No. 19-764

In the Supreme Court of the United States

MARK I. SOKOLOW, ET AL., PETITIONERS,

v.

PALESTINE LIBERATION ORGANIZATION
AND PALESTINIAN AUTHORITY

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

REPLY BRIEF FOR PETITIONERS

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The Second Circuit held that United States courts may not exercise personal jurisdiction over defendants who murder U.S. nationals abroad "even when the political branches conclude that personal jurisdiction over a defendant for extraterritorial conduct is in the national interest." Pet. App. 30a. After Congress enacted 18 U.S.C. § 2334(e) to restore jurisdiction over respondents in this and similar cases, the same panel held, improbably, that Congress had enacted a law that did nothing. Pet. App. 7a-9a.

Overwhelming bipartisan majorities in Congress have now acted a second time to close the statutory gaps perceived by the panel and to clarify that Congress has empowered the federal courts to exercise personal jurisdiction over respondents if they continue conduct that they have engaged in for decades, *i.e.*, maintaining facilities and conducting activities in the United States, and paying money to families of terrorists imprisoned for or killed while attacking Americans. Promoting Security and Justice for Victims of Terrorism Act of 2019, Pub. L. No. 116–94, div. J, tit. IX, § 903, 133 Stat. 3082 (PSJVTA).

Respondents concede (Opp. 21) that a new federal statute is an "intervening development[]" warranting a GVR if 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," and such redetermination may change "'the ultimate outcome' of the matter." See *Wellons* v. *Hall*, 558 U.S. 220, 225 (2010) (*per curiam*) (internal quotation marks omitted).

Respondents argue that there is no "reasonable probability" that the PSJVTA has conferred jurisdiction over them. Opp. 21-25. But respondents do not represent

unconditionally that they stopped *all* conduct designated as consent to jurisdiction before the PSJVTA's deadlines. Indeed, they are conspicuously silent about one trigger—their notorious "Pay for Slay" program, which provides financial rewards to terrorists. Instead, they selectively disclose some facts about their U.S. activities and attempt to litigate those facts in this Court, which is "an inappropriate place to develop the key facts." *Sykes* v. *United States*, 564 U.S. 1, 31 (2011) (Scalia, J., dissenting).

Respondents also resist a GVR on the ground that potentially outcome-determinative facts are not in the record. Opp. 3, 21-24. To be sure, findings (possibly aided by discovery) may ultimately be required if respondents refuse voluntarily to confirm the predicate facts. But as this Court recognized in *Wellons*, 558 U.S. at 226, that is a reason *for* a GVR.

Last, respondents purport to invoke an interest in "finality"—at the same time that they suggest that petitioners should rely on the PSJVTA to prosecute a brand-new action. Opp. 12-16. Thus, respondents concede that true "finality" is not an option here, because *some* further proceedings will be necessary in light of the PSJVTA. The question, then, is whether the interest in finality is better served by a GVR, which would allow the lower courts to end the case forthwith after making a single jurisdictional determination; or whether finality is better served by requiring that *same* jurisdictional determination in a *new* case about the same facts, to be followed by a second lengthy trial about the same facts already tried, and then a second set of appeals. Simply asking the question reveals that respondents' true interest is not in finality but in its opposite: relitigating this case from the beginning to postpone as long as possible their day of reckoning.

ARGUMENT

A. The New Statute Supersedes Every Legal Conclusion Supporting The Second Circuit's Decision

In the PSJVTA, Congress superseded each of the Second Circuit's three legal conclusions that 18 U.S.C. § 2334(e) did not provide a basis for finding respondents consented to personal jurisdiction.

First: The court held that § 2334(e) does not reach respondents because they are not "benefiting from a waiver or suspension" of Section 1003 of the Anti-Terrorism Act of 1987, 22 U.S.C. § 5202. Pet. App. 7a-8a. In response, Congress eliminated the "benefiting from a waiver or suspension" requirement. The statute now applies simply to "defendant[s]," defined to include respondents by name. Supp. Br. App. 3a-4a (amending § 2334(e)(1)), 6a (adding § 2334(e)(5)).

Second: The court held that respondents' Manhattan townhouse "is not considered to be within the jurisdiction of the United States" because it is used—in part—for UN business. Pet. App. 8a. In response, Congress created two new jurisdictional triggers and clarified the existing one.

a. Congress added a new jurisdictional trigger, effective April 18, 2020, providing that respondents are deemed to have consented to jurisdiction by paying families of terrorists imprisoned for or killed while attacking Americans. Supp. Br. App. 4a (amending § 2334(e)(1)(A)). Congress based this trigger on respondents' notorious "Pay for Slay" policy "codified in Palestinian law," which gives "generous rewards to Palestinians who carry out bombings, stabbings and other attacks against innocents in Israel." Editorial, "Pay for Slay in Palestine," *Wall Street Journal* (Mar. 27, 2017). Respondents say nothing about this trigger. Their silence is pregnant, since they

have repeatedly vowed never to cease these payments. See, *e.g.*, Statement by Mahmoud Abbas, United Nations General Assembly, 74th Sess. (Sept. 26, 2019), www.youtube.com/watch?v=LOvUGKcjSHI at 24:26-46 ("Even if I only have one penny left, I will give this penny to the families of the martyrs, to our prisoners and heroes * * * .").

b. With regard to respondents' U.S. presence, Congress responded to the panel decision by deleting the phrase "within the jurisdiction" from § 2334(e)(1) so that the statute now provides that respondents consent to jurisdiction by maintaining "any office, headquarters, premises, or other facilities or establishments *in the United States*," unless "used *exclusively* for the purpose of conducting official business of the United Nations." § 2334(e)(1)(B)(i), (3)(A) (emphasis added). To ensure that mixed-use facilities like respondents' Manhattan townhouse are included, Congress provided: "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.* § 2334(e)(4) (emphasis added).

Respondents dismiss these amendments, relying on *dicta* in the Second Circuit's *Klinghoffer* decision that there is a "legal fiction that the UN Headquarters is not really United States territory." Opp. 22 (quoting *Klinghoffer* v. *S.N.C. Achille Lauro*, 937 F.2d 44, 51 (2d Cir. 1991)). Respondents are incorrect. To begin, respondents' New Jersey facility provides consular services having nothing to do with UN business. C.A. Doc. 305-5, at A-278 to A-313.

As for the townhouse, insofar as the panel held that the UN Headquarters Agreement supersedes § 2334(e),

see Pet. App. 8a, Congress overrode that holding by amending the statute to apply "notwithstanding * * * any treaty." § 2334(e)(4). That language reflects "unequivocal" "intent to supersede treaty obligations." *United States* v. *Palestine Liberation Org.*, 695 F. Supp. 1456, 1469 (S.D.N.Y. 1988).[1] As the PSJVTA's lead sponsor, Senator Lankford, explained before the Senate voted, unless respondents "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 concede that the public relations activities conducted from their Manhattan townhouse are "peripheral" and "supplementary" rather than "essential" to UN business. Opp. 22-23.

Respondents are mistaken in arguing (at 22) that § 2334(e)(3)(F)'s exemption for certain "ancillary" activities puts their "physical presence * * * in the United States" beyond the courts' reach. Section 2334(e)(4) requires the opposite conclusion: *all* facilities in the United States "shall be considered to be in the United States" unless they are "specifically exempted by paragraph (3)(A)"—an exemption respondents do not attempt to meet. Paragraph (4) precludes respondents' argument, yet they do not mention it.

Respondents assert (at 24) that there is no evidence *in the record* that they have continued to maintain U.S. facilities after this portion of the PSJVTA took effect January 4, 2020. But respondents' publicly available and U.S.-

[1] The PLO's UN Mission actually *is* within the jurisdiction of the United States, *id.* at 1461, as is the UN Headquarters, see Agreement Regarding the Headquarters of the United Nations, § 7(c), 61 Stat. 3416, T.I.A.S. 1676, 554 U.N.T.S. 308 (1947).

hosted social media presence on Twitter (twitter.com/Palestine_UN) and Facebook (facebook.com/Palestine.at.UN/) and their U.S.-hosted website (PalestineUN.org) reveal that they continue to use their Manhattan facility for public-relations purposes—condemning, for example, alleged "illegal Israeli Settlement Construction," and "Settler Violence." And the need for discovery and fact-finding is a reason to *grant* a GVR request. Thus, in *Wellons*, this Court's GVR instructed the court of appeals to "consider, on the merits, whether petitioner's allegations, together with the undisputed facts, warrant discovery and an evidentiary hearing." 558 U.S. at 226.

Pointing to this Court's denial of review in *Livnat* v. *Palestinian Authority* (No. 17-508), respondents assert that "the facts creating jurisdiction do not yet (and may never) exist." Opp. 24-25. But in *Livnat*, the GVR request was based on anticipated facts that would not develop for several months: the Court denied review nearly four months before the new statute took effect. 139 S. Ct. 373 (2018); see Anti-Terrorism Clarification Act of 2018, Pub. L. 115-253, § 4, 132 Stat. 3183 (ATCA). Here, in contrast, the PSJVTA's January 4, 2020 trigger date has passed, so jurisdiction does not depend on "contingent future events that may never occur." Contra Opp. 25 (quoting *Texas* v. *United States*, 523 U.S. 296, 300 (1998)).

c. Finally, Congress added a jurisdictional trigger, effective January 4, 2020, providing that respondents are deemed to have consented to jurisdiction if they engage in "any activity while physically present in the United States" with certain exemptions including "any activity undertaken *exclusively* for the purpose of conducting official business of the United Nations." § 2334(e)(1)(B)(iii), (3)(B) (emphasis added). Respondents tacitly admit that their activities go beyond those "exclusively for the

purpose of conducting official business of the United Nations" by attempting to invoke paragraph (3)(F)'s exemption for "ancillary" activities. Opp. 22-23.

Respondents' attempt to invoke the "ancillary" activities exemption falls short. Consular services are not "ancillary" to official UN business. And, as Senator Lankford explained, neither are public relations: "the exception in the language for 'ancillary' activities is 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. S7182 (Dec. 19, 2019) (emphasis added). Senator Lankford's guidance tracks the dictionary definition of "ancillary": "activities and services that provide *essential support* to the functioning of a *central service*." Oxford English Dictionary (online ed. 2020) (emphasis added). Respondents urge a more expansive reading of exemption (3)(F), but the courts ordinarily read statutory exceptions narrowly, see *Commissioner* v. *Clark*, 489 U.S. 726, 739 (1989), and here the statute instructs just that: the PSJVTA "should be liberally construed to carry out the purposes of Congress to provide relief for victims of terrorism." Supp. Br. App. 7a, § 903(d)(1)(A).

Respondents rely (at 23) on a supposedly "clarifying" floor statement made five weeks *after* enactment by Senator Leahy, who *opposed* the bill.[2] But "subsequent legislative history" like this "should not be taken seriously," *Sullivan* v. *Finkelstein*, 496 U.S. 617, 632 (1990) (Scalia, J., concurring), especially considering "the danger, when interpreting a statute, of reliance upon the views of its

[2] Senate Judiciary Committee, Results of Executive Meeting Roll-Call Vote on S.2132 (Oct. 17, 2019), www.judiciary.senate.gov/imo/media/doc/101719%20Results%20of%20Executive%20Business%20Meeting.pdf.

legislative opponents." *Dawson Chem. Co.* v. *Rohm & Haas Co.*, 448 U.S. 176, 239 n.14 (1980).

Third: The court held that the "interest in finality also weighs against recalling the mandate," because § 2334(e) "does not provide explicitly or implicitly that closed cases can be reopened" and "does not suggest that courts should reopen cases that are no longer pending." Pet. App. 9a. In response, Congress provided, explicitly, that the courts can and should reopen closed cases. They *can*, because the PSJVTA's amendments "apply to any case pending on or after August 30, 2016," Supp. Br. App. 7a, § 903(d)(2), the day before the Second Circuit issued its judgment in this case, Pet. App. 11a. They *should*, per the PSJVTA's text, because claims by U.S. nationals previously "dismissed for lack of personal jurisdiction" "should be resolved in a manner that provides just compensation to the victims" "without subjecting victims to unnecessary or protracted litigation." *Id.* at 2a-3a, § 903(b)(4)(A), (B).

Respondents' suggestion (at 2, 15) that this aspect of PSJVTA may violate separation of powers is unfounded. To be sure, Congress may not *require* the Judiciary to reopen closed cases. *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1994). But Congress may *enable* the Judiciary to salvage jurisdiction by relying on the "courts' own inherent and discretionary power * * * to set aside a judgment whose enforcement would work inequity." *Id.* at 233. Congress did so here. As Senator Lankford explained, "we are making clear Congress's intent that courts have the power to restore jurisdiction in cases previously dismissed for lack of jurisdiction after years of litigation." 165 Cong. Rec. S7182 (Dec. 19, 2019).

Respondents argue that "finality" was an "independent and discretionary ground" for the panel's order denying the motion to recall the mandate. Opp. 12-16. This appears to misconstrue the order. The court did not say it

was independently weighing "the interest in finality of litigation" and "the interests of justice," *Gondeck* v. *Pan Am. World Airways, Inc.*, 382 U.S. 25, 26-27 (1965), to deny petitioners' motion. Rather, its discussion of "finality" analyzed the presumption against giving legislation retroactive application, suggesting its decision was based on its *legal* conclusion that § 2334(e), as it was then worded, did not apply. Pet. App. 9a. That law has now been amended. At a minimum, there is a "reasonable probability" that reevaluation in light of the PSJVTA "may determine the ultimate outcome." *Wellons*, 558 U.S. at 225.

However, if respondents are correct that the Second Circuit treated finality as an independent ground not to recall its mandate (Opp. 13-14), then the court abused its discretion by misperceiving "the interest in finality" and ignoring "the interests of justice," *Gondeck*, 382 U.S. at 26-27, which requires vacatur of the *judgment*, not merely the order denying the motion to recall the mandate, see *infra* Section B.

B. The Court Should Grant The Petition, Vacate the Judgment, And Remand

This Court has long held that "the interest in finality of litigation must yield," "where the interests of justice would make unfair the strict application of our rules" against reopening judgments. *Gondeck*, 382 U.S. at 26-27 (1965) (quoting *United States* v. *Ohio Power Co.*, 353 U.S. 98, 99 (1957)). Here, the interests are aligned: Finality militates in *favor* of salvaging the judgment.

1. A GVR would advance the goals served by finality. In our Supplemental Brief, we highlighted (at 7-8) the principle that, "once a * * * case has been tried in federal court," "considerations of finality, efficiency, and economy become overwhelming" against forcing a retrial if

jurisdiction can be salvaged on appeal. *Caterpillar Inc.* v. *Lewis*, 519 U.S. 61, 75 (1996)). This is because "requiring dismissal [and retrial] after years of litigation would impose unnecessary and wasteful burdens on the parties, judges, and other litigants waiting for judicial attention." *Newman-Green, Inc.* v. *Alfonzo-Larrain*, 490 U.S. 826, 836-837 (1989). Therefore, "courts should strive to cure jurisdictional defects, rather than dismiss for want of jurisdiction, in cases that have already proceeded to trial and judgment." *CGB Occupational Therapy, Inc.* v. *RHA Health Servs. Inc.*, 357 F.3d 375, 381 n.6 (3d Cir. 2004). This case has been pending for sixteen years. Two plaintiffs have died waiting to see justice done for their murdered children. Respondents never acknowledge the strong institutional interests in salvaging jurisdiction after trial, if at all possible.

We also highlighted (Supp. Br. 8-9) petitioners' strong reliance interest in restoring the final judgment in their favor. A terror victim forced to undergo "the wrenching process of testifying again" suffers "serious prejudice," due to the "enormous emotional cost to Plaintiffs should they be forced to undergo the excruciating process of testifying about their loss all over again." *Gilmore* v. *Palestinian Interim Self-Governing Auth.*, 675 F. Supp. 2d 104, 111 (D.D.C. 2009) (internal quotation marks omitted), aff'd, 843 F.3d 958 (D.C. Cir. 2016). Respondents have nothing to say about petitioners' reliance interest.

And we observed (Supp. Br. 9-10) that respondents have no countervailing reliance interest in the finality of the Second Circuit's jurisdictional dismissal, because—as they acknowledge—if this Court does not GVR, they will still be required to defend the re-filed case. See Opp. 13, 27. Thus, denying the petition would do nothing to advance any interest in "repose." Respondents' insistence that the "interest in finality" requires relitigating and

retrying this 16-year-old case is nothing less than Orwellian doublespeak.

2. The "interests of justice" also weigh heavily in favor of recalling the mandate. "Congress conceived of the ATA, at least in part, as a mechanism for protecting the public's interests through private enforcement." *Linde* v. *Arab Bank, PLC*, 706 F.3d 92, 112 (2d Cir. 2013). As the United States said earlier in this case, "[t]he ability of victims to recover under the ATA" advances "our nation's compelling interest in combatting and deterring terrorism at every level, including by eliminating sources of terrorist funding and holding sponsors of terrorism accountable for their actions." D. Ct. Doc. 953-1, at 2 (Aug. 10, 2015). Congress also views private anti-terrorism enforcement as essential, for reasons explained by the bi-partisan co-sponsors of the PSJVTA and the ATCA in their *amicus* brief recommending a GVR. Grassley-Nadler Br. at 18-19.

Respondents have nothing to say about these interests. Rather, as a last-ditch effort to delay a GVR, respondents urge the Court to call for the views of the Solicitor General. But given the equities and efficiencies favoring a GVR, the Court need not burden the Executive Branch with the time-consuming and resource-intensive process more appropriately employed to assist the Court in deciding whether to review a case on the merits.

CONCLUSION

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

Respectfully submitted.

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