No. 13-318

IN THE

Supreme Court of the United States

JOHN PATRICK O'NEILL, JR., ET AL.,
Petitioners,

v.

AL RAJHI BANK, ET AL.,
Respondents.

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

BRIEF IN OPPOSITION BY PERSONAL JURISDICTION RESPONDENTS

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QUESTION PRESENTED

The undersigned Respondents were dismissed on the basis of only the second question Petitioners present for review:

Whether Petitioners must, in order to establish specific personal jurisdiction over foreign individuals or entities for conduct outside the United States, allege facts to show that those individuals or entities "expressly aimed" their own conduct at the United States.

CORPORATE DISCLOSURE STATEMENTS

Respondent Asat Trust Reg. has no parent corporation and there is no publicly held corporation that owns more than ten percent of its stock.

Respondent DMI Administrative Services S.A. is wholly owned by its parent company Dar Al-Maal Al-Islami Trust. No publicly-traded corporation owns more than ten percent of DMI S.A.

Respondent Faisal Islamic Bank – Sudan has no parent corporation. Hospitalia Operation Services Procurement International Co., Ltd. ("HOSPICO"), United Arab Emirates (UAE) is a publicly held corporation that owns ten percent or more of Respondent Faisal Islamic Bank – Sudan's stock. Faisal for Finance Investments Company (Egypt) is a publicly held corporation that owns ten percent or more of Respondent Faisal Islamic Bank – Sudan's stock.

Respondent National Commercial Bank ("NCB") is not publicly traded. NCB has no parent company. The Kingdom of Saudi Arabia owns the majority of NCB's outstanding shares, which are held by the Kingdom's Ministry of Finance. No publicly held company owns ten percent or more of NCB's stock.

Respondent Saudi Binladin Group is a privately held company. It has no parent company, and there is no publicly held company owning ten percent or more of its stock.

Respondent Schreiber & Zindel Treuhand Anstalt has no parent corporation, and no publicly held corporation owns ten percent or more interest in it.

Respondent Sercor Treuhand Anstalt has no parent corporation and there is no publicly held corporation that owns more than ten percent of its stock.

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STATEMENT OF THE CASE

This brief is submitted on behalf of Respondents who are foreign persons or entities dismissed by the district court for lack of personal jurisdiction, and whose dismissals were upheld by the court of appeals. In this action, Petitioners have attempted to hold hundreds of defendants liable for allegedly aiding the heinous terrorist attacks of September 11, 2001. Throughout more than ten years of litigation, Petitioners have been unable, in the view of multiple federal judges, to identify any specific allegations to support their claims against the vast majority of defendants who have appeared. Moreover, this Court has already denied Petitioners' petition for a writ of certiorari on the personal jurisdiction question presented here.

Both the district court and court of appeals carefully considered Petitioners' allegations in a series of decisions spanning several years of dispositive motions briefing. First, in 2005 the district court dismissed several members of the Saudi royal family on sovereign immunity and personal jurisdiction grounds, as well as other defendants related to the Kingdom of Saudi Arabia. *In re Terrorist Attacks on September 11, 2001*, 349 F. Supp. 2d 765 (S.D.N.Y. 2005) ("*Terrorist Attacks I*"); *In re Terrorist Attacks on September 11, 2001*, 392 F. Supp. 2d 539 (S.D.N.Y. 2005) ("*Terrorist Attacks II*"). Petitioners appealed those dismissals.

The Second Circuit, applying *Calder v. Jones*, 465 U.S. 783 (1984), upheld the dismissals, holding that Petitioners had failed to allege facts that the defendants themselves "expressly aimed" their conduct at the United States. *In re Terrorist Attacks*

on September 11, 2001, 538 F.3d 71 (2d Cir. 2008) ("*Terrorist Attacks III*") (Pet. App. 185a–231a). This Court, after asking for the views of the Solicitor General, who agreed with the result below and recommended against certiorari, denied Petitioners' petition for a writ of certiorari. *Fed. Ins. Co. v. Kingdom of Saudi Arabia*, 557 U.S. 935 (2009).

After considering motions to dismiss from dozens of other defendants, as well as permitting Petitioners to take jurisdictional discovery from some defendants, the district court issued an omnibus opinion on June 17, 2010, that dismissed Petitioners' claims against 35 defendants for lack of personal jurisdiction. *In re Terrorist Attacks on September 11, 2001*, 718 F. Supp. 2d 456 (S.D.N.Y. 2010) ("*Terrorist Attacks IV*"). The district court denied the motion to dismiss of one defendant, as to whom the court found that Petitioners had alleged conduct expressly directed at the United States. *Id.* at 488–95.

In two subsequent opinions, the district court analyzed the allegations against the remaining defendants who had moved to dismiss for lack of personal jurisdiction, and granted the motions as to those defendants who were not alleged to have purposefully directed tortious activity at the United States. *In re Terrorist Attacks on September 11, 2001*, 740 F. Supp. 2d 494 (S.D.N.Y. 2010) ("*Terrorist Attacks V*"); *In re Terrorist Attacks on September 11, 2001*, 840 F. Supp. 2d 776 (S.D.N.Y. 2012) ("*Terrorist Attacks VI*").[1]

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[1] Petitioners' Statement of the Case omits *Terrorist Attacks VI*, which dismissed their claims against Respondent Saudi

Petitioners appealed the dismissals as to three groups of defendants: (1) thirty-seven who had been dismissed for lack of personal jurisdiction; (2) five who had been dismissed for failure to state a claim under the Anti-Terrorism Act; and (3) two who had been dismissed pursuant to the Foreign Sovereign Immunities Act. The Second Circuit issued three separate opinions on April 16, 2013, one for each category of defendant. As to the personal jurisdiction defendants, the Second Circuit once again applied *Calder* to the allegations presented by Petitioners, and concluded that Petitioners had failed to allege that 25 of the defendants "expressly aimed" their conduct at the United States. *In re Terrorist Attacks on September 11, 2001*, 714 F.3d 659 (2d Cir. 2013) ("*Terrorist Attacks VII*"). The court remanded the case as to 12 defendants in order to permit further jurisdictional discovery. The Second Circuit denied rehearing and rehearing en banc.

Binladin Group ("SBG") after several years of jurisdictional discovery. The district court held that Petitioners' allegations against SBG were either legally insufficient or had "no evidentiary support, which is required at th[at] stage." *Terrorist Attacks VI*, 840 F. Supp. 2d at 782.

REASONS FOR DENYING THE PETITION AS TO PETITIONERS' QUESTION TWO

Petitioners do not claim that the Respondents participated in any way in the September 11 attacks or provided contemporaneous support to Osama Bin Laden or al Qaeda. Instead, they argue that conduct outside the United States that directly or indirectly benefited al Qaeda several years before the attacks—no matter how geographically, temporally, or causally remote from the attacks and without any alleged intentional targeting of the United States—is enough to establish personal jurisdiction over Respondents. The Second Circuit has now twice held under *Calder v. Jones* that, without alleged facts that the Respondents themselves "expressly aimed" their conduct at the United States, personal jurisdiction does not lie over foreign defendants simply because they are alleged to have supported groups hostile to the United States. There is no ground for this Court to reconsider that fact-bound application of established law.

I. THE DECISION BELOW WAS A STRAIGHTFORWARD APPLICATION OF *TERRORIST ATTACKS III*, ON WHICH THIS COURT PREVIOUSLY DENIED CERTIORARI.

This Court has already denied Petitioners' petition for a writ of certiorari on the personal jurisdiction question presented here. In 2009, with a different group of Respondents who, in their personal capacities, presented substantially identical issues, Petitioners asked this Court to decide "[w]hether the Due Process Clause precludes U.S. courts from exercising personal jurisdiction over individuals who

provide material support to terrorists outside the United States, knowing those terrorists intend to commit terrorist attacks in the United States." Pet. for Writ of Cert. at i, *Fed. Ins. Co. v. Kingdom of Saudi Arabia*, 557 U.S. 935 (2009) (No. 08-640), 2008 WL 4906103, *i.

There is nothing in the latest decision below that warrants a different course now. Petitioners themselves acknowledge that the standard they challenge is one in which the Second Circuit was "quoting and applying [its earlier decision in] *Terrorist Attacks III*." (Pet. 23); *see Terrorist Attacks III*, 538 F.3d 71 (Pet. App. 185a–231a). The primary conflict of law Petitioners claim, *see* Pet. 25, is between the legal standard set out in *Terrorist Attacks III* (which they acknowledge the decision below applied) and what they again argue *Calder v. Jones* requires. The decision below made no new law and changed nothing about Petitioners' argument. In fact, the Second Circuit, after quoting extensively from *Terrorist Attacks III*'s analysis of personal jurisdiction (Pet. App. 38a–40a) proceeded to apply it to the facts pertinent to these particular Respondents without citing any additional authority or establishing any new standard. In doing so, the Second Circuit also reversed dismissal of twelve defendants and ordered additional jurisdictional discovery.[2]

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[2] Petitioners improperly include those twelve Respondents in their petition: Aqeel Al-Aqeel; Soliman H.S. Al-Buthe; Abdullah Omar Naseef; Abdullah Bin Saleh Al Obaid; Abdullah Muhsen Al Turki; Adnan Basha; Mohammed Jamal Khalifa; Abdul

This Court previously declined to review the asserted conflict between Petitioners' misreading of *Calder* and Second Circuit law, and it should do so again. Petitioners have cited *no* decision of any other circuit that has disagreed with the analysis of *Terrorist Attacks III*—either before or since. Instead, they rely erroneously on the conflict among the circuits the Court is addressing in *Walden v. Fiore*, No. 12-574 (*see infra*, 17–19), one that does not involve the Second Circuit and has no bearing on this case. The decision below is simply a straightforward application of the Second Circuit's ruling in *Terrorist Attacks III* to the particular facts and allegations regarding this set of Respondents.

II. THE SECOND CIRCUIT FAITHFULLY (AND CORRECTLY) APPLIED THIS COURT'S PRECEDENTS GOVERNING PERSONAL JURISDICTION

Both times it addressed this case, the Second Circuit recognized two fundamental requirements for Petitioners to establish specific jurisdiction over foreign persons or entities in this context. First,

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Rahman Al Swailem; Suleiman Al-Ali; Yassin Abdullah Kadi; Saleh Al-Hussayen; and Dallah Avco. (Two of these Respondents, Messrs. Khalifa and Al-Hussayen, are deceased, but Petitioners made no timely effort to substitute their estates or personal representatives as required under Fed. R. Civ. P. 25.) The Second Circuit's remand for jurisdictional discovery is an interlocutory decision that is not, absent exceptional circumstances, appropriate for review in this Court. *Cf. Jefferson v. City of Tarrant*, 522 U.S. 75, 77 (1997) ("This case, still *sub judice* in Alabama, was brought to this Court too soon.") (dismissing writ of certiorari as improvidently granted).

Petitioners must plead facts to show that a defendant "'expressly aimed' intentional tortious acts at residents of the United States."[3] *Terrorist Attacks III*, 538 F.3d at 95 (quoting *Calder*, 465 U.S. at 789) (Pet. App. 228a); *Terrorist Attacks VII* (Pet. App. 38a). Second, Petitioners must plead facts to show that their injuries "'arise out of or relate to' those activities." *Terrorist Attacks III*, 538 F.3d at 93 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472–73 (1985)) (Pet. App. 224a); *Terrorist Attacks VII* (Pet. App. 38a). The defendants in *Terrorist Attacks III*, as on this appeal, were accused of having knowingly provided material support to al Qaeda years before the September 11 attacks. That support was purportedly given largely through contributions to charities that are alleged al Qaeda front organizations—none of which were designated terrorist supporters by the U.S. government when the contributions were allegedly made—or, in some instances, through the provision of ordinary banking services to those charities.

Solely for purposes of analyzing personal jurisdiction, the Second Circuit took as true Petitioners' allegations that those defendants had "caused money to be given to . . . Muslim charities (from the Kingdom [of Saudi Arabia] as well as their own accounts), with the knowledge that the charities would transfer the funds to al Qaeda." *Terrorist Attacks III*, 538 F.3d at 77 (Pet. App. 190a). Such

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[3] The Second Circuit uses the terms "expressly aimed" and "purposefully directed" interchangeably. *See, e.g.*, Pet. App. 37a.

alleged conduct could not, however, establish personal jurisdiction. The Second Circuit explained:

> It may be the case that acts of violence committed against residents of the United States were a foreseeable consequence of the princes' alleged indirect funding of al Qaeda, but foreseeability is not the standard for recognizing personal jurisdiction. Rather, the plaintiffs must establish that the Four Princes "expressly aimed" intentional tortious acts at residents of the United States. *Calder*, 465 U.S. at 789.

Id. at 95 (Pet. App. 227a–28a). Providing material support—including contributions to and management of al Qaeda "front" organizations and provision of banking services—"to an organization that was openly hostile to the United States does not constitute this type of intentional conduct." *Id.* In the decision below, the Second Circuit found that Petitioners' allegations were in large part "indistinguishable" from those in *Terrorist Attacks III*, and therefore likewise insufficient to satisfy the expressly aimed requirement. (Pet. App. 41a).

1. The Second Circuit's decisions did not break new ground. "When a controversy is related to or 'arises out of' a defendant's contacts with the forum, the Court has said that a 'relationship among the defendant, the forum, and the litigation' is the essential foundation of in personam jurisdiction." *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984) (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977)). This constitutional limitation prevents a foreign defendant from "being subject to the binding judgments of a forum with which he has established no meaningful contacts,

ties, or relations." *Burger King*, 471 U.S. at 471–72 (internal quotations omitted). It is therefore "'*essential in each case* that there be some act by which the defendant *purposefully avails* itself of the privilege of conducting activities within the forum State . . . .'" *Id.* at 474–75 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)) (emphasis added). This "purposeful availment" requirement ensures that jurisdiction is not premised on "'attenuated' contacts," *id.* at 475 (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 773 (1984); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 299 (1980)), or "'unilateral activity of another party,'" 471 U.S. at 475 (quoting *Helicopteros Nacionales*, 466 U.S. at 417). The jurisdictional contacts must be such that "the defendant *himself* . . . create[s] a 'substantial connection' with the forum State." *Id.* (quoting *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957)).

In cases where an intentional tort is the alleged basis for jurisdiction, this Court has long held, as the Second Circuit recognized, that specific jurisdiction exists only if the defendant "expressly aimed" tortious acts at the forum. *Calder*, 465 U.S. at 789. Inexplicably, Petitioners dismiss *Calder* as a "stream of commerce" case, a phrase *Calder* did not use and a concept *Calder* did not apply. By its very terms *Calder* involved "'expressly aimed' intentional tortious acts" directed at a resident of the forum, *id.*; it is *Calder*'s standard which the Second Circuit

properly applied here.[4] The defendants in *Calder* were "*primary participants* in an alleged wrongdoing *intentionally directed* at a California resident." *Id.* at 790 (emphasis added). That much was not in dispute. And Petitioners here have alleged no such thing as to any of the Respondents dismissed for lack of personal jurisdiction here.

Instead of applying *Calder* to the intentional torts they allege, Petitioners seek to invent a new species of personal jurisdiction out of *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011). Yet *J. McIntyre* (which is, unlike *Calder*, a stream-of-commerce case) again confirmed that it is not enough for a plaintiff to claim that a defendant "'kn[ew] or reasonably should [have] know[n]'" that its conduct "'*might*'" have an impact in the forum. *Id.* at 2793 (Breyer, J., joined by Alito, J., concurring in the judgment) (quoting *Nicastro v. McIntyre Mach. Am., Ltd.*, 987 A.2d 575, 592 (N.J. 2010)) (emphasis by Justice Breyer). Instead, the defendant must "have targeted the forum," *id.* at 2788 (plurality opinion), or at least have made a "specific effort" directed at the forum, *id.* at 2792 (Breyer, J., concurring in the judgment). This "Court's precedents make clear that it is *the defendant's actions, not his expectations*, that empower a State's courts to subject him to

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[4] In the court below, Petitioners disclaimed any argument that *Calder* did not apply to this case and instead argued that it supported their argument. *See* Pltfs. Reply Br. to Jt. Resp. at 6–7, *Terrorist Attacks VII*, No. 11-3294(2d Cir. June 25, 2012) (Dkt. # 578). Accordingly, "[b]ecause this argument was not raised below, it is waived." *Sprietsma v. Mercury Marine, a Div. of Brunswick Corp.*, 537 U.S. 51, 56 n.4 (2002).

judgment." *J. McIntyre*, 131 S. Ct. at 2789 (plurality opinion) (emphasis added).[5]

2. That jurisdictional distinction between what is "expressly aimed" and what is merely "foreseeable" is ultimately where the Petitioners' argument lies. In their own Question Presented, Petitioners urge this Court to adopt a standard based on what a defendant can "foresee." Pet. i. As this Court explained in *Burger King*, however, "[a]lthough it has been argued that *foreseeability of causing injury* in another State should be sufficient to establish such contacts there when policy considerations so require, the Court has consistently held that this kind of foreseeability is not a 'sufficient benchmark' for exercising personal jurisdiction." *Burger King*, 471 U.S. at 474 (quoting *World-Wide Volkswagen*, 444 U.S. at 295) (some emphasis added; footnote omitted). Instead, jurisdiction requires "actions by the defendant *himself* that create a 'substantial connection' with the forum." *Id.* at 475. The Second Circuit therefore correctly held, in both the prior appeal and this one, that even if the Respondents "could and did foresee"

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[5] Petitioners' alternative reading takes out of context the plurality's reference to defendants who allegedly "attempt to obstruct [a forum's] laws," *J. McIntyre*, 131 S. Ct. at 2787. The plurality, however, merely cited that as one example of conduct targeted at the forum. Petitioners trace their independent jurisdictional theory back to language taken out of context from *United States v. Sisal Sales Corp.*, 274 U.S. 268, 276 (1927), but that case is inapposite because it involved a "conspiracy entered into *by parties within the United States* and made effective by acts done therein." *Id.* (emphasis added). *Sisal Sales* therefore does not even address the jurisdictional issue before the Court.

that the groups they supported "would attack targets in the United States," that does not establish jurisdiction. *Terrorist Attacks VII* (Pet. App. 37a); *Terrorist Attacks III*, 538 F.3d at 94–95 (Pet. App. 227a).

That distinction is fundamental to the Second Circuit's decision in this case. Petitioners have repeatedly urged the courts below, as they do this Court, to treat any alleged support of al Qaeda or charities allegedly linked to al Qaeda—even if such support occurred before al Qaeda declared its intent to attack the United States—as conduct directed at the United States. Yet their own complaints described al Qaeda as a "decentralized" and "compartmentalized" organization that seeks the overthrow of non-Islamic governments around the world. J.A. at A-790, *Terrorist Attacks VII*, No. 11-3294 (2d Cir. Jan. 20, 2012) (Dkt. #272). Their appellate briefs noted al Qaeda military operations in the Philippines, Bosnia, Chechnya, Kosovo, Sudan, Ethiopia, Kashmir, Somalia, Palestine, Pakistan, Yemen, Kenya, Tanzania, Egypt, Indonesia, and Malaysia. Appellants' Cons. Pers. Jur. Br. at 17–18, *Terrorist Attacks VII*, No. 11-3294 (2d Cir. Jan. 20, 2012) (Dkt. # 298). Many of their allegations against the Respondents pertain to conduct focused on these other parts of the world. Given al Qaeda's global focus, the Second Circuit correctly held that Petitioners must allege that each Respondent engaged in acts purposefully directed at the United States, rather than acts that had some effects there through an attenuated, albeit arguably foreseeable, "causal chain." *See Terrorist Attacks VII* (Pet. App. 37a); *Terrorist Attacks III*, 538 F.3d at 94 (Pet. App. 226a). It correctly recognized here (and in *Terrorist*

Attacks III), that the "mere likelihood" that aid to an organization *might* be used for attacks against the United States—and that use of the money for that kind of purpose was "foreseeable" in that sense—would not be sufficient to support the exercise of personal jurisdiction over the donor. *See World-Wide Volkswagen*, 444 U.S. at 297.

3. By rejecting a foreseeability standard, the courts below did not, as Petitioners claim, Pet. 30, require "specific intent" to establish personal jurisdiction. Petitioners do not actually quote any language from the opinion below requiring specific intent. The best that Petitioners can do is point generally to the Second Circuit's observation that Saleh Al-Hussayen "may have intended his alleged indirect support of al-Qaeda to cause injury in the United States." *Terrorist Attacks VII* (Pet. App. 47a–48a). But an observation does not equal a requirement, and "may" is a far cry from "must." And, in all events, the Second Circuit in the same breath discussed "Dallah Avco's *knowledge* of" alleged terrorist activities, thus confirming that it was not holding Petitioners to a specific intent standard. *Id.* (Pet. App. 48a) (emphasis added).

A defendant's intent is certainly relevant to the specific jurisdiction inquiry, but the district court made quite clear that a "defendant need not know that the support provided is specifically for the 9/11 attacks" so long as he "reasonably anticipat[es] that the brunt of the injuries will be felt []here," *Terrorist Attacks IV*, 718 F. Supp. 2d at 481, and that jurisdiction may be established "even though [the defendant is] unenlightened as to the specific means by which such harm will be inflicted." *Id. See*

Terrorist Attacks VII (Pet. App. 46a–47a) (remanding for jurisdictional discovery where allegations suggested direct support for al Qaeda, knowing that al Qaeda was directing attacks at U.S., without requiring any showing of specific intent). The district court summarized:

> For purposes of this litigation, "a defendant's alleged intentional tortious conduct aimed at the United States is conduct that is intended to directly aid in the commission of a terrorist act, with knowledge that the brunt of the injuries will be felt in the United States."

Terrorist Attacks V, 740 F. Supp. 2d at 507 (quoting *Terrorist Attacks IV*, 718 F. Supp. 2d at 480); *accord Terrorist Attacks VI*, 840 F. Supp. 2d at 780. In this way, both the district court and the Second Circuit held Petitioners' complaints insufficient not because they failed to allege personal involvement in or a specific intent to support the 9/11 attacks, but because they failed to allege conduct sufficient to show that the dismissed Respondents themselves had "'expressly aimed' intentional tortious acts at residents of the United States." *Terrorist Attacks III*, 538 F.3d at 95 (Pet. App. 224a) (quoting *Calder*, 465 U.S. at 789).

4. The Second Circuit's decision in this case is consistent with the views expressed by the Solicitor General the last time this Court denied certiorari on the question presented by Petitioners. In counseling against certiorari in *Terrorist Attacks III*, then-Solicitor General Kagan explained that the Due Process Clause requires more than Petitioners contend: "due process is not satisfied merely because a defendant can 'foresee' that his actions will 'have an

effect' in the foreign jurisdiction"; the plaintiff must allege that "the defendant took 'intentional . . . tortious actions' and 'knew that the brunt of th[e] injury would be felt' in the foreign forum." Br. for the United States at 18–19, *Fed. Ins. Co.*, 557 U.S. 935 (No. 08-640), 2009 WL 1539068, *18 (quoting *Calder*, 465 U.S. at 789–90). The Solicitor General further clarified that where, as here, "the connection between the defendant and direct tortfeasor is separated by intervening actors," *Calder* requires more than "a simple allegation" of purposeful direction—a plaintiff must plead specific facts establishing the "requisite intention and knowledge." *Id.* at 19–20. Here, the Second Circuit applied exactly that standard. *See, e.g.*, *Terrorist Attacks VII* (Pet. App. 42a–45a). Moreover, the Solicitor General concluded that Petitioners' conclusory allegations in *Terrorist Attacks III*, which are identical in all material respects to Petitioners' allegations against Respondents, did not satisfy *Calder*'s jurisdictional requirements. *See* Br. for the United States at 19–20, *Fed. Ins. Co.*, 557 U.S. 935 (No. 08-640), 2009 WL 1539068, *18–19.

5. Despite Petitioners' claims, the decision below does not conflict with *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010), because *Holder* has nothing to do with personal jurisdiction. It did not even mention *Calder* or *Burger King*. *Holder* involved a civil suit by U.S. citizens and domestic organizations who sought to support insurgent groups in Turkistan and Sri Lanka. Accordingly, personal jurisdiction was not at issue. *Holder*'s only relevance to the decision below is to confirm that this Court's "precedents, old and new, make clear that concerns of national security do not warrant

abdication of the judicial role"—the Court does not "defer to the Government's reading of" constitutional provisions "even when such interests are at stake." *Id.* at 2727 (internal quotations omitted). The Second Circuit here properly fulfilled its judicial role in construing the Due Process Clause's limitations on personal jurisdiction.[6] The Solicitor General, when this case was previously before this Court, likewise recognized that the exercise of personal jurisdiction was not warranted for similarly-situated foreign defendants.[7]

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[6] The premise of Petitioners' argument, however, is also wrong. Neither Congress nor the Executive reads the Due Process Clause as Petitioners claim they do. The Anti-Terrorism Act ("ATA") itself creates a remedy for American victims of "international terrorism" and does not require any conduct "purposefully directed" at the United States. *See* 18 U.S.C. § 2331(1)(B) & (C) (2006); *see, e.g.*, *Linde v. Arab Bank, PLC*, 384 F. Supp. 2d 571 (E.D.N.Y. 2005) (seeking ATA recovery for deaths caused in Palestinian intifada[JB: There have been multiple intifada.]). Therefore, the only connection to the United States that the ATA substantively requires is that Americans are injured. As explained above, however, the foreseeability of causing that injury cannot support personal jurisdiction. Moreover, the ATA's legislative history shows that the Act's sponsors were well aware of the due process limitations on § 2333's reach. *See* Antiterrorism Act of 1990: Hearing on S. 2465 Before the Subcomm. on Courts and Admin. Practice of the S. Comm. on the Judiciary, 101st Cong. 132 (1990) (Hrg. Tr. 132) (statement of Prof. Wendy Collins Perdue, Georgetown Univ., in response to letter from Sen. Heflin); *id.* at Tr. 87 (statement of Joseph Morris, Lincoln Legal Foundation).

[7] Similarly, the Executive Branch, speaking through the Solicitor General, rejected the idea that the Second Circuit's standard in *Terrorist Attacks III* would impair the Government's fight against terrorism. As the Solicitor General

III. THE DECISION BELOW IMPLICATES NO CONFLICT OF AUTHORITY AMONG THE CIRCUIT COURTS

A. The Decision Below Neither Mentioned Nor Implicates the Circuit Split Regarding the "Focal Point of the Tort" Test

Although Petitioners try to shoehorn their challenge into a "widely acknowledged" circuit split over *Calder*'s "'express aiming' test," Pet. 27 (citing to and discussing *Tamburo v. Dworkin*, 601 F.3d 693, 704 (7th Cir. 2010), and *Dudnikov v. Chalk & Vermillion Fine Arts, Inc.*, 514 F.3d 1063, 1074 n.9 (10th Cir. 2008)), the decision below has no connection to that conflict, which the Court is reviewing in *Walden v. Fiore*, No. 12-574 (argued Nov. 4, 2013). That conflict concerns whether a plaintiff—having alleged that the defendant intentionally targeted him—can satisfy the "expressly aimed" requirement by alleging that the defendant had knowledge that the plaintiff was a forum resident, or whether some additional allegation that the forum was the "focal point of the tort" is required. Most circuit courts except the Ninth have required the plaintiff to make the additional showing that the "forum state [is] the focal point of the tort." *Tamburo*, 601 F.3d at 704; *see also Dudnikov*, 514 F.3d at 1074 n.9 (noting distinction

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explained, in criminal matters, the Government establishes personal jurisdiction through physical presence rather than a theory anything like Petitioners propound. *See* Br. for the United States at 21, *Fed. Ins. Co.*, 557 U.S. 935 (No. 08-640), 2009 WL 1539068, *21.

between Ninth Circuit's "known forum resident" approach and Tenth Circuit's own "more restrictive approach"). Notably, the Second Circuit is one of the few that has not yet taken a position. *Cf. Fiore v. Walden*, 688 F.3d 558, 565 (9th Cir. 2012) (O'Scannlain, J., dissenting from denial of reh'g en banc) (placing First, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and D.C. Circuits in more restrictive "focal point of the tort" camp), *cert. granted*, 133 S. Ct. 1493 (2013).

This case gave the Second Circuit no cause to consider that unrelated issue dividing other courts. The "focal point of the tort" was not at issue here. Rather, Petitioners failed to allege that the Respondents had expressly aimed their conduct at *either* Petitioners or the forum. The Second Circuit properly—and without reference to *any* of the decisions staking out this split—found that Petitioners could not satisfy *Calder's* "expressly aimed" standard merely by alleging that Respondents could have "foreseen" through an attenuated causal chain that their actions might have an effect in the forum.

Nor would the Ninth Circuit's view help Petitioners here. First, each of the three Ninth Circuit cases Petitioners cite involved a defendant who was alleged to have *personally* and *intentionally* engaged in the conduct that directly harmed the plaintiff. *See Washington Shoe Co. v. A-Z Sporting Goods, Inc.*, 704 F.3d 668, 678 (9th Cir. 2012) (defendant alleged to have willfully infringed plaintiff's copyright by selling knock-off items after being notified of infringement); *Columbia Pictures Television v. Krypton Broad. of Birmingham*, 106

F.3d 284, 289 (9th Cir. 1997), *rev'd on other grounds sub nom. Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998) (same); *Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000) (defendant sent letter to registrar of domain names, forcing plaintiff to bring suit or lose control of its website). As both the Second Circuit and the Solicitor General recognized in distinguishing *Mwani v. bin Laden*, 417 F.3d 1 (D.C. Cir. 2005), and related cases (*see infra*), Petitioners have alleged nothing of the sort against Respondents here. Second, even the Ninth Circuit expressly rejected the idea that jurisdiction can be based on a defendant's expectation that his actions may lead to harm in the forum at some future date. *See Washington Shoe*, 704 F.3d at 675 ("*Calder* cannot stand for the broad proposition that a foreign act with foreseeable effects in the forum state always gives rise to specific jurisdiction. We noted that our previous cases said that there must be something more, and we held that that something more is what the Supreme Court described as 'express aiming' at the forum state.") (internal citations omitted).

B. The Second Circuit Clearly and Properly Distinguished the D.C. Circuit's Decision in *Mwani*

For like reasons, the Second Circuit's decision creates no conflict with the D.C. Circuit's 2005 decision in *Mwani*, 417 F.3d 1. In both *Terrorist Attacks III* and in the decision below, the Second Circuit correctly distinguished *Mwani* and similar cases because they involved defendants who were "primary participants" in terrorist attacks, which the Respondents certainly were not. *See Terrorist*

Attacks VII (Pet. App. 40a) (citing *Mwani*; *Rein v. Socialist People's Libyan Arab Jamahiriya*, 995 F. Supp. 325 (E.D.N.Y. 1998), *aff'd in part, dismissed in part*, 162 F.3d 748 (2d Cir. 1998); *Morris v. Khadr*, 415 F. Supp. 2d 1323 (D. Utah 2006); *Pugh v. Socialist People's Libyan Arab Jamahiriya*, 290 F. Supp. 2d 54 (D.D.C. 2003); *Daliberti v. Republic of Iraq*, 97 F. Supp. 2d 38 (D.D.C. 2000)); *Terrorist Attacks III*, 538 F.3d at 93–94 (Pet. App. 226a) (same). The Second Circuit recognized that those cases do not support the proposition that "'participation in al Qaeda's terrorist agenda' is sufficient to create jurisdiction over a defendant," Pet. 29 (quoting *Morris*, 415 F. Supp. 2d at 1335–36), but rather that those defendants specifically helped plan and encouraged the very attacks for which plaintiffs sued. In *Morris*, for example, as the Second Circuit noted, the defendant was "an al Qaeda member who 'actively participated in and helped plan al Qaeda's terrorist agenda – so much so, in fact, that he convinced his son to risk his life and attack American soldiers' in Afghanistan, killing the plaintiffs' relatives in the course of engagement." *Terrorist Attacks III*, 538 F.3d at 94 (Pet. App. 225a) (quoting *Morris*, 415 F. Supp. 2d at 1336). The Solicitor General made the exact same point in her brief opposing certiorari in *Terrorist Attacks III*. *See* Br. for United States at 20–21, *Fed Ins. Co.*, 557 U.S. 935 (No. 08-640), 2009 WL 1539068, *20–21 (in all of the "appellate cases cited by petitioners as evidence of a conflict . . . the defendant was a primary wrongdoer—not, as here, a person whose alleged tortious act consisted of providing material support to another party engaged in tortious conduct"). As they did below—and the last time they sought certiorari

on the question they again present—Petitioners simply ignore that important factual distinction here.

IV. THE PETITIONERS' FACT-BOUND ARGUMENTS DO NOT MERIT REVIEW

Petitioners conclude their argument with a highly selective and distorted recitation of alleged facts meant to create the false impression that the dismissed Respondents were directly involved in terrorist attacks on the United States. At each stage of the litigation, Petitioners have recast their conclusory allegations—many of which were based on hearsay and affirmative misrepresentations in the first place—or simply invented new ones, all in an effort to infer some conduct expressly directed at the United States that was missing from their complaints. New factual claims, of course, may not be raised for the first time on appeal. *See Singleton v. Wulff*, 428 U.S. 106, 120 (1976).

Such arguments, aside from being baseless, are also ill-suited to this Court. At least four federal judges (and, with respect to some Respondents, even five or six) have carefully reviewed Petitioners' allegations and concluded that they do not support the inferences of "express aiming" at the United States that Petitioners repeatedly attempt to draw. That Petitioners' arguments are fundamentally fact-bound is illustrated by the fact that the Second Circuit remanded for jurisdictional discovery regarding twelve defendants who "allegedly sent financial and other material support directly to al Qaeda when al Qaeda allegedly was known to be targeting the United States," because "[t]his alleged support of al Qaeda . . . is more direct and one step closer to al Qaeda when compared to" the other

defendants. *Terrorist Attacks VII* (Pet. App. 46a). Some defendants are in merits discovery, others are in jurisdictional discovery, and yet others are before this Court after dismissal, all on the basis of the lower courts' careful assessment of the particular allegations against each defendant. There is no cause for this Court to wade into and revisit that intensely fact-specific analysis, especially in view of the unique factual setting in which Petitioners' allegations arise.

CONCLUSION

The petition for writ of certiorari should be denied.

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