No. 19-764

IN THE
Supreme Court of the United States

MARK SOKOLOW, *et al.*,

Petitioners,

v.

PALESTINE LIBERATION ORGANIZATION AND PALESTINIAN AUTHORITY, A/K/A THE PALESTINIAN INTERIM SELF-GOVERNMENT AUTHORITY AND OR PALESTINIAN COUNCIL AND OR PALESTINIAN NATIONAL AUTHORITY,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The original Petition raises two issues:

1. Did the court of appeals abuse its discretion in refusing to recall its mandate based on its conclusion, consistent with the unrebutted representations of the United States, that the actions of Respondents did not satisfy the factual predicates of the Anti-Terrorism Clarification Act (ATCA), Pub. L. No. 115-253, 132 Stat. 3183 (Oct. 3, 2018)?

2. Did the court of appeals abuse its discretion when it independently refused to recall its mandate on finality grounds in a case in which *certiorari* already had been denied with the benefit of the views of the United States?

Petitioners' supplemental brief raises the following question:

3. Should this Court grant *certiorari*, vacate the decision below, and remand based on the Promoting Security and Justice for Victims of Terrorism Act of 2019 (PSJVTA), Pub. L. No. 116-94, §903, 133 Stat. 3082 (Dec. 20, 2019), where: (i) the court of appeals' decision denying the motion to recall the mandate rests on the alternative, discretionary ground of finality that the PSJVTA does not disturb; and (ii) where the factual predicates of the PSJVTA have not been satisfied, and there accordingly is no reasonable probability that the court of appeals would recall the mandate based on the PSJVTA?

PARTIES TO THE PROCEEDING

Petitioners, who were plaintiffs-appellees/cross-appellants below, are: Mark I. Sokolow, Rena M. Sokolow, Jamie A. Sokolow, Lauren M. Sokolow, Elana R. Sokolow, Dr. Alan J. Bauer, Revital Bauer, Yehonathon Bauer, Bin-yamin Bauer, Daniel Bauer, Yehuda Bauer, Shmuel Waldman, Henna Novack Waldman, Morris Waldman, Eva Waldman, Rabbi Leonard Mandelkorn, Shaul Man-delkorn, Nurit Mandelkorn, Oz Joseph Guetta, Varda Guetta, Nevenka Gritz, individually, and as successor to Norman Gritz, and as personal representative of the Estate of David Gritz, Shayna Eileen Gould, Ronald Allan Gould, Elise Janet Gould, Jessica Rine, Katherine Baker, individually and as personal representative of the Estate of Benjamin Blutstein, Rebekah Blutstein, Richard Blu-tstein, individually and as personal representative of the Estate of Benjamin Blutstein, Larry Carter, individually and as personal representative of the Estate of Diane ("Dina") Carter, Shaun Choffel, Dianne Coulter Miller, individually and as personal representative of the Estate of Janis Ruth Coulter, Robert L Coulter, Jr., individually and as personal representative of the Estate of Janis Ruth Coulter, Ann Marie K. Coulter, as personal representative of the estate of Robert L. Coulter, Sr., individually and as personal representative of the Estate of Janis Ruth Coulter, Chana Bracha Goldberg, Eliezer Simcha Goldberg, Esther Zahava Goldberg, Karen Goldberg, individually, as personal representative of the Estate of Stuart Scott Goldberg, and as natural guardian of plaintiff Yaakov Moshe Goldberg, Shoshana Malka Goldberg, Tzvi Ye-hoshua Goldberg, Yaakov Moshe

Goldberg, minor, by his next friend and guardian Karen Goldberg, and Yitzhak Shalom Goldberg.

Respondents, who were defendants-appellants-cross-appellees below, are the Palestine Liberation Organization and the Palestinian Authority (aka Palestinian Interim Self-Government Authority and or Palestinian Council and or Palestinian National Authority).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

U.S. Constit., Statutes, & Other Authorities

RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF *CERTIORARI*

OPINIONS BELOW

The court of appeals' opinion is reported at *Waldman v. PLO*, 925 F.3d 570 (2d Cir. 2019). Pet. App. 1a-10a. The court of appeals' prior opinion, the subject of a prior petition for *certiorari*, is reported at *Waldman v. PLO*, 835 F.3d 317 (2d Cir. 2016). Pet. App. 11a-56a. The relevant district court opinion is unreported. Pet. App. 95a-111a.

JURISDICTION

The court of appeals entered its decision on June 3, 2019. Pet. App. 1a. A petition for rehearing was denied on July 23, 2019. On September 12, 2019, Justice Ginsburg extended the time within which to file a petition for a writ of *certiorari* to December 20, 2019. The petition was filed on December 13, 2019. This Court has jurisdiction under 28 U.S.C. 1254(1).

INTRODUCTION

This Court should reject Petitioners' request to overturn the court of appeals' discretionary decision not to recall an old mandate. "In light of the profound interests in repose attaching to the mandate of a court of appeals," the recall of a mandate is an "extraordinary" step of "last resort." *Calderon v. Thompson*, 523 U.S. 538, 549-50 (1998). The court below held that Petitioners failed to prove that jurisdiction existed under the ATCA. But it also held independently that "[r]ecalling the mandate now would offend the need to preserve finality in judicial proceedings." Pet. App. 9a. Noting that Plaintiffs had

filed a parallel case in district court to take advantage of new jurisdictional developments, the court of appeals explained that: "To the extent that there are any developments in the activities of the PA or the PLO that may subject them to personal jurisdiction . . . they can be raised in that case." Pet. App. 9a-10a n.2. These finality grounds are unaffected by the subsequent passage of the PSJVTA, providing an independent and sufficient reason to uphold the outcome and deny a GVR.

Denying review so that Petitioners can pursue new jurisdictional arguments in their new case avoids trampling on the court of appeals' discretionary decision on finality. *By Petitioners' own design*, the new case (which, on Petitioners' request, was stayed at the pleadings stage pending disposition of this Petition) is better suited to develop Petitioners' arguments concerning the PSJVTA, including facts not yet in existence regarding Respondents' unknown future actions. In the new case, the district court has a full toolkit for fact-based adjudication of personal-jurisdiction questions—making the new case a better vehicle for resolving Respondents' facial and as-applied constitutional challenges to, and other arguments concerning the application of, the newly-enacted statute. Leaving those issues to be litigated in the new case also avoids the need to address any arguments that the PSJVTA was a Congressional end-run around separation of powers for cases that have reached finality. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 227 (1995).

Critically, furthermore, Petitioners fail to show any "reasonable probability" that the PSJVTA in fact creates jurisdiction over Respondents. *See Wellons v. Hall*, 558 U.S. 220, 225 (2010) (a GVR requires a "reasonable probability" that the change in the law will affect "the ultimate outcome") (citation omitted).

The PSJVTA will not affect the outcome of this case because the record facts concerning Respondents' prior activities in the United States do not satisfy the statute's requirements. Under the new statute, like the old statute, Respondents' UN Mission, and the activities of its UN Mission personnel in the United States, cannot create jurisdiction. The PSJVTA, furthermore, provides that Respondents "shall be deemed to have consented to personal jurisdiction" if they take certain actions only ***after*** its recent enactment. Petitioners have given this Court no reason to believe the PSJVTA creates jurisdiction over Respondents at this time—or ever will do so.

This Court should not disrupt a long-final judgment and issue a GVR based on the speculation that, sometime in the future, the factual predicates of the PSJVTA might come to pass. Future factual developments are more appropriately addressed in Petitioners' newly-filed case, as the court of appeals expressly recognized.

In addition, the provisions of the PSJVTA and the ATCA at issue here apply exclusively to Respondents and to a handful of plaintiffs. They are not of widespread application and their interpretation produces no precedent that will control other cases.

Petitioners' original Petition also provides no basis for *certiorari*. Their argument under the ATCA does not warrant *certiorari* given that two courts of appeals have held that the ATCA's factual predicates have not been met, in accord with the unrebutted factually-grounded views of the United States. In addition, the ATCA has been replaced and will not be applied in future cases. Nor do Petitioners' recycled arguments about a supposed circuit-split previously raised in their prior *certiorari* petition warrant review. These arguments were fully considered in *Sokolow I*, with

the benefit of the views of the United States, which recommended against *certiorari*. There is no basis for giving Petitioners another bite at the apple.

STATEMENT OF THE CASE

The 1993 Oslo Accords established the PA as the interim and non-sovereign government of parts of the West Bank and the Gaza Strip, collectively referred to as "Palestine." Pet. App. 16a. The PA is headquartered in the city of Ramallah in the West Bank. Pet. App. 16a. The PLO was founded in 1964. Pet. App. 17a. At all relevant times, the PLO was headquartered in Ramallah, the Gaza Strip, and Amman, Jordan. Pet. App. 17a. Because the Oslo Accords limited the PA's reach to domestic affairs, Israel retains external security control, and the PLO conducts Palestine's foreign affairs. Pet. App. 17a.

The United States does not recognize the PA or the PLO as a sovereign government. Pet. App. 18a. Although the PLO had a diplomatic mission in Washington D.C., it closed on October 10, 2018. Pet. App. 17a. The PLO also has a mission to the United Nations in New York City. *Id*.

Petitioners alleged violations of the Anti-Terrorism Act for attacks committed in Israel by nonparties who Petitioners asserted were assisted by Respondents during a period of violence called the "al Aqsa Intifada." Pet. App. 18a. The PA and PLO timely moved to dismiss for lack of personal jurisdiction, which included renewing their jurisdictional challenge after this Court's decision in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014). Pet. App. 21a-23a. The district court proceeded to hold a seven-week trial in 2015.

Petitioners did not submit any evidence that the attackers targeted Americans or the United States.

Pet. App. 24a. Instead, their experts opined that the "killing was indeed random" as the attackers fired their guns "indiscriminately." Pet. App. 44a. The jury found Respondents liable and awarded $218.5 million, which was automatically trebled under the Anti-Terrorism Act, to $655.5 million. Pet. App. 25a.[1]

A. The appeal, the first *certiorari* petition, and the CVSG brief.

The Second Circuit reversed, finding there was neither general nor specific jurisdiction over Respondents under *Daimler* and *Walden v. Fiore,* 571 U.S. 277, 291 (2014). Pet. App. 11a-56a. Petitioners argued that the Fifth Amendment's guarantee of due process was particularly weak in this case because it involved a federal statute, and that therefore *Daimler* and *Walden* did not apply. The court of appeals rejected this argument, holding that federal cases "clearly establish the congruence of due process analysis under both the Fourteenth and Fifth Amendments." Pet. App. 30a. It held that Respondents were "persons" under the Fifth Amendment as "neither the PLO nor the PA is recognized by the United States as a sovereign state, and the executive's determination of such a matter is conclusive." Pet. App. 28a.

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[1] During this time, three similar cases were dismissed for lack of personal jurisdiction. *See Livnat v. Palestinian Auth.*, 82 F. Supp. 3d 19, 30 (D.D.C. 2015); *Safra v. Palestinian Auth.*, 82 F. Supp. 3d 37, 48 (D.D.C. 2015); *Estate of Klieman v. Palestinian Auth.*, 82 F. Supp. 3d 237, 244, 248 (D.D.C. 2015). The D.C. Circuit affirmed those decisions. *Estate of Klieman v. Palestinian Auth.*, 923 F.3d 1115, 1118 (D.C. Cir. 2019), *petition for cert. filed*, No. 19-741 (Dec. 5, 2019); *Livnat v. Palestinian Auth.*, 851 F.3d 45, 48, 50 (D.C. Cir. 2017), *cert. denied*, 139 S. Ct. 373 (2018).

Applying *Daimler*, the Second Circuit held that the PA and PLO were not "essentially at home" in the United States and therefore not subject to general jurisdiction in U.S. courts. Pet. App. 35a. Rather, "[t]he overwhelming evidence shows that the defendants are 'at home' in Palestine, where they govern." Pet. App. 34a. The court of appeals held that there was no specific jurisdiction because the United States was not the focal point of the attacks. Pet. App. 55a. The court further determined that there was "no basis to conclude" that Respondents took any action in the United States relevant to the attacks, that the Israeli terror attacks at issue "were not expressly aimed at the United States," and that the injuries suffered by "American plaintiffs in these attacks were 'random [and] fortuitous.'" *Id.*

Petitioners' subsequent *certiorari* petition raised many of same arguments as the current petition.[2] Petition for Writ of *Certiorari*, *Sokolow v. Palestinian Liberation Org.*, No. 16-1071 (Mar. 3, 2017). In particular, Petitioners argued that there was a circuit split about the differences between the due process standards under the Fifth and Fourteenth Amendments. *Id*. at 22a-30a. They also argued that the court of appeals undercut the Legislative Branch's ability to prescribe laws and the Executive Branch's authority to enforce anti-terrorism laws. *Id*. at 14a-18a.

This Court requested the views of the United States, and the Solicitor General recommended against *certiorari*. Br. of the United States as Amicus Curiae ("CVSG Br.") at 1, *Sokolow v. Palestinian Liberation*

[2] Plaintiffs in the parallel *Livnat* and *Safra* cases also sought this Court's review on "substantially the same" issues raised in the first *Sokolow* petition. *See* Petition, p. *i*, *Livnat v. Palestinian Auth.*, No. 17-508 (Sept. 28, 2017).

Org., No. 16-1071 (Feb. 22, 2018). The Solicitor General agreed that the court of appeals' "treatment of respondents as entities that receive due process protections" did not conflict with any decision of any other court of appeals, and accorded with the D.C. Circuit's decision in *Livnat*. CVSG Br. at 9.

The United States also recommended denial of the petition because Petitioners' Fifth Amendment theory was "not [] well developed." CVSG Br. at 16-17. As the Solicitor General explained, the Second Circuit's dismissal "does not conflict with any decision of this Court, implicate any conflict among the courts of appeals, or otherwise warrant this Court's intervention." *Id.* at 7, 15-16 ("Petitioners point to no decision adopting their [] theory . . . [i]ndeed, the D.C. Circuit concluded that 'no court has ever' adopted such an argument.").

Finally, the Solicitor General rejected Petitioners' arguments that the court of appeals' holding harmed the Executive Branch's ability to enforce the Anti-Terrorism Act: "[N]othing in the court's opinion calls into question the United States' ability to prosecute defendants under the broader due process principles the courts have recognized in cases involving the application of U.S. criminal laws to conduct affecting U.S. citizens or interests." *Id.* at 18. This Court denied *certiorari*. *Sokolow v. PLO*, 138 S. Ct. 1438 (2018).

B. The ATCA and Petitioners' motion to recall the mandate.

After the court of appeals' decision became final, Congress passed the ATCA. The ATCA purported, in pertinent part, created "deemed" consent to personal jurisdiction if, after the date that is 120 days after the date of enactment, (1) the defendant accepted certain U.S. foreign aid, or (2) "in the case of a defendant

benefiting from a waiver or suspension of section 1003 of the Anti-Terrorism Act of 1987 (22 U.S.C. §5202)," the defendant "establish[ed]" or "continue[d]" to "maintain any office, headquarters, premises, or other facilities or establishments within the jurisdiction of the United States." Pet. App. 116a-117a.

Following the ATCA's passage, Petitioners moved to recall the Second Circuit's mandate, arguing that the ATCA created personal jurisdiction over Respondents. Motion, Oct. 8, 2018, Dkt 255, p. 10 (2d Cir. No. 15-3135). Petitioners admitted that they planned to "refile and re-prosecute their ATA claims in a new action." *Id.* at 11. They filed that action in the district court less than three months later. *See Sokolow v. Palestine Liberation Organization*, No. 18-cv-12213 (S.D.N.Y.).

The ATCA was enacted while the *Livnat* petition was still pending. *See* Petition for *certiorari*, *Livnat v. Palestinian Auth.*, No. 17-508. In the same fashion as the *Sokolow* Petitioners have raised the PSJTVA in this case, the *Livnat* plaintiffs raised the ATCA by supplemental brief before this Court and argued that the new statute required a GVR. *See* Pet. Supp. Br., p. 1, *Livnat v. Palestinian Auth.*, No. 17-508 (Sept. 14, 2018), and Pet. Letter (Oct. 5, 2018). This Court denied *certiorari* in *Livnat* on October 15, 2018. 139 S. Ct. 373 (2018).

In another similar case pending before the D.C. Circuit, the United States filed two amicus briefs stating that the factual prerequisites for jurisdiction under the ATCA had not been met. U.S. Brief, *Klieman v. Palestinian Auth.*, No. 15-7034 (D.C. Cir. Feb. 15, 2019) ("Feb. 2019 U.S. Br."); U.S. Brief, *Klieman v. Palestinian Auth.*, No. 15-7034 (D.C. Cir. Mar. 13, 2019) ("Mar. 2019 U.S. Br."). The United States explained that the ATCA "does not operate to

'deem[]' defendants to have consented to personal jurisdiction in this case." Feb. 2019 U.S. Br. at 1. The United States also advised that the ATCA's "factual predicates are not satisfied" because Respondents "declined to 'accept' the foreign assistance specified in the ATCA and do not currently 'benefit' from a waiver of section 1003 of the Anti-Terrorism Act of 1987." Mar. 2019 U.S. Br. at 1.

The United States determined that the last waiver of Section 1003 expired in November 2017 and that Respondents' Washington, D.C. Mission closed as of October 10, 2018. Feb. 2019 U.S. Br. at 4-6. While Respondent PLO "continues to maintain its United Nations Observer Mission in New York," the United States stated that the UN Mission does not "fall within the terms of the ATCA" because it is not considered to be within the jurisdiction of the United States. *Id*. For these reasons the United States concluded that the "ATCA's statutory predicates are not satisfied, and thus Section 4 does not operate to 'deem' the PA/PLO to have consented to personal jurisdiction." *Id.* at 7.

Accepting the unrebutted representations of the Executive Branch, the court of appeals denied Petitioners' motion to recall the mandate. The court found that "[t]he plaintiffs have not shown that either factual predicate of Section 4 of the ATCA has been satisfied." Pet. App. 7a; *see also Klieman*, 923 F.3d at 1128 ("plaintiffs have failed to offer plausible allegations that any of the factual predicates of ATCA § 4 has been met"). As to the foreign aid prong of the ATCA, the court noted that "plaintiffs state only that the defendants have accepted qualifying assistance in the past; they do not contend that the defendants currently do so." Pet. App. 7a.

Turning to the ATCA's requirement of a physical office within the jurisdiction of the United States, the court of appeals held that Petitioners failed to show that Respondents had "an office or other facility 'within the jurisdiction of the United States.'" *Id.* The court concluded that Petitioners' filings did "not provide any reason to doubt the Department of Justice's representation" that the factual predicates of the ATCA have not been satisfied. *Id.*

The court of appeals also rested its decision on an alternate ground, holding that the "[c]ourt's interest in finality . . . weighs against recalling the mandate." Pet. App. 9a. The court concluded that "[r]ecalling the mandate now would offend 'the need to preserve finality in judicial proceedings.'" *Id.* (internal quotations omitted). The ATCA did not undermine those finality concerns because, as the court noted, the statute "does not suggest that courts should reopen cases that are no longer pending." *Id.* Noting that Plaintiffs had filed a duplicative case to take advantage of new jurisdictional facts, the court determined that "[t]o the extent that there are any developments in the activities of the PA or the PLO that may subject them to personal jurisdiction under the ATCA, they can be raised in that case." Pet. App. 9a-10a n.2.

Petitioners petitioned for *certiorari* from the court of appeals' denial of their motion to recall the mandate based on the passage of the ATCA.

C. The PSJVTA.

One week after Petitioners filed their Petition for *certiorari*, Congress amended the ATCA with the PSJVTA. Under the PSJVTA, Respondents are "deemed to have consented to personal jurisdiction" if, after January 4, 2020, they "continue[] to maintain any office, headquarters, premises or other facilities

or establishments" or "conduct[] any activity" "on behalf of the Palestine Liberation Organization or Palestinian Authority while physically present in the United States." 18 U.S.C. §2334(e)(1)(B).

The PSJVTA, however, specifically exempts from jurisdictional consideration (1) the maintenance of "any office, headquarters, premises, or other facility or establishment used exclusively for the purpose of conducting official business of the United Nations;" (2) "any activity undertaken exclusively for the purpose of conducting official business of the United Nations;" (3) activities "exclusively for the purpose of meetings with officials of the United States or other foreign governments" or other activities approved by the Secretary of State, and (4) activities related to legal representations. *See* 18 U.S.C. §2334(e)(3)(A)-(E). Significantly, the PSJVTA expressly exempts "any personal or official activities conducted *ancillary to*" those types of activities. *Id.*, §2334(e)(3)(F) (emphasis added). The PSJVTA also contains a savings clause providing that it "shall not abrogate any consent deemed to have been given under" the ATCA. PSJVTA, §903(d)(2).

A month after the passage of the PSJVTA, Petitioners filed a supplemental brief asking this court to issue a GVR based on the PSJVTA. Petitioners' supplemental brief makes no meaningful assertion that the factual prerequisites of the PSJVTA have been satisfied since its passage.

REASONS TO DENY THE PETITION

I. The Petition should be denied because the decision below rests on an independent and discretionary ground unaffected by the PSJVTA.

The court of appeals' reliance on the finality of its mandate renders this case a poor candidate for *certiorari*, via GVR or otherwise. The Second Circuit declined to reopen the mandate on the alternative ground that "[r]ecalling the mandate now would offend 'the need to preserve finality in judicial proceedings.'" Pet. App. 9a (citation omitted). That discretionary basis for denying Petitioners' motion independently supports the outcome here, and is unaffected by the PSJVTA.

Courts of appeals have "inherent power" over their mandates that is "subject to review for an abuse of discretion." *Calderon v. Thompson*, 523 U.S. 538, 549 (1998). This Court should be especially hesitant to overturn a court's decision to decline such an "extraordinary" remedy given the "'the profound interests in repose' attaching to the mandate of a court of appeals." *Id.* at 550 (citing 16 Wright, Miller, & Cooper, Federal Practice and Procedure §3938, p. 712 (2d ed. 1996)).

This Court has long upheld the interests of finality. In *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 75 (1996), for example, the defendant improperly removed the case from state court. While reasons to reverse based on the improper removal were "hardly meritless," this Court held that "considerations of finality, efficiency, and economy" were "overwhelming." *Id.*; *Cobbledick v. United States*, 309 U.S. 323, 326 (1940) ("For purposes of appellate procedure, finality . . . is not a technical concept of temporal or physical termination. It is the means for achieving a healthy legal system.");

McCleskey v. Zant, 499 U.S. 467, 491 (1991) ("One of the law's very objects is the finality of its judgments.").

The concern for finality—and the discretion afforded to the courts of appeals on that issue—is especially pronounced in the context of recalling a mandate. This Court has explained that recalling a mandate is a power "of ***last resort***, to be held in reserve against ***grave, unforeseen contingencies***." *Calderon*, 523 U.S. at 549 (emphasis added). Such circumstances are entirely absent here: Petitioners do not need to recall the mandate to preserve their claims, or to explore future jurisdictional facts. As the court of appeals explained, Petitioners already have a case in which to raise future jurisdictional developments:

> The plaintiffs in this case have filed a new complaint in the Southern District of New York. *Sokolow v. Palestine Liberation Organization*, No. 18-cv-12213 (S.D.N.Y.). To the extent that there are any developments in the activities of the PA or the PLO that may subject them to personal jurisdiction under the ATCA, they can be raised in that case. Pet. App. 9a-10a n.2. If, at some future time, facts develop implicating the PSJVTA's deemed-consent provisions, Petitioners' other lawsuit would be a much better vehicle to raise them than this closed case.

Emphasizing Petitioners' other path forward, the court of appeals held that Petitioners' desire to re-open the case did not eclipse its finality concerns. Pet. App. 9a. The court underscored that, "[t]he mandate in this case was issued two and a half years ago, and the Supreme Court denied the plaintiffs' petition for a writ of *certiorari* more than six months before the plaintiffs filed their motion to recall the mandate." *Id.* This focus on judicial finality is an alternative, entirely discretionary ground that is independently

sufficient to uphold the lower court's decision not to recall its mandate.

The PSJVTA does not change this alternative basis for the decision below. Indeed, the only relevant change is the passage of time: *three and a half years* have now elapsed since the original mandate. In response to the ATCA, Petitioners argued that the legislation allowed the Second Circuit to re-open the case and reinstate the jury verdict. *See* Plaintiffs' Br., Oct. 8, 2018, Doc. 255, p. 1 (2nd Cir. No. 15-3135). But the court of appeals reviewed the actual language of the ATCA and found no indication in the text that closed cases should be reopened. Pet. App. 9a. And while Petitioners make the exact same argument as to the PSJVTA (Pet. Supp. Br. 5 ("Congress *enabled* the Judiciary to reopen judgments…")), Petitioners concede that Congress cannot require the court of appeals to re-open this closed case (*id.*), and once again the PSJVTA's text includes no provision stating that the mandate in closed cases should be recalled. Pet. Supp. App. 1a-7a.

Lacking such a provision, Petitioners point to the PSJVTA's provision stating that it applies to cases "pending on or after August 30, 2016." Pet. Supp. Br. 4-5. Petitioners argue that Congress wanted to direct the court of appeals, *sub silentio*, to recall its mandate by using the date of the original decision of the court of appeals in this case. *Id*. While Petitioners concede that Congress cannot explicitly direct the court of appeals to reopen its mandate, they suggest that Congress can achieve this forbidden result by providing this implicit "signpost." Pet. Supp. Br. 4-5. Even if a judgment could be undone by reading Congressional tea-leaves, it makes little sense in this case. In the face of the lower court's decision that no language in the ATCA provided that "closed cases can

be reopened," Pet. App. 9a, Congress again omitted that language in the PSJVTA.

In any event, issuing a GVR here would undermine a federal court's constitutional power to declare an end to litigation. Petitioners agree that "Congress may not 'retroactively comman[d] the federal courts to reopen final judgments'" and concede Congress did not do so here. Pet. App. 9a (citing *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1323 (2016)). This Court has long protected federal courts' authority to declare finality. Once a decision of the Judicial Branch becomes final, "Congress may not declare by retroactive legislation that the law applicable to that very case was something other than what the courts said it was." *Plaut*, 514 U.S. at 227. The judiciary's judgments "may not lawfully be revised, overturned or refused faith and credit by another Department of Government." *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113-14 (1948).

Congress cannot, as Petitioners suggest, expect courts to follow "implied" commands to reopen a case when it cannot actually issue such directives. *Downes v. Bidwell*, 182 U.S. 244, 261 (1901) ("in other words, Congress could not do indirectly . . . what it could not do directly"). And if Congress does use circumlocutions to hint that the federal courts should reopen a closed case, courts should ignore such overtures and instead apply the plain text of the legislation. *See Peabody Coal Co. v. Dir., Office of Workers' Comp. Programs*, No. 12-4366, 2017 Fed. App. 0108P, *7 (6th Cir. Dec. 23, 2014) (Sutton, J., concurring) (legislation violates separation of powers whether it explicitly changes the law that applies in a closed case or whether a court interprets that legislation to do the same thing).

These separation of powers principles further counsel against a GVR in this already-final case. The concern for finality animated the court of appeals' decision and should be respected by this Court. Denying the petition allows Petitioners to raise their new jurisdictional arguments in the duplicative new case they chose to file, and avoids creating unnecessary constitutional problems.

II. *Certiorari* is unwarranted on the ATCA.

Petitioners' arguments about the ATCA do not warrant *certiorari*. As discussed above, the Second Circuit rejected Petitioners' motion to recall the mandate based on the independent and discretionary ground of finality. This is reason alone to deny *certiorari* on the ATCA issues.

In addition, with the passage of the PSJVTA, the ATCA is now applicable retrospectively to only the plaintiffs in this and the *Klieman* cases and will not apply in any future cases. *See Vasquez v. United States*, 454 U.S. 975, 977 (1981) (Stevens, J., concurring in denial of *certiorari*) ("It is often appropriate to decline to review a decision that turns on details of the evidence that are not likely to be duplicated in other cases."); *Triangle Improv. Council v. Ritchie*, 402 U.S. 497, 499 (1971) (Harlan, J., concurring in dismissal) ("The fact that the statute has been repealed since certiorari was granted and that less than 10 persons would be affected were we to accept petitioners' legal position renders this case, I think, a classic instance of a situation where the exercise of our powers of review would be of no significant continuing national import."). And although the PSJVTA provides that it "shall not abrogate any consent deemed to have been given under" the ATCA, PSJVTA §903(d)(2), two courts of appeals have accepted the United States' unrebutted

determination that the ATCA's factual predicates were not met during the period before the PSJVTA supplanted the ATCA.

Granting *certiorari*, furthermore, would require this Court to address the thorny constitutional issues regarding Congress' creation of artificial "consent," which were avoided by both courts of appeals to address the ATCA. *See* Pet. App. 10a; *Estate of Klieman*, 923 F.3d at 1131 ("we need not reach the defendants' constitutional challenges"). Indeed, the United States also advised those courts to avoid those issues. Mar. 2019 U.S. Br. at 8 ("[i]t is particularly appropriate for the Court to avoid unnecessarily addressing the constitutional issue here, as it arises in the context of the conduct of foreign relations"). The relevant constitutional problems include that the government may not impose conditions which require the relinquishment of constitutional rights, and deemed consent cannot replace the due process-based tests for personal jurisdiction. The PSJVTA has changed the "deemed" jurisdictional framework yet again, and the developing facts under the new framework have not been analyzed by any court. Accordingly, this case is not a good use of this Court's *certiorari* power, and Petitioners' duplicative new case is a far better, and purpose-built, vehicle for doing so.

Nor is there any circuit split on the narrow, fact-intensive question of whether the ATCA's factual predicates were met here. The court below, the D.C. Circuit, and the United States all agree that Respondents' activities do not satisfy that now-superseded statute. In relevant respect, the ATCA provides that Respondents "shall be deemed to have consented to personal jurisdiction" in an action under the Anti-Terrorism Act if they (1) "benefit[]" from a "waiver" of Section 1003 of the Anti-Terrorism Act of 1987 (22 U.S.C. §5202) with respect to (2) a mission or

office "within the jurisdiction of the United States."[3] The court below held that the ATCA did not apply in this case because Plaintiffs failed to demonstrate that either of those two separate, mandatory components had been met. Pet. App. 7a-8a.

First, as to whether the Executive Branch has issued a waiver for Respondents' benefit under 22 U.S.C. §5202, the Executive Branch is in the unique position to settle that question conclusively. It represented that the Executive Branch had *not* issued such a waiver. The court of appeals accepted that representation, which was unrebutted by Petitioners below. The D.C. Circuit is in agreement. That agreement by two courts on a dispositive factual issue makes this question unworthy of *certiorari* review. *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 841 (1996) (The Court "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.") (citation omitted).

Section 1003 of the 1987 Anti-Terrorism Act forbids the PLO from establishing any office or mission "within the jurisdiction of the United States." 22 U.S.C. §5202. As recently explained by the United States, the Executive Branch has the ability to waive that prohibition to allow the PLO "to maintain an office of the General Delegation in Washington, DC." Mar. 2019 U.S. Br. at 2-4. The Executive Branch explained that it stopped granting that waiver such that "defendants do not currently 'benefit[]' from a

[3] The ACTA also creates jurisdiction if Respondents accept certain U.S. foreign aid. But Petitioners do not challenge the lower court's decision on this point: "the plaintiffs state only that the defendants have accepted qualifying assistance in the past; they do not contend that the defendants currently do so." Pet. App. 7a.

waiver of section 1003." *Id.* at 1, 4 ("No waiver of section 1003 currently is in effect.").

Petitioners argue that the Executive Branch has actually issued an "implied" or "constructive" waiver—the protestations of that very branch notwithstanding. Pet. 14-17. Petitioners' arguments regarding implied waiver are undeveloped and unsupported by any lower court decisions. They are also contrary to the statutory text. As explained by the court below, "allowing implied waivers to qualify under Section 4 of the ATCA would 'neglect the actual language of the legal authorization to issue waivers under [1987 Anti-Terrorism Act] § 1003, . . . which creates legal consequences when the President 'certifies in writing' that a waiver is to be issued.'" Pet. App. 7a-8a, quoting *Estate of Klieman*, 923 F.3d at 1131.

Second, Petitioners argue that, contrary to the Second Circuit's holding, the UN Mission is "within the jurisdiction of the United States." *See* Pet. 17. This argument was made for the first time in their petition for rehearing from denial of their motion to recall the mandate. This Court has "generally refused to consider issues raised clearly for the first time in a petition for rehearing." *Adams v. Robertson*, 520 U.S. 83, 89 n.3 (1997); *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987) (declining to address issue where "Appellants did not present the issues squarely to the state courts until they filed their petition for rehearing with the Court of Appeal.").

Petitioners identify no authority departing from the Second Circuit's conclusion that the PLO's UN Mission "is not considered to be within the jurisdiction of the United States." Pet. App. 8a. Rather, "[s]ince the enactment of section 1003, courts have held that its prohibitions 'do not apply . . . to the PLO's Mission

in New York.'" Mar. 2019 U.S. Br. at 2-4. As the Second Circuit has explained, "the PLO's participation in the UN is dependent on the legal fiction that the UN Headquarters is not really United States territory at all, but is rather neutral ground over which the United States has ceded control." *See* Pet. App. 8a (quoting *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 51 (2d Cir. 1991)).

Indeed, the United States agrees that Section 1003 of the 1987 Anti-Terrorism Act does "not apply … to the PLO's Mission in New York." Mar. 2019 U.S. Br. at 4, quoting *Klinghoffer*, 937 F.2d at 46. In the view of the Executive Branch, the "United Nations Observer Mission in New York" does not "*fall within the terms of the ATCA*." Feb. 2019 U.S. Br. at 6 (emphasis added). The United States explained that it does not regard Respondents' New York UN Mission as requiring a waiver under 22 U.S.C. §5202 (Section 1003 of the 1987 Anti-Terrorism Act) for this reason. *Id*. at 5-7 ("The Executive Branch does not issue waivers of section 1003 to permit the PLO to maintain its New York Observer Mission.").

More broadly as to both issues, this Court should be in no rush to review the unrebutted factual assertions of the Executive Branch regarding the characterization of a foreign mission or the ability of foreign missions to function. *See Dept. of the Navy v. Egan*, 484 U.S. 518, 529-30 (1988) ("The Court . . . has recognized the generally accepted view that foreign policy was the province and responsibility of the Executive.") Indeed, the United States previously filed a Statement of Interest to prevent prior plaintiffs from using a judgment to foreclose on the PLO's UN Mission. *Ungar v. Palestinian Auth.*, U.S. Statement of Interest, Doc. 29-1 (S.D.N.Y. No. 1:05-mc-00180) (arguing that decisions regarding foreign missions are committed to the Executive Branch).

The ATCA forced Respondents to stop accepting foreign aid from the United States, and it was enacted after the Executive Branch had forced the closure of their Washington D.C. Mission by withdrawing the Section 1003 waiver, which prevents its reopening. *See id.* at 1131. Nonetheless, the Executive Branch has stated authoritatively that these circumstances do not impair the continued functioning of the PLO UN Mission, and that the ATCA does not implicate "deemed" jurisdiction over Respondents. Given these carefully considered Executive Branch positions, which foster the continued functioning of the PLO UN Mission, this Court should not wade into the Executive Branch's nuanced foreign policy decisions by reviewing these narrow, fact-intensive issues, which in any event will have no wider application now that the PSJVTA has supplanted the ATCA.

III. Petitioners fail to show a "reasonable probability" that the PSJVTA would change the ultimate outcome.

A GVR requires a "reasonable probability" that that newly-passed legislation will affect "the ultimate outcome" of the case. *Wellons*, 558 U.S. at 225. This in turn requires both that the PSJVTA likely creates personal jurisdiction over Respondents *and* that the court of appeals would likely ignore its independent finality holding and recall its mandate. Petitioners fail to make either showing.

A. Petitioners fail to show that the PSJVTA creates personal jurisdiction.

The PSJVTA altered the ATCA's "within the jurisdiction of the United States" language to deem that Respondents "consent" to jurisdiction if they have a physical presence or engage in certain activities "in the United States" after January 4, 2020. But, as with the ATCA, the record facts as to Respondents' U.S.

presence and past activities are exempt from jurisdiction under the PSJVTA's revised framework.

First, as the court of appeals held relevant to the ATCA provisions, "the plaintiffs in this case have not shown that the defendants have established or continued to maintain an office or other facility within the jurisdiction of the United States." Pet. App. 8a. The PSJVTA's "in the United States" language has no bearing on the PLO's UN Mission, as it is not "in the United States" for jurisdictional purposes as a matter of law. *See Klinghoffer*, 937 F.2d at 51 ("the PLO's participation in the UN is dependent on the legal fiction that the UN Headquarters is not really United States territory at all, but is rather neutral ground over which the United States has ceded control.").

Second, the PSJVTA explicitly forecloses Petitioners' claim that the ordinary-course activities of the PLO's UN Mission personnel creates "deemed-consent" jurisdiction over Respondents. The PSJVTA adds an express exemption that forbids courts from finding jurisdiction based on conduct "ancillary to" Respondents' official UN and government-focused activities, and legal representation. *See* 18 U.S.C. §2334(e)(3)(A)-(F). For consent to jurisdiction to be "deemed" under the PSJTVA, Petitioners would have to show that Respondents' physical presence and activities in the United States go beyond those that are "ancillary" to United Nations' business, meetings with U.S. or foreign government officials, and legal representation. *Id*.

Petitioners nowhere discuss the PSJVTA's express exception for "ancillary" activities, let alone claim that the activities of Respondents' UN Mission personnel, reflected in the record below, exceed those that are "ancillary" under the PSJVTA. Ancillary means "supplementary," Black's Law Dictionary (11th ed.

2019), or "incidental or peripheral to another thing," The Wolters Kluwer Bouvier Law Dictionary Desk Ed. (2012). *See also Wis. Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214 (1992) (distinguishing activities that are "essential" to an activity from those that are "ancillary" because they have a "connection" to an activity); *see also* Statement of Sen. Leahy, Cong. Rec.—Sen., S267 (Jan 28, 2020) (statement that under the PSJVTA, Respondents "may meet with advocates regarding relevant issues, make public statements, and otherwise engage in public advocacy and civil society activities that are ancillary to the conduct of official business without consenting to personal jurisdiction").[4]

Respondents' UN Mission, and the record facts concerning the past activities of its Mission personnel, all easily fall within the exceptions for UN and governmental activities and ancillary activities. The only record facts cited by Petitioners in their supplemental brief involve old examples of public speeches by members of the Palestinian UN Mission. Pet. Supp. Br. 4. Tellingly, Petitioners do not explore these citations in any detail. Specifically, the citations state that: (1) decades ago, UN Mission employees "gave speeches and interviews every month or so" and distributed "informational materials . . . to those seeking information about the PLO," *Klinghoffer v. S.N.C. Achille Lauro*, 795 F. Supp. 112, 114-15 (S.D.N.Y. 1992); (2) the UN Mission once "had a checking account and at least two telephone lines" and the UN ambassador participated in TV interviews, Pet. App. 107a-109a; finally, (3) the UN ambassador

[4] Petitioners extrapolate from vague statements in the legislative history and the "Sense of Congress" (Pet. Supp. Br. 5), but the language of the PSJVTA is quite clear—and consistent with Sen. Leahy's statement.

gave a speech at a church and talked with Fox News, a "Palestine UN" twitter account was active, and an employee of the UN Mission was not accredited with the United Nations, *see* Plaintiffs' Br., Mar. 25, 2019, Doc. 305-2, p. 8-9 (2d Cir. No. 15-3135). These activities are plainly "ancillary," "supplementary," "incidental or peripheral," or otherwise "connect[ed]" to the official activities of Respondents' UN Mission.

The United States and the court below already considered and rejected Petitioners' claims about the significance of such activities under the ATCA. Feb. 2019 U.S. Br. at 6-7; Pet. App. 8a. Indeed, Petitioners have argued for many years that those activities created general jurisdiction over Respondents. *See* Pet. App. 107a. Given that the PSJVTA has been amended to now explicitly exempt conduct that is "ancillary" to official functions of the UN Mission, there is no reasonable probability that the same conduct could create jurisdiction under that statute. In other words, Petitioners have no evidence of *past* conduct by UN Mission personnel that would create jurisdiction, and no *current* prospects of future facts that would create jurisdiction under the PSJVTA.

A GVR on a decision not to recall the mandate is a poor use of this Court's power, especially where, as here, the facts creating jurisdiction do not yet (and may never) exist. Petitioners rely on this Court's recent GVR orders, including *Clearstream Banking S.A. v. Peterson*, 205 L. Ed. 2d 450 (2020), claiming that the PSJVTA is no different than the other legislation. Pet. Supp. Br. 3. But the legislation at issue in each of the cases they cite applied to the existing record facts. On remand from a GVR in those cases, the court of appeals could simply apply the new legislation to the existing facts. The PSJVTA, by contrast, applies only to new facts occurring after its

enactment—which must necessarily be developed in the future.

In a case such as this, there can be no "reasonable probability" that the factual predicates of jurisdiction under the PSJVTA will ever come to pass. The statute's potential to affect the outcome of a long-final judgment depends on facts that may never occur. *Cf. Tex. v. United States*, 523 U.S. 296, 300 (1998) ("A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'"). The interference with discretion, delay, and uncertainty that would accompany a GVR in such circumstances counsels strongly against such an action. *Lawrence v. Chater*, 516 U.S. 163, 167-68 (1996) ("if the delay and further cost entailed in a remand are not justified by the potential benefits of further consideration by the lower court, a GVR order is inappropriate"). If Petitioners believe that future facts that implicate the PSJVTA will develop, they can wait until they develop and then use their already-filed parallel lawsuit to raise those issues.

This Court was faced with this exact same situation in *Livnat v. Palestinian Auth.* (No. 17-508). Congress passed the ATCA when the petition for *certiorari* in *Livnat* was pending, and those plaintiffs asked the Court for a GVR based on the possibility that Respondents would take *future* actions that would create jurisdiction under the new statute. Pet. Supp. Br., Sep. 14, 2018, p. 2 (*Livnat*, No. 17-508) ("If the Palestinian Authority chooses to continue receiving" certain U.S. foreign aid "it will consent to personal jurisdiction in the present cases . . ."). This Court rejected the request for a GVR and denied the Petition, *Livnat*, 139 S. Ct. 373. The same result should obtain in this case.

Petitioners are also wrong to assume that the "interest of the United States" (*see, e.g.,* Pet. 26-30) requires that they prevail on any argument that leads to jurisdiction. The United States has uniformly rejected Petitioners' jurisdictional claims. Most recently, the Department of Justice explained that there was no personal jurisdiction over Respondents under the ATCA. Feb. 2019 U.S. Br. at 1; Mar. 2019 U.S. Br. at 1. The Solicitor General's prior CVSG brief in this case argued against *certiorari* because Petitioners' jurisdictional theories were undeveloped and unsupported. CVSG Br. at 15-17. And the State Department made Respondents' appeal possible in the first place by asking the lower court to consider a stay pending appeal to prevent the Palestinian Authority from "insolvency and collapse." U.S. Statement of Interest, Aug. 10, 2015, Doc. 953 & 953-1, at 2 (S.D.N.Y., No. 04-cv-00397).

Nonetheless, the Court may consider it useful to seek the views of the United States concerning the PSVTA-interpretation issues given the potential impact of Petitioners' interpretations of the PSJVTA on the Administration's recently announced "*Peace to Prosperity*" framework to resolve the Israeli-Palestinian conflict.

B. Petitioners fail to show a reasonable probability that the court of appeals will reverse its finality holding and recall the mandate.

Finally, even if there were a reasonable probability the PSJVTA's requirements are met, a GVR would not be appropriate unless a "reasonable probability" existed that the court of appeals would reverse its finality holding. As explained above, recalling a mandate is only appropriate as a "last resort, to be held in reserve against grave, unforeseen

contingencies." *Calderon*, 523 U.S. at 550. The court of appeals concluded that the *opposite* circumstances exist here, because "any developments in the activities of the PA or the PLO" could be raised in other cases. Pet. App. 9a-10a n.2.

As the court below recognized, Petitioners can pursue their new, post-judgment jurisdictional theories through the duplicative new lawsuit they chose to initiate. *Id*. That separate, open case that Petitioners chose to file is a better vehicle for developing future jurisdictional facts and arguments under the PSJVTA. *Sokolow v. Palestine Liberation Organization*, No. 18-cv-12213 (S.D.N.Y.). The district court can adjudicate issues of personal jurisdiction that Respondents will promptly raise at the appropriate time. And the district court can determine if evidence from this case is admissible in the new case. Petitioners' new case thus is a far better vehicle for resolution of their fact-based questions of personal jurisdiction under the PSJVTA than a GVR in this case.[5]

IV. Petitioners' circuit split does not exist—and their theory is still entirely undeveloped.

Petitioners' arguments about a circuit split were raised in their first petition for *certiorari*, which this Court denied—and no court has meaningfully addressed the issue since. With nothing new for this Court to consider, the views of the United States recommending against *certiorari* should prevail. It is a waste of the Court's time and the parties' resources

[5] A GVR here would raise the additional complication that, in vacating and directing dismissal for lack of jurisdiction the court of appeals never reached Respondents' additional grounds for reversal, which were independent of the jurisdictional question. *See* Brief for Appellants, p. 50-66, *Waldman v. PLO* (2d. Cir. No. 15-3135).

to address the same issues in successive petitions without new law.

The Solicitor General recommended against *certiorari* for Petitioners' prior petition because the application of due process did "not conflict with any decision of this Court, implicate any conflict among the courts of appeals, or otherwise warrant this Court's intervention at this time." CVSG Br. at 7. The Solicitor General explained that, "the contours and implications of petitioners' jurisdictional theory—which turns on whether a defendant's conduct 'interfered with U.S. sovereign interests as set out in a federal statute' . . . —are not themselves well developed." *Id*. at 16-17. The Solicitor General also rejected Petitioners' arguments about undermining anti-terrorism laws because "nothing in the court's opinion calls into question the United States' ability to prosecute defendants under the broader due process principles the courts have recognized in cases involving the application of U.S. criminal laws to conduct affecting U.S. citizens or interests." *Id*. at 18.

As the Solicitor General advised, Petitioners claimed circuit-split does not exist. The Petition cites no new cases that change the analysis. The Petition cherry-picks quotations from old Fifth Amendment cases, but does not discuss their facts or discuss those circuit's current positions. No court has in fact disagreed with the Fifth Amendment due process analysis of the court below. *See* Pet. App. 30a (federal precedent "clearly establish[es] the congruence of [the] due process analysis under both the Fourteenth and Fifth Amendments"). On the contrary, the D.C. Circuit has reached the same holding. *See Livnat*, 851 F.3d at 54 ("No court has ever held that the Fifth Amendment permits personal jurisdiction without the same 'minimum contacts' with the United States as the Fourteenth Amendment requires with respect to

States."). While courts have speculated that the interest of the federal government may take an increased importance in Fifth Amendment cases, the weight and import of that interest has not been explored and no holding contrary to the decision below has been reached.

The criminal cases cited by Petitioners concern the jurisdiction to prescribe extraterritorial conduct (*i.e.*, subject matter jurisdiction), not personal jurisdiction over extraterritorial actors, and are therefore irrelevant. Both *United States v. Noel*, 893 F.3d 1294, 1297 (11th Cir. 2018), *cert denied*, 140 S. Ct. 157 (2019), and *United States v. Murillo*, 826 F.3d 152, 154 (4th Cir. 2016), *cert denied*, 137 S. Ct. 812 (2017), addressed only subject-matter jurisdiction challenges raised by individuals physically present in the United States for overseas attacks against American nationals. Indeed, the defendant in *Murillo* did not even challenge personal jurisdiction on appeal. *Murillo*, 826 F.3d at 156-58. There is no suggestion in either case that the framework for criminal subject-matter jurisdiction should become the personal-jurisdiction framework for civil cases. *See, e.g.,* Brief for the United States, *Murillo v. United States*, No. 16-5924, p. 17-18 (Dec. 14, 2016).

As previously explained by the Solicitor General, Petitioners' cases simply do not discuss any circuit split that is relevant to this case. CVSG Br. at 15-17. Review by this Court is at best premature. *See, e.g., Box v. Planned Parenthood of Indiana & Kentucky, Inc.*, 139 S. Ct. 1780, 1784 (2019) (Thomas, J.) ("[B]ecause further percolation may assist our review of this issue of first impression, I join the Court in declining to take up the issue now.") (concurring in denial of certiorari); *Arizona v. Evans*, 514 U.S. 1, 24 n.1 (1995) (Ginsburg, J., dissenting) ("We have in many instances recognized that when frontier legal

problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court.").

CONCLUSION

For all of the foregoing reasons, the Court should deny the Petition.

Respectfully submitted,

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