Nos. 24-20 and 24-151

IN THE

Supreme Court of the United States

MIRIAM FULD, *et al.*,
Petitioners,
v.

PALESTINE LIBERATION ORGANIZATION, *et al.*,
Respondents.

UNITED STATES,
Petitioner,
v.

PALESTINE LIBERATION ORGANIZATION, *et al.*,
Respondents.

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

BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts.

The Chamber unequivocally condemns acts of terrorism in all forms, including those committed against American citizens at issue in this case. Respondents should be – and are – answerable in United States Courts for the "pay for slay" policy that Petitioners describe, that the political branches seek to address, and that the Chamber finds abhorrent. *See* Petn. for Cert. at 13, *Fuld v. Palestine Liberation Org.*, (No. 24-20) (U.S. July 3, 2024). Specifically, Respondents are subject to the *in personam* jurisdiction of the United States Courts for their actions, and the exercise of that jurisdiction does not offend the Due Process Clause of the Fifth Amendment.

While that is the topline conclusion, the basis upon which this Court reaches that conclusion carries important implications for the American business community. American businesses rely on predictable rules governing personal jurisdiction. Those rules provide essential guidance about where disputes can

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[1] No counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

be heard whether in matters where American businesses are seeking relief or named as defendants.

Consistent with those interests, the Chamber has participated in many cases lying at the intersection of foreign affairs and the constitutional limits on a court's exercise of personal jurisdiction. Such cases include *CC/Devas (Multimedia) Ltd. v. Antrix Corp., Ltd.*, (No. 23-1201) ("*Devas*") and *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873 (2011). Following its positions articulated in those and other cases, the Chamber files this brief to offer its unique perspective on how to resolve this case in a manner that takes into consideration the broader implications of any rule of decision.

SUMMARY OF ARGUMENT

The Chamber agrees with the United States that this Court should decide this case narrowly, without addressing broad questions of how the Fifth Amendment's Due Process Clause restrains federal courts' exercise of personal jurisdiction. *See* Gov't Br. at 47.

Both petitions concern a facial challenge to a unique federal statute specifically designed to overcome jurisprudential impediments to the exercise of personal jurisdiction over the Palestinian Authority ("PA") and the Palestine Liberation Organization ("PLO," and together with the PA, "Respondents") in cases involving acts of terrorism against United States nationals. The sole question presented is whether the exercise of personal jurisdiction against Respondents pursuant to the Promoting Security and Justice for Victims of Terrorism Act of 2019, Pub. L. 116-94, div. J., tit. IX, § 903, 133 Stat. 2534, 3082-85 ("PSJVTA"),

violates the Due Process Clause of the Fifth Amendment. The answer to that question is "no."

The straightforward reason is that Respondents are not entitled to the protections of the Due Process Clause. As the Chamber has explained in its brief in *Devas*, due process protections do not extend to foreign sovereign governments or their alter egos. Although Palestine is not a foreign sovereign, the reasons advanced in the Chamber's brief in *Devas* support the same conclusion for Respondents. For decades, the Executive Branch has taken this view and concluded that foreign political entities, including Respondents specifically, are not entitled to the Fifth Amendment's protections. Nothing in the decision below offers a persuasive reason to depart from the Executive Branch's historical position. This reason alone is sufficient to resolve these appeals in Petitioners' favor and to reverse the judgment below.

The Court should go no further. It is not necessary in this case to examine the precise relationship between the Fifth and Fourteenth Amendment limits on personal jurisdiction. That question involves difficult methodological debates with significant repercussions that cannot be fully fleshed out here. If this Court nevertheless opts to delve into that question, it should formally adopt the approach suggested by this Court in *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 619 (1992), and the plurality opinion in *Nicastro*, 564 U.S. 873, and consistently employed by the federal appellate courts: the Fifth Amendment requires that a defendant have minimum contacts with the United States as a whole. Sound reasons counsel against a more radical approach never embraced by this Court or any federal appellate court, that the Fifth Amendment only affords defendants the process authorized by

Congress and imposes no independent limits on the personal jurisdiction of the federal courts.

Likewise, it is not necessary to examine whether the consent doctrine might support the exercise of jurisdiction. The judges dissenting from rehearing *en banc* suggested that this Court's decision in *Mallory v. Norfolk Southern Ry. Co.*, 600 U.S. 122 (2023), might be read to support the exercise of personal jurisdiction based on the PSJVTA's "deemed consent" provisions. Pet. App. 246a-248a, 309a-310a. But *Mallory* did not grant Congress (or state legislatures) a blank check to equate any activity with a blanket consent to all-purpose jurisdiction. *See* Gov't Br. at 24 ("That does not mean anything goes.") (quoting *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 592 U.S. 351, 362 (2021)). And the unique context of this statute makes this case a far from ideal vehicle to begin defining the contours of that doctrine post *Mallory*.

In sum, this Court can and should take the straightforward route to resolving this case. Respondents, like States of the Union and foreign sovereign governments, are not entitled to the protections of the Due Process Clause. This Court thus need not consider the downstream question whether an entity entitled to the protections of that Clause could be subjected to personal jurisdiction under the statute as a matter of contacts or consent. The exercise of personal jurisdiction over ***these*** Respondents pursuant to ***this*** statute comports with the Constitution.

ARGUMENT

Any exercise of personal jurisdiction requires proof of three propositions. First, "the procedural requirement of service of summons must be satisfied." *Omni Capital Intern., Ltd. v. Wolff & Co. Ltd.*, 484 U.S. 97, 104 (1987) Second, the exercise of personal jurisdiction requires a statutory authorization. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774-75 (1984). Third, any statutory authorization of personal jurisdiction must comport with the Constitution.

As the courts below correctly recognized, only the third requirement is at issue here. Respondents have been properly served, and the PSJVTA authorizes personal jurisdiction over these Respondents. Pet. App. 16a.

The court below framed its assessment of the constitutional question by reference to three categories: general jurisdiction, specific jurisdiction and consent. That framing elided a critical antecedent issue, namely, whether Respondents were entitled to the protections of the Due Process Clause *at all*. *See* Pet. App. 153a-154a. They are not. For this reason alone, the constitutional inquiry ends. Further examination of the three above-referenced categories is not necessary.

I. Respondents are not "persons" entitled to due process under the Fifth Amendment.

"Foreign states" are not persons entitled to the protections of the Due Process Clause of the Fifth Amendment. *See* Chamber Br. at 4-25, *Devas* (No. 23-1201) (U.S. Dec. 11, 2024). This rule can easily be extended to foreign political entities like Respondents. *See* Gov't Br. at 19 ("[R]espondents' status as non-sovereign foreign entities weighs strongly in favor of

the [PSJVTA's] constitutionality."). Considerations of text, history, and precedent all support this conclusion.

Text. While the Constitution does not define the term "person," the use of the term throughout the document reveals that the Framers did not intend for it to encompass certain governmental entities, including "foreign states" (U.S. Const. art. I, § 9; *id.* art. III, § 2; *id.* amend. XI), "foreign nations," (*id.* art. I, § 8) "foreign Power[s]," (*id.* art. I, § 10), and "States" of the Union (*id.* art. I, § 8; *id.* amend XIV). The repeated and deliberate use of these terms throughout the Constitution to refer to governmental bodies demands the conclusion that, had the Framers intended for the Fifth Amendment's protections to extend to these categories of litigants, it would have include such terms (along with "persons") among the parties entitled to the protections set forth therein. *Compare id.* amend. V, *with id.* art. I, §§ 8, 9, 10, *id.* art. III, §2, *id.* amend. XI, and *id.* amend XIV.

This conclusion comports with the commonly held belief that the Constitution was not intended to protect governments, especially foreign ones. As one scholar succinctly summarized the point: "the opposite of a constitutional right is a government power." Kent Greenfield, *In Defense of Corporate Persons*, 30 Const. Comment. 309, 316 (2015). It would therefore "be quite strange to interpret the Due Process Clause as conferring upon [Respondents] rights and protections *against* the power of federal government." *Price v. Socialist People's Libyan Arab Jamahiriya,* 294 F.3d 82, 97 (D.C. Cir. 2002) (emphasis in original).

Because the Fifth Amendment seeks to protect *persons* from the exercise of an unlawful *government* power, foreign political entities – regardless of

sovereignty status – are not, as a textual matter, entitled to its protection.

History. What text suggests, history confirms. For fifty years, the Executive Branch has been steadfast in its pronouncement that the Constitution was not intended to apply to entities like Respondents. In 1975, Attorney General Levi testified that because the preamble of the Constitution refers to "We the People," it could "be urged that it was not meant to apply to foreign nations, their agents and collaborators." *Intelligence Activities – The National Security Agency and Fourth Amendment Rights: Hearings on S. Res. 21 Before the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities*, 94th Cong., 1st Sess. 66, 74 (1975) (statement of Attorney General Edward H. Levi). Five years later, the Office of Legal Counsel sought to clarify the distinction between a foreign individual and a foreign government, explaining that the former may have Fifth Amendment rights, whereas the latter does not. *See Presidential Authority to Settle the Iranian Crisis*, 4A Op. O.L.C. 248, 260 n.9 (1980) ("A foreign nation [ ], unlike a foreign national, does not have rights under the Fifth Amendment.").

In 1987, the Office of Legal Counsel directly spoke to the constitutional rights of the PLO in the face of the federal government's decision to close the Palestine Information Office. The opinion declared that the "PLO [ ], as a foreign political entity, has no constitutional rights," and that this conclusion "flows inexorably from the nature of foreign sovereigns and their interaction with the United States as a foreign, co-equal sovereign." *Constitutionality of Closing the Palestine Info. Off., an Affiliate of the Palestine Liberation Org.*, 11 Op. O.L.C. 104, 106 (1987). "Simply

put, a foreign political entity such as the PLO, 'lies outside the structure of the union.'" *Id.* at 107 (citing *Principality of Monaco v. Mississippi*, 292 U.S. 313, 330 (1934)). It "[has undertaken] no general obligation to abide by the constitutional norms to which the federal government and the several states are subject, nor are there any effective means to place [it] on parity with the United States or the states for purposes of enforcement of particular norms." 11 Op. O.L.C. at 107 (internal citations omitted).

Recognizing that "the PLO is not a sovereign nation," the Executive Branch further dispensed with any suggestion that this lack of status would "bring it within the constitutional fold." *Id.* at 120 n.7. The Executive Branch explained, "[a]lthough the United States chooses not to recognize the PLO as [a sovereign state], the PLO nonetheless interacts with the United States as a foreign political entity within the structure of international law," and "is reported to have diplomatic relations with approximately one hundred countries throughout the world." *Id.* at 119-20 (citing G.A. Res. 3237, 29 U.N. GAOR, 29th Sess., Supp. No. 31, at 4, U.N. Doc. A/9631 (1974)). The same is true for the PA, which was created by treaty under the Gaza-Jericho Agreement and Oslo Accords to act as the interim civil government of defined territory. Pet. App. 6a, 61a; *Declaration of Principles on Interim Self–Government Arrangements* ("Oslo I") art III, Sept. 19, 1993, Isr.-P.L.O., 32 I.L.M. 1525, 1529-30 (1993); *Agreement on the Gaza Strip and the Jericho Area* ("Gaza-Jericho Agreement"), May 4, 1994, Isr.-P.L.O., 33 I.L.M. 622, 626 (1994); *Interim Agreement on the West Bank & the Gaza Strip* ("Oslo II") art I, Sept. 28, 1995, Isr.-P.L.O., 36 I.L.M. 551, 559 (acknowledging "Palestinian Authority [as] established in accordance with the Gaza-Jericho Agreement"). Because the Oslo

Accords constrain the PA's authority within the identified territory, the PLO conducts foreign affairs on behalf of the Palestinian People and is a Permanent Observer to the United Nations. Pet. App. 6a, 61a; Oslo II art IX, 36 I.L.M. at 561. Respondents may therefore be subjected to the exercise of the federal government's "necessary and inherent power to preclude foreign encroachment." 11 Op. O.L.C. at 120. As a result, the Executive Branch concluded that "[t]he PLO qua PLO, [a]s a foreign political entity, does not itself enjoy constitutional protection." *Id.*

Consistent with Attorney General Levi's testimony and the Office of Legal Counsel's opinions, the United States has appeared in numerous federal cases to defend its view that entities like Respondents are not entitled to constitutional due process. *See, e.g.*, U.S. Br. 44, *Palestine Information Office v. Shultz,* 853 F.2d 932 (D.C. Cir. 1988) (No. 87-5398) ("Foreign entities such as the PLO obviously do not have due process rights since they are not part of our constitutional scheme." (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 323-24 (1966))); U.S. Br., *People's Mojahedin Organization of Iran v. Department of State*, 182 F.3d 17 (D.C. Cir. 1999) (No. 97-1648), 1998 WL 35239624, at *23 ("[T]he [People's Mojahedin Organization of Iran] is admittedly a foreign political organization, and therefore is not entitled to constitutional protection under the Due Process Clause."); U.S. Br., *National Council of Resistance of Iran v. Department of State*, 251 F.3d 192 (D.C. Cir. 2001) (Nos. 99-1438, 99-1439), 2000 WL 35576228, at *35 ("Indeed, with [the PLO], as with foreign nations, the Executive Branch must be able to act swiftly and on the basis of classified or confidential information, without providing the panoply of due process protections that are enjoyed by persons in the United States."); U.S. Br., *32 County Sovereignty Committee v.*

United States Department of State, 292 F.3d 797 (D.C. Cir. 2002) (No. 01-1270), 2002 WL 34245980, at *42 n.8 ("[The Executive Branch] continue[s] to believe that foreign political organizations . . . are not entitled to claim the protections of the United States Constitution."). In sum, the Executive Branch has made clear that Respondents should not be afforded Due Process rights under the Fifth Amendment.

Notably, in 1994, the year after the PA was established, OLC took the position that *domestic* non-sovereign governing bodies, like U.S. territories, also lacked due process rights. *See Mut. Consent Provisions in the Guam Commonwealth Legis.*, 1994 WL 16193765, at *5 (O.L.C. July 28, 1994) ("[T]he rationale of [*Katzenbach*]" is fully applicable to other "governmental bodies," even when they are not "states or instrumentalities of states"); *accord* Letter from Robert Raben, Dep't of Justice, to Frank H. Murkowski, Chairman, Committee on Energy and Natural Resources, United States Senate 9 n.11 (Jan. 18, 2001) ("While *Katzenbach* was concerned with a State, its rationale suggests that a governmental body . . . could not assert rights under the Due Process Clause."). It would be odd to suggest that *foreign* non-sovereign governing bodies, like Respondents, would have greater due process rights than domestic bodies with comparable authority.

And Congress has legislated consistent with these pronouncements, providing express statutory authority for courts to establish personal jurisdiction over Respondents. *See* Anti-Terrorism Clarification Act ("ATCA"), Pub. L. No. 115-253, § 4, 132 Stat. 3183, 3184 (adding 18 U.S.C. § 2334(e)), *and* PSJVTA. Pub. L. 116-94, div. J, tit. IX, § 903, 133 Stat. 3082; *see generally Shatsky v. Palestine Liberation Org.*, 18-cv-12355 (MKV), 2022 WL 826409, at *2 (S.D.N.Y. Mar. 18, 2022)

(discussing chronology of legislative response to courts' refusal to exercise jurisdiction over Respondents). The collective judgment of the political branches over time supports the conclusion that Respondents are not entitled to the protections of the Due Process Clause.

Precedent/Purpose. This Court's precedents buttress that conclusion. In *Katzenbach*, this Court held that "the word 'person' in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union." 383 U.S. at 323. The underlying rationale was that the Fifth Amendment's Due Process Clause "recognizes and protects an individual liberty interest," *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982), not a sovereign government's interest. Subsequently in *Weltover*, this Court cited *Katzenbach* to suggest that a "foreign state" is likely not a "person" entitled to due process. 504 U.S. at 619. Following *Weltover*'s lead, the D.C. Circuit and Second Circuit have since affirmatively held that "foreign states" are not persons entitled to due process protection. *Price,* 294 F.3d at 96; *Frontera Res. Azerbaijan Corp. v. State Oil Co. of Azerbaijan Republic*, 582 F.3d 393, 399 (2d Cir. 2009); *Gater Assets Ltd. v. AO Moldovagaz*, 2 F.4th 42, 49 (2d Cir. 2021).

This development had an unusual effect. Before *Weltover*, courts in these Circuits did not hesitate to conclude that if States of the Union are not "persons" then neither are foreign political entities like Respondents. *See Mendelsohn v. Meese*, 695 F. Supp. 1474, 1481 (S.D.N.Y. 1988) ("[T]he PLO, an organization whose status, while uncertain, lies outside the constitutional system. It has never undertaken to abide by United States law or to accept the constitutional plan. . . . No

foreign entity of its nature could be expected to do so." (internal quotations omitted)); *Palestine Information Office v. Shultz,* 674 F. Supp. 910 (D.D.C.1987) ("If the States of the Union have no due process rights, then [the Palestine Information Office as] a 'foreign mission' qua 'foreign mission' surely can have none."). After *Weltover* and its progeny (e.g., *Price*, *Frontera*), some courts drew too fine a line and concluded that any foreign entity apart from a sovereign government enjoyed due process rights. *See* Pet. App. 153a-154a; *Livnat v. Palestinian Authority*, 851 F.3d 45, 48-53 (D.C. Cir. 2017).

This jurisprudential shift was a mistake. Underlying this shift is a distorted notion of sovereignty and its significance in the due process inquiry. Specifically, the Second and D.C. Circuits appear to believe that if a foreign political entity is not recognized as sovereign, then it must be a "person" possessing due process rights. *See* Pet. App. 153a; *Livnat*, 851 F.3d at 49.

This false dichotomy lacks any jurisprudential or conceptual rationale. For instance, political subdivisions, municipalities, and U.S. territories are not sovereigns, yet also cannot claim due process rights. *See, e.g., City of E. St. Louis v. Cir. Ct. for the Twentieth Jud. Cir., St. Clair Cnty., Ill.,* 986 F.2d 1142, 1144 (7th Cir. 1993) ("Municipalities . . . are not 'persons' within the meaning of the Due Process Clause."); *City of Sault Ste. Marie, Mich. v. Andrus,* 532 F. Supp. 157, 167-68 (D.D.C. 1980) (concluding municipality could not assert due process rights under the Fifth Amendment because "a state cannot confer a constitutional status . . . which the state does not itself enjoy"); *Puerto Rico Pub. Hous. Admin. v. U.S. Dep't of Hous. & Urb. Dev.*, 59 F. Supp. 2d 310, 325 (D.P.R. 1999) (concluding instrumentalities of the Commonwealth of Puerto Rico

were "non-persons" for purposes of their constitutional claims); *Virgin Islands v. Miller*, 53 V.I. 162, 172 (V.I. Super. 2010) (concluding Virgin Islands "[g]overnment is not a person for purposes of due process").

The PA, as a local "non-sovereign government," is roughly analogous to a municipal civil government, Pet. App. 142a, possessing only those limited powers afforded it under the Oslo Accords. *See* Oslo I art III, 32 I.L.M. at 1529-30 ("Israel shall transfer authority . . . from the Israeli military government and its Civil Administration to the [PA] . . . on the following spheres: education and culture, health, social welfare, direct taxation, and tourism."); Gaza-Jericho Agreement art III, 33 I.L.M. at 627; Oslo II art I, 36 I.L.M. at 559. And the PLO is recognized, domestically and internationally, as the sole non-sovereign representative of the Palestinian people. Oslo I, 32 I.L.M. at 1527; Oslo II, 36 I.L.M. at 558 (identifying PLO as "the representative of the Palestinian people"); Pet. App. 6a, 61a (acknowledging PLO holds Permanent Observer status to the United Nations on behalf of the Palestinian people). It would be illogical to conclude that foreign non-sovereign governments are somehow differently situated with respect to personhood under our Constitution than domestic non-sovereign governments. *See Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 20-21 (D.D.C. 1998).

Moreover, the dichotomy does not comport with the reasoning of the very courts making it. As those courts have observed, it would be "highly incongruous to afford greater Fifth Amendment rights to foreign nations, who are entirely alien to our constitutional system, than are afforded to the states, who help make up the very fabric of that system." *Price,* 294 F.3d at 96-97; *Frontera,* 582 F.3d at 399. It would be even more

"incongruous" to place entities like Respondents—who the Executive Branch and Congress agree are not entitled to constitutional protections of any kind—"in a more favored position with respect to the safeguards of due process than both U.S. states and foreign sovereigns with whom the political branches have established friendly relations." *Shatsky*, 2022 WL 826409 at *6; 11 Op. O.L.C. at 120 n.7 ("It would be anomalous if the Executive's decision to withhold recognition from a foreign political entity – with respect to which it has complete discretion – invested that entity with rights greater than those enjoyed by friendly sovereigns present in the United States."). Such an outcome "would distort the very notion of 'liberty' that underlies the Due Process Clause." *See Price*, 294 F.3d at 99.

Furthermore, "interpreting due process rights to hinge on diplomatic recognition [and sovereign immunity] (or rather a lack thereof)" would create an unreliable rule. *See* House of Representatives Br. at 14, *Fuld v. Palestine liberation Organization*, (No. 24-20) (U.S. Aug. 8, 2024). Specifically, "the Executive alone would be able to strip, and bestow, important constitutional protections on a whim." *Id.*; *United States v. Cooper Corp.,* 312 U.S. 600, 604–05 (1941) (concluding "there is no hard and fast rule of exclusion" of the sovereign). Indeed, as a direct result of the Oslo Accords, the office of then-President Bill Clinton publicly declared the United States' intent, at that time, to resume diplomatic relations with the PLO. *Remarks on the Israeli-Palestinian Declaration of Principles*, 2 Pub. Papers 1463, 1464 (Sept. 10, 1993) (Exec. Off. of the Pres.), 1993 WL 13967468, at *1 ("As a result and in light of [Oslo I], I have decided to resume the dialog and the contacts between the United States and the PLO."). As the dissent from

rehearing *en banc* observed, "[f]undamental constitutional rights are not typically so contingent." Pet. App. 238a.

The counterargument by the D.C. Circuit was that non-sovereign governments cannot be analogized to sovereigns for purposes of the Due Process analysis because they are not the "juridical equals" of the United States government and do not possess the same quantum of governmental rights and privileges otherwise held by recognized states in the domestic and international spheres. *Livnat*, 851 F.3d at 51 (concluding that as a non-sovereign, the PA lacks the ability to claim sovereign immunity or the "power to secure its territory against external threats," Oslo II art. X, 36 I.L.M. at 561, and because the PA only possesses a "limited" number of rights in international arena, it "cannot rely on comity and international-law protections to the exclusion of domestic law"). This line of reasoning quickly unravels.

An argument rooted in the "quantum of rights" Respondents possess on the international stage says *nothing* about whether they are "persons" within the meaning of the Constitution's Due Process Clause. Indeed, similar distinctions could be drawn between exclusively sovereign governments whom this Court has recognized are not persons within the meaning of that Clause. The federal government, for example, has certain rights that are greater relative to the States of the Union, which have greater rights relative to foreign nations. U.S. Const. art. VI, cl. 2; *see also Commonwealth of Massachusetts v. Mellon*, 262 U.S. 447, 485 (1923) (delineating when States of the Union versus the United States has standing to represent American citizens as *parens patriae*); *Price*, 294 F.3d at 96 (concluding foreign states have an even weaker claim to personhood status than States of the Union).

Finally, even if foreign political entities might possess fewer rights and special privileges than recognized sovereigns, *see Livnat* 851 F.3d at 51, they are not powerless to defend their interests. Respondents are perfect examples. The PA has a president and ministers and is the self-proclaimed "government of a State[.]" *See* PA Mtn. to Dismiss Br. at 17, *Livnat v. Palestinian Authority,* (No. 13-498) (E.D. Va. June 5, 2013), ECF No. 6. The PLO conducts foreign affairs and maintains dozens of 'embassies, missions, and delegations around the world,' including a UN mission office located in New York City." *See* Pet. App. 142a. In short, Respondents "are sophisticated international organizations with billion-dollar budgets . . . that govern a territory recognized as a sovereign state by many other countries." *Id.* 238a; Jim Zanotti, Cong. Research Serv., *U.S. Foreign Aid to the Palestinians* 1 (Dec. 12, 2018), *available at* https://sgp.fas.org/crs/mideast/RS22967.pdf ("Bilateral assistance to the Palestinians since 1994 has totaled more than $5 billion, and has been a key part of U.S. policy to . . . strengthen the West Bank-based PA vis-à-vis Hamas in Gaza."). One can hardly argue that these entities would be rendered defenseless without the protections of the Fifth Amendment's Due Process Clause.

Put simply, while the Executive Branch has not recognized Palestine as a nation-state, Respondents remain, as the United States acknowledges here, "non-sovereign foreign entities exercising governmental functions." Gov't Br. at 34. As a consequence, text, history and precedent continue to support the Executive Branch's historically held view that such entities lack due process rights.

II. It is not necessary for this Court to examine other aspects of the Fifth Amendment limits on the exercise of personal jurisdiction. Even if it did so, it should still reverse and remand.

This Court could easily dispose of these petitions by holding that Respondents are not "persons" within the meaning of the Due Process Clause, a conclusion that is logically antecedent to any of the downstream arguments about how that Clause might otherwise apply. The Court thus need not and should not go further. Specifically, it need not definitively decide the relationship between the Fifth Amendment and the Fourteenth Amendment limits on the exercise of personal jurisdiction or demarcate the outer boundaries of the "consent" doctrine. But if the Court is inclined to address these issues, it should adopt the nationwide contacts test universally employed by the federal appellate courts in Fifth Amendment analysis and reject a boundless construction of the consent doctrine suggested by the lower court judges dissenting from the denial of *en banc* rehearing. If it chooses to explore these issues, it should still reverse and remand.

A. The Fifth Amendment imposes different limits on the exercise of personal jurisdiction than does the Fourteenth Amendment.

The Fifth and the Fourteenth Amendments impose limits on the exercise of personal jurisdiction. The provisions have "materially identical" language. *Herederos de Roberto Gomez Cabrera, LLC v. Teck Resources Ltd.*, 43 F.4th 1303,1308 (11th Cir. 2022) (Newsom, J.); *see also Douglass v. Nippon Yusen Kabushiki Kaisha*, 46 F.4th 226, 243 (5th Cir. 2022) (*en banc*) (Ho, J., concurring) ("There's no denying the textual parallel between the Fifth and Fourteenth Amendment."). And this Court has long recognized that the Fourteenth Amendment's Due Process Clause requires minimum contacts with the sovereign State exercising personal jurisdiction. If the Court decides to reach the question, it should hold that the Fifth Amendment's Due Process Clause does too. The only material difference is that the Fifth Amendment's analysis focuses on minimum contacts with the United States as the relevant sovereign. Virtually every federal appellate court has adopted this approach.

Justice Scalia's opinion for a unanimous Court in *Weltover* supplies the starting point for any analysis. 504 U.S. 607. *Weltover* represents one of the first cases to reach this Court in the post-*International Shoe* era where the exercise of personal jurisdiction involved a case arising under federal law. *Weltover* assumed, without deciding, that the foreign state (Argentina) was entitled to due process. *Id.* at 619. After making that assumption, *Weltover* went on to explain that Argentina possessed "minimum contacts" that would satisfy the relevant constitutional standard. By issuing negotiable debt instruments denominated in

United States dollars and payable in New York and by appointing a financial agent in that city, Argentina "purposefully avail[ed] itself of the privilege of conducting activities *within the [United States]*." *Id.* at 619-20 (emphasis added). *Weltover*'s bracketed reference to the "United States" necessarily implied two propositions – (1) that the minimum contacts framework governs the constitutional inquiry under the Fifth Amendment and (2) that the relevant "forum" for contacts analysis purposes is the United States (as opposed to a State of the Union).

Since *Weltover*, this Court in several subsequent decisions has characterized the contours of the Fifth Amendment test as an "open" question. Virtually all of those cases arose out of state court or involved federal courts borrowing state long-arm statutes and, thus unlike *Weltover*, did not confront the Fifth Amendment question. *See Bristol-Myers Squibb Co. v. Superior Ct. of Calif.*, 582 U.S. 255, 269 (2017); *Nicastro*, 564 U.S. at 885 (plurality opinion) *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 102 n.5, (1987); *Asahi Metal Indus. Co. v. Superior Ct. of Cal.*, 480 U.S. 102, 113 n.* (1987). None questioned *Weltover*'s analytic framework under the Fifth Amendment. Moreover, the "open" question about that framework identified in several of those opinions was whether the Fifth Amendment requires minimum "nationwide" contacts, not whether the Fifth Amendment requires any "minimum contacts" to the United States at all. *See, e.g., Asahi*, 480 U.S. at 113 n.*; *see also Douglass*, 46 F. 4th at 240 n.26.

To the extent *Weltover* did not supply a definitive holding on the matter, other opinions of this Court track its essential framework. This Court's plurality opinion in *Nicastro* offers the fullest explication.

564 U.S. 873. The *Nicastro* plurality identified two interrelated principles from a survey of its personal jurisdiction jurisprudence. The first principle is that "personal jurisdiction requires a forum-by-forum, or sovereign-by-sovereign, analysis." *Id.* at 884. *See also* Fuld Petrs. Br. at 42-43. The second principle is that "[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.*

Both before and after *Nicastro*, decisions of the federal appellate courts have consistently tracked these twin principles. Specifically, consistent with *Nicastro*'s sovereign-specific analysis, virtually every federal appellate court has held that, as a constitutional matter, a defendant must have sufficient contacts with the United States a whole. *See* Gary B. Born & Peter B. Rutledge, International Civil Litigation in United States Courts 224-29 (7th ed. 2023) (collecting cases).[2] This is "the law as it has been unanimously

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[2] With one possible exception, every federal appellate court has a reported opinion applying the nationwide contacts test to the Fifth Amendment inquiry. *See Lewis v. Mutond*, 62 F.4th 587, 592 n.2 (D.C. Cir. 2023) (reaffirming nationwide contacts test and citing decisions from the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Eleventh and Federal Circuits); *Douglass*, 46 F.4th at 239 & n. 24 (adopting nationwide contacts test and citing cases from the Second, Sixth, Seventh, Eleventh, Federal and D.C. Circuits). Jurisprudence in the Eighth Circuit is scant, but its most authoritative opinion, *In re Federal Fountain*, 165 F.3d 600 (8th Cir. 1999) (*en banc*), has been interpreted to apply a nationwide contacts test. *See, e.g., FTC v. BINT Ops. LLC,* 595 F.Supp.3d 740, 746-47 (E.D. Ark. 2022).

The lone exception might be the Tenth Circuit. *Peay v. BellSouth Med. Assistance Plan*, 205 F.3d 1206 (10th Cir. 2000), could be read to require "constitutionally significant inconvenience." *Klein v. Cornelius*, 786 F.3d 1310 (10th Cir. 2015). *But see*

accepted among the circuit courts." *Douglass*, 46 F.4th at 232 n.8. This "nationwide contacts" test operates in cases arising under federal law either where the federal statute supplying the basis for federal question jurisdiction authorizes nationwide (or worldwide) service of process or, in cases of certain federal claims lacking a service of process provision and involving foreign defendants, under Federal Rule of Civil Procedure 4(k)(2). *See BNSF Ry. Co. v. Tyrrell*, 581 U.S. 402, 409 (2017); *Omni Capital*, 484 U.S. at 106–107. *See also* Gov't Br. at 33.

Other aspects of federal practice reflect this commonsense view. Specifically, Rule 4(k)(2), adopted by this Court pursuant to the Rules Enabling Act, authorizes personal jurisdiction in certain cases that (a) arise under federal law and (b) where no state court would have jurisdiction. *See United States v. Swiss Am. Bank*, 191 F.3d 30, 38-40 (1st Cir. 1999) (describing operation of Rule 4(k)(2)). In such cases, Rule 4(k)(2) still requires the exercise of jurisdiction to be "consistent with the [United States] Constitution." *Id.* at 38. This formulation necessarily implies that some exercises of personal jurisdiction by the United States can be *inconsistent* with the Constitution.

What the rule implies, the Advisory Committee Notes confirm. Those Advisory Committee Notes have previously guided this Court's interpretation of the

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Compañía de Inversiones Mercantiles, S.A. v. Grupo Cementos de Chihuahua S.A.B. De C.V., 970 F.3d 1269, 1281 n.1 (10th Cir. 2020) (reserving the question whether there is a "meaningful distinction" between the Fifth Amendment and Fourteenth Amendment frameworks). Despite the difference in phraseology, the Tenth Circuit has not explicitly rejected a nationwide contacts test, nor would the results have clearly differed under express application of a nationwide contacts test.

constitutional boundaries of personal jurisdiction. *See, e.g., Insurance Corp. of Ireland*, 456 U.S. at 705 n.11. Here, they explain that the underlying reason for Rule 4(k)(2)'s "consistency" test was to ensure that federal courts' exercise of personal jurisdiction under 4(k)(2) comported with the Fifth Amendment. Fed. R. Civ. P. 4 advisory committee's note (1993). Specifically, according to the Advisory Committee Notes, "[t]he Fifth Amendment requires that any defendant have affiliating contacts with the United States sufficient to justify the exercise of personal jurisdiction over that party." *Id.*

Despite this practically uniform view among the lower federal courts, a few federal judges have pointed to scholarly literature suggesting a radically different view of the Fifth Amendment. *See Lewis v. Mutond*, 62 F.4th 587, 597-98 (D.C. Cir. 2023) (Rao, J., concurring); *Douglass*, 46 F.4th at 249-82 (Elrod, J., dissenting); *see generally* Stephen E. Sachs, *The Unlimited Jurisdiction of the Federal Courts*, 106 Va. L. Rev. 1703 (2020). Under that view, personal jurisdiction can be exercised consistent with the Fifth Amendment so long as it is consistent with whatever process Congress has authorized. That conclusion follows, according to the judges relying on this literature, from the propositions that "due process of law" does not directly incorporate the traditional limits on personal jurisdiction; the Fourteenth Amendment's limits on such jurisdiction rest primarily on narrow concerns about interstate federalism; and the corollary proposition that federalism interests drop out for the Fifth Amendment. These supporting propositions are all flawed and would lead to a dramatic and disruptive sea change in the law if endorsed by this Court.

For starters, "[i]t is manifest that it was not left to the legislative power to enact any process which might be devised." *Murray's Lessee v. Hoboken Land & Imp. Co.*, 59 U.S. 272, 276 (1855). The Fifth Amendment's Due Process Clause, like the Fourteenth's, is "a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave congress free to make any process 'due process of law,' by its mere will." *Id.* The Fifth Amendment instead guarantees "those 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." *Id.* at 277.

During the Founding era, the territorial reach of a court's process (that is, the extent of its personal jurisdiction) was governed by the unwritten law of nations. *See, e.g., Picquet v. Swan*, 19 F. Cas. 609, 611-13 (C.C.D. Mass. 1828) (Story, J., riding circuit); *Toland v. Sprague*, 37 U.S. 300, 328 (1838) (describing *Picquet*'s reasoning as having "great force"); *see generally* Austen Parrish, *Foreign Nations, Constitutional Rights and International Law*, 88 Fordham L. Rev. Online 88, 99 (2019) ("In the Founding era personal jurisdiction was limited by the territorial limits of international law."). The law of nations was "adopted in its full extent by the common law, and [was] held to be a part of the law of the land." 4 Blackstone's Commentaries on the Laws of England 67 (Chicago 1979); *see also, e.g.*, *The Nereide*, 13 U.S. 388, 423 (1815) (Marshall, C.J.) ("[T]he law of nations . . . is a part of the law of the land."). And because due process requires a valid judgment issued by a court with jurisdiction, this Court has "long" considered "the principles traditionally followed

by American courts in marking out the territorial limits of" judicial process to be among those usages and modes of proceedings required for due process of law. *Burnham v. Superior Court*, 495 U.S. 604, 609 (1990) (citing *Pennoyer v. Neff*, 95 U.S. 714, 722-23 (1877)). So, while those procedural principles apply somewhat differently to state and federal courts, they are constitutionalized by the Due Process Clauses of the Fifth and Fourteenth Amendments. The traditional rules governing personal jurisdiction apply *directly* by those Amendments' own force.

The Founding- and Reconstruction-era history shows, moreover, that the Fourteenth Amendment's limits on state-court personal jurisdiction do not merely derive from narrow concerns about interstate federalism. *See Livnat*, 851 F.3d at 55 ("[P]ersonal jurisdiction is not just about federalism[.]") (citations and internal quotations omitted)). Those limits are instead state-level applications of the broader, "well-established principles of public law" under the law of nations governing the territorial reach of *all* sovereigns' courts. *Pennoyer*, 95 U.S. at 722; *see generally* Born & Rutledge at 106-07. And those limits are "ultimately a function of the individual liberty interest preserved by the Due Process Clause." *Insurance Corp. of Ireland*, 456 U.S. at 702 n.10; *see Douglass,* 46 F.4th at 236 ("'[F]ederalism' is a proxy for the abstract burden of a defendant submitting to the coercive power of a forum with little interest in the dispute[.]"). *Cf. Bond v. United States*, 564 U.S. 211, 222 (2011) ("[F]ederalism protects the liberty of the individual."). While the protection of that liberty interest may give rise to additional federalism concerns when state courts are involved, the liberty interest is still implicated in federal courts. Both the Fifth and Fourteenth Amendments protect defendants from the "burden of

litigating in a distant or inconvenient forum" in violation of the traditional territorial limits on judicial process governing all sovereigns. *World–Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291–92 (1980); *see also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 807 (1985).

Taken to its logical extreme, the contrary academic argument admits few, if any, limits. The traditional limits on personal jurisdiction, for both state and federal courts, would remain vulnerable to judicial erosion and total abrogation by Congress. Such abrogation would harm the American business community, especially the small businesses that comprise a majority of that community. *See* Stephanie Ferguson Melhorn et al., *Small Business Data Center*, U.S. Chamber of Commerce (May 20, 2024), https://www.uschamber.com/small-business/small-business-data-center (reporting that 99.9% of businesses in the U.S. are small businesses). On this point, several opinions in *Nicastro* explained how capacious views of personal jurisdiction (like Justice Brennan's "foreseeability" test from *Asahi*) carry "undesirable consequences . . . no less significant for domestic producers. The owner of a small Florida farm might sell crops to a large nearby distributor, for example, who might then distribute them to grocers across the country." 564 U.S. at 885 (plurality opinion); *see also id.* at 891-92 (Breyer, J., concurring in the judgment, joined by Alito, J.) (discussing adverse implications of sweeping personal jurisdiction rules for domestic small businesses). The "undesirable consequences" of the academic argument are far more substantial than Justice Brennan's foreseeability test. That same Florida farmer is not simply subject to personal jurisdiction in "foreseeable" federal forums but, rather, in *any* federal forum provided that the defendant has been served with process.

As the Government acknowledges, "strong policy reasons" counsel against the academic argument. *See* Gov't Br. at 47-48. As this Court elsewhere has acknowledged, apart from the effect on domestic commerce, expansive assertions of jurisdiction (whether prescriptive or judicial) elevate the risk of foreign nations engaging in retaliatory assertions of jurisdiction over United States citizens and companies. *See Kiobel v. Royal Dutch Petroleum*, 569 U.S. 108, 124 (2013). Such risks are more than hypothetical and have ample historical precedents. *See* Born & Rutledge at 776-79. By contrast, a constitutional test examining nationwide contacts reduces the friction between the United States and foreign nations, thereby accommodating the "strong policy reasons" noted in the Government's brief.

In sum, the implications of adopting the broad position in this case are not limited to foreign entities but have profound implications for American citizens and American business, especially small businesses, where the costs and burdens of having to defend in unfamiliar federal forums are substantial. Ultimately, these petitions do not require this Court to examine those implications. As already explained, the values underpinning the Fifth Amendment are not at stake in this case: Respondents are not entitled to the protections of the Due Process Clause.

B. The consent doctrine is a narrow exception to those Fifth and Fourteenth Amendment limits on personal jurisdiction.

It has long been recognized that a defendant can, under some circumstances, consent to personal jurisdiction. *Ins. Corp. of Ireland*, 456 U.S. at 703. This flows from the uncontested proposition that the constitutional constraints on personal jurisdiction partly protect a nonresident defendant's "liberty interest." *Id.* at 702. But consent is not a wholly malleable concept. Neither Congress (nor a state government) can "simply declare anything it wants to be consent," *see* Pet. App. 123a, lest it trample upon that very liberty interest.

Consent in this context is not always easy to define. The easiest cases are typically when consent is explicit, such as in a pre-dispute agreement (like in a forum selection or arbitration clause) or after a dispute has arisen (like in a stipulation). *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595 (1991); *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972); *National Equipment Rental, Ltd. v. Szukhent*, 375 U.S. 311, 316 (1964); *Petrowski v. Hawkeye-Security Co.*, 350 U.S. 495, 496 (1956). Implied consent is more difficult. This Court has approved it in only a handful of cases as a result of certain litigation-related conduct, *see Ins. Corp. of Ireland*, 456 U.S. at 704, or select activity that is "deemed" consent by operation of law, *see, e.g., Mallory*, 600 U.S. at 134-35; *Pennsylvania Fire Ins. Co. of Philadelphia v. Gold Issue Mining & Milling Co.*, 243 U.S. 93, 94-95 (1917).

The Second Circuit judges divided on how the consent doctrine might be applied to the PSJVTA. The panel found that the consent doctrine did not support

jurisdiction because the PSJVTA did not rely on litigation-related conduct or on "reciprocal benefits" that a defendant derived from the United States. Pet. App. 25a-47a. By contrast, the judges dissenting from the denial of *en banc* rehearing found that the consent doctrine supported jurisdiction because that doctrine did not require a "reciprocal benefit;" it simply required "knowing and voluntary" conduct "with a nexus to the forum." *Id.* 231a.

The division is not surprising; *Mallory* left many open questions about the concept of implied consent. Indeed, to the list of factors the Second Circuit discussed as potentially relevant to the issue of consent, one could add others. For example, how "voluntary" does the conduct have to be to constitute consent? *Cf. College Savings Bank v. Florida Prepaid Postsecondary Education Expense Bd.*, 527 U.S. 666, 682 (1999). What relevance, if any, does the power authorizing the "deemed consent" legislation have to the analysis? *Cf. Holder v. Humanitarian Law Project*, 561 U.S. 1, 36 (2010) (recognizing that, with the exercise of the foreign affairs power, the views of the political branches are "entitled to significant weight"); *see also Bank Markazi v. Peterson*, 578 U.S. 212, 215 (2016); Gov't Br. at 37. How does the scope of the consent—general or specific—factor into assessment of voluntariness? *Cf. Hess v. Pawloski*, 274 U.S. 352, 355-56 (1927); Gov't Br. at 29. And should the particular characteristics of defendants—here, foreign political entities—be taken into account?

To the extent this Court seeks to engage on this issue, it would be helpful to reject a boundless reading of *Mallory* and impose clear guardrails. "A prospective defendant's activities do not signify consent to personal jurisdiction simply because Congress has labeled them

as such." Pet. App. 21a. Much like a boundless interpretation of the Fifth Amendment, *supra* Part II.A., a boundless "consent doctrine" would undermine the individual liberty interests of all persons protected by the Due Process Clauses, including United States citizens. A boundless construction of the consent doctrine "would effectively mean that there are no due process limitations on the exercise of personal jurisdiction. Congress or a state legislature could provide for jurisdiction over *any* defendant for *any* conduct so long as the conduct postdated enactment of the law at issue." *Id.* 115a. For example, Congress could enact a statute subjecting United States citizens to all-purpose general jurisdiction in any federal court in the country based upon their implied "consent" through engagement in certain ordinary, even constitutionally protected, acts like purchasing goods from another state or interstate travel. Such an approach would be inconsistent with settled doctrine. *See College Savings Bank*, 527 U.S. at 682.

And a boundless theory of consent is simply unnecessary. This Court's general jurisdiction jurisprudence already "afford[s] plaintiffs recourse to at least one clear and certain forum" in the case of domestic defendants, *Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014): the defendant's domicile in case of an individual defendant and, in the case of a corporate entity, its state of incorporation and, possibly, a separate principal place of business. Foreign defendants may also be subject to jurisdiction in the United States if they meet an appropriate contacts analysis. *See supra* Part II.A. Here, of course, Respondents are not even entitled to the protections of the Due Process Clause.

This final point returns full circle to the Chamber's opening argument: Respondents are not entitled to the protections of the Due Process Clause. This Court should reverse on that basis.

CONCLUSION

For the foregoing reasons, the lower court's judgment should be reversed, and the case should be remanded.

Respectfully submitted,

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