No. 13-

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

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PETITION FOR A WRIT OF CERTIORARI

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September 9, 2013

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QUESTIONS PRESENTED

1. Whether the civil remedy provision of the Anti-Terrorism Act, 18 U.S.C. § 2333, supports claims against defendants based on theories of secondary liability, and requires plaintiffs to establish that a defendant's support provided to a terrorist organization was a proximate cause of the plaintiffs' injury.

2. Whether U.S. courts have personal jurisdiction over defendants who, acting abroad, provide material support to a terrorist organization that attacks the territorial United States and the defendant intends to provide support to the organization, knows of the organization's objective and history of attacking U.S. interests, and can foresee that its material support will be used in attacks on the United States.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

There are over 6,000 petitioners in these proceedings. They are listed in the appendix at Pet. Supp. App. 234a-416a. A separate corporate disclosure statement for the corporate petitioners is included at Pet. Supp. App. 417a-421a.

Respondents are:

Asat Trust Reg.

Al Shamal Islamic Bank, also known as Shamel Bank also known as Bank El Shamar

Schreiber & Zindel

Frank Zindel

Engelbert Schreiber, Sr.

Engelbert Schreiber, Jr.

Martin Watcher

Erwin Watcher

Sercor Treuhand Anstalt

Khalid Bin Mahfouz

National Commercial Bank

Faisal Islamic Bank

Abdullah Bin Laden

Abdulrahman Bin Mahfouz

Sulaiman Bin Abdul Aziz Al Rajhi

Saleh Abdul Aziz Al Rajhi

Abdullah Sulaiman Al Rajhi

Tadamon Islamic Bank

Bakr M. Bin Laden
Tarek M. Bin Laden
Omar M. Bin Laden
DMI Administrative Services S.A.
Yeslam M. Bin Laden
Yousef Jameel
Saudi Binladin Group
Al Rajhi Bank
Saudi American Bank
Dar Al-Maal Al-Islami Trust
Saleh Abdullah Kamel
Dallah Al Baraka Group LLC
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 Rahman Al Swailem
Suleiman Al-Ali
Yassin Abdullah Al Kadi
Saleh Al-Hussayen
Dallah Avco

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PETITION FOR A WRIT OF CERTIORARI

Petitioners are thousands of victims of the September 11, 2001 terrorist attacks on the United States who are pursuing civil litigation against the principal financial and operational supporters of al Qaeda during the period leading up to those attacks. They respectfully petition for a writ of certiorari to review the judgments and opinions of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The related opinions of the court of appeals are reported at 714 F.3d 118, 714 F.3d 659, and 714 F.3d 109, and reproduced at Pet. App. 1a-15a, 16a-54a, and 55a-72a. The court of appeals' order denying the petition for panel rehearing and rehearing en banc, Pet. App. 232a-233a, is unreported. The opinions of the district court are reported at 718 F. Supp. 2d 456 and 740 F. Supp. 2d 494, and reproduced at Pet. App. 117a-184a and 73a-116a. The court of appeals' prior opinion in this litigation is reported at 538 F.3d 71, and reproduced at Pet. App. 185a-231a.

JURISDICTION

The court of appeals issued its opinions on April 16, 2013. Pet. App. 1a-72a. A timely petition for panel rehearing and rehearing en banc was denied on June 10, 2013. *Id.* at 232a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part: "No person

shall … be deprived of life, liberty, or property, without due process of law ….”

18 U.S.C. § 2333(a) of the Anti-Terrorism Act (“ATA”) provides that “[a]ny national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, … may sue therefor.”

STATEMENT OF THE CASE

This petition is brought by thousands of the victims of the September 11, 2001 attacks on the United States against the principal financial and operational supporters of al Qaeda in the years leading up to those attacks. Such civil litigation directed against the material support of terrorism is broadly recognized as an important component of the nation’s arsenal of counter-terrorism measures. The petition seeks review of determinations of the Second Circuit that significantly curtail the efficacy of such litigation and thus its capacity to deter supporters of terrorist organizations. It addresses precisely the arrangements that Congress and the Executive Branch have determined most threaten U.S. interests: the suit targets those who use and operate the web of financial and operational networks that leading anti-U.S. terrorist groups depend upon to develop their global strike capabilities, move money and personnel internationally, and shield their activities from counter-terrorism efforts.

The petition presents two important legal issues that have divided the courts of appeals concerning when civil actions may proceed against those who allegedly provide material support to terrorist organizations. Specifically, the Second Circuit held that (1) the ATA – Congress’ principal civil litigation measure designed to direct the full weight of tort

remedies against support for terrorism – does not provide for secondary liability and requires that supporters of terrorism "proximately cause" the specific terrorist attack resulting in harm to victims of terrorism; and (2) before U.S. courts may exercise personal jurisdiction over supporters of a terrorist organization targeting the United States, a plaintiff must establish that the defendant specifically and "expressly" intended that its support to the organization harm the United States (even where it is assumed that the defendant intends to fund the organization, understands that the organization has struck and will target the U.S., and foresees that the support will lead to harm to U.S. residents).

Review is warranted because these holdings of the Second Circuit conflict with decisions of other federal courts of appeals, and certain of them further conflict with decisions of this Court and the position of the United States. Both issues also concern matters of vital public importance related to whether the civil remedies Congress designed to redress and deter material support for terrorism can be effectively deployed against the core instances of that support that Congress and the Executive Branch have sought to end over the past decades.

This Court should grant the petition to resolve these conflicts and to restore the capacity of civil litigation to redress and deter support for terrorist organizations targeting the United States.

A. The September 11th Victims' Claims

Petitioners include family members of the nearly 3,000 people killed in the September 11, 2001 terrorist attacks, thousands of individuals who were severely injured as a result of the attacks, and commercial entities that incurred billions of dollars of

property damage and other losses as a result of the attacks (collectively, the "victims" or "petitioners"). These victims brought several lawsuits, later consolidated, seeking to hold accountable the principal parties that, knowing of and seeking to advance al Qaeda's objective of targeting the United States, provided material support to al Qaeda and thereby provided it with essential means to carry out the attacks. Petitioners brought claims under the ATA, the Alien Tort Statute ("ATS") 28 U.S.C. § 1350), RICO, and state common law.

Respondents (defendants below) are organizations and individuals alleged to have knowingly supported Osama bin Laden and al Qaeda in the years before the attacks, including through the management and provision of support to "charities" alleged to be components of al Qaeda. They include senior leaders of those al Qaeda constituents used to fund and direct operations of al Qaeda, companies owned by Osama bin Laden, certain of bin Laden's relatives, and the core of the principal financial supporters of al Qaeda during the years leading up to the September 11, 2001 attacks. Respondents – held by the court of appeals to be beyond the district court's jurisdiction – include various leaders of an al Qaeda entity identified by the U.S. government as a terrorist organization; officials who worked directly with Osama bin Laden and were instrumental to al Qaeda's development; the financial entity that was largely owned by Osama bin Laden and directly financed by al Qaeda; and two of al Qaeda's principal financiers who maintained a web of relations with al Qaeda officials.[1] Other respondents – held by the

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[1] *See* Appellants Br., Personal Jurisdiction at 101-52, No. 11-3294 (filed Jan. 20, 2012) (Dkt. 298) ("Per. Juris. Br.");

court of appeals to be beyond the ATA's reach – supported and conspired with senior al Qaeda leaders to advance al Qaeda's terrorism objectives.[2]

Plaintiffs alleged that, through defendants' knowing support of an organization they knew to be targeting the U.S. with terrorist attacks, the September 11th attacks were "a direct, intended and foreseeable product" of the defendants' sponsorship of al Qaeda, and defendants' contributions of support fueled al Qaeda's "phenomenal development and global expansion" and provided al Qaeda with "the financial resources, physical assets, membership base, technological knowledge, communication skills and global reach required to conceive, plan and execute" the September 11th attacks. Pet. App. 9a; C.A. App. 1199, 1201, 2374, 3776-78, 3848 (complaint of *Federal Insurance* plaintiffs).

B. Prior Proceedings

Between 2002 and 2005, groups of the plaintiffs in the underlying litigation filed their complaints, and approximately 100 defendants entered appearances and moved to dismiss the claims against them. In response, petitioners supplemented their already-detailed complaints with extrinsic information, including government and intelligence reports, documents obtained through Freedom of Information Act requests, U.S. filings in criminal trials, Congressional testimony, and analyses of counterterrorism experts and think tanks.

Appellants Br., Saudi Bin Ladin Group at 38-48, No. 11-3294 (filed June 26, 2012) (Dkt. 593); *infra* pp. 31-33.

[2] *See* Appellants Br., ATA Claim at 78-112, No. 11-3294 (filed Jan. 20, 2012) (Dkt. 299) ("ATA Br."); Appellants Reply Br., ATA Claim at 41-91, No. 11-3294 (filed June 25, 2012) (Dkt. 580) ("ATA Reply"); *infra* pp. 20-22.

***Terrorist Attacks I and II*:** On January 18, 2005 and September 21, 2005, the district court issued decisions dismissing, *inter alia*, the Kingdom of Saudi Arabia and a Saudi governmental entity on sovereign immunity grounds and dismissing several Saudi princes on sovereign immunity and personal jurisdiction grounds. *In re Terrorist Attacks on September 11, 2001*, 349 F. Supp. 2d 765 (S.D.N.Y. 2005) ("*Terrorist Attacks I*"), and 392 F. Supp. 2d 539 (S.D.N.Y. 2005) ("*Terrorist Attacks II*"). Petitioners appealed these dismissals.

***Terrorist Attacks III*:** On August 14, 2008, the Second Circuit affirmed the dismissals. Pet. App. 185a-231a ("*Terrorist Attacks III*"). The court upheld the dismissals of claims against the Kingdom and the Saudi governmental entity, and against the Saudi princes in their official capacities, based on constructions of the Foreign Sovereign Immunities Act ("FSIA") that significantly limited the scope of claims against supporters of terrorism – but which have since been abrogated or overruled.[3]

The Second Circuit also found a lack of personal jurisdiction over the princes, requiring dismissal of the claims brought against them in their personal capacities. The court held that even if the princes had provided material support to al Qaeda through affiliated front groups, personal jurisdiction could not be established by a showing that a defendant "intended to fund al Qaeda" and did so with

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[3] A decision of this Court abrogated one of the Second Circuit's holdings, and the Second Circuit itself later overruled another. *See Samantar* v. *Yousuf*, 130 S. Ct. 2278 (2010) (the FSIA does not apply to claims against individual officials of foreign states); *Doe* v. *Bin Laden*, 663 F.3d 64 (2d Cir. 2011) (overturning *Terrorist Attacks III*'s limiting construction of 28 U.S.C. § 1605(a)(5)).

"aware[ness] of Osama bin Laden's public announcements of jihad against the United States" and of al Qaeda's past attacks on U.S. interests, even if "violence committed against residents of the United States [was] a foreseeable consequence of the princes' alleged indirect funding of al Qaeda." Pet. App. 227a. That was not the "intentional conduct" aimed at the United States that the Second Circuit believed that *Calder* v. *Jones*, 465 U.S. 783 (1984), required. Pet. App. 228a. As to one prince, the court found that his involvement in the provision of financial services to al Qaeda was not direct enough to establish personal jurisdiction. *Id*. at 229a.

Petitioners then sought this Court's review of each of these three principal holdings. *Fed. Ins. Co.* v. *Kingdom of Saudi Arabia*, No. 08-640 (filed Nov. 12, 2008). At the invitation of the Court, the United States expressed its disagreement with each of *Terrorist Attacks III*'s main holdings, but nonetheless recommended denial of the petition. Br. for the United States, No. 08-640 (May 29, 2009). This Court denied the petition. 129 S. Ct. 2859 (2009).

***Terrorist Attacks IV and V*:** Thereafter, the district court issued two decisions that are the principal basis for the court of appeals' decisions at issue in this petition.

The district court applied *Terrorist Attacks III* to dismiss 36 defendants for lack of personal jurisdiction. Pet App. 117a-184a ("*Terrorist Attacks IV*"). The district court generally based the dismissals on its conclusions that: (1) a defendant's indirect funding of al Qaeda through a charitable intermediary "is, under controlling Second Circuit law, of no jurisdictional import," *id.* at 167a; or (2) petitioners were required, but failed, to present allegations and facts sufficient to demonstrate these

defendants' "specific intent that [their support for al Qaeda] be used to aid al Qaeda in the commission of a terrorist attack against the United States," *id.* at 169a.

The district court later dismissed seven additional defendants for lack of personal jurisdiction on similar grounds and granted three defendants' motions to dismiss for failure to state a claim under the ATA. Pet. App. 73a-116a ("*Terrorist Attacks V*"). These latter dismissals were primarily based upon the conclusion that petitioners had not established that those defendants knew that their support advanced al Qaeda's activities, *id.* at 108a-110a – despite petitioners' detailed pleading of defendants' extensive dealings with al Qaeda and its network of supporting entities.[4]

The district court entered final judgments under Rule 54(b) in favor of 75 defendants – those dismissed under *Terrorist Attacks IV* & *V* and the remaining defendants dismissed under *Terrorist Attacks I* & *II* who were not within the scope of a prior Rule 54(b) judgment. Petitioners then voluntarily withdrew their appeals as to 27 defendants, focusing only on those defendants who had most substantially and directly supported al Qaeda or directed its affiliated front groups. In the appeals that are the subject of this petition, petitioners challenged the district court's (1) dismissal of five defendants for failure to state a claim under the ATA,[5] (2) dismissal of 37 defendants for lack of personal jurisdiction, and (3) dismissal of Saudi governmental entities Saudi Joint

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[4] ATA Br. at 63-120; ATA Reply at 6-91.

[5] Three of these defendants were dismissed in *Terrorist Attacks V*, and two defendants had been dismissed in prior orders.

Relief Committee and Saudi Red Crescent Society pursuant to the FSIA.

C. The Court of Appeals' Opinions

"Due to the logistical challenges associated with these appeals," Pet. App. 3a, 18a, 57a, the court of appeals addressed the issues raised by petitioners in three separate opinions issued on April 16, 2013.

One decision affirmed the district court's dismissal of petitioners' ATA claims against five defendants on the ground that the ATA does not provide for secondary liability and thus "a defendant cannot be liable under the ATA on an aiding-and-abetting theory of liability." Pet. App. 6a. As to primary liability, the court separately held that the ATA requires a showing that defendants proximately caused the harm to plaintiffs and that plaintiffs' allegations did not meet that standard (under the particular formulation of "proximate cause" adopted). *Id*. at 7a-10a. (The court also held that the tort claims plaintiffs asserted under New York state law required that same showing of proximate cause and thus similarly had to be dismissed. *Id*. at 13a.).

A second decision, Pet. App. 16a-54a, affirmed the dismissal of 25 defendants for lack of personal jurisdiction, while remanding for further proceedings to address the jurisdictional status of 12 defendants. It expressly reaffirmed and applied *Terrorist Attacks III*'s holding that personal jurisdiction could not be established through provision of material support to al Qaeda via a front organization – even where a defendant "'intended to fund al Qaeda,'" did so knowing of "'Osama bin Laden's public announcements of jihad against the United States and al Qaeda's attacks on the African embassies and U.S.S. Cole,'" and foresaw that the consequence would be

"'acts of violence committed against residents of the United States.'" *Id.* at 39a-42a (quoting *Terrorist Attacks III*, *id.* at 227a). It also reaffirmed *Terrorist Attacks III*'s narrow view as to when the provision of financial services to terrorist organizations can give rise to personal jurisdiction. Dismissal of 12 defendants was based on these aspects of *Terrorist Attacks III*, see *id.* at 41a-42a, 44a-45a n.13, and the remand regarding the 12 additional defendants was to determine whether the acts of those defendants were "expressly aimed at the United States" within the meaning of that decision. *Id.* at 45a-49a & n.15.

Similarly, the decision upheld the dismissals of four of Osama bin Laden's half-brothers and the family company they owned with other family members (alleged to have been instrumental in supporting al Qaeda's establishment and the development of al Qaeda's capabilities in Sudan in the early 1990's), on the ground that no record support showed that "these actions were 'expressly aimed' at the United States or are connected … to the September 11, 2001 attacks." Pet. App. 42a-44a & n.12. The court endorsed the district court's weighing of evidence in this respect (which yielded a conclusion that pre-1994 actions could not have contributed to the September 11th attacks), and separately concluded that the "weight of the factual allegations" supported the grant of a motion to dismiss for another defendant. *Id.* at 45a. Finally, it upheld the grant of motions to dismiss for certain other defendants on the ground that no inferences supporting personal jurisdiction could be drawn from allegations related to their "serv[ice] in various positions of authority within organizations that are alleged to have supported" al Qaeda. *Id.* at 44a.

The third decision, Pet. App. 55a-72a, affirmed the dismissal of two Saudi governmental defendants and is not addressed by this petition.

The Second Circuit denied rehearing and rehearing en banc.

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS' HOLDINGS REGARDING THE ATA CONFLICT WITH DECISIONS OF THE SEVENTH CIRCUIT AND THE POSITION OF THE UNITED STATES, AND ARE CONTRARY TO DECISIONS OF THIS COURT.

The Second Circuit held that (i) the ATA does not authorize claims asserting secondary liability, specifically aiding and abetting claims, and (ii) ATA claims asserting primary liability may proceed only if plaintiffs can meet a stringent standard of proximate causation. Pet. App. 5a-10a. Each conclusion is inconsistent with the redress and deterrence of material support of terrorism that Congress designed the ATA to accomplish, conflicts with the holdings of another court of appeals and other federal courts, and does serious harm to U.S. counter-terrorism policies.

A. Aiding and Abetting Liability Under the ATA

1. The ATA provides that "[a]ny national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, … may sue therefor." 18 U.S.C. § 2333(a). The Second Circuit held that the ATA does not support petitioners' claims based on defendants' secondary liability for the acts of the al Qaeda organization they supported. By interpreting Section 2333(a)'s unqualified language as precluding aiding

and abetting liability, the Second Circuit is at odds with virtually every other federal court that has addressed this issue.

"Courts are divided on whether Congress intended to include aiding and abetting liability for a violation of § 2333(a)." *Goldberg* v. *UBS AG,* 660 F. Supp. 2d 410, 425 (E.D.N.Y. 2009). In contrast to the Second Circuit's ruling at issue here, "[t]he majority of federal courts have concluded that the ATA allows for claims based on a theory of secondary liability – *e.g.,* aiding and abetting." *Gill* v. *Arab Bank, PLC,* 893 F. Supp. 2d 474, 497 (E.D.N.Y. 2012) (citing *Wultz* v. *Islamic Republic of Iran,* 755 F. Supp. 2d 1, 54-57 (D.D.C. 2010) (collecting cases holding that ATA allows claims based on secondary liability)); see also*, e.g., Estate of Parsons* v. *Palestinian Auth.,* 2013 WL 3722169, at *5-6 (D.D.C. July 3, 2013) (recognizing secondary liability under ATA); *Abecassis* v. *Wyatt*, 785 F. Supp. 2d 614, 645, 649 (S.D. Tex. 2011) (proceeding on basis that secondary liability applies); *In re Chiquita Brands Int'l, Inc., Alien Tort Statute & Shareholder Derivative Litig.*, 690 F. Supp. 2d 1296, 1309 (S.D. Fla. 2010) ("*Chiquita*") (recognizing divergence with only one "case refusing to recognize 'secondary liability' under the ATA"); *Morris* v. *Khadr*, 415 F. Supp. 2d 1323, 1330 (D. Utah 2006); *Estates of Ungar & Ungar* v. *Palestinian Auth.,* 325 F. Supp. 2d 15, 32, 65 (D.R.I. 2004) (recognizing secondary liability); *Burnett* v. *Al Baraka Inv. & Dev. Corp.*, 274 F. Supp. 2d 86, 105-07 (D.D.C. 2003) (plaintiffs may bring claim under ATA based on aiding and abetting theory).

Of particular importance to the Court's review, the Second Circuit and Seventh Circuit have adopted conflicting approaches to this issue. The Seventh Circuit holds that the ATA "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). *Boim* v. *Holy Land Found.*, 549 F.3d 685, 690-92 (7th Cir. 2008) (en banc) ("*Boim III*"); *id.* at 695 ("when the primary violator of a statute is someone who provides assistance to another he is functionally an aider and abettor"); see *id.* at 720-21 (Wood, J., concurring and dissenting in part) (the en banc majority's approach addresses the panel's earlier finding that § 2333 imposes secondary liability and "although in the end it neither adopts it or rejects it," the majority reaches "exactly the conclusion that the … panel reached"); see also *Gill,* 893 F. Supp. 2d at 502 (*Boim III's* "chain of incorporation" approach is "functionally equivalent" to permitting secondary liability); *Abecassis,* 785 F. Supp. 2d at 629-30 (*Boim III* held that secondary actors could be held liable under a primary liability theory). The *Boim III* en banc concurrence would directly recognize ATA secondary liability, while the en banc majority does so by focusing on how a "primary" violation of the ATA occurs when a defendant violates an underlying state or federal statute – addressing, for example, conspiracy or other "secondary" action such as providing material support to terrorism. See 549 F.3d at 690. Thus, especially when combined with a much more generous conception of the causation that must be pled under the ATA, see *infra* pp. 16-17, the Seventh Circuit construes the ATA to "impose[] liability on a class of aiders and abetters" precisely where, as in this case, the Second Circuit would not: when defendants conspire with or provide material support to terrorist organizations targeting the United States. *Boim III*, 549 F.3d at 690-92.

2. The Second Circuit's limitation of ATA liability also conflicts with the position of the United States. As a matter of statutory construction and counter-terrorism policy, the United States has repeatedly argued that Section 2333(a) provides for aiding and abetting liability "when the defendant knowingly and substantially assist[s] tortious conduct by the principal." Br. for the United States at 9, *Boim* v. *Quranic Literacy Inst.*, No. 01-1969 (7th Cir. Nov. 14, 2001) ("U.S. *Boim I* Br."); see Br. for the United States at 2-3, 26, 31, *Boim* v. *Holy Land Found.*, No. 05-1815 (7th Cir. Aug. 21, 2008). The ATA seeks to deter support for terrorism and "'is meant to reach beyond those who themselves commit the violent act that directly causes the injury.' Thus, those who aid or abet terrorists may be liable under Section 2333." Br. for the United States at 60, *United States* v. *Holy Land Found.,* No. 04-11282 (5th Cir. Jan. 10, 2007) (citation omitted).

The United States rightly points out that the ATA "does not limit, or even mention, the class of potential defendants," but "instead focuses …. on the conduct that violates federal law (an act of international terrorism) and on providing appropriate redress." U.S. *Boim I* Br. at 22. A contrary interpretation "would mean that Congress created a largely hollow remedy if it merely allows suits against terrorists who pull the trigger or plant the bomb." *Id.* at 18.

3. In interpreting Section 2333(a), the Second Circuit failed to follow this Court's directive that the meaning of statutory language be determined by the background common law principles that Congress intended to incorporate. See *Molzof* v. *United States*, 502 U.S. 301, 306-07 (1992). The ATA's broad language includes no limitation on which defendants are subject to claims and instead extends liability to

those who provide material support to terrorism, including the financing and provision of financial services in support of terrorism – where civil liability necessarily has a secondary nature. See, *e.g.*, 18 U.S.C. §§ 2339A-2339C.

Secondary liability is further required by the ATA's definition of "international terrorism," which includes violent acts and "acts dangerous to human life" – language which plainly includes acts that aid and abet terrorism. See *Boim III*, 549 F.3d at 690 ("[g]iving money to [a terrorist organization], like giving a loaded gun to a child (which also is not a violent act), is an 'act dangerous to human life'").

The court of appeals erred in claiming support for the opposite presumption based on *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994). See Pet. App. 6a-7a. *Central Bank* established, at most, that in the absence of *any* express cause of action in a statute, a rebuttable presumption against aiding and abetting liability applies. Here, of course, Section 2333(a) is an express cause of action, and its terms, statutory context, and purpose all rebut any such presumption.

Congress intended that Section 2333(a) "accord[] victims of terrorism the remedies of American tort law," 137 Cong. Rec. 8143 (1991), and impose "liability at any point along the causal chain of terrorism," which "would interrupt, or at least imperil, the flow of money." S. Rep. No. 102-342, at 22 (1992); see *id.* at 45 (substantive liability standards are "not defined by the statute, because the fact patterns giving rise to such suits will be as varied and numerous as those found in the law of torts"). Tort liability typically extends to those who aid and abet in the commission of a tort, not merely to the person who actually commits the tort. See, *e.g.*,

Restatement (Second) of Torts, § 876(b)-(c) (1979). Thus, the presumption and analysis required by *Molzof* reinforce the language of the ATA that encompasses claims asserting secondary liability.

B. The Causation Requirement of the ATA

The Second Circuit held that "proximate cause is required to state a claim under § 2333" of the ATA. Pet. App. 7a; *id.* (citing *Holmes* v. *Sec. Investors Protection Corp.*, 503 U.S. 258 (1992) (requiring "a showing that the defendant's violation not only was a 'but for' cause of his injury, but was the proximate cause as well")). Applying this standard, the court found that plaintiffs' allegations were insufficient because, *inter alia,* plaintiffs had not alleged "that the money allegedly donated by the … defendants to the purported charities actually was transferred to al Qaeda and aided in the" September 11th attacks. *Id.* at 8a. The court also found that funds directed to al Qaeda through intermediary "front groups" did not meet the proximate cause standard. *Id.* at 8a-9a.

1. The Second Circuit's ruling directly conflicts with the Seventh Circuit's en banc decision in *Boim III,* which held that, in stating an ATA claim, plaintiffs are "not required to prove 'but for' causation" and need not establish proximate causation. *Boim III*, 549 F.3d at 696; *id.* at 698 ("if you give money to an organization that you know to be engaged in terrorism, the fact that you earmark it for the organization's nonterrorist activities does not get you off the liability hook"); see, *e.g.*, *Abecassis*, 785 F. Supp. 2d at 633, 635 (*Boim III* "required a minimal showing of causation," rather than proximate cause, and thereby "stretched civil liability under the ATA more than previous courts"). The Seventh Circuit reasoned that because "terrorism is *sui generis*" and results from multiple causes and multiple tortfeasors,

"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." *Boim III*, 549 F.3d at 697-98; see also *id.* at 695-97 (analyzing various classic multi-tortfeasor circumstances).

This conflict between the Second and Seventh Circuits is part of a broader divergence in approach and confusion among the federal courts, which "disagree on what causal standard must be alleged and proven" under the ATA. *Abecassis,* 785 F. Supp. 2d at 646; see *Estate of Parsons* v. *Palestinian Auth.,* 715 F. Supp. 2d 27, 34 n.5 (D.D.C. 2010) ("courts have not settled on a causation standard for the ATA"), *aff'd*, 651 F.3d 118 (D.C. Cir. 2011). Some courts, like the Second Circuit, have held that the ATA requires a showing of strict proximate cause.[6] Other courts have ruled that proximate causation is required, but that "but for" causation is not, given the fungibility of money.[7] And still other courts, without expressly rejecting "but for" causation, have held that a proximate cause standard is required in ATA actions, but – unlike the Second Circuit here – do not require a plaintiff to show that the terrorist organization actually used the support provided by the defendant to support or undertake the terrorist attacks that harmed the plaintiff.[8]

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[6] *See, e.g., Stansell* v. *BGP, Inc.*, 2011 WL 1296881, at *9-10 (M.D. Fla. Mar. 31, 2011); *Wultz,* 755 F. Supp. 2d at 42.

[7] *See Abecassis*, 785 F. Supp. 2d at 646 ("The courts agree that 'but for' causation is not required."); *Chiquita*, 690 F. Supp. 2d at 1315; *cf. Gill,* 893 F. Supp. 2d at 507-08.

[8] *See, e.g., Strauss* v. *Credit Lyonnais, S.A.,* 2013 WL 751283, at *15 (E.D.N.Y. Feb. 28, 2013) (plaintiffs "are not required to

2. The Second Circuit's holding also conflicts with the Seventh Circuit's rule regarding the related issue whether ATA liability can arise from a defendant's support provided to terrorist organizations when routed through a "front group" or other entity that serves to facilitate terrorism. Under the Second Circuit's rule, such contributions do not satisfy its heightened proximate cause standard. Pet. App. 8a-9a.

In contrast, the Seventh Circuit's rule is that defendants in Section 2333 actions cannot "escape liability [merely] because terrorists and their supporters launder donations through a chain of intermediate organizations," and that allowing such defendants to escape liability "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." *Boim III*, 549 F.3d at 701-02.

3. The Second Circuit's holding disregards this Court's directive that legislative intent is "the controlling consideration" in determining the proper standard of causation, see *Blue Shield of Va.* v. *McCready*, 457 U.S. 465, 477 n.13 (1982), and is particularly contrary to the recent explication of Congress' intent in enacting the ATA, in *Holder* v. *Humanitarian Law Project,* 130 S. Ct. 2705, 2725 (2010).[9]

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trace specific dollars to specific attacks to satisfy the proximate cause standard," because such a task "would be impossible"); *Goldberg,* 660 F. Supp. 2d at 429 (same).

[9] The Second Circuit erred in claiming that its approach finds support in *Holmes,* 503 U.S. 258. In *Holmes*, this Court based its interpretation on the source of RICO's language, Section 4 of the Clayton Act, which courts had held to require proximate

In enacting the ATA, Congress clearly rejected a strict proximate causation requirement and especially rejected any limitation based on the transfer of funds or support through an intermediary entity. Congress found that "foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct." Anti-terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 301(a)(7), 110 Stat. 1214, 1247 (codified at 18 U.S.C. § 2339B note). Congress sought to impose "liability at any point along the causal chain of terrorism," which "would interrupt, or at least imperil, the flow of money." S. Rep. No. 102-342, at 22; see *supra* pp. 15-16. The Executive Branch has confirmed the nature of the terrorist threat that Congress sought to address through the ATA. The "'experience and analysis of the U.S. government agencies charged with combating terrorism strongly suppor[ts]'" this Congressional finding. *Humanitarian Law Project,* 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 ….'") (quoting Dec. of Kenneth McKune, ¶ 8).

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causation. *Id.* at 267. In contrast, Congress did not model the ATA on the Clayton Act, and, in the antitrust context addressed by *Holmes*, a tighter causation nexus was deemed appropriate to limit the scope of indirect injuries giving rise to claims and to reduce the risk that legitimate commercial conduct, valued by Congress, would be deterred. By contrast, providing material support to terrorist organizations has no social value, and deterrence is a virtue, not a risk – and the injury here is precisely the type Congress intended to authorize plaintiffs to redress.

In *Humanitarian Law Project,* this Court canvassed those Congressional and Executive Branch conclusions regarding the terrorist threat as it construed the ATA in a manner that is incompatible with the Second Circuit's rule. "'[T]errorist groups systematically conceal their activities behind charitable, social, and political fronts,'" and some designated foreign terrorist organizations "'use social and political components to recruit personnel to carry out terrorist operations, and to provide support to criminal terrorists and their families in aid of such operations.'" *Id.* at 2725 (citation omitted). "Fronts" are used because "[m]oney is fungible," and therefore even a contribution to purportedly non-violent activities "frees up other resources within the organization that may be put to violent ends." *Id.* Thus, in prohibiting "'contribution[s]'" to terrorist organizations, Congress through the ATA sought to bar "any form of material support" furnished to such an organization. *Id*.

4. The Second Circuit's rule and its application in this case present an issue of fundamental importance because a robust causation requirement would effectively render the ATA "a dead letter," *Boim III*, 549 F.3d at 701-02, as illustrated by the rule's operation in this case to allegations of support routed through al Qaeda front groups. Cf. *Strauss*, 2013 WL 751283, at *15 (a tight causation requirement "would make the ATA practically [a] dead letter").

The Second Circuit's rule precludes recovery even when such "front groups" effectively operate as part of the principal terrorist groups targeting the United States. In upholding the district court's grant of defendants' motions to dismiss (prior to any discovery), the Second Circuit concluded that plaintiffs had not alleged sufficient causation even

though the court had previously recognized that petitioners' allegations "include 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 (*Terrorist Attacks III*). It found that defendants' contributions to al Qaeda were insufficiently direct despite petitioners' allegations that the "charities" were, and defendants knew them to be, "*fully integrated components of al Qaida's organizational structure*, and … actively involved at every level of al Qaida's operations, from recruitment and training of new members, to the planning and conduct of terrorist attacks." C.A. App. 3778 (complaint of *Federal Insurance* plaintiffs) (emphasis supplied). The pleadings further alleged that those charities "have served as the primary vehicle for raising, laundering and distributing funds," "provided arms … physical assets and logistical support to al Qaida," and senior al Qaeda members were embedded in the charities as "employ[ees]" "to shield their direct involvement" in terrorist activities. C.A. App. 3778, 3849 (same). And, even if the "charities" could be viewed as separate intermediaries, petitioners alleged that the charities were simply a conduit for contributions to al Qaeda that were essential to al Qaeda's acquiring the global capabilities used in the September 11th attacks. C.A. App. 3778-80, 4052-54, 4210-14, 7882, 7885 (same).

Indeed, the activities addressed by the complaint are precisely those that the ATA was designed to address and that have been the focus of Executive Branch counter-terrorism efforts. "[A]l Qaeda was funded, to the tune of approximately $30 million per year, by diversions of money from Islamic charities

and the use of well-placed financial facilitators who gathered money from both witting and unwitting donors, primarily in the Gulf Region." Nat'l Comm'n on Terrorist Attacks Upon the United States, *Staff Monograph on Terrorist Financing* 4 (2004).[10] Likewise, petitioners alleged that the September 11th attacks were "a direct, intended and foreseeable product" of the defendants' sponsorship of al Qaeda, and that defendants' contributions of support fueled al Qaeda's "phenomenal development and global expansion," providing it with "the financial resources, physical assets, membership base, technological knowledge, communication skills and global reach required to conceive, plan and execute the September 11th Attack." Pet. App. 9a; C.A. App. 1199, 1201, 2374, 3776-78, 3848 (complaint). If the Second Circuit's rule is allowed to stand, the ATA's civil liability provisions will no longer be available to address and deter the most important forms of material support for terrorism employed to create al Qaeda's global strike capabilities and employed today by al Qaeda and other terrorist groups targeting the United States.

II. THE COURT OF APPEALS' PERSONAL JURISDICTION HOLDINGS CONFLICT WITH THE DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS AND PRESENT SIGNIFICANT BARRIERS TO THE EXERCISE OF JUDICIAL POWER OVER THOSE DIRECTING HARM AGAINST THE UNITED STATES.

In conflict with the decisions of this Court and other courts of appeals, the Second Circuit has

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[10] *Available at* http://govinfo.library.unt.edu/911/staff_statements/911_TerrFin _Monograph.pdf.

significantly limited when personal jurisdiction can arise based on a defendant's tortious acts undertaken outside the United States that are directed toward and cause damage within the United States.

The Second Circuit held that provision of financial and other material support to terrorist organizations such as al Qaeda through a front group did not give rise to personal jurisdiction, even when the supporter "'intended to fund al Qaeda'" with full knowledge of al Qaeda's "'public announcements of jihad against the United States and [its prior] attacks'" on U.S. interests, and when "'acts of violence committed against residents of the United States were a foreseeable consequence of the [defendants'] alleged indirect funding of al Qaeda.'" Pet. App. 39a-42a (quoting and applying *Terrorist Attacks III*, *id.* at 227a). Instead, plaintiffs must show that a defendant specifically intended to harm the United States. *Id.* at 38a; *infra* pp. 29-31. The Second Circuit separately imposed further barriers to jurisdiction when financial support to terrorist organizations is directed through entities providing "financial services." Pet. App. 41a-42a.

1. The Second Circuit's restrictive view of personal jurisdiction is contrary to this Court's cases establishing that when defendants have "brought about forbidden results within the United States," "[t]hey are within the jurisdiction of our courts and may be punished for offenses against our laws." *United States* v. *Sisal Sales Corp.*, 274 U.S. 268, 276 (1927). The Second Circuit's rule is an unduly narrow application of this Court's cases addressing when acts affecting the "stream of commerce" can give rise to personal jurisdiction. See Pet. App. 37a (applying *Burger King* v. *Rudzewicz*, 471 U.S. 462 (1985) (international food franchise); *Calder* v. *Jones*, 465

U.S. 783 (1984) (national media)). As a plurality of this Court recently emphasized, however, the "stream of commerce" principles should *not* apply where "as with an intentional tort, the defendant might well fall within the State's authority by reason of his attempt to obstruct its laws." *J. McIntyre Mach. Ltd.* v. *Nicastro*, 131 S. Ct. 2780, 2787 (2011); see also *United States* v. *Klimavicius-Viloria*, 144 F.3d 1249, 1256 (9th Cir. 1998) (for criminal acts abroad violating U.S. law, due process is satisfied by "'a sufficient nexus between the defendant and the United States, so that … application [of U.S. law] would not be arbitrary or fundamentally unfair'").

Here, defendants are alleged to have undertaken intentional wrongs directed against the United States unrelated to commerce and in violation of its criminal and civil laws (both state laws and the ATA, directly and as a matter of secondary liability). *Sisal* and the *McIntyre* plurality decision indicate that due process concerns are satisfied in those circumstances, and the "stream of commerce" test simply does not apply. See *World-Wide Volkswagen Corp* v. *Woodson,* 444 U.S. 286, 292 (1980) (personal jurisdiction is to be 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"); 18 U.S.C. §§ 2333, 2339A-2339C (ATA provisions addressing U.S. counter-terrorism interests); *Humanitarian Law Project*, 130 S. Ct. at 2727-29 (recognizing U.S. interests in combating terrorism reflected in the ATA).

2. The Second Circuit's rule is also contrary to *Calder* v. *Jones* (even assuming that the "stream of commerce" cases apply), especially in light of considerations set forth in *Humanitarian Law*

Project. Under those decisions, due process is satisfied when the "'defendant's conduct and connection with the forum … are such that he should reasonably anticipate being haled into court there,'" *Burger King Corp.*, 471 U.S. at 474 (quoting *Woodson*, 444 U.S. at 297), and such reasonable anticipation exists when defendant's intentional tort "knowingly cause[s] … injury" in the foreign forum. *Calder*, 465 U.S. at 789-91; *id.* (tort "calculated to cause injury" in foreign forum).

The Second Circuit held that plaintiffs' allegations were insufficient to establish personal jurisdiction, even though it accepted that the defendants "intended to fund al Qaeda" and knew of al Qaeda's past and promised attacks on the U.S., and that defendants "could and did foresee that recipients of their donations would attack targets in the United States." Pet. App. 227a (*Terrorist Attacks III*); *id.* at 39a-42a (decision below applying *Terrorist Attacks III*). In contrast, *Calder*, 465 U.S. at 788-89, did not require proof that the journalist and editor specifically intended to cause harm in the distant forum, but rather required allegations that defendants committed an intentional tort, knowing that the "brunt of the harm" would occur there. Defendants' material support for terrorism (and secondary liability for state law violations) are just such intentional torts, and plaintiffs alleged – and the Second Circuit accepted – that defendants knew and foresaw that harm would occur in the U.S.

Nor can the Second Circuit's rule be reconciled with *Humanitarian Law Project* and its treatment of the interests underlying the ATA. Personal jurisdiction depends on the nexus between the defendants' support for terrorism and the interests of the United States, see *Woodson*, 444 U.S. at 292, and

Humanitarian Law Project establishes that material support for an anti-U.S. terrorist organization creates a very direct nexus to the United States, as confirmed by Executive Branch and Congressional assessments animating the Act. See 130 S. Ct. at 2727-29. Although this Court does not defer to coordinate branches' views of the constitutional issue at hand, *Humanitarian Law Project* establishes that courts should defer to factual and policy assessments that inform the courts' constitutional determination. See *id*. at 2728-29. That includes, here, the assessment that material support for terrorism provided abroad to organizations targeting the United States very directly implicates U.S. interests, justifying the exercise of personal jurisdiction over those who provide such support. See *id*. at 2727-29.

3. The Second Circuit's decision creates and deepens a conflict among the courts of appeals regarding the application of *Calder* v. *Jones* and specifically that decision's "express aiming" requirement. In the Ninth Circuit, *Calder*'s "express aiming" requirement is satisfied when a defendant allegedly undertakes an intentional tort that harms a defendant and knows facts establishing that the harm will occur in the distant forum. See *Wash. Shoe Co.* v. *A-Z Sporting Goods Inc.*, 704 F.3d 668, 674-76 (9th Cir. 2012) (*Calder* satisfied by infringement of copyright of defendant known to be domiciled in distant forum); see also *Bancroft & Masters, Inc.* v. *Augusta Nat'l Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000); *Columbia Pictures Tel.* v. *Krypton Broad. of Birmingham, Inc.*, 106 F.3d 284 (9th Cir. 1997) (infringement in Southeastern U.S. of copyright known to be held by company domiciled in California), *rev'd on other grounds*, 523 U.S. 340 (1998). Because the Second Circuit found no personal

jurisdiction even assuming defendants undertook an intentional tort harming plaintiffs and knew of al Qaeda's past and prospective targeting of U.S. residents, which would satisfy the Ninth Circuit test, a clear conflict exists.

The circuit conflict over and confusion regarding *Calder*'s "express aiming" test, which now extends to the Second Circuit's decision, are widely acknowledged:

> Some circuits have read *Calder*'s "express aiming" requirement fairly broadly, requiring only conduct that is "targeted at a plaintiff whom the defendant knows to be a resident of the forum state." *Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000). Others have read it more narrowly to require that the forum state be the "focal point of the tort." *Dudnikov* [v. *Chalk & Vermillion Fine Arts, Inc.*], 514 F.3d [1063,] 1074 n.9 [(10th Cir. 2008)]; *see also IMO Indus., Inc.* [v. *Kiekert AG*], 155 F.3d [254,] 263-65 [(3rd Cir. 1998)] ("the *Calder* 'effects test' can only be satisfied if the plaintiff can point to contacts which demonstrate that the defendant expressly aimed its tortious conduct at the forum, and thereby made the forum the focal point of the tortious activity"); *ESAB Group, Inc.* v. *Centricut, Inc.*, 126 F.3d 617, 625 (4th Cir. 1997) (conduct must be "intentionally targeted at and focused on" the forum state).

Tamburo v. *Dworkin*, 601 F.3d 693, 704 (7th Cir. 2010). The Tenth Circuit similarly observed:

> Some courts have held that the "expressly aimed" portion of *Calder* is satisfied when the defendant "individually target[s] a known forum

> resident." *See Bancroft*, 223 F.3d at 1087. We have taken a somewhat more restrictive approach, holding that the forum state itself must be the "focal point of the tort." *See Far West Capital, Inc. v. Towne*, 46 F.3d 1071, 1080 (10th Cir. 1995) (internal quotations omitted); *see also Remick v. Manfredy*, 238 F.3d 248, 259-60 (3d Cir. 2001).

Dudnikov, 514 F.3d at 1074 n.9 (alteration in original); see *Tamburo*, 601 F.3d at 706 n.9 ("We note the circuits are also divided on the proper way to understand *Calder*'s emphasis on the defendant's knowledge of where the 'brunt of the injury' would be suffered," describing split between decisions of the Ninth and Tenth Circuits). The conflict on this issue extends to the state courts. See *Newsom* v. *Gallacher*, 722 F.3d 1257, 1280 (10th Cir. 2013) (observing that "[c]ourts are split" regarding *Calder*'s application and acknowledging that the Tenth Circuit position conflicts with that of the Colorado Supreme Court and Texas and California courts).

4. In particular, the Second Circuit's decision conflicts with decisions of the D.C. Circuit applying *Calder* to support for terrorism undertaken abroad but causing harm here. In the D.C. Circuit, *Calder* supports personal jurisdiction over defendants who 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) (citation and internal quotation marks omitted); see *Pugh* v. *Socialist People's Libyan Arab Jamahiriya*, 290 F. Supp. 2d 54, 59 (D.D.C. 2003) (personal jurisdiction exists where defendants violate the criminal laws underlying ATA Section 2333, which

"all contemplated the assertion by a United States court of jurisdiction over a foreign national for terrorist activities committed abroad"); *Daliberti* v. *Republic of Iraq*, 97 F. Supp. 2d 38, 53-54 (D.D.C. 2000) (those who "sponsor terrorism [have] been given adequate warning that terrorist acts against United States citizens, no matter where they occur, may subject them to suit in a United States court"); see also *Morris*, 415 F. Supp. 2d at 1335-36 ("participation in al Qaeda's terrorist agenda" is sufficient to create jurisdiction over a defendant). The allegations that the Second Circuit acknowledged and found to be insufficient – intentional funding of al Qaeda knowing of its anti-U.S. objectives and foreseeing that the funds would be used for terrorist attacks on the U.S. – would readily establish personal jurisdiction under the D.C. Circuit's test, creating a clear conflict. Indeed, the D.C. Circuit has concluded that persons are "part of" al Qaeda for purposes of combatant detention on bases far short of the allegations made here,[11] and membership in al Qaeda would surely suffice to establish personal jurisdiction.

5. The United States has faulted the due process test of *Terrorist Attacks III,* and the government's suggestion that an alternative analysis may have underlain that decision has now been dispelled by the

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[11] For example, circumstantial evidence must be considered as a whole and may support an inference of al Qaeda membership or the supporter's intent to advance al Qaeda's objectives. *See Al Alwi* v. *Obama*, 653 F.3d 11, 17-18 (D.C. Cir. 2011) (collecting cases), *cert. denied*, 132 S. Ct. 2739 (2012); *Uthman* v. *Obama*, 637 F.3d 400, 403-04 (D.C. Cir. 2011) (relevance of interactions with al Qaeda leaders), *cert denied*, 132 S. Ct. 2739 (2012); *Al-Bihani* v. *Obama*, 590 F.3d 866, 873 n.2 (D.C. Cir. 2010) (simply being at "Al Qaeda training camps" or "Al Qaeda guest houses.… overwhelmingly, if not definitively" supports an inference of membership).

Second Circuit's reaffirmance and application of *Terrorist Attacks III*. Addressing *Terrorist Attacks III*, the U.S. stated:

> To the extent the court of appeals' language suggests that a defendant must specifically intend to cause injury to residents in the forum before a court there may exercise jurisdiction over him, that is incorrect. It is sufficient 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 19, *Fed. Ins. Co.* v. *Kingdom of Saudi Arabia*, No. 08-640 (U.S. filed May 29, 2009) (omission and alteration in original). The U.S. also suggested that the Second Circuit's decision could conceivably have rested on the weight of allegations particular to the defendants in that case. See *id*. at 19-20.

Now, however, the Second Circuit has confirmed that its test does require a showing of specific intent to harm the United States, see Pet. App. 47a-48a (potential inference regarding such intent for Saleh Al-Hussayen); *id*. at 49a n.15 (remand to determine whether defendants' acts were "'expressly aimed' at the United States"), and that knowingly contributing to al Qaeda through affiliated front groups cannot be the basis for personal jurisdiction. See *id.* at 42a (applying *Terrorist Attacks III* to allegations related to Jameel); *id.* at 44a n.13 (same regarding Khalid bin Mahfouz). Indeed, even allegations of specific intent to harm the U.S., with supporting detail, are insufficient when support is funneled to al Qaeda through an affiliated entity, because *Terrorist Attacks III* "conclud[es] that 'providing indirect funding to an organization that was openly hostile to the United States does not constitute the type of intentional

conduct' necessary for personal jurisdiction purposes." *Id.* at 45a n.13 (alterations omitted); see *id.* at 46a (finding jurisdiction over al-Kadi based on direct contribution, "instead of knowingly sending money to purported charitable organizations that allegedly supported al Qaeda – like the defendants in *Terrorist Attacks III*").

6. The importance of the issue presented is shown by the significance of the dismissed defendants' alleged support for al Qaeda's terrorist agenda, which the Second Circuit deemed insufficient to establish personal jurisdiction. For example, two defendants dismissed directly on the basis of *Terrorist Attacks III* were alleged to be significantly involved in al Qaeda. Jameel was alleged to be a principal fundraiser for al Qaeda itself (having been specifically so identified in testimony of al Qaeda's former financial chief, cited of record) and to have provided communications equipment to Osama bin Laden. See Pers. Juris Br. at 142-44. Khalid bin Mahfouz was alleged to have co-founded Muwafaq, a component that was formally rolled into al Qaeda before the September 11th attacks; contributed $30 million to that organization; been listed in al Qaeda documents as a key fundraiser; separately contributed funds directly to Osama bin Laden; appointed and directed a U.S. designated terrorist (al-Kadi) to positions in Muwafaq; and appointed al Qaeda officials within his bank, which had extensive ties to Muwafaq. *Id.* at 28, 36, 40-44, 133; Appellants Reply Br., Personal Jurisdiction at 160, No. 11-3294 (filed June 25, 2012) (Dkt. 581).

Likewise, the 15 defendants dismissed on the ground that they merely "maintained bank accounts" used by al Qaeda or provided similar financial services, Pet. App. 41a, were in fact alleged to be

organizations or managers of organizations that funneled their own funds to al Qaeda, moved funds to support al Qaeda operations, and themselves served as part of al Qaeda's fundraising and money-laundering operations. See Pers. Juris. Br. 101-52. For example, Osama bin Laden was a principal shareholder in defendant Al Shamal Islamic Bank and personally capitalized it with $50 million; its senior officers were al Qaeda leaders; and it moved and raised funds in support of al Qaeda operations and served as part of the Sudanese support structure that provided al Qaeda with global strike capabilities. See *id.* at 32-34, 37-39, 115.

As significantly, the Second Circuit deemed insufficient for jurisdictional purposes allegations related to various defendants' acknowledged "serv[ice] in various positions of authority within organizations that are alleged to have supported terrorist organizations." Pet. App. 44a. Those organizations were alleged to be *part of* al Qaeda, not just its supporters. See *supra* pp. 20-21. Several defendants, including Sulaiman al Rajhi and Tarek bin Ladin, had instrumental roles in the IIRO, one of the components whose offices the U.S. has formally identified as terrorist organizations and that led al Qaeda attacks on U.S. interests. See Pers. Juris. Br. 25-26, 44, 140. Sulaiman al Rajhi also founded the SAAR network, a complex web of purported charities and companies allegedly established specifically to channel resources to al Qaeda covertly. *Id.* at 121-24. And, the Second Circuit upheld the dismissal of certain of Osama bin Laden's half-brothers and the company he partly owned with them, based on the rationale that support they provided to Osama and al Qaeda in Sudan in the early 1990's could not have been "'expressly aimed'" at the United States. Pet.

App. 42a-43a. However, that pre-1994 support was alleged to be essential to al Qaeda's acquiring its capability to undertake cross-border attacks; al Qaeda in the early 1990's undertook a series of attacks on U.S. interests; and, as the Seventh Circuit has emphasized, terrorist plots often take many years to develop (as plaintiffs alleged here). See *Boim III*, 549 F.3d at 699-700.

CONCLUSION

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

Respectfully submitted,

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