

No. 19-741

IN THE
Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

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

SUPPLEMENTAL BRIEF

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SUPPLEMENTAL BRIEF FOR PETITIONERS

Petitioners respectfully submit this supplemental brief pursuant to SCR 15.8 to address the passing of the trigger date 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, whereby the respondents the PA and PLO have now consented to the jurisdiction of the U.S. court system on at least one of the applicable grounds and declared their intent to consent to jurisdiction under another.

Respondents have continued to make the so-called martyr payments and have recently announced an intention to continue making the payments, even during the ongoing public health crisis, which constitutes consent to personal jurisdiction under the PSJVTA. Now that the PSJVTA's—passed by Congress 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)—April 18, 2020 trigger date has passed and respondents have repeatedly announced their intentions to continue making these payments, it is clear that they intend to consent to the personal jurisdiction of the lower courts under the terms of the PSJVTA.

Because the lower courts may now find jurisdiction over the PA and PLO pursuant to the newly-enacted PSJVTA, 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.¹

1. 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 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

¹ As outlined by Petitioners in their Supplemental brief and Reply, personal jurisdiction also exists as a result of other provisions of the PSJVTA. For example, in the PSJVTA, 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)). 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. 3a-4a (amending § 2334(e)(1)). Instead, the statute now applies simply to “defendants,” defined to include these respondents by name. App. 6a (adding § 2334(e)(5)). This ground alone should support a GVR order.

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)).

The PSJVTA provided that three categories of conduct would be deemed to constitute consent to personal jurisdiction:

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

See App. 4a-5a, PSJVTA § 903(c)(1).

2. On March 29, 2020, the PA’s Prime Minister Mohammed Shtayyeh declared that “we will pay full salaries this month over several days to prevent the public from crowding in front of banks . . . [t]he third day for prisoners and martyrs”, as announced by Wafa, the official PA news agency. See Exhibit 1 at App. 10a (English translation of http://www.wafa.ps/ar_page.aspx?id=Zbdh4fa872920250763aZbdh4f (last visited April 20, 2020)).

3. On April 16, 2020, PA President Mahmoud Abbas declared “[t]he issue of the prisoners will

remain our first priority despite all the difficulties we are facing. This is to preserve the just, inalienable rights of our people”, as announced by Wafa. See <http://english.wafa.ps/page.aspx?id=GqpYGBa115822629582aGqpYGb> (last visited April 20, 2020).

4. The issue of martyrs payments remains an inflexible issue for the PA and its leading officials have continually announced their intentions to continue the payments, as evidenced by the recent round of payments in April. In these circumstances, a GVR would conserve the Court’s resources and allow the court below to build the proper record to determine whether personal jurisdiction exists under the PSJVTA.

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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APRIL 2020

APPENDIX

APPENDIX A - 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.

(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 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, 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

“(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

(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—

“(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—

“(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.

(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.

APPENDIX B — EXHIBIT 1

Shtayyeh: We Will Adopt an Austere Emergency Budget and the Government's Revenues Will Drop by More Than 50%

4. Due to disruption in the cycle of production, importation and consumption, Mohammed Shtayyeh, Palestinian Prime Minister, announced that the Authority's revenues will fall dramatically by more than 50%, whether from local taxes, offset or other. He added "we will witness a drop in international aid as the whole world is in a state of crisis. Therefore, we will adopt an austere emergency budget by reducing expenses as much as possible. Nevertheless, we will pay full salaries this month over several days to prevent the public from crowding in front of banks, where:

- On the first day, the salaries of medical and backup staff will be paid.
- The second day will be for the security personnel.
- The third day for prisoners and martyrs.
- The fourth day for the social affairs beneficiaries and the disadvantaged.
- The fifth day for teachers.
- The sixth day for the remaining employees.

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Appendix B

- The last batch will be on the seventh day which will be dedicated for officials, senior civil servants and ministers.

I hope you spend with caution as we don't know how things will unfold in the coming month."

12a

Appendix B

Day Translation
Certified Translation

CERTIFICATE OF ACCURACY

Micheline Chahine
Translator/Interpreter

Translated document:

On April 16, 2020 I created a PDF copy of an article found at this URL: http://www.wafa.ps/ar_page.aspx?id=Zbdh4fa872920250763aZbdh4f. I have translated two parts of the article:

- 1) the bolded title which comes from page 1 and
- 2) sub-paragraph 4 which comes from page 4.

As a translator for Day Translations, Inc., I, Micheline Chahine, declare that I am a bilingual translator who is thoroughly familiar with the English and Arabic languages. I have translated the attached document to the best of my knowledge from Arabic into English and the English text is an accurate and true translation of the original document presented to the best of my knowledge and belief.

Signed on April 19, 2020

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Appendix B

Micheline Chahine

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