

No. 19-741

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IN THE  
**Supreme Court of the United States**

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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.*

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

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**SUPPLEMENTAL BRIEF FOR PETITIONERS**

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Dated: January 31, 2020

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## SUPPLEMENTAL BRIEF FOR PETITIONERS

Petitioners respectfully submit this supplemental brief to address the impact on the pending petition of the Promoting Security and Justice for Victims of Terrorism Act of 2019 (PSJVTA), Pub. L. No. 116-94, div. J, tit. IX, § 903, 133 Stat. 3082-3085, which became law on December 20, 2019. The PSJVTA is reproduced as an appendix to this brief.

This Court should grant the petition, vacate the judgment of the court of appeals, and remand for consideration of the impact of the PSJVTA, as the Court did earlier this Term in *Clearstream Banking S.A. v. Peterson*, No. 17-1529, 2020 WL 129504 (Jan. 13, 2020) when presented with the same circumstances.

The PSJVTA amends the text of 18 U.S.C. § 2334(e), which the lower court found ineffective to secure personal jurisdiction over respondents, the Palestine Liberation Organization (PLO) and Palestinian Authority (PA), *see* Pet. App. 24a-32a. This is now the second time in fourteen months that Congress has acted for the purpose of restoring jurisdiction in civil anti-terrorism cases against *these* respondents, in explicit disapproval of decisions of the D.C. Circuit in this and other cases and of the Second Circuit in *Sokolow v. Palestinian Authority*, which is also pending in this Court on a petition for a writ of certiorari (No. 19-764). The judgment of the court of appeals should be vacated and the case remanded for further consideration in light of the PSJVTA.

1. Congress passed the Anti-Terrorism Act of 1992, Pub. L. 102-572, tit. X, § 1003, 106 Stat. 4522-4524 (ATA),

to “codify” and “extend” the Second Circuit’s holding in *Klinghoffer v. Palestine Liberation Org.*, 937 F.2d 44 (2d Cir. 1991), by providing for federal-court jurisdiction over terror attacks occurring outside the United States if such attacks injured or killed nationals of the United States. See *Boim v. Quranic Literacy Inst.*, 291 F.3d 1000, 1010-1011 (2002); Br. of Charles Grassley, *et. al.*, in *Sokolow v. Palestine Liberation Org.*, No. 19-764 at 8-9 (U.S. filed Jan. 15, 2020).

For nearly 25 years, “every federal court to have considered the issue [agreed] that the totality of activities in the United States by the PLO and the PA justifies the exercise of general personal jurisdiction” over them. *Sokolow v. Palestine Liberation Org.*, No. 04 Civ. 397 (GBD), 2011 WL 1345086, at \*3 n.10 (S.D.N.Y. Mar. 30, 2011) (citing *Knox v. Palestine Liberation Org.*, 248 F.R.D. 420, 427 (S.D.N.Y. 2008); *Estate of Klieman v. Palestinian Auth.*, 467 F. Supp. 2d 107, 113 (D.D.C. 2006); *Knox v. Palestine Liberation Org.*, 229 F.R.D. 65, 67 (S.D.N.Y. 2005); 325 F. Supp. 2d 15, 59 (D. R.I. 2004); *Biton v. Palestinian Auth.*, 310 F. Supp. 2d 172, 179 (D.D.C. 2004); *Estates of Ungar v. Palestinian Auth.*, 153 F. Supp. 2d 76, 88 (D.R.I. 2001); *Klinghoffer v. S.N.C. Achille Lauro*, 795 F. Supp. 112, 114 (S.D.N.Y. 1992)), *rev’d sub. nom. Waldman v. Palestine Liberation Org.*, 835 F.3d 317 (2d Cir. 2016).

2. In 2005, Petitioners filed their lawsuit under the ATA against the PA-PLO for its support of the murder of Esther, which occurred on March 24, 2002. In 2006, the District Court in this case followed earlier cases to hold that “the PA and the PLO have sufficient contacts with the United States as a whole to justify the exercise of personal

jurisdiction under the Due Process Clause.” *Estate of Klieman v. Palestinian Auth.*, 467 F. Supp. at 113. In 2015, however, the District Court reconsidered that ruling in light of this Court’s decision in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), and dismissed the case based upon a lack of personal jurisdiction. Pet. App. 42a-54a.

The D.C. Circuit stayed this case on appeal, pending its decision in two cases raising similar issues. *See Livnat v. Palestinian Auth.*, 851 F.3d 45 (D.C. Cir. 2017); *Gilmore v. Palestinian Auth.*, 843 F.3d 958 (D.C. Cir. 2016). In *Livnat*, the D.C. Circuit held that the Fifth Amendment’s Due Process Clause forbade the exercise of jurisdiction over the PA for its employee’s murder of a U.S. National outside the United States. 851 F.3d 56-58.

In response to *Livnat* and the Second Circuit’s decision in *Sokolow*, Congress then passed the Anti-Terrorism Clarification Act (ATCA), Pub. L. No. 115-253, § 4 (adding 18 U.S.C. § 2334(e)). The ATCA amended the ATA to provide that respondents are deemed to consent to jurisdiction in civil ATA cases if, after a specified date, they continued to maintain any facility within the jurisdiction of the United States or accepted foreign assistance from the United States. *See* H.R. Rep. No. 115-858 at 7 & n.23.

The ATCA became law while this case was being briefed in the D.C. Circuit. After receiving limited supplemental briefing, the D.C. Circuit largely affirmed the District Court, ruling that the factual predicates of the ATCA had not been met without allowing any discovery by Petitioners regarding relevant jurisdiction-creating activities by the PA-PLO. Pet. App. 24a-32a. In particular,

the lower court accepted at face value respondents’ denial that they were accepting U.S. foreign assistance, *id.* at 27a-28a, and held that “plaintiffs have not \* \* \* 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).” Pet. App. 30a.

3. Congress has now acted—again—passing the PSJVTA in direct response to the D.C. Circuit’s decision in this case and the Second Circuit’s similar decision in *Sokolow*. See 165 Cong. Rec. S7182–7183 (daily ed. Dec. 19, 2019). As most relevant here, Congress eliminated the “benefiting from a waiver or suspension” requirement, which the D.C. Circuit found to be dispositive, and replaced it by extending the statute’s reach to any “defendant,” defined specifically to cover these respondents in this case by name. App. 3a (amending 18 U.S.C. § 2334(e)(1), 6a (adding 18 U.S.C. § 2334(e)(5)).

4. This Court should grant the petition, vacate the judgment of the court of appeals, and remand for consideration of the impact of the PSJVTA. “A GVR is appropriate when [1] ‘intervening developments ... reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and [2] where it appears that such a redetermination may determine the ultimate outcome’ of the matter.” *Wellons v. Hall*, 558 U.S. 220, 225 (2010) (quoting *Lawrence v. Chater*, 516 U.S. 163, 167 (1996)).

A new federal statute is a classic example of an “intervening development” meriting a GVR order. *Lawrence*, 516 U.S. at 167 (1996) (citing *Sioux Tribe*

of *Indians v. United States*, 329 U.S. 685 (1946)). This Court has issued many GVR orders in light of new federal statutes.<sup>1</sup>

a. The intervening legislation (here, the PSJVTA) reveals a “reasonable probability” that the court of appeals decision “rests upon a premise that the court would reject if given the opportunity for further consideration.” *Wellons*, 558 U.S. at 225; *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam). A GVR is appropriate where intervening legislation expressly addresses the issues that resulted in dismissal below. *See Dep’t of Def. v. ACLU*, 558 U.S. 1042 (2009) (granting, vacating, and remanding in light of the Department of Homeland Security Appropriations Act, 2010, Pub. L. No. 111-83, § 565, 123 Stat. 2142); *Dep’t of Justice v. City of Chicago*, 537 U.S. 1229 (2003) (granting, vacating, and remanding in light of the Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7, § 644, 117 Stat. 11); *Bureau of Econ.*

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1. *See, e.g., Clearstream Banking S.A. v. Peterson*, No. 17-1529, 2020 WL 129504 (Jan. 13, 2020); *Jefferson v. United States*, No. 18-9325, 2020 WL 129507 (Jan. 13, 2020); *Richardson v. United States*, 139 S. Ct. 2713 (2019); *Wheeler v. United States*, 139 S. Ct. 2664 (2019); *Dep’t of Def. v. Am. Civil Liberties Union*, 558 U.S. 1042 (2009); *Diawara v. Gonzales*, 546 U.S. 1086 (2006); *Department of Justice v. City of Chi.*, 537 U.S. 1229 (2003); *American Bible Soc’y v. Richie*, 522 U.S. 1011 (1997); *Doherty v. Pennington*, 522 U.S. 909 (1997); *K.R. v. Anderson Cmty. Sch. Corp.*, 521 U.S. 1114 (1997); *American Life & Cas. Ins. Co. v. Trostel*, 519 U.S. 1104 (1997); *Fields v. Battle*, 519 U.S. 801 (1996); *Bureau of Econ. Analysis v. Long*, 454 U.S. 934 (1981); *see also Lawrence v. Chater*, 516 U.S. 163, 166-167 (1996) (per curiam) (explaining that this Court has granted, vacated, and remanded for a “wide range of developments,” including “new federal statutes”).

*Analysis v. Long*, 454 U.S. 934 (1981) (granting, vacating, and remanding in light of the Economic Tax Recovery Act of 1981, Pub. L. No. 97-34, § 701, 95 Stat. 172).

That is the situation here. The court of appeals held that 18 U.S.C. § 2334(e)(1) did not reach respondents because they are not “benefiting from a waiver or suspension” of Section 1003 of the Anti-Terrorism Act of 1987, 22 U.S.C. § 5202. Pet. App. 30a-32a. In response, Congress amended § 2334(e)(1) to omit the “benefiting from a waiver or suspension” requirement. *See App. infra*, 3a-4a (amending § 2334(e)(1)). Instead, the statute now applies simply to “defendants,” defined to include these respondents by name. *App., infra*, 6a (adding § 2334(e)(5)).

Congress also expanded the bases of consent to jurisdiction to include additional types of conduct, including making payments to terrorists who killed or injured Americans. *Id.* at 4a (adding § 2334(e)(1)(A)).

Moreover, Congress enacted a number of interpretive rules to support the assertion of jurisdiction. To ensure that respondents’ building on East 65th Street in New York City is covered, the PSJVTA amended the ATA to replace the phrase “within the jurisdiction of the United States” in § 2334(e)(1)(B)(i) with the phrase “in the United States.” *App., infra*, 4a (amending § 2334(e)(1)(B)(i) and (ii)). And, to make doubly sure that the Agreement Between the United Nations and the United States of America Regarding the Headquarters of the United Nations, 61 Stat. 3416, T.I.A.S. 1676, 554 U.N.T.S. 308 (1947) is not construed to supersede the ATA, Congress added a rule of construction that, “[n]otwithstanding any other law (including any treaty),” any facility that is not

used “*exclusively* for the purpose of conducting official business of the United Nations” is “considered to be in the United States.” *Id.* at 5a-6a. (adding § 2334(e)(3)(A) and (4) (emphasis added). Respondents have long used their building for non-UN purposes. *See Klinghoffer v. S.N.C. Achille Lauro*, 795 F. Supp. 112, 114-115 (S.D.N.Y. 1992)).

The PSJVTA also contains a “sense of Congress” that claims by U.S. nationals previously “dismissed for lack of personal jurisdiction”—*i.e.*, this case and like cases—“should be resolved in a manner that provides *just compensation to the victims*” and “*without* subjecting victims to unnecessary or protracted litigation.” *Id.* at 2a-3a, § 903(b)(4)(A), (b)(4)(B), (b)(5). Congress provided that the statute “should be liberally construed to carry out the purposes of Congress *to provide relief for victims of terrorism,*” *id.* at 7a, § 903(d)(1)(A) (emphasis added). Finally, Congress provided that the new statute and its amendments, “shall apply to any case pending on or after August 30, 2016,” App., *infra*, 7a, § 903(d)(2), which is well before the lower court disposed of this case, Pet. App. 1a.

b. A GVR order is the proper course here, because this Court is “a court of review, not of first view.” *Cutter v. Wilkinson*, 544 U.S. 709, 718 (2005); see *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2056 (2019) (remanding to allow court of appeals to address threshold question in the first instance); *Frank v. Gaos*, 139 S. Ct. 1041, 1046 (2019).

Redetermination by the court of appeals on remand “may determine the ultimate outcome of the litigation.” *Wellons v. Hall*, 558 U.S. at 225. A GVR order is an appropriate response after a recent change in applicable

law, which is what this Court did earlier this Term in *Clearstream Banking S.A. v. Peterson*, No. 17-1529, 2020 WL 129504 (Jan. 13, 2020). In that case, the Solicitor General had filed an amicus brief arguing that the petition for writ of certiorari should be denied, but less than a month later filed a supplemental amicus brief after the passage of legislation that addressed the financial assets at issue in the case. Suppl. Amicus Brief for the Solicitor General, *Clearstream*, No. 17-1529, 2020 WL 129504 (Jan. 13, 2020). The Solicitor General advocated that the Court grant the petition, vacate the judgment below, and remand for further proceedings where a new law “contains a provision that bears on the question presented here.” *Id.* at 2-3. This Court issued the GVR Order. *Clearstream*, No. 17-1529, 2020 WL 129504 (Jan. 13, 2020). The same circumstances present themselves in this case and should result in a GVR in this case as well.



**CONCLUSION**

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

Respectfully Submitted,

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## **APPENDIX**

**APPENDIX — RELEVANT STATUTES AND  
OTHER CONSTITUTIONAL PROVISIONS**

**SEC. 903. PROMOTING SECURITY AND JUSTICE  
FOR VICTIMS OF TERRORISM.**

(a) **SHORT TITLE.**—This section may be cited as the Promoting Security and Justice for Victims of Terrorism Act of 2019.

(b) **FACILITATION OF THE SETTLEMENT OF TERRORISM-RELATED CLAIMS OF NATIONALS OF THE UNITED STATES.**—

(1) **COMPREHENSIVE PROCESS TO FACILITATE THE RESOLUTION OF ANTI-TERRORISM ACT CLAIMS.**—The Secretary of State, in consultation with the Attorney General, shall, not later than 30 days after the date of enactment of this Act, develop and initiate a comprehensive process for the Department of State to facilitate the resolution and settlement of covered claims.

(2) **ELEMENTS OF COMPREHENSIVE PROCESS.**—The comprehensive process developed under paragraph (1) shall include, at a minimum, the following:

(A) Not later than 45 days after the date of enactment of this Act, the Department of State shall publish a notice in the Federal Register identifying the method by which a national of the United States, or a representative of a national of the United States, who has a covered claim, may contact the Department of State to give notice of the covered claim.

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(B) Not later than 120 days after the date of enactment of this Act, the Secretary of State, or a designee of the Secretary, shall meet (and make every effort to continue to meet on a regular basis thereafter) with any national of the United States, or a representative of a national of the United States, who has a covered claim and has informed the Department of State of the covered claim using the method established pursuant to subparagraph (A) to discuss the status of the covered claim, including the status of any settlement discussions with the Palestinian Authority or the Palestine Liberation Organization.

(C) Not later than 180 days after the date of enactment of this Act, the Secretary of State, or a designee of the Secretary, shall make every effort to meet (and make every effort to continue to meet on a regular basis thereafter) with representatives of the Palestinian Authority and the Palestine Liberation Organization to discuss the covered claims identified pursuant to subparagraph (A) and potential settlement of the covered claims.

(3) REPORT TO CONGRESS.—The Secretary of State shall, not later than 240 days after the date of enactment of this Act, and annually thereafter for 5 years, submit to the Committee on the Judiciary and the Committee on Foreign Relations of the Senate and the Committee on the Judiciary and the Committee on Foreign Affairs of the House of Representatives a report describing activities that the Department of

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State has undertaken to comply with this subsection, including specific updates regarding subparagraphs (B) and (C) of paragraph (2).

(4) SENSE OF CONGRESS.—It is the sense of Congress that—

(A) covered claims should be resolved in a manner that provides just compensation to the victims;

(B) covered claims should be resolved and settled in favor of the victim to the fullest extent possible and without subjecting victims to unnecessary or protracted litigation;

(C) the United States Government should take all practicable steps to facilitate the resolution and settlement of all covered claims, including engaging directly with the victims or their representatives and the Palestinian Authority and the Palestine Liberation Organization; and

(D) the United States Government should strongly urge the Palestinian Authority and the Palestine Liberation Organization to commit to good-faith negotiations to resolve and settle all covered claims.

(5) DEFINITION.—In this subsection, the term “covered claim” means any pending action by, or final judgment in favor of, a national of the United States, or any action by a national of the United States dismissed for lack of personal jurisdiction, under section 2333 of title 18,

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United States Code, against the Palestinian Authority  
or the Palestine Liberation Organization.

(c) JURISDICTIONAL AMENDMENTS TO FACILITATE RESOLUTION  
OF TERRORISM-RELATED CLAIMS OF NATIONALS OF THE  
UNITED STATES.

(1) IN GENERAL.—Section 2334(e) of title 18, United  
States Code, is amended—

(A) by striking paragraph (1) and inserting the  
following:

“(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 the enactment of the Promoting Security and  
Justice for Victims of Terrorism Act of 2019, makes  
any payment, directly or indirectly—

“(i) to any payee designated by any individual  
who, after being fairly tried or pleading guilty,  
has been imprisoned for committing any act of  
terrorism that injured or killed a national of  
the United States, if such payment is made by  
reason of such imprisonment; or

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“(ii) to any family member of any individual, following such individual’s death while committing an act of terrorism that injured or killed a national of the United States, if such payment is made by reason of the death of such individual; or

“(B) after 15 days after the date of enactment of the Promoting Security and Justice for Victims of Terrorism Act of 2019—

“(i) continues to maintain any office, headquarters, premises, or other facilities or establishments in the United States;

“(ii) establishes or procures any office, headquarters, premises, or other facilities or establishments in the United States; or

“(iii) conducts any activity while physically present in the United States on behalf of the Palestine Liberation Organization or the Palestinian Authority.”;

(B) in paragraph (2), by adding at the end the following: “Except with respect to payments described in paragraph (1)(A), no court may consider the receipt of any assistance by a nongovernmental organization, whether direct or indirect, as a basis for consent to jurisdiction by a defendant.”; and

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(C) by adding at the end the following:

“(3) EXCEPTION FOR CERTAIN ACTIVITIES AND LOCATIONS.—  
In determining whether a defendant shall be deemed to have consented to personal jurisdiction under paragraph (1)(B), no court may consider—

“(A) any office, headquarters, premises, or other facility or establishment used exclusively for the purpose of conducting official business of the United Nations;

“(B) any activity undertaken exclusively for the purpose of conducting official business of the United Nations;

“(C) any activity involving officials of the United States that the Secretary of State determines is in the national interest of the United States if the Secretary reports to the appropriate congressional committees annually on the use of the authority under this subparagraph;

“(D) any activity undertaken exclusively for the purpose of meetings with officials of the United States or other foreign governments, or participation in training and related activities funded or arranged by the United States Government;

“(E) any activity related to legal representation—



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“(i) for matters related to activities described in this paragraph;

“(ii) for the purpose of adjudicating or resolving claims filed in courts of the United States; or

“(iii) to comply with this subsection; or

“(F) any personal or official activities conducted ancillary to activities listed under this paragraph.

“(4) **RULE OF CONSTRUCTION.**—Notwithstanding any other law (including any treaty), any office, headquarters, premises, or other facility or establishment within the territory of the United States that is not specifically exempted by paragraph (3)(A) shall be considered to be in the United States for purposes of paragraph (1)(B).

“(5) **DEFINED TERM.**—In this subsection, the term ‘defendant’ means—

“(A) the Palestinian Authority;

“(B) the Palestine Liberation Organization;

“(C) any organization or other entity that is a successor to or affiliated with the Palestinian Authority or the Palestine Liberation Organization; or

“(D) any organization or other entity that—

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“(i) is identified in subparagraph (A), (B), or (C); and

“(ii) self identifies as, holds itself out to be, or carries out conduct in the name of, the ‘State of Palestine’ or ‘Palestine’ in connection with official business of the United Nations.”.

(2) PRIOR CONSENT NOT ABROGATED.—The amendments made by this subsection shall not abrogate any consent deemed to have been given under section 2334(e) of title 18, United States Code, as in effect on the day before the date of enactment of this Act.

(d) RULES OF CONSTRUCTION; APPLICABILITY; SEVERABILITY.—

(1) RULES OF CONSTRUCTION.—

(A) IN GENERAL.—This section, and the amendments made by this section, should be liberally construed to carry out the purposes of Congress to provide relief for victims of terrorism.

(B) CASES AGAINST OTHER PERSONS.—Nothing in this section may be construed to affect any law or authority, as in effect on the day before the date of enactment of this Act, relating to a case brought under section 2333(a) of title 18, United States Code, against a person who is not a defendant, as defined in paragraph (5) of section 2334(e) of title 18, United States Code, as added by subsection (c) (1) of this section.

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(2) **APPLICABILITY.**—This section, and the amendments made by this section, shall apply to any case pending on or after August 30, 2016.

(3) **SEVERABILITY.**—If any provision of this section, an amendment made by this section, or the application of such provision or amendment to any person or circumstance is held to be unconstitutional, the remainder of this section, the amendments made by this section, and the application of such provisions to any person or circumstance shall not be affected thereby.