No. 17-508

IN THE

Supreme Court of the United States

RIVKA LIVNAT, INDIVIDUALLY AND AS
PERSONAL REPRESENTATIVE OF
THE ESTATE OF BEN-YOSEF LIVNAT, *et al.*,

Petitioners,

v.

PALESTINIAN AUTHORITY, A/K/A THE PALESTINIAN
INTERIM SELF-GOVERNMENT AUTHORITY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

SUPPLEMENTAL BRIEF OF RESPONDENT

GASSAN A. BALOUL
Counsel of Record
MITCHELL R. BERGER
ALEXANDRA E. CHOPIN
SQUIRE PATTON BOGGS (US) LLP
2550 M Street, NW
Washington, D.C. 20037
(202) 457-6000
gassan.baloul@squirepb.com

Counsel for Respondent

October 5, 2018

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
SUPPLEMENTAL BRIEF OF RESPONDENT...	1
CONCLUSION	12

TABLE OF AUTHORITIES

CASES Page(s)

Access Telecom, Inc. v. *MCI Telecomms. Corp.*, 197 F.3d 694 (5th Cir. 1999) 5

Agency for Int'l Dev. v. *All. for Open Soc'y Int'l*, 570 U.S. 205 (2013) 1, 9, 10

Bailey v. *United States*, 516 U.S. 137 (1995) 4

Brown v. *Lockheed Martin Corp.*, 814 F.3d 619 (2d. Cir. 2016) 1, 10

Bruesewitz v. *Wyeth LLC*, 562 U.S. 223 (2011) 5

Burger King Corp. v. *Rudzewicz*, 471 U.S. 462 (1985) 6, 7

Cent. Bank of Denver v. *First Interstate Bank, N.A.*, 511 U.S. 164 (1994) 4

Daimler AG v. *Bauman*, 571 U.S. 117 (2014) 1, 6, 10, 11

Frost & Frost Trucking Co. v. *R.R. Comm'n*, 271 U.S. 583 (1926) 10, 11

Genuine Parts Co. v. *Cepec*, 137 A.3d 123 (Del. 2016) 11

Glencore Grain Rotterdam B.V. v. *Shivnath Rai Harnarain Co.*, 284 F.3d 1114 (9th Cir. 2002) 10

Hamdan v. *Rumsfeld*, 548 U.S. 557 (2006) 4

TABLE OF AUTHORITIES—Continued

Page(s)

Harlow v. *Children's Hosp.*,
432 F.3d 50 (1st Cir. 2005) 5

Kasier Aluminum & Chem. Corp. v. *Bonjorno*,
494 U.S. 827 (1990).................................. 6

Keene Corp. v. *United States*,
508 U.S. 200 (1993).................................. 3

Koontz v. *St. Johns River Water Mgmt. Dist.*,
570 U.S. 595 (2013).................................. 9, 10

Landgraf v. *Usi Film Prods.*,
511 U.S. 244 (1994).................................. 3, 6

Lindh v. *Murphy*,
521 U.S. 320 (1997).................................. 4

McCullough v. *Va.*,
172 U.S. 102 (1898).................................. 7

Midatlantic Nat'l Bank v. *N.J. Dep't of Envtl. Prot.*,
474 U.S. 494 (1986).................................. 5, 6

Pennoyer v. *Neff,*
95 U.S. 714 (1877).................................... 11

Plaut v. *Spendthrift Farm*,
514 U.S. 211 (1995).................................. 7

R.S.W.W., Inc. v. *City of Keego Harbor*,
397 F.3d 427 (6th Cir. 2005)..................... 9

Rice v. *Sioux City Mem'l Park Cemetery, Inc.*, 349 U.S. 70 (1955) 8, 9

Segregated Account of Ambac Assurance Corp. v. *Countrywide Home Loans*,
898 N.W.2d 70 (Wis. 2017) 11

TABLE OF AUTHORITIES—Continued

Page(s)

Sokolow v. *Palestine Liberation Organization*, 138 S. Ct. 1438 (2018) 2, 8

Stoneridge Inv. Partners LLC v. *Sci-Atl., Inc.*, 552 U.S. 148 (2000) 4

Terral v. *Burke Constr. Co.*, 257 U.S. 529 (1922) 9, 10

United States v. *O'Brien*, 560 U.S. 218 (2010) 4

Vartelas v. *Holder*, 566 U.S. 257 (2012) 3, 6

CONSTITUTION

U.S. Const. art. I, § 7, cl. 2 1

U.S. Const. amend. V 6

STATUTES

Antiterrorism Act, 18 U.S.C. § 2333 .... 2, 3

Foreign Assistance Act of 1961, 22 U.S.C. § 2151 2

Taylor Force Act, Pub. L. 115-141, 132 Stat. 1143 (2018) 8

OTHER AUTHORITIES

Antiterrorism Clarification Act of 2018, S. 2946, 115th Cong. (Sept. 24, 2018) .....*passim*

SUPPLEMENTAL BRIEF OF RESPONDENT

The Antiterrorism Clarification Act of 2018, S. 2946, 115th Cong. ("ATCA")—which Congress passed just days before the initially scheduled conference on this long-pending Petition—is not a development that warrants certiorari in this case.

First, as a matter of statutory construction, ATCA's jurisdictional-consent provision does not apply retroactively. *Second*, as a matter of constitutional due process, ATCA's jurisdictional-consent provision cannot apply retroactively. *Third*, any attempted retroactive application of ATCA in this case must presuppose hypothetical future events that may never occur, and whose outcome will not be known before January 2019.

Fourth, even if it could be applied retroactively, ATCA imposes an unconstitutional condition on continued U.S. foreign assistance to Palestine by attempting to coerce Respondent's consent to general jurisdiction in the U.S. courts. Due process prevents Congress from legislating directly to exercise general jurisdiction over Respondent in the United States, where it is not "at home" under *Daimler AG* v. *Bauman*, 571 U.S. 117 (2014). Br. in Opp. at 12, 27; Pet. App. 21a (D.C. Cir. Op.). Equally, because consent to general jurisdiction under *Daimler* must be "free and voluntary," *Brown* v. *Lockheed Martin Corp.*, 814 F.3d 619, 640 (2d Cir. 2016), ATCA cannot constitutionally extract Respondent's "deemed" consent to general jurisdiction because that new condition is unrelated to the objectives of previously authorized U.S. economic assistance to Palestine. *See Agency for Int'l Dev.* v. *All. for Open Soc'y Int'l*, 570 U.S. 205, 214-15 (2013).

Given these weighty statutory and constitutional issues, it would be improvident at the last minute in this case to grant certiorari summarily, vacate the judgment below, and remand for consideration of ATCA. These issues can be more properly developed in other cases commenced after ATCA's effective date. The Petition thus should be denied for all of the reasons stated in Respondent's Brief in Opposition, and in the amicus brief of the United States supporting denial of certiorari in *Sokolow* v. *Palestine Liberation Organization*, 138 S. Ct. 1438 (2018). *See* Resp't. App. 1a-27a (Br. for the United States as Amicus Curiae).

1. Petitioners' theory depends upon a showing that ATCA's jurisdictional-consent provision (Section 4) applies retroactively to this case. The plain language of Section 4 shows that it does not apply retroactively to pending cases, particularly when read in conjunction with ATCA's other provisions, which do expressly provide for such retroactive application.

Section 4 of ATCA provides that a defendant in a case under the Antiterrorism Act, 18 U.S.C. § 2333 ("ATA"), will be "deemed to have consented" to general personal jurisdiction if it continues to accept specific types of foreign assistance "after the date that is 120 days after" ATCA becomes law.[1]

---

[1] *See* S. App. 3-4 (specifying aid authorized in the Foreign Assistance Act of 1961, 22 U.S.C. § 2151: The Economic Support Fund and Overseas Contingency Operations; International Narcotics Control and Law Enforcement; and, Nonproliferation, Antiterrorism, Demining, and Related Programs).

ATCA has three operative sections, each of which contains an "applicability" provision. Section 2 amends the act-of-war exclusion from ATA liability and states that it "shall apply to any civil action pending on or commenced after the date of the enactment of this Act." S. App. 2. Section 3 expands the pool of assets available to ATA judgment creditors, and similarly states that it applies "to any judgment entered before, on, or after the date of enactment of this Act." S. App. 3.

In contrast, the "applicability" provision of Section 4 states only that it "shall take effect on the date of enactment of this Act." S. App. 4. There is no explicit statement that Section 4 shall apply to lawsuits commenced or pending before the enactment of ATCA.

Under traditional canons of statutory construction, "where Congress includes particular language in one section of a statute but omits it in another," this Court generally "presume[s] that Congress acts intentionally and purposefully in the disparate inclusion or exclusion." *Keene Corp.* v. *United States*, 508 U.S. 200, 208 (1993) (internal quotation marks and citation omitted). ATCA's jurisdictional-consent provision does not replicate the express retroactivity language of Sections 2 and 3, and thus is not retroactive by its plain language.

This Court has long held that legislation applies prospectively unless Congress explicitly provides that the statute applies retroactively. *See Vartelas* v. *Holder*, 566 U.S. 257, 266 (2012). The Court requires an explicit statement to ensure that "Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits." *Landgraf* v. *Usi Film Prods.*, 511 U.S. 244, 272-73 (1994).

Therefore, because Sections 2 and 3 contain explicit retroactivity language that is notably absent from Section 4, "a negative inference may be drawn" about the retroactivity of Section 4. *Hamdan* v. *Rumsfeld*, 548 U.S. 557, 578 (2006); *see also Bailey* v. *United States*, 516 U.S. 137, 146 (1995), superseded by amendment of statute as stated in *United States* v. *O'Brien*, 560 U.S. 218 (2010) (holding that the distinction between "used" and "intended to be used" in a statute creates an implication that a related provision's reliance on "use" alone refers to actual and not intended use). This is particularly true when, as here, "the portions of a statute treated differently . . . were being considered simultaneously." *Lindh* v. *Murphy*, 521 U.S. 320, 330 (1997) (holding that Congress must have intended one section of the statute to be applied to pending cases, while the other would not, because the provisions evolved together).

The explicit retroactivity language in Sections 2 and 3 shows that Congress understood how to draft provisions that apply retroactively to pending cases. Congress's omission of explicit retroactivity language in Section 4 is strong evidence that Section 4 does not apply to cases commenced and pending before the effective date of ATCA. *See, e.g.*, *Cent. Bank of Denver* v. *First Interstate Bank, N.A.*, 511 U.S. 164, 176-77 (1994), superseded by amendment to statute as stated in *Stoneridge Inv. Partners LLC* v. *Sci-Atl., Inc*., 552 U.S. 148 (2000) (holding that although "Congress knew how to impose aiding and abetting liability when it chose to do so," it did not use the words "aid" and "abet" in the statute at issue, and hence did not impose aiding and abetting liability). Having bypassed the opportunity to state expressly that Section 4—like Sections 2 and 3—applies to pending cases, Congress must be presumed

to have intended that Section 4 have only prospective effect.

Petitioners quote from ATCA's legislative history to argue that Section 4 should be construed to apply to pending cases. *See* Pet. Suppl. Br. at 3-4. But legislative history cannot trump the statutory text and structure actually enacted by Congress. *See Bruesewitz* v. *Wyeth LLC*, 562 U.S. 223, 240 (2011). Whatever the content of the legislative history, the text of Section 4 of ATCA does not expressly provide for retroactive application to pending cases, and therefore does not apply to this case.

Finally, retroactive application of Section 4 would implicitly abrogate the established rule that general personal jurisdiction is assessed based solely on the defendant's connection to the forum at the time the lawsuit is commenced.[2] Read retroactively, Section 4 would allow a retrospective revision of a defendant's forum-connection.

If Congress had intended to abrogate the settled rule that courts assess general jurisdiction based on the facts existing when a lawsuit is commenced, then it was obliged to state that intent expressly and unmistakably. *See Midatlantic Nat'l Bank* v. *N.J. Dep't of Envtl. Prot.*, 474 U.S. 494, 501 (1986) ("The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of

---

[2] *See Harlow* v. *Children's Hosp.*, 432 F.3d 50, 65 (1st Cir. 2005) (holding that "a court should consider all of a defendant's contacts with the forum state prior to the filing of the lawsuit"); *Access Telecom, Inc.* v. *MCI Telecomms. Corp.*, 197 F.3d 694, 717 (5th Cir. 1999) ("General jurisdiction can be assessed by evaluating contacts of the defendant with the forum over a reasonable number of years, up to the date the suit was filed.").

a judicially created concept, it makes that intent specific."). Further, basic fairness dictates that the "the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place . . . ." *Landgraf*, 511 U.S. at 265-66 (quoting *Kasier Aluminum & Chem. Corp.* v. *Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring)).

2. Retroactive application of Section 4 would violate Respondent's due process right to *advance* "fair warning that a particular activity may subject [it] to the jurisdiction" of U.S. courts. *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 472 (1985) (internal quotation marks and citation omitted). This "fair warning" requirement protects a defendant's due process liberty interests by enabling a prospective defendant to shape its primary conduct in accordance with settled law. *See Daimler*, 571 U.S. at 139 (holding that defendants must be allowed "to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit") (quoting *Burger King*, 471 U.S. at 472).

The Fifth Amendment Due Process Clause will preclude retrospective application of a law, therefore, "when such application would take away or impair vested rights acquired under existing laws, or create a new obligation, impose a new duty, or attach a new disability, in respect to transactions or considerations already past." *Vartelas*, 566 U.S. at 266 (internal quotation marks and brackets omitted) (collecting cases).

Retroactive statutes raise these due process concerns because of the "Legislature's unmatched powers," which enable it to "sweep away settled expectations suddenly and without individualized consideration," often for political reasons. *Landgraf*, 511 U.S. at 266-67.

To protect those settled expectations, due process requires "fair warning" of jurisdictional rules in *advance* of the commencement of a lawsuit. *See Burger King*, 471 U.S. at 472. Retroactive application of ATCA's jurisdictional-consent provision would violate that liberty interest by deeming a defendant's *after-the-fact and implied* consent to jurisdiction in a pending lawsuit, solely based on the continued provision of U.S. foreign assistance. *Post hoc* "deemed" consent to jurisdiction is constitutionally incompatible with the due process advance "fair warning" requirement.

Equally, the last-minute arrival of ATCA cannot divest Respondent of its property interest in the judgment here because legislation cannot "take away rights which have been once vested by a judgment." *McCullough* v. *Va.*, 172 U.S. 102, 123 (1898); *see also Plaut* v. *Spendthrift Farm*, 514 U.S. 211, 218-19 (1995) (holding that Congress cannot retroactively command federal courts to reopen federal judgments because "a judgment conclusively resolves the case" pending further appellate review and it is the purview of the judiciary "to render dispositive judgments") (internal quotation marks and citation omitted). In *McCullough*, this Court counseled that the appeals court "properly . . . took no notice of the subsequent repeal of the act under which [a] judgment was obtained" because the "rights acquired by the judgment . . . were not disturbed by a subsequent repeal of the statute." 172 U.S. at 124.

Retroactive application of Section 4 here would impair Respondent's due process property interest in the judgment in this case, a full review of which was completed by the Court of Appeals more than a year ago. The potential for this Court's discretionary review of that judgment was deferred primarily to

accommodate submission of the views of the United States in the look-alike *Sokolow* case, where this Court denied certiorari. 138 S. Ct. 1438 (2018). In the ordinary course, therefore, the Petition here would have gone to conference well in advance of ATCA's passage. Even now, it remains entirely speculative what will happen after the expiration of Section 4's 120-day post-enactment hiatus. *See infra*, point 3.

3. Any attempted retroactive application of ATCA here would depend upon hypothetical future events that may never occur, and whose outcome will not be known for months. "[D]eemed" consent to personal jurisdiction under Section 4(e)(A) depends on the continued availability, and Respondent's continued acceptance "after the date that is 120 days after the enactment of th[at] subsection," of U.S. aid under any of three referenced foreign assistance programs.[3] S. App. 3-4. Evolving political circumstances leave considerable doubt as to any continued U.S. aid under the referenced programs. *See supra* n.3.

As a result, it is purely speculative that there would ever be a factual foundation to apply ATCA's jurisdictional-consent provision here, even if it could apply retroactively. It would be improvident to grant certiorari, or to hold disposition of this Petition, to await the outcome of those hypothetical future events. *See Rice* v. *Sioux City Mem'l Park Cemetery, Inc*., 349 U.S. 70, 74 (1955) (holding that certiorari is unwarranted "to satisfy a scholarly interest" or "for the benefit of particular litigants" but requires "a

[3] The majority of U.S. assistance to Palestine goes to third parties, and not to Respondent, and therefore could not be "accepted" by Respondent for purposes of the ATCA. *See* Taylor Force Act, § 1002, Pub. L. 115-141, 132 Stat. 1143 (2018) ("The United States does not provide direct budgetary support to the Palestinian Authority.").

reach to a problem beyond the academic or episodic"). Future cases commenced after ATCA's effective date will provide more appropriate vehicles for review of ATCA's jurisdictional-consent provision.

4. ATCA violates the "unconstitutional conditions" doctrine because it purports to compel Respondent to relinquish its due process-based objection to general jurisdiction as a condition for continued receipt of U.S. government aid. ATCA cannot coerce Respondent's submission to general jurisdiction in this fashion because the consent-to-jurisdiction provision is unrelated to the previously-established objectives of the foreign assistance programs referenced in ATCA (*e.g.*, economic support, narcotics control, nonproliferation). *See Int'l Dev.*, 570 U.S. at 214-15, 218.

International Development drew a distinction "between conditions that define the limits of the government spending program—those that specify the activities Congress wants to subsidize—and conditions that seek to leverage funding to regulate" the exercise of constitutional rights (there, speech) "outside the contours of the program itself." *Id.* at 214. The unconstitutional conditions doctrine has been widely applied outside the free-speech context, including as a prohibition against the "government . . . conditioning benefits on a[n] . . . agreement to surrender due process rights." *R.S.W.W., Inc.* v. *City of Keego Harbor*, 397 F.3d 427, 434 (6th Cir. 2005).

ATCA's jurisdictional-consent provision fits that latter profile, of "unconstitutional conditions cases in which someone refuses to cede a constitutional right in the face of coercive pressure." *Koontz* v. *St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 607 (2013); *see also Terral* v. *Burke Constr. Co.*, 257 U.S. 529, 532 (1922) (holding that "a State may not, in imposing

conditions upon the privilege of a foreign corporation's doing business in the State, exact from it a waiver of the exercise of its constitutional right to resort to the federal courts").

The "predicate for any unconstitutional conditions claim is that the government could not have constitutionally ordered the person asserting the claim to do what it attempted to pressure the person into doing." *Koontz*, 570 U.S. at 612. That predicate is satisfied here because Congress cannot by statute directly eliminate the PA's due process objection to general jurisdiction in a forum where it is not "at home" per *Daimler*. *See* Br. in Opp. at 12; Pet. App. 21a (D.C. Cir. Op.). Even if Congress intended to achieve that result, it could not do so constitutionally. "It is a bedrock principle of civil procedure and constitutional law that a statute cannot grant personal jurisdiction where the Constitution forbids it." Br. in Opp. at 27-29 (quoting *Glencore Grain Rotterdam B.V.* v. *Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1121 (9th Cir. 2002)) (internal quotation marks and citations omitted).

Equally, because consent to general jurisdiction under *Daimler* must be "free and voluntary," *Brown*, 814 F.3d at 640, ATCA cannot constitutionally extract Respondent's "deemed" consent to general jurisdiction as a new condition that is unrelated to the objectives of previously authorized U.S. economic assistance to Palestine. *See Int'l Dev.*, 570 U.S. at 214-15.

The government "may not impose conditions which require the relinquishment of constitutional rights," like Respondent's due process right to be free of general jurisdiction in the United States when it is not "at home" here under *Daimler*. *Frost & Frost Trucking Co.* v. *R.R. Comm'n*, 271 U.S. 583, 594, 598 (1926).

Recent cases applying *Daimler* to state business-registration statutes confirm that deemed jurisdictional-consent cannot replace the due process-based "at home" test for general jurisdiction. In *Genuine Parts Co.* v. *Cepec*, the Delaware Supreme Court held that case law that stands for the proposition that registration statutes can create consent is rooted in the territorial thinking that dominated the *Pennoyer* era, when states created a "fictional basis to find them present there." 137 A.3d 123, 145-47 (Del. 2016) (referencing *Pennoyer* v. *Neff*, 95 U.S. 714 (1877)). By contrast, "*Daimler's* reasoning indicates that such a grasping assertion of state authority is inconsistent with principles of due process." *Id*. at 147.

Similarly, the Wisconsin Supreme Court explained in *Segregated Account of Ambac Assurance Corp.* v. *Countrywide Home Loans*, that "[t]he shade of constitutional doubt that *Goodyear* and *Daimler* cast on broad approaches to general jurisdiction" means that "subjecting foreign corporations to general jurisdiction wherever they register an agent for service of process would reflect the 'sprawling view of general jurisdiction' rejected by the Supreme Court in *Goodyear*." 898 N.W.2d 70, 81-82 (Wis. 2017) (quoting *Daimler*, 571 U.S. at 118).

ATCA Section 4 unconstitutionally coerces "deemed" consent to general jurisdiction as a condition of continued foreign aid. Government "is without power to impose an unconstitutional requirement as a condition for granting a privilege." *Frost*, 271 U.S. at 598.

CONCLUSION

The Court should deny the Petition.

Respectfully submitted,

GASSAN A. BALOUL
Counsel of Record
MITCHELL R. BERGER
ALEXANDRA E. CHOPIN
SQUIRE PATTON BOGGS (US) LLP
2550 M Street, NW
Washington, D.C. 20037
(202) 457-6000
gassan.baloul@squirepb.com

Counsel for Respondent

October 5, 2018