No. 24-20 & 24-151

IN THE

Supreme Court of the United States

MIRIAM FULD, ET AL.

v.

PALESTINE LIBERATION ORGANIZATION, ET AL.

UNITED STATES

v.

PALESTINE LIBERATION ORGANIZATION, ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AMICUS CURIAE AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

The American Association for Justice ("AAJ") is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions. Throughout its 78-year history, AAJ has served as a leading advocate for the right of all Americans to seek legal recourse for wrongful conduct.

This case is of acute interest to AAJ members, who represent plaintiffs in private causes of action under the Anti-Terrorism Act (ATA) against defendants who dispute personal jurisdiction. More broadly, the statute at issue in this case is the Promoting Security and Justice for Victims of Terrorism Act (PSJVTA), which Congress enacted in 2019 to expand personal jurisdiction over foreign ATA defendants based on meeting certain statutory conditions "deemed" consent. The statute shares key features with consent-by-registration statutes in place in many states, which provide injured plaintiffs with access to their own courts to obtain legal redress against companies incorporated elsewhere, a form of consent that this Court recently

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[1] Pursuant to Rule 37.6, amicus affirms that no counsel for any party authored this brief in whole or in part and no person or entity, other than amicus, its members, or its counsel has made a monetary contribution to its preparation or submission.

reaffirmed. The Second Circuit's decision is inconsistent with precedent and, if allowed to stand, would provide the United States with lesser authority to assert its interests and personal jurisdiction than that enjoyed by the States, suggesting that the Fifth Amendment's due-process requirements are somehow even more limiting in this area than those of the Fourteenth Amendment.

AAJ has filed amicus briefs in this Court and throughout the country on similar issues, including in the court below in the consolidated cases before this Court. *See, e.g., Mallory v. Norfolk So. Rwy. Co.*, 600 U.S. 122 (2023) (upholding consent jurisdiction); *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 592 U.S. 351 (2021) (upholding state court personal jurisdiction across state lines); *Atchley v. AztraZeneca UK Ltd.*, 22 F.4th 204 (D.C. Cir. 2022) (addressing personal jurisdiction under the ATA); *Cooper Tire & Rubber Co. v. McCall*, 863 S.E.2d 81 (Ga. 2021) (discussing personal jurisdiction over a foreign corporation based on the corporation's registration to do business in the state); and *Aybar v. Aybar*, 177 N.E.3d 1257 (N.Y. 2021) (same).

INTRODUCTION AND SUMMARY OF ARGUMENT

The Second Circuit erred in concluding that the Promoting Security and Justice for Victims of Terrorism Act of 2019 (PSJVTA), Pub. L. No. 116-94, § 903, 133 Stat. 3082, violated due process in extending personal jurisdiction to the Palestine Liberation Organization (PLO) and the Palestine Authority (PA). *Amicus curiae* AAJ focuses on two issues, either one of

which suffices by itself to reverse the holding below. First, the court erroneously treated Fifth Amendment due process the same as Fourteenth Amendment due process for purposes of personal jurisdiction and imported inapt limitations. Second, it improperly constricted Congress's authority to establish consent jurisdiction.

The Second Circuit read the due-process clauses of the Fifth and Fourteenth Amendments to impose the same geographical limitations, respectively, on the federal government and on the States. The type of reverse incorporation it undertook ignored key differences in the nature of State and federal sovereignty that requires a different result.

The two amendments have separate histories, separate contexts, and substantially different purposes with respect to personal jurisdiction. Due process, as understood for the United States in 1791, underwent significant change by the time the concept was applied to the States in 1868 with the ratification of the Fourteen Amendment. Additionally, the very different status of the States in relation to each other, when compared to an independent sovereign nation in relation to other independent nations, has critically important implications for the exercise of extraterritorial personal jurisdiction that favor the use that the PSJVTA authorizes.

Importing the Fourteenth Amendment's limitations on States into the Fifth Amendment imposes limits on the federal government that were never part of the Fifth Amendment, particularly when personal jurisdiction is the subject of the inquiry. When a court does what the Second Circuit did here, the different

histories behind the respective amendments are elided with ill effect. To the extent that the Fifth Amendment says anything about personal jurisdiction, it must be read in the context of the general law and the law of nations. Neither legal reference point imposed limits beyond notice or voluntary submission to a sovereign's tribunal as a prerequisite to ensure fair process. Issues of enforcement were left to the practicalities of comity and did not suggest impediments that would now have a constitutional basis.

On the other hand, States—obligated to recognize full faith and credit in another State's actions and laws, U.S. Const. art. IV, § 1—lacked a uniform approach to the validity of sister State judgments that the Fourteenth Amendment supplied through its due-process guarantee. Rather than mere comity, the States were subject to an overriding constitutional obligation of equal treatment of each other as part of a federalized system that was mediated by minimum constitutionally imposed obligations. In other words, States operated within a system that allocates regulatory power among coequals with overlapping authority, subject to the superior authority of the Constitution and the supremacy it vested in the federal government. At the same time, as this Court has repeatedly recognized, due process addresses personal jurisdiction in state courts largely as an instrument of federalism. It assures that one State does not exercise authority allocated under our constitutional system to another State.

The same considerations do not inform the prerogatives of the federal government. Our nation is not just a State in a different pool of co-equals subject to being

overridden in its self-governance by some higher sovereign. And the federal courts do not stand in the same shoes with respect to other national sovereigns and their courts as state courts do to other States' courts.

Another critical difference is that the federal government exercises plenary authority over interstate and foreign commerce, foreign affairs, and the making of treaties. That authority to operate extraterritorially, authorizes federal legislation, including statutes that convey personal jurisdiction to the federal courts, and confirms that the United States enjoys a different type of sovereignty than that which resides in the States. The PSJVTA, however, does more than convey personal jurisdiction. It also serves as an instrument through which the United States seeks to discourage and deter terrorism, protects Americans traveling abroad, and exercises its distinct sovereign interests, all of which exist well outside the sovereign authority of any State.

The fact that the operative language in both amendments ("due process of law") remains the same does not dictate the same reading any more than our understandings of the federal due-process clauses obligate state courts to read their identical state constitutional provisions in lockstep with this Court's holdings. The concept of due process is both flexible and contextual, operating differently on a sovereign-by-sovereign basis.

Finally, and separately, the Second Circuit gave short shrift to how consent jurisdiction may be manifested. It ignored that the PSJVTA was a congressional enactment well within its authority and wrongly denied that consent could operate as the Act

establishes it. In addition, it imposed a novel *quid pro quo* requirement as though consent required some type of bargain or inducement that has no place in analyzing jurisdiction by consent. For example, if applied to tag jurisdiction, authority to serve a person who chose to be within the jurisdiction would evaporate. Certainly, it is also not part of consent through voluntary appearance. What the Second Circuit did, however, was to conflate a type of "purposeful availment" with consent. Yet, even if a benefit were a requirement of consent, the record below amply satisfied that metric.

ARGUMENT

I. THE FIFTH AMENDMENT'S PERSONAL JURISDICTION DUE PROCESS CONCERNS ARE DISTINCT FROM THOSE OF THE FOURTEENTH AMENDMENT.

The Second Circuit erred in treating the Fifth Amendment's Due Process Clause as identical to that of the Fourteenth Amendment for personal-jurisdiction purposes, a question this Court has explicitly and repeatedly left open. *Bristol-Myers Squibb Co. v. Superior Ct. of California, San Francisco Cnty.*, 582 U.S. 255, 268–69 (2017); *see also Omni Cap. Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 102 n.5 (1987); *Asahi Metal Indus. Co. v. Superior Ct. of California, Solano Cnty.*, 480 U.S. 102, 113 n.* (1987). At the same time, this Court also has acknowledged that the "United States is a distinct sovereign [so that] a defendant may in principle be subject to the jurisdiction of the courts of the United States but not of any particular State."

J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 884 (2011) (plurality op.).[2]

It would also be error to assume that the use of the same text, "due process of law," implicates the same limitations on the federal government as it does on the States. The application of due process involves "intensely practical matters and . . . the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Goss v. Lopez*, 419 U.S. 565, 578 (1975) (citation omitted). Thirty-two state constitutions use the same language as the federal Constitution to guarantee due process, Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. Cal. L. Rev. 323, 333

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[2] Scholars, too, have suggested that the Fifth Amendment poses no obstacle to an extensive transnational exercise of personal jurisdiction in the federal courts beyond U.S. territorial borders. *See, e.g.*, Max Crema & Lawrence B. Solum, *The Original Meaning of "Due Process of Law" in the Fifth Amendment*, 108 Va. L. Rev. 447, 453, 461–524 (2022) [hereinafter Crema & Solum, *Original Meaning*]; Lawrence B. Solum & Max Crema, *Originalism and Personal Jurisdiction: Several Questions and a Few Answers*, 73 Ala. L. Rev. 483, 524 (2022) [hereinafter Solum & Crema, *Several Questions*]; Stephen E. Sachs, *The Unlimited Jurisdiction of the Federal Courts*, 106 Va. L. Rev. 1703 (2020) [hereinafter Sachs, *Unlimited Jurisdiction*]; Aaron D. Simowitz, *Legislating Transnational Jurisdiction*, 57 Va. J. Int'l L. 325 (2018); Wendy Perdue, *Aliens, the Internet, and "Purposeful Availment": A Reassessment of Fifth Amendment Limits on Personal Jurisdiction*, 98 Nw. U. L. Rev. 455, 456 (2004); Gary B. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 Ga. J. Int'l & Comp. L. 1, 39 (1987); Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121, 1136 (1966).

(2011), yet remain free to read the provision as providing greater rights than this Court's interpretation of Fourteenth Amendment process. Because due process must be considered flexibly for any given circumstance, *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972), it "poses some interpretational difficulties" and "draws meaning from its context." *Dubin v. United States*, 599 U.S. 110, 118 (2023) (interpreting the word "use" but equally applicable to "due process"); *see, e.g.*, *Goss*, 419 U.S. at 579 (describing "due process" as "cryptic and abstract" but "at a minimum" including notice and an opportunity to be heard prior to an adjudication). The identical nature of the text in the Fifth and Fourteenth Amendments does not control the issue before this Court, as different sovereigns warrant different analyses. *Nicastro*, 564 U.S. at 884 (plurality op.).

Yet, as with other lower courts in civil cases (although, tellingly, not in criminal prosecutions),[3] the Second Circuit assumed that the authority of the United States with respect to other nations parallels that of the States with respect to each other, where this Court has said that one State's sovereignty "implie[s] a limitation on the sovereignty of all of its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980). The same consideration, however, does not apply to the relationship of

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[3] *See infra* pp. 24–27.

the United States to other national sovereigns and certainly is not a "limitation expressed or implicit in the original scheme of the Constitution" or in the Fifth Amendment specifically.

The Second Circuit also ignored the importance of the PSJVTA as a tool intended to deter terrorism visited upon Americans, "an urgent objective of the highest order." *Holder v. Humanitarian L. Proj.*, 561 U.S. 1, 28 (2010), by penalizing those who support those acts of terrorism, even after the fact through "martyr payments" that have the effect of encouraging future acts of terrorism. Punishing organizations supporting terrorism effectively deters future violence against Americans. *See* Jack D. Smith & Gregory J. Cooper, *Disrupting Terrorist Financing with Civil Litigation*, 41 Case W. Res. J. Int'l L. 65, 77–79 (2009). In addition, the United States has an overriding and unique national interest in protecting Americans abroad. *See Gamble v. United States*, 587 U.S. 678, 687 (2019); *see also United States v. Pink*, 315 U.S. 203, 233 (1942) ("Power over external affairs is not shared by the States," but "is vested in the national government exclusively."). The determination of how to deal with terrorism and with foreign states falls within the realm of foreign policy, another uniquely national interest that is "much more the province of the Executive Branch and Congress than of this Court." *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 196 (1983). Yet, the Second Circuit paid that consideration no heed.

That court also gave little weight to congressional authority over the exercise of personal jurisdiction by

a federal court, despite past decisions and recent language from this Court suggesting otherwise. *See, e.g.*, *Nicastro*, 564 U.S. at 885 (plurality op.) (indicating, without deciding, that "Congress could authorize the exercise of [personal] jurisdiction in appropriate courts."); *cf.* Sachs, *Unlimited Jurisdiction*, *supra*, at 1704 ("A federal court's writ may run as far as Congress, within its enumerated powers, would have it go.").

A. The Fifth Amendment's Due Process Clause Has a Different History and Had Different Requirements Than the Same Clause in the Fourteenth Amendment.

Fifth Amendment due process reflects certain "settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country." *Murray's Lessee v. Hoboken Land & Imp. Co.*, 59 U.S. (18 How.) 272, 277 (1855) (upholding a federal statute that departed from the common law but still tracked prior statutory remedies).

The motivating concerns for including a due-process guarantee in the Bill of Rights did not touch upon personal jurisdiction, but focused on preventing the government from operating lawlessly or arbitrarily. *See* Robert Allen Rutland, *The Birth of the Bill of Rights, 1776-1791* 10 (1955) (citing the influence of Sir Edward Coke's Second Institutes). To the extent that

courts could exercise authority over individuals consistent with common English practices and the Framers' understandings, the common law and the law of nations required parties to a lawsuit to provide notice of the legal action. *See* Solum & Crema, *Several Questions*, *supra*, at 524. Alternatively, a defendant could consent to the court's jurisdiction through a voluntary appearance. Robin J. Effron & Aaron D. Simowitz, *The Long Arm of Consent*, 80 N.Y.U. Ann. Surv. Am. L. 179, 200 (2024).

1. The Fifth Amendment's personal-jurisdiction requirements reflect the law of nations.

Courts understood their authority over persons and things to be a function of the law of nations, the common law, and statutory law. Sachs, *Unlimited Jurisdiction*, *supra*, at 1718. Still, national sovereignty played an important role. Chief Justice Marshall acknowledged that, within the territory of the United States, the only restraint on jurisdiction would be those that are self-imposed because restrictions derived from external sources would effectively diminish national sovereignty. *The Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812). Even so, no constitutional impediment restricted a federal court's jurisdictional reach over an individual outside a nation's borders. Instead, a litigant, but not a court, had to consider enforceability, a practical concern, which suggested caution in seeking to exercise extraterritorial reach. *See* Stephen E. Sachs, *Pennoyer Was Right*, 95 Tex. L. Rev. 1249, 1253 (2017). Confident that extravagant assertions of jurisdiction resulted in judgments that were unenforceable, defendants would often default so that they could fight enforcement on

their home turf. *Id.* at 1252–53. Due process played no role in the original court's assessment of personal jurisdiction.

Useful insight into the settled usages in the nascent nation comes from Justice Story's decision in *Picquet v. Swan*, 19 F. Cas. 609 (C.C.D. Mass. 1828). In that case, the justice examined the authority granted by the Judiciary Act of 1789 to assert personal jurisdiction over a non-inhabitant. He said that because "congress never had any such intention" to extend process that far, "no suit would lie against any person, who was not locally present, either as an inhabitant, or in transitu in the United States." *Id.* at 613. However, if Congress had chosen to expand service of process, there was no bar to a federal court's authority to have "a subject of England, or France, or Russia . . . summoned from the other end of the globe to obey our process, and submit to the judgment of our courts." *Id.*

He added that, regardless of any objections based on "principles of public law, public convenience, and immutable justice" that might be mustered, a federal court "would certainly be bound to follow [an act of Congress extending personal jurisdiction], and proceed upon the law." *Id.* at 614–15. Due process was not a consideration. This Court subsequently adopted *Picquet*'s reasoning and held that "positive legislation" could authorize process on non-inhabitants to provide notice of the lawsuit sufficient to obligate the person to appear. *Toland v. Sprague*, 37 U.S. 300, 330 (1838); *cf. Ex parte Graham*, 10 F. Cas. 911, 912 (C.C.E.D. Pa. 1818) (Washington, J.) ("It is admitted, that these courts, in the exercise of their common law and equity

jurisdiction, have no authority, generally, to issue process into another district, except in cases where such authority has been specially bestowed, by some law of the United States."). Authorized process of the kind that Congress could enact was dubbed "legislative jurisdiction." *D'Arcy v. Ketchum*, 52 U.S. (11 How.) 165, 176 (1850).

The Constitution also contains an explicit grant that justifies admiralty jurisdiction, U.S. Const., art. III, § 2, which reflects the law of nations and that this Court has recognized is part of the law of the land and thus part of U.S. law. *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815) (Marshall, C.J.); *see also Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004). Under that jurisdiction, federal courts have long entertained lawsuits that would not otherwise meet a territorially based limit on personal jurisdiction. Yet, admiralty permits "complete jurisdiction over suits of a maritime nature between foreigners." *Langnes v. Green*, 282 U.S. 531, 544 (1931) (citations omitted). It even permits "cognizance of a case entirely between foreigners" concerning a collision on the high seas. *Mason v. Blaireau*, 6 U.S. (2 Cranch) 240, 264 (1804) (Marshall, C.J.). The expectation in international law that U.S. courts will adjudicate those matters easily supports expectations that the looser personal-jurisdiction requirements of the law of nations supports the PSJVTA's assertion of jurisdiction consistent with due process and "settled usages."

Subsequent to his *Picquet* opinion, Justice Story, writing for the Court, contrasted the more limited authority States had to authorize personal jurisdiction without geographic limitation by noting that state

"legislative and judicial authority . . . [a]re bounded by the territory of that state." *Wilkinson v. Leland*, 27 U.S. (2 Pet.) 627, 655 (1829).

The authority to exercise expansive legislation on personal jurisdiction was not merely a quirk of American law. France asserted the prerogative to adjudicate "virtually any case in which the plaintiff or defendant is a French citizen;" Germany claimed jurisdiction over a Russian based on leaving insignificant property (galoshes) in a Berlin Hotel; and Belgium engaged in reciprocal claims of personal jurisdiction if a foreign court "would entertain a comparable action against a Belgian defendant." Sachs, *Unlimited Jurisdiction*, *supra*, at 1728 (footnote and citations omitted).

These stances in other nations, as well as in the United States, reflected the law of nations, which served as the "original federal common law." Thomas H. Lee, *The Law of Nations and the Judicial Branch*, 106 Geo. L.J. 1707, 1709 (2018). Even with respect to State assertions of personal jurisdiction, courts applied "international law as it existed among the States in 1790" and "a judgment rendered in one State, assuming to bind the person of a citizen of another, was void within the foreign State, when the defendant had not been served with process or voluntarily made defence." *D'Arcy*, 52 U.S. (11 How.) at 176. Personal jurisdiction, then, was "a question of state law." *Hanson v. Denckla*, 357 U.S. 235, 250 (1958). This position allowed States to define how process was served. Thus, for example, this Court held that a federal court could disregard a Kentucky judgment where notice was accomplished through publication, but only because

state law did not authorize that method of service. *Hollingsworth v. Barbour*, 29 U.S. (4 Pet.) 466 (1830).

Where, however, state law authorized service that effectively crossed state lines, personal jurisdiction provided no obstacle to judgment. For example, a Massachusetts statute permitted personal jurisdiction over former state residents by leaving a summons at the prior *in-state residence* of the defendant. *Morrison v. Underwood*, 59 Mass. 52, 54 (1849). The Supreme Judicial Court found no error in the exercise of personal jurisdiction on this basis even though the defendant "was not an inhabitant of the state, and was out of the commonwealth, at the time of the service of the writ." *Id.*

2. Congress has broad authority to extend personal jurisdiction transnationally.

More recently, this Court has recognized that Congress could authorize personal jurisdiction where it does not presently exist. *Nicastro*, 564 U.S. at 885 (plurality op.) (acknowledging Congress could provide for the personal jurisdiction that the Court denied); *cf. Blackmer v. United States*, 284 U.S. 421, 438 (1932) (finding no Fifth Amendment problem with a congressional enactment that extended in personam jurisdiction over a U.S. citizen domiciled abroad as long as "appropriate notice of the judicial action and an opportunity to be heard" occurred). In fact, this Court recently recognized that Congress may make a law extraterritorial in scope and reach "claims alleging exclusively foreign conduct," *Abitron Austria GmbH v. Hetronic Int'l, Inc.*, 600 U.S. 412, 418 (2023), even

when the "particular statute . . . merely confers jurisdiction." *RJR Nabisco, Inc. v. Eur. Cmty.*, 579 U.S. 325, 326 (2016). That type of "legislative jurisdiction" exists under the Foreign Sovereign Immunities Act, *see GSS Grp. Ltd v. Nat'l Port Auth.*, 680 F.3d 805, 814 (D.C. Cir. 2012), as well as the Clayton Antitrust Act and Federal Trade Commission Act. *See BNSF Ry. Co. v. Tyrrell*, 581 U.S. 402, 409 (2017). Thus, for example, the Clayton Act authorizes worldwide service of process "wherever [a defendant] may be found." 15 U.S.C. § 22. Other statutes authorizing transnational service include the securities acts, 15 U.S.C. §§ 77v(a), 78aa(a), 80a-43; the False Claims Act, 31 U.S.C. § 3732(a); and the Bankruptcy Act, 11 U.S.C. § 541(a). *See also Omni Cap.*, 484 U.S. 106–07 (discussing statutes authorizing nationwide service of process).

The key animating and venerable principle behind these statutes is that valid service of process *establishes* valid personal jurisdiction. *See, e.g.*, *The Mary*, 13 U.S. (9 Cranch) 126, 144 (1815) (Marshall, C.J.) ("[N]otice of the controversy is necessary in order to become a party, and it is a principle of natural justice."). Indeed, service of process enables a number of assertions of personal jurisdiction to remain valid beyond traditional territorial borders. For example, domestically, the Interpleader Act provides for nationwide service of process, 28 U.S.C. § 2361, and establishes personal jurisdiction over a defendant "even if she lacks minimum contacts" with the forum state. *Mudd v. Yarbrough*, 786 F. Supp. 2d 1236, 1242–43 (E.D. Ky. 2011). The Racketeer Influenced and Corrupt Organizations Act (RICO) also uses nationwide service of process to overcome lack of sufficient contacts to satisfy specific jurisdiction and any at-home

requirement to establish personal jurisdiction and venue. 18 U.S.C. §§ 1961–1968. *See ESAB Grp., Inc. v. Centricut, Inc.*, 126 F.3d 617, 621, 627–28 (4th Cir. 1997), *cert. denied*, 523 U.S. 1048 (1998).

Thus, where Congress authorizes it and service of process can occur in a valid fashion, the Fifth Amendment does not impose additional requirements to achieve personal jurisdiction. The PSJVTA operates well within congressional authority and does not contravene the Fifth Amendment.

B. The Fourteenth Amendment Focused on Very Different Concerns Than the Fifth Amendment Did.

Personal jurisdiction was not a central concern of the Fourteenth Amendment's drafters. They had the immediate objective of "the complete overturning and uprooting of *Dred Scott v. Sandford*, ensuring that no state could take away someone's life, freedom, or possessions and guaranteeing, as a legal term of art, procedural due process for all persons." Steven G. Calabresi & Lena M. Barsky, *An Originalist Defense of* Plyler v. Doe, 2017 B.Y.U. L. Rev. 225, 246 (2017) (footnote omitted).[4] Recent scholarship examining pri-

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[4] This Court has also acknowledged that an additional primary objective of Section 1 of the Fourteenth Amendment—and by most justices' views, through its Due Process Clause—was to render the Bill of Rights, on a selective though nearly complete basis, applicable to the States. *See McDonald v. City of Chicago*, 561 U.S. 742, 763, 762 n.9 (2010). If so, it is incongruent to assert that "due process" means the same thing in the Fifth Amendment as

Footnote continued on next page.

mary sources concluded that the meaning of due process "changed since the First Congress proposed [the Fifth Amendment] for ratification" in 1789 and before the 39th Congress proposed the Fourteenth Amendment in 1866," ascribing the change to "linguistic drift." Crema & Solum, *Original Meaning*, *supra*, at 453, 461–524 (2022). *See also* Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 Yale L.J. 408, 408 (2010) ("Between 1791 and the Fourteenth Amendment's enactment in 1868, due process concepts evolved dramatically."); *Douglass v. Nippon Yusen Kabushiki Kaisha*, 46 F.4th 226, 255–62 (5th Cir. 2022) (en banc) (Elrod, J., dissenting), *cert. denied*, 143 S. Ct. 1021 (2023).

Prior to the ratification of the Fourteenth Amendment, personal jurisdiction over persons or property outside the geographic boundaries of an American State raised no federal constitutional question. In that pre-1868 world, States as sovereigns could exercise inordinate jurisdictional reach, if they chose to, while facing limits to a judgment's enforceability when the damages or property could only be collected within another State.

This Court recognized the validity of that strategy for defendants. Looking backward, this Court noted

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it does in the Fourteenth because only in the latter is it a basis for incorporation. Moreover, it would seem redundant if Fourteenth Amendment due process incorporates the Fifth Amendment's due-process guarantee when the same phrase is used. Certainly, the Fourteenth Amendment's framers could easily have accomplished the goal of incorporation with another phrase if their use of "due process" meant the same thing as it did in the Fifth Amendment.

that "[s]ince the adoption of the Fourteenth Amendment," litigants dispute judgments and oppose enforcement "on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law." *Pennoyer v. Neff*, 95 U.S. 714, 733 (1878), *overruled in part by Shaffer v. Heitner*, 433 U.S. 186 (1977).

Only after *Pennoyer* did federal due process require that a nonresident defendant be served within the forum state or voluntarily appear. *Id. Pennoyer* mandated that, as a matter of due process, courts adhere to "those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights." *Id.* at 733. In that regard, this Court modernized personal jurisdiction but only to the extent that it remained consistent with "traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (citation omitted); *see also Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (permitting the assertion of jurisdiction by state courts to determine nonresidents' interests, consistent with due process, because the State's interest is "insistent and rooted in custom").

State courts generally had not associated due process with personal jurisdiction. An Arkansas Supreme Court decision was the first to suggest, in *dicta*, that the state constitution's "law of the land" provision could impose restrictions on personal jurisdiction unless the court "gained such jurisdiction and exercised its powers in conformity to law." *Ex parte Woods*, 3 Ark. 532, 537 (1841). A later Indiana Supreme Court

decision held that the "due course of law" clause in the Indiana Constitution allowed constructive notice of a suit on residents temporarily absent from the State, but could not authorize proceeding against a non-resident absent, possibly, some attachment of property. *Beard v. Beard*, 21 Ind. 321, 323, 328 (1863).

The bottom line is that, prior to the Fourteenth Amendment, due process did not restrict personal jurisdiction. Its limitations, therefore, should not be added to the reach of the Fifth Amendment's due-process requirements.

C. The Fifth and Fourteenth Amendments Highlight Different Concerns.

1. *Federalism, inapplicable to the extraterritorial reach of the nation, defines the limits on States.*

Under the Fourteenth Amendment, federalism concerns animate this Court's state-court personal-jurisdiction decisions. For example, in *Bristol-Myers*, this Court explained again, that regardless of the strength of the interest a State may have in applying its law or the convenience of the forum, "the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment." 582 U.S. at 263 (quoting *World-Wide Volkswagen*, 444 U.S. at 294). It undertakes that function to impose order on the competing interests of co-equal States as a mandate of the Constitution. *World-Wide Volkswagen*, 444 U.S. at 292. Thus, it places great emphasis on the "sovereignty of each State . . . [which] implie[s] a limitation on the sovereignty of all its sister States." *Id.* at 293.

For even greater emphasis, this Court has insisted that limits on personal jurisdiction serve to maintain "federal balance, the relationship between States as sovereigns." *Nicastro*, 564 U.S. at 884 (plurality op.).

Even the minimum-contacts test works to assure that "States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *World-Wide Volkswagen*, 444 U.S. at 292. Thus, federalism concerns largely define Fourteenth Amendment personal-jurisdiction jurisprudence. Inconvenience, a once prominent explanation for limited personal jurisdiction, on the other hand, has been "substantially relaxed" as a rationale and has taken a back seat to federalism because transactions often involve multiple jurisdictions and issues of transportation and communication that are no longer deemed as burdensome as they once were. *Id.* at 292–93 (citing *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 222 (1957)).

Critically, States are not "separable economic entities" but participate in a constitutionally established "common market" with an "economic interdependence . . . [that] was foreseen and desired by the Framers." *Id.* at 293. Although States exist on a constitutionally prescribed "equal footing," *see Coyle v. Smith*, 221 U.S. 559, 567 (1911), the Constitution does not require a balancing of U.S. sovereign interests with those of other countries. After all, "foreign states are not 'persons' entitled to rights under the Due Process Clause." *See, e.g.*, *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 694 (7th Cir. 2012*), aff'd sub nom. Fischer v. Magyar Allamvasutak Zrt.*, 777 F.3d 847 (7th Cir.), *cert. denied*, 576 U.S. 1006 (2015); *see also Frontera Res.*

Azerbaijan Corp. v. State Oil Co. of the Azerbaijan Republic, 582 F.3d 393, 398–400 (2d Cir. 2009); *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 95–100 (D.C. Cir. 2002).

Additionally, "it is long settled as a matter of American constitutional law that foreign citizens outside U.S. territory do not possess rights under the U.S. Constitution." *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 591 U.S. 430, 433 (2020). *See also United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990) ("[W]e have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States."); *id.* at 260 ("[T]he claim that extraterritorial aliens are entitled to rights under the Fifth Amendment—which speaks in the relatively universal term of 'person'—has been emphatically rejected."); *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

2. Extraterritorial reach implicates foreign affairs, a distinctly national concern.

The PSJVTA also serves as a tool intended to deter terrorism. The protection of Americans abroad from terrorism is "an urgent objective of the highest order." *Holder*, 561 U.S. at 28. The Act accomplishes that purpose by penalizing those who support terrorism. Here, it does so when "martyr payments" are made, which provides a financial incentive for future acts of terrorism. Punishing organizations supporting terrorism effectively deters future violence against Americans. *See* Smith & Cooper, *supra*, at 77–79. In addition, the United States has an undeniable and uniquely federal interest in protecting Americans

abroad. *See Gamble*, 587 U.S. at 687; *see also Pink*, 315 U.S. at 233 ("Power over external affairs is not shared by the States," but "is vested in the national government exclusively."). Determining how to deal with terrorism and with foreign states falls within the realm of foreign policy, another uniquely national interest that is the province of the political branches, which must be accorded broad discretion in pursuing those interests. *See Container Corp.*, 463 U.S. at 196. Yet, the Second Circuit gave no deference to that policy consideration, but should have.

Differences between state authority and that of the United States explains why "personal jurisdiction requires a forum-by-forum, or sovereign-by-sovereign, analysis." *Nicastro*, 564 U.S. at 884 (plurality op.). As a function of constitutional design, "[b]ecause the United States is a distinct sovereign, a defendant may in principle be subject to the jurisdiction of the courts of the United States but not of any particular State." *Id. See also* 4 Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. Civ. § 1068.1 (4th ed. 2024) ("When a federal court adjudicates a federal question claim, it exercises the sovereign power of the United States and no federalism problem is presented.").

The differences in sovereign authority—along with the Constitution's explicit grant of congressional authority to establish lower federal courts, unconstrained by state borders, U.S. Const. art. III, § 1—supports the idea that the Fifth Amendment does operate with the territorial imperatives that undergird the Fourteenth Amendment. On that basis alone, reversal of the decision below is warranted.

D. The Different Treatment of Personal Jurisdiction in Criminal Cases as a Matter of Fifth Amendment Due Process Should Be Extended to Civil Cases.

Precedent shows that the same Fifth Amendment due-process considerations that the Second Circuit employed here to invalidate the PSJVTA poses no obstacle when a transnational defendant is pursued on federal criminal charges. As Judge Elrod observed in a Fifth Circuit case concerning extraterritorial personal jurisdiction, treating the Fifth Amendment the same as the Fourteenth Amendment on personal jurisdiction "quite anomalously, afford[s] foreign civil defendants greater due process protection than foreign criminal defendants." *Douglass*, 46 F.4th at 249 (Elrod, J., dissenting); *see also id.* at 269–70 (Elrod, J., dissenting) (calling it "nonsense on stilts" that due process allows the United States to "prosecute foreign pirates, arms traffickers, murderers, and terrorists in our federal courts for criminal conduct abroad" and to punish them with life imprisonment or even death but do not allow them to be subject to a civil lawsuit).

In fact, the Second, Third, Fourth, Fifth, Sixth, Ninth, Eleventh, and D.C. circuits have found that the Fifth Amendment has *less rigid* due-process application for criminal personal jurisdiction. For example, in *United States v. Yousef*, 327 F.3d 56, 87 (2d Cir. 2003), a foreign national prosecuted for conspiracy to bomb United States commercial airliners in Southeast Asia was held within "the special aircraft jurisdiction of the United States," as authorized by 18 U.S.C. § 32(a)(1). It adopted the Ninth Circuit's due-process standard to

hold that the "substantial intended effect of their attack on the United States and its citizens" was not "so unrelated to American interests as to render their prosecution in the United States arbitrary or fundamentally unfair." *Yousef*, 327 F.3d at 111–12.

Other circuits have adopted similar or looser standards. *See United States v. Martinez-Hidalgo*, 993 F.2d 1052, 1056 (3d Cir. 1993) (holding "nothing fundamentally unfair in [prosecution] exactly as Congress intended—extraterritorially without regard for a nexus between a defendant's conduct and the United States"), *cert. denied*, 510 U.S. 1048 (1994); *United States v. Mohammad-Omar*, 323 F. App'x 259, 262 (4th Cir.) (2009) (foreign national prosecution did not violate due process because the defendant should have "anticipate[d] being haled into court in the United States on account of his drug trafficking activity in Afghanistan, Dubai, and Ghana") (citation omitted), *cert. denied,* 558 U.S. 908 (2009); *United States v. Lawrence*, 727 F.3d 386, 396 (5th Cir. 2013) (extraterritorial application of statute to non-U.S. defendants arrested while traveling between two foreign countries in connection with drug-running exercise of jurisdiction was not "arbitrary or fundamentally unfair."), *cert. denied*, 571 U.S. 1222 (2014); *United States v. Iossifov*, 45 F.4th 899, 914 (6th Cir. 2022) ("even assuming that the Fifth Amendment limits congressional authority to criminalize extraterritorial conduct, . . . prosecution [of Bulgarian national who never stepped foot in the United States] did not run afoul of those limits because it was not arbitrary or fundamentally unfair"); *United States v. Medjuck*, 156 F.3d 916, 918 (9th Cir. 1998) ("[E]xtraterritorial application of United States penal statutes . . . satisfy the strictures

of due process [when] there exists 'a sufficient nexus between the conduct condemned and the United States' such that the application of the statute would not be arbitrary or fundamentally unfair to the defendant."), *cert. denied*, 527 U.S. 1006 (1999); *United States v. Cabezas-Montano*, 949 F.3d 567, 586–87 (11th Cir. 2020) (rejecting argument that Fifth Amendment "due process prohibits the prosecution of foreign nationals for offenses bearing no 'nexus' to the United States"), *cert. denied*, 141 S. Ct. 814 (2020); *United States v. Ballestas*, 795 F.3d 138, 148 (D.C. Cir. 2015) (holding no due-process violation because "[t]here is no arbitrariness or fundamental unfairness" in prosecuting a Columbian citizen for drug running through vessels on the high seas), *cert. denied*, 577 U.S. 1166 (2016).

In holding that criminal and civil due-process considerations for personal jurisdiction are different, these circuits typically rely on two justifications. One theorizes that authority over a criminal prosecution is warranted when the defendant's actions "'affected significant American interests'—even if the defendant did not mean to affect those interests," *United States v. Murillo*, 826 F.3d 152, 157 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 812 (2017). Another distinction treats intent to "harm U.S. citizens and interests and to threaten the security of the United States" differently from "terror attacks" abroad unless there is "evidence the attacks specifically targeted United States citizens." *Waldman v. Palestine Liberation Org.*, 835 F.3d 317, 341 (2d Cir. 2016).

Neither rationale, however, explains why Fifth Amendment due process requires a foreign defendant's liberty interests to vary depending on whether the case is criminal or civil. Nor do they account for the possibility that the U.S. interest is at least as acute in using the civil justice system to deter terrorism as the criminal justice system. Indeed, the PSJVTA seems to have the focus that these courts require because it covers defendants only when their victims are U.S. nationals. *See* 18 U.S.C. §§ 2333(a), 2334(e)(1).

Because caselaw already recognizes the personal jurisdictional reach for the same activity, if the charges are criminal without offending Fifth Amendment due process, and the U.S. interests are just as great and justifying here where Congress has made its purpose clear. There should be no constitutional objection to personal jurisdiction in these consolidated cases.

II. THE PSJVTA'S CONSENT PROVISION PROVIDES A SECOND VALID RATIONALE TO PERMIT THE EXERCISE OF PERSONAL JURISDICTION IN THIS CASE.

The PSJVTA deems that Respondents have consented to personal jurisdiction for terrorism-related claims by U.S. citizens because Respondents made "martyr payments" to terrorists or their families. 18 U.S.C. § 2334(e)(1)(A), or by maintaining "premises, or other facilities or establishments in the United States" or by conducting any activities "while physically present in the United States," exempting certain diplo-

matic activities. *Id.* at § 2334(e)(1)(B). Consent constitutes a waiver of due-process objections to personal jurisdiction so that the differences between the Fifth and Fourteenth Amendment are not joined where consent is manifest. Thus, in *Mallory v. Norfolk S. Ry. Co.*, 600 U.S. 122 (2023) (plurality op.), this Court explained that *International Shoe* and its progeny addressed personal jurisdiction where no consent to suit in the forum existed. *Mallory*, 600 U.S. at 138 (plurality op.). Where "express or implied consent" does exist, "manifested in various ways by word or deed," personal jurisdiction attaches without having to consider due-process standards. *Id.*

In this case, neither the Second Circuit nor the litigants dispute that the Respondents were engaged in activities that fit the PSJVTA consent triggers. Still, the Second Circuit held that such consent was invalid as a due-process violation because it was not the product of a contract, litigation-related activity, or some reciprocal benefit. Pet. App. 21a–24a.

That holding misreads this Court's precedents and adopts a far more constricted view of consent than this Court has articulated. Consent jurisdiction has its basis in the common law. *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 592 U.S. 351, 379 (2021) (Gorsuch, J., concurring). And "[a] variety of legal arrangements have been taken to represent express or implied consent to the personal jurisdiction of the court." *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982). This Court has acknowledged the three kinds of consent the Second Circuit mentioned. *See id.* at 704 (mentioning contract and "voluntary use

of certain state procedures"); *Denckla*, 357 U.S. at 253 (describing a reciprocal benefit where a "defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."). However, the list does not exhaust the ways in which consent may be manifested or be constructed.

A. Similar Statutes Have Met Constitutional Muster for More Than a Century.

Early in this country's history, this Court recognized that States could grant a foreign corporation authority to transact business within its borders as a matter of "comity," *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 592 (1839), but it may also require the corporation to adhere to "such terms and conditions as those States may think proper to impose." *Paul v. Virginia*, 75 U.S. (13 Pet.) 168, 181 (1868), *overruled on other grounds by United States v. S.-E. Underwriters Ass'n*, 322 U.S. 533 (1944); *see also Hanover Fire Ins. Co. v. Carr*, 272 U.S. 494, 507–08 (1926).

Legislation requiring consent by registration was widely adopted in the nineteenth century. *See, e.g.*, *Baltimore & Ohio R.R. Co. v. Harris*, 79 U.S. 65, 74 (1870) (listing some of the early State adopters). This Court upheld these statutes against constitutional attack almost immediately. *See Lafayette Ins. Co. v. French*, 59 U.S. 404, 406 (1855). It also validated a federal statute to the same effect, covering the District of Columbia. *Harris*, 79 U.S. at 81. Thus, Congress, too, could impose conditions on doing business. Notably, this Court stated, without such deemed consent residents would have

> no legal redress short of the seat of the company in another State. In many instances the cost of the remedy would have largely exceeded the value of its fruits. In suits local in their character, both at law and in equity, there could be no relief. The result would be, to a large extent, immunity from all legal responsibility.

Id. at 83–84. The grant of jurisdiction was broad. Consent to the forum's jurisdiction extended to actions arising in other jurisdictions. *Id.* at 77–78.

The authority to transact business that might be considered a reciprocal benefit in that case is no different than the activities the Second Circuit detailed in this case. The Respondents, beyond their diplomatic activities, engage in lobbying and other activities within the United States that cannot be distinguished from "transacting business." *See* Pet. App. 142a-143a.

B. Consent Through Affirmative Actions That Meet Statutory Criteria Is Express and Not Constructive.

This type of consent, this Court said, "actually is conferred" and not "presumed or a "mere fiction." *Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93, 96 (1917) (Holmes, J.). Taking a similar view two years earlier was Judge Learned Hand, who called that type of consent "express," not implied. *Smolik v. Philadelphia & Reading Coal & Iron Co.*, 222 F. 148, 150 (S.D.N.Y. 1915). Thus, while some might regard the PSJVTA as creating a form of constructive consent, precedent suggests

that, having had notice of the conduct that constitutes consent and choosing to continue to engage it, Respondents have voluntarily and affirmatively consented to U.S. jurisdiction. *Cf. Ex parte Schollenberger*, 96 U.S. 369 (1877) (by stipulating to service of process upon its designated in-state agent, defendants "have in express terms . . . agreed that they may be sued there.").

C. Consent Does Not Require *Quid Pro Quo*.

A reciprocal benefit is not a prerequisite to consent jurisdiction. A voluntary appearance in a court, which involves no inducement, constitutes consent to submit to the court's authority. *Ins. Corp. of Ir.*, 456 U.S. at 703 ("[A]n individual may submit to the jurisdiction of the court by appearance."). Even the "voluntary use of certain state procedures" can amount to constructive consent. *Id.* at 704. Moreover, consent may be constructed from waiver or forfeiture through inadvertence, such as failing to enter a special appearance to challenge personal jurisdiction. *See Mallory*, 600 U.S. at 147 (Jackson, J., concurring). Yet, these types of acceptance of a court's jurisdiction over the defendant do not require the *quid pro quo* that the Second Circuit seemed to lard onto due process's requirements. That Justice Jackson mentioned as a separate way in which to submit to jurisdiction "voluntarily invok[ing] certain benefits from a State that are conditioned on submitting to the State's jurisdiction," *id.* at 148 (Jackson, J., concurring), demonstrates that the Second Circuit's "reciprocal benefits" requirement is not a prerequisite to valid consent, but an entirely separate consideration.

Voluntary submission can occur through affirmative acts. This Court has previously endorsed a definition of "appearance" as submission to a court's jurisdiction through "formal written or oral declaration, or record entry, or it may be implied from some act done with the intention of appearing and submitting to the court's jurisdiction." *Roell v. Withrow*, 538 U.S. 580, 587 n.3 (2003) (quoting Black's Law Dictionary 95 (7th ed. 1999)). However, an appearance can also be accomplished through unintentional inactivity as well, such as failing to comply with a discovery order. *Ins. Corp. of Ir.*, 456 U.S. at 707.

Recently, this Court recognized that "a variety of 'actions of the defendant' that may seem like technicalities nonetheless can 'amount to a legal submission to the jurisdiction of a court.'" *Mallory*, 600 U.S. at 146 (2023) (plurality op.) (quoting *Ins. Corp. of Ir.*, 456 at 704–05). In fact, Congress generally enjoys wide latitude in prescribing the manner in which statutory rights are deemed waived. For example, in *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422 (1998), where a plaintiff brought an action under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 *et seq.*, the employer asserted that plaintiff had waived her rights under the statute. This Court held that plaintiff's release did not comply with the Older Workers Benefit Protection Act of 1990, 29 U.S.C. § 626. Congress there had explicitly provided that a waiver of an employee's ADEA rights "may not be considered knowing and voluntary unless at a minimum" the waiver "is written in a manner calculated to be understood by such individual" and "the individual is advised in writing to consult with an attorney prior to executing the agreement." 29 U.S.C. § 626(f)(1)(A), (E).

Because the plaintiff's release failed to meet the statutory prerequisites for waiver, it was ineffective and could not bar employee's ADEA claims. *Oubre*, 522 U.S. at 427–28.

In *Licci v. Lebanese Canadian Bank, SAL*, 732 F.3d 161 (2d Cir. 2013), the Second Circuit upheld a New York district court's jurisdiction over terrorism-related claims against a Lebanese bank based on the bank's "repeated use of [a] correspondent account—and hence New York's banking system—as an instrument to achieve the wrong complained of." *Id.* at 173. The court viewed the bank's repeated and intentional use of the New York-based account as "part of the principal wrong" at issue, *id.* at 170, as well as the basis for personal jurisdiction. *Id.* at 171.

The D.C. Circuit took a similar stand. In *Atchley v. AstraZeneca UK Ltd.*, 22 F.4th 204 (D.C. Cir. 2022), the plaintiffs sued foreign pharmaceutical corporations alleging they aided and abetted international terrorist attacks against U.S. nationals in Iraq by providing free American-made medical goods and cash bribes to organizations affiliated with terrorists. The appeals court upheld jurisdiction over the drug companies based on their contacts in the United States—the channeling of American-made medical goods to terrorist-dominated organizations. *Id.* at 231.

In sum, due process demands only that Congress has identified actions that signify consent with a sufficient grace period so that a defendant makes a knowing and voluntary choice to continue engaging in those activities and thereby accept its consequences for personal jurisdiction. The PSJVTA complies with that requirement and is therefore constitutional.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Second Circuit in this case.

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Respectfully submitted,

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