jurisdiction in federal court under the Fifth Amendment and personal jurisdiction in state court under the Fourteenth Amendment, noting the absence of historical evidence supporting that proposition and the absence of federalism concerns in the Fifth Amendment context. *Id.* at 254a-266a.

SUMMARY OF ARGUMENT

To "resolve a case," a court "must have * * * power over the parties before it (personal jurisdiction)." *Lightfoot* v. *Cendant Mortg. Corp.*, 580 U.S. 82, 95 (2017). Congress has provided for federal courts to exercise personal jurisdiction in these cases under the deemed-consent provisions of the Act. The Act's provisions for establishing jurisdiction over respondents comport with any due process limitations that apply to federal courts in this field.

A. This Court has long held that due process limits state courts' exercise of personal jurisdiction. But this Court has repeatedly reserved whether the Fifth and Fourteenth Amendments limit personal jurisdiction in the same manner. This Court need not resolve that question here, since the Act is constitutional even under the due process standards that constrain state courts.

As the Court recently reaffirmed in *Mallory* v. *Norfolk Southern Railway Co.*, 600 U.S. 122 (2023), a defendant's "'express or implied consent' can * * * ground personal jurisdiction" under the Fourteenth Amendment, "and consent may be manifested in various ways by word or deed." *Id.* at 138 (plurality opinion) (citation omitted); see *id.* at 167 (Barrett, J., dissenting). Actual consent is not required. Rather, construc-

tive consent suffices to establish personal jurisdiction when the defendant voluntarily takes an act—whether it be obtaining a business license, defying a discovery order, or driving on a public highway. The State must provide notice that it will treat the act in question as consent to personal jurisdiction. And the exercise of jurisdiction cannot be otherwise unfair or exorbitant.

Under those principles, respondents constructively consented to personal jurisdiction in federal courts for ATA claims involving their alleged role in terrorist acts that harmed Americans. The Act applies only to respondents and their successors and affiliates. The Act unambiguously informs respondents that they are "deemed to have consented to personal jurisdiction in such" suits if, after specified dates, they (a) paid terrorists who injured or killed Americans, or (b) engaged in covered activities in the United States. 18 U.S.C. 2334(e)(1). And the Act limits consent to federal jurisdiction to the specified ATA claims.

Respondents undisputedly had notice of those conditions. They do not dispute that choices to pay terrorists or engage in covered activities in the United States are entirely voluntary. And they do not dispute that they nonetheless continued at least to make such payments. Having been put on notice that making payments to terrorists who harm Americans would trigger federal jurisdiction, respondents cannot claim any unfairness in facing claims for terrorist attacks harming Americans. Nor do they dispute that the actions Congress designated as triggering consent to federal jurisdiction—and the ATA suits against respondents that are covered by the Act—implicate vital American national-security and foreign-policy interests. The Act thus comports with "traditional notions of fair play and substantial justice."

International Shoe Co. v. *Washington*, 326 U.S. 310, 316 (1945) (citation omitted).

B. In all events, the Act is a federal law subject to the Due Process Clause of the *Fifth* Amendment, not the Fourteenth. That difference matters, because the federalism concerns animating Fourteenth Amendment personal-jurisdiction principles disappear when Congress, not a State, provides for personal jurisdiction. Under the Fifth Amendment, the operative question is whether, in the circumstances of the case, a federal court's exercise of personal jurisdiction is so burdensome as to be fundamentally unfair to the defendant. Respondents have never attempted to establish that the Act is unfair in that sense.

Furthermore, respondents' status as non-sovereign foreign entities weighs strongly in favor of the Act's constitutionality. Foreign sovereigns lack due process rights. Pet. App. 153a. Respondents are not foreign sovereigns. But they exercise governmental functions and are subject to similar foreign-relations and national-security judgments. Even assuming that respondents have due process rights, those rights are reduced compared to the due process rights afforded to private entities. Due process does not bar Congress—which has the constitutional authority and capacity to weigh the various foreign-policy considerations—from subjecting respondents to federal-court jurisdiction if they pay terrorists or engage in covered activities on U.S. soil. The Act, in the judgment of the political Branches, is an important measure to deter terrorism and facilitate the resolution of our nationals' claims against respondents.

C. The Second Circuit made several errors in holding the Act unconstitutional.

To start, the court misunderstood constructive consent under Fourteenth Amendment case law as limited to "litigation-related activities" or an "exchange of benefits." The court drew an inapt analogy to waivers of state sovereign immunity—waivers that are subject to a stringent standard inapplicable to constructive consent in this due process context.

Even assuming that the court's framework were correct, the court failed to adequately explain why the Act is not reasonably understood as reflecting an exchange of undertakings. The court also erroneously treated the Fifth and Fourteenth Amendment due process standards as entirely parallel. And it afforded no meaningful deference to the judgments concerning foreign and national-security policy, and protection of U.S. nationals abroad, that underlie the Act.

At bottom, the court of appeals seemed to view the Act's consent provisions as too novel to pass constitutional muster. But the Act is not as novel as the court supposed, and it appropriately reflects the unusual nature of ATA claims and respondents' status as sui generis foreign entities with a distinctive history and relationship to the United States.

D. The plaintiff petitioners, for their part, defend the Act on the further theory that, as a matter of original meaning, the Due Process Clause of the Fifth Amendment does not constrain federal courts at all in exercising personal jurisdiction. This Court need not and should not address that contention because the Act comports with due process principles applicable under the Fifth and Fourteenth Amendments in any event.

ARGUMENT

THE ACT'S PROVISIONS FOR ESTABLISHING PERSONAL JURISDICTION OVER RESPONDENTS COMPORT WITH FIFTH AMENDMENT DUE PROCESS PRINCIPLES

The Promoting Security and Justice for Victims of Terrorism Act, 133 Stat. 3082, materially advances the United States' longstanding objectives of combating international terrorism and compensating American victims of terrorism and their families. The Act does so by providing that, in suits filed under the ATA in U.S. courts, respondents are deemed to consent to personal jurisdiction if they continued after specified dates to make payments to terrorists or their survivors because of the terrorists' activities that injured or killed U.S. nationals, or to conduct certain activities in the United States. 18 U.S.C. 2334(e). Respondents undisputedly made such payments, and they are alleged to have engaged in various forms of the covered activities. That constructive consent to federal courts' jurisdiction satisfies any due process test—whether the test is the Fourteenth Amendment standards limiting state courts' exercise of personal jurisdiction, or the Fifth Amendment's more relaxed rules for federal courts.

A. The Act Satisfies This Court's Fourteenth Amendment Personal-Jurisdiction Precedents

This Court has long held that the Due Process Clause of the Fourteenth Amendment limits state courts' exercise of personal jurisdiction over defendants located outside the forum State, see *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), and it has repeatedly reserved the question whether the Due Process Clause of the Fifth Amendment imposes the same limits on federal courts, see, *e.g.*, *Bristol-Meyers Squibb*

Co. v. *Superior Ct.*, 582 U.S. 255, 269 (2017). The Court could continue to reserve that question here. Because the Act's provisions deeming respondents to consent to personal jurisdiction satisfy the Fourteenth Amendment's standards, then they necessarily satisfy the Fifth Amendment's.

1. A variety of voluntary actions can constitute consent to personal jurisdiction

a. "'Due process is flexible,'" as this Court has often observed, "and it 'calls for such procedural protections as the particular situation demands.'" *Jennings* v. *Rodriguez*, 583 U.S. 281, 314 (2018) (brackets omitted) (quoting *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972)). Thus, the Court has eschewed a "mechanical or quantitative" test for personal jurisdiction under the Fourteenth Amendment in favor of a flexible approach focused on the ultimate fairness of exercising jurisdiction under the circumstances. *International Shoe*, 326 U.S. at 319. The question is whether the State's exercise of personal jurisdiction over the defendant comports with "traditional notions of fair play and substantial justice," *id.* at 316 (citation omitted), a standard derived from Justice Holmes's opinion for the Court in *McDonald* v. *Mabee*, 243 U.S. 90, 91-92 (1917).

Many different bases for personal jurisdiction satisfy that due process standard. "General" jurisdiction "extends to 'any and all claims' brought against [the] defendant" in the State where the "defendant is 'essentially at home.'" *Ford Motor Co.* v. *Montana Eighth Jud. Dist. Ct.*, 592 U.S. 351, 358 (2021) (citation omitted). "Specific" jurisdiction exists outside the defendant's home jurisdiction, but requires a nexus between the plaintiff's claims and "the defendant's contacts" with the forum State. *Id.* at 359 (citation omitted). Un-

der so-called "tag" jurisdiction, a natural person may be sued wherever he may be found and served with process. *Mallory* v. *Norfolk S. Ry. Co.*, 600 U.S. 122, 128-129 (2023) (plurality opinion); see *Burnham* v. *Superior Ct.*, 495 U.S. 604 (1990).

Of particular relevance here, the defendant's "'express or implied consent' can continue to ground personal jurisdiction—and consent may be manifested in various ways by word or deed." *Mallory*, 600 U.S. at 138 (plurality opinion) (citation omitted); see *id.* at 167 (Barrett, J., dissenting). A "variety of legal arrangements have been taken to represent express or implied consent to the personal jurisdiction of the court." *Insurance Corp. of Ir., Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982). As the Court put it more than a century ago, "what acts of the defendant shall be deemed a submission to [a court's] power is a matter upon which States may differ" without "deny[ing] due process of law." *Chicago Life Ins. Co.* v. *Cherry*, 244 U.S. 25, 29-30 (1917) (Holmes, J.).

For example, due process allows a State to deem nonresident corporations to have constructively consented to personal jurisdiction based on their registration to do business in the State. In *Pennsylvania Fire Insurance Co.* v. *Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917) (Holmes, J.), this Court rejected a due process challenge to a Missouri law deeming a nonresident corporation to consent to personal jurisdiction on any claim, based on the corporation's registration to do business in the State. *Id.* at 94-96. *Mallory* recently reaffirmed that decision, upholding a similar Pennsylvania statute. 600 U.S. at 135-136.

A litigant's noncompliance with jurisdictional discovery orders can also provide a valid basis for constructive

consent to personal jurisdiction. *Insurance Corp.*, 456 U.S. at 695, 705. A party can consent to personal jurisdiction by contract. See *Carnival Cruise Lines, Inc.* v. *Shute*, 499 U.S. 585, 595 (1991); *D.H. Overmyer Co.* v. *Frick Co.*, 405 U.S. 174, 183-184, 187 (1972); Pet. App. 21a-22a; U.S. Br. at 23-26, *CC/Devas (Mauritius) Ltd. v. Antrix Corp.*, No. 23-1201 (Dec. 11, 2024). A party can consent by stipulation. *Insurance Corp.*, 456 U.S. at 704 (citing *Petrowski* v. *Hawkeye-Security Co.*, 350 U.S. 495 (1956) (per curiam)). A party can consent through "the voluntary use of certain state procedures." *Ibid.* (citing *Adam* v. *Saenger*, 303 U.S. 59, 67-68 (1938)). A party can consent through the use of public roads. *Hess* v. *Pawloski*, 274 U.S. 352, 356-357 (1927); see also *Shaffer* v. *Heitner*, 433 U.S. 186, 216 (1977) (suggesting a state "statute that treats acceptance of a [corporate] directorship as consent to jurisdiction in the State" would be constitutional).

b. As these cases illustrate, due process does not demand actual willingness to submit to personal jurisdiction; "constructive" or deemed consent can suffice. *Insurance Corp.*, 456 U.S. at 703-704; see *Mallory*, 600 U.S. at 147-148 (Jackson, J., concurring). Thus, it did not matter in *Mallory* that the defendant railroad insisted it had "not *really* submitted to proceedings in Pennsylvania." 600 U.S. at 144 (plurality opinion). Nor did it matter in *Carnival Cruise Lines* that it was "doubtful" the ticketholders had ever actually read the relevant contractual provision. 499 U.S. at 590. Nor in *Hess* that the visiting motorist had presumably never given a thought to potential litigation before driving on a Massachusetts highway. 274 U.S. at 353.

"That does not mean anything goes." *Ford Motor*, 592 U.S. at 362. Constructive consent to personal juris-

diction must be premised on a knowing and voluntary act, and the exercise of personal jurisdiction must not be fundamentally unfair or exorbitant. See Pet. App. 231a (Menashi, J., dissenting from denial of rehearing en banc). Otherwise, a State could circumvent constitutional limits on personal jurisdiction by simply declaring nonresident defendants to have consented to suit. Cf. *Chicago Life*, 244 U.S. at 29 (a court cannot find jurisdiction based on "its mere assertion of its own power").

In every case where this Court has found adequate consent to personal jurisdiction under the Fourteenth Amendment, the Court has pinpointed some voluntary action, whether it was the business registrations in *Pennsylvania Fire* and *Mallory* or the disobedience of discovery orders in *Insurance Corp.* See, *e.g.*, *Adam*, 303 U.S. at 67 (noting the "voluntary act" triggering jurisdiction); *Pennsylvania Fire*, 243 U.S. at 96 ("The execution was the defendant's voluntary act."). *Pennsylvania Fire* distinguished on that basis a prior case, *Old Wayne Mutual Life Ass'n* v. *McDonough*, 204 U.S. 8 (1907), where the corporation never "voluntarily appointed" an agent under state law, and thus never triggered consent. 243 U.S. at 95-96.

Most of this Court's consent cases also assess whether the relevant "legal arrangement[]" was otherwise unfair or exorbitant. *Insurance Corp.*, 456 U.S. at 703; see, *e.g.*, *id.* at 707-708 (canvassing factors that made consent "just" and satisfied due process); *Carnival Cruise Lines*, 499 U.S. at 595 (scrutinizing the forum clause for "fundamental fairness"); *Hess*, 274 U.S. at 356-357 (assessing the fairness of the motorist-consent law). That framework has some parallels to the fairness inquiry in nonconsent cases. In those cases,

such factors as "'the burden on the defendant,'" "'the forum State's interest in adjudicating the dispute,'" "'the interstate judicial system's interest in obtaining the most efficient resolution of controversies,'" and the "'shared interest of the several States in furthering fundamental substantive social policies,'" *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 476-477 (1985) (quoting *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 292 (1980)), inform whether an exercise of personal jurisdiction comports with "traditional notions of fair play and substantial justice," *International Shoe*, 326 U.S. at 316.

Mallory is illustrative. The Court noted that the state law deemed the defendant railroad to have consented to personal jurisdiction based on its voluntary compliance with the State's business-registration procedures. 600 U.S. at 134-135. The plurality then explained why that legal consequence was fair: the company had, for instance, touted its extensive business operations in the forum State and received clear notice of the State's consent regime. *Id.* at 141-143; see *id.* at 153 (Alito, J., concurring in part and concurring in the judgment) (constructive consent was "not so deeply unfair that it violates the railroad's constitutional right to due process"). Those determinations undergirded the Court's due process holding. See *id.* at 146 n.11 (plurality opinion).

2. The Act does not offend traditional notions of fair play and substantial justice

a. The Act's provisions for establishing personal jurisdiction over respondents comport with this Court's Fourteenth Amendment due process standards. Under the Act, respondents are deemed to consent to personal jurisdiction if they make the specified terrorism-related

payments, or engage in the specified activities in the United States, after the specified dates. See 18 U.S.C. 2334(e)(1). Respondents have never disputed that those triggering actions are voluntary and within their control. See, *e.g.*, Br. in Opp. 15 ("The payments reflect Respondents' own domestic laws and policies."). Indeed, when Congress enacted the Act's predecessor, the ATCA, respondents "knowingly and voluntarily chose *not* to submit to personal jurisdiction in the United States" by ceasing to accept certain assistance and completing the closure of the PLO's office in Washington. 22-76 Resp. C.A. Br. 50; see Pet. App. 10a.

Here, by contrast, respondents concededly triggered the Act's payments prong, Pet. App. 16a n.5, and the case comes to this Court on the premise that they triggered the activities prong as well. See pp. 14-15, *supra*. The Act put respondents on clear notice that making payments for terrorists who injured or killed Americans would provide a basis for U.S. courts to exercise jurisdiction over respondents in cases alleging their more direct involvement in acts of terror that injured or killed Americans. And respondents chose to prioritize their policy of continuing to make payments to terrorists and their families or designees over avoiding federal-court jurisdiction in ATA cases.

The Act's activities prong is likewise directed toward respondents' voluntary conduct. The Act preserves respondents' ability to maintain their UN mission and engage in other specified activities, even though respondents could be barred from engaging in those activities in this country. The Act provides for personal jurisdiction if respondents exceed those limits and derive the benefits of engaging in other forms of activity on U.S. soil.

b. Nor is there any reason to view the Act's deemed-consent provisions as unfair or exorbitant. Respondents are "sophisticated entit[ies]," *Mallory*, 600 U.S. at 151 (Alito, J., concurring in part and concurring in the judgment), that exercise governance functions in portions of the West Bank and engage internationally, including with the UN and the United States. If the United States recognized respondents as the government of a sovereign state, the court of appeals would correctly have deemed them to lack due process rights entirely. Pet. App. 153a; see U.S. Br. at 26-32, *CC/Devas*, *supra* (No. 23-1201); cf. *id.* at 32-34 (noting the United States ensures fair treatment of foreign sovereigns in other ways); *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607, 619 (1992) (reserving the question whether "a foreign state is a 'person' for purposes of the Due Process Clause"); *South Carolina* v. *Katzenbach*, 383 U.S. 301, 323-324 (1966) (holding a U.S. State is not a "person" under the Due Process Clause).

Conversely, if respondents were natural persons, the mere act of serving them with process in the United States would have sufficed for tag jurisdiction. See *Burnham*, 495 U.S. 604. As Judge Menashi noted below, "[t]he Chief Representative of [respondents] was served" by the *Sokolow* plaintiffs "at his home in the United States," and the burden of litigating these cases "entailed travel of approximately four miles from [respondents'] office in Manhattan to the courthouse downtown." Pet. App. 239a; see pp. 8-9, *supra* (discussing respondents' prior ATA litigation in U.S. courts). And if respondents were corporations registered to do business in New York and service were made on their representatives under a law like the one upheld in *Mallory*, personal jurisdiction would lie as well. It would be per-

verse for respondents to trigger the Act's tailored provisions for personal jurisdiction, yet avoid federal jurisdiction simply because they are unique foreign non-sovereign entities that operate on the international plane.

Furthermore, the Act applies only to ATA cases, a narrow category of claims that relate to the United States and implicate the vital national interest in furthering the safety of Americans abroad, facilitating compensation for injuries or death, and deterring international terrorism. 18 U.S.C. 2334(e)(1); see 18 U.S.C. 2333(a); *Hines* v. *Davidowitz*, 312 U.S. 52, 64 (1941). The actions triggering consent likewise relate to the relevant forum—the United States. The Act's payments prong furthers U.S. policy to deter payments that incentivize acts of terrorism that may injure or kill Americans. And the activities prong ensures that entities that benefit from operating in the United States cannot avoid answering ATA claims in U.S. courts. Cf. Taylor Force Act, 132 Stat. 1143; ATCA House Report 7-8. The Act provided respondents with fair notice of the actions that would trigger constructive consent, giving them an opportunity to "structure [their] primary conduct" to avoid personal jurisdiction. *Ford Motor*, 592 U.S. at 360 (citation omitted). At a minimum, these considerations taken together show that exercising personal jurisdiction over respondents under the Act is "reasonable and just." *International Shoe*, 326 U.S. at 320.

Indeed, in several respects, the Act presents an easier case than did the Pennsylvania statute upheld in *Mallory*. That law deemed the defendant to have consented to personal jurisdiction on *any* claim, 600 U.S. at 127—even ones (like the plaintiff's there) that had "nothing to do with" the forum whatsoever, *id.* at 167,

180 (Barrett, J., dissenting); see *id.* at 173-174 (surveying historical cases "limit[ing] jurisdiction to suits with a connection to the forum"). But the Act here narrowly applies only to ATA claims. The Pennsylvania law's consent provisions were also less clear than the Act's, which unambiguously establish constructive consent in the enumerated circumstances, see *id.* at 167; cf. 18 U.S.C. 2334(e)(1), and are an integral feature of respondents' longstanding and multifarious relationship with the United States.

* * * * *

For the foregoing reasons, the Act satisfies due process even assuming Fourteenth Amendment standards applied to it. Far from a conclusory "mere assertion" of power, *Chicago Life*, 244 U.S. at 29, the Act provides a fair and reasonable mechanism for establishing personal jurisdiction over respondents, based on their voluntary actions, in a narrow category of suits related to the United States and its vital interests.

B. At A Minimum, The Act Is Constitutional Under The Due Process Clause Of The Fifth Amendment

The Act is constitutional even if this Court disagrees with the Fourteenth Amendment analysis above. As a federal law applied in federal court, the Act is subject to the Due Process Clause of the Fifth Amendment. The Court has reserved the question of what due process standards govern federal courts' exercise of personal jurisdiction. See pp. 21-22, *supra*. But the Fifth Amendment must impose lesser constraints on federal courts' ability to exercise personal jurisdiction than the Fourteenth Amendment does vis-à-vis the States. The United States' constitutional powers and special competence in this context contrast with the States' more lim-

ited, geographically cabined sovereignty and permit the exercise of federal judicial power in ways that have no analogue at the state level.

As in other contexts, the Fifth Amendment due process inquiry is flexible and calibrated to the circumstances at hand. See *Jennings*, 583 U.S. at 314. Here, those circumstances strongly support allowing Congress to deem respondents to have consented to federal-court jurisdiction in cases where the political Branches have a heightened interest because of the Nation's foreign-policy and national-security interests. The Court could thus uphold the Act on this alternative basis as well.

1. Congress enjoys greater flexibility than the States in providing for personal jurisdiction

To the extent the Due Process Clause of the Fifth Amendment constrains personal jurisdiction in federal courts, see pp. 46-47, *infra*, those constraints are less restrictive than the Fourteenth Amendment's.

a. The two Due Process Clauses are textually parallel. Compare U.S. Const. Amend. V ("No person shall * * * be deprived of life, liberty, or property, without due process of law."), with Amend. XIV, § 1 ("No State shall * * * deprive any person of life, liberty, or property, without due process of law.").

But it does not follow that the Fifth and Fourteenth Amendments impose exactly the same due process constraints on state and federal courts' exercise of personal jurisdiction. "While the language of those amendments is the same, yet, as they were engrafted upon the Constitution at different times and in widely different circumstances of our national life, it may be that questions may arise in which different constructions and applica-

tions of their provisions may be proper." *French* v. *Barber Asphalt Paving Co.*, 181 U.S. 324, 328 (1901).

In particular, when the distinct national and state sovereigns exercise their distinct sovereign powers, a different analysis applies. "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).

States' sovereignty is limited to their particular geographical boundaries and powers. "The limits of State power are defined in view of the relation of the States to each other in the Federal Union." *Burnet* v. *Brooks*, 288 U.S. 378, 401 (1933). And this Court's Fourteenth Amendment personal-jurisdiction jurisprudence rests on two different but related "sets of values—treating defendants fairly and protecting 'interstate federalism'" under the Constitution. *Ford Motor*, 592 U.S. at 360 (quoting *World-Wide Volkswagen*, 444 U.S. at 293); see *Bristol-Myers Squibb*, 582 U.S. at 263.[4] Hence, for instance, the Fourteenth Amendment personal-jurisdiction analysis examines only a defendant's contacts with the forum State. See *Ford Motor*, 592 U.S. at 358.

But federal sovereignty extends nationwide and encompasses unique, constitutionally enshrined powers over such areas as commerce and foreign affairs. See *Board of Trustees* v. *United States*, 289 U.S. 48, 59 (1933) ("In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and

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[4] In *Mallory*, five Justices agreed that federalism concerns bear on the personal-jurisdiction analysis even in consent cases, albeit through different constitutional mechanisms. 600 U.S. at 150 (Alito, J., concurring in part and concurring in the judgment); *id.* at 168-169 (Barrett, J., dissenting).

adequate national power."). The federal government's power "in relation to other countries and their subjects" is not territorially confined the way state sovereignty is. *Burnet*, 288 U.S. at 406. Unlike a State, see *Healy* v. *Beer Inst.*, 491 U.S. 324, 336 (1989), the United States also has power "to enforce its laws beyond [its] territorial boundaries," *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991), a power Congress unambiguously exercised in the ATA, see 18 U.S.C. 2331(1)(C). Federal courts—whatever their location—are courts of a single, unitary sovereign. See *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 928 (1975). And, when Congress provides for personal jurisdiction over foreign defendants, "no federalism problem is presented." 4 Charles Alan Wright et al., *Federal Practice and Procedure* § 1068.1, at 699 (4th ed. 2015).

Courts have thus recognized material differences in the due process inquiries in state and federal courts. For instance, in cases implicating foreign defendants engaged in interstate or foreign commerce, courts have held that federal courts can exercise personal jurisdiction under the Fifth Amendment so long as the foreign defendant has had sufficient "aggregate contacts with the nation as a whole," not with the State where the federal court sits. *Republic of Panama* v. *BCCI Holdings (Lux.) S.A.*, 119 F.3d 935, 946-947 (11th Cir. 1997); see *id.* at 947 n.22 (citing cases taking that approach). The Second Circuit below acknowledged this rule, underscoring that the Fifth and Fourteenth Amendment inquiries do not proceed in lockstep. Pet. App. 62a.

b. It follows that Fifth Amendment due process limits on personal jurisdiction are more flexible than those imposed by the Fourteenth Amendment. "The only constitutional limitation on Congressional power to pro-

vide a forum is whatever fairness to the defendant is required by fifth amendment due process." *Horne* v. *Adolph Coors Co.*, 684 F.2d 255, 259 (3d Cir. 1982).

Among the factors that affect whether an assertion of jurisdiction comports with "fair play and substantial justice" under the Fourteenth Amendment, *International Shoe*, 326 U.S. at 316, are considerations like the interest of the forum relative to others "in adjudicating the dispute" and potential interference with another forum's "social policies," *Burger King*, 471 U.S. at 477 (citation omitted). Such considerations generally play a less significant constitutional role under the Fifth Amendment, especially when an Act of Congress establishes personal jurisdiction. At a minimum, the Fifth Amendment permits the exercise of personal jurisdiction unless it would be "so gravely difficult and inconvenient," *id.* at 478 (citation omitted), as to be fundamentally unfair. See *Medina* v. *California*, 505 U.S. 437, 443 (1992).

2. The Act is a permissible exercise of Congress's powers to advance foreign policy and national security

Here, the Act implicates a panoply of uniquely federal interests and concerns that confirm the constitutionality of prescribing personal jurisdiction in federal courts in this setting.

Start with respondents' status. As noted, the Act regulates only respondents, which are non-sovereign foreign entities exercising governmental functions. Throughout U.S. history, such entities have engaged in diplomatic activities with the United States. President Adams negotiated with the provisional Haitian government of Toussaint L'Ouverture, for example, and the United States received "unofficial Soviet representatives" before it recognized the government of the Soviet Union. *PLO Office*, 42 Op. O.L.C. at 124. Diplomatic

contacts with such entities can present particularly sensitive foreign-relations considerations. Moreover, the United States has often restricted these entities' activities in ways that no private actor's would normally be regulated. See, *e.g.*, *id.* at 126 (discussing President Carter's closure of "Rhodesia's unofficial U.S. office" and President Clinton's prevention of the Taiwan President from speaking at Cornell University).

Consider respondents themselves. The PA was created pursuant to agreements, the Oslo Accords, between Israel and the PLO. Pet. App. 6a. Respondents are recognized as sovereign representatives by foreign nations, although not by the United States. They operate embassies abroad, but are currently limited to operating a UN mission in the United States because of foreign-relations concerns and the political Branches' judgments regarding respondents' history of involvement in terrorism. See pp. 7-8, *supra*. And respondents have been subject to a series of Acts of Congress aimed at deterring them from facilitating terrorism and at accomplishing other foreign-relations objectives. See, *e.g.*, 8 U.S.C. 1182(a)(3)(B); 22 U.S.C. 286w, 2227(a), 2378b(a) and (b), 2378c(a), 2378c-1(a), 5201-5202. For instance, Congress has over time conditioned waivers of restrictions on the PLO's U.S. activities on certifications that the PLO had complied with the Oslo Accords, or had not attained UN member status or prompted investigations of Israeli nationals by the International Criminal Court. *PLO Office*, 42 Op. O.L.C. at 112-113 & n.3. Congress has likewise enacted restrictions on foreign assistance directly benefiting the PA based on concerns about support for terrorism. See, *e.g.*, Taylor Force Act, 132 Stat. 1143.

Given that respondents are unique foreign entities that engage with the United States, it would be anoma-

lous and deeply prejudicial to American foreign-policy interests to treat respondents as equivalent to run-of-the-mill foreign private defendants for due process purposes. On the international plane, the political Branches must be able to subject respondents to federal-court jurisdiction as necessary to ensure compensation for victims of terrorism and deter conduct detrimental to the United States' national security and foreign relations and the safety of Americans in the Middle East. In this context, the political Branches have constitutional authority and capacity to weigh various considerations, including diplomatic and other consequences in the international sphere; the best approaches to combating terrorism and protecting Americans abroad; and fairness to American plaintiffs and foreign defendants.

Within that sphere of special responsibility in the political Branches, the Act is narrowly and precisely tailored to address respondents' circumstances and their alleged connection to acts of terrorism abroad that harmed Americans. The Act is a significant element of nuanced U.S. policy toward respondents. See pp. 6-13, *supra*. A key premise of the Act is that facilitating the adjudication of ATA claims like the plaintiffs' is important to the Nation's efforts to deter and prevent terrorism. See, *e.g.*, U.S. Senators' Cert. Amici Br. 18-19; ATCA House Report 3-4, 7-8. "Everyone agrees" that combating terrorism "is an urgent objective of the highest order." *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 28 (2010).

The political Branches determined that the appropriate way to advance these objectives and deter terrorist acts that harm Americans was to deem respondents to consent to personal jurisdiction in ATA cases if they persisted in the covered payments or activities. The

Act, as one of its coauthors explained, strikes a "delicate balance" "between Congress's desire to provide a path forward for American victims of terror to have their day in court and * * * to allow [respondents] to conduct a very narrow scope of activities on U.S. soil * * * without consenting to personal jurisdiction in civil ATA cases." 65 Cong. Rec. S7182 (daily ed. Dec. 19, 2019) (statement of Sen. Lankford). The Act also facilitates resolution of U.S. nationals' claims against respondents. Congress and the President have repeatedly "exercised control over" similar claims "[i]n furtherance of their authority over the Nation's foreign relations." *Bank Markazi* v. *Peterson*, 578 U.S. 212, 235 (2016).

Congress's judgment that it is appropriate for a federal court to exercise jurisdiction in cases like these warrants particular respect because it involves the Nation's foreign policy and national security and the perpetration of terrorism against U.S. nationals abroad. "Foreign policy and national security decisions are delicate, complex, and involve large elements of prophecy for which the Judiciary has neither aptitude, facilities, nor responsibility." *Hernandez* v. *Mesa*, 589 U.S. 93, 113 (2020) (quoting *Jesner* v. *Arab Bank, PLC*, 584 U.S. 241, 284 (2018) (Gorsuch, J., concurring in part and concurring in the judgment)) (brackets and internal quotation marks omitted). In that domain, the political Branches play "the controlling role," and their actions accordingly warrant "respectful review" by courts. *Bank Markazi*, 578 U.S. at 215, 234. Deference is particularly appropriate when Congress and the President act in tandem, see *id.* at 235 n.28, and when they account for how their "actions may implicate constitutional concerns," *Humanitarian Law Project*, 561 U.S. at 35.

Meanwhile, respondents have never claimed that any burden of litigating these cases in the United States would itself give rise to a due process violation. Nor would such a contention be plausible. Congress took care to account for fairness to respondents and appropriate limits on U.S. courts' jurisdiction over them. It gave respondents an opportunity to avoid triggering jurisdiction and tailored the Act by, among other things, confining personal jurisdiction to ATA claims. See *Humanitarian Law Project*, 561 U.S. at 35-36. Respondents are sophisticated entities that have long maintained a presence in the United States, and they voluntarily took actions that triggered constructive consent under the Act with clear notice of the jurisdictional consequences. See pp. 6-9, 13-14, *supra*. The Fifth Amendment's more flexible due process standard in this context accommodates the Act's provision for personal jurisdiction over respondents in these cases.

C. The Second Circuit Erred In Invalidating The Act

The Second Circuit's decision holding the Act unconstitutional rested on a series of legal errors. The court applied this Court's Fourteenth Amendment due process precedents too rigidly to an inapt context, while depriving Congress and the President of the deference and flexibility to which they are entitled in this field.

1. The court of appeals erroneously confined the United States' power to provide for constructive consent to personal jurisdiction

The court of appeals erred by imposing artificial restrictions on Congress's authority to provide for personal jurisdiction by constructive consent, and by relying in doing so on what it perceived to be limits imposed by the Fourteenth, not the Fifth, Amendment.

a. Citing this Court's previous consent cases under the Fourteenth Amendment, the court of appeals held that a defendant can be held to submit to such jurisdiction only "expressly" via contract or stipulation, or "impliedly" through "litigation-related activities" (as in *Insurance Corp.*, *supra*) or "reciprocal bargains" (as in business-registration cases like *Mallory*, *supra*). Pet. App. 21a-24a; see *id.* at 30a, 35a n.13.

The court made no effort to discern any principle linking those fact patterns, nor did it offer any reason why they would constitute the only constitutionally permissible bases for consent to personal jurisdiction. The court thus erroneously treated this Court's decisions as resting upon "ad hoc improvisations" rather than "general principles." *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U.S. 449, 470 (2017) (Gorsuch, J., concurring in part) (quoting *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 25 (2004) (Rehnquist, C.J., concurring in the judgment)). As we have explained, see pp. 24-25, *supra*, the proper approach under this Court's Fourteenth Amendment constructive-consent cases would have considered whether the defendant voluntarily took actions that would trigger jurisdiction in circumstances that are not otherwise unfair or exorbitant. The Act amply clears that bar.

b. In justifying its restrictive approach to personal jurisdiction by constructive consent, the court of appeals placed heavy reliance on *College Savings Bank* v. *Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999). Pet. App. 39a-42a; see Resp. Br. 12-13, *Mallory*, *supra* (No. 21-1168) (defendant railroad similarly invoking *College Savings Bank*). That was error too. *College Savings Bank* rejected the contention that a State could be deemed to have construc-

tively waived its sovereign immunity in Lanham Act suits by engaging in activities regulated by that statute. 527 U.S. at 676, 680. In so holding, this Court described the test "for determining whether a State has waived its immunity from federal-court jurisdiction" as "stringent," *id.* at 675 (citation omitted).

That standard plainly does not apply to due process limits on personal jurisdiction, or on constructive consent to such jurisdiction. Such a stringent standard would never permit tag jurisdiction, for instance. See Pet. App. 247a-248a (Menashi, J., dissenting from denial of rehearing en banc). Nor would that approach likely permit all the various "legal arrangements" that have been held to support constructive consent to personal jurisdiction. *Insurance Corp.*, 456 U.S. at 703. This Court has taken a markedly different approach with personal jurisdiction, as shown 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).

Indeed, *College Savings Bank* generally rejected the concept of constructive waiver as "ill conceived" for sovereign immunity. 527 U.S. at 680. And to the extent the concept of waiver, as distinguished from constructive consent, is even relevant here, the court of appeals overlooked the reality that the standards for waiving different constitutional protections can vary. See Note, *Constitutional Waivers by States and Criminal Defendants*, 134 Harv. L. Rev. 2552, 2563-2564, 2568-2569 (2021).

2. The Act is structured as an exchange of benefits

a. In any event, the court of appeals also failed to explain persuasively why, even assuming its restrictive view of the valid forms of consent to personal jurisdiction is correct, the Act does not reflect a "reciprocal bar-

gain[]" or "exchange of benefits" in the unique context of the United States' dealings with respondents. Pet. App. 24a, 43a. The Act offers respondents (a) the benefit of avoiding jurisdiction in ATA suits, in exchange for (b) respondents' terminating the specified payments and activities, which U.S. policymakers have long sought to end or limit. In that regard, the Act takes much the same approach as the ATCA, which essentially instructed respondents: "if you accept U.S. foreign assistance and enter our nation's borders, you must do so on the condition not to support or take part in acts of international terrorism and that you compensate your victims if you breach that promise." ATCA House Report 7.

Moreover, the Act's activities prong, 18 U.S.C. 2334(e)(1)(B), tracks the business-registration consent statutes that courts have considered consonant with due process for more than a century. See *Mallory*, 600 U.S. at 134-136; Pet. App. 246a-247a (Menashi, J., dissenting from denial of rehearing en banc). The activities prong is tailored to allow respondents to continue enjoying the benefit of conducting certain activities in the U.S. (including activities associated with the UN mission and certain other contacts involving U.S. officials and deemed necessary for foreign relations).

That provision essentially tells respondents that they can engage in U.S. activities only on the condition that they do not stray from those boundaries—and if they stray, their activities are deemed to constitute consent to personal jurisdiction in the forum, and for a much narrower set of claims than state statutes like the one at issue in *Mallory* covered. Moreover, whereas the Constitution limits a State's power to exclude out-of-state businesses, see *Mallory*, 600 U.S. at 160-161 (Alito, J., concurring in part and concurring in the judg-

ment), the federal government has unquestioned authority to exclude respondents from the United States altogether.

b. The court of appeals rejected that reciprocity aspect of the Act on meager grounds. It dismissed the Act's payments prong as levying on respondents "a jurisdictional sanction" for "disfavored activity," and asserted that Congress has "other tools at its disposal for discouraging the payments in question." Pet. App. 27a. Labeling constructive consent as a "sanction" does not establish a constitutional problem, however, see *Insurance Corp.*, 456 U.S. at 705, and there is no reason why due process should confine Congress to the "other tools" the court mentioned. Quite the contrary, this Court has routinely rejected such judicial second-guessing of the mechanisms the political Branches require to accomplish foreign-relations and national-security objectives. See p. 37, *supra*.

As to the activities prong, the court emphasized that all the covered activities—*i.e.*, the activities respondents would have to terminate in order to avoid jurisdiction—were already prohibited by other federal laws (like the Anti-Terrorism Act of 1987), and that the Act "does not purport to relax or override these prohibitions." Pet. App. 29a; see *id.* at 28a-29a. The court's first premise was not entirely correct: for example, the PA is restricted from "establish[ing] or maintain[ing] an office, headquarters, premises, or other facilities or establishments" in the United States (and only in certain factual circumstances), Palestinian Anti-Terrorism Act of 2006, § 7(a), 120 Stat. 3324, not from "conduct[ing] any activity" at all in the United States, 18 U.S.C. 2334(e)(1)(B)(iii).

Even granting the court's imprecise premise, however, that would simply mean, as the court acknowl-

edged, that respondents' ability to engage in the covered activities would depend on the Executive's enforcement decisions rather than legislation. Pet. App. 29a n.10; see, *e.g.*, *Application of the Anti-Terrorism Act of 1987 to Diplomatic Visit of Palestinian Delegation*, 46 Op. O.L.C. __, at *5-10 (Oct. 28, 2022) (memorializing advice that the President had constitutional authority to host PLO officials in Washington despite statutory prohibitions). The court offered no reason why the exchange-of-benefits framework it devised required the benefits to be traded by the same legal means—let alone in the same statute, as the court appeared to demand, Pet. App. 29a. "The Constitution deals with substance, not shadows." *Cummings* v. *Missouri*, 71 U.S. (4 Wall.) 277, 325 (1867).

Regardless, this narrowly drawn Act arose from a unique, decades-long, and nuanced relationship between the United States and respondents on the plane of foreign relations. The Fifth Amendment does not foreclose Congress from determining that the exercise of jurisdiction by a federal court over these suits is a proper component of that ongoing course of dealing.

3. The court of appeals' remaining due process concerns lack merit

In the end, the Second Circuit's central concerns with the Act appeared to be more generalized: that the Act does not closely enough approximate *genuine* consent to jurisdiction, and that its structure is unusual. The court objected that respondents' triggering actions "allegedly constitute 'consent' under the [Act] only because Congress has labeled them that way," which "cannot support a fair and reasonable inference of the defendants' voluntary agreement to proceed in a federal forum." Pet. App. 26a; see *id.* at 38a. And the court

faulted the plaintiffs and the government for not identifying another "similar constructive waiver" in the case law. *Id.* at 43a.

Neither of those concerns is sound. The first resists the concept of constructive consent, which is a legal "fiction" that is not grounded on the defendant's actual willingness to submit to suit. *Pennsylvania Fire*, 243 U.S. at 96 (citing *Smolik* v. *Philadelphia & Reading Coal & Iron Co.*, 222 F. 148, 151 (S.D.N.Y. 1915) (L. Hand, J.)); see *Mallory*, 600 U.S. at 144 (plurality opinion). The court of appeals' reasoning mirrors that of the state court whose decision was reversed in *Mallory*. Compare Pet. App. 38a ("Congress cannot, by legislative fiat, simply 'deem' activities to be 'consent' "), with *Mallory* v. *Norfolk S. Ry. Co.*, 266 A.3d 542, 569 (Pa. 2021) (rejecting consent by "legislative command"), vacated and remanded, 600 U.S. 122 (2023). The court articulated no standard for determining when a defendant's constructive consent is close enough to actual consent to satisfy due process.

With respect to the second concern, the Act—especially its activities prong—is not as unprecedented as the court of appeals seemed to believe. See p. 41, *supra*. If anything, the unusual features of the Act cut strongly the other way: the Act pinpoints respondents and uses the prospect of personal jurisdiction to deter respondents from paying terrorists or to impose consequences for engaging in certain activities in the United States, and respondents are non-sovereign foreign entities that exercise governmental functions, not private parties. If the Act is unusual, that is because respondents' dealings with the United States are themselves unusual. The real novelty would be in ignoring the unique status of these entities and the political Branches'

concomitant constitutional authorities and instead favoring the court of appeals' one-size-fits-all approach.

4. The court of appeals reviewed the Act's constitutionality under the wrong standard

Compounding its errors, the court of appeals erroneously equated the Fifth and Fourteenth Amendments for purposes of personal jurisdiction and withheld the deference due to Congress and the President in this context.

a. The court of appeals adhered to circuit precedent holding, consistent with the views of several other circuits, that the Due Process Clauses of the Fifth and Fourteenth Amendments impose mirror-image constraints on personal jurisdiction. See Pet. App. 47a-52a & n.17; see also, *e.g.*, *Douglass* v. *Nippon Yusen Kabushiki Kaisha*, 46 F.4th 226, 234-241 (5th Cir. 2022) (en banc), cert. denied, 143 S. Ct. 1021 (2023). Its defense of that precedent, like the precedent itself, was seriously flawed.

Acknowledging the absence of federalism concerns here, the court stressed that Fourteenth Amendment limits on personal jurisdiction also protect interests that it believed are inflexibly transferable to the Fifth Amendment context—namely individual liberty and fairness. Pet. App. 48a ("federalism is not the only constraint on the exercise of personal jurisdiction"); accord *Livnat* v. *PA*, 851 F.3d 45, 55 (D.C. Cir. 2017) ("personal jurisdiction is not just about federalism"), cert. denied, 586 U.S. 952 (2018). That is merely a reason for applying *some* limit on personal jurisdiction under the Fifth Amendment, however, not for reverse-incorporating Fourteenth Amendment doctrine in toto. The court's bolder suggestion that the Fourteenth Amendment rules safeguard federalism only incidentally, see Pet.

App. 48a, is irreconcilable with this Court's personal-jurisdiction cases. See, *e.g.*, *Ford Motor*, 592 U.S. at 360; *Mallory*, 600 U.S. at 169 (Barrett, J., dissenting).

The court of appeals also invoked the proposition that "jurisdictional rules should be simple, easily ascertainable, and predictable." Pet. App. 49a n.16 (quoting *Livnat*, 851 F.3d at 56) (brackets and internal quotation marks omitted). But the jurisdictional rule here is provided by an Act of Congress that is not ambiguous in any relevant respect. The court's demand for certainty in the due process principles governing personal jurisdiction is inconsistent with the "flexible approach" that has long prevailed. *Mallory*, 600 U.S. at 139 (plurality opinion); see *Kulko* v. *Superior Ct.*, 436 U.S. 84, 92 (1978).

b. Finally, the court of appeals paid "mere lip service," *Bonet* v. *Texas Co. (P.R.)*, 308 U.S. 463, 471 (1940), to the deference that the Act warrants as a measure involving the Nation's foreign relations, national security, and efforts to deter terrorism and compensate its victims. The court acknowledged that aspect of the Act only after declaring the statute unconstitutional, having shown no deference to Congress's and the President's determinations that the Act is important to addressing the urgent problem of international terrorism. See Pet. App. 45a-47a. The court appeared to simply disagree with those judgments. See, *e.g.*, *id.* at 27a (asserting that "Congress has a variety of other tools at its disposal for discouraging [respondents'] payments" that may incentivize terrorism).

D. The Court Should Not Reach The Plaintiffs' Broader Fifth Amendment Argument

The plaintiffs further defend the Act on the theory (24-20 Pet. 15-25) that the Fifth Amendment's Due Pro-

cess Clause does not constrain federal courts at all in exercising personal jurisdiction. This Court need not address that contention, and it would be prudent not to.

First, the plaintiffs' theory is not easily confirmed as a historical matter. As Professor Sachs noted in the leading article advancing that theory, "[s]howing that Founding-era due process *didn't* limit federal personal jurisdiction is an exercise in proving a negative" because "Congress strictly limited the venues in which a federal civil suit could be brought" until about a century after the Founding. Stephen E. Sachs, *The Unlimited Jurisdiction of the Federal Courts*, 106 Va. L. Rev. 1703, 1710-1711 (2020); cf. *Vidal* v. *Elster*, 602 U.S. 286, 312 (2024) (Barrett, J., concurring in part).

Second, for the reasons we have explained, the Act can be upheld on the assumption that the Fifth Amendment imposes meaningful limits—or even limits parallel to the Fourteenth Amendment's—on personal jurisdiction over foreign defendants. It is a "fundamental principle of judicial restraint that courts should neither 'anticipate a question of constitutional law in advance of the necessity of deciding it' nor 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *Washington State Grange* v. *Washington State Republican Party*, 552 U.S. 442, 450 (2008) (quoting *Ashwander* v. *TVA*, 297 U.S. 288, 346-347 (1936) (Brandeis, J., concurring)) (some internal quotation marks omitted).

Third, strong policy reasons caution against reaching the plaintiffs' broader argument when it is unnecessary to sustain the Act. Holding that the Fifth Amendment imposes no limits on Congress's authority to provide for personal jurisdiction over foreign defendants could invite other countries to assert blanket jurisdic-

tion over U.S. nationals. This Court has previously shared the Executive Branch's concerns about other nations haling U.S. citizens into their courts under expansive theories of jurisdiction. See, *e.g.*, *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U.S. 108, 124 (2013). The Court should go no further than necessary to decide this particular case.

* * * * *

For the foregoing reasons, the Act is constitutional under the Due Process Clause of the Fifth Amendment.

CONCLUSION

The judgments of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

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APPENDIX

1. U.S. Const. Amend. V provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. 18 U.S.C. 2334 (2018 & Supp. IV 2022) provides:

Jurisdiction and venue

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

(b) SPECIAL MARITIME OR TERRITORIAL JURISDICTION.—If the actions giving rise to the claim occurred within the special maritime and territorial jurisdiction of the United States, as defined in section 7 of this title, then any civil action under section 2333 of this title against any person may be instituted in the district court of the United States for any district in which any

plaintiff resides or the defendant resides, is served, or has an agent.

(c) SERVICE ON WITNESSES.—A witness in a civil action brought under section 2333 of this title may be served in any other district where the defendant resides, is found, or has an agent.

(d) CONVENIENCE OF THE FORUM.—The district court shall not dismiss any action brought under section 2333 of this title on the grounds of the inconvenience or inappropriateness of the forum chosen, unless—

(1) the action may be maintained in a foreign court that has jurisdiction over the subject matter and over all the defendants;

(2) that foreign court is significantly more convenient and appropriate; and

(3) that foreign court offers a remedy which is substantially the same as the one available in the courts of the United States.

(e) CONSENT OF CERTAIN PARTIES TO PERSONAL JURISDICTION.—

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

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

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

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

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

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

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

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

(2) APPLICABILITY.—Paragraph (1) shall not apply to any defendant who ceases to engage in the conduct described in paragraphs (1)(A) and (1)(B) for 5 consecutive calendar years. Except with respect to payments described in paragraph (1)(A), no court may consider the receipt of any assistance by a nongovernmental organization, whether direct or indi-

rect, as a basis for consent to jurisdiction by a defendant.

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

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

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

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

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

(E) any activity related to legal representation—

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

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

(iii) to comply with this subsection; or

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

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

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

(A) the Palestinian Authority;

(B) the Palestine Liberation Organization;

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

(D) any organization or other entity that—

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

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