No. 19-741

IN THE

Supreme Court of the United States

ESTATE OF ESTHER KLIEMAN, BY AND THROUGH ITS ADMINISTRATOR, AARON KESNER, *et al.*,

Petitioners,

v.

PALESTINIAN AUTHORITY, AKA PALESTINIAN INTERIM SELF-GOVERNMENT AUTHORITY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF

STEVEN R. PERLES
Counsel of Record
PERLES LAW FIRM, P.C.
1050 Connecticut Avenue, NW, Suite 500
Washington, DC 20036
(202) 955-9055
sperles@perleslaw.com

Counsel for Petitioners

295284

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Page

TABLE OF CITED AUTHORITIES

Page(s)

Cases

Statutes and Other Authorities

The D.C. Circuit held that the murder of a U.S. citizen in a terrorist attack abroad lacked "any U.S. nexus," because, "absent intentional targeting, the fact that an American died in a terrorist incident abroad would amount only to a 'random, fortuitous, or attenuated' contact" with the United States. Pet. App. 17a-20a. The court then held that the Anti-Terrorism Clarification Act of 2018, Pub. L. 115-253, 132 Stat. 3184 (ATCA), the legislation enacted by Congress for the manifest purpose of restoring jurisdiction in this and similar cases was of no effect, as if Congress had randomly amended a statute for no reason and to change nothing. Pet. App. 24a-32a.

Congress has now responded (again in bipartisan fashion) to provide that the federal courts should exercise the judicial power of the United States over Respondents if they engage in specified, jurisdictionally relevant conduct. Promoting Security and Justice for Victims of Terrorism Act of 2019, Pub. L. 116-94, Pub. L. No. 116–94, div. J, tit. IX, § 903, 133 Stat. 3082 (PSJVTA).

This case merits plenary review because the D.C. Circuit's decision nullified a federal statute enacted to further Congress's legislative scheme and attendant foreign-policy objectives, developed in over forty years of enactments, to deter and punish international terrorism and entrenched a circuit split regarding due process requirements under the Fifth Amendment. But in light of the intervening PSJVTA, the Court should grant the petition, vacate the court of appeals' judgment, and remand (GVR) for further consideration in light of the PSJVTA. As Petitioners established in their Supplementary Brief, the PSJVTA directly addresses the grounds for the D.C. Circuit's decision, which exceeds the "reasonable probability" standard required to grant a GVR. A GVR would

allow the lower courts to apply the PSJVTA in the first instance and thereby preserve scarce judicial resources.

A. A GVR In Light Of The PSJVTA Is Appropriate

1. The PSJVTA directly addresses and obviates one of the D.C. Circuit's adverse holdings below. Under the ATCA (codified at 18 U.S.C. § 2334(e)), the maintenance of an office or facility within the United States constituted consent to jurisdiction for any defendant "benefiting from a waiver" of § 1003 of the Anti-Terrorism Act of 1987 (22 U.S.C. § 5202), a statute applicable to the PLO and its agents and successors. The court of appeals treated Respondents' New York City office as a facility within the jurisdiction of the United States, as earlier cases had held. Pet. App. 29a-30a (discussing *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 46 (2d Cir. 1991), *on remand*, 795 F. Supp. 112, 114 (S.D.N.Y. 1992)). The court also recognized respondents' mixed use of that facility for non-UN activities as well as official UN business; indeed, the court acknowledged that Respondent's current use of its office for public relations activities is "rather similar" to the uses found to support jurisdiction in earlier cases. Pet. App. 29a-30a.

The court of appeals nevertheless held that the ATCA's "benefiting from a waiver" requirement had not been triggered. Pet. App. 30a-32a. This is the holding below which prevented application of the ATCA.

2. In the PSJVTA, Congress superseded that holding by eliminating the "benefiting from a waiver" language in § 2334(e); making the statute explicitly applicable to Respondents. See Supp. Br. App. 6a, PSJVTA § 903 (adding § 2334(e)(5)). The PSJVTA also provided that three categories of conduct would be deemed to constitute consent to personal jurisdiction:

- making any payment to any individual imprisoned for any terrorist act that injured or killed an American, or to any relative of an individual who died while committing such an act;
- maintaining any office or other facility in the United States; and
- conducting any activity while physically present in the United States.

See Supp. Br. App. 4a-5a, PSJVTA § 903(c)(1).

a. The first trigger, based on respondents' infamous "Pay to Slay" policies, wherein Respondents pay financial compensation to terrorists who murder U.S. citizens and others, takes effect April 18, 2020, before the Court is scheduled to consider this case. While Respondents' counsel are conspicuously silent regarding this trigger, Respondents' chairman has repeatedly pledged to continue these payments. For example, on September 26, 2019, he stated: "Even if I have only one penny left, I will give this penny to the families of the martyrs, to our prisoners and heroes." Statement by Mahmoud Abbas, United Nations General Assembly, 74th Sess. (Sept. 26, 2019).[1] And, as the Congressional Research Service recently observed, Respondents have continued to make these "Pay to Slay" payments at great cost to them-

[1] *State of Palestine - President Addresses General Debate, 74th Session*, YOUTUBE (Sep. 26, 2019), www.youtube.com/watch?v=LOvUGKcjSHI (beginning at 24:26-46); *see also Palestinian Authority President Abbas: 'If We Had Only A Single Penny Left, We Would Pay It To Families Of The Martyrs And Prisoners'*, Middle East Media Research Institute (July 24, 2018), www.memri.org/reports/palestinian-authority-pa-president-abbas-if-we-had-only-single-penny-left-we-would-pay-it (collecting statements).

selves, "even after they led to a legal suspension of significant ESF funding for the PA under the Taylor Force Act." Jim Zanotti, Congressional Research Service, *The Palestinians and Amendments to the Anti-Terrorism Act* 3 (March 18, 2020).[2]

b. The second trigger applies if, after January 4, 2020, Respondents "maintain any office * * * or other facilities or establishments in the United States," subject to an exemption in paragraph (3)(A) for "any office … used *exclusively* for the purpose of conducting official business of the United Nations." Supp. Br. App. 6a, 18 U.S.C. § 2334(e)(1)(B)(i), (3)(A) (emphasis added). The exemption in paragraph (3)(A) "codifies" the holding in *Klinghoffer* and its progeny that a mixed-use facility is not exempt. See 165 Cong. Rec. S5782 (Statement of Sen. Lankford). Furthermore, paragraph (4) provides: "Notwithstanding any other law (including any treaty), any office, headquarters, premises, or other facility or establishment within the territory of the United States that is not *specifically* exempted by paragraph (3)(A) shall be considered to be in the United States for purposes of paragraph (1)(B)." *Id.* at 7a, § 2334(e)(4) (emphasis added). Under paragraph (4), only locations that are "specifically exempted by paragraph 3(A)" are disregarded; a mixed-use facility by definition is not used "*exclusively* for purposes of conducting official business of the United Nations," and therefore "shall be considered to be in the United States…." *Id.* at 6a (emphasis added).

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[2] The Taylor Force Act suspended most economic aid to Respondents until they terminate their "Pay to Slay" payments. *See* Jim Zanotti, Congressional Research Service, *U.S. Foreign Aid to the Palestinians* 12-13 (December 12, 2018).

Respondents concede that they are still using their Manhattan facility in the same mixed-use manner: the office's public relations activities are, in respondents' words, "supplementary" and "peripheral" to official UN business, rather than "essential" to it. Opp. 18. Petitioners provided facts reflecting Respondents' mixed use of the office in the record below, *e.g.*, Appellants' Supp. Br. at 6-7 (D.C. Circuit filed March 13, 2019), and the Court may take judicial notice that these "supplementary" uses of the Manhattan facility continued after the PSJVTA's January 4, 2020, trigger date.[3]

c. The third trigger, in paragraph (1)(B)(iii), applies if, after January 4, 2020, either Respondent "conducts any activity while physically present in the United States," subject to six exemptions in paragraph (3)(B)-(F). Supp. Br. App. 6a-7a, 18 U.S.C. § 2334(e)(1)(B)(iii), (3)(B)-(F). Respondents focus on two of those exemptions, set out in paragraphs (3)(B) and (3)(F). Respondents concede that their activities do not fall within the exemption in paragrpah (3)(B) for activities "conducted exclusively for the purpose of conducting official business of the United Nations," but rather contend that their public-relations activities are within paragraph (3)(F)'s further exemption for activities "ancillary to activities listed under this paragraph." See Br. in Opp. 18.

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[3] See Permanent Observer Mission of the State of Palestine to the United Nations, Facebook, https://www.facebook.com/Palestine.at.UN/ (last visited March 23, 2020); State of Palestine – Official Twitter of the Mission to the United Nations, Twitter, https://twitter.com/palestine_un?lang=en (last visited March 23, 2020).

As a threshold matter, exemption (3)(F) is irrelevant to the "maintains an office" trigger discussed above. As noted, paragraph (4) provides that unless the office is "*specifically* exempted by paragraph (3)(A)" (*i.e.*, used for the "exclusive purpose" of official U.N. business) it "*shall* be considered to be in the United States for purposes of paragraph (1)(B)." Supp. Br. App. 7a (emphasis added).

Further, Respondents' reliance, Opp. 18, on paragraph (3)(F) to escape the "any activity" trigger is misplaced. The word "ancillary" designates "activities and services that provide essential support to the functioning of a central service or industry." See *Ancillary*, Oxford *English Dictionary*, (3d ed. 2000). As Senator Lankford, the PSJVTA's lead sponsor, explained before the Senate voted, the exemption for "ancillary" activities was "intended to permit only essential support or services that are absolutely necessary to facilitate the conduct of diplomatic activities expressly exempted in the bill." 165 Cong. Rec. S.7182 (daily ed. Dec. 19, 2019). As Senator Lankford also explained, and as Respondents concede, "public relations activities … are not essential to their diplomatic functions at the United Nations Headquarters." *Id.*; *see* Opp. 18 (conceding that public relations activities are "supplementary," rather than "essential").

Respondents urge a broader construction of the word "ancillary," but doing so would permit the "ancillary activities" exemption in paragraph (3)(F) to overwhelm the narrow exemption in paragraph (3)(B) for activities "exclusively for the purpose of conducting official business of the United Nations." *See Maracich v. Spears*, 570 U.S. 48, 60 (2013) ("exceptions ought not operate to the farthest reach of their linguistic possibilities if that result would contravene the statutory design"). Congress specifically provided that the PSJVTA "should

be liberally construed to carry out the purposes of Congress to provide relief for victims of terrorism." See Supp. Br. App. 8a, PSJVTA § 903(d)(1)(A). Senator Lankford explained, the exemptions permit "a very narrow scope of activities" to give respondents "a clear choice": "Unless they limit their presence to official business with the United Nations and their U.S. activities commensurate with their special diplomatic need to be in the United States, they will be consenting to personal jurisdiction in ATA cases." 165 Cong. Rec. S7182 (Dec. 19, 2019).

Respondents rely on a "clarifying" statement by Senator Leahy five weeks after Congress enacted the law. Opp. 18. But this is doubly suspect because Senator Leahy opposed the PSJVTA, see Senate Judiciary Committee, *Results of Executive Committee Meeting* (Oct. 17, 2019), and even authority relying on *pre*-enactment legislative history has "often cautioned against the danger, when interpreting a statute, of reliance upon the views of its legislative opponents." *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760*, 377 U.S. 58, 66 (1964).

Respondents' discussion of "ancillary" activity is ultimately a diversion. A remand is plainly appropriate to determine the actual scope of *all* of Respondents' jurisdictionally relevant conduct and apply the new statute to the facts as they are found below. "Supreme Court briefs are an inappropriate place to develop the key facts in a case," *Sykes v. United States*, 564 U.S. 1, 31 (2011) (Scalia, J., dissenting), and even on questions of law, this Court is "a court of review, not of first view." *Ret. Plans Comm. of IBM v. Jander*, 140 S. Ct. 592 (2020) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718, n. 7 (2005)).

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Respondents' discussion of "the "reasonable probability" standard is also a diversion. Opp. 16-22. Indeed, Petitioners described how the PSJVTA would alter the decision by the court below. *See* Supp. Br. 6-7. In *Clearstream Banking S.A.* v. *Peterson*, No. 17-1529, 2020 WL 129504 (Jan. 13, 2020), this Court issued a GVR Order when faced with similar circumstances. *Id.* at 8a. The Solicitor's brief recommended a GVR even though the court below would have had to make additional findings, such as whether the new law applied to the financial assets at issue. Suppl. Amicus Brief for the Solicitor General at 5, *Clearstream*, No. 17-1529, 2020 WL 129504 (Jan. 13, 2020). In this case, the PSJVTA directly bears upon a central ruling by the court below and Petitioners have demonstrated a strong probability that Respondents have engaged in activity that creates jurisdiction under the PSJVTA, thus, there is a "reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration," *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (*per curiam*).

B. Respondents' Procedural Arguments Against A GVR Are Unpersuasive

Respondents raise three procedural objections to a GVR, each of which is meritless.

Respondents erroneously contend that the outcome "depends on facts that may never occur," Opp. 21, but as noted above, the facts with respect to the "office" and "activities" triggers have already occurred, and respondents' deadline to cease the "Pay to Slay" payments or submit to jurisdiction will pass before this Court considers the petition. Respondents point to this Court's denial of the petition in *Livnat v. Palestinian Authority* (No. 17-508), but in *Livnat*, the GVR request was based on

potential events that would not develop for several months. In *Garcia v. Texas*, 564 U.S. 940, 947 (2011) the dissent argued in favor of a stay to await pending legislation which, if enacted, "would almost certainly" result in a GVR, but here, the PSJVTA's trigger date has already passed.

Respondents also contend that a GVR is procedurally improper unless the relevant facts are in the "existing record." Opp. 21. That is incorrect. GVRs often result from events that arise after the court of appeals enters judgment. *E.g., U.S. Dep't of State v. Legal Assistance for Vietnamese Asylum Seekers, Inc.*, 519 U.S. 1 (1996) (GVR after oral argument in light of new legislation). In *Wellons v. Hall*, 558 U.S. 220, 226 (2010) (per curiam), the Court entered a GVR precisely so that the court of appeals could "consider, on the merits, whether petitioner's allegations, together with the undisputed facts, warrant discovery and an evidentiary hearing."

Finally, respondents urge the court not to GVR because there are later-filed cases filed by Petitioners to protect against the running of the statute of limitations, Opp. 22-24, as prudence requires. See *Cote v. Wadel*, 796 F.2d 981, 985 (7th Cir. 1986). But where multiple district courts "have concurrent jurisdiction over a dispute involving the same parties and issues, as a general proposition, the forum in which the first-filed action is lodged has priority." Arthur R. Miller, 15 Fed. Prac. & Proc. Juris. § 3854 (4th ed.). This first-filed case not only has priority (it was filed in 2004) but has proceeded through most of discovery. Allowing the dismissal of this case for lack of jurisdiction might make issue-preclusion unavailable in the later-filed case, opening the door to relitigation of every issue decided in this case. See *NextWave Pers. Commc'ns, Inc.* v. *F.C.C.*, 254 F.3d 130, 147 (D.C. Cir. 2001), *aff'd*, 537 U.S. 293 (2003).

C. This Case Merits Plenary Review

Although a GVR is the correct path for this case, respondents are incorrect that the case does not merit plenary review.

1. The D.C. Circuit recognized due-process rights in a foreign government, contrary to the long-held position of the United States, and held that a federal statute enacted to protect national security had no effect upon enactment, contrary to this Court's teaching that "[w]hen Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect." *Stone v. INS*, 514 U.S. 386, 397 (1995). These holdings warrant plenary review without awaiting a circuit split as a matter of respect for coordinate branches of government.

The decision to enlist the Judiciary in the enforcement of anti-terrorism interests of the United States "belongs to those answerable to the people and assigned by the Constitution to defend this nation." *Jesner* v. *Arab Bank, PLC*, 138 S. Ct. 1386, 1412 (2018) (Gorsuch, J., concurring). The Constitution expressly grants Congress the power to determine the extent of the judicial power of the United States. And when Congress ordains and establishes federal jurisdiction, the federal courts have a "virtually unflagging obligation" to exercise it. *Mata* v. *Lynch*, 135 S. Ct. 2150, 2156 (2015) (quotation omitted); *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 716 (1996).

2. The circuit split on the due process question is real, and outcome-determinative in this case. In the D.C., Second, and Seventh Circuits, civil cases brought to enforce federal statutes are being dismissed because the courts in those circuits narrowly construe the powers of Congress, forbidding the exercise of jurisdiction in federal cases absent liability-creating conduct on U.S. soil,

or (in the D.C. Circuit) intentional "targeting" of Americans.

In contrast, in the Third, Fifth, Sixth, Tenth and Eleventh Circuits, cases are permitted to proceed if they further the "national interest." For example, the Fourth and Eleventh Circuits recently rejected due process challenges to criminal prosecutions because the victims were American citizens. *United States v. Noel*, 893 F.3d 1294, 1305 (11th Cir. 2018); *United States v. Murillo*, 826 F.3d 152, 157 (4th Cir. 2016). In those Circuits, due process is satisfied when "the aim of [the defendant's] activity is to cause harm inside the United States *or to U.S. citizens or interests*." *E.g.*, *United States v. Brehm*, 691 F.3d 547, 553 (4th Cir. 2012) (emphasis added). Conversely, under the standard applied by the D.C. Circuit in this case, *Noel* and *Murillo* would have been dismissed.

Respondents contend that the split is "not…well developed", Opp. 28, but the Circuits are deeply divided, and in criminal cases the Government *embraces* the standard Petitioners urge. See, *e.g.*, U.S. Br. in Opp. 13, *Murillo v. United States*, No. 16-5924 (Dec. 2016).

3. Finally, Respondents contend that the merits arguments were not raised in the D.C. Circuit, Opp. 24, but they were addressed by that court, and "this Court's practice "permit[s] review of an issue not pressed so long as it has been passed upon." *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (alterations by the Court; quotations omitted).

CONCLUSION

This Court should grant the petition, vacate the judgment, and remand for further consideration in light of the PSJVTA.

Respectfully submitted,

STEVEN R. PERLES
Counsel of Record
PERLES LAW FIRM, P.C.
1050 Connecticut Avenue, NW, Suite 500
Washington, DC 20036
(202) 955-9055
sperles@perleslaw.com

Counsel for Petitioners