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[ORAL ARGUMENT REQUESTED]

Nos. 23-1286, 23-1335

**IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

CHAYA WERFEL, et al.,

Plaintiffs-Appellants,

v.

THE PALESTINE LIBERATION ORGANIZATION, et al.,

Defendants-Appellees.

UNITED STATES OF AMERICA,

Intervenor-Appellant.

On Appeal from the United States District Court
for the District of Colorado
District Court Case No. 21-cv-03043 (Judge Gallagher)

**BRIEF FOR INTERVENOR-APPELLANT
THE UNITED STATES OF AMERICA**

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**STATEMENT OF RELATED APPEALS
PURSUANT TO CIRCUIT RULE 28.2(C)(3)**

Appeal Nos. 23-1286 and 23-1335 arise from the same district court order and judgment and have been consolidated for procedural purposes.

The issue involved in these appeals is also before the Second Circuit in *Fuld v. Palestine Liberation Organization*, No. 22-76 (2d Cir.) (rehearing petition filed Nov. 22, 2023); *Waldman v. Palestine Liberation Organization*, No. 22-496 (2d Cir.) (rehearing petition filed Nov. 22, 2023); and *Shatsky v. Palestine Liberation Organization*, Nos. 22-791, 22-1138 (2d Cir.) (in abeyance pending conclusion of *Fuld* and *Sokolow*).

GLOSSARY

ATA	Anti-Terrorism Act of 1992
ATCA	Anti-Terrorism Clarification Act of 2018
PA	Palestinian Authority
PLO	Palestine Liberation Organization
PSJVT	Promoting Security and Justice for Victims of Terrorist Act of 2019

INTRODUCTION

In the Anti-Terrorism Act of 1992 (ATA), Congress provided a civil damages remedy for United States nationals harmed by acts of international terrorism. In order to make the ATA's civil remedies provision function effectively, Congress enacted the Promoting Security and Justice for Victims of Terrorism Act of 2019 (PSJVTa). The PSJVTa provides that if the Palestinian Authority (PA), the Palestine Liberation Organization (PLO), or their successors or affiliates, engage in certain specified conduct after a specified date, that conduct will be deemed to be consent by those entities to personal jurisdiction in U.S. courts for civil actions under the ATA.

The district court in this case erroneously held the PSJVTa's jurisdictional provisions are inconsistent with Fifth Amendment due process. The Supreme Court has long recognized that consent, whether express or implied, is a valid basis for personal jurisdiction, and that "consent may be manifested in various ways by word or deed." *Mallory v. Norfolk S. Ry. Co.*, 600 U.S. 122, 138 (2023) (plurality opinion). In the PSJVTa, Congress gave clear notice to the PA and PLO as to what conduct will be deemed consent to jurisdiction for a particular type of claim—civil claims under the ATA—and a reasonable period of time to structure their conduct accordingly. The actions that Congress chose in the PSJVTa to deem as consent to jurisdiction have a fair and reasonable connection to the United States as a forum and the ATA cause of action. And Congress has particular authority to enact such a statute with respect to the PA and PLO, *sui generis* non-sovereign foreign entities that exercise

governmental authority and that have a unique relationship with the United States government that has long been predicated on conditions intended to encourage those entities to renounce terrorism and commit to peace in the Middle East. The district court's determination that the PSJVTA's deemed-consent provisions are inconsistent with the Due Process Clause of the Fifth Amendment should be reversed.

STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. § 1331. App. Vol. 1 at 25.¹ The district court granted defendants' motion to dismiss and entered final judgment in favor of defendants on August 23, 2023. App. Vol. 4 at 980. Plaintiffs filed a timely notice of appeal on September 13, 2023. App. Vol. 4 at 983. The United States, which intervened in district court, filed a timely notice of appeal on October 20, 2023. App. Vol. 4 at 1003. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether the provisions of the PSJVTA stating that certain activities by the PA and PLO will be deemed consent to a district court's exercise of personal jurisdiction over those defendants in civil actions under the ATA comport with the Due Process Clause of the Fifth Amendment.

¹ Citations to the appendix refer to the Consolidated Joint Appendix filed by plaintiffs.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. Background

1. The PA and PLO

The PLO is recognized by the United Nations as the representative of the Palestinian people, and the United States has engaged with it on that basis since the time of the Oslo Accords between Israel and the PLO. The PA was created under the Oslo Accords to exercise interim governance authority for the Palestinian people in Gaza and the West Bank. The United States does not recognize either the PA or the PLO as the government of a sovereign State. As a matter of historical practice, Congress and the Executive Branch have worked together closely to determine the United States' policies with respect to those entities.²

Prior to the Oslo Accords, in 1987, Congress “determine[d] that the PLO and its affiliates are a terrorist organization and a threat to the interests of the United States, its allies, and to international law and should not benefit from operating in the United States.” 22 U.S.C. § 5201(b). Congress thus made it unlawful for the PLO or

² The United States currently assists training of PA security forces, a key partner in efforts to stabilize the West Bank. Anticipating an end to the current conflict between Hamas and Israel, the United States has expressed the view that the future of Gaza must include Palestinian-led governance and Gaza unified with the West Bank under the PA.

“its constituent groups” to “establish or maintain an office, headquarters, premises, or other facilities or establishments” within the United States or to “expend funds from the PLO” for the purpose of furthering the interests of the PLO or its constituent groups. *Id.* § 5202; *see also* Palestinian Anti-Terrorism Act of 2006, Pub. L. No. 109-446, § 7, 120 Stat. 3318, 3324 (codified as amended at 22 U.S.C. § 2378b note) (prohibition of PA facilities in the United States under certain circumstances).

The Executive Branch has constitutional authority to decline to enforce this prohibition in certain circumstances. In his statement upon signing the prohibition into law, President Reagan emphasized the President’s constitutional prerogative to determine the United States’ diplomatic relationship, if any, with the PLO, and stated the prohibition presented no actual conflict so long as he did not intend to establish diplomatic relations with the PLO. *See* Statement on Signing the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989, 2 Pub. Papers 1541, 1542 (Dec. 22, 1987); *see also* U.S. Dep’t of Justice, Office of Legal Counsel, *Application of the Anti-Terrorism Act of 1987 to Diplomatic Visit of Palestinian Delegation*, 2022 WL 16859386, at *6 (Oct. 28, 2022) (explaining that the prohibition “may not constitutionally be applied in a manner that effectively prevents” PLO representatives invited to Washington, DC “from making a reasonable expenditure of PLO funds on activities that are necessary incidents of such diplomatic engagements with representatives from the Executive Branch”).

Subsequent to the Oslo Accords, Congress has regularly authorized the President to waive the statutory prohibition under certain conditions. *See, e.g.*, Middle East Peace Facilitation Act of 1993, Pub. L. No. 103-125, § 3(b)(2), (d)(2), 107 Stat. 1309, 1310 (authorizing temporary waiver if the President certifies that “it is in the national interest of the United States” and “the Palestine Liberation Organization continues to abide by” its Oslo Accords commitments); Department of State, Foreign Operations, and Related Programs Appropriations Act, 2023, Pub. L. No. 117-328, div. K, tit. VII, § 7041(l)(3)(B)(i), 136 Stat. 4459, 5049 (authorizing waiver if President determines the Palestinians have not obtained the same standing as member states in the United Nations or its specialized agencies and have not “initiated or actively supported an [International Criminal Court] investigation against Israeli nationals for alleged crimes against Palestinians”). Such waivers were routinely made between 1994 and 2017. No such waiver of 22 U.S.C. § 5202 is currently in effect.

2. The ATA and PSJVT

a. In the ATA of 1992, in order “to develop a comprehensive legal response to international terrorism,” Congress created a civil damages remedy for United States nationals harmed by an act of international terrorism committed by a foreign terrorist organization. H.R. Rep. No. 102-1040, at 5 (1992) (1992 House Report); *see* Pub. L. No. 102-572, § 1003(a), 106 Stat. 4506, 4521-24 (adding 18 U.S.C. § 2331, 2333-38) (ATA). The ATA allows a United States national to sue “any person who aids and abets, by knowingly providing substantial assistance, or who conspires with the

person who committed such an act of international terrorism.” 18 U.S.C.

§ 2333(d)(2). A civil action under the ATA may be brought in federal district court “for any district where any plaintiff resides or where any defendant resides or is served, or has an agent.” *Id.* § 2334(a).

b. In the years following the ATA’s enactment, courts exercised general personal jurisdiction over the PA and PLO in civil ATA cases. *E.g., Estate of Klieman v. PA*, 467 F. Supp. 2d 107, 113 (D.D.C. 2006). In 2014, however, the Supreme Court clarified that general personal jurisdiction is appropriate under the Due Process Clause of the Fourteenth Amendment only when the defendant is “essentially at home in the forum.” *Daimler AG v. Bauman*, 571 U.S. 117, 139 (2014) (quotation marks omitted). Courts then applied the *Daimler* standard to pending ATA cases and concluded that the PA and PLO were not “at home” in the United States and thus not subject to general jurisdiction. *See, e.g., Waldman v. PLO*, 835 F.3d 317, 337 (2d Cir. 2016); *Estate of Klieman v. P.A.*, 82 F. Supp. 3d 237, 246 (D.D.C. 2015). Those courts, on the facts presented in those cases, also declined to exercise specific personal jurisdiction over the PA and PLO. *See, e.g., Waldman*, 835 F.3d at 337; *Estate of Klieman*, 82 F. Supp. 3d at 248-49.

Congress responded by enacting the Anti-Terrorism Clarification Act of 2018 (ATCA), which provided that “for purposes of any civil action” under the ATA, “a defendant shall be deemed to have consented to personal jurisdiction in such civil action if” the defendant, after a specified date following the ATCA’s enactment, either

accepts certain forms of foreign assistance or maintains an office within the United States pursuant to a waiver or suspension of 22 U.S.C. § 5202—a provision that, as discussed above, otherwise prohibits the PLO from maintaining an office in the United States. *See* ATCA, Pub. L. No. 115-253, § 4, 132 Stat. 3183, 3184 (2018).

After the ATCA's enactment, the PA informed the Secretary of State that it was declining to accept the forms of foreign assistance listed in the ATCA. (The PLO does not receive U.S. foreign assistance.) Since the ATCA's enactment, the PLO has not operated any office in the United States pursuant to a waiver or suspension of 22 U.S.C. § 5202. The PLO continues to occupy its United Nations Observer Mission in New York, but that office does not require any waiver or suspension of 22 U.S.C.

§ 5202. *See Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria*, 937 F.2d 44, 46 (2d Cir. 1991).

Courts in pending ATA cases thus concluded that the ATCA's factual predicates were not satisfied and continued to hold that U.S. courts could not exercise personal jurisdiction over the PA and PLO. *Estate of Klieman ex rel. Kesner v. PA*, 923 F.3d 1115, 1128 (D.C. Cir. 2019), *vacated*, 140 S. Ct. 2713 (2020); *Waldman v. PLO*, 925 F.3d 570, 575 (2d Cir. 2019), *vacated sub nom. Sokolow v. PLO*, 140 S. Ct. 2714 (2020). The plaintiffs in those cases filed petitions for certiorari in the Supreme Court; while those petitions were pending, Congress enacted the PSJVTa, the statute at issue here.

As relevant here, the PSJVTa supersedes the personal jurisdiction provisions in the ATCA. *See* PSJVTa, Pub. L. No. 116-94, div. J, tit. IX, § 903, 133 Stat. 2534,

3082-85 (2019) (codified at 18 U.S.C. § 2334(e)).³ The PSJVTa defines “defendant” to mean only “the Palestinian Authority,” “the Palestine Liberation Organization,” and their affiliates or successors. 18 U.S.C. § 2334(e)(5). And it revises the factual predicates for those defendants’ conduct that will be deemed consent to personal jurisdiction in civil ATA actions.

First, the PSJVTa focuses on payments to designees of terrorists in Israeli prisons and to the families of persons killed while committing an act of terrorism that injured or killed a United States national. The PSJVTa specifies that a defendant “shall be deemed to have consented to personal jurisdiction” in civil ATA cases if, more than 120 days after the PSJVTa’s enactment (*i.e.*, April 18, 2020), the defendant 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.

18 U.S.C. § 2334(e)(1)(A).

³ The PSJVTa also includes a number of provisions that are not at issue here, aimed at facilitating the resolution of ATA claims. *See* Pub. L. No. 116-94, § 903(b), 133 Stat. at 3082. The portion of the PSJVTa challenged in this action is limited to the jurisdictional amendments contained in § 903(c), which, for ease of reference, this brief refers to as the PSJVTa.

Second, the PSJVTA provides that a defendant “shall be deemed to have consented to personal jurisdiction” in civil ATA cases if, more than 15 days after the PSJVTA’s enactment (*i.e.*, January 4, 2020), the defendant maintains, establishes, or procures any office in the United States or “conducts any activity while physically present in the United States on behalf of” the PLO or PA, with certain limited exceptions related to United Nations business; activities involving U.S. government officials; or certain training activities, legal representation, or ancillary activities. 18 U.S.C. § 2334(e)(1)(B), (e)(3).

B. Prior Proceedings

Plaintiffs include family members and personal representatives of the estates of United States citizens killed in a 2014 terrorist attack in a synagogue in Israel. App. Vol. 1 at 50-60. Plaintiffs brought suit under the ATA against the PA and PLO for their alleged role in the attack. *See* App. Vol. 1 at 25. Plaintiffs asserted that the district court could exercise specific personal jurisdiction over the PA and PLO and that the court had jurisdiction pursuant to the PSJVTA’s jurisdictional provisions. App. Vol. 1 at 28-32. The PA and PLO moved to dismiss; in opposing the PSJVTA as a basis for personal jurisdiction, defendants did not dispute that they made “at least one” payment described in the PSJVTA’s payments prong. App. Vol. 1 at 92-93 n.4 (“[F]or purposes of this Motion, Defendants do not contest they have made at least one such payment after the PSJVTA’s effective date.”). Defendants argued, however, that the PSJVTA’s jurisdictional provisions violate the Due Process Clause of the

Fifth Amendment. The United States intervened in district court to defend the PSJVTAs constitutionality. *See* App. Vol. 4 at 875-93.

The district court granted defendants’ motion to dismiss on August 23, 2023. The district court held that the facts alleged in the complaint did not establish specific personal jurisdiction over the PA and PLO. App. Vol. 4 at 977. The court further held that it could not exercise personal jurisdiction under the PSJVTAs because that statute’s jurisdictional provisions violate Fifth Amendment due process. The court reasoned that “Congress cannot simply legislate that any conduct, without regard for its connections to the United States generally or to litigation in the United States specifically, signals a party’s intent to submit to the jurisdiction of a United States court.” App. Vol. 4 at 971 (quotation marks omitted). According to the district court, Congress in the PSJVTAs had simply taken “conduct in which the PLO and PA had previously engaged,” which had previously been held insufficient to support general or specific personal jurisdiction over the PA and PLO, “and declared that such conduct ‘shall be deemed’ to be consent,” which the court found inconsistent with due process. App. Vol. 4 at 974 (quotation marks omitted).

SUMMARY OF ARGUMENT

The PSJVTAs is consistent with Fifth Amendment requirements of due process. A defendant’s consent has long been recognized as a basis for a court’s exercise of personal jurisdiction, “and consent may be manifested in various ways by word or deed.” *See Mallory v. Norfolk S. Ry.*, 600 U.S. 122, 138 (2023) (plurality opinion).

Congress in the PSJVTAs set out expressly what actions of the PA and PLO will be deemed consent to personal jurisdiction in U.S. courts for a limited class of claims—civil actions under the ATA—and gave those entities a reasonable period of time to structure their conduct accordingly. The PSJVTAs thus provides defendants fair notice and the opportunity to “structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit,” consistent with the Due Process Clause. *See Daimler AG v. Bauman*, 571 U.S. 117, 139 (2014) (quotation marks omitted).

The foreign-affairs context in which the PSJVTAs was enacted underscores its constitutionality. Congress enacted the PSJVTAs so that the ATA’s civil-remedies provision could function effectively to halt and deter international terrorism. The actions that Congress considered to be consent to personal jurisdiction under the PSJVTAs are consistent with this legislative purpose and have a fair and reasonable connection to the ATA cause of action and the United States as a forum. The United States views the PA and PLO as *sui generis* foreign entities and does not recognize those entities as a government of a sovereign and independent state. The political branches have long imposed restrictions on the PA’s and PLO’s ability to operate in the United States based on terrorism-related concerns. In this unique context, it is fair and reasonable for Congress to specify that to the extent the PA and PLO continue to perform certain activity within the United States or continue to make certain payments to designees and family members of persons who committed acts of

terrorism that killed or injured U.S. nationals, those actions will be deemed consent to jurisdiction in U.S. courts for this particular class of terrorism-related claims. That the PSJVTa must be assessed under the due process standards of the Fifth Amendment, rather than the Fourteenth Amendment, further confirms its constitutionality.

In holding the PSJVTa unconstitutional, the district court reasoned that Congress cannot simply “deem” conduct that is unrelated to the forum or the lawsuit to be consent to jurisdiction. But that is not what Congress did in the PSJVTa, and the district court’s contrary reasoning ignores the PSJVTa’s limitations and the unique foreign-affairs context in which it was enacted. For substantially similar reasons, this Court should not follow *Fuld v. PLO*, 82 F.4th 74 (2d Cir. 2023) (rehearing petition filed Nov. 22, 2023), in which a panel of the Second Circuit determined that the PSJVTa’s deemed-consent provisions violate the Due Process Clause. Like the district court here, the Second Circuit panel took far too narrow a view of the circumstances in which consent may be implied from a defendant’s conduct.

STANDARD OF REVIEW

This Court “review[s] de novo the district court’s legal determination that it lacks personal jurisdiction over defendants.” *Peay v. BellSouth Med. Assistance Plan*, 205 F.3d 1206, 1209 (10th Cir. 2000).

ARGUMENT

THE PSJVTAs JURIDITIONAL PROVISIONS COMPORT WITH FIFTH AMENDMENT DUE PROCESS

A. Personal Jurisdiction Under the PSJVTAs Is Fair and Reasonable

1. The United States assumes for purposes of defending the PSJVTAs constitutionality that the PA and PLO have Fifth Amendment due process rights. The Supreme Court has long recognized, however, that because “personal jurisdiction is a *personal* defense,” it “may be waived” by a defendant. *Mallory v. Norfolk S. Ry.*, 600 U.S. 122, 144 (2023) (plurality opinion). The Supreme Court has also long recognized that a defendant’s “express or implied consent” may “ground personal jurisdiction—and consent may be manifested in various ways by word or deed.” *Id.* at 138 (plurality opinion) (quotation marks omitted); *see also Insurance Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982) (recognizing there are a “variety of legal arrangements” through which a defendant may consent to personal jurisdiction). Where a defendant’s consent is “knowing and voluntary,” *Wellness Int’l Network, Ltd. v. Sharif*, 575 U.S. 665, 685 (2015), and the circumstances are not “unreasonable and unjust,” *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n.14 (1985) (quotation marks omitted), a court’s exercise of personal jurisdiction comports with due process requirements.

Consistent with these principles, the PSJVTAs sets out a reasonable “legal arrangement[],” *Bauxites*, 456 U.S. at 703, through which the PA and PLO may,

knowingly and voluntarily, constructively consent to personal jurisdiction in U.S. courts for a particular type of claim: civil claims under the ATA. *See* 18 U.S.C. § 2334(e)(1); *id.* § 2333(a). Specifically, the PSJVTa provides that the PA and PLO will be “deemed to have consented” to personal jurisdiction in U.S. courts for civil ATA claims if: (1) more than 15 days after the PSJVTa’s enactment, the PA and PLO maintain an office in the United States or conduct certain activity “while physically present in the United States”; or, (2) more than 120 days after the PSJVTa’s enactment, the PA and PLO make any payment to a designee or family member of an individual imprisoned for or killed while committing an act of terrorism that injured or killed a U.S. national, if the payment is made by reason of such individual’s imprisonment or death for that act. *See id.* § 2334(e).

The PSJVTa thus expressly describes what actions of the PA and PLO will cause such defendants to be “deemed to have consented to personal jurisdiction” in U.S. courts; it specifies the particular cause of action for which such consent will apply—civil claims under the ATA; and it provides an implementation period to give defendants fair warning that the particular conduct will subject them to personal jurisdiction and a reasonable period of time to structure their conduct accordingly. *See* 18 U.S.C. § 2334(e)(1). Since the PSJVTa’s enactment, therefore, the PA and PLO have “know[n]” what actions will be deemed consent to personal jurisdiction for civil ATA claims, and they have had the opportunity to “voluntarily” choose whether or not to continue such actions and thereby consent to jurisdiction for that particular

type of claim. *See Wellness Int’l Network*, 575 U.S. at 685. Defendants have thus had the opportunity to “structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit,” consistent with due process. *See Daimler AG v. Bauman*, 571 U.S. 117, 139 (2014) (quoting *Burger King*, 471 U.S. at 472).

The PSJVTa therefore operates similarly to other legal arrangements through which a defendant may validly consent to personal jurisdiction. Just last term, in *Mallory v. Norfolk Southern Railway Co.*, 600 U.S. 122, the Supreme Court upheld as consistent with due process a Pennsylvania law providing that an out-of-state company’s registration in the state as a foreign corporation made the company amenable to suit in Pennsylvania courts “on any claim.” *Id.* at 135. The Court explained that the Pennsylvania law was “explicit” that registration in the state would permit state courts “to exercise general personal jurisdiction” over an out-of-state corporation, and that the defendant had “understood” that it would be “amenable to suit on any claim” as a result of its registration. *Id.* at 134-35 (quotation marks omitted). It was thus “hardly unfair” for Pennsylvania’s state courts to exercise personal jurisdiction over the out-of-state defendant that had registered pursuant to the statute’s terms. *See id.* at 146 n.11 (noting grounds on which a majority of the Court “agree[d]”).

The PSJVTa similarly gives clear notice as to what conduct will be deemed consent to jurisdiction in the courts of the United States if taken after a specified date.

Indeed, the PSJVTAs' jurisdictional provisions are much narrower than the business-registration statute upheld in *Mallory*. While Pennsylvania's law applied to any out-of-state business registering in the state and made such businesses amenable to suit in Pennsylvania state court "on *any* claim," *see Mallory*, 600 U.S. at 135 (emphasis added), the PSJVTAs are limited to a particular type of claim—civil claims under the ATA—that has a fair and reasonable connection to the activity Congress determined would be consent to jurisdiction. *See infra* pp. 16-19. Moreover, the PSJVTAs apply only to the PA and PLO: *sui generis* foreign non-sovereign entities that, as discussed further *infra* pp. 17-19, have a unique relationship with the United States government.

2. That "Congress passed, and the President signed, [the PSJVTAs] in furtherance of their stance on a matter of foreign policy," *Bank Markazi v. Peterson*, 578 U.S. 212, 215 (2016), further supports the PSJVTAs' constitutionality. The political branches' judgments in this context "warrant[] respectful review by courts," *id.*, and this context meaningfully informs the fairness and reasonableness of the PSJVTAs' deemed-consent provisions.

Congress enacted the ATA's civil-liability provision "to develop a comprehensive legal response to international terrorism." 1992 House Report 5. Congress found, however, that because courts had held that the PA and PLO were not subject to general personal jurisdiction in the United States, the ATA's goals were not being realized. *See* H.R. Rep. No. 115-858, at 6 (2018). Congress thus determined that it was necessary to enact the PSJVTAs' statutory predecessor, the ATCA, in 2018

so that the ATA’s civil-liability provision could function effectively to “halt, deter, and disrupt international terrorism.” *Id.* at 7-8. In revising the ATCA’s factual predicates in the PSJVTa, Congress acted with the same statutory purpose. *See, e.g.*, 165 Cong. Rec. S7182 (daily ed. Dec. 19, 2019) (statement of Sen. Lankford); *id.* at S7182-83 (statement of Sen. Grassley).

The actions of the PA and PLO Congress selected in the PSJVTa to “deem[]” as consent by those entities to personal jurisdiction are consistent with this legislative purpose and have a fair and reasonable connection to the ATA cause of action and the United States as a forum. The PA and PLO are *sui generis* foreign non-sovereign entities. Their ability to operate within the United States and engage in a range of activities is dependent on the coordinated judgments of the political branches, which have long imposed restrictions on the PA’s and PLO’s activities and operations in the United States based on the same concerns that motivated enactment of the PSJVTa—namely, concerns about their historical support for acts of terrorism. *See supra* pp. 3-5 (discussing constitutional and statutory conditions under which the Executive Branch may waive or decline to enforce prohibitions to permit the PLO to operate in the United States); *see also, e.g.*, Middle East Peace Facilitation Act of 1993, § 3(b)(2)(A), (d)(2), 107 Stat. at 1310 (authorizing temporary waiver of prohibition if President certifies “it is in the national interest of the United States” and the PLO is honoring its Oslo Accords commitments); Palestinian Anti-Terrorism Act of 2006, Pub. L. No. 109-446, § 7, 120 Stat. at 3324 (prohibiting the establishment or

maintenance in the United States of any office of the PA during any period for which it is effectively controlled by or unduly influenced by Hamas in the absence of a statutory waiver).

In this context, where Congress and the Executive Branch have long conditioned the PA's and PLO's ability to engage in a range of activities in the United States on the judgments of the political branches concerning those entities' renouncement of terrorism and commitment to peace in the Middle East, it does not offend due process for Congress to specify in the PSJVT A that to the extent the PA and PLO continue to perform certain activities in the United States after a specified date, the performance of those activities will be deemed consent to personal jurisdiction in U.S. courts for civil ATA claims brought to redress injuries to U.S. nationals caused by terrorism. *See* 18 U.S.C. § 2334(e)(1)(B), (e)(3).

Similarly, in this unique context, it was fair and reasonable for Congress to specify that the PA's and PLO's payments to designees and family members of persons imprisoned for or killed while committing acts of terrorism that kill or injure U.S. nationals will be deemed consent to personal jurisdiction in U.S. courts for civil anti-terrorism claims. *See* 18 U.S.C. § 2334(e)(1)(A). Indeed, in other legislation, Congress has found that such payments by the PA and PLO incentivize the very type of terrorism Congress sought to combat in creating the ATA cause of action. *See* Taylor Force Act, Pub. L. No. 115-141, div. S, tit. X, § 1002(1), 132 Stat. 348, 1143 (2018) (codified at 22 U.S.C. § 2378c-1 note) (finding the PA's "practice of paying

salaries to terrorists serving in Israeli prisons, as well as to the families of deceased terrorists, is an incentive to commit acts of terror”). Congress’s tailored effort in the PSJVTa to ensure that the ATA cause of action is enforceable in United States courts does not violate the Due Process Clause.

3. Finally, the PSJVTa must be assessed under the due process standards of the Fifth Amendment, rather than the Fourteenth Amendment, *see Peay v. BellSouth Med. Assistance Plan*, 205 F.3d 1206, 1210 (2000), further confirming its constitutionality. Although the PSJVTa would be constitutional even under the Fourteenth Amendment’s limitations, the Fifth Amendment, properly understood, permits federal courts to exercise personal jurisdiction over foreign defendants in ways that have no analogue for a state court exercising personal jurisdiction under the Fourteenth Amendment.

The Supreme Court has “[l]eft open the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court” as the Fourteenth Amendment. *See Bristol-Myers Squibb Co. v. Superior Court*, 582 U.S. 255, 269 (2017). Importantly, the limitations recognized in the Fourteenth Amendment context reflect not only concerns about fairness to individual defendants, but also concerns about federalism and the limited and mutually exclusive sovereignty of the several states—concerns that, “at times,” may “be decisive.” *Id.* at 263; *see also, e.g., World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-94 (1980)

(“The sovereignty of each State . . . implie[s] a limitation on the sovereignty of all its sister States.”).

Those same concerns do not apply to the United States, which has authority over foreign commerce and foreign affairs and, unlike a state, power “to enforce its laws beyond [its] territorial boundaries.” *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991). Moreover, the United States’ “powers of external sovereignty” and its ability to conduct relationships with foreign actors are grounded in the United States’ status in international law as an independent state. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 318 (1936); *see Burnet v. Brooks*, 288 U.S. 378, 396, 403-06 (1933).

Thus, while this Court has recognized that “the Fourteenth Amendment’s fairness and reasonableness requirements” are not to be “be discarded completely when jurisdiction is asserted under a federal statute,” *Peay*, 205 F.3d at 1212 (quoting *Republic of Panama v. BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935, 945 (11th Cir. 1997)), the United States’ position as a sovereign in the international community and its special competence in matters of foreign affairs and international commerce are, at a minimum, relevant to determining whether a federal court’s exercise of jurisdiction pursuant to congressional authorization is “fair and reasonable” to a foreign defendant, *see id.*; *see also Republic of Panama*, 119 F.3d at 945-46 (recognizing, in context of minimum contacts analysis, that the “factors used in determining fairness under the Fourteenth Amendment” are not to be applied “mechanically” to the Fifth Amendment). And those considerations should inform the analysis of what conduct

is “fair and reasonable” for Congress to deem consent to jurisdiction in U.S. courts for a particular type of claim. That is particularly so with respect to *sui generis* foreign entities such as the PA and PLO that exercise governmental authority but have not been recognized as the government of a sovereign state by the Executive.

As discussed above, Congress has enacted numerous laws, including the ATA, to combat acts of international terrorism outside the United States that affect U.S. persons and interests, and Congress has sought to make that legislation effective by putting the PA and PLO on reasonable notice that engaging in certain related activities will subject them to the adjudicative authority of federal courts for purposes of those specific claims. Even if a state could not enact similar legislation consistent with structural limitations on state authority and the Fourteenth Amendment, the Fifth Amendment does not prohibit the United States from determining that certain actions of the PA and PLO properly subject them to personal jurisdiction in U.S. courts in these limited circumstances.

B. The District Court’s Contrary Reasoning, and the Second Circuit’s Recent Decision in *Fuld v. PLO*, Are Unpersuasive

1. In concluding the PSJVT is inconsistent with due process, the district court primarily reasoned “that Congress cannot simply legislate that any conduct, without regard for its connections to the United States generally or to litigation in the United States specifically, signals a party’s intent to submit to the jurisdiction of a United States court.” App. Vol. 4 at 971 (quotation marks omitted). For the reasons

explained above, however, Congress in the PSJVTa did not “deem” the PA and PLO to have consented to personal jurisdiction based on conduct entirely unrelated to the forum or to the lawsuit. To the contrary, the activities that Congress identified in the PSJVTa to constitute consent to personal jurisdiction have a fair and reasonable connection to the only cause of action to which the PSJVTa applies—civil ATA actions concerning terrorist attacks killing or injuring U.S. citizens—and to the United States as a forum in light of the United States’ unique relationship with the PA and PLO as *sui generis* foreign non-sovereign entities whose ability to operate in the United States has long been linked to anti-terrorism-related objectives. *See supra* pp. 16-19. The district court’s contrary analysis fails to give appropriate weight to the PSJVTa’s limitations and the foreign-affairs context in which it was enacted.

The district court further reasoned that the PSJVTa is inconsistent with due process because the activity Congress identified to “deem[]” as consent is activity that courts have held insufficient to establish general or specific jurisdiction over the PA and PLO. App. Vol. 4 at 974 (quotation marks omitted). But consent—whether explicit or implied—is a separate and independent basis for personal jurisdiction that can apply even if the requirements for general or specific jurisdiction have not been established. *See Mallory*, 600 U.S. at 138; *id.* at 148 (Jackson, J., concurring); *id.* at 153 (Alito, J., concurring in part and concurring in the judgment); *see also, e.g., Burger King*, 471 U.S. at 472 (recognizing a forum’s ability to exercise jurisdiction by consent is

separate and apart from the forum’s ability to exercise general or “specific jurisdiction over an out-of-state defendant who has not consented to suit there”).

The district court similarly erred in reasoning that the PSJVTa is inconsistent with due process because the conduct Congress chose to “deem” as consent is conduct that the PA and PLO “had previously engaged” in prior to the statute’s enactment. App. Vol. 4 at 974. Under the PSJVTa, the identified conduct will be “deemed” consent to personal jurisdiction only if the PA and PLO undertake those actions *after* specified periods of time following the statute’s enactment. *See* 18 U.S.C. § 2334(e). Thus, as explained above, the PSJVTa gives the PA and PLO “fair warning” of the activity that will subject them to personal jurisdiction and a reasonable period of time in which to choose whether or not to continue those activities knowing the jurisdictional consequences, consistent with due process. *See Burger King*, 471 U.S. at 472.

2. After the district court issued its decision in this case, a panel of the Second Circuit similarly held that the PSJVTa does not comport with due process requirements. *See Fuld v. PLO*, 82 F.4th 74, 88 (2d Cir. 2023) (rehearing petition filed Nov. 22, 2023); *Waldman v. PLO*, 82 F.4th 64, 73 (2d Cir. 2023) (incorporating “the entirety of *Fuld*’s analysis” in case presenting the same issue) (rehearing petition filed Nov. 22, 2023). In reaching that conclusion, the Second Circuit stated that “a variety of legal arrangements” may represent a defendant’s consent to personal jurisdiction and that a defendant’s consent may be express or implied. *See Fuld*, 82 F.4th at 88

(quotation marks omitted). The Second Circuit interpreted the case law, however, to essentially limit the ways in which a defendant may impliedly consent to personal jurisdiction to just two: a defendant’s “litigation-related conduct” or due to a defendant’s “reciprocal bargain[]” to accept a “government benefit” in exchange for submission to the forum. *Id.* at 88, 90-94. The Second Circuit concluded that neither circumstance was present and therefore consent could not fairly be implied under the PSJVT A. *See id.* at 97.

The Second Circuit took too narrow an understanding of the circumstances under which consent to jurisdiction can be inferred and this Court should not follow its reasoning. Nothing in the Fifth Amendment’s text or history limits implied consent to litigation-related conduct or a “reciprocal bargain” for a government benefit, *Fuld*, 82 F.4th at 90, and there is no basis to conclude that a court’s exercise of jurisdiction is fair and reasonable only in those limited circumstances. Thus, in upholding Pennsylvania’s business-registration statute in *Mallory*, the Supreme Court did not limit its reasoning to a reciprocal exchange of benefits between the defendant and the forum (as the Second Circuit erroneously suggested, *Fuld*, 82 F.4th at 90, 96), but rather the Court emphasized the “explicit” language of the statute and that the defendant had “understood” that by registering in the jurisdiction it would be “amenable to suit” there. *See* 600 U.S. at 135-36 & n.5; *id.* at 150-62 (Alito, J., concurring in part and concurring in the judgment) (recognizing the company had taken “steps that, under the express terms” of state law, “were understood as consent

to the State’s jurisdiction”); *id.* at 148-49 (Jackson, J., concurring) (recognizing “the jurisdictional consequences of registration were clear” and that the company “made the choice to register”).

For the reasons explained above, where Congress has provided fair notice to a limited, *sui generis* class of defendants of what conduct will be deemed consent for a specific type of claim and a reasonable period of time to determine whether or not to continue that conduct—and where that identified conduct is fairly connected to the subject matter of the litigation and the United States as a forum—it is fair and reasonable for federal courts to exercise jurisdiction over defendants on that specific type of claim, even if there is not a reciprocal exchange of benefits in return.

Moreover, and in any event, at least with respect to the PSJVT’s prong specifying that certain conduct of the PA and PLO within the United States will be deemed consent to jurisdiction, 18 U.S.C. § 2334(e)(1)(B), the United States *has* conferred a benefit: to the extent the PA and PLO are performing activities in the United States that satisfy that prong, they are receiving the benefit of being permitted to do so because the United States could limit or prohibit them from engaging in those activities in the United States—and, in some cases, has done so. *See supra* pp. 3-5. The PSJVT’s activities prong thus serves the same function as registration in *Mallory* in subjecting defendants to suit. It does “not offend traditional notions of fair play and substantial justice” for Congress to specify that the performance of such activities by the PA and PLO within the United States will be considered consent to

personal jurisdiction in U.S. courts for civil ATA claims. *See Bauxites*, 456 U.S. at 702-03 (quotation marks omitted).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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REQUEST FOR ORAL ARGUMENT

The United States believes that oral argument would be of assistance to this Court, and respectfully requests oral argument.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,515 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Word for Microsoft 365 in Garamond 14-point font, a proportionally spaced typeface.

s/ Courtney L. Dixon

Courtney L. Dixon

CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2024, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system.

s/ Courtney L. Dixon

Courtney L. Dixon