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 PERSONAL JURISDICTION ISSUES

STEPHEN A. COZEN
ELLIOTT R. FELDMAN
SEAN P. CARTER
J. SCOTT TARBUTTON
COZEN O'CONNOR
1900 Market Street
Philadelphia, PA 19103
(215) 665-2000

CARTER G. PHILLIPS*
RICHARD KLINGLER
JACQUELINE G. COOPER
PAUL J. SAMPSON
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
cphillips@sidley.com

Counsel for the Federal Insurance Petitioners

* Counsel of Record

[Additional Counsel on Inside Cover]

November 25, 2013

ANDREA BIERSTEIN
HANLY CONROY BIERSTEIN
SHERIDAN FISHER &
HAYES, LLP
112 Madison Avenue
7th Floor
New York, NY 10016
(212) 784-6400

Counsel for the EuroBrokers and Burnett Petitioners

ROBERT M. KAPLAN
FERBER CHAN ESSNER &
COLLER, LLP
530 Fifth Avenue
23rd Floor
New York, NY 10036
(212) 944-2200

Counsel for the Continental Petitioners

JAMES P. KREINDLER
JUSTIN T. GREEN
ANDREW J. MALONEY, III
KREINDLER & KREINDLER
LLP
750 Third Avenue
32nd Floor
New York, NY 10017
(212) 687-8181

Counsel for the Ashton Petitioners

JERRY S. GOLDMAN
ANDERSON KILL P.C.
1251 Avenue of the
Americas
New York, NY 10020
(212) 278-1000

Counsel for the O'Neill Petitioners

CHRIS LEONARDO
ADAMS HOLCOMB LLP
1875 Eye Street N.W.
Suite 810
Washington, D.C. 20006
(202) 580-8820

Counsel for the Cantor Fitzgerald Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

SCHOLARLY AUTHORITY

INTRODUCTION

Respondents do not dispute that the federal courts substantially diverge over the showing of intent required before jurisdiction can be asserted over a defendant who commits an intentional tort affecting the forum. They cannot contest that the Second Circuit has cleanly presented that issue here by holding that no jurisdiction extends to a defendant that the court *assumed* to have intentionally provided support to a terrorist organization, knowing of the organization's ongoing agenda of targeting the United States and foreseeing that the aid could result in harm to residents of the United States. Respondents ignore this Court's due process framework in trying to justify the Second Circuit's rule, incorrectly characterize that rule as addressing only foreseeability of harm, and wish away the direct conflict between the rules of the D.C. Circuit and the Second Circuit based on a supposed factual distinction. They assert that this Court's consideration of *Walden* v. *Fiore*, No. 12-574, makes irrelevant further conflicts among the courts of appeals, but *Walden* presents a different issue of the locale of the tort rather than the requisite mental state (and, to the extent relevant, will in any event benefit petitioners however it is decided). Respondents' arguments confirm that this petition cleanly presents an important issue that has divided the courts of appeals – and thus review is warranted.

I. THE SECOND CIRCUIT'S DECISION CONFLICTS WITH THE DUE PROCESS ANALYSIS OF THIS COURT.

Respondents sidestep the due process principles, central to the petition, that establish a forum's interest in asserting jurisdiction over acts that violate

its laws – as noted by the plurality in *J. McIntyre Machinery Ltd.* v. *Nicastro*, 131 S. Ct. 2780, 2787 (2011), and reflected in *United States* v. *Sisal Sales Corp.*, 274 U.S. 268, 276 (1927). Pet. 23-24. A forum has an interest, consistent with due process, in bringing to justice those who foster a violent attack on the forum's territory. Plaintiffs' claims under the Anti-Terrorism Act ("ATA") and state law seek that result. Whether one's conduct is "'such that [a defendant] should reasonably anticipate being haled into court'" in the forum is the touchstone of the constitutional analysis, see *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 474 (1985), and supporters of terrorist organizations have "'engaged in unabashedly malignant actions directed at [and] felt' in this country … [and] should therefore 'reasonably anticipate being haled into court' here by those injured as a result of those actions." *Mwani* v. *bin Laden*, 417 F.3d 1, 4 (D.C. Cir. 2005). Respondents and the Second Circuit may not acknowledge this point or this basic due process framework, but neither has been lost on the D.C. Circuit. See *id.*; *infra* pp. 6-7.[1]

---

[1] Contrary to respondents' vague assertion, *see* Opp. 10 n.4, petitioners have not waived any aspect of their due process arguments (much less did so in a *reply* brief). They repeatedly made all these arguments, including in the briefing cycle respondents cite, throughout their briefing before the Second Circuit, including direct reliance on *Sisal*, *McIntyre*, and the due process notice concepts reflected in *Burger King* and *Mwani*. *See* Appellants' Br., Jurisdiction 52-77, No. 11-3294 (filed Jan. 20, 2012) (Dkt. 298); Appellants' Reply Br., Jurisdiction 5-10, No. 11-3294 (filed June 25, 2012) (Dkt. 578); Appellants' Reply Br., Jurisdiction 8-42, No. 11-3294 (filed June 25, 2012) (Dkt. 581); *see also* Appellants' Br. 19-33, No. 11-3294 (filed June 26, 2012) (Dkt. 593); Appellants' Reply Br. 22-28, No. 11-3294 (filed Oct. 5, 2012) (Dkt. 639). Nothing in petitioners' argument that *Calder*

Respondents' claim that *Holder* v. *Humanitarian Law Project*, 130 S. Ct. 2705 (2010), is irrelevant "because *Holder* has nothing to do with personal jurisdiction," Opp. 15, similarly overlooks the relevant issue. Personal jurisdiction is determined by "[t]he relationship between the defendant and the forum," considering the forum's "interest in adjudicating the dispute" and the "plaintiff's interest in obtaining convenient and effective relief." *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 292 (1980). *Holder* establishes the profound interest of the United States in bringing to justice those who provide material support to organizations dedicated to harming the United States and underscores Congress's and the Executive Branch's identical conclusions. 130 S. Ct. at 2727-29. Read with *Woodson*, *Holder* very directly bears on the scope of personal jurisdiction over persons who, like respondents, foster anti-U.S. terrorism through acts undertaken abroad.

Respondents also mistake how the Second Circuit's decision relates to *Calder* v. *Jones*, 465 U.S. 783 (1984). Their lengthy discussion of this issue, Opp. 6-17, functions as a merits argument but hardly provides a reason not to grant the petition. Their argument also rests on a basic mischaracterization of the Second Circuit's decision, as rejecting "foreseeability" of harm as the basis for jurisdiction. *See id.* at 8, 11-13. In this way, respondents avoid confronting the mental state issue presented by the petition and the Second Circuit's decision. It is common ground, however, that "mere foreseeability" of harm is insufficient under *Calder* and other

---

v. *Jones* supports them is a waiver of related due process arguments.

decisions. See *Calder*, 465 U.S. at 789; Opp. 11-13 (laboring to establish this point).

The Second Circuit went much further. It established a *per se* bar on establishing jurisdiction when material support is provided through an intermediary (even one alleged to be an "integrated component" of al Qaeda), without regard to intent, and dismissed at least two defendants on that basis. Pet. App. 41a, 44a & n.13 (Yousef Jameel and Khalid bin Mahfouz). It went further, too, in holding that the provision of material support to a terrorist organization targeting the U.S. is insufficient to establish jurisdiction even when the defendant "'knowingly and intentionally provided material support to terrorists,'" "'intended to fund al Qaeda,'" and was "'aware of Osama bin Laden's public announcements of jihad against the United States'" – and of al Qaeda's pattern and objective of attacking U.S. interests. *Id.* at 39a-42a (quoting *id.* at 227a). All of this is *in addition* to the court's assuming that the later "violence committed against residents of the United States [is] a foreseeable consequence" of respondents' support to al Qaeda. *Id.* at 227a. Supporting al Qaeda in the face of this "foreseeability" of consequences *plus* actual knowledge of al Qaeda's agenda, the targeting of the United States, and likely harm arising from the aid amounts to intent or express aiming. Cf. *Halberstam* v. *Welch*, 705 F.2d 472, 488 (D.C. Cir. 1983) (if a defendant's "assistance" in a civil conspiracy is "knowing, then it evidences a deliberate long-term intention to participate in an ongoing illicit enterprise," reflecting the defendant's "intent and desire to make the venture succeed"); *Lee* v. *Lee Cnty. Bd. of Educ.*, 639 F.2d 1243, 1267 (5th Cir. 1981) ("a person intends the natural and

foreseeable consequences of his voluntary actions"); Pet. 26-29.

In *Calder*, precisely that foreseeability *plus* knowledge of harm and the target of the joint activity rendered the defendants subject to jurisdiction. See *Calder*, 465 U.S. at 789; Pet. 24-26. Other cases confirm that providing material support to a terrorist organization, knowing its character and targeting agenda, amounts to intentional conduct. See *Boim* v. *Holy Land Found.*, 549 F.3d 685, 694 (7th Cir. 2008) (en banc) ("*Boim III*"). And, given that the Second Circuit upheld the grant of motions to dismiss, its rule is all the more extreme and inconsistent with *Calder* because it amounted to a conclusion that no reasonable jury could infer the requisite intent or the knowing likelihood of harm – even when presented with evidence of the intent and knowledge of the terrorists' targeting of the United States that the Second Circuit was willing to assume. Pet. App. 22a-32a.[2]

---

[2] Respondents also argue that intent could not be established because there was only a "'mere likelihood' that aid to an organization *might* be used for attacks against the United States." Opp. 13. But this is contrary to what the Second Circuit assumed in applying its rule, Pet. App. 39a-42a (knowledge of funds to al Qaeda and agenda of targeting the U.S.); contrary to what this Court acknowledged and the Executive Branch had concluded in *Holder*, 130 S. Ct. at 2727 ("'Given the purposes, organizational structure, and clandestine nature of foreign terrorist organizations, it is *highly likely* that any material support to these organizations will ultimately inure to the benefit of their criminal, terrorist functions ….'") (emphasis added) (quoting McKune Aff. App., ¶ 8); contrary to plaintiffs' allegations, *see* Pet. App. 22a-32a; and inconsistent with the reasonable inferences that must be drawn in addressing a motion to dismiss.

II. THE SECOND CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS.

1. Respondents assert that no conflict exists between the Second Circuit and the D.C. Circuit over the rule used to analyze personal jurisdiction because the Second Circuit "distinguished" the leading D.C. Circuit case on its facts. Opp. 19; see *id.* at 19-21. The Second Circuit indeed sought to distinguish *Mwani* v. *bin Laden*, 417 F.3d 1 (D.C. Cir. 2005), by asserting that it did not involve a "primary actor" in the terrorist attack, Pet. App. 229a-30a,[3] but that fact does nothing to disprove the existence of a conflict.

The D.C. Circuit did not apply a "primary actor" test or limit its rule with that concept; instead, as noted above, it tested whether a defendant is on reasonable notice that its support for terrorism directed against U.S. interests could result in being "haled into" U.S. court. *Supra* p. 2; Pet. 28-29. The Second Circuit did not apply that due process analysis. Had it done so, or had this case been before the D.C. Circuit, that test would readily establish jurisdiction. The criminal and civil prohibitions on providing material support to a terrorist organization targeting the United States are *designed* to apply to persons other than the "primary actors" in an attack, see *Holder*, 130 S. Ct. at 2712, and – as the Second Circuit assumed for purposes of deciding this case,

---

[3] Even the Second Circuit's factual distinction is inapt: one who knowingly provides financial or other support to an organization such as al Qaeda is more properly characterized as a "primary" participant in the organization's activities. *See Holder*, 130 S. Ct. at 2727 (importance of financial support to organization's terrorist attacks); *Boim III*, 549 F.3d at 691-92 (material support gives rise to "primary liability" under the ATA).

see Pet. App. 39a-42a – respondents knew of al Qaeda's terrorist, anti-U.S. agenda and its ongoing attacks on U.S. interests. Indeed, the Second Circuit assumed that defendants, aware of al Qaeda's attacks and objectives, could foresee that their support would harm "residents of the United States." *Id*. at 39a-42a; *supra* p. 4-5. It is inconceivable that such supporters of terrorism could be surprised when the United States directed any number of actions against them: economic sanctions, military force, criminal prosecutions, or at the very least the civil process at issue here. That different result, arising from application of the D.C. Circuit's test but not the Second Circuit's, establishes the conflict.

2. Respondents acknowledge the extensive conflicts and confusion among the courts of appeals regarding *Calder*'s express aiming requirement, but incorrectly claim that these conflicts are irrelevant because they are being addressed by this Court in *Walden* v. *Fiore*, No. 12-574 (argued Nov. 4, 2013), and that the outcome of that case would provide no assistance to petitioners. Opp. 17.

Walden implicates only one aspect of the widespread divergence among the courts in applying *Calder*: whether tortious conduct directed at an out-of-forum victim establishes jurisdiction (and venue) when the tortfeasor is aware of the victim's ties to the forum. See Questions Presented, *Walden* v. *Fiore*, No. 12-574. To the extent *Walden* implicates this case, petitioners would prevail under either outcome because, whether or not targeting victims in the forum is required, the Second Circuit would deny jurisdiction even where it accepted that al Qaeda was targeting the U.S. and where a defendant anticipated that its support would "harm residents of the United States." See Pet. App. 39a-42a; *supra* p. 4-5. That is,

no jurisdiction would exist even where the forum is clearly the "focal point of the tort." In addition, this case presents the issue whether petitioners have *any* remedy in any U.S. court, not just which of several U.S. forums is appropriate.[4] So, at a minimum, the Court should hold this petition pending *Walden* v. *Fiore* if it does not grant the petition or seek the views of the Solicitor General.

At its core, however, this petition presents an issue of the mental state required by *Calder*'s "effects test" or "express aiming" requirement that extends far beyond the "focus of the tort" issue before the Court in *Walden*. Specifically, the issue is what constitutes the requisite standard and proof of intent. "Post-*Calder* decisions applying the effects test … have evidenced considerable confusion over the kind of intent that is relevant in applying the *Calder* test," leading to "widespread divergence among the lower courts." Floyd & Baradaran-Robison, *Toward a Unified Test of Personal Jurisdiction in an Era of Widely Diffused Wrongs*, 81 Ind. L.J. 601, 612, 618 (2006) ("*Unified Test*"). Some courts require "something close to a subjective purpose or desire to harm the plaintiff in the forum;" others require "defendants' awareness that their conduct would cause harm in the forum state;" and yet others focus on "only whether [the defendants] should have been aware that it would." *Id.* at 618-19 (collecting court of appeals cases, including cases canvassed in the petition, Pet. 26-28, that apply different standards). For example, that article notes *(Unified Test, supra*, at 618 & n.88) that *Bancroft & Masters, Inc.* v.

---

[4] In part for this reason, the D.C Circuit upheld the assertion of jurisdiction over those who facilitated al Qaeda attacks on U.S. embassies and other interests *abroad*. *See Mwani*, 417 F.3d at 13.

Augusta National Inc., 223 F.3d 1082, 1088 (9th Cir. 2000), imposes one of the more stringent tests, and the petition described how even *Bancroft*'s test of "foreseeability plus knowledge" would be satisfied as to respondents and thus conflicts with the Second Circuit's even more extreme approach. Pet. 26-27; see *Unified Test*, *supra*, at 618-19 (discussing divergence among, *e.g.*, *Bancroft*, *IMO Indus., Inc.* v. *Kiekert AG*, 155 F.3d 254 (3d Cir. 1998), and *ESAB Grp., Inc.* v. *Centricut, Inc.*, 126 F.3d 617 (4th Cir. 1997)).

III. THE PETITION CLEANLY PRESENTS THE PERSONAL JURISDICTION LEGAL ISSUE.

Respondents suggest that the allegations in this case are "conclusory" and "fact-specific analysis" is required, Opp. 21-22, but it is hard to imagine how this case could more cleanly present the personal jurisdiction legal issue related to *Calder*'s intent requirement, generally or as applied to support for terrorism. Respondents prevailed in their motions to dismiss, where the allegations must be accepted as true. The Second Circuit upheld those dismissals by applying the general rule set forth in *Terrorist Attacks III*, and both decisions assumed the crucial factual issues that present the legal issue: that respondents "'intended to fund al Qaeda'" and did so with awareness of al Qaeda's targeting of the U.S. and its past attacks, and proceeded despite the foreseeability that their support would lead to "'acts of violence committed against residents of the United States.'" Pet. App. 39a-42a (quoting *id.* at 227a); see Pet. 23-26. So, the issue presented is the purely legal one whether, on these assumed facts and in the context of material support for terrorism, the Constitution bars all U.S. courts from asserting jurisdiction over claims asserted by those U.S. resident victims against those supporters of al Qaeda.

Nor is there any doubt that the allegations clearly suffice if petitioners prevail in establishing the correct jurisdictional rule. The Second Circuit itself found that the complaint "include[s] a wealth of detail (conscientiously cited to published and unpublished sources) that, if true, reflect close working arrangements between ostensible charities and terrorist networks, including al Qaeda." Pet. App. 189a. Petitioners' detailed allegations also established respondents' central role in those "charities" and, in many cases, their dealings with senior al Qaeda leaders, including Osama bin Laden. See Pet. 31-33; see, *e.g.*, Appellants' Br., Jurisdiction 52-165, No. 11-3294 (filed Jan. 20, 2012) (Dkt. 298) (collecting allegations).

IV. THIS COURT'S DENIAL OF CERTIORARI IN *TERRORIST ATTACKS III* DOES NOT WEIGH AGAINST REVIEW NOW.

Respondents prominently assert that because this petition presents "substantially identical issues" as *Terrorist Attacks III*, which this Court declined to review, review is unwarranted now. Opp. 4-6. Initially, their premise is incorrect: denying jurisdiction over key al Qaeda facilitators, kingpin financiers, and entities directly tied to Osama bin Laden, see Pet. 31-33, would be more extreme than the prior denial of jurisdiction over Saudi Princes alleged to have far less direct ties to al Qaeda, and this petition also presents separate issues related to the Anti-Terrorism Act that *Terrorist Attacks III* did not present. See *id*. at 11-22.

Even if that were not so, respondents' conclusion is a *non sequitur*. This Court may well have denied certiorari knowing that the personal jurisdiction issue would arise again when the Second Circuit applied its rule to other defendants in this case,

because *Terrorist Attacks III* presented sensitive issues surrounding the defendant Saudi Princes and the Foreign Sovereign Immunities Act (the prior petition also sought review of two FSIA issues), or because the United States questioned allegations related to the Princes and indicated that it was not yet clear whether the Second Circuit meant what its language suggested about requiring a high level of intent. See Pet. 29-31. That meaning is clear now; this case presents no issue of sovereign immunity or diplomatic sensitivity; and application of the Second Circuit's rule to respondents cleanly presents the issues raised in this petition. The passage of time has confirmed that *Terrorist Attacks III* was indeed error-filled, with two of its three core holdings set aside. See *id.* 6 & n.3. Nothing in this Court's prior denial of certiorari reflected any determination that bears on whether review of this case is warranted now.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

STEPHEN A. COZEN
ELLIOTT R. FELDMAN
SEAN P. CARTER
J. SCOTT TARBUTTON
COZEN O'CONNOR
1900 Market Street
Philadelphia, PA 19103
(215) 665-2000

CARTER G. PHILLIPS*
RICHARD KLINGLER
JACQUELINE G. COOPER
PAUL J. SAMPSON
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
cphillips@sidley.com

Counsel for the Federal Insurance Petitioners

ANDREA BIERSTEIN
HANLY CONROY BIERSTEIN SHERIDAN FISHER & HAYES, LLP
112 Madison Avenue
7th Floor
New York, NY 10016
(212) 784-6400

Counsel for the EuroBrokers and Burnett Petitioners

ROBERT M. KAPLAN
FERBER CHAN ESSNER & COLLER, LLP
530 Fifth Avenue
23rd Floor
New York, NY 10036
(212) 944-2200

Counsel for the Continental Petitioners

JAMES P. KREINDLER
JUSTIN T. GREEN
ANDREW J. MALONEY, III
KREINDLER & KREINDLER LLP
750 Third Avenue
32nd Floor
New York, NY 10017
(212) 687-8181

Counsel for the Ashton Petitioners

JERRY S. GOLDMAN
ANDERSON KILL P.C.
1251 Avenue of the Americas
New York, NY 10020
(212) 278-1000

Counsel for the O'Neill Petitioners

CHRIS LEONARDO
ADAMS HOLCOMB LLP
1875 Eye Street N.W.
Suite 810
Washington, D.C. 20006
(202) 580-8820

Counsel for the Cantor Fitzgerald Petitioners