UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 22-76 _____ Caption [use short title] _____

Motion for: Leave to File Amicus Curiae Brief in Support of Plaintiffs-Appellants and Reversal

Set forth below precise, complete statement of relief sought:

The American Association for Justice respectfully requests that this Court grant its motion for leave to file a brief as amicus curiae in support of Plaintiffs-Appellants and reversal and that the Court accept for filing the brief that is submitted contemporaneously with this motion.

Fuld v. Palestine Liberation Org.

MOVING PARTY: American Association for Justice **OPPOSING PARTY:** Palestine Liberation Org.

☐ Plaintiff ☐ Defendant

☐ Appellant/Petitioner ☐ Appellee/Respondent

MOVING ATTORNEY: Jeffrey R. White **OPPOSING ATTORNEY:** Mitchell Berger

[name of attorney, with firm, address, phone number and e-mail]

Jeffrey R. White, American Association for Justice
777 6th Street NW, Suite 200, Washington, DC 20001
202-944-2839 jeffrey.white@justiceorg

Mitchell R. Berger, Squire Patton Boggs (US) LLP
2550 M Street NW, Washington, DC 20037
202-457-5601 mitchell.berger@squirepb.com

Court- Judge/ Agency appealed from: Southern District of New York, Honorable Jesse M. Furman

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):_____

Opposing counsel's position on motion:
☐ Unopposed ☑ Opposed ☐ Don't Know

Does opposing counsel intend to file a response:
☑ Yes ☐ No ☐ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUCTIONS PENDING APPEAL:

Has this request for relief been made below? ☐ Yes ☐ No

Has this relief been previously sought in this court? ☐ Yes ☐ No

Requested return date and explanation of emergency: _____

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:_____

Signature of Moving Attorney:

s/Jeffrey R. White **Date:** 6/28/22 Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

22-76(L)

22-496(CON)

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

MIRIAM FULD, individually, as natural guardian of plaintiff NATAN SHAI FULD, and as personal representative and administrator of the ESTATE OF ARI YOEL FULD, deceased; NATAN SHAI FULD, minor, by his next friend and guardian MIRIAM FULD; NAOMI FULD; TAMAR GILA FULD; ELIEZER YAKIR FULD,

Plaintiffs-Appellants,

UNITED STATES OF AMERICA

Intervenor-Appellant,

v.

PALESTINE LIBERATION ORGANIZATION; PALESTINIAN AUTHORITY; a/k/a PALESTINIAN INTERIM SELF-GOVERNMENT AUTHORITY and/or PALESTINIAN COUNCIL and/or PALESTINIAN NATIONAL AUTHORITY,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK (20 CIV. 3374 (JMF))

MOTION OF THE AMERICAN ASSOCIATION FOR JUSTICE FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

Jeffrey R. White
AMERICAN ASSOCIATION FOR JUSTICE
777 6th Street NW, Suite 200
Washington, DC 20001
(202) 944-2839
jeffrey.white@justice.org

Counsel for Amicus Curiae American Association for Justice

Pursuant to Federal Rule of Appellate Procedure 29(a)(3), the American Association for Justice ("AAJ") moves for leave to file the attached brief as amicus curiae in support of Plaintiffs-Appellants, Miriam Fuld et al., and reversal. AAJ has consulted with counsel for the parties concerning this motion. Counsel for Plaintiffs-Appellants and Intervenor-Appellant consent to the motion. Counsel for Defendant-Appellee opposes the motion and intends to file a response.

AAJ is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ's members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions. Throughout its over 75-year history, AAJ has served as a leading advocate for the right of all Americans to seek legal recourse for wrongful conduct.

This case is of acute interest to AAJ members. AAJ members represent plaintiffs in private causes of action under the Anti-Terrorism Act against defendants who dispute personal jurisdiction under the statute. More broadly, the statute at issue in this case is the Promoting Security and Justice for Victims of Terrorism Act, which Congress enacted in 2019 to expand personal jurisdiction over foreign ATA defendants based on "deemed" consent. The statute shares important features with

consent-by-registration statutes in place in many states, which provide injured plaintiffs with access to their own courts to obtain legal redress against companies incorporated elsewhere. The lower court's decision, if allowed to stand, would undermine the states' efforts to provide legal recourse to its own residents.

AAJ has filed amicus briefs throughout the country on similar issues. *See, e.g.*, *Atchley v. AztraZeneca UK Ltd.*, 22 F.4th 204 (D.C. Cir. 2022) (addressing personal jurisdiction in case involving Anti-Terrorism Act); *Cooper Tire & Rubber Co. v. McCall*, 863 S.E.2d 81 (Ga. 2021) (discussing personal jurisdiction over a foreign corporation based on the corporation's registration to do business in the state); *Aybar v. Aybar*, 177 N.E.3d 1257 (N.Y. 2021) (same). AAJ believes that its familiarity with the jurisdictional questions at issue will be of assistance to this Court in determining whether the Court has personal jurisdiction over Defendants-Appellees.

Participation by AAJ as amicus curiae will not delay the briefing or argument in this case. AAJ is filing its brief within the time allowed by Federal Rule of Appellate Procedure 29(a)(6).

Accordingly, AAJ respectfully requests that this Court grant its motion for leave to file a brief as amicus curiae in support of Plaintiffs-Appellants and reversal, and that the Court accept for filing the brief that is submitted contemporaneously with this motion.

June 28, 2022

Respectfully submitted,

/s/ Jeffrey R. White

Jeffrey R. White
American Association for Justice
777 6th Street NW, Suite 200
Washington, DC 20001
(202) 944-2803
jeffrey.white@justice.org

Counsel for Amicus Curiae
American Association for Justice

22-76(L)

22-496(CON)

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

MIRIAM FULD, individually, as natural guardian of plaintiff NATAN SHAI FULD, and as personal representative and administrator of the ESTATE OF ARI YOEL FULD, deceased; NATAN SHAI FULD, minor, by his next friend and guardian MIRIAM FULD; NAOMI FULD; TAMAR GILA FULD; ELIEZER YAKIR FULD,

Plaintiffs-Appellants,

UNITED STATES OF AMERICA

Intervenor-Appellant,

v.

PALESTINE LIBERATION ORGANIZATION; PALESTINIAN AUTHORITY; a/k/a PALESTINIAN INTERIM SELF-GOVERNMENT AUTHORITY and/or PALESTINIAN COUNCIL and/or PALESTINIAN NATIONAL AUTHORITY,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK (20 CIV. 3374 (JMF))

BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

Navan Ward
President
AMERICAN ASSOCIATION FOR JUSTICE
777 6th Street NW, Suite 200
Washington, DC 20001

Jeffrey R. White
Counsel of Record
AMERICAN ASSOCIATION FOR JUSTICE
777 6th Street NW, Suite 200
Washington, DC 20001
(202) 944-2839
jeffrey.white@justice.org

June 28, 2022

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, amicus curiae hereby provides the following disclosure statement:

The American Association for Justice ("AAJ") is a non-profit voluntary national bar association. There is no parent corporation or publicly owned corporation that owns ten percent or more of this entity's stock.

Respectfully submitted this 28th day of June, 2022.

/s/ Jeffrey R. White
Jeffrey R. White

Counsel for Amicus Curiae
American Association for Justice

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IDENTITY AND INTEREST OF AMICUS CURIAE

The American Association for Justice (AAJ) is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ's members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions. Throughout its more than 75-year history, AAJ has served as a leading advocate for the right of all Americans to seek legal recourse for wrongful conduct.[1]

AAJ is concerned that the decision of the district court below, if allowed to stand, will present an obstacle for forum states to provide access to their own courts for their citizens and residents to obtain legal redress for wrongful injury.

SUMMARY OF ARGUMENT

The central issue presented to this Court concerns the due process limits on Congress in providing for consent jurisdiction over statutory causes of action. The Anti-Terrorist Act of 1992, as amended in 2019 by the Promoting Security and Justice for Victims of Terrorism Act ("PSJVTA"), provides that Defendants, by making payments to terrorists or their families for attacking Americans, shall be

[1] No counsel for a party authored this brief in whole or in part and no person other than amicus curiae or its counsel made a monetary contribution to its preparation or submission of this brief.

deemed to have consented to the jurisdiction of United States courts for the limited purpose of adjudicating ATA claims by U.S. nationals harmed by international terrorism. Defendants intentionally made such payments with full knowledge that their conduct would be interpreted as a "Yes" to U.S. jurisdiction. Nevertheless, the district court held that the PSJVTA violates the Due Process Clause of the Fifth Amendment. AAJ submits that the lower court erred.

1. Consent-by-registration statutes, which have long been used by many states to provide for personal jurisdiction over foreign corporations, operate similarly to the PSJVTA. By the mid-nineteenth century, persons harmed by companies that were incorporated in other states, needed access to their own courts to obtain legal recourse. The Supreme Court of the United States made clear that states have broad discretion in imposing conditions foreign corporations that seek permission to transact business in the state. Many states enacted consent statutes which, like the PSJVTA, were designed to open the forum's courthouse doors to residents who have been harmed by foreign entities. Like the PSJVTA, those statutes based jurisdiction on the foreign corporations' express consent, which they communicated by complying with the statutory provisions, generally by designating an agent for receiving service of process.

In a long and unbroken line of decisions, the Supreme Court has upheld such statutes as based on the actual, express consent of foreign corporations, including

their application to causes of action arising outside of the forum jurisdiction if the forum legislation so provides. Failure to give consent statutes their intended effect, the Supreme Court recognized, would effectively grant wrongdoers immunity from any accountability.

2. The district court erred in asserting that the PSJVTA would undermine the Supreme Court's case law basing jurisdiction on sufficient contacts with the forum state. Sufficient contacts expands "presence" jurisdiction beyond the territorial boundaries of the forum. However, the Supreme Court's case law has consistently distinguished "consent" as an entirely independent basis for jurisdiction. The Court's most recent decisions explicitly limit general jurisdiction to places where a corporation that has not consented is "at home."

3. Congress, as the forum legislature, has broad latitude in defining the manner in which a defendant can signal its consent to the jurisdiction of the forum's courts. Waiver of the due process right not to be subject to judicial authority that lacks meaningful contacts can, of course be waived. The waiver of constitutional rights must be knowing and voluntary. Where jurisdiction is based on constructive or implied consent, as the lower court here assumed is the case with PSJVTA, due process may demand that the predicate actions or circumstances support a reasonable inference that the defendant intended to waive its due process rights.

But, as the Supreme Court has repeatedly stated, consent statutes are based on express, actual consent. Express waivers of personal jurisdiction, for example in forum selection provisions of private contracts, are broadly enforced. In consent statutes, like the PSJVTA, express consent is communicated by the defendant by knowingly and voluntarily carrying out the actions prescribed in the enactment. Congress enjoys broad discretion in prescribing the manner in which rights may be knowingly and voluntarily waived.

Because express consent does not require a court to find implied consent by drawing inferences from the facts or circumstances, Congress could, hypothetically, define arbitrary conduct as signifying "Yes" to jurisdiction—even by hanging a blue banner from defendant's headquarters. Where the statute has prescribed the conduct that will be deemed consent, due process demands only that the defendant undertake that conduct knowingly and intelligently. It is no defense to waiver that the defendant had fingers crossed at the time.

4. For the same reason, the district court erred in holding that Congress may not designate as consent conduct that forms the basis for plaintiff's cause of action. As earlier stated, where jurisdiction is based on express consent, the forum legislature has broad latitude in defining the actions by which a defendant communicates that consent. There is no persuasive reason why Congress could not prescribe knowing and voluntary conduct that is also the wrongful conduct that

forms the basis for plaintiff's cause of action. Indeed, an essential requirement for specific jurisdiction based on sufficient contacts is that plaintiff's cause of action "arise out of or relate to" the defendant's contacts with the forum. Decisions have found specific jurisdiction under the ATA on that basis, including by this Court.

5. The Due Process Clause protects not only the liberty and property interests of defendants. It also guarantees fundamental fairness for plaintiffs seeking to vindicate their rights in court. As well, several additional provisions of the U.S. Constitution safeguard access to the courts for those seeking to vindicate recognized causes of action.

Plaintiffs in this case are Americans harmed by international terrorism for whom Congress intended to provide judicial redress. The decision below, if allowed to stand, would not simply reduce the number of possible places to seek recourse. It would leave no courthouse door open to them. This cannot be squared with our "traditional notions of fair play and substantial justice."

ARGUMENT

I. CONSENT GIVEN IN ADVANCE PURSUANT TO STATUTE HAS TRADITIONALLY SERVED AS A VALID BASIS FOR PERSONAL JURISDICTION OVER PERSONS NOT PRESENT IN THE FORUM.

Plaintiffs are the family of an American who was stabbed to death in the West Bank. They have brought this action against the Palestinian Authority ("PA") and the Palestine Liberation Organization ("PLO") under the Anti-Terrorist Act of 1992

("ATA"), 18 U.S.C. § 2331 *et seq*., which provides a civil cause of action for American nationals to sue "any person who aids and abets, by knowingly providing substantial assistance, or who conspires [to commit] an act of international terrorism." *Id.* at § 2333(d)(2). Congress expanded the personal jurisdiction provisions of the ATA in 2019 by enacting the Promoting Security and Justice for Victims of Terrorism Act ("PSJVTA"), Pub. L. No. 116-94, codified at 18 U.S.C. § 2334.

As relevant here, the PSJVTA provides that the PA and PLO will be "deemed to have consented to personal jurisdiction" in actions brought under the ATA if, after a date certain, they engaged in certain specified conduct: (1) making so-called "martyr payments" to individuals or families of individuals who were imprisoned for an act of terrorism that injured or killed an American national or who died while committing such an act, 18 U.S.C. § 2334(e)(1)(A); or (2) maintaining any "premises, or other facilities or establishments in the United States" or conducting any activities "while physically present in the United States," apart from certain diplomacy-related exceptions. *Id.* at § 2334(e)(1)(B). Plaintiffs allege that the PA and PLO have carried on activities that fulfill both prongs; the district court determined that Defendants did in fact undertake the payments described in the statute. *See* Slip Op. 9.

The central question presented to this Court by the decision below is whether Due Process Clause of the Fifth Amendment restricts Congress in designating the actions that will be deemed to signify consent to the jurisdiction of U.S. courts, at least for the limited purpose of adjudicating private claims under the ATA. Plaintiffs and the United States agree that, where Defendants knew that their actions would be accepted by U.S. courts as consent and voluntarily proceeded to undertake those actions, assertion of jurisdiction comported with due process. *See* Slip Op. 19.

The district court disagreed and held that due process also limits the types of conduct that Congress can designate as signifying Defendants' consent. Specifically, the court stated a jurisdictional consent statute must also meet the due process requirement of "sufficient contacts with the forum," or at least not provide a "back-door" means of evading that requirement. Slip Op. 19. The court also held that the predicate conduct described in the statute must give rise to a reasonable inference of actual consent, *id.* at 15, and must not be the same wrongful conduct that forms the basis of the cause of action. *Id.* at 16.

AAJ submits that the district court erred.

A. States Have Long Relied on Consent Statutes To Allow Residents To Assert Personal Jurisdiction Over Foreign Corporations.

In the early nineteenth century, the corporation was a relatively new force in the American economy, powering the Industrial Revolution's dramatic increases in productivity and living standards, but also bringing unprecedented preventable

injuries and deaths. *See* Lawrence M. Friedman, *A History of American Law*, 409-11 (1973).

The aim of the law of torts, as with the ATA private cause of action, is both to compensate victims and deter wrongful conduct. *See* Andrew F. Popper, *In Defense of Deterrence*, 75 Alb. L. Rev. 181, 190 (2012) The "uniform opinion of the courts" in the early nineteenth century was that "'corporations [may be held] liable for torts.'" Joseph Kinnicut Angell & Samuel Ames, A Treatise on the Law of Private Corporations Aggregate 221 (1832) (quoting *Chestnut Hill & Springhouse Tpk. Co. v. Rutter*, 1818 WL 2109, at *7 (Pa. 1818)).

But plaintiffs faced daunting obstacles in establishing jurisdiction over corporations that were formed under the laws of other states. The Supreme Court initially deemed a corporation to be a mere fiction, with "no legal existence out of the boundaries of the sovereignty by which it is created." *Bank of Augusta v. Earle*, 38 U.S. 519, 588 (1839). The Supreme Court later came to recognize that, due to the "great increase in the number of corporations of late years, and the immense extent of their business," the "exemption of a corporation from suit in a state other than that of its creation, was the cause of much inconvenience and often of manifest injustice." *St. Clair v. Cox*, 106 U.S. 350, 355 (1882).

However, the Court had also provided a blueprint for extending the reach of a state's courts to provide legal recourse to its citizens. A state may permit a foreign

corporation to transact business within its borders as a matter of "comity," *Bank of Augusta*, 38 U.S. at 592, and that permission "may be granted upon such terms and conditions as those States may think proper to impose." *Paul v. Virginia*, 75 U.S. 168, 181 (1868); *see also Hanover Fire Ins. Co. v. Carr*, 272 U.S. 494, 507-08 (1926).

Many states adopted "legislative enactments requiring foreign corporations to appoint resident agents, on whom service of process may be made, in order to entitle them to transact business within the State." *March v. Eastern R.R. Co.*, 40 N.H. 548, 582 (1860). For example, the Supreme Court in *Baltimore & Ohio R.R. Co. v. Harris*, 79 U.S. 65, 74 (1870), noted that such legislation was enacted in New York in 1849, in Pennsylvania in 1849, and by Congress for the District of Columbia in 1867. In Massachusetts, an 1851 statute required every "foreign corporation, before transacting any business within this state, to appoint . . . some person resident therein their attorney, and provid[e] that service of process upon such attorney shall be deemed to be sufficient service upon" the corporation. *Thayer v. Tyler*, 76 Mass. 164, 169 (1857).

Another New York statute was adopted in 1853, "making the appointment of an attorney or agent in this State upon whom process in suits against the company may be served a prerequisite to its doing business in the State, [so that] it thereby submits itself to the jurisdiction of the State courts." *Gibbs v. Queen Ins. Co.*, 63

N.Y. 114, 114 (1875). The court in *Hobbs v. Manhattan Ins. Co.*, 56 Me. 417, 420-21 (1869), upheld a Maine statute that required every foreign fire insurance company in the state to instruct its agents to accept service of lawful processes against the company and to consent to the jurisdiction of state courts based on that service. *Id.* The Indiana Supreme Court in *Walter A. Wood Mowing & Reaping Mach. Co. v. Caldwell*, 54 Ind. 270, 275 (1876), made reference to an 1854 statute requiring agents of foreign insurance companies to produce "an instrument from the company authorizing it to be sued and brought into court by service of process on the agent." Alabama prohibited "any fire, marine, river or life insurance company" from transacting business within the state "without first procuring a certificate of authority from the comptroller of this state" by filing written consent that service of process upon its designated agent shall be valid service upon the company and "waiving all claims of error by reason of such service." Revised Code of Alabama §§ 1180, 1190 (A.J. Walker, 1867). Jurisdiction under these statutes was based on consent expressed by compliance with the state's registration requirements.[2]

[2] Typically the foreign corporation was motivated to give its consent in exchange for authorization to transact business in the forum. However, as the district court correctly observed, a reciprocal benefit is not essential to voluntary consent. Slip Op. 28 n.10.

B. The Supreme Court of the United States Has Consistently Upheld Jurisdiction Based on Compliance with Consent Statutes.

In a long and unbroken line of precedents, the U.S. Supreme Court has upheld the validity of such consent statutes. Beginning in 1855, the Court upheld an Ohio statute that permitted foreign insurance companies to conduct business in that state on condition that the company agree to accept service of process on the corporation's resident agent as valid and effective for jurisdiction in Ohio courts. *Lafayette Ins. Co. v. French*, 59 U.S. 404, 406 (1855). The Court found "nothing in this provision either unreasonable in itself, or in conflict with any principle of public law." *Id.* at 407. The Court added that it was entirely reasonable "that the State of Ohio should endeavor to secure to its citizens a remedy, in their domestic forum." *Id.*

Not long after, the Court relied on *Lafayette* to uphold a consent statute enacted by Congress. In *Harris*, plaintiff Harris was injured in a collision in Virginia caused by the alleged negligence of the railroad, a Maryland corporation. Harris brought suit in the District of Columbia, relying on a federal statute requiring the railroad, as a condition of extending its track into D.C., to accept service of process upon its agent. The Court found it well-settled that a foreign corporation "may exercise its authority in a foreign territory upon such conditions as may be prescribed by the law of the place. One of these conditions may be that it shall consent to be sued there." 79 U.S. at 81. To hold otherwise, the Court declared, would mean that forum residents would have

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

Id. at 83-84. Significantly, the consent to the forum's jurisdiction defined by the statute was held to extend to actions arising elsewhere. *Id.* at 77-78.

The Court in *Pennoyer v. Neff*, 95 U.S. 714 (1878), held that due process limited a state court's jurisdiction to the territorial boundaries of the state. *Id.* at 720. But the Court also recognized that a defendant could waive its due process rights "in advance." *Id.* at 733. For example, the Court explained, a state may require a non-resident "to appoint an agent or representative in the State to receive service of process and notice in legal proceedings" and that "judgments rendered upon such service are "binding upon the non-residents both within and without the State." *Id.* at 735. That was precisely the case in *Ex parte Schollenberger*, 96 U.S. 369 (1877), decided the same year as *Pennoyer.* The Court there upheld jurisdiction over foreign insurance companies, based on a Pennsylvania statute that required such corporations, as a condition to doing business in the Commonwealth, to file a stipulation agreeing that service of process upon its designated in-state agent would be valid and effective to establish jurisdiction in Pennsylvania courts. The Court explained that, by filing the requisite stipulation, defendants "have *in express terms*

. . . agreed that they may be sued there," a condition that is "not unreasonable." *Id.* at 376 (emphasis added).

The Supreme Court again upheld a state consent statute in *Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co*., 243 U.S. 93 (1917), upholding the jurisdiction of Missouri courts over an Arizona corporation in a suit arising out of loss of insured buildings in Colorado. The defendant had appointed an agent authorized to receive service, as required by the Missouri statute, which had been construed by the Missouri Supreme Court to confer general jurisdiction. *Id.* at 95. Justice Oliver Wendell Holmes, writing for a unanimous Court, stated that by voluntarily appointing the agent as prescribed by the statute, general jurisdiction "actually is conferred," and not "presumed" or "a mere fiction." *Id.* at 96. *See also Smolik v. Philadelphia & Reading Coal & Iron Co.*, 222 F. 148 (S.D.N.Y. 1915), in which Judge Learned Hand referred to the same New York provision as based on "express," not implied, consent. *Id*. at 150.

The Supreme Court next addressed this issue in *Neirbo Co. v. Bethlehem Shipbuilding Corp*., 308 U.S. 165 (1939), where a Delaware corporation was sued by New Jersey residents in federal district court in New York. The Court held that, under New York's consent statute, Bethlehem's voluntary appointment of an agent for service of process constituted "actual consent by Bethlehem to be sued in the courts of New York," and therefore in the federal courts of New York. *Id*. at 175.

Thus, the Supreme Court has repeatedly and consistently upheld consent statutes as based on a foreign corporation's express, not implied consent and that the forum legislature enjoys very broad discretion in prescribing the conditions that a foreign corporation must fulfill in order to signify its express consent and thereby obtain permission to transact business in the forum state.

II. CONSENT STATUTES ARE NOT SUBJECT TO THE DUE PROCESS "MINIMUM CONTACTS" REQUIREMENT.

The district court nevertheless held that the PSJVTA violates due process because "Congress by legislative fiat [cannot] simply 'deem' conduct that would *otherwise not support personal jurisdiction* in the United States to be 'consent.'" Slip Op. 19. To do so would evade "the case law conditioning personal jurisdiction on *sufficient contacts with the forum"* like "a back-door thief." *Id.* (emphasis added) (internal quotes omitted).

The common law recognized two independent bases for personal jurisdiction: "the defendant's presence in, or consent to, the sovereign's jurisdiction." *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1036 (2021) (Gorsuch, J., concurring). *See, e.g.*, *The La Nereyda*, 21 U.S. 108, 125 (1823) ("[W]herever a Court has jurisdiction of the subject matter, but not of the person, consent would remove the objection.").

The Supreme Court's "canonical decision," *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), broadened the scope of "presence" jurisdiction to

include sufficient contacts within the territorial boundaries of the forum. *See Ford Motor Co.*, 141 S. Ct. at 1024. At the same time, Chief Justice Stone, writing for the Court in *International Shoe*, left no doubt that express consent, as where "authorization to an agent to accept service of process has been given," remained a valid basis for general jurisdiction. 326 U.S. at 317. Only one month after deciding *International Shoe*, the Court upheld a consent statute in *Mississippi Pub. Corp. v. Murphree*, 326 U.S. 438 (1946), stating that by "designating an agent to receive service of process" the Delaware corporation had consented be sued in Mississippi. *Id.* at 442. In addition, post-*International Shoe*, the Court reaffirmed its consent-statute precedents. *See Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 443 n.4 (1952) (citing *Pennsylvania Fire*, 243 U.S. 93 (1917)); *Olberding v. Illinois Cent. R. Co.*, 346 U.S. 338, 341-42 (1953) (citing *Neirbo Co.*, 308 U.S. 165 (1939)).

As Justice Scalia later explained, the standard set by *International Shoe* "is satisfied if a state court adheres to jurisdictional rules that are generally applied and have always been applied in the United States." *Burnham v. Superior Ct*., 495 U.S. 604, 619 (1990) (plurality opinion). Sufficient forum contacts are relevant to asserting jurisdiction over "a *nonconsenting* defendant who is not present in the forum." *Id.* at 618 (emphasis added). But any notion that *International Shoe* swept aside or restricted the preexisting traditional bases for jurisdiction, including

consent, would be "unfaithful to both elementary logic and the foundations of our due process jurisprudence." *Id.* at 619.

The district court further suggested that knowing and voluntary compliance with a consent statute might not be enough to comply with the Supreme Court's more recent due process requirement that, to be subject to the forum's jurisdiction over actions arising elsewhere, a corporation must have such contacts with the forum state as to be "at home" there. Slip Op. 18 & n.6. *See Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014).

But the Court's "at home" standard is simply a particularly stringent application of its sufficient-contacts-with-the-forum requirement, which the Court has consistently and carefully stated does not apply to consent jurisdiction. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (due process requires minimum contacts with the forum where the "forum seeks to assert specific jurisdiction over an out-of-state defendant *who has not consented* to suit there.") (emphasis added); *Omni Cap. Int'l, Ltd. v. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97, 104 (1987) ("*Absent consent*" personal jurisdiction requires "a constitutionally sufficient relationship between the defendant and the forum.") (emphasis added); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 928 (2011) (general jurisdiction may be "appropriately exercised over a foreign corporation that has *not consented* to suit in the forum") (emphasis added).

Indeed, the *Daimler* Court itself explicitly made clear that its "at home" limitation applied to the assertion of "general jurisdiction . . . over a foreign corporation that has *not consented* to suit in the forum." 571 U.S. at 129 (emphasis added) (quoting *Goodyear*, 564 U.S. at 928)). The Court in *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1556 (2017), once again drew this distinction, stating that a state may not assert general jurisdiction based solely on a corporation's in-state activity "absent consent."

In short, consent statutes operate entirely separate from the "sufficient contacts" standard and thus cannot create an opportunity to rob that standard of meaning like "a back-door thief." Slip Op. 19.

III. THE FORUM LEGISLATURE HAS BROAD LATITUDE IN DEFINING THE MANNER IN WHICH A DEFENDANT CAN EXPRESS CONSENT TO JURISDICTION AND IS NOT LIMITED TO CONDUCT SUPPORTING AN INFERENCE OF SUBJECTIVE INTENT TO SUBMIT TO THE FORUM'S LAWS.

The Due Process Clause protects a defendant's liberty interest in not being subject to the judicial authority of a forum with which the defendant has no meaningful contacts. *International Shoe*, 326 U.S. at 319. But that right "can, like other such rights, be waived." *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982). A waiver of due process rights must,

of course, be "voluntary, knowing, and intelligently made." *D.H. Overmeyer Co., Inc. v. Frick Co*., 405 U.S. 174, 185 (1972).[3]

The district court held that more is required. It was not sufficient that Defendants knew their martyr payments would be read as consent to U.S. jurisdiction in ATA cases against them and yet voluntarily proceeded to make those payments. Slip Op. 20. In the court's view, due process also limits the type of conduct that may be deemed consent by the defendants to U.S. jurisdiction. Specifically, Congress could not arbitrarily define any conduct as consent. Congress is required to identify "circumstances . . . from which it is proper to infer . . . an intention to submit to the laws of the forum." Slip Op. 13 (internal quotation and emphasis omitted). The court determined that the martyr payments described in the PSJVTA did not support "a meaningful inference of consent to jurisdiction in this country." *Id.* at 15.

AAJ suggests that the court below erred in viewing jurisdiction under the PSJVTA as matter of "constructive consent," Slip Op. 16, or "implied consent," Slip. Op. 12 & 23 n.8. Implied consent requires the court to make a reasonable inference of such intent from the predicate conduct or circumstances. As the Court in

[3] "Whether such surrender of a personal immunity be conceived negatively as a waiver or positively as a consent to be sued, is merely an expression of literary preference." *Neirbo Co.*, 308 U.S. at 168.

International Shoe emphasized, the notion that a corporation's "consent [may be] implied from . . . the acts of its authorized agents" is a legal "fiction" that is valid only so long as the underlying facts are" of such a nature as to justify the fiction." 326 U.S. at 318. Thus, to support a finding of implied consent, as the lower court stated, "the predicate conduct would have to be a much closer proxy for actual consent." Slip Op. 15.

But the PSJVTA does not purport to establish an inference of implied consent. It is well settled that jurisdiction under consent registration statutes is a matter of a foreign corporation's express consent. For example, in *Ex parte Schollenberger*, the Court emphasized that defendants, by filing a stipulation agreeing to service of process upon its designated in-state agent, "have *in express terms* . . . agreed that they may be sued there." 96 U.S. at 376 (emphasis added). In *Pennsylvania Fire*, the Court stated that when defendant "voluntarily appointed" an agent to receive service, as required by the Missouri consent statute, general jurisdiction "actually is conferred," and not "presumed" or "a mere fiction." 243 U.S. at 96. In *Neirbo Co.*, the Court determined that appointment of an agent for service of process under New York's statute constituted "actual consent by Bethlehem to be sued in the courts of New York." 308 U.S. at 175. *See also* Restatement (Second) of Conflict of Laws § 43 cmt. a & b (1971) ("[A]ctual assent to the exercise of jurisdiction and not a

fictitious one" most commonly "takes the form of the appointment of a statutory agent to receive service of process.")

Congress generally enjoys wide latitude in prescribing the manner in which statutory rights may be waived voluntarily. For example, in *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422 (1998), where plaintiff brought an action under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, the employer asserted that plaintiff had waved her rights under the statute. The Court held that plaintiff's release did not comply with the Older Workers Benefit Protection Act, 29 U.S.C.A. § 626. Congress there had explicitly provided that a waiver of an employee's ADEA rights "may not be considered knowing and voluntary unless at a minimum" the waiver "is written in a manner calculated to be understood by such individual" and "the individual is advised in writing to consult with an attorney prior to executing the agreement." 29 U.S.C. § 626(f)(1)(A) & (E). Because plaintiff's release failed to meet the statutory prerequisites for waiver, it was ineffective and could not bar employee's ADEA claims. *Oubre*, 522 U.S. at 427-28.

A common example of an express waiver of personal jurisdiction is the contractual forum selection provision allowing a party to "validly consent to be sued in a jurisdiction where he cannot be found." *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10-11 (1972). *See also Nat'l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 316 (1964) (parties "may agree in advance to submit to the jurisdiction of a

given court"). Such express waivers of personal jurisdiction are broadly enforced. *See Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 591 (1991).

Implied consent requires the court to make reasonable inferences from facts or circumstances as to whether a defendant intended waiver. But where Congress has spelled out the manner in which a defendant can say "Yes" to the jurisdiction of U.S. courts, no inferences are necessary. Hypothetically, a consent statute could provide that defendants can communicate their consent to jurisdiction by hanging a blue banner from the second-story window of its headquarters. The intentional display of a blue banner, with full knowledge that it would signal a "Yes" to U.S. courts' jurisdiction, would operate as a valid waiver.[4]

Defendants in this case may have viewed making "martyr payments" as politically necessary. They may have expected to successfully challenge the consent statute in court as they had previously. *See* Slip Op. 4. In any event, the affirmative actions of the PA and PLO were knowing and voluntary. It is not a defense to a knowing and voluntary express waiver that defendants had their fingers crossed.

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[4] For the same reason, the district court erred in *Sokolow v. Palestine Liberation Org.*, No. 04 CIV. 397 (GBD), 2022 WL 719261, at *5 (S.D.N.Y. Mar. 10, 2022), reconsideration denied, No. 04 CIV. 397 (GBD), 2022 WL 2159351 (S.D.N.Y. June 15, 2022), holding that "Defendants actions in violation of the statute is insufficiently related to the litigation to enable the court to exercise constitutionally valid personal jurisdiction over Defendants *on the basis of constructive or implied consent*." (emphasis added).

IV. THE FORUM LEGISLATURE MAY DEFINE CONDUCT THAT IS THE BASIS OF PLAINTIFF'S CLAIM AS EXPRESS CONSENT TO THE FORUM'S JURISDICTION.

The district court further asserted that that Congress cannot designate conduct that forms the basis for plaintiff's cause of action as "constructive consent." Slip Op. 16. Admittedly, the commission of an offense may be too ambiguous to support a reasonable inference of surrender of a constitutional right, as the court suggests. *Id.* But in fashioning a statute prescribing the manner in which defendants can communicate express consent, there would appear to be no persuasive reason why Congress cannot so provide. Indeed, the Supreme Court's "most common formulation of the rule" for specific jurisdiction, requires "that the suit 'arise out of or relate to the defendant's'" forum contacts. *Ford Motor Co.*, 141 S. Ct. at 1026 (emphasis omitted) (quoting *Bristol-Myers Squibb Co. v. Superior Ct.*, 137 S. Ct. 1773, 1786 (2017)).

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

A recent decision by the District of Columbia Circuit Court of Appeals reaffirms the same point. In *Atchley v. AstraZeneca UK Ltd.*, 22 F.4th 204 (D.C. Cir. 2022), plaintiffs sued foreign pharmaceutical corporations alleging they aided and abetted international terrorist attacks against U.S. nationals in Iraq by providing free American-made medical goods and cash bribes to organizations affiliated with terrorists in violation of the ATA. The appeals court upheld jurisdiction over the drug companies based on their contacts in the U.S.—the channeling of American-made medical goods terrorist-dominated organizations—which were also "at the heart of all of plaintiffs' claims" of violation of the ATA. *Id.* at 231.

In sum, due process demands only that the activity Congress has identified as signifying express consent must be knowing and voluntary.

V. COMPLETE ELIMINATION OF PLAINTIFFS' STATUTORY CAUSE OF ACTION VIOLATES THEIR RIGHTS TO DUE PROCESS AND ACCESS TO THE COURTS.

In the Anti-Terrorism Act of 1992, Congress provided a civil damages remedy for United States nationals harmed by acts of international terrorism. 18 U.S.C. § 2333(d)(2). The district court disparaged Congress's efforts to open the doors of the federal courthouse to American victims of international terrorism as "sleight of hand," Slip Op. 21, and "too cute by half." *Id*. at 15.

But the constitutional guarantee of due process, which requires the government to abide by "traditional notions of fair play and substantial justice,"

Ford Motor Co., 141 S. Ct. at 1024 (quoting *International Shoe*, 326 U.S. at 316-17), also protects "plaintiffs attempting to redress grievances" as well as defendants. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982). Plaintiffs have a property interest in their statutory cause of action, *id.* at 431, and the government may not terminate that cause of action without affording plaintiffs an opportunity to be heard. *Id.* at 437. Indeed, the Constitution in multiple provisions guarantees access to the courts to vindicate a recognized cause of action. *Christopher v. Harbury*, 536 U.S. 403, 415 & n.12 (2002).

This case is not like *Daimler AG*, where the Supreme Court narrowed the scope of "general" personal jurisdiction to two places where a corporation is "essentially at home," i.e., its place of incorporation or principal place of business. 571 U.S. at 136-39. The result of the district court's ruling in this case, if permitted to stand, will be that American nationals for whom Congress expressly provided this cause of action will have no courthouse door open to them at all. "If our courts were closed to plaintiffs' claims, no other forum would hold these defendants to account for these ATA violations." *Atchley*, 22 F.4th at 234. Using novel narrow constructions of the principles of personal jurisdiction to hollow out the redress that Congress intended for these victims does not at all meet Americans' "traditional notions of fair play and substantial justice." *Id.* at 232.

CONCLUSION

For the foregoing reasons, amicus curiae the American Association for Justice respectfully urges this Court to reverse the decision by the district court.

June 28, 2022

Respectfully submitted,

/s/ Jeffrey R. White
Jeffrey R. White
Counsel of Record
AMERICAN ASSOCIATION FOR JUSTICE
777 6th Street NW, Suite 200
Washington, DC 20001
(202) 944-2839
jeffrey.white@justice.org

Counsel for Amicus Curiae
American Association for Justice

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because this brief contains 5,858 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). I further certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman type style.

June 28, 2022

/s/ Jeffrey R. White
Jeffrey R. White

Counsel for Amicus Curiae
American Association for Justice

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of June, 2022, I electronically filed the foregoing document with the Clerk of Court using CM/ECF. I also certify that the foregoing document is being served on this day on all counsel of record via transmission of the Notice of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronic Notices of Electronic Filing.

/s/ Jeffrey R. White
Jeffrey R. White

Counsel for Amicus Curiae
American Association for Justice