15-3135(L)

15-3151(XAP), 22-1060(CON)

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

EVA WALDMAN, REVITAL BAUER, individually and as natural guardian of plaintiffs YEHONATHON BAUER, BINYAMIN BAUER, DANIEL BAUER and YEHUDA BAUER, SHAUL MADELKORN, NURIT MANDELKORN, OZ JOSEPH GUETTA, minor, by his next friend and guardian VARDA GUETTA, VARDA GUETTA, individually and as natural guardian of plaintiff OZ JOSEPH GUETTA, NORMAN GRITZ, individually and as personal representative of the ESTATE OF DAVID GRITZ, MARK I. SOKOLOW, individually and as a natural guardian of plaintiff JAMIE A. SOKOLOW, RENA M. SOKOLOW, individually and as a natural guardian of plaintiff JAMIE A. SOKOLOW, JAMIE A. SOKOLOW, minor, by her next friends and guardian

(*Caption continued on inside cover*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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

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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 NATIONAL AUTHORITY,

Defendants-Appellees,

YASSER ARAFAT, MARWIN BIN KHATIB BARGHOUTI, AHMED TALEB MUSTAPHA BARGHOUTI, a/k/a AL-FARANSI, NASSER MAHMOUD AHMED AWEIS,MAJID AL-MASRI, a/k/a ABU MOJAHED, MAHMOUD AL-TITI, MOHAMMED ABDEL RAHMAN SALAM MASALAH, a/k/a ABU SATKHAH, FARAS SADAK MOHAMMED GHANEM, A/K/A HITAWI, MOHAMMED SAMMI IBRAHIM ABDULLAH, ESTATE OF SAID RAMADAN, deceased, ABDEL KARIM RATAB YUNIS AWEIS, NASSSER JAMAL MOUSA SHAWISH, TOUFIK TIRAWI, HUSSEIN AL-SHAYKH, SANA'A MUHAMMED SHEHADEH, KAIRA SAID ALI SAID, ESTATE OF MOHAMMED HASHAIKA, deceased, MUNZAR MAHMOUD KHALIL NOOR, ESTATE OF WAFA IDRIS, deceased, ESTATE OF MAZAN FARITACH, DECEASED, ESTATE OF MUHANAD ABU HALAWA, deceased, JOHN DOES 1-99, HASSAN ABDEL RAHMAN,

Defendants.

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 4th day of November 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

1. The Promoting Security and Justice for Victims of Terrorism Act ("PSJVTA") provides that the Palestinian Authority ("PA") and the Palestine Liberation Organization ("PLO") will be "deemed to have consented to personal jurisdiction" in actions brought under the Anti-Terrorism Act ("ATA") if they make financial payments to individuals who have been imprisoned for committing an act

[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.

of terrorism that injured or killed an American national or to families of individuals who died while committing such a terrorist act. The district court erred in determining that the PSJVTA imposes "constructive or implied" consent. On that basis, the district court applied an incorrect standard, holding erroneously that Defendants' conduct was insufficiently related to this litigation for the exercise of personal jurisdiction consistent with due process.

To the contrary, personal jurisdiction under the PSJVTA is based on express consent. Consent may be expressed through actions. The Supreme Court of the United States has consistently upheld the validity a state's assertion of personal jurisdiction over foreign corporations based on the appointment of an agent in-state to receive service of process. The Court has viewed such designation as express, not implied, consent to the jurisdiction of the state's courts if the forum state has so provided and provided that the defendant's conduct was knowing and voluntary.

Where Congress has prescribed in detail the actions that denote Defendants' consent to jurisdiction, and Defendants have chosen to proceed with those actions, Defendants have *expressly* agreed to submit to U.S. jurisdiction for the limited purpose of adjudicating ATA claims. There is no added requirement that the payments be related to this litigation. The only due process requirement is that Defendants' conduct be knowing and voluntary.

In this case the PA and PLO knew that making payments would communicate their consent to U.S. jurisdiction and voluntarily chose to make those payments anyway. As this Court knows, the PA and PLO were very aware of the provisions of the legislation expanding the bases for jurisdiction for ATA claims and of their options to accept or reject U.S. jurisdiction through their actions. By opting to make the payments prescribed in the PSJVTA, they chose to consent to jurisdiction. It does not matter that the payments were not related to this litigation. It does not matter that Defendants had their fingers crossed and did not subjectively intend to submit to U.S. jurisdiction. The demands of due process were satisfied.

2. States have long relied on consent statutes, particularly business registration statutes providing that a foreign corporation's appointment of an agent to receive service of process constitutes express consent to the jurisdiction of the state's courts. States enacted such consent statutes long before the adoption of the Fourteenth Amendment's Due Process Clause, to provide judicial recourse for their residents who suffered wrongful injury at the hands of foreign corporations. Such traditionally well-settled procedures necessarily conform to the guarantee of due process.

Moreover, the U.S. Supreme Court has consistently upheld the assertion of jurisdiction over an absent defendant based on its such consent statutes. From well before the enactment of the Fourteenth Amendment through the landmark

International Shoe decision, the Court has consistently upheld personal jurisdiction based on the defendant's consent expressed by voluntarily appointing an agent for service of process as prescribed by the forum's business registration statute.

Moreover, although the Supreme Court in recent years has narrowed the scope of general jurisdiction permissible under the Due Process Clause, the Court has explicitly reaffirmed its jurisprudence regarding consent statutes as separate and unaffected by those developments. Defendants' due process rights regarding personal jurisdiction may be waived by their knowing and voluntary consent.

3. By enacting the PSJVTA, Congress intended to ensure that the doors of federal courthouses remain open to American victims of international terrorism to pursue the cause of action Congress created in the ATA. The Due Process Clause protects plaintiffs seeking to vindicate their rights as well as defendants. By rejecting jurisdiction based on Defendants' statutory consent, the court below deprived Plaintiffs of due process as well as their constitutional right of access to the courts of the United States, to obtain a judicial remedy created for them by Congress.

This is not a case in which the lower court merely declared itself to be the wrong forum, narrowing the choices open to plaintiffs. Instead, the court below effectively closed all available courthouse doors to plaintiffs to pursue the cause of action created for them by Congress. The district court's ruling directly contravenes

the bedrock common-law principle that for every right recognized by law, the law must provide a remedy. This Court should reverse.

ARGUMENT

I. BY KNOWINGLY AND VOLUNTARILY MAKING PAYMENTS TO TERRORISTS OR THEIR FAMILIES IN THE MANNER PRESCRIBED BY CONGRESS, DEFENDANTS EXPRESSLY CONSENTED TO THE JURISDICTION OF U.S. COURTS OVER ATA CLAIMS.

The American Association for Justice ("AAJ") respectfully addresses this Court regarding the central issue in this appeal: Congress's authority to prescribe the manner in which foreign entities can indicate their consent to appear in American courts to respond to claims by Americans seeking legal redress for wrongful injury.

Those Americans in this case are eleven families whose loved ones were killed or injured in terrorist attacks that were planned or carried out by employees or agents of the Palestinian Authority and the Palestine Liberation Organization and by terrorist organizations supported by Defendants. The families sued under the Anti-Terrorist Act of 1992, 18 U.S.C. § 2331 *et seq.*, which provides a civil cause of action for American nationals "injured . . . by reason of an act of international terrorism." 18 U.S.C. § 2333(a). Following a seven-week trial, a jury returned a verdict for Plaintiffs. This Court reversed, ruling that Plaintiffs failed to establish personal jurisdiction over the PA and PLO. *Waldman v. Palestine Liberation Org.*, 925 F.3d 570 (2d Cir. 2019). Congress subsequently expanded the personal

jurisdiction provisions of the ATA in 2019 by enacting the Promoting Security and Justice for Victims of Terrorism Act, Pub. L. No. 116-94, codified at 18 U.S.C. § 2334.

The Supreme Court of the United States vacated and remanded the case for further consideration in light of the new legislation. *Sokolow v. Palestine Liberation Org.*, —– U.S. ——–, 140 S. Ct. 2714 (2020). On remand from this Court, the district court held that assertion of jurisdiction by U.S. courts based on payments to terrorists or their families violated the due process rights of the PA and PLO. *See Sokolow v. Palestine Liberation Org.*, No. 04 CIV. 397 (GBD), 2022 WL 719261, at *6 (S.D.N.Y. Mar. 10, 2022) ("Slip Op."). AAJ submits that the district court erred.

A. Making Financial Payments to Terrorists or Their Families in the Manner Specifically Defined by the PSJVTA Constitutes Express Consent.

The PSJVTA provides that the PA and PLO will be "deemed to have consented to personal jurisdiction" in actions brought in United States courts under the ATA if, after 120 days following enactment, they make financial 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). The district court determined that Defendants did in

fact make the payments described in the statute, Slip Op. at *3-4, but held that assertion of jurisdiction on that basis would violate due process. *Id*. at *6.[2]

Specifically, the district court concluded that the payments to terrorists or their families were "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*. *Id.* at *5 (emphasis added).

The district court relied, erroneously, on *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 705-07 (1982). *See* Slip Op. at *6. The Supreme Court there did not uphold personal jurisdiction based on voluntary consent, but rather on the involuntary waiver of the defendant's right to object to jurisdiction, imposed as a sanction for disregarding the court's discovery orders. The lower court erred as well in relying on *Hammond Packing Co. v. State of Ark.*, 212 U.S. 322, 351 (1909), which did not involve "constructive[] consent[] to a court's

[2] The PSJVTA additionally deems consent based on Defendants' 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. 18 U.S.C. § 2334(e)(1)(B). On Plaintiffs' motion for reconsideration, the district court also held that exercise of jurisdiction pursuant to this "U.S. activities" prong, would also violate the Due Process Clause. *Sokolow v. Palestine Liberation Org*., No. 04 CIV. 397 (GBD), 2022 WL 2159351, at *1 (S.D.N.Y. June 15, 2022). AAJ here addresses only the district court's order regarding the "payments" prong, reversal of which is sufficient basis for upholding jurisdiction over Defendants.

personal jurisdiction," Slip Op. at *5, but rather upheld the involuntary striking of defendant's answer as a discovery sanction.

Neither decision supports the district court's holding that actions that may be deemed to be expressions of consent must be sufficiently "related to the litigation" in the forum's courts. Slip Op. at *6. To the contrary, the Supreme Court has held that parties "may agree in advance to submit to the jurisdiction of a given court" even if unrelated to any litigation. *Nat'l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 316 (1964). Such express waivers of personal jurisdiction are broadly enforced. *See Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 591 (1991); *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10-11 (1972) (holding that a party may "validly consent to be sued in a jurisdiction where he cannot be found.").

Most importantly, however, the district court erred in mischaracterizing the PSJVTA as imposing "constructive or implied consent." Slip Op. at *5. To the contrary, the PA and PLO knowingly and voluntarily made payments that have been defined by Congress to constitute *express* consent to the jurisdiction of American courts.

The fact that the statutory text provides that Defendants will be "deemed to have consented to personal jurisdiction" if they undertake the defined payments, 18 U.S.C. § 2334(e)(1)(A), in no way denotes that Defendants' consent is merely "implied" or "constructive." For example, as courts have recognized, under Federal

Communications Commission regulations enforcing the Telephone Consumer Protection Act, "the knowing release of a phone number in the telephone context can be *deemed to constitute express consent* . . . to receive calls" even though the statute "does not say 'express consent.'" *Physicians Healthsource, Inc. v. Cephalon, Inc*., 954 F.3d 615, 622 (3d Cir. 2020) (emphasis added); *accord. Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1045 (9th Cir. 2017).

Courts routinely find valid express consent to submit disputes to an arbitral forum despite lack of subjective intent. *See, e.g., AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (upholding as voluntary a contractual arbitration provision described by the lower court as buried in fine print at time of sale and presented on take-it-or-leave-it basis) (citing *Laster v. T-Mobile USA, Inc.*, No. 05CV1167DMS AJB, 2008 WL 5216255, at *12 (S.D. Cal. Aug. 11, 2008)); *Carnival Cruise Lines*, 499 U.S. at 587 (enforcing forum selection provision set forth on back pages of ticket); *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997) (arbitral forum had exclusive jurisdiction over dispute against computer seller where agreement was delivered with computer and buyer expressed consent by opening box and using computer).

Express consent to judicial authority can, of course, be communicated "through actions rather than words." *Roell v. Withrow*, 538 U.S. 580, 589 (2003). Here, Congress has prescribed the manner in which the PA and PLO can

communicate their consent to the jurisdiction of U.S. courts. So long those actions were "knowing and voluntary," due process is satisfied. *Wellness Int'l Network v. Sharif*, 575 U.S. 665, 685 (2015). There is no basis for an added requirement that those actions be related to the litigation.

B. The Forum Has Broad Authority to Prescribe the Manner in Which a Party Can Express Consent to the Jurisdiction of the Forum's Courts.

Clear guidance on this point is found in the settled proposition that states may provide that a foreign corporation's act of appointing an agent for service of process constitutes express consent. *See* Restatement (Second) of Conflict of Laws § 43, at cmts. a, b (1971).

The Supreme Court of the United States has consistently held that such designations constitute express consent to jurisdiction if so defined by the forum state. For example, in *Ex parte Schollenberger*, 96 U.S. 369 (1877), 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." *Id.* at 376 (emphasis added). Similarly, in *Pennsylvania Fire Ins. Co. v. Gold Issue Mining Co*., 243 U.S. 93 (1917), Justice Holmes, writing for the Court, made clear 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." *Id.* at 96. In *Neirbo Co. v.*

Bethlehem Shipbuilding Corp., 308 U.S. 165 (1939), 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." *Id.* at 175. *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.[3]

C. The Payments by Defendants Were Knowing and Voluntary.

The lower court's misreading of the PSJVTA as imposing involuntary "constructive or implied consent", Slip Op. at *5, led the court to apply the incorrect due process standard.

As the Court in *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. 310, 318 (1945). The district court below concluded that Defendants' payments to terrorists or their families, were not sufficiently "related to the litigation." Slip Op. at *5.

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[3] The New York Court of Appeals has more recently reinterpreted this statute to provide that appointment constitutes express consent to specific jurisdiction, but not to the general jurisdiction of New York Courts. *Aybar v. Aybar*, 37 N.Y.3d 274, 290-91, 177 N.E.3d 1257, 1266 (2021). The decision did not address due process matters and is consistent with the proposition that the forum state has broad authority to prescribe both the manner in which a defendant can express consent and the scope of its consent.

To the contrary, because jurisdiction under the PSJVTA is based on express consent, the proper standard looks to whether Defendants' conduct — their payments to terrorists or their families — was knowing and voluntary, regardless of whether they were related to the litigation. Because Congress has spelled out the manner in which a defendant can say "Yes" to U.S. jurisdiction, the court need not search for added indicia of intent.[4] Indeed, if Congress had specified that Defendants could communicate their consent to U.S. jurisdiction by hanging a blue banner from the second-story window their headquarters, voluntarily doing so, knowing that U.S. courts would construe this action as an expression of consent, would suffice. Due process demands no more.

Defendants in this case may have viewed making prisoner payments and "martyr" payments as politically necessary. They might have expected to successfully challenge the consent statute in court. Regardless, the affirmative actions of the PA and PLO were knowing and voluntary. It cannot be a defense to express consent that defendants had their fingers crossed.

[4] This Court is aware that the PA and PLO have closely followed congressional modifications of the actions defined as the basis for express consent to jurisdiction in ATA actions and have altered their conduct when they intended to avoid communicating express consent. *See Waldman*, 925 F.3d at 574-75, *cert. granted, vacated sub nom. Sokolow*, 140 S. Ct. 2714.

II. EXPRESS CONSENT GIVEN IN ADVANCE PURSUANT TO STATUTE HAS TRADITIONALLY SERVED AS A VALID BASIS FOR PERSONAL JURISDICTION OVER PERSONS NOT PRESENT IN THE FORUM AND THEREFORE COMPORTS WITH DUE PROCESS.

The constitutional question before this Court is whether Congress can, consistent with due process, prescribe the manner in which Defendants can expressly consent to the jurisdiction of United States courts, by actions that are unrelated to the litigation. AAJ submits that similar consent statutes have traditionally and historically been recognized as a fundamentally fair means of establishing jurisdiction over foreign defendants. They therefore meet the due process standard. Nor has the Supreme Court overruled or undermined its longstanding approval of such consent statutes.

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

The most familiar example of statutory consent to personal jurisdiction is found in the doing-business legislation widely enacted by state legislatures. In the early nineteenth century, corporations were 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 – and demands for justice. *See* Lawrence M. Friedman, *A History of American Law*, 409-11 (1973); Stuart Speiser, *Lawsuit*, 120-24 (1980). Tort liability developed at this time to not only "define[] duties not to injure others" but also to make those

who breach these duties "vulnerable to being held responsible or accountable to the victim through the court system." John C.P. Goldberg & Benjamin C. Zipursky, *Tort Law and Responsibility*, in PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS 17, 17-18 (John Oberdiek ed., 2014). The aim of the law of torts, which is reflected in the ATA's 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).

In the early nineteenth century, it was the "uniform opinion of the courts" that "'corporations [may be held] liable for torts.'" Joseph Kinnicut Angell & Samuel Ames, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS AGGREGATE [Ma1]221 (1832) (quoting *Chestnut Hill & Springhouse Tpk. Co. v. Rutter*, 1818 WL 2109, at *7 (Pa. 1818)).

But as businesses expanded their activities across boundaries, injured plaintiffs faced daunting obstacles to establishing jurisdiction over corporations that were formed under the laws of other states. As the Supreme Court came to recognize, 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).

The Court itself provided a blueprint for extending the reach of a state's courts to provide legal recourse to its citizens. Although a corporation may have "no legal existence out of the boundaries of the sovereignty by which it is created," a state may permit a foreign corporation to transact business within its borders as a matter of "comity." *Bank of Augusta v. Earle*, 38 U.S. 519, 588, 592 (1839). Moreover, that permission "may be granted upon such terms and conditions as those States may think proper to impose." *Paul v. Virginia*, 75 U.S. (1 Wall.) 168, 181 (1868); *see also Hanover Fire Ins. Co. v. Harding*, 272 U.S. 494, 507-08 (1926).

Even prior to the adoption of the due process guarantee of the Fourteenth Amendment, 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 1852 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.[5]

Because such consent statutes were widely employed at the time Congress adopted the Fourteenth Amendment, they necessarily comport with the Due Process Clause.[6] In addition, the Supreme Court has upheld such statutory consent statutes.

D. 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 express consent statutes.[7]

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[5] Typically, the foreign corporation gave its consent in exchange for authorization to transact business in the forum. However, as the district court correctly observed in a separate opinion, whether the defendant received a reciprocal benefit is not relevant to voluntary consent. *Sokolow*, 2022 WL 2159351, at *3 (citing *Fuld v. Palestine Liberation Org.*, 578 F. Supp. 3d 577, 595, n.10 (S.D.N.Y. 2022)).

[6] This Court has held that the scope of due process constraints on personal jurisdiction are substantially identical under both the Fifth and Fourteenth Amendments. *Waldman v. Palestine Liberation Org.*, 835 F.3d 317, 329-31 (2d Cir. 2016). Plaintiffs contend that the Fourteenth Amendment imposes stricter limitations. Consequently, jurisdictional bases that were widely accepted when the Fourteenth Amendment was adopted in 1869 necessarily satisfy both the Fifth and Fourteenth Amendment guarantees of due process.

[7] Some states during this period deemed foreign corporations to have *impliedly* consented to the state's jurisdiction simply by doing business through its agents within the state. *See* Gerard Carl Henderson, THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW 80-81, 92-93 (1918) (discussing examples). *International Shoe* did reject the reasoning of decisions where a corporation's "consent [was] implied from its presence in the state through the acts of its authorized agents" doing business there. 326 U.S. at 318. *Cf. Robert Mitchell Furniture Co. v. Selden Breck Construction Co.*, 257 U.S. 213 (1921),

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. (18 How.) 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*, 79 U.S. 65 (1870), 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." *Id.* at 81. To hold otherwise, the Court declared, would mean that forum residents would have

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stating that jurisdiction based on such "implied" consent was limited to "liability incurred within the State." *Id.* at 215. AAJ's discussion is limited to Supreme Court precedents based on express consent shown by appointment of an agent for service.

> [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.

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 would be "binding" and consistent with due process. *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 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. Justice Oliver Wendell Holmes, writing for a unanimous Court, stated that by voluntarily appointing an agent authorized to receive service of process, as prescribed by the statute, general jurisdiction "actually is conferred," and not "presumed" or "a mere fiction." *Id.* at 96.

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." *Id*. at 175.

Thus, the Supreme Court has repeatedly and consistently upheld consent statutes as based on a foreign corporation's express consent and the forum legislature's very broad discretion in prescribing the actions that shall signify express consent.

E. Recent Supreme Court Decisions Narrowing the Scope of General Jurisdiction Based on Forum Contacts Have Not Altered or Undermined the Validity of Consent Statutes.

The Supreme Court of the United States has in recent years narrowed the permissible scope of personal jurisdiction based on forum contacts. *See Daimler AG v. Bauman*, 571 U.S. 117, 127 (2014) (holding that state courts may exercise general jurisdiction only where a corporation has such contacts as to be "essentially at home in the forum State"). However, the Court's jurisprudence regarding consent statutes is separate from and unaffected by those developments.

The common law recognized two independent bases for personal jurisdiction: (1) "the defendant's presence in," or (2) its "consent to" the sovereign's jurisdiction. *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1036 (2021) (Gorsuch, J., concurring).

The Supreme Court's "canonical decision," *International Shoe Co. v. Washington*, 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, the Court also reaffirmed its approval of statutory consent jurisdiction. Chief Justice Stone, writing for the Court in *International Shoe*, left no doubt that express consent based on "authorization to an agent to accept service of process," 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, years after *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 due process standard of *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 traditional consent-statute jurisdiction would be "unfaithful to both elementary logic and the foundations of our due process jurisprudence." *Id.* at 619.

The Court's "at home" standard is simply a particularly stringent application of its sufficient-contacts requirement, which the Court has consistently and carefully stated does not apply to consent jurisdiction. *See, e.g., Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (due process requires minimum contacts "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, a defendant's due process right not to be subject to the judicial authority of a forum with which it has no meaningful contacts, "can, like other such rights, be waived." *Ins. Corp. of Ireland*, 456 U.S. at 703;[8] *see also International Shoe*, 326 U.S. at 319. 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.

[8] "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.

174, 185 (1972). Where defendants have chosen to do so in the manner prescribed by the PSJVTA, they cannot complain of fundamental unfairness.

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

By enacting the PSJVTA, Congress intended to ensure that the doors of federal courthouses remain open to American victims of international terrorism to pursue the cause of action Congress created in the ATA. *See Boim v. Quranic Literacy Inst. & Holy Land Found. for Relief and Dev.*, 291 F.3d 1000, 1010–11 (7th Cir. 2002) (examining legislative history). By rejecting jurisdiction based on Defendants' statutory consent, the court below deprived Plaintiffs of their own right to due process right of access to the courts of the United States, to obtain a judicial remedy created for them by Congress, compelling reversal.

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), protects not only defendants, but also "plaintiffs attempting to redress grievances" in court. *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. Indeed, multiple constitutional provisions guarantee access to the courts for plaintiffs to vindicate a recognized cause of action. *Christopher v. Harbury*, 536 U.S. 403, 415 & n.12. (2002).

The Founders were familiar with the bedrock common-law principle: "Every right, when withheld, must have a remedy, and every injury its proper redress" by access to "a legal remedy by suit or action at law." 3 William Blackstone, *Commentaries* *23, *109 (1765). As Justice Powell wrote for the Court in *Ingraham v. Wright*, 430 U.S. 651 (1977), the Founders intended to incorporate into the Due Process Clause those rights which "Blackstone catalogued among the 'absolute rights of individuals.'" *Id*. at 661. These include the right of personal security against wrongful bodily injury. 1 William Blackstone, *Commentaries* *120, *125 & *134-35 (1765).

Chief Justice John Marshall, echoing Blackstone, restated this principle in a cornerstone decision for Americans:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

In *Bristol-Myers Squibb Co. v. Superior Ct. of California*, 137 S. Ct. 1773 (2017) ("BMS"), the Court determined that "the due process rights of plaintiffs," though important, were not infringed by rejecting their assertions of general jurisdiction over a foreign corporation. Plaintiffs who were California residents were not deprived of access to the California courts to press their claims. *Id.* at 1782. Nor were nonresident plaintiffs deprived of due process because they "could probably

sue together in their home States." *Id*. at 1783. Similarly, in *Daimler*, the Supreme Court narrowed the scope of general personal jurisdiction but left a minimum of two places were plaintiffs could bring their cause of action — the state of defendant's incorporation and the state of its principal place of business. 571 U.S. at 136-39. That is not the case here, where the lower court barred all recourse for plaintiffs. This difference requires reversal.

The ATA authorizes plaintiffs to bring their civil action "in the district court of the United States for any district where any plaintiff resides." 18 U.S.C. § 2334. Under the Court's due process pronouncement in *BMS*, plaintiffs, as residents of the forum jurisdiction, have a constitutional right to access to U.S. courts to pursue their ATA claims. The statute provides no basis for suit in any foreign nation, and a foreign court may be expected to "have little legitimate interest in the claims in question." *BMS*, 137 S. Ct. at 1780. Additionally, the practical costs would be simply insurmountable. *Cf. McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957) (noting that plaintiffs "would be at a severe disadvantage if they were forced to follow the [defendant] to a distant State in order to hold it legally accountable."). Due process is not satisfied by a merely theoretical right of access to a legal remedy, but rather by "*meaningful* access to the courts." *United Transp. Union v. State Bar of Michigan*, 401 U.S. 576, 585 (1971) (emphasis added). The lower court has truly held that Plaintiffs have a right, but no remedy.

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 v. AstraZeneca UK Ltd.*, 22 F.4th 204, 234 (D.C. Cir. 2022). 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 of the district court.

November 3, 2022

Respectfully submitted,

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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 6,495 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.

I further certify pursuant to L.A.R.31.1(c) that the electronic copy of this brief filed with the Court is identical in all respects to the hard copy filed with the Court, and that a virus check was performed on the electronic version using Kapersky Endpoint Security. No computer virus was detected.

November 3, 2022

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of November 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.

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