No. 13-318

IN THE
Supreme Court of the United States

IN RE TERRORIST ATTACKS ON SEPTEMBER 11, 2001
(AL RAJHI BANK, *et al.*)

JOHN PATRICK O'NEILL, JR., *et al.*,
Petitioners,

v.

AL RAJHI BANK, SAUDI AMERICAN BANK, DAR AL-MAAL AL-ISLAMI TRUST, SALEH ABDULLAH KAMEL, DALLAH AL BARAKA GROUP LLC,
Respondents.

IN RE TERRORIST ATTACKS ON SEPTEMBER 11, 2001
(ASAT TRUST REG., *et al.*)

JOHN PATRICK O'NEILL, JR., *et al.*,
Petitioners,

v.

ASAT TRUST REG., *et al.*,
Respondents.

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

REPLY BRIEF OF PETITIONERS ON ANTI-TERRORISM ACT ISSUES

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INTRODUCTION

The petition demonstrated that the Second Circuit's interpretation of the civil enforcement provision of the Anti-Terrorism Act ("ATA"), 18 U.S.C. § 2333(a), conflicts with the holdings of the Seventh Circuit and other federal courts with respect to two separate and central issues (secondary liability and causation), is inconsistent with the ATA's objectives to redress and deter material support of terrorism, and does serious harm to U.S. counter-terrorism efforts. The language and reasoning of the Seventh Circuit's decisions preclude respondents' argument that no conflict exists, and other federal courts (whether agreeing or disagreeing with the Seventh Circuit) *acknowledge* that those decisions must be construed in a manner that conflicts with the Second Circuit's holdings on both points. Respondents simply deem irrelevant that the United States has repeatedly urged that the ATA be construed to recognize secondary liability (contrary to the Second Circuit's holding), and they ignore the government's expert and coordinating role in leading the nation's counter-terrorism efforts directed against the financiers and sponsors of international terrorism such as respondents. Both Congress and other federal courts have confirmed that the provision of the ATA at issue is essential to deterring and punishing the financing and material sponsorship of terrorism. Those courts have also stated that adopting the rules applied by the Second Circuit regarding causation and secondary liability would impede counter-terrorism efforts and render the statute a "dead letter." The petition cleanly presents both issues surrounding Section 2333(a)'s application to the financiers of terrorism, and respondents point to no reason that it should not be granted.

I. THE SECOND CIRCUIT'S HOLDING REGARDING SECONDARY LIABILITY UNDER THE ATA CONFLICTS WITH DECISIONS OF THE SEVENTH CIRCUIT AND OTHER FEDERAL COURTS, AND THE POSITION OF THE UNITED STATES, AND OTHERWISE MERITS REVIEW.

1. Courts have adopted three separate positions on secondary liability under the ATA: (i) Section 2333(a) directly authorizes claims asserting secondary liability (the position of the Seventh Circuit panel and *en banc* concurrence, several district courts, and the United States); (ii) Section 2333(a) provides for the functional equivalent of secondary liability through a "chain of incorporations" permitting claims against secondary actors who provide material support for terrorist organizations (the Seventh Circuit *en banc* majority's approach); and (iii) Section 2333(a) categorically bars secondary liability (the Second Circuit's rule). See Pet. 12-14. Respondents' denial that a circuit split exists focuses myopically on the first and third of these approaches. See Opp. 8-10. They fail to confront, much less rebut, that the second of these approaches adopted by the Seventh Circuit conflicts with the Second Circuit's rule, as acknowledged by various federal courts, and would be outcome determinative as applied to the defendants in this case.

The Seventh Circuit's construction of the ATA clearly differs from, and conflicts with, the Second Circuit's. In *Boim* v. *Holy Land Found.,* 549 F.3d 685 (7th Cir. 2008) (en banc) ("*Boim III*"), the Seventh Circuit concluded that although the ATA does not *directly* provide for aiding and abetting liability, it "expressly impose[s] liability on a class of aiders and abettors" through a "chain of incorporations by

reference" to the Act's criminal liability provisions that define the scope of Section 2333(a). *Id.* at 688-92. It further indicated that "functionally the primary violator is an aidor and abettor or other secondary actor." *Id.* at 692. These conclusions and the reasoning leading to them are flatly inconsistent with respondents' arguments.[1]

Federal courts have acknowledged that the Seventh Circuit's "incorporation" approach is equivalent to imposing secondary liability and conflicts with a rule (such as the Second Circuit's) that bars secondary liability. Judge Wood and her concurring colleagues made just that point in *Boim III*. See *id.* at 720-21 (Wood, J., concurring and dissenting in part) (majority's approach is "exactly the conclusion that the [prior] panel reached" that Section 2333 imposes secondary liability). Other federal courts have similarly recognized that *Boim III*'s construction of the ATA "'provide[s] for what is effectively aiding-and-abetting liability in the terrorism context,'" *Gill* v. *Arab Bank, PLC,* 893 F. Supp. 2d 474, 502 (E.D.N.Y. 2012), and extended liability "to *secondary actors*" by adopting a "chain of explicit statutory incorporations by reference." *In re Chiquita Brands Int'l, Inc.*, 690 F. Supp. 2d 1296, 1309 (S.D. Fla. 2010); see *Abecassis* v. *Wyatt,* 785 F. Supp. 2d 614, 629-30 (S.D. Tex. 2011) (*Boim III* held that secondary actors could not be liable for aiding and abetting but "nonetheless concluded that the plaintiffs had a claim against the defendant charities for *primary* liability" on equivalent grounds); Pet 12 (listing courts that

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[1] The Second Circuit cited *Boim III* only for its holding that the ATA does not directly authorize secondary liability and did not address the Seventh Circuit's "chain of incorporations" approach. Pet. App. 6a.

have concluded that the ATA provides for secondary liability).

The conflict is further confirmed by how the different rules would affect the outcome of this case. The defendants here are alleged to be precisely the type of secondary actors who, through their "primary" conduct of providing material support to terrorists or their aiding and abetting of terrorists, would be liable under the standard employed by the *Boim III* majority as well as that of the *Boim I* panel and other courts that have found that Section 2333(a) provides for secondary liability.[2] Of course, the Second Circuit's rule yields the opposite outcome.

2. Respondents do not contest that the United States construes Section 2333(a) as imposing secondary liability and views secondary liability as important to the operation of the ATA and the nation's counter-terrorism efforts, but they oddly – and bluntly – dismiss those views as irrelevant. Opp. 14.

The United States is, however, in a unique position to assess how important secondary liability is to the

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[2] Petitioners extensively alleged facts indicating and supporting the inference that respondents contributed funds to al Qaeda through its integrated, "front group" charities. Pet. 20-22; Appellants' Br., ATA Claims at 72-112, No. 11-3294 (Jan. 20, 2012) (Dkt. 299) (collecting allegations); Appellants Reply Br., 12(b)(6) at 54-91, No. 11-3294 (June 25, 2012) (Dkt. 580) (same). Respondents' claim that these allegations were inadequate, Opp. 3, 18-19, also ignores the procedural posture of the case (a grant of a motion to dismiss before discovery) and is contrary to the Second Circuit's own assessment that the complaint "includes a wealth of detail (conscientiously cited to published and unpublished sources) that, if true, reflect close working arrangements between the ostensible charities and terrorist networks, including al Qaeda." Pet. App. 189a.

administration of the ATA and the role of civil remedies as a component of the nation's counter-terrorism strategy. The government itself has asserted that "the United States has an obvious interest in the proper application" of Section 2333(a), which "can be an effective weapon in the battle against international terrorism," but would be "a largely hollow remedy" if it did not impose secondary liability. U.S. *Boim I* Br. at 2-3, 18; Pet. 5. Through robust diplomatic and military efforts, as well as criminal, civil, and administrative law enforcement efforts, the United States also coordinates the nation's efforts to stop the financing of terrorist groups that target the nation. Secondary civil liability under the ATA, whether direct or through the Seventh Circuit's "chain of incorporations by reference" approach, is especially important to this effort: it is "well neigh impossible" to collect a damages judgment against a terrorist organization, whereas "suits against financiers of terrorism can cut the terrorists' lifeline" and serve a vital "deterrent or incapacitative effect." *Boim III*, 549 F.3d at 691; see Pet. 14 (statements of the United States).

3. Nor is there any merit to respondents' lengthy argument that the Second Circuit's determination is supported by *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.,* 511 U.S. 164 (1994). Opp. 11-13. Respondents' points address the merits of the issue, not whether the petition should be granted, and respondents clearly err to the extent they suggest that the issue is so clear that review is unwarranted on this basis. The analysis of the many courts that have found that the ATA supports secondary liability, see Pet. 12, shows that to be so, as does the analysis of the United States. See Pet. 14; U.S. *Boim I* Br. at 19-21. In any event, *Central Bank* has no bearing on

this issue. *Central Bank*'s conclusion was "control[led]" by "the text of the statute" (Section 10(b) of the 1934 Securities Exchange Act), which did not expressly provide for *any* private right of action, and imposed liability only for certain specific conduct – not for aiding and abetting such conduct. 511 U.S. at 173-79; see *Stoneridge Inv. Partners LLC* v. *Scientific-Atlanta,* 552 U.S. 148, 157 (2008) ("In *Central Bank,* the Court …. found the scope of § 10(b) to be delimited by the text"). Here, Section 2333 is an express cause of action, is not limited to primary liability, and arises in a context where Congress clearly intended that it have a broad remedial scope to attack the financial support of terrorist organizations by secondary actors. See Pet. 14-16.

II. THE SECOND CIRCUIT'S HOLDING REGARDING THE ATA'S CAUSATION REQUIREMENT CONFLICTS WITH DECISIONS OF THE SEVENTH CIRCUIT AND OTHER FEDERAL COURTS AND OTHERWISE MERITS REVIEW.

1. Respondents do not dispute that broad disagreement and confusion exist among federal courts regarding what causation standard the ATA requires, but instead claim that "no conflict" exists between the Second Circuit's requirement of "but for" and proximate cause and the Seventh Circuit's standard set out in *Boim III*. Opp. 15-17.

A simple reading of *Boim III* shows that respondents' assertion is wrong. Over several pages of the Federal Reporter, the Seventh Circuit canvassed cases establishing that tort principles do not require "proof of causation" where, as with the multiple sources of support to a terrorist organization at issue in the case, "*the requirement of proving causation is relaxed* because otherwise there would be a wrong

and an injury but no remedy because the court would be unable to determine which wrongdoer inflicted the injury." 549 F.3d at 695-702 (emphasis added). In those circumstances, where "terrorism is *sui generis*," "the tort principles that we have reviewed would make the defendant jointly and severally liable with all those other contributors. The fact that the death [caused by the terrorist organization] could not be traced to any of the contributors … would be irrelevant." *Id.* at 698, 700. The majority's determination not to require "but for" causation, *id.*, also marks a sharp departure from that core element of the standard applied by the Second Circuit.

Judge Wood's opinion, dissenting on this point, understood the majority's rule in precisely this way, as "appear[ing] to eliminate the need to show what was classically called 'proximate cause.'" See *id* at 724. District courts have also read *Boim III* as departing from the proximate cause standard. See *Abecassis,* 785 F. Supp. 2d at 633, 635 (*Boim III* "required a minimal showing of causation" rather than proximate cause); *Gill,* 893 F. Supp. 2d at 507 (*Boim III* "has been criticized" for omitting "any requirement that a plaintiff prove even proximate causation").[3]

Respondents' particular arguments do not bear scrutiny. They find significance in the fact that *Boim III*'s majority opinion did not mention the term "proximate cause," Opp. 15, but, as the language

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[3] Respondents claim that *Abecassis* and the decisions of two other district courts "concluded that *Boim III* required a showing of proximate causation under the ATA," Opp. 16-17, but this language of *Abecassis* shows otherwise, and *Chiquita Brands* relied on *Boim III* only for its holding that "but for" causation is not required. *Chiquita Brands,* 690 F. Supp. 2d at 1313.

noted above makes clear, the opinion did not use the term because it was clearly *not* applying that standard – and of course Judge Wood did use the term in criticizing that approach. See *supra* p. 7. And, they misleadingly note that "the Second Circuit cited *Boim III* in both the decision below and in *Rothstein,*" Opp. 15, but those decisions cited *Boim III* only in their discussion of secondary liability – *not* causation. See Pet. App. 6a-10a; *Rothstein* v. *UBS, AG,* 708 F.3d 82, 94-98 (2d Cir. 2013). Indeed, respondents' separate argument that the Second Circuit adopted the strict causation rules found in RICO and the Clayton Act, see Opp. 20-23, further confirms the stark divergence between the approaches of the Second and Seventh Circuits.

The conflict between the two circuits' standards is illustrated by their different treatment of the issue central to this petition: when liability arises for persons who contribute to terrorist organizations through "front groups." The Second Circuit found that allegations of such contributions were inadequate because the plaintiffs did not *also* allege that the contributors actually participated in the September 11th attacks or gave money directly to al-Qaeda, or that the contributions to the "fronts" were actually transferred to al-Qaeda and aided in the attacks. Pet. App. 8a. In contrast, the Seventh Circuit requires plaintiffs to allege only that the contributor to the "front" organization knows, or is reckless in failing to discover, that donations to the "front" end up in the hands of terrorist organizations. *Boim III,* 549 F.3d at 701-02. Petitioners' allegations readily met that standard. See Pet. 4-5, 21.[4] The Seventh

[4] Respondents claim that plaintiffs did not establish respondents' state of mind, but that ignores the posture of this case, the Second Circuit's reasoning, and the issue presented by

Circuit explained that "to set the knowledge and causal requirement higher ... would be to invite money laundering, the proliferation of affiliated organizations, and two-track terrorism (killing plus welfare). Donor liability would be eviscerated, and the statute would be a dead letter." 549 F.3d at 702. The conflict between the two circuits could not be more clear, more fundamental to the operation of the statute, or more clearly presented by this case.

2. Respondents argue that the Second Circuit's construction of the ATA is supported by this Court's decisions construing RICO and the Clayton Act, but these arguments address the merits of the issue presented rather than provide any reason for denying the petition. The Seventh Circuit and the district courts that have applied a less strict causation standard clearly view the terrorism context as calling for a different causation standard, unresolved by this Court's decisions, and this conclusion accords with Congress' intent. See Pet. 16-19.

In any event, construction of the "by reason of" language for purposes of RICO and the Clayton Act was highly dependent on the particular objectives and context of those statutes, see *Holmes* v. *Sec. Investor Prot. Corp.,* 503 U.S. 258, 267 (1992) (RICO

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the petition: the courts below granted and upheld respondents' motion to dismiss, so plaintiffs' ample allegations and the inferences that may reasonably be drawn from them must be taken as true; the Second Circuit assumed *arguendo* that respondents knowingly provided support to terrorist fronts, and did not otherwise address the issue, Pet. App. 5a; and, when the correct legal standard is applied, it is clear that petitioners did allege that respondents provided significant material support to terrorist organizations through "front" groups, with knowledge of those organizations' character. *See* p. 4 n.2, *supra*; Pet. 4-5 & n.2, 21. Those allegations would more than suffice under the "relaxed" causation standard of the Seventh Circuit.

"statutory history" and legislative objective "key" to construction), and this Court has warned against translating context-specific constructions of phrases in circumstances that implicate much different considerations. See *Envtl. Def.* v. *Duke Energy Corp.*, 549 U.S. 561, 574-76 (2007). The purpose and context of RICO and the Clayton Act plainly differ from those of Section 2333(a), which Congress enacted to "impose 'liability at any point along the causal chain of terrorism'" and "'interrupt, or at least imperil, the flow of money'" to terrorists. Pet. 15 (quoting ATA's legislative history). This reasoning tracks precisely how this Court interpreted the Federal Employer Liability Act's broadly remedial purpose to eliminate the common law standard of proximate causation. *CSX Transp., Inc.* v. *McBride,* 131 S. Ct. 2630, 2634-44 (2011). Similar reasoning applies to the ATA. See *Boim III*, 549 F.3d at 692 (*Holmes* inapplicable to the terrorism context).

3. Respondents, oddly, argue that the issue presented is of no importance because the government continues to pursue criminal charges against a few dozen supporters of international terrorism, only some of whom are terrorist financiers. Opp. at 27-28. That ignores the judgment of Congress and the Executive Branch that a robust civil enforcement mechanism is an important component of the nation's counter-terrorism strategy. Pet. 14, 18-20.[5] As the

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[5] Respondents incorrectly claim that certain statements of Congressional intent were limited to the ATA's criminal provisions, *see* Opp. 24-25, but this is doubly wrong: the relevant Congressional findings related generally to the funding of terrorism, *see* Pet. 19; Pub. L. No. 104-32, § 301(a)(7), 110 Stat. 1214, 1247 (1996), and Section 2333(a) serves to enforce the ATA's criminal provisions. *See* 18 U.S.C. §§ 2331(1), 2333(a) (predicate violation of federal criminal laws); *Boim III,* 549 F. 3d

Seventh Circuit also emphasized, civil enforcement is especially important to deter and redress the financing of international terrorism. See *Boim III*, 549 F.3d at 690-93, 697, 702; *supra* p. 5 (position of United States). Nothing in respondents' argument undermines the conclusion of federal courts and others that if a strict causation standard, such as the Second Circuit's rule, is permitted to stand, "[d]onor liability would be eviscerated, and the statute would be a dead letter." *Boim III*, 549 F.3d at 701-02; see *Strauss* v. *Credit Lyonnais, S.A.,* 925 F. Supp. 2d 414, 433-34 (E.D.N.Y. 2013); Pet. 16-22.

CONCLUSION

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

Respectfully submitted,

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at 688-92 (chain of incorporation of ATA criminal law provisions).

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