No. 19-

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, ALSO KNOWN AS PALESTINIAN INTERIM SELF-GOVERNMENT AUTHORITY AND PALESTINIAN LIBERATION ORGANIZATION, ALSO KNOWN AS PLO,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

RICHARD D. HEIDEMAN
NOEL J. NUDELMAN
TRACY REICHMAN KALIK
HEIDEMAN NUDELMAN & KALIK, P.C.
1146 19th Street, N.W., Fifth Floor
Washington, DC 20036
(202) 463-1818

STEVEN R. PERLES
Counsel of Record
EDWARD MACALLISTER
JOSHUA K. PERLES
PERLES LAW FIRM, PC
1050 Connecticut Ave, NW Suite 500
Washington, DC 20036
(202) 955-9055
sperles@perleslaw.com

Counsel for Petitioners

Dated: December 5, 2019

291217

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

QUESTIONS PRESENTED

The questions presented are:

1. Whether the PA-PLO has the right to raise a Due Process defense under the Fifth Amendment—a defense the Court has ruled unavailable to U.S. state sovereigns and many courts have ruled unavailable to foreign sovereigns—while simultaneously asserting its status as a foreign sovereign in a case against the United States at the International Court of Justice, which handicaps Congress's constitutional powers;

2. Whether a court can override Congress's intent to subject the PA-PLO under the Anti-Terrorism Act to civil litigation in U.S. courts, despite Congress's constitutional authority to amend the jurisdiction of federal courts and protect Americans from acts of PA-PLO terrorism;

3. Whether the Fifth Amendment Amendment's Due Process Clause, which allows criminal prosecution of a terrorist who murders a U.S. citizen, as well any person or entity that supported the crime, would nonetheless bar a lawsuit by the victim's family to impose civil liability on the same actors under the same U.S. Code section;

PARTIES TO THE PROCEEDING

Petitioners in this proceeding are Esther Klieman, estate of, Nachman Klieman, Ruanne Klieman, Dov Klieman, Yosef Klieman, and Gavriel Klieman. Respondents are the Palestinian Authority (a.k.a. The Palestinian Interim Self-Government Authority) and the Palestinian Liberation Organization (a.k.a "PLO").

RULE 29.6 STATEMENT

None of the petitioners is a nongovernmental corporation. None of the petitioners has a parent corporation or shares held by a publicly traded company.

RULE 14.1 RELATED PROCEEDINGS

Pursuant to Supreme Court Rule 14.1, Petitioners state that the following proceedings are directly related to the action that is the subject of this Petition.

United States District Court for the District of Columbia:

Estate of Esther Klieman v. Palestinian Authority, CA 04-1173 (PLF)

Estate of Esther Klieman v. Palestinian Authority, CA 18-3013 (PLF)

United States District Court for the Southern District of New York:

Kesner v. Palestinian Authority, CA 18-12238 (JGK)

United States Court of Appeals for the District of Columbia Circuit:

Estate of Esther Klieman v. Palestinian Authority, No. 15-7034

TABLE OF CONTENTS

TABLE OF APPENDICES

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes & Other Authorities:

PETITION FOR A WRIT OF CERTIORARI

Petitioners Estate of Esther Klieman, et al., respectfully submit this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in Case No. 15-7034.

OPINIONS BELOW

The opinion of the D.C. Circuit is published and available at 923 F.3d 1115 (D.C. Cir. 2019). App. 1. The opinion of the U.S. District Court for the District of the District of Columbia granting Respondents' Motion to Reconsider is published and available at 82 F. Supp. 3d 237 (D.D.C. 2015). App. 33.

JURISDICTION

The D.C. Circuit entered judgment on May 14, 2019 and denied panel rehearing and rehearing en banc on July 8, 2019. App. 59-62. 28 U.S.C. § 1254(1) confers jurisdiction in this matter.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Relevant constitutional and statutory provisions are listed at App. 63.

STATEMENT OF THE CASE

Petitioners are U.S. victims of PA-PLO supported terrorism which occurred overseas during the Second Intifada. Esther Klieman, a 23-year-old American citizen and teacher, was murdered as part of a PA-PLO terrorism campaign targeting Americans visiting or living in and near Israel. On March 24, 2002 she was shot by a terrorist who attacked the public bus she was riding in Israel. Petitioners, all American citizens, initiated a lawsuit under the Antiterrorism Act ("ATA"), 18 U.S.C. § 2331, *et seq*., which provides a federal cause of action for American citizens killed or injured, *see* 18 U.S.C. § 2333(a), "by reason of an act of international terrorism" which is defined as a "violent act", "dangerous to human life", which "appear[s] to be intended—to influence the policy of a government by intimidation or coercion" or to "affect the conduct of a government . . . ." 18 U.S.C. § 2331(1). Petitioners brought suit against the PA and PLO for their roles in supporting the terrorist attack that resulted in Esther Klieman's murder.

It is undisputed both that scores of Americans were killed and wounded during the Second Intifada and that Congress has passed numerous laws since the late 1980s to protect Americans from PA-PLO terrorism. Petitioners brought suit under a federal statute passed by Congress to empower Americans and their family members to pursue civil litigation against the PA-PLO for overseas acts of terrorism against U.S. citizens.

The Court of Appeals in this case, following a handful of recent decisions by courts of appeals in similar cases, has voided Congress's legislative

scheme, designed to protect American lives, by effectively immunizing the PA-PLO from civil lawsuits in the United States brought by U.S. victims of its terrorism if the act of terrorism occurred abroad. The PA-PLO has killed many Americans, but not in the United States.

Over a period of decades, Congress has legislated extensively and explicitly to protect American citizens from PA-PLO terrorism by passing laws, many with extra-territorial reach. In 1987, Congress determined that "the PLO and its affiliates are a terrorist organization and a threat to the interests of the United States, its allies, and to international law and should not benefit from operating in the United States." Pub. L. 100-204 § 1002, 101 Stat. 1407 (Dec. 22, 1987) (codified at 22 U.S.C. § 5201). Congress forbade the PLO and its agents to spend money in the United States or operate an office on U.S. soil. *Id.*

In 1990, Congress enacted the PLO Commitments Compliance Act. Pub. L. 101-246 Title VIII, 104 Stat. 76-80 (Feb. 16, 1990). That law reiterated "long-standing United States policy" that "any dialogue with the PLO be contingent upon the PLO's…renunciation of all acts of terrorism." *Id.* § 803(a). Congress required the Secretary of State to report periodically on, *inter alia*, the PLO's actions and statements "regarding cessation of terrorism" and whether the PLO would provide "compensation to the American victims or the families of American victims of PLO terrorism." *Id.* § 803(a).

In 1991, Congress enacted the Anti-Terrorism Act of 1992, 18 U.S.C. § 2333 (ATA), which established federal court jurisdiction for civil claims by U.S.

nationals arising out of terrorist attacks that occur "outside the territorial jurisdiction of the United States." 18 U.S.C. § 2331(1)(C). The ATA was precipitated by jurisdictional defenses raised by the PLO in attempt to avoid paying compensation to the family of U.S. citizen Leon Klinghoffer, who was murdered by PLO-affiliated terrorists who hijacked an Italian cruise ship. H.R. Rep. No. 102-1040, at 5 (1992). President Bush signed the law, explaining that it provides a remedy "for Americans injured abroad by senseless acts of terrorism." Statement by President George Bush Upon Signing S. 1569, 28 Weekly Comp. Pres. Docs. 2212 (Oct. 29, 1992).

Starting in 1993, after the PLO publicly renounced the use of terrorism, Congress allowed the PLO and PA to establish a U.S. office and receive foreign assistance. However, Congress conditioned these benefits on certification by the President that the PLO was complying with its commitment to renounce "the use of terrorism." Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1994, Pub. L. 103-87, §§ 516(c), 578, 107 Stat. 960, 973-74 (1993). Congress repeatedly imposed this condition on the maintenance of a U.S. office, *see e.g.*, Middle East Peace Facilitation Act of 1994, Pub. L. 103-236 § 583, 108 Stat. 382 (1994), and on the provision of foreign assistance to the PLO and PA. *See e.g.*, Consolidated Appropriations Act, 2017, Pub. L. 115-31, §§ 7036-40, 7041(*l*)(3), 131 Stat. 135, 655-59, 668 (May 5, 2017).

In 2002, Congress made permanent its requirement that the Secretary of State report to it on the PLO's and PA's compliance with their anti-terror commitments, provide detailed information about

their connections to terror attacks and the effects of such attacks on American citizens, and sanction them for failure to comply. Middle East Peace Commitments Act of 2002, Pub. L. 107-228, Title VI, 116 Stat. 1350, 1394-96 (Sept. 30, 2002). These requirements remain in place.

In 2005, Petitioners filed their lawsuit against the PA-PLO for its support of the murder of Esther, which occurred on March 24, 2002.

In view of the Second Intifada and documented links between the PA-PLO and the murder and injury of many Americans, Congress continued to legislate to protect Americans against PA-PLO terrorism. In 2006, Congress enacted the Palestinian Anti-Terrorism Act of 2006, imposing additional terrorism-related conditions on the PA during certain periods. First, the PA must "declare an unequivocal end to violence and terrorism and undertake visible efforts on the ground to arrest, disrupt, and restrain individuals and groups conducting and planning violent attacks on Israelis anywhere." Palestinian Anti-Terrorism Act of 2006, Pub. L. 109-446, 120 Stat. 3318 (Dec. 21, 2006). Second, the PA must have made "demonstrable progress" toward "dismantling all terrorist infrastructure within its jurisdiction, confiscating unauthorized weapons, arresting and bringing terrorists to justice, destroying unauthorized arms factories, thwarting and preempting terrorist attacks, and fully cooperating with Israel's security services." *Id.* § 620K(b)(2)(B).

In this case, the District Court originally denied the PA-PLO's first of two motions to dismiss for lack of personal jurisdiction and a subsequent motion for

reconsideration, holding that under Petitioners' general personal jurisdiction theory "both the PA and the PLO have sufficient minimum contacts within the United States to permit suit here consistent with the Due Process Clause of the Constitution", App. 36-37. Several years of intensive discovery and active trial preparation ensued. Then, this Court announced a new "essentially at home" standard for general personal jurisdiction in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011), which overruled the prior test for general jurisdiction of "continuous and systematic" contacts.

On February 5, 2014, almost a year after the close of fact discovery and three years after *Goodyear*, the PA-PLO moved for reconsideration of the District Court's orders on personal jurisdiction in light of the Supreme Court decision *Daimler AG v. Bauman*. The PA-PLO's motion ignored *Goodyear*, despite *Daimler*'s holding, which relied on *Goodyear*: "[i]nstructed by *Goodyear*, we conclude Daimler is not 'at home' in California, and cannot be sued there for injuries plaintiffs attribute to MB Argentina's conduct in Argentina." 571 U.S. 117, 122 (2014). Undoubtedly the magistrate judge's January 6, 2014 order requiring the PA-PLO to produce evidence of their support for the terrorist group, to which some of Esther's murderers had pledged allegiance, inspired the PA-PLO's decision to finally argue the "at-home" defense.

The District Court granted the PA-PLO's motion for reconsideration and dismissed the case based upon a lack of personal jurisdiction, rejecting the following arguments by Petitioners, among others:

1) that the PA-PLO's conspiracy to attack and murder Americans abroad, such as Esther Kleiman, to support their simultaneous publicity campaign inside the United States, designed to pressure U.S. foreign policy vis-à-vis Palestinian goals subjected them to the court's specific personal jurisdiction under the Fifth Amendment, App. 50-54;

2) that the PA-PLO are not entities capable of raising a Due Process defense against the assertion of personal jurisdiction by a U.S. court under the Fifth Amendment, App. 47;

3) that caselaw issued under the Fourteenth Amendment should not be applied to this case, which revolves around the Fifth Amendment, App. 46; and

4) that the PA-PLO forfeited the *Goodyear* defense by failing to raise it for three years, which prevented Petitioners from obtaining evidence that tied the PA-PLO to the murder plot. App. 41.

Petitioners appealed and the case remained stayed while two similar cases were considered by the D.C. Circuit and the Second Circuit. These courts consistently found that a district court could not assert specific personal jurisdiction over the PA-PLO for conspiring to or aiding and abetting the murder of U.S. citizens overseas.

In response to these decisions, as well as to the District Court's ruling in this case, Congress *unanimously* passed and the President signed into law the Anti-Terrorism Clarification Act, Pub. L. No. 115-

253 (ATCA). The ATCA amended the ATA by mandating that certain entities are deemed to consent to suit under the ATA when they accept U.S. assistance, maintain offices in the U.S., or benefit from waivers of U.S. anti-terror laws. The ATCA became law on October 3, 2018, while the *Kliman* case remained pending at the Court of Appeals.

The House Report on the ATCA explains that "[n]o defendant should be able to accept U.S. foreign assistance while simultaneously dodging responsibility in U.S. courts for aiding or carrying out terrorist attacks that harm Americans." H.R. Rep. No. 115-858, at 6-7. (2018). "If they continue to accept the covered benefits, they will subject themselves to personal jurisdiction in U.S. courts in ATA cases that are already pending or that may be filed in the future." *Id.*; *accord* 164 Cong. Rec. S5103 (daily ed. July 19, 2018) (statement of Sen. Grassley) ("[T]he bill also restores jurisdiction in cases pending at the time of the bill's enactment. No defendant, after all, should be able to enjoy privileges under U.S. law, while simultaneously dodging responsibility for supporting terrorists that injure or kill Americans."). Congress explicitly intended that the new law would apply to this case on appeal because, as the House Report explains, the provision:

> is purely procedural and affects no substantive entitlement to relief, it takes effect on the date of enactment . . .

H.R. Rep. No. 115-858, at 7. The Court of Appeals accepted supplementary briefing on the application of the ATCA. App. 26-27.

Congress continued to pass legislation to further its critical and long-standing goal to protect Americans against PA-PLO terrorism. In March 2018, Congress enacted the Taylor Force Act, which prohibited the provision of U.S. assistance to the PA - PLO should they continue to provide economic assistance to terrorists who kill or injure U.S. citizens. Taylor Force Act, Pub. L. 115-141 Title X, § 1004(a)(1), 132 Stat. 797-98 (Mar. 23, 2018).

On May 14, 2019 the D.C. Circuit largely affirmed the District Court, but also ruled on the applicability of the ATCA, without allowing any discovery by Petitioners regarding relevant jurisdictional activities by the PA-PLO. The Court of Appeals held:

> [P]laintiffs have not (as discussed below) shown that defendants have been "benefiting from a waiver or suspension," as required for an inference of consent to suit triggered by ATCA § 4(e)(1)(B).

The Court of Appeals denied Petitioners' motion for en banc rehearing.

REASONS FOR GRANTING THE WRIT

This Petition presents an opportunity for the Court to outline and clarify whether (a) the PA-PLO has the right to raise a Due Process defense under the Fifth Amendment—a defense the Court has ruled unavailable to U.S. state sovereigns and many courts have ruled unavailable to foreign sovereigns—while it simultaneously asserts its status as a foreign

sovereign in a case against the United States at the ICJ; which handicaps Congress's constitutional powers; (b) a court can override Congress's intention to subject the PA-PLO to civil litigation in U.S. courts under the Anti-Terrorism Act, despite Congress's constitutional authority to create federal court jurisdiction and to protect Americans from acts of PA-PLO terrorism; and (c) the Fifth Amendment, which allows criminal prosecution of a terrorist who murders a U.S. citizen, as well any person or entity that supported the crime, would nonetheless bar a lawsuit by the family to impose civil liability on the same actors under the same section of the U.S. Code.

I. ALLOWING FOREIGN GOVERNING BODIES SUCH AS THE PA-PLO TO ASSERT A FIFTH AMENDMENT DUE PROCESS DEFENSE TRAMPLES CONGRESS'S FOREIGN AFFAIRS POWERS

The United States has long held the view that the PA-PLO do not qualify as a "person" under the Fifth Amendment. *See, e.g.*, *Constitutionality of Closing the Palestine Information Office, an Affiliate of the Palestine Liberation Organization*, 11 Op. O.L.C. 104 (1987); U.S. Br. at 44, *Palestine Info. Office v. Schultz*, No. 87-5396 (D.C. Cir. Jan. 1988).

Recognizing the PA-PLO, a foreign governing body, as a person under the Constitution would undermine the critical need of the President and Congress to supervise the United States' foreign relations with such entities. The PA has declared

itself a sovereign nation and purports to function as such; recently it has even pursued litigation against the United States in the International Court of Justice (ICJ)[1]; such an entity requires different treatment under the Fifth Amendment than a foreign corporation, which is deserving of Fifth Amendment Due Process. In view of the fact that the PA filed its suit against the United States at the ICJ on September 28, 2018, several months after the United States filed an amicus curiae brief with the Court which assumed that the PLO could raise a Fifth Amendment defense, Brief of the United States as Amicus Curiae, *Sokolow v. Palestinian Liberation Organization*, No. 16-1071 at 7-12 (February 22, 2018), the Solicitor General should be accorded an opportunity to comment on the new factual circumstances. Furthermore, the handful of recent decisions which accord Fifth Amendment Due Process to the PA, invariably mean that foreign governing bodies such as ISIS would also deserve Due Process rights.

The Court has recognized that a State of the Union does not qualify as a person under the Fifth Amendment, *South Carolina v. Katzenbach*, 383 U.S. 301, 323 (1966), and this holding has been applied to foreign nations by the D.C. Circuit, *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 96 (2002) ("Indeed, we think it would be highly incongruous to afford greater Fifth Amendment rights to foreign nations, who are entirely alien to our

[1] *Relocation of the United States Embassy to Jerusalem (Palestine v. United States of America)*, Press Release, No. 2018/47 at 1(September 28, 2018) (found at https://www.icj-cij.org/en/case/176 on December 4, 2019).

constitutional system, than are afforded to the states, who help make up the very fabric of that system."); to state instrumentalizes controlled by foreign nations by the Second Circuit, *Frontera Res. Azer. Corp. v. State Oil Co. of the Azer. Republic*, 582 F.3d 393, 401 (2d Cir. 2009); and to municipalities by the Seventh Circuit. *City of E. St. Louis* v. *Circuit Ct. for 20th Judicial Circuit*, 986 F.2d 1142, 1144 (7th Cir. 1993) (citing *Vill. of Arlington Heights v. Reg'l Transp. Auth.*, 653 F.2d 1149, 1153 (7th Cir. 1981) (municipalities as a "state's political subdivision" are equally ineligible for Due Process protections as a State).[2] The Court has also accorded due process protections to privately -owned foreign corporations. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 418-19, (1984).

The PA-PLO is much more akin to a foreign government—a foreign body with political ties to the United States—than a foreign corporation—a foreign body with commercial ties to the United States. A "foreign State," "lies outside the structure of the Union" altogether. *Principality of Monaco v. State of Miss.*, 292 U.S. 313, 330 (1934). The United States conducts diplomacy and international negotiations with the PA-PLO, even if it does not recognize them as a foreign nation. Several countries have recognized the PA as a sovereign government and it litigates at the ICJ as such, having recently brought suit against the United States. This should be dispositive in this matter from the viewpoint of the United States, which

[2] While "[t]he circuits are split as to whether a state's political subdivisions are afforded due process under the Fifth Amendment", *South Dakota v. United States DOI*, 665 F.3d 986, 990 n.4 (8th Cir. 2012), this need for clarity is another reason supporting the Court's intervention in this case.

States has argued to this Court that an assertion of "sovereign status" by the PLO is incompatible with an assertion of fundamental constitutional rights.[3] The PA's simultaneous assertion of its sovereign status at the ICJ is likewise incompatible with its assertion of a Fifth Amendment defense in U.S. courts.

The PA, which is a foreign governing body, falls outside protections of the Due Process Clause because the "touchstone of due process is protection of the individual against arbitrary action of government." *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998) (emphasis added). The PA-PLO's relation to the United States and its courts is not a matter of liberty, but of international relations. The PA is no different from a foreign state in that respect. F urthermore, an entitlement to a Fifth Amendment defense has hindered Congress in its exercise of its foreign relations power to regulate such foreign governing bodies, by allowing them to assert a due process defense against civil litigation authorized by Congress.

Allowing a Fifth Amendment due process defense for the PA effectively forbids Congress from passing legislation that regulates the jurisdiction of the court over matters involving the PA, or similar entities, as demonstrated in this case, and in other similar cases brought by victims of PA terrorism against the PA-PLO. *See e.g.*, *Estate of Klieman v. Palestinian Auth.*, 923 F.3d 1115, 1128 (D.C. Cir. 2019) (finding the ATCA inapplicable despite

---

[3] Brief of the United States as Amicus Curiae, *Sokolow v. Palestinian Liberation Organization*, No. 16-1071 at 11 n.2 (February 22, 2018).

Congress's intention that it apply to pending cases); *Livnat v. Palestinian Auth.*, F.3d 45, 54 (2017) (immunizing the PA against litigation for its overseas acts of terrorism against US citizens); *Waldman v. PLO*, 835 F.3d 317, 340 (2d Cir. 2016) (same). Such a result tramples Congress's constitutional powers to conduct foreign policy and regulate the jurisdiction of the courts and therefore requires intervention by the Court.

II. IN ITS OPINION BELOW, THE D.C. CIRCUIT SUBSTITUTES ITS JUDGMENT FOR CONGRESS'S, AND TRAMPLES ITS FOREIGN POLICY OBJECTIVES

A. The Opinion below violates Congress's constitutional power over both the judiciary and foreign relations

Congress's legislative scheme, carefully designed over the course of decades to protect Americans from PA-PLO terrorism, derives its constitutional basis from Congress's unquestioned power over the judiciary and in the realm of foreign affairs. Congress unquestionably "has the constitutional authority to define the jurisdiction of the lower federal courts." *Keene Corp.* v. *United States*, 508 U.S. 200, 207 (1993). Article III authorizes Congress—and "[o]nly Congress," *Kontrick* v. *Ryan*, 540 U.S. 443, 452 (2004)—to "ordain and establish" inferior courts. U.S. Const. art. III, § 1. Within the "boundaries fixed by the Constitution," Congress's power is plenary. *Kline* v. *Burke Constr. Co.*, 260 U.S. 226, 234 (1922). Congress likewise "has the power to

prescribe rules of procedure for the federal courts," *Palermo* v. *United States*, 360 U.S. 343, 353 n.11 (1959). The courts in the D.C. and Second Circuit however have rendered the ATA, which targets "international terrorism" which "occur primarily outside the territorial jurisdiction of the United States", *see* 18 U.S.C. § 2331(1), inapplicable to overseas acts of terrorism, whether conducted by the PA-PLO, Al Qaeda, or ISIS.

This Court has also repeatedly accorded deference to Congress's considered judgments in the fluid realm of foreign affairs, especially in the context of protecting Americans from international terrorism:

> We have noted that "neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people." *Boumediene* v. *Bush*, 553 U.S. 723, 797 (2008). It is vital in this context "not to substitute . . . our own evaluation of evidence for a reasonable evaluation by the Legislative Branch." *Rostker* v. *Goldberg*, 453 U.S. 57, 68 (1981).

Holder v. Humanitarian Law Project, 561 U.S. 1, 34 (2010). The Constitution allows Congress to pursue the objectives "security against foreign danger" as an "avowed and essential object of the American Union." *Id.* at 40 (quoting *Federalist No. 41*, at 256,J. Cooke ed., 1961). Courts are ill-suited to assessing the myriad factors that Congress considers in this sphere. As this Court has admitted, Congress has a significant

institutional advantage over the courts in assessing the need for action. *Humanitarian Law Project*, 561 U.S. at 34 (explaining that, "when it comes to collecting evidence and drawing factual inferences in this area, 'the lack of competence on the part of the courts is marked'") (citation omitted). Anti-terrorism legislation implicates Congress's and the President's power over "foreign affairs, a domain in which the controlling role of the political branches is both necessary and proper." *Bank Markazi*, 136 S. Ct. at 1328. Indeed, in no other area has the Court accorded Congress greater deference." *Rostker* v. *Goldberg*, 453 U.S. 57, 64-65 (1981); *see Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 111–15 (2013) (cautioning against "unwarranted judicial interference in the conduct of foreign policy").

As this Court has recognized, "[e]veryone agrees that the Government's interest in combating terrorism is an urgent objective of the highest order." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010). Congress has a particular informational advantage over the courts in the fight against international terrorism; and its resulting legislative schemes have consequently withstood challenges based upon fundamental rights under the Constitution. In *Regan v. Wald*, 468 U.S. 222, 243 (1984), the Court concluded that Congress could limit travel to Cuba to "curtail the flow of hard currency" that fueled the regime's campaign of violence and subversion abroad. In *Humanitarian Law Project*, this Court rejected a First Amendment challenge and approved of Congress's ban on donations to benign charitable groups that might be tied to terrorists. 561 U.S. at 29. The conduct of foreign relations is "so exclusively entrusted to the political branches of

government as to be largely immune from judicial inquiry or interference." *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 589 (1952); *see Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302 (1918).

The Court must intervene where the lower court has substituted its own judgment for that of Congress, and essentially immunized overseas acts of terrorism from civil litigation, despite Congress's explicit intent to bring such activity within the jurisdiction of U.S. courts. *See* 18 U.S.C. sec. 2331(1)(C) (defining act of terrorism as overseas murder of U.S. citizens). Such decisions are especially fraught where, as here, they circumscribe Congress's constitutional prerogatives over foreign relations, and in an arena within which Congress has repeatedly legislated over the past 30 years.

The Court recently reiterated these long-established principles in *Bank Markazi v. Peterson,* 136 S.Ct. 1310 (2016). There, the Court explained that an amendment to the Iran Threat Reduction and Syria Human Rights Act was "an exercise of congressional authority regarding foreign affairs, a domain in which the controlling role of the political branches is both necessary and proper." 136 S.Ct. at 1328. To substitute the judgment of the courts in the timing of the implementation of foreign policy determinations is not only error, it raises the risk of interference with the intended and effective implementation of foreign policy actions by the politically accountable branches of government.

If the Court does not intervene or does not otherwise ensure that the lower courts defer to the political branches, it runs the risk that opinions like

that of the D.C. Circuit and the Second Circuit will void the carefully-drawn Congressional legislative scheme designed to protect Americans against PA-PLO terrorism. This Court has not hesitated to grant certiorari to define the respective roles of the three branches of government in cases implicating separation-of-powers and foreign policy concerns without awaiting a circuit split. *E.g.*, *Patchak* v. *Zinke*, 138 S. Ct. 897 (2018); *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1852 (2017); *Bank Markazi* v. *Peterson*, 136 S. Ct. 1310 (2016); *Zivitovsky* v. *Kerry*, 135 S. Ct. 2076 (2015); *Bond* v. *United States*, 134 S. Ct. 2077 (2014).

B. The Opinion below imposes language from another statute to overturn the explicit goal of the ATCA

The decision below not only eviscerated the ATA by essentially immunizing the PA-PLO against civil litigation by U.S. victims of terrorism for overseas acts of terrorism, but also interpreted the Anti-Terrorism Clarification Act of 2018, Pub. L. 115-253, § 4 (ATCA), to deny its purpose as well.

In 2018, Congress enacted the ATCA. The ATCA provides that defendants in ATA civil actions "shall be deemed to have consented to personal jurisdiction" if they accept U.S. financial assistance or maintain facilities in the U.S. after January 31, 2019, "regardless of the date of the occurrence of the act of international terrorism." 18 U.S.C. § 2334(e)(1).

Congress passed the ATCA specifically in response to the recent series of court decisions which granted the PA-PLO's motions to dismiss based upon

a lack of personal jurisdiction over a case arising from an overseas act of terrorism against U.S. citizens. The ATCA's lead sponsors, Senate Judiciary Committee Chairman Grassley, House Judiciary Committee Chairman Goodlatte and House Judiciary Committee Ranking Member Nadler, explained that the ATCA was specifically intended to overturn "recent Federal court decisions," "that severely undermined the ability of American victims to bring terrorists to justice." 164 Cong. Rec. S5103 (daily ed. July 19, 2018); 164 Cong. Rec. H6617-18 (daily ed. July 23, 2018). The House Judiciary Committee Report explained that the bill's "purpose" was "to better ensure that victims of international terrorism can obtain justice in United States courts," H.R. Rep. No. 115-858, at 2-3 (2018), and that it "addresses lower court decisions " "that have allowed entities that sponsor terrorist activity against U.S. nationals overseas to avoid the jurisdiction of U.S. courts" in civil ATA cases. *Id.* at 3, 6.

The ATCA set forth multiple grounds that would create consent by the PA or PLO to these lawsuits. One subsection provides that a defendant "benefiting from a waiver or suspension" of § 1003 of the Anti-Terrorism Act of 1987, Pub. L. No. 100-204, tit. X ("§ 1003"), is deemed to consent to personal jurisdiction if it "continues to maintain any office, headquarters, premises, or other facilities or establishments within the jurisdiction of the United States." 18 U.S.C. § 2334(e)(1)(B)(i). Section 1003—incorporated by reference into the ATCA—forbids the PLO and its successors and agents to "expend funds" or to "establish or maintain * * * facilities within the jurisdiction of the United States." 22 U.S.C. § 5202.

The House Judiciary Committee Report explained that the ATCA therefore "applies to the Palestinian Liberation Organization and the Palestinian Authority" if either or both "continues to maintain any office * * * or other facilities within the United States." H.R. Rep. No. 115-858, at 7 & n.23; *accord* 164 Cong. Rec. H6617-18 (daily ed. July 23, 2018) (Statement of Rep. Nadler).

The court below found that these factual predicates were not satisfied, App. 24, despite evidence that the PA-PLO continue to maintain or establish, "any office, headquarters, premises, or other facilities or establishments within the jurisdiction of the United States," which creates personal jurisdiction under 18 U.S.C. § 2334(e)(1)(B). The court below construed the "waiver or suspension" requirement in the ATCA to require an express waiver or suspension. App. 31. While the PA-PLO "continues to maintain any office, headquarters, premises, or other facilities or establishments within the jurisdiction of the United States", in contravention of the ATCA, the lack of a written waiver to authorize the activity does not satisfy the written waiver requirement imposed by the court below.

However, the language of 18 U.S.C. § 2334(e)(1)(B) does not limit itself to any particular form of "waiver or suspension." , the United States may constructively waive the requirements of a law by simply allowing the forbidden activity to continue unabated. *See, e.g.*, *Morris Commc'ns, Inc. v. FCC*, 566 F.3d 184, 189 (D.C. Cir. 2009) (government can "constructive[ly] waive[]"payment deadlines by conduct). Additionally, a waiver may be express or

implied. *See e.g.*, *Ins. Corp. of Ir. v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 703-04 (1982). The fact that the United States allows the PA-PLO to continue engage in the relevant activity constitutes an implicit waiver of the bar against doing so. Similarly, a suspension of enforcement may be affected merely by governmental forbearance. *See Salazar v. King*, 822 F.3d 61, 78-79 (2d Cir. 2016). Congress certainly knows how to specify a "written" requirement or condition on the words "waiver or suspension" if it wished to do so, and did not here. *See, e.g.*, 10 U.S.C. § 2193b ("if the Secretary expressly waives, in writing, the limitation").

The court below grafted an express, written requirement onto the "waiver or suspension" language in the ATCA by looking to another statute, § 7041(j)(2)(B)(i) of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242, 2780 (2015), which includes a written certification requirement to waive section 1003 of Pub. L. No. 100-204. App. 31. But the language of the ATCA is controlling, and its expansive and unrestricted language embracing *any* "waiver or suspension" does not allow the court to fill the gap with restrictive language.

Furthermore, while the court below is correct that the President may have statutory authority to waive § 1003 with an express, written certification under Pub. L. No. 114-113; he also has independent constitutional authority to waive or suspend § 1003, absent a written certification under Pub. L. No. 114-113. As President Reagan's 1987 signing statement

concerning § 1003 explained: "the right to decide the kind of foreign relations, if any, the United States will maintain is encompassed by the President's authority under the Constitution, including the express grant of authority in Article II, Section 3, to receive ambassadors." *Statement on Signing the Foreign Relations Authorization Act*, 2 Pub. Papers 1541, 1542 (Dec. 22, 1987); *see generally* 19 O.L.C. 123, 125-26 (1995) (collecting authorities for the proposition that "Congress cannot trammel the President's constitutional authority to conduct the nation's foreign affairs").

This constitutional authority cannot be abridged by Congress where Congress did not require the "waiver or suspension" to be expressed in writing. Indeed, the statute used by the court below—Pub. L. No. 114-113—to create a written waiver requirement in the ATCA, includes an explicit written requirement:

> The President may waive the provisions of section 1003 of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989 (Public Law 100-204) if the President determines and *certifies in writing* to the Speaker of the House of Representatives, the President pro tempore of the Senate, and the appropriate congressional committees that the Palestinians have not, after the date of enactment of this Act [either (1) taken certain steps at the U.N. or (2) taken certain actions vis-à-vis the International Criminal Court] (emphasis added).

App. 31 (quoting § 7041(j)(2)(B)(i) of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242, 2780 (2015)). The wording of the ATCA, "waiver or suspension" 18 U.S.C. § 2334(e)(1)(B)(i), does not contain a similar restrictive requirement for a writing or a certification, and the courts cannot add words where Congress did not. The Court must intervene where courts have inserted a more restrictive requirement into a statute which reduces the scope of the statute and thereby interferes with Congress's constitutional prerogatives.

III. THE COURT OF APPEALS' DECISION DEEPENS A CIRCUIT SPLIT REGARDING DUE PROCESS REQUIREMENTS UNDER THE FIFTH AMENDMENT

A. Due Process Protections under the Fifth and Fourteenth Amendments

The Court of Appeals ruling hangs on a question that this Court has expressly left unanswered[4] and that multiple circuits have answered differently: whether the Due Process requirements to allow a court to assert specific personal jurisdiction over a defendant under the Fifth and Fourteenth Amendments are the same. The Court of Appeals ruled that the Fifth Amendment required a showing that the specific

[4] *Bristol-Myers Squibb Co.* v. *Superior Court of Cal.*, 137 S. Ct. 1773, 1784 (2017); *Omni Capital Int'l* v. *Rudolf Wolff & Co.*, 484 U.S. 97, 102 n.5 (1987); *Asahi Metal Indus. Co.* v. *Superior Court of Cal.*, 480 U.S. 102, 113 n.* (1987).

gunman who murdered Esther Klieman received instructions beforehand from the PA-PLO to kill Americans, which is a test drawn from Fourteenth Amendment cases. App. 20 (citing *Walden v. Fiore*, 571 U.S. 227, 286 (2014)). This test is not appropriate under the Fifth Amendment, especially where its effect is to undermine Congressional intent in a context that could mean the life or death of numerous Americans.

Indeed, numerous circuits have found that a Fourteenth Amendment analysis must be different than a Fifth Amendment analysis. "Those strictures of fourteenth amendment due process analysis which attempt to prevent encroachment by one state upon the sovereignty of another do not apply with equal force to the adjudication of federal claim in a federal court." *Max Daetwyler Corp. v. A W. German Corp.*, 762 F.2d 290, 294 (3d Cir. 1985) (citing *Hanson v. Denckla*, 357 U.S. 235, 257 (1958)). As this Court stated in *Hanson v. Denckla*, "restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States." 357 U.S. at 257.

The *Max Daetwyler Corp.* decision focused on "a general fairness test incorporating *International Shoe's* requirement that 'certain minimum contacts'" exist between the non-resident defendant and the forum "such that maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" 762 F.2d at 293 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). More recently the Third Circuit restated its separate Fifth Amendment Due Process analysis, emphasizing its

distinction from a Fourteenth Amendment analysis: "In the federal court context, the inquiry will be slightly different, taking less account of federalism concerns, see Max Daetwyler, 762 F.2d at 294 n.4, and focusing more on the national interest in furthering the policies of the law(s) under which the plaintiff is suing." *Pinker v. Roche Holdings, Ltd.*, 292 F.3d 361, 370-71 (3d Cir. 2002). There is no issue of collision of state power in a case under the Fifth Amendment, and there is no countervailing force to circumscribe the reach of a Congressional statute, aside from the internal requirements of the Fifth Amendment.

The Sixth Circuit and the Tenth Circuit have also ruled that the analyses for a federal question case should derive from the Fifth Amendment, and not the Fourteenth: "When a federal court is hearing and deciding a federal question case there are no problems of 'coequal sovereigns.' That is a Fourteenth Amendment concern which is not present in actions founded on federal substantive law." *Handley v. Ind. & Mich. Elec. Co.*, 732 F.2d 1265, 1271 (6th Cir. 1984); *Peay v. BellSouth Med. Assistance Plan*, 205 F.3d 1206, 1210 (10th Cir. 2000); *see also Republic of Pan. v. BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935, 946 (11th Cir. 1997) ("As we noted in *Chase & Sanborn*, 'the due process concerns of the fifth and fourteenth amendments are not precisely parallel.' 835 F.2d at 1345 n. 9.").

The rulings of these Circuits sharply diverge from the D.C. Circuit and Second Circuit. The Court of Appeals in this case followed its recent decision in *Livnat v. Palestinian Auth.*, 82 F. Supp. 3d 19, 28 (D.D.C. 2015) (finding the inquiries are the same), by

relying exclusively on Fourteenth Amendment cases in its analysis of a Fifth Amendment Due Process question. It also followed the Second Circuit which recently held, "[t]his Court's precedents clearly establish the congruence of due process analysis under both the Fourteenth and Fifth Amendments." *Waldman v. PLO*, 835 F.3d 317, 330 (2d Cir. 2016). These decisions cannot be reconciled with the Third, Sixth, and Tenth Circuit decisions discussed above.

B. The D.C. Circuit in this case and others has created much higher Fifth Amendment Due Process requirements to protect the PA-PLO than some Circuits impose in protections of defendants in criminal cases

It is paradoxical that the Circuits have uniformly adopted looser Due Process standards for the assertion of personal jurisdiction over persons or corporations that engage in criminal conduct overseas than those that apply in civil proceedings to the agents of the PA, or ISIS.

The Fourth Circuit has rejected a due process challenge in a criminal prosecution that rested "solely on the premise that [defendant's] prosecution in this country was fundamentally unfair, because he did not know that [his victim] was an American." *United States* v. *Murillo*, 826 F.3d 152, 157 (4th Cir. 2016). Similarly, the Eleventh Circuit has held recently that the victim's status as a United States citizen satisfies the Fifth Amendment Due Process Clause. *United States* v. *Noel*, 893 F.3d 1294, 1305 (11th Cir. 2018).

These decisions came in criminal cases, but the Due Process Clause requires, in criminal cases, a "nexus between the prohibited activity and the United States," "which * * * serves the same purpose as the 'minimum contacts' test in personal jurisdiction." *United States* v. *Perlaza*, 439 F. 3d 1149, 1168 (9th Cir. 2006); *see United States* v. *Angulo-Hernandez*, 576 F.3d 59, 62 (1st Cir. 2009) (Torruella, J., dissenting from denial of en banc review) ("principles of due process [developed in civil cases] * * * should be applied when our government attempts to exercise criminal jurisdiction over foreign nationals"). The higher bar is both paradoxical and creates further separation of powers concerns, as it undermines Congress's exercise of its foreign affairs powers, to protect Americans and impose liability against the PA-PLO for its support of terrorism.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/ Steven R. Perles
Steven R. Perles (No. 326975)
Edward MacAllister (No. 494558)
Joshua K. Perles (No. 1031069)
PERLES LAW FIRM, PC
1050 Connecticut Ave, NW
Suite 500
Washington, DC 20036
Telephone: 202-955-9055
Telefax: 202-772-3101
sperles@perleslaw.com

HEIDEMAN NUDELMAN & KALIK, P.C.
Richard D. Heideman (No. 377462)
Noel J. Nudelman (No. 449969)
Tracy Reichman Kalik (No. 462055)
1146 19th Street, N.W., Fifth Floor
Washington, DC 20036
Telephone: 202.463.1818
Telefax: 202.463.2999

Counsel for Petitioners

Dated: December 5, 2019

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, DATED MAY 14, 2019

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

December 13, 2018, Argued;
May 14, 2019, Decided

No. 15-7034

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

Appellants,

v.

PALESTINIAN AUTHORITY, ALSO KNOWN AS PALESTINIAN INTERIM SELF-GOVERNMENT AUTHORITY AND PALESTINIAN LIBERATION ORGANIZATION, ALSO KNOWN AS PLO,

Appellees.

Appeal from the United States District Court
for the District of Columbia.
(No. 1:04-cv-01173).

Before: GARLAND, *Chief Judge*, KATSAS, *Circuit Judge*, and WILLIAMS, *Senior Circuit Judge.*

Appendix A

Opinion for the Court filed by *Senior Circuit Judge* WILLIAMS.

WILLIAMS, *Senior Circuit Judge*: During the Second Intifada, Palestinian terrorists ambushed an Israeli public bus traveling in the West Bank and opened fire, killing an American schoolteacher, Esther Klieman. Klieman's estate (along with some survivors and heirs) sued numerous defendants—including the Palestinian Authority ("PA") and Palestinian Liberation Organization ("PLO")—under the Anti-Terrorism Act ("ATA"), 18 U.S.C. §§ 2331, *et seq.*, among other laws. Having previously dismissed the case against all non-PA/PLO defendants for insufficient service of process, *Estate of Klieman v. Palestinian Auth.*, 547 F. Supp. 2d 8, 15 (D.D.C. 2008), the district court dismissed the case against the PA/PLO for want of personal jurisdiction under the constraints of the due process clause, *Estate of Klieman v. Palestinian Auth.*, 82 F. Supp. 3d 237 (D.D.C. 2015). Plaintiffs now appeal.

In *Livnat v. Palestinian Authority*, 851 F.3d 45, 48-54, 428 U.S. App. D.C. 140 (D.C. Cir. 2017), *cert. denied*, 139 S. Ct. 373, 202 L. Ed. 2d 301 (2018), this court held that the due process clause of the 5th Amendment barred U.S. courts from exercising jurisdiction over non-sovereign foreign entities without an adequate nexus to the United States. (In contrast, foreign sovereigns sued in the United States do not enjoy the benefit of this due process protection.) The district court here found that plaintiffs had failed to establish such a nexus for the PA/PLO.

We agree. We conclude that the district court did not abuse its discretion in agreeing, in light of the intervening Supreme Court case of *Daimler AG v. Bauman*, 571 U.S. 117, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014), to reconsider its earlier ruling that the court had general personal jurisdiction over defendants. As plaintiffs recognize, *Daimler* (and this court's opinion in *Livnat*) effectively foreclose a ruling that the district court had general jurisdiction over the PA/PLO. See Klieman Br. 29. We then consider plaintiffs' argument for specific jurisdiction and their request for discovery to substantiate that theory, but find both sets of arguments inadequate. Finally, we address § 4 of the Anti-Terrorism Clarification Act of 2018, Pub. L. No. 115-253, 132 Stat. 3183 ("ATCA") (codified at 18 U.S.C. § 2334(e)), enacted during the pendency of this appeal and deeming certain conduct to qualify as consent to the jurisdiction of U.S. courts over terrorism cases. We find that plaintiffs have established neither the circumstances rendering § 4 applicable nor facts justifying a remand for discovery on the issue. Accordingly, we affirm the decision of the district court.

* * *

On March 24, 2002, a group of terrorists carried out an attack on an Israeli bus in the West Bank, killing Esther Klieman. See *Estate of Klieman*, 82 F. Supp. 3d at 240; see also Compl. ¶¶ 23-25 (Jul. 13, 2004), ECF No. 1.[1] Plaintiffs brought suit in 2004 against a host of defendants,

1. Citations to ECF Numbers are to the district court docket in *Estate of Klieman v. Palestinian Authority*, No. 1:04-cv-01173-PLF (D.D.C. filed Jul. 13, 2004).

including the PA, PLO, and other Palestinian individuals and entities, including the Al Aqsa Martyrs Brigade, a U.S.-designated Foreign Terrorist Organization that had "claimed responsibility for the attack." *Estate of Klieman*, 82 F. Supp. 3d at 240.

Plaintiffs allege among other things that the PA/PLO, acting "by and through their officials, employees and agents," had "provided" other defendants "weapons, instrumentalities, permission, training, and funding for their terrorist activities," along with "safe haven and a base of operations," and encouraged certain defendants to "plan and execute acts of violence, murder and terrorism against innocent civilians in Israel, Gaza and the West Bank"—including the attack that killed Klieman. Compl. ¶ 40; see also Compl. ¶¶ 41-49. Besides asserting various tort claims, plaintiffs alleged violations of the ATA, 18 U.S.C. §§ 2332, 2333, and 2339A. See Compl. ¶¶ 50-60. Section 2333 creates a cause of action for "[a]ny national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs." 18 U.S.C. § 2333(a); see *id.* § 2331(1) (defining "international terrorism"). And § 2333(d)(2) creates liability for persons who have aided or abetted, or conspired with a designated foreign terrorist organization (such as the Al Aqsa Martyrs Brigade) in the commission of terrorist acts.

Defendants moved in May 2006 to dismiss the case for lack of personal jurisdiction, asserting among other problems that they had insufficient "minimum contacts" with the United States. See Defs.' Mot. to Dismiss for

Lack of Personal Jurisdiction 3 (May 30, 2006), ECF No. 55. As to the PA/PLO, the district court initially ruled, in December 2006, that it could exercise general jurisdiction over these defendants. *Estate of Klieman v. Palestinian Auth.*, 467 F. Supp. 2d 107, 113 (D.D.C. 2006). In April 2008, it denied defendants' motion for reconsideration of that decision. Mem. Op. and Order (Apr. 24, 2008), ECF No. 85. Fact discovery proceeded until 2013.

In February 2014, defendants filed a motion for reconsideration of the 2006 and 2008 rulings, invoking the requirements for general personal jurisdiction set forth in *Daimler*, 571 U.S. at 137. See Defs.' Mot. for Reconsideration (Feb. 5, 2014), ECF No. 233. The district court agreed to reconsider the matter. It also embraced defendants' jurisdictional argument, finding that the PA/PLO are not "at home" in the United States, as required for purposes of *general* jurisdiction under *Daimler*. It then found unpersuasive plaintiffs' theory of *specific* jurisdiction and denied their request for jurisdictional discovery. As the PA/PLO had been the "sole remaining defendants," the district court dismissed the case. *Estate of Klieman*, 82 F. Supp. 3d at 250.

Following the roadmap laid out above, we affirm.

* * *

The due process limits on judicial exercise of personal jurisdiction over non-resident defendants take two forms: "general or all-purpose jurisdiction, and specific or conduct-linked jurisdiction." *Daimler*, 571 U.S. at 122.

General jurisdiction licenses a court "to hear any and all claims against" a defendant, *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919, 131 S. Ct. 2846, 180 L. Ed. 2d 796 (2011)—no matter where arising. Specific jurisdiction permits a court only to hear disputes that "aris[e] out of or relat[e] to the defendant's contacts with the forum." *Daimler*, 571 U.S. at 127 (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.8, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984)).

General jurisdiction entails a relatively demanding standard—reflecting its plenary reach over a defendant's affairs. "A court may assert general jurisdiction over foreign . . . corporations to hear any and all claims against them when their affiliations with the [forum] are so 'continuous and systematic' as to render them *essentially at home* in the forum . . . ." *Daimler*, 571 U.S. at 127 (emphasis added) (quoting *Goodyear*, 564 U.S. at 919). The upshot is that, absent exceptional circumstances, see, e.g., *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 72 S. Ct. 413, 96 L. Ed. 485, 63 Ohio Law Abs. 146 (1952), general jurisdiction will lie only where an entity is formally incorporated or maintains its principal place of business, see *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1558, 198 L. Ed. 2d 36 (2017); *Daimler*, 571 U.S. at 138-39 & n.19.

Specific jurisdiction's more limited scope justifies a less onerous standard. First, a defendant need not be "at home" in the forum. Second, unlike with general jurisdiction, minimum contacts must stem from or relate to conduct giving rise to the suit. Plaintiffs must establish

a relationship among "the defendant, the forum, and the litigation." *Walden v. Fiore*, 571 U.S. 277, 291, 134 S. Ct. 1115, 188 L. Ed. 2d 12 (2014) (quoting *Calder v. Jones*, 465 U.S. 783, 788, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984)). More specifically, for a court "to exercise [specific] jurisdiction consistent with due process, the defendant's *suit-related conduct* must create a *substantial connection* with the forum." *Id.* at 284 (emphases added).

Where, as here, a claim arises under federal law and, as the parties agree, a "defendant is not subject to jurisdiction in any state's court of general jurisdiction," Fed. R. Civ. P. 4(k)(2)(A); see *Estate of Klieman*, 82 F. Supp. 3d at 244, personal jurisdiction may be asserted under Rule 4(k)(2), "which functions as a federal long-arm statute," *id.* Besides proper service of process, it requires only that "exercising jurisdiction [be] consistent with the United States Constitution and laws." Fed. R. Civ. P. 4(k)(2)(B); see *Mwani v. Bin Laden*, 417 F.3d 1, 10-11, 368 U.S. App. D.C. 1 (D.C. Cir. 2005). With that requirement met, the relevant forum is "the United States as a whole." *Mwani*, 417 F.3d at 11; accord, e.g., *Plixer Int'l, Inc. v. Scrutinizer GmbH*, 905 F.3d 1, 6 (1st Cir. 2018).

* * *

In the wake of *Daimler*, defendants moved for reconsideration of the court's 2006 and 2008 rulings on personal jurisdiction. The district court granted the request, and plaintiffs now object.

We review the district court's decision to reconsider the issue for abuse of discretion. See, e.g., *Capitol Sprinkler*

Inspection, Inc. v. Guest Servs., Inc., 630 F.3d 217, 225, 394 U.S. App. D.C. 73 (D.C. Cir. 2011); accord *Connors v. Hallmark & Son Coal Co.*, 935 F.2d 336, 341 n.9, 290 U.S. App. D.C. 170 (D.C. Cir. 1991) ("[T]he abuse of discretion standard ordinarily applies to a district judge's decision *whether to consider* a new theory raised on motion for reconsideration."). The district court divided the matter into a segment on the propriety of reconsideration vel non and the plaintiffs' claim of waiver or forfeiture. We address both issues, but in the reverse order.

Although the PA/PLO raised its personal jurisdiction defense in a pre-answer motion under Rule 12(b)(2), thereby avoiding forfeiture under Rule 12(h)(1), the plaintiffs argue that defendants' failure to raise the claim promptly after the Supreme Court's decision in *Goodyear*, 564 U.S. at 919, the precursor of *Daimler*, waived or forfeited the personal jurisdiction defense. See Klieman Br. 17-20; see also Pls.' Opp'n to Defs.' Mot. to Strike 3 (Nov. 2, 2018), Dkt. No. 1758524.

Plaintiffs point out that "more than 250 federal court cases" have "discussed *Goodyear*'s 'at home' standard, including eighteen circuit court cases and three cases in this District." Klieman Br. 24 (quoting *Gilmore v. Palestinian Interim Self-Gov't Auth.*, 8 F. Supp. 3d 9, 16 (D.D.C. 2014), *aff'd*, 843 F.3d 958, 427 U.S. App. D.C. 53 (D.C. Cir. 2016)). They note, too, that defense counsel in this litigation at the time of *Goodyear* had invoked the "at-home" language on behalf of the PA/PLO in other lawsuits shortly after *Goodyear* was decided—as well as in 2013. *Id.* at 25. Defendants' wait till 2014 to file the motion,

plaintiffs conclude, constitutes undue delay. Further, they say the delay was prejudicial because the motion wasn't filed until *after* fact discovery had closed. *Id.* at 21, 30. As plaintiffs see it, they were, in effect, precluded from taking discovery to support their specific jurisdiction theory, since at the time they had (reasonably) relied on the district court's prior decision confirming personal jurisdiction. See *id.* at 12, 20-21, 36.

Defendants respond that *Goodyear*, and this circuit's post-*Goodyear* but pre-*Daimler* cases, show sufficient room for nuance as to the status and reach of *Goodyear*'s "at-home" language that it was not unreasonable to seek reconsideration only after *Daimler*. And they argue that the timing of their motion was not prejudicial. See PA/PLO Br. 24-27.

In finding the motion for reconsideration not barred by delay, the district court acknowledged that *Goodyear* had introduced the "at-home" language, but argued that "the reach of this language was not immediately clear," citing the 2013 supplement of a leading procedure treatise for the view that, "[i]f the *Goodyear* opinion stands for anything . . . it simply reaffirms that defendants must have continuous and systematic contacts with the forum in order to be subject to general jurisdiction." *Estate of Klieman*, 82 F. Supp. 3d at 243. The court believed that *Goodyear*'s full import as a departure from laxer standards was "appreciated" only after *Daimler* issued in 2014. *Id.* Defendants thus did not proceed with "undue delay." And the court noted that neither plaintiffs nor the court could identify a case in which a similar motion was

denied on grounds of "delay in identifying intervening case law." *Id.*

We see no abuse of discretion in the ruling on forfeiture (which the district court styles as a "waiver" analysis). On the one hand, in light of in-circuit cases elaborating on the "at-home" doctrine pre-*Daimler*—and defense counsel's arguments on behalf of PA/PLO in other suits—there is some force to plaintiffs' argument that defendants' delay was unjustifiable. But a few points are dispositive in favor of defendants' view. First, as a general matter, a district court has leeway "always" to "reconsider[]" interlocutory orders not subject to the law of the case doctrine "prior to final judgment." "[S]o long as the court has jurisdiction over an action, it should have complete power over interlocutory orders made therein and should be able to revise them when it is consonant with equity to do so." *Langevine v. Dist. of Columbia*, 106 F.3d 1018, 1023, 323 U.S. App. D.C. 210 (D.C. Cir. 1997) (quoting *Schoen v. Washington Post*, 246 F.2d 670, 673, 100 U.S. App. D.C. 389 (D.C. Cir. 1957)); see also Fed. R. Civ. P. 54(b). Second, the court properly gave weight to the uncertainty in the wake of *Goodyear*, so clearly reflected in the passage quoted above from a leading treatise on procedure. Third, the court plausibly concluded that plaintiffs were not prejudiced by the timing of the motion.

To be sure, under some circumstances we would be swayed by plaintiffs' argument that they have been prejudiced by the delay in the defendants' *Goodyear-Daimler* motion—coupled with their reasonable reliance on the district court's finding of general personal

jurisdiction and the closure of fact discovery. But here, as we'll develop later in this opinion, plaintiffs have been unable to make a showing that discovery on their specific jurisdiction theory could have yielded evidence to support a finding of specific jurisdiction, and there is no sign that the district court relied at all on the "closure" of discovery in deciding to deny plaintiffs' motion for further discovery to explore facts relevant to specific jurisdiction.

Our approach is in keeping with *Gilmore v. Palestinian Interim Self-Government Authority*, 843 F.3d 958, 963-65, 427 U.S. App. D.C. 53 (D.C. Cir. 2016). There we affirmed the district court's decision under Rule 12(h)(1) that the PA/PLO had waived a constitutional personal jurisdiction defense that had been "available" because they had altogether failed to raise it in their 2002 pre-answer motion. The delay argument pressed here is quite different from the 12(h)(1) issue in *Gilmore*; defendants here asserted constitutional personal jurisdictional defenses in 2006 and 2007 on the basis of insufficient "minimum contacts" with the forum in advance of filing their answer in May 2008. See Defs.' Mot. to Dismiss for Lack of Personal Jurisdiction 3 (May 30, 2006), ECF No. 55; see also Answer 2 (May 2, 2008), ECF No. 86; cf. *Estate of Klieman*, 467 F. Supp. 2d at 110, 113. So defendants essentially proceeded as *Gilmore*'s holding would have envisaged—on the basis of defenses "available" at the time of their pre-answer filings. In *Gilmore* we didn't pass on the district court's alternative theory of forfeiture based on acquiescence in the court's jurisdiction. See *Gilmore*, 8 F. Supp. 3d at 14-16. We need not do so now. Even if we had affirmed the district court in reliance on the acquiescence

theory, finding *no* abuse of discretion *there*, and even if the district court's decision were inconsistent with the one we're now reviewing, this outcome would not establish that the latter was an abuse of discretion.

As to the motion for reconsideration viewed separately from the delay issue, the district court noted that the Federal Rules of Civil Procedure do not state standards governing such a motion before judgment, *Estate of Klieman*, 82 F. Supp. 3d at 241-42, and in this gap relied on a three-part test from *In re Vitamins Antitrust Litig.*, No. 99-1097, 2000 U.S. Dist. LEXIS 11350, 2000 WL 34230081 (D.D.C. Jul. 28, 2000); accord, e.g., *McCoy v. FBI*, 775 F. Supp. 2d 188, 190 (D.D.C. 2011) (Wilkins, J.) (adopting the *Vitamins* test). That opinion said that, given the value of finality, interlocutory orders may be reconsidered only "when the movant demonstrates (1) an intervening change in the law; (2) the discovery of new evidence not previously available; or (3) a clear error of law in the first order." *Vitamins*, 2000 U.S. Dist. LEXIS 11350, 2000 WL 34230081, at *1; cf. *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817, 108 S. Ct. 2166, 100 L. Ed. 2d 811 (1988) ("A court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance, although as a rule courts should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice.'" (citation omitted)). Neither party takes issue with the *Vitamins* test, and we accept it for present purposes. (The district court had used the same test in *denying* defendants' 2008 motion for reconsideration of its 2006 ruling on personal jurisdiction. See Mem. Op. and Order 2 (Apr. 24, 2008), ECF No. 85.)

We believe the district court acted within the bounds of its discretion in finding reconsideration appropriate. Two criteria of the *Vitamins* test seem applicable—"(1) an intervening change in the law" and "(3) a clear error of law in the first order." Given that the *governing* law applicable at the time of the district court's ruling was *Daimler*, see, e.g., *Landgraf v. USI Film Prods.*, 511 U.S. 244, 273, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994) (noting that "in many situations, a court should 'apply the law in effect at the time it renders its decision'") (quoting *Bradley v. Sch. Bd. of City of Richmond*, 416 U.S. 696, 711, 94 S. Ct. 2006, 40 L. Ed. 2d 476 (1974)), the prior ruling was indeed a clear error of law. Further, it was quite reasonable to say that the law had changed since the court's most recent prior ruling on jurisdiction—2008.

* * *

We now take up the court's disposition of the merits of the motion, including plaintiffs' effort to establish specific jurisdiction, which we review de novo. See *Livnat*, 851 F.3d at 48; *FC Inv. Group LC v. IFX Mkts., Ltd.*, 529 F.3d 1087, 1091, 381 U.S. App. D.C. 383 (D.C. Cir. 2008). The district court first concluded that it could not properly exercise general jurisdiction over defendants because they are not "'essentially at home' in the United States." *Estate of Klieman*, 82 F. Supp. 3d at 245 (quoting *Daimler*, 571 U.S. at 127). We agree. Because the PA's "headquarters, officials, and primary activities are all in the West Bank," it is not subject to general jurisdiction in the United States, as we held in *Livnat*, 851 F.3d at 56; see *Waldman v. Palestinian Liberation Org.*, 835 F.3d 317, 332-34 (2d Cir. 2016) (applying similar reasoning to PLO).

Finding plaintiffs' effort to salvage the earlier ruling in favor of general personal jurisdiction unavailing, we turn to the substance of plaintiffs' theory of specific jurisdiction.

To advance that theory, plaintiffs sought to develop a link between the killing of Esther Klieman and the furthering of PA/PLO goals in the United States. They offered a hypothesis building on these elements: First, the PA/PLO supported acts of terrorism during the Second Intifada in the early 2000s, targeting Israelis and areas frequented by Americans. Second, they pursued this terrorist program in part with the goal of advancing their "campaign in the United States to influence or affect United States foreign policy as it related to Israel and the Palestinian territories," Klieman Br. 32; see also *id.* at 42, 43, carrying on the campaign through the use of U.S. offices, fundraising, lobbying, speaking engagements, as well as commercial dealings, *id.* at 32. Third, as an integral part of this blended strategy of terrorism and diplomacy, they facilitated the killing of Esther Klieman.

The first two elements may at first blush seem counterintuitive, but their logic is basically that a spate of terrorism claiming American (and Israeli) lives could impel U.S. policymakers to urge their Israeli counterparts to make concessions to defendants in exchange for their exerting their influence to halt, or attenuate, the attacks. For example, they quote a PA/PLO representative explaining on U.S. national television in 2002 that—in order for Palestinian suicide bombings to abate—the U.S. Secretary of State should prevail on Israel's prime

minister to reduce Israeli troop levels and settler presence in contested areas, for, "if the occupation continues . . . no one can stop the Palestinians." *Id.* at 43; see also Reply Br. 22 (same).

The basic theme here appears reasonable and seems to possess historical support. See, e.g., Klieman Br. 35 n.7; cf. *Peterson v. Islamic Republic of Iran*, 264 F. Supp. 2d 46, 53 (D.D.C. 2003) (quoting an expert witness on Iran explaining that "the foreign policy objective of the October 23rd, 1983, attack [on the U.S. Marine barracks in Lebanon] and other like attacks by Iran during this period" was "to end the Western, especially the American[,] presence in Lebanon"). Rather, our focus is on the third element of plaintiffs' theory—the alleged link between the overall strategy and the killing of Esther Klieman. Plaintiffs have not alleged tangible facts as to how *this* attack was intended (or even used *ex post*) to further defendants' political aims in the United States. The assertion that "the PA and PLO campaign to influence U.S. policy or affect its conduct, by leveraging the carnage of the Second Intifada, was expressly directed at . . . the United States," Klieman Br. 43, is a claim that might apply to a welter of attacks spanning the years of the Second Intifada. But in a "jurisdictional inquiry focuse[d] on the relationship among the defendant, the forum, and the litigation," *Walden*, 571 U.S. at 287 (internal quotation marks and citation omitted), the "litigation" element requires tangible allegations relating the attack that cost Esther Klieman's life to defendants' contacts with the forum, cf. *Waldman*, 835 F.3d at 341-42.

This circuit's previous decision in *Livnat* appears controlling. The case arose out of a 2011 terrorist attack on Jewish worshipers at Joseph's Tomb, a holy site in the West Bank. *Livnat*, 851 F.3d at 46. Plaintiffs had alleged that the attack was "part and parcel of" the PA's "general practice of using terrorism to influence United States public opinion and policy" and was "intended, through intimidation and coercion, to influence the Israeli and United States government[s'] policies." *Id.* at 57 (quoting complaint). To reinforce these allegations, plaintiffs supplied a declaration by a professor attesting that the PA's support for terrorism was meant to "influence U.S. policy in the [PA's] favor." *Id.* But this didn't convince us of an adequate relation between the Joseph's Tomb attack and the United States. *Id.* We declined even to consider the legal sufficiency of plaintiffs' theory, given their failure to "'make a prima facie showing of the pertinent jurisdictional facts' to survive a motion to dismiss." *Id.* at 56-57 (citation omitted). Plaintiffs, in essence, had asked us to infer "that because some attacks against Jews and Israelis have been aimed to influence U.S. policy, the Joseph's Tomb attack was, too." *Id.* at 57. "The record before us," we concluded, "does not support that inference." *Id.*

Livnat's logic governs here. Even if some terrorist acts carried out in Israel or the West Bank were used by defendants to influence U.S. policy, nothing in the record indicates that *this* attack fills that bill. Plaintiffs would distinguish *Livnat* by noting that whereas the attacks there were against Jews and Israelis—the present allegations center on attacks on "areas and targets known

to be frequented by U.S. citizens." Klieman Br. 35. But the distinction doesn't help plaintiffs on the facts presented. After all, they have alleged no facts indicating that the attack on an Israeli bus in the West Bank was directed at locales with a strong presence of U.S. nationals—either in the form of high-level planning or the individual attackers' motives. To the extent the attackers had—unbeknownst to them—chosen as their target a bus traveling through such a locale, the resulting "random, fortuitous, or attenuated contacts" with the forum are insufficient under *Walden*. A court's "exercise of jurisdiction over an out-of-state intentional tortfeasor must be based on *intentional* conduct by the defendant that creates the necessary contacts with the forum." *Walden*, 571 U.S. at 286 (emphasis added).

In some circumstances allegations of a defendant's general policy might adequately support an inference that the defendant aided and abetted a particular attack in furtherance of that policy. If two countries are engaged in armed conflict, we might be confident in explaining one country's execution of a bombing raid against the other's territory as part of its general policy of inflicting damage on its adversary. But the case here plainly differs. Apart from any U.S. nexus there is a wholly plausible alternative explanation for defendants' aiding and abetting the attack—dynamics altogether internal to the Israeli-Palestinian conflict. Cf. *Ashcroft v. Iqbal*, 556 U.S. 662, 682, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (addressing effect of "obvious alternative explanation" (citation omitted)). We think that distinction helps explain *Livnat*'s refusal to draw an inference that "because some

attacks against Jews and Israelis have been aimed to influence U.S. policy, the Joseph's Tomb attack was, too." 851 F.3d at 57.

Plaintiffs might fill the resulting gap with allegations that PA/PLO officials invoked this attack in public or private statements in the United States *after* it took place, or perhaps that they took steps in the U.S. to aid and abet this particular attack *before* it occurred with the goal of advancing political objectives in the United States. But they offer nothing resembling such claims. As to the latter tack, plaintiffs "have not alleged [or] provided any prima facie showing . . . that either the PA or the PLO engages in fundraising in the United States," let alone fundraising whose proceeds might have facilitated the 2002 attack. *Estate of Klieman*, 82 F. Supp. 3d at 247 n.7.

Nor does *Calder*'s "effects test" help plaintiffs. See Klieman Br. 38-40. That analysis permits courts, in some instances, to assert jurisdiction over defendants whose conduct outside the forum causes certain "effects" within it. In *Calder* itself the Supreme Court approved a California state court's jurisdiction over two Florida residents—an editor and reporter of the National Enquirer, a Florida corporation. Defendants penned and published a libelous article about a California resident distributed widely in that state. See *Calder*, 465 U.S. at 784-86. In glossing *Calder*'s "effects test," the *Walden* Court stressed defendants' intentional contacts with the forum. The "crux of *Calder* was that the reputation-based 'effects' of the alleged libel connected the defendants to California, not just to the plaintiff." *Walden*, 571 U.S. at

287. "[B]ecause publication to third persons is a necessary element of libel . . . the defendants' intentional tort actually occurred *in* California." *Id.* at 288. Thus the "effects" of defendants' libelous article—reputational harms arising in California—"connected the defendants' conduct to *California*, not just to a plaintiff who lived there." *Id.*

Unlike the tort in *Calder*, which had "occurred *in*" the forum, *Walden*, 571 U.S. at 288, the planning, carrying out, and occurrence of Klieman's killing all took place in the West Bank. And the emotional suffering felt by forum residents and (perhaps) foreseen by the attackers cannot without more qualify as the relevant "effect." The *Walden* Court rejected such an approach, reasoning that it would "impermissibly allow[] a *plaintiff's* contacts with the defendant and forum to drive the jurisdictional analysis." *Walden*, 571 U.S. at 289 (emphasis added). Instead, "[t]he proper question is . . . whether the defendant's conduct connects him to the forum in a meaningful way." *Id.* at 290. Here we lack such allegations.

Finally, plaintiffs' invocation of our decision in *Mwani v. bin Laden* is unpersuasive. There defendants' contacts with the United States were manifest in the very act that had precipitated the suit—a "devastating truck bomb" outside the U.S. Embassy in Nairobi, Kenya, in 1998, which "killed more than 200 people, including 12 Americans." *Mwani*, 417 F.3d at 4. In choosing their target, a U.S.-government building, Osama bin Laden and Al Qaeda had manifestly sought "purposefully [to] direct their terror at the United States," *id.* at 14, and "not only to kill both American and Kenyan employees

inside the building, but to cause pain and sow terror in the embassy's home country, the United States," *id.* at 13. Given conduct "no doubt . . . 'directed at [and] felt in'" the United States, *id.* (alteration in original) (citation omitted), defendants could "reasonably anticipate being haled into" court there, *id.* at 14 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)), even, as we noted there, if we put aside defendants' "ongoing" plots to carry out attacks in the United States, *id.* at 13. It was thus of no moment that "the plaintiff group was composed of non-U.S. nationals." Klieman Br. 42; see *Mwani*, 417 F.3d at 14.

But whereas the *Mwani* defendants, in attacking a U.S. government outpost, indisputably aimed to kill Americans (at least in part), here we have no basis for inferring that the terrorists who attacked an Israeli bus were instructed, or endeavored, to injure American nationals. And absent intentional targeting, the fact that an American died in a terrorist incident abroad would amount only to a "random, fortuitous, or attenuated" contact "ma[de] by interacting with . . . persons affiliated with the" United States. *Walden*, 571 U.S. at 286. It would thus be inadequate for specific jurisdiction absent a firmer link showing "intentional conduct by the defendant that creates the necessary contacts with the forum." *Id.* at 286.

We note that other circuits have taken a more stringent view of the necessary relation between the tort and in-forum activities than is manifest in *Livnat* and this decision. Thus the court in *Waite v. All Acquisition Corp.*, 901 F.3d 1307 (11th Cir. 2018), ruled that "a tort 'arise[s]

out of or relate[s] to' the defendant's activity in a [forum] only if the activity is a 'but-for' cause of the tort." *Id.* at 1314 (first two alterations in original); see also *O'Connor v. Sandy Lane Hotel Co.*, 496 F.3d 312, 318-19 (3d Cir. 2007) (describing the typically stricter proximate cause or "legal cause" test). Under a but-for view, in-forum activities postdating completion of the wrongful conduct—here, for example, any PA/PLO flourishing of the killing as part of its U.S. diplomatic efforts—would likely not help in establishing minimum contacts for purposes of specific jurisdiction. Given that plaintiffs' theory fails under our *Livnat* decision, we have no need to consider such cases or assess their possible application to these facts.

We conclude that plaintiffs' prima facie case for specific jurisdiction does not meet the Constitution's requirements. Accordingly, we affirm the district court's determination on this score.

* * *

The district court also turned down plaintiffs' request for discovery in support of their theory of specific jurisdiction.

We review the district court's discovery rulings for abuse of discretion. "[A] district court has broad discretion in its resolution of discovery problems that arise in cases pending before it." *Naartex Consulting Corp. v. Watt*, 722 F.2d 779, 788, 232 U.S. App. D.C. 293 (D.C. Cir. 1983) (quoting *In re Multi-Piece Rim Products Liability Litigation*, 653 F.2d 671, 679, 209 U.S. App.

D.C. 416 (D.C. Cir. 1981)); see also *Mwani*, 417 F.3d at 17; *Goodman Holdings v. Rafidain Bank*, 26 F.3d 1143, 1147, 307 U.S. App. D.C. 79 (D.C. Cir. 1994). Just as a plaintiff's personal jurisdiction theory must clear the speculative level, a "request for jurisdictional discovery cannot be based on mere conjecture or speculation." *FC Inv. Grp. LC*, 529 F.3d at 1094.

In opposing defendants' 2014 motion for reconsideration, plaintiffs sought discovery intended to disclose facts under two headings, both focused on aspects of defendants' U.S.-centered activities:

> 1. The extent of Defendants' activities within the United States and this jurisdiction to attempt to influence the foreign policy and public opinion in the United States to pressure Israel to change its public policies vis-à-vis the PA, including, but not limited to, information on the consultants, lobbyists and other professionals ret[]ained for this purpose.
>
> 2. The financial investment of the Defendants' commercial contracts with US companies which allow the Defendants to raise revenue in the United States to support the operating budgets of the Defendants, which funded the joint public relations and terrorism campaign. As demonstrated above, funds from the Defendants are then used to support terrorism, including the very terrorists who murdered Esther Klieman.

Pls.' Supp. Br. in Opp'n to Defs.' Mot. for Reconsideration 10 (Jul. 11, 2014), ECF No. 256, J.A. 94. The district court understandably saw the requested discovery as "limited to seeking information about defendants' public advocacy and fundraising activities in the United States." *Estate of Klieman*, 82 F. Supp. 3d at 249. It found that "[e]ven if the plaintiffs did obtain any such evidence through additional discovery . . . the plaintiffs would be unable to meet their burden of showing either general or specific personal jurisdiction under *Daimler* and *Walden*." *Id.* Given the failure of these requests to focus on what we have identified as the fatal gap in plaintiffs' allegations, the purpose of the bus ambush in which the terrorists killed Esther Klieman, we can find no abuse of discretion in this result. See *Livnat*, 851 F.3d at 57 ("A district court acts well within its discretion to deny discovery when no 'facts additional discovery could produce . . . would affect [the] jurisdictional analysis.'") (alteration in original) (quoting *Goodman Holdings*, 26 F.3d at 1147)); see also *Mwani*, 417 F.3d at 6, 17.

In their appellate briefs plaintiffs express a new wish to seek discovery as to facts far beyond their original request, facts which might close the gap that we (and *Livnat*) have identified: They ask for

> jurisdictional discovery on whether the PA and PLO directed terrorists to attack Americans, such as in this case, or launch their attacks against areas and targets frequented by Americans. Discovery into the proximity of PA/PLO-attributed attacks to concentrations of

> U.S. citizens, such as well-known tourist areas frequented by U.S. citizens or areas where U.S. citizens lived, would be one fruitful area of discovery.

Klieman Br. 33; see also Reply Br. 15. But even if such discovery was aimed closely enough at the missing link in plaintiffs' allegations, they failed to make the request to the district court, and "issues not raised before judgment in the district court are usually considered to have been [forfeited] on appeal." *Murthy v. Vilsack*, 609 F.3d 460, 465, 391 U.S. App. D.C. 251 (D.C. Cir. 2010); accord, e.g., *Texas v. United States*, 798 F.3d 1108, 1113, 418 U.S. App. D.C. 387 (D.C. Cir. 2015); *United States v. Stover*, 329 F.3d 859, 872, 356 U.S. App. D.C. 175 (D.C. Cir. 2003). Accordingly, these late requests provide no basis for overturning the district court's exercise of discretion over the requests plaintiffs did make.

* * *

Having addressed the case as initially briefed, we now turn to the ATCA, enacted during the pendency of this appeal. Pursuant to ATCA § 4, certain conduct after January 31, 2019, is deemed to qualify as consent to the jurisdiction of U.S. courts over terrorism cases.

The parties spar over the factual predicates for the application of ATCA § 4, as well as its constitutionality. We conclude that plaintiffs have not made an adequate showing that any of § 4's factual predicates has been triggered between February 1, 2019, and the time of the

parties' latest round of briefing on the subject on March 13, 2019. Section 4, accordingly, does not affect our analysis of personal jurisdiction, and we need not reach the defendants' constitutional challenges.

Section 4 identifies five factual predicates grouped under two headings to trigger its "deemed to have consented" clause. See 18 U.S.C. § 2334(e). The first heading, § (e)(1)(A), refers to "accept[ing]" "any form of assistance, however provided," under the following parts of the Foreign Assistance Act of 1961, 22 U.S.C. §§ 2151 *et seq.*:

> (1) chapter 4 of part II, 22 U.S.C. §§ 2346 *et seq.*;
>
> (2) section 481, 22 U.S.C. § 2291; or
>
> (3) chapter 9 of part II, 22 U.S.C. §§ 2349bb *et seq.*

The second heading, § (e)(1)(B), refers to a defendant "benefiting from a waiver or suspension of section 1003" of the ATA, 22 U.S.C. § 5202, and

> (4) "continu[ing] to maintain"— or
>
> (5) "establish[ing] or procur[ing]"—

"any office, headquarters, premises, or other facilities or establishments within the jurisdiction of the United States."

As we noted earlier, once defendants raise personal jurisdiction as a defense, "[t]he plaintiffs have the burden of establishing the court's personal jurisdiction over" defendants. *FC Inv. Grp. LC*, 529 F.3d at 1091. To do so, they must "'make a prima facie showing of the pertinent jurisdictional facts' to survive a motion to dismiss for lack of personal jurisdiction." *Livnat*, 851 F.3d at 56-57 (quoting *First Chicago Int'l v. United Exch. Co.*, 836 F.2d 1375, 1378, 267 U.S. App. D.C. 27 (D.C. Cir. 1988)). We analyze the record on the factual predicates as an extension of plaintiffs' prima face case for personal jurisdiction, asking whether plaintiffs have put forward plausible allegations that meet any of the factual predicates for implied consent under § 4. Cf. *Iqbal*, 556 U.S. at 679 ("[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss.").

The government filed an amicus brief at the invitation of the court and agrees with defendants that § 4's factual predicates have not been satisfied. "[A]s of February 1, 2019 and since that date, defendants have not accepted any of the foreign assistance provided under the authorities enumerated in Section 4, and they do not currently 'benefit[]' from a waiver of section 1003 of the Anti-Terrorism Act of 1987, including to maintain an office in the United States pursuant to such a waiver." United States' Response to Feb. 6, 2019, Order 7 (Feb. 15, 2019) ("U.S. Response"), Dkt. No. 1773566.

Plaintiffs demur as to both subsections (A) and (B) of § (e)(1). We ultimately find, in keeping with the view of the United States, that plaintiffs have failed to offer plausible

allegations that any of the factual predicates of ATCA § 4 has been met or to offer credible grounds to support their requested remand for discovery.

Foreign assistance and § 4(e)(1)(A). The PA/PLO offered its December 26, 2018, letter to the State Department as conclusively rejecting aid covered by ATCA. Plaintiffs say that the letter "merely expresses a 'wish' to no longer receive" relevant forms of assistance. Klieman Supp. Br. 7 (Mar. 13, 2019), Dkt. No. 1777379. Hardly. The letter is quite emphatic: "The Government of Palestine unambiguously makes the choice not to accept such assistance." U.S. Response, Exhibit 1, Letter at 2. And the State Department and Department of Justice readily discerned its meaning. See U.S. Response 7.

Plaintiffs refer to certain "debt relief grant agreements with the PA" dating to 2015 and 2016, Klieman Supp. Br. 7-8, which were indeed provided under the Economic Support Fund covered by § 4(e)(1)(A)(i), see *Foreign Assistance: U.S. Assistance for the West Bank and Gaza, Fiscal Years 2015 and 2016*, Gov't Accountability Office (Aug. 2018), https://www.gao.gov/assets/700/693823.pdf. But plaintiffs (1) fail to allege that any such forms of debt relief have persisted after January 31, 2019; and (2) do not grapple with the PA/PLO's renunciation of all relevant funding sources. Because we lack credible allegations that debt relief grants are currently being provided to PA/PLO, its instrumentalities, or creditors as of February 1, 2019—or that any of these "accept" such relief—plaintiffs' mere allusions to past examples and hypothesizing their continuation or renewal is not enough to warrant a remand.

The same goes for plaintiffs' references to funding for nongovernmental organizations. See Klieman Supp. Br. 8. Plaintiffs rely on a Congressional Research Service report from 2011, which is unconvincing as to February 2019. Second, a gap remains in plaintiffs' analysis. Section 4(e)(1)(A) requires that defendants "accept" the relevant aid, yet plaintiffs allude only to payments to non-governmental organizations. Although such assistance might constitute a "form of assistance, however provided" to *PA/PLO*, plaintiffs offer nothing to establish that link.

Finally, nothing in the papers before us suggests that if granted an opportunity for discovery on remand plaintiffs would be able, in spite of the government's denial, to unearth sources of funding that continue to flow to the PA/PLO post-January 31, 2019, and come within § 4.

Benefiting from a waiver or suspension and maintaining or establishing an office, headquarters, etc.; § 4(e)(1)(B). Subsection (B) sets out two necessary but individually insufficient conditions for deeming a defendant to have consented to personal jurisdiction. (1) The defendant must maintain or establish, etc., "any office, headquarters, premises, or other facilities or establishments within the jurisdiction of the United States." (2) The defendant must be "benefiting from a waiver or suspension of section 1003."

Because the second requirement is dispositive against the plaintiffs we address the first requirement only enough to give an idea of the context within which the "waiver" is to be examined.

Appendix A

(1) *Activities allegedly triggering implied consent if defendant is "benefiting from a waiver or suspension of section 1003."* Plaintiffs' strongest argument centers on activities carried out by defendants under the auspices of the U.N. Permanent Observer Mission in New York. They do not dispute the Second Circuit's holding that the ATA—and, accordingly, § 1003—do not apply to defendants' U.N. Mission as such. See *Klinghoffer v. S.N.C, Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria*, 937 F.2d 44, 46 (2d Cir. 1991). Rather, plaintiffs allege that various activities carried out by personnel of the Mission go beyond the legal shield afforded by the exclusion of the Mission itself.

Klinghoffer reasons that "only those activities not conducted in furtherance of the PLO's observer status may properly be considered as a basis of jurisdiction," 937 F.2d at 51, and offers some examples. The court mentions "proselytizing and fundraising activities," *id.* at 52, including those of the then-Permanent Representative of the PLO Zuhdi Labib Terzi, who had "spok[en] in public and to the media in New York in support of the PLO's cause" "[e]very month or two," *id.* (quoting district court opinion). On remand, the district court found various activities to exceed the shelter accorded the U.N. Mission, including Dr. Terzi's speeches and the Mission's generation of "informational materials" and distribution of them "to those seeking information about the PLO." *Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria*, 795 F. Supp. 112, 114 (S.D.N.Y. 1992). Plaintiffs here rely on rather similar promotional activities; for example, Dr.

Riyad Mansour, Permanent Observer for Palestine at the U.N., gave speeches well beyond New York itself, to wit, in Orlando, Florida. See Klieman Supp. Br. 7; see also *id.* Exhibit 4.

Even if we were to assume arguendo that the line drawn by the Second Circuit in *Klinghoffer* is correct and that the activities of the U.N. Mission in fact ranged beyond that line, plaintiffs have not (as discussed below) shown that defendants have been "benefiting from a waiver or suspension," as required for an inference of consent to suit triggered by ATCA § 4(e)(1)(B).

(2) *"[B]enefiting from a waiver or suspension."* Plaintiffs do not and cannot claim an *express* waiver or suspension. The PLO shuttered its D.C. office as of October 10, 2018, after the State Department declined to extend its § 1003 waiver. See U.S. Response 5-6; see also *id.* Exhibits 3-5. And the New York U.N. Mission operates without a waiver precisely because it isn't subject to the ATA. As the government has stated, "[t]here is no waiver of section 1003 currently in effect." *Id.* at 6.

In fact it appears correct to interpret the phrase "waiver or suspension" in (B) as referring solely to an express waiver under § 1003(3), as the government assumes.

For legal authority to issue periodic waivers to the PLO, the State Department has relied on annual State Department appropriations bills. See U.S. Response, Exhibits 3-4. For example, the 2017 letter in

Appendix A

Exhibit 3 invokes § 7041(j)(2)(B)(i) of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242, 2780 (2015), which says:

> The President may waive the provisions of section 1003 of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989 (Public Law 100-204) if the President determines and *certifies in writing* to the Speaker of the House of Representatives, the President pro tempore of the Senate, and the appropriate congressional committees that the Palestinians have not, after the date of enactment of this Act [either (1) taken certain steps at the U.N. or (2) taken certain actions vis-à-vis the International Criminal Court] (emphasis added).

The natural reading then, of "waiver or suspension" in § (e)(1)(B), is the sort of formal exercise of power plainly contemplated in this statute setting forth the waiver procedure.

Plaintiffs point to nothing that could either qualify as or substitute for the formal waiver or suspension evidently required. They point instead, see Klieman Supp. Br. 3, to: (1) an agency's "constructive" waiver of a deadline by accepting payments after that deadline, *Morris Communs., Inc. v. FCC*, 566 F.3d 184, 189, 386 U.S. App. D.C. 1 (D.C. Cir. 2009); (2) the unremarkable truth that defendants may implicitly consent to personal jurisdiction, *Ins. Corp.*

of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703-04, 102 S. Ct. 2099, 72 L. Ed. 2d 492 (1982); (3) the fact that an agency may be required to suspend enforcement efforts to collect funds after making certain findings, *Salazar v. King*, 822 F.3d 61, 78-79 (2d Cir. 2016); and (4) a statutory provision permitting the Secretary of Defense to "expressly waive[], in writing," a certain "limitation," 10 U.S.C. § 2193b(c)(3)(B). The relevance of items (1)-(3) is remote at best. As to (4), plaintiffs' statement that "Congress certainly knows how to specify 'written waivers' when it wishes, and *did not do so here*," Klieman Supp. Br. 3 (emphasis added), appears to neglect the actual language of the legal authorization to issue waivers under § 1003, namely the one quoted above, which creates legal consequences when the President "certifies in writing" that a waiver is to be issued.

Plaintiffs would equate government "failure to prosecute" allegedly excessive propaganda activities with provision of a waiver or suspension. Klieman Supp. Br. 5. But the statute permits no such equation. ATCA § 4 is triggered by a *waiver* of § 1003—not its *violation*. Thus, the predicate for making defendants' U.N. activities legally material under ATCA § 4 has not been met.

* * *

We affirm the decision of the district court in full.

So ordered.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, FILED MARCH 3, 2015

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 04-1173 (PLF)

ESTATE OF ESTHER KLIEMAN, *et al.*,

Plaintiffs,

v.

PALESTINIAN AUTHORITY, *et al.*,

Defendants.

OPINION

Esther Klieman, an American schoolteacher, was killed in a terrorist attack in Israel in 2002. Her estate, survivors, and heirs have brought this action under Section 2333 of the Antiterrorism Act ("ATA"), 18 U.S.C. §§ 2331 *et seq.*, and various tort theories, against the Palestinian Authority ("PA") and the Palestine Liberation Organization ("PLO"), as well as several other organizations and individuals alleged to have engaged in or otherwise supported terrorist activities in or near Israel. The PA and the PLO are the sole remaining defendants in this case.

In 2006, the Court determined that it could exercise general personal jurisdiction over the PA and PLO based

on their "continuous and systematic" contacts with the United States. The Court denied defendants' motion for reconsideration of that decision in 2008. In light of the Supreme Court's recent decision in *Daimler AG v. Bauman*, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014), the PA and the PLO again move for reconsideration of this Court's rulings on personal jurisdiction. Upon consideration of the parties' papers, the relevant legal authorities, the oral arguments of counsel, and the entire record in this case, the Court will grant defendants' motion to reconsider. Due to the intervening change in the law, this Court concludes that it cannot exercise general personal jurisdiction over the PA and the PLO. The Court also finds insufficient bases for the exercise of specific personal jurisdiction. The Court therefore will dismiss the PA and the PLO from this action and will dismiss the case.[1]

---

1. The papers considered in connection with the pending motion include: Defendants' second motion to dismiss for lack of jurisdiction ("Defs.' Second Mot. to Dismiss") [Dkt. No. 55]; defendants' motion for reconsideration of decision on personal jurisdiction ("Defs.' First Recons. Mot.") [Dkt. No. 77]; defendants' motion for reconsideration of 2006 and 2008 orders on personal jurisdiction ("Defs.' Mot.") [Dkt. No. 233]; plaintiffs' memorandum in opposition to defendants' second motion for reconsideration ("Pls.' Opp.") [Dkt. No. 240]; defendants' reply to plaintiffs' memorandum in opposition to defendants' second motion for reconsideration ("Defs.' Reply") [Dkt. No. 244]; plaintiffs' notice of supplemental authority [Dkt. No. 247]; defendants' response to plaintiffs' notice of supplemental authority [Dkt. No. 248]; plaintiffs' second notice of supplemental authority [Dkt. No. 250]; plaintiffs' supplemental brief in opposition to defendants' second motion for reconsideration ("Pls.' Supp. Mem.") [Dkt. No. 256]; defendants' response to plaintiffs' supplemental brief ("Defs.' Supp. Mem.") [Dkt. No. 257]; defendants' supplemental brief on U.S. fundraising as a basis for specific personal jurisdiction ("Defs.' Supp.

Appendix B

I. BACKGROUND

On March 24, 2002, terrorists with machine guns attacked a public bus near Neve Tzuf, an Israeli settlement in the West Bank. Esther Klieman, an American schoolteacher, was shot and killed. In the aftermath, Al Aqsa Martyrs Brigade, an organization designated as a Foreign Terrorist Organization by the U.S. Department of State, claimed responsibility for the attack. Compl. ¶ 32. By the time plaintiffs' complaint was filed in 2004, two individuals — Tamar Rassem Salim Rimawi and Hussam Abdul-Kader Ahmad Halabi — had been arrested, tried, and convicted of Klieman's murder in an Israeli court. *Id.* ¶ 28. A third suspect, Ahmed Hamad Rushdie Hadib, had been arrested and indicted, while a fourth suspect, Annan Aziz Salim Hashash, remained at large. Compl. ¶ 30.

Mem. on Fundraising") [Dkt. No. 260]; plaintiffs' supplemental brief in response to defendants' supplemental brief on U.S. fundraising as a basis for specific personal jurisdiction ("Pls.' Supp. Mem. on Fundraising") [Dkt. No. 261]; plaintiffs' third notice of supplemental authority [Dkt. No. 265]; defendants' response to plaintiffs' third notice of supplemental authority [Dkt. No. 266]; plaintiffs' response to defendants' response to plaintiffs' third notice of supplemental authority [Dkt. No. 267]; plaintiffs' fourth notice of supplemental authority [Dkt. No. 270]; defendants' response to plaintiffs' fourth notice of supplemental authority [Dkt. No. 272]; plaintiffs' fifth notice of supplemental authority [Dkt. No. 273]; defendants' response to plaintiffs' fifth notice of supplemental authority [Dkt. No. 275]; plaintiffs' response to defendants' response to plaintiffs' fifth notice of supplemental authority [Dkt. No. 277]; plaintiffs' sixth notice of supplemental authority [Dkt. No. 279]; and defendants' response to plaintiffs' sixth notice of supplemental authority [Dkt. No. 280].

Appendix B

Klieman's estate, survivors, and heirs brought this action against thirteen individuals and organizations under Section 2333 of the ATA, 18 U.S.C. §§ 2331 *et seq.*, and various tort theories. The original defendants can be broken into four categories: (1) the four alleged perpetrators named above; (2) three additional individuals allegedly involved in the attack; (3) four organizations, Al Aqsa, Fatah, Tanzim, and Force 17, accused of directly supporting the attack; and (4) the Palestinian Authority and the Palestine Liberation Organization. Plaintiffs accuse the PA and the PLO of not only failing to take effective measures to prevent terrorist attacks, but of providing weapons, funding, and other support to the organizations and individuals responsible for the attack. Compl. ¶¶ 31-49.

The procedural history of this case spans a decade. It is summarized here as relevant. On March 30, 2006, the Court issued an Opinion and Order denying defendants' first motion to dismiss and granting plaintiffs' partial motion for summary judgment. *See Estate of Klieman v. Palestinian Auth.*, 424 F. Supp. 2d 153 (D.D.C. 2006) ("*Klieman I*"). Defendants then moved to dismiss for lack of personal jurisdiction due to inadequate service of process and insufficient contacts to satisfy due process. *Estate of Klieman v. Palestinian Auth.*, 467 F. Supp. 2d 107, 110 (D.D.C. 2006) ("*Klieman II*"). On December 29, 2006, the Court issued an Opinion and Order holding that plaintiffs' service of process was ineffective and granting plaintiffs thirty days to perfect service. *Id.* at 110. But the Court rejected the PA's and the PLO's arguments that they lacked sufficient contacts with the United States for the exercise of personal jurisdiction. *Id.*

Defendants then filed a third motion to dismiss based on insufficient service of process, as well as a motion for reconsideration of the Court's personal jurisdiction decision. On April 18, 2008, the Court found that only the PA and the PLO had been properly served, and it therefore dismissed all other defendants from the case. *See Estate of Klieman v. Palestinian Auth.*, 547 F. Supp. 2d 8, 11 (D.D.C. 2008) ("*Klieman III*"). In a separate Memorandum Opinion and Order, the Court denied the defendants' motion for reconsideration of this Court's decision on personal jurisdiction. Memorandum Opinion and Order at 1, 3, April 24, 2008 [Dkt. No. 85]. The Court explained that the contacts the PA and the PLO allegedly had with the United States, including speechmaking and participation in other public appearances, were sufficient for the Court to exercise personal jurisdiction, and that doing so "comport[ed] with traditional notions of fair play and substantial justice." *Id.* at 3. In so holding, the Court aligned itself with other U.S. courts finding general personal jurisdiction over the PA and the PLO. *See, e.g., Ungar v. Palestinian Auth.*, 153 F. Supp. 2d 76, 88 (D.R.I. 2001) (concluding that the PA's and the PLO's contacts with the United States, including maintaining an office in Washington, D.C., engaging in fundraising and public speaking engagements, and hiring a U.S. lobbying firm were sufficient to exercise personal jurisdiction); *see also Biton v. Palestinian Auth.*, 310 F. Supp. 2d 172, 175, 179-80 (D.D.C. 2004) (concluding that the PA's contacts with the United States — such as maintaining offices and bank accounts in the United States and employing a lobbying firm to develop a U.S. public relations campaign — were sufficient to exercise personal jurisdiction).

Appendix B

Defendants have filed another motion for reconsideration of this Court's personal jurisdiction decisions in light of the Supreme Court's recent decision in *Daimler AG v. Bauman*, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014). Defs.' Mot. at 12. In response, plaintiffs argue that (1) the defendants waived their objection to the Court's previous findings of personal jurisdiction, (2) the Court can exercise general jurisdiction over defendants despite *Daimler*, (3) this Court can exercise specific personal jurisdiction in the alternative, and (4) plaintiffs at the least are entitled to jurisdictional discovery before the Court decides whether it has jurisdiction. These arguments are addressed in turn.

II. DISCUSSION

A. Motions for Reconsideration

Motions for reconsideration are not specifically addressed in the Federal Rules of Civil Procedure. While the most analogous rule is Rule 60, which provides relief from a final judgment or order, motions to reconsider interlocutory orders are not governed by Rule 60(b), but rather, such determinations "are within the discretion of the trial court." *Keystone Tobacco Co. v. U.S. Tobacco Co.*, 217 F.R.D. 235, 237 (D.D.C. 2003); *see also Bean v. Soberano*, No. 04-1713, 2008 U.S. Dist. LEXIS 6293, 2008 WL 239833, at *1 (D.D.C. Jan. 24, 2008); *America v. Preston*, No. 03-1807, 2007 U.S. Dist. LEXIS 102910, 2007 WL 8055550, at *1 (D.D.C. Feb. 12, 2007); FED. R. CIV. P. 54(b) ("[A]ny order or other decision, however designated, that adjudicates fewer than all the claims or

the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities."). Notwithstanding the broad discretion of a court to reconsider its own interlocutory decisions, however, and "in light of the need for finality in judicial decision-making," district courts should only reconsider interlocutory orders "when the movant demonstrates (1) an intervening change in the law; (2) the discovery of new evidence not previously available; or (3) a clear error of law in the first order." *In re Vitamins Antitrust Litig.*, No. 99-1097, 2000 U.S. Dist. LEXIS 11350, 2000 WL 34230081, at *1 (D.D.C. July 28, 2000).

Defendants argue that *Daimler AG v. Bauman*, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014), was such an intervening change in the law. The Court agrees. In *Daimler*, Argentine residents sought jurisdiction in California over DaimlerChrysler Atiengesellchaft ("Daimler"), a German corporation, based on the California contacts of Daimler's U.S. subsidiary. *Id.* at 750-51. The Supreme Court rejected plaintiffs' arguments, however, holding that Daimler's U.S. subsidiary, its continuous business operations, and commercial sales accounting for 2.4% of Daimler's worldwide sales were insufficient to support general jurisdiction. *Id.* at 751-52, 760-62. Applying the "essentially at home" test first articulated in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 180 L. Ed. 2d 796 (2011), the Supreme Court iterated that a court may not exercise general jurisdiction over a foreign corporation unless "[the corporation's] affiliations with the

[forum] are so 'continuous and systematic' as to render them essentially at home in the forum State." *Daimler AG v. Bauman*, 134 S. Ct. at 754 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. at 2851); *see also Alkanani v. Aegis Def. Servs. LLC*, 976 F. Supp. 2d 13, 29 (D.D.C. 2014) (holding that, under *Daimler*, a court must consider whether a foreign corporation's contacts are "so extensive, so constant, and so prevalent that they render the defendant 'essentially at home' in the forum").

Prior to the Supreme Court's decisions in *Goodyear* and *Daimler*, courts in this Circuit exercised general jurisdiction over a foreign corporation if its "contacts with the District [were] so continuous and systematic that it could [have] foresee[n] being haled into a court in the District of Columbia." *AGS Int'l Servs. S.A. v. Newmont USA Ltd.*, 346 F. Supp. 2d 64, 74 (D.D.C. 2004). In rendering its 2006 and 2008 personal jurisdiction decisions in this case, the Court thus did not consider whether the PA's and the PLO's U.S. contacts were "so 'continuous and systematic' as to render them essentially at home" in the United States. *Daimler* and *Goodyear* therefore constitute an intervening change in the law and reconsideration of those prior decisions is warranted.

B. Waiver of the Personal Jurisdiction Defense

The Court must first address plaintiffs' threshold argument that defendants have waived their personal jurisdiction defense by failing to file a motion for reconsideration immediately after the Supreme Court first articulated the "at home" test in *Goodyear*. The Court concludes that they have not.

Appendix B

Defendants persistently have objected to personal jurisdiction throughout this case, including by filing two motions near the commencement of the action and a prior motion for reconsideration. This Court issued decisions in 2006 and in 2008 denying defendants' motions and holding that it could exercise personal jurisdiction over the defendants. Plaintiffs therefore had ample notice of defendants' objection to personal jurisdiction throughout the litigation of this case.[2] And, unlike a responsive pleading or a motion to dismiss under Rule 12(b) of the Federal Rules of Civil Procedure, motions for reconsideration may be filed at any time prior to the final judgment. *See* FED. R. CIV. P. 54(b). Tellingly, the Court has not identified, and plaintiffs do not cite, any case denying a motion for reconsideration because of a delay in identifying intervening case law.

Furthermore, defendants have not acted with undue delay nor have the plaintiffs been unfairly prejudiced by any delay. Although the "at home" language first appeared in the Supreme Court's 2011 decision in *Goodyear*, the reach of this language was not immediately clear. *See U.S. ex rel. Barko v. Halliburton Co.*, 952 F. Supp. 2d 108, 115-16 (D.D.C. 2013) (Gwin, J., sitting by designation) (declining to apply the *Goodyear* "at home" test outside

2. Judge Kessler's recent decision finding the PA and the PLO waived personal jurisdiction in another pending case is inapposite because the PA and the PLO failed to move to dismiss the case for lack of personal jurisdiction until after the conclusion of discovery and summary judgment briefing. *See Gilmore v. Palestinian Interim Self-Gov't Auth.*, 8 F. Supp. 3d 9, 2014 WL 2865538, at *3-5 (D.D.C. 2014).

of the stream of commerce context); *see also* 4 CHARLES ALAN WRIGHT &ARTHUR R.MILLER, FED. PRAC. &PROC. § 1067.5 (3d ed. Supp. 2013) ("If the *Goodyear* opinion stands for anything . . . it simply reaffirms that defendants must have continuous and systematic contacts with the forum in order to be subject to general jurisdiction."). It was only after the Supreme Court issued its decision in *Daimler* that the scope of *Goodyear*'s "at home" test was appreciated. And there is no indication that plaintiffs have been prejudiced because, since *Goodyear* was decided, the activity in this case largely has been confined to discovery matters initiated by plaintiffs.

C. Personal Jurisdiction

1. Legal Standard

The plaintiffs bear the burden of establishing a *prima facie* showing that the Court has personal jurisdiction over the PA and the PLO. *See Mwani v. Bin Laden*, 417 F.3d 1, 6-7, 368 U.S. App. D.C. 1 (D.C. Cir. 2005); *First Chicago Int'l v. United Exch. Co.*, 836 F.2d 1375, 1378-79, 267 U.S. App. D.C. 27 (D.C. Cir. 1988). In order to meet this burden, plaintiffs "must provide sufficient factual allegations, apart from mere conclusory assertions, to support the exercise of personal jurisdiction over the defendant." *Howe v. Embassy of Italy*, No. 13-1273, 68 F. Supp. 3d 26, 2014 U.S. Dist. LEXIS 127326, 2014 WL 4449697, at *2 (D.D.C. Sept. 11, 2014); *see also First Chicago Int'l v. United Exch. Co.*, 836 F.2d at 1378 ("Conclusory statements . . . do not constitute the *prima facie* showing necessary to carry the burden of establishing personal

jurisdiction."); *Alkanani v. Aegis Def. Servs.*, 976 F. Supp. 2d at 22 (plaintiff has the burden of establishing a factual basis for a court's exercise of personal jurisdiction and for alleging facts connecting defendant with the forum).

In determining if plaintiffs have met their burden, the Court need not accept all of the plaintiffs' allegations as true. *Jung v. Assoc. of Am. Med. Colls.*, 300 F. Supp. 2d 119, 127 (D.D.C. 2004). It "may receive and weigh affidavits and other relevant matter [outside of the pleadings] to assist in determining the jurisdictional facts." *Id.* (quoting *United States v. Philip Morris Inc.*, 116 F. Supp. 2d. 116, 120 n.4 (D.D.C. 2000)); *see also Alkanani v. Aegis Def. Servs.*, 976 F. Supp. 2d at 22. But all factual discrepancies must be resolved in the plaintiffs' favor. *Crane v. N.Y. Zoological Soc.*, 894 F.2d 454, 456, 282 U.S. App. D.C. 295 (D.C. Cir. 1990).

Plaintiffs assert that defendants have sufficient contacts with the United States for purposes of establishing personal jurisdiction under Rule 4(k)(2) of the Federal Rules of Civil Procedure, which functions as a federal long-arm statute. *See Simon v. Repub. of Hungary*, 37 F. Supp. 3d 381, 2014 WL 1873411, at *30 (D.D.C. 2014). Rule 4(k)(2) provides that:

> For a claim that arises under federal law, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if: (A) the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and (B) exercising jurisdiction is

> consistent with the United States Constitution and laws.

FED. R. CIV. P. 4(k)(2). This Rule thus "allows a district court to acquire jurisdiction over a foreign defendant which has insufficient contacts with any single state but has 'contacts with the United States as a whole.'" *In Re Vitamins Antitrust Litig.*, 94 F. Supp. 2d 26, 31 (D.D.C. 2000) (Hogan, J.) (citing Advisory Comm. Note to 1993 Amendment). As there is no dispute that some of plaintiffs' claims arise under federal law, and neither party asserts that the defendants are subject to jurisdiction in any state's courts of general jurisdiction, the only question before the Court is whether jurisdiction over the defendants may be exercised consistent with the Constitution and laws of the United States. *See Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702-03, 102 S. Ct. 2099, 72 L. Ed. 2d 492 (1982); *Biton v. Palestinian Auth.*, 310 F. Supp. 2d at 177.

The Due Process Clause of the Fifth and Fourteenth Amendments requires that, in order to be subject to the jurisdiction of a court, the defendant must "have certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe Co. v. State of Wash.*, Office of Unemployment Comp. & Placement, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463, 61 S. Ct. 339, 85 L. Ed. 278 (1940)); *see Walden v. Fiore*, 134 S. Ct. 1115, 1121, 188 L. Ed. 2d 12 (2014). "The relationship between the defendant and the forum must be such that

it is 'reasonable . . . to require the corporation to defend the particular suit which is brought there.'" *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980) (quoting *Int'l Shoe Co. v. State of Wash., Office of Unemployment Comp. & Placement*, 326 U.S. at 317); *see also Gordon v. Holder*, 826 F. Supp. 2d 279, 290 (D.D.C. 2011), *aff'd*, 721 F.3d 638, 406 U.S. App. D.C. 6 (D.C. Cir. 2013).

2. General Personal Jurisdiction

On reconsidering defendants' U.S. contacts in light of *Daimler*, the Court concludes that it cannot exercise general personal jurisdiction over the PA and the PLO.[3] As noted in this Court's 2008 decision, plaintiffs allege that the PA and the PLO engage in speechmaking and participate in other public appearances in the United States, as well as public relations activities associated with the D.C. office of the PLO Mission to the United States. Memorandum Opinion and Order at 3, April 24, 2008 [Dkt. No. 85]. In addition, this Court considered the PA's and PLO's contacts identified in two other cases,

3. Plaintiffs also claim that the Court should exercise general jurisdiction because plaintiffs served defendants' agents, and "serving a suitable agent 'doing business' in the jurisdiction" has been used to uphold general jurisdiction. Pls.' Opp. at 17. But personal jurisdiction requires *both* proper service and minimum contacts that comport with due process; proper service alone is insufficient to meet the due process requirements. *Mwani v. bin Laden*, 417 F.3d at 8 ("[S]ervice of process does not alone establish personal jurisdiction. As the Supreme Court said . . . '[b]efore a court may exercise personal jurisdiction over a defendant, there must be more than notice to the defendant.'").

Ungar v. Palestinian Auth., 153 F. Supp. 2d 76, and *Biton v. Palestinian Auth.*, 310 F. Supp. 2d 172, when conducting its personal jurisdiction analysis. *Klieman II*, 467 F. Supp. 2d at 113. The contacts of the PA and the PLO identified in those cases include: maintaining a PLO office in Washington, D.C.; conducting fundraising activities and other public speaking engagements; hiring a lobbying firm to develop a public relations campaign; entering into commercial contracts in the United States; and maintaining bank accounts in New York. *Ungar v. Palestinian Auth.*, 153 F. Supp. 2d at 88; *Biton v. Palestinian Auth.*, 310 F. Supp. 2d at 179-80.

In *Goodyear* and in *Daimler*, the Supreme Court clarified that, for general personal jurisdiction, "minimum contacts" are those "so continuous and systematic as to render [the foreign entity] essentially *at home* in the forum State." *Daimler AG v. Bauman*, 134 S. Ct. at 754, 758 n.11 (emphasis added) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. at 2851) (internal quotation marks omitted).[4] Defendants' alleged

4. The plaintiffs argue that *Goodyear* and *Daimler* are not controlling because both cases were decided under the Fourteenth Amendment. *See* Pls.' Opp. at 10-13. The minimum contacts analysis, however, is the same under the Fifth Amendment and the Fourteenth Amendment. *See, e.g., Securities and Exchange Commission v. Straub*, 921 F. Supp. 2d 244, 253 (S.D.N.Y. 2013) ("[B]ecause the language of the Fifth Amendment's due process clause is identical to that of the Fourteenth Amendment's due process clause, the same general principles guide the minimum contacts analysis."); *see also GSS Grp. Ltd v. Nat'l Port Auth.*, 680 F.3d 805, 816-17, 401 U.S. App. D.C. 1 (D.C. Cir. 2012) (applying *Goodyear* when considering minimum contacts under the Fifth Amendment). The

contacts — including those previously identified by this Court and the decisions it cited, *see supra* at 10-11 — do not suffice to render the PA and the PLO "essentially at home" in the United States. The PA is based in the West Bank and the Gaza Strip. *See* Defs.' Mot. at 12. Although not recognized as a sovereign government by the United States, it governs a portion of the West Bank. *See Safra v. Palestinian Auth.*, No. 14-0669, 82 F. Supp. 3d 37, 2015 U.S. Dist. LEXIS 16492, 2015 WL 567340, at *8 (D.D.C. Feb. 11, 2015). The PLO likewise is based in the West Bank and operates embassies and missions around the world. *See* Defs.' Mot. at 12. Defendants' activities in the United States represent a tiny fraction of their overall activity during the relevant time period, and are a smaller proportion of their overall operations than Daimler's California-based contacts. Defs.' Reply at 3.[5] The fact that defendants maintain a small office in Washington does not save plaintiffs' argument. *Daimler AG v. Bauman*, 134 S.

Court similarly rejects plaintiffs' contention that defendants are foreign political entities not entitled to constitutional protections. Pls' Opp. at 4-6. This issue was resolved by the Court's earlier decisions that defendants are not foreign states entitled to sovereign immunity, *Klieman I*, 424 F. Supp. 2d at 159, but rather are foreign organizations protected by the Due Process Clause. *Klieman II*, 467 F. Supp. 2d at 113; *see also GSS Grp. Ltd v. Nat'l Port Auth.*, 680 F.3d at 809-10.

5. Defendants claim, and plaintiffs do not dispute, that the PLO employed approximately 1,300 people at their global embassies, missions, and delegations between 1998 and 2004, but employed no more than twelve staff members at the Washington, D.C. office during that time. *See* Defs.' Reply at 3, 6. According to defendants, the Washington, D.C. PLO office accounted for 0.037 percent of the PA's total expenditures. *Id.* at 6.

Ct. at 761 n.18 (noting that exercising general jurisdiction based on the presence of a local office "should not attract heavy reliance today").[6]

The Court disagrees with the recent application of *Daimler* to the Palestinian Authority in *Sokolow v. Palestine Liberation Org.*, No. 04-397, 2014 U.S. Dist. LEXIS 168114, 2014 WL 6811395 (S.D.N.Y. Dec. 1, 2014). There the court concluded that, because the record did not indicate where the Palestinian Authority's employees worked, "[t]his record is therefore insufficient to conclude that either defendant is 'at home' in a particular jurisdiction other than the United States." 2014 U.S. Dist. LEXIS 168114, [WL] at *2. But that is not the question *Daimler* requires courts to ask. It is not defendants' burden to demonstrate a "home" outside the United State, but the plaintiffs' burden to present a *prima facie* case that defendants are "at home" in the United States. *See supra* at 6, 8-9; *see also Safra v. Palestinian Auth.*, 2015 U.S. Dist. LEXIS 16492, 2015 WL 567340, at *9 (holding same and noting that plaintiffs "must [also] overcome the common sense presumption that a non-sovereign government is at home in the place they govern"). Plaintiffs in this case have failed to do so.

---

6. Defendants assert that many of these contacts are exempted for personal jurisdiction purposes under the "government contacts" exception. *See* Defs.' Supp. Mem. at 3 ("[U]nder the well-established government contacts exception, Plaintiffs cannot rely on speech intended to lobby the federal government as a jurisdictional contact."); *see also Alkanani v. Aegis Def. Servs.*, 976 F. Supp. 2d at 25; *Savage v. Bioport, Inc.*, 460 F. Supp. 2d 55, 62 (D.D.C. 2006). The Court need not resolve this question, however, because these contacts nonetheless are insufficient for the exercise of general personal jurisdiction under *Goodyear* and *Daimler*.

3. Specific Personal Jurisdiction

Where general jurisdiction is unavailable, a court nevertheless may hear a suit that "aris[es] out of or relate[s] to the defendant's contacts with the forum." *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.8, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984). A court's exercise of specific jurisdiction "depends on an 'affiliatio[n] between the forum and the underlying controversy,' principally, activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. at 2851 (quoting Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136 (1966)); *see Walden v. Fiore*, 134 S. Ct. at 1121 (whether a forum state may assert specific jurisdiction depends on "the relationship among the defendant, the forum, and the litigation," and "defendant's suit-related conduct must [have] a substantial connection with the forum State"). If the activities giving rise to the suit occurred abroad, jurisdiction is proper only if the defendant has "purposefully directed" its activities towards the forum and if defendant's "conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, 474, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985); *Williams v. Romarm, SA*, 756 F.3d 777, 410 U.S. App. D.C. 405, 2014 WL 2933222, at *5, *7 (D.C. Cir. 2014) (concluding that plaintiffs' failure to allege any conduct by defendant that was purposefully directed towards the forum compelled a finding of no specific jurisdiction); *cf. Mwani v. bin Laden*,

417 F.3d at 13 (concluding that specific jurisdiction was proper when defendants "purposefully directed" their activities at the United States and the litigation resulted from injuries to the plaintiffs "that 'arise out of or relate to' those activities").

In their opposition to defendants' motion for reconsideration, plaintiffs assert that the March 24, 2002 attack "arises out of" defendants' contacts with the United States. *See* Pls.' Opp. at 26-33. But because the Court had difficulty discerning the precise nature of this asserted connection, the Court directed the plaintiffs to file a supplemental memorandum before oral argument clearly explaining their theory of specific jurisdiction and permitted defendants to respond. *See* Memorandum Opinion and Order, June 27, 2014 [Dkt. No. 253]. Upon careful consideration of the plaintiffs' arguments and supplemental papers, the Court concludes that it may not exercise specific jurisdiction in this case.

There appear to be three facets to plaintiffs' theory of specific jurisdiction. *First*, plaintiffs assert that, while engaged in the terror campaign in Israel, defendants simultaneously conducted a publicity campaign in the United States intended to pressure the United States government to persuade Israel to withdraw from Gaza and the West Bank. The defendants' alleged support for Ms. Klieman's attackers "relates" to defendants' activities in the United States because both activities were motivated by the same political goal. *See* Pls.' Supp. Mem. at 6 ('[I]t is not necessary that the terrorist attack which killed Esther was *caused by* the Defendants' U.S. contacts to

assert specific jurisdiction; both the U.S. contacts and Defendants' terrorism result from the same cause: the PA/PLO's political goals."). Plaintiffs' theory is tenuous at best, and this broad reading of the phrase "relates to" has no support in the relevant case law. Courts typically require that the plaintiff show some sort of causal relationship between a defendant's U.S. contacts and the episode in suit. *See Walden v. Fiore*, 134 S. Ct. at 1121 ("For a State to exercise jurisdiction consistent with due process, the defendant's suit-related conduct must create a substantial connection with the forum State."); *Alkanani v. Aegis Def. Servs., LLC*, 976 F. Supp. 2d at 27 (noting that "[s]ome courts have interpreted the phrase 'arise [from]' [under D.C.'s long-arm statute] as endorsing a theory of 'but-for' causation, while other courts have required proximate cause to support the exercise of specific jurisdiction," but holding that "at a minimum [arise from] means that the claim raised must 'have a discernible relationship' to the defendant's business transacted in the district"). Plaintiffs have failed to allege anything of the kind.[7]

---

7. Related to this argument is plaintiffs' suggestion at oral argument that defendants had engaged in U.S.-based fundraising. Following oral argument in this case, therefore, the Court ordered supplemental briefing regarding U.S. fundraising as a basis for specific personal jurisdiction. Order at 2, July 28, 2014 [Dkt. No. 258]. Having reviewed the supplemental filings, the Court agrees with defendants that plaintiffs have not alleged, provided any *prima facie* showing, nor developed any facts through discovery that either the PA or the PLO engages in fundraising in the United States. *See* Defs.' Supp. Mem. on Fundraising at 2-5. Moreover, defendants provided a declaration from the head of the PLO's U.S. mission office attesting to the absence of any fundraising activities. *Id.* at 2 (citing Declaration of Ambassador Maen Areikat ¶ 11 [Dkt. No. 244-2]).

Second, plaintiffs argue that defendants supported terrorists, such as those individuals and organizations behind the March 2002 attack, in order to persuade U.S. policymakers to pressure Israel to withdraw from the contested areas. *See* Pls.' Supp. Mem. at 4-6. Plaintiffs' proposed narrative is difficult to follow; they appear to speculate that the PA and the PLO believed that American policymakers would blame Israel for increased terrorist attacks by Palestinian organizations and thus pressure Israel to withdraw from contested areas. *See id.* Plaintiffs argue that defendants' conduct therefore was "purposefully directed" at the United States. *See, e.g.*, *Mwani v. bin Laden*, 417 F.3d at 4, 14 (concluding that a terrorist act directed at the United States embassy abroad was sufficient for the exercise of personal jurisdiction over foreign defendants, as defendants "purposefully direct[ed] their terror at the United States," and therefore could "reasonably anticipate being haled into court" here).

Plaintiffs' theory, however, lacks plausibility and is divorced from the factual allegations in the complaint. Plaintiffs' complaint does not contain any allegations that the PA and PLO supported terrorist attacks to cause the United States to pressure Israel to withdraw from contested areas. And plaintiffs' new theory is undermined by the allegation that the United States government, rather than blame Israel for the attacks, "repeatedly demanded from [d]efendants . . . PA and PLO that they take effective measures to prevent every terrorist attack by" the individuals responsible for Esther Klieman's death. Compl. ¶ 38. Moreover, despite the fact that discovery has been ongoing for many years, plaintiffs do not point to any

evidence supporting their theory, nor do they suggest that jurisdictional discovery would reveal facts to support this theory. *See* Pls.' Supp. Mem. at 10.

Third, plaintiffs argue that specific personal jurisdiction is proper because "injury to Americans was a foreseeable result" of defendants' conduct abroad. *See* Pls.' Supp. Mem. at 8. Such a foreseeability test has been rejected by the Supreme Court repeatedly, and most recently in *Walden v. Fiore*, where the Court held that a defendant's actions outside of the forum do not create sufficient contacts with the forum simply because the defendant directed his conduct at plaintiffs that he knew were residents of the forum state. *Walden v. Fiore*, 134 S. Ct. at 1125 ("Such reasoning improperly attributes a plaintiff's forum connections to the defendant and makes those connections 'decisive' in the jurisdictional analysis."); *see also World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. at 295 ("'Foreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause.").

Plaintiffs' attempt to analogize this case to *Calder v. Jones*, 465 U.S. 783, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984), is unavailing. In *Calder*, the Supreme Court held that a court in California could properly exercise specific jurisdiction over two Florida journalists where California was "the focal point both of the story and of the harm suffered." *Id.* at 788-89. But the facts in this case are readily distinguishable. Plaintiffs have not made any *prima facie* showing that defendants' alleged conduct — providing support for terrorist organizations in Israel —

focused on the United States, or that the resulting harm was disproportionately suffered in the United States. And, as noted, exercising specific jurisdiction because the victim of a foreign attack happened to be an American would run afoul of the Supreme Court's holding that "[d]ue process requires that a defendant be haled into court in a forum State based on his own affiliation with the State, not based on the 'random, fortuitous, or attenuated' contacts he makes by interacting with other persons affiliated with the State." *Walden v. Fiore*, 134 S. Ct. at 1123 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. at 475).[8]

D. Plaintiffs' Request for Jurisdictional Discovery

Plaintiffs request jurisdictional discovery to "demonstrate that the terrorist attack in this case . . . appeared to be intended to influence the policy of the United States and Israeli governments in favor of acceding to Defendants' political goals and demands."

---

8. The Court recognizes plaintiffs' concern that this holding may appear inconsistent with the aims of the Antiterrorism Act, which was designed to ensure that Americans harmed by international terrorist acts would have an adequate forum for civil actions against the responsible entities. *See Goldberg v. UBS AG*, 660 F. Supp. 2d 410, 420-22 (E.D.N.Y. 2009); *Strauss v. Credit Lyonnais, S.A.*, 249 F.R.D. 429, 443-46 (E.D.N.Y. 2008). But as the D.C. Circuit has pointed out, a "statute cannot grant personal jurisdiction where the Constitution forbids it." *Price v. Socialist People's Libyan Arab Jamahirya*, 294 F.3d 82, 95, 352 U.S. App. D.C. 284 (D.C. Cir. 2002). The Court is confident, however, that courts are able to exercise specific personal jurisdiction in ATA cases with a sufficient nexus with the United States. *See, e.g., In re Terrorist Attacks on September 11, 2001*, 714 F.3d 659, 673-75 (2d Cir. 2013).

See Pls.' Opp. at 32. Such jurisdictional discovery "lies within the district court's discretion," *Goodman Holdings v. Rafidain Bank*, 26 F.3d 1143, 1147, 307 U.S. App. D.C. 79 (D.C. Cir. 1994), and is appropriate "if it could produce facts that would affect [the court's] jurisdictional analysis." *Al Maqaleh v. Hagel*, 738 F.3d 312, 325-26, 407 U.S. App. D.C. 323 (D.C. Cir. 2013). Jurisdictional discovery is not appropriate, however, "in the absence of some specific indication regarding what facts additional discovery could produce." *Id.* The plaintiffs therefore must "demonstrate with plausible factual support amounting to more than speculation or conclusory statements that discovery will uncover sufficient evidence" to establish personal jurisdiction. *Simon v. Repub. of Hungary*, 37 F. Supp. 3d 381, 2014 WL 1873411, at *41; *see, e.g., El-Fadl v. Cent. Bank of Jordan*, 75 F.3d 668, 671, 316 U.S. App. D.C. 86 (D.C. Cir. 1996), *abrogated on other grounds by Samantar v. Yousuf*, 560 U.S. 305, 130 S. Ct. 2278, 176 L. Ed. 2d 1047 (2010) (plaintiff was entitled to jurisdictional discovery based upon evidence of specific transactions by defendant bank in the forum).

Plaintiffs seek the following information in jurisdictional discovery:

> (1) The extent of Defendants' activities within the United States and this jurisdiction to attempt to influence the foreign policy and public opinion in the United States to pressure Israel to change its public policies vis-à-vis the PA, including, but not limited to, information on the consultants, lobbyists

> and other professionals retained for this purpose.
>
> (2) The financial investment of the Defendants' commercial contracts with U.S. companies which allow the Defendants to raise revenue in the United States to support the operating budgets of the Defendants, which funded the joint public relations and terrorism campaign. As demonstrated above, funds from the Defendants are then used to support terrorism, including the very terrorists who murdered Esther Klieman.

Pls.' Supp. Mem. at 10.

Even if the plaintiffs did obtain any such evidence through additional discovery — discovery that is limited to seeking information about defendants' public advocacy and fundraising activities in the United States — the plaintiffs would be unable to meet their burden of showing either general or specific personal jurisdiction under *Daimler* and *Walden*. *See Safra v. Palestinian Auth.*, 2015 U.S. Dist. LEXIS 16492, 2015 WL 567340, at *9, *13. Jurisdictional discovery therefore is unwarranted and plaintiffs' request will be denied. *See Williams v. Romarm, SA*, 756 F.3d 777, 786, 410 U.S. App. D.C. 405 (D.C. Cir. 2014) (affirming denial of jurisdictional discovery when plaintiffs' requested discovery would not enable plaintiffs "to account for the tenuous connection" between defendant and the forum); *Savage v. Bioport, Inc.*,

Appendix B

460 F. Supp. 2d at 62-63 (denying jurisdictional discovery where "[a]dditional discovery of [defendant]'s contacts will not affect the jurisdictional outcome").

Appendix B

III. CONCLUSION

For the foregoing reasons, defendants' motion for reconsideration of the 2006 and 2008 interlocutory orders on personal jurisdiction will be granted. In light of the intervening change in law, the Court concludes that it cannot exercise general jurisdiction over the PA and the PLO because their contacts with the United States are not so continuous or systematic as to render them "essentially at home" in this forum. The Court also finds that it cannot exercise specific jurisdiction over the defendants because the suit does not arise out of or relate to defendants' contacts with the United States. The PA and the PLO therefore will be dismissed from this case pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure. Because the PA and the PLO were the sole remaining defendants, this case will be dismissed with prejudice and all currently pending motions will be denied as moot. An Order consistent with this Opinion will issue this same day.

DATE: March 3, 2015

/s/
PAUL L. FRIEDMAN
United States District Court

APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED JULY 8, 2019

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-7034
September Term, 2018
1:04-cv-01173-PLF

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

Appellants,

v.

PALESTINIAN AUTHORITY, ALSO KNOWN AS PALESTINIAN INTERIM SELF-GOVERNMENT AUTHORITY AND PALESTINIAN LIBERATION ORGANIZATION, ALSO KNOWN AS PLO,

Appellees.

July 8, 2019, Filed

BEFORE: Garland, Chief Judge; Katsas, Circuit Judge; and Williams, Senior Circuit Judge

Appendix C

ORDER

Upon consideration of appellants' petition for panel rehearing filed on June 13, 2019, it is

ORDERED that the petition be denied.

PER CURIAM

FOR THE COURT:

Mark J. Langer, Clerk
/s/_____
Ken Meadows
Deputy Clerk

APPENDIX D — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED JULY 8, 2019

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-7034
September Term, 2018
1:04-cv-01173-PLF

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

Appellants,

v.

PALESTINIAN AUTHORITY, ALSO KNOWN AS
PALESTINIAN INTERIM SELF-GOVERNMENT
AUTHORITY AND PALESTINIAN LIBERATION
ORGANIZATION, ALSO KNOWN AS PLO,

Appellees.

BEFORE: Garland, Chief Judge; Henderson, Rogers, Tatel, Griffith, Srinivasan, Millett, Pillard, Wilkins, Katsas, and Rao, Circuit Judges; and Williams, Senior Circuit Judge

ORDER

Upon consideration of appellants' petition for rehearing *en banc*, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Appendix D

PER CURIAM

FOR THE COURT:

Mark J. Langer, Clerk
BY: /s/_____
Ken Meadows
Deputy Clerk

APPENDIX E — ANTI-TERRORISM CLARIFICATION OF THE ONE HUNDRED FIFTEENTH CONGRESS OF THE UNITED STATES AT THE SECOND SESSION

ONE HUNDRED FIFTEENTH CONGRESS
OF THE
UNITED STATES OF AMERICA

AT THE SECOND SESSION

Begun and held at the City of Washington on Wednesday, the third day of January, two thousand and eighteen

AN ACT

To amend title 18, United States Code, to clarify the meaning of the terms "act of war" and "blocked asset", and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Anti-Terrorism Clarification Act of 2018".

Appendix E

SEC. 2. CLARIFICATION OF THE TERM "ACT OF WAR".

(a) IN GENERAL.—Section 2331 of title 18, United States Code, is amended—

(1) in paragraph (4), by striking "and" at the end;

(2) in paragraph (5), by striking the period at the end and inserting "; and"; and

(3) by adding at the end the following:

"(6) the term 'military force' does not include any person that—

"(A) has been designated as a—

"(i) foreign terrorist organization by the Secretary of State under section 219 of the Immigration and Nationality Act (8 U.S.C. 1189); or

"'(ii) specially designated global terrorist (as such term is defined in section 594.310 of title 31, Code of Federal Regulations) by the Secretary of State or the Secretary of the Treasury; or

"(B) has been determined by the court to not be a 'military force'.".

(b) APPLICABILITY.—The amendments made by this section shall apply to any civil action pending on or commenced after the date of the enactment of this Act.

SEC. 3. SATISFACTION OF JUDGMENTS AGAINST TERRORISTS.

(a) IN GENERAL.—Section 2333 of title 18, United States Code, is amended by inserting at the end following:

"(e) USE OF BLOCKED ASSETS TO SATISFY JUDGMENTS OF U.S. NATIONALS.—For purposes of section 201 of the Terrorism Risk Insurance Act of 2002 (28 U.S.C. 1610 note), in any action in which a national of the United States has obtained a judgment against a terrorist party pursuant to this section, the term 'blocked asset' shall include any asset of that terrorist party (including the blocked assets of any agency or instrumentality of that party) seized or frozen by the United States under section 805(b) of the Foreign Narcotics Kingpin Designation Act (21 U.S.C. 1904(b))."

(b) APPLICABILITY.—The amendments made by this section shall apply to any judgment entered before, on, or after the date of enactment of this Act.

SEC. 4. CONSENT OF CERTAIN PARTIES TO PERSONAL JURISDICTION.

(a) IN GENERAL.—Section 2334 of title 18, United States Code, is amended by adding at the end the following:

''(e) CONSENT OF CERTAIN PARTIES TO PERSONAL JURISDICTION.—

''(1) IN GENERAL.—Except as provided in paragraph (2), for purposes of any civil action under section 2333 of this title, a defendant shall be deemed to have consented to personal jurisdiction in such civil action if, regardless of the date of the occurrence of the act of international terrorism upon which such civil action was filed, the defendant—

"(A) after the date that is 120 days after the date of enactment of this subsection, accepts—

"(i) any form of assistance, however provided, under chapter 4 of part II of the Foreign Assistance Act of 1961 (22 U.S.C. 2346 et seq.);

"(ii) any form of assistance, however provided, under section 481 of the Foreign Assistance Act of 1961 (22 U.S.C. 2291) for international narcotics con- trol and law enforcement; or

"(iii) any form of assistance, however provided, under chapter 9 of part II of the Foreign Assistance Act of 1961 (22 U.S.C. 2349bb et seq.); or

"(B) 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) after the date that is 120 days after the date of enactment of this subsection—

"(i) continues to maintain any office, headquarters, premises, or other facilities or establishments within the jurisdiction of the United States; or

''(ii) establishes or procures any office, head- quarters, premises, or other facilities or establishments within the jurisdiction of the United States.

"(2) APPLICABILITY.—Paragraph (1) shall not apply to any defendant who ceases to engage in the conduct described in paragraphs (1)(A) and (1)(B) for 5 consecutive calendar years.".

Appendix E

S. 2946—3

(b) APPLICABILITY.—The amendments made by this section shall take effect on the date of enactment of this Act.

Speaker of the House of Representatives.

Vice President of the United States and President of the Senate.