No. 14-1

IN THE

Supreme Court of the United States

AEP ENERGY SERVICES,

Petitioner,

v.

HEARTLAND REGIONAL MEDICAL CENTER, *et al.,*

Respondents.

AEP ENERGY SERVICES, *et al.*,

Petitioners,

v.

ARANDELL CORP., *et al.,*

Respondents.

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

REPLY BRIEF FOR THE PETITIONERS

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INTRODUCTION

Respondents confirm that the Ninth Circuit's jurisdictional analysis was seriously flawed, for they make no serious attempt to defend it. The court of appeals held that a defendant accused of participating in a nationwide price-fixing conspiracy is subject to personal jurisdiction in any forum where a plaintiff alleges the conspiracy had an intended effect, even if the plaintiff bought *nothing* from the defendant in the forum (or anywhere else). That sweeping theory, which the Ninth Circuit purported to draw from *Calder* v. *Jones*, 465 U.S. 783 (1984), conflicts with decisions from other circuits and state high courts that read *Calder* to find jurisdiction proper only when out-of-state conduct focuses on the forum. Because the Ninth Circuit's analysis entrenches a split, contravenes this Court's precedents, and violates due process, review is warranted.

Rather than embrace the Ninth Circuit's reasoning, Respondents offer a hodgepodge of alternative jurisdictional theories. But these theories are based on factual allegations unsupported by the record and forum conduct lacking the requisite nexus to Respondents' asserted injuries. Respondents' argument that jurisdiction exists because Petitioners sold gas to other unrelated entities in the forum provides an opportunity to resolve a second split on whether a plaintiff's claim must have a causal connection to the defendant's forum conduct.

The writ should be granted.[1]

ARGUMENT

I. RESPONDENTS CANNOT CREATE JURISDICTION BASED ON FACTUAL ASSERTIONS THE COURTS BELOW REJECTED AS UNSUPPORTED BY THE RECORD.

Because Respondents seek to shore up the Ninth Circuit's faulty jurisdictional analysis by raising allegations with no grounding in the record, some initial brush clearing is necessary.

1. The Wisconsin Respondents are flatly wrong to assert that Petitioners sold them gas. Wis. Opp. 8. As the Ninth Circuit explained in no uncertain terms: "AEPES has *never* entered a contract or delivered gas to any of the named plaintiffs in the case." Pet. App. 50a (emphasis added); *see also* Pet. App. 78a (District Ct. Op.) ("It is undisputed AEPES never made a sale to the named Plaintiffs in this action.").[2]

2. The Missouri Respondents likewise play fast and loose with the record by insinuating that alleged

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[1] The Ninth Circuit's separate preemption ruling is pending before the Court in *OneOK, Inc.* v. *Learjet, Inc.*. No. 13-271. Reversal on the preemption question could obviate the need to grant this petition, which should be held for appropriate disposition pending the decision in *OneOK*.

[2] The Wisconsin Respondents also maintain that Petitioners sold gas to "putative class members." Wis. Opp. 8. But no class has been certified here, and Respondents "cannot rely upon the possibility that unnamed class members' claims may arise out of AEPES's Wisconsin contacts." Pet. App. 94a. *See* Charles Alan Wright, *et al.*, 4A *Fed. Prac. & Proc.* § 1069 & n.18 (2011) (only named class representative's claim can be considered for personal jurisdiction).

index manipulation occurring in Ohio, where Petitioners were located, was geographically targeted at Missouri. Respondents contend that Petitioners misreported information about trades occurring in the "Mid-Continent region," which included Missouri and all other states in that region. Mo. Opp. 2-3. But Respondents' own complaints allege that index manipulation occurred from multiple desks covering states across the country, demonstrating no specific focus on Missouri. *See* Pet. App. 135a, 158a. Indeed, the Wisconsin Respondents rely principally on allegations of misconduct involving Petitioners' Gulf Desk, suggesting that this region—which of course does not include Missouri or Wisconsin—was at the center of the purported conspiracy. *See* Pet. App. 194a-195a (summarizing alleged misconduct by Gulf Desk Head Joseph Foley).

Moreover, the record contains no evidence of purportedly inaccurate price reports or wash sales occurring in or relating to Missouri. In allegations that the District Court ruled were untimely, the Missouri Respondents belatedly attempted to argue that Petitioners reported trades with a Missouri-based company (Aquila Merchant Services) to the indices. Mo. Opp. 4. Not only did the District Court find that these allegations untimely, but it also found they were unconnected to any harm Respondents supposedly suffered. Pet. App. 99a-102a. The Ninth Circuit declined to disturb those rulings, even though Respondents urged it to do so. There is accordingly no basis in the record to conclude that any alleged misconduct targeted Missouri.

Finally, the Missouri Respondents incorrectly assert that Petitioners "admit targeting publications aimed specifically at the Mid-Continent region." Mo.

Opp. 17. Respondents provide no citation because there is none. Petitioners have made no such admission. Moreover, the Missouri Respondents' complaint did not even allege the existence of any publications specifically targeting the Mid-Continent region, instead making reference only to *national* publications such as *Inside FERC* and *Gas Daily*. 156a-158a.

* * *

By raising allegations with no basis in the record, Respondents reveal what little faith they have in the Ninth Circuit's jurisdictional analysis. Respondents' newfound theories cannot obscure that the Ninth Circuit identified only two possible grounds for jurisdiction in Missouri and Wisconsin: (1) "collusive manipulation of the gas price indices" as part of a nationwide conspiracy, which Respondents generically alleged was " 'intended to have' an effect in" the forums (as well as presumably all other states in the nation), Pet. App. 56a, 58a; and (2) "sales of natural gas in the forum states to third parties," but not to Respondents, Pet. App. 55a. Because neither of these grounds supports jurisdiction and both implicate circuit splits, review is warranted.

II. THIS COURT SHOULD RESOLVE THE SPLIT CONCERNING *CALDER*'S EXPRESS-AIMING REQUIREMENT.

By approving jurisdiction based on allegations of a nationwide conspiracy intended to generally affect gas prices, the Ninth Circuit split from other courts that hold that a defendant must specifically target the forum. The Court should grant certiorari to correct the Ninth Circuit's overly expansive understanding of *Calder*'s effects test.

1. In seeking to defend the Ninth Circuit's reading of *Calder*, Respondents do not rely on *Calder* itself. Instead, Respondents argue that *Keeton* v. *Hustler Magazine, Inc.*, 465 U.S. 770 (1984) can justify the Ninth Circuit's holding. Mo. Opp. 14-16; Wis. Opp. 20. But the Ninth Circuit did not even mention *Keeton*, and for good reason. The Ninth Circuit's jurisdictional holding was premised on Petitioners' *out-of-state* conduct: alleged false reports and wash sales which occurred, if at all, in *Ohio*. The Court's *Keeton* decision, by contrast, involved when *in-state* conduct alleged to have caused the plaintiff's harm can be a basis for exercising personal jurisdiction.

In *Keeton*, the plaintiff brought a libel suit against a magazine publisher in New Hampshire that was predicated on her claim of being harmed by the publisher's circulation of the libelous magazine in New Hampshire. The Court concluded that personal jurisdiction in New Hampshire was proper given that "the cause of action arises out of the very activity being conducted, in part, in New Hampshire." 465 U.S. at 781. Because "jurisdiction over a complaint based on those contacts, would ordinarily satisfy the requirement of the Due Process Clause," it did not matter "that the bulk of the harm * * * occurred outside New Hampshire." *Id.* at 773, 780.

In *Calder*, by contrast, the complaint was based on defendants' out-of-state conduct, and the Court accordingly found jurisdiction only after determining that the forum was the location of the "brunt of the harm." 465 U.S. at 789. Because the Ninth Circuit similarly focused on Respondent's alleged out-of-state conduct, *Calder* and not *Keeton* controls. *See, e.g.*, *uBid, Inc.* v. *GoDaddy Group, Inc.*, 623 F.3d 421, 434 (7th Cir. 2010) (Manion, J., concurring) (*Calder*

rather than *Keeton* supplies the appropriate analysis when assessing "intentional harms directed at other states"); Denis T. Rice & Julia Gladstone, *An Assessment of the Effects Test in Determining Personal Jurisdiction in Cyber Space*, 58 Bus. Law. 601, 629 (2003) (explaining that *Keeton* applies when the defendant is "sufficiently 'present' in the state to meet due process requirements without the need to resort to the [*Calder*] effects test"). And because the Ninth Circuit's analysis contravenes *Calder*, Pet. 21-24, it should be reversed.

2. Respondents also seek to evade review by maintaining that there is no *Calder* split, ignoring that numerous courts have acknowledged the division between the Ninth Circuit's broad interpretation of *Calder* and other courts' narrower view. *See, e.g.*, *Tamburo* v. *Dworkin*, 601 F.3d 693, 703, 706 n.9 (7th Cir. 2010) (circuits are "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," with the Ninth Circuit, in contrast to other courts, requiring only "a jurisdictionally sufficient amount of harm" (internal quotation marks omitted)); *Dudnikov* v. *Chalk & Vermillion Fine Arts, Inc.*, 514 F.3d 1063, 1074 n.9 (10th Cir. 2008) (contrasting its interpretation of *Calder*, which requires "that the forum state itself must be the focal point of the tort," with the Ninth Circuit's less "restrictive approach"); Pet. 12-13 (citing additional cases). Thus, the lower courts disagree with Respondents' contention that the split is "illusory." Mo. Opp. 11; Wis. Opp. 6.

3. In efforts to explain away the split, Respondents insist that other courts have not interpreted *Calder*

to "*require* some focal point or brunt of the harm analysis." Mo. Opp. 19 (emphasis in original).

But that is *exactly* how other courts have read *Calder*. In the Third Circuit's words: "*Calder requires* that the 'brunt' of the harm be felt in the forum" and "that the forum *must* be the focal point of the harm." *Imo Indus., Inc.* v. *Kiekert AG*, 155 F.3d 254, 263-264 (3d Cir. 1998) (emphases added). These courts have correctly recognized that the focal-point and brunt-of-the-harm limitations were not just facts present in *Calder*, but essential elements of its jurisdictional test: *Calder*'s "effects analysis *necessitates* conduct 'calculated to cause injury' in a 'focal point' where the 'brunt' of the injury is experienced." *Kauffman Racing Equip., L.L.C.* v. *Roberts*, 930 N.E.2d 784, 796 (Ohio 2010) (emphasis added); *see also, e.g., Griffis* v. *Luban*, 646 N.W.2d 527, 534 (Minn. 2002) ("The test *requires* the plaintiff to show that * * * the forum state was the focal point of the tortious activity" (emphasis added)); *Dakota Indus., Inc.* v. *Dakota Sportswear, Inc.*, 946 F.2d 1384, 1391 (8th Cir. 1991) (upholding jurisdiction because the defendant's actions "were uniquely aimed at the forum state and * * * the 'brunt' of the injury [was] felt there, as *required* by *Calder*" (emphasis added)).

Nor can Respondents dismiss these holdings with the observation that each individual case presents different facts. Wis. Opp. 21; Mo. Opp. 18-20. The important point is that these courts have announced legal principles that would cause them to reach a different outcome from the Ninth Circuit on *these* facts. And while Respondents speculate that the courts would abandon their focal-point and brunt-of-the-harm analysis if confronted with conduct alleged

to cause intended effects in multiple forums, Mo. Opp. 18, Wis. Opp. 20, the decisions themselves suggest otherwise. *See, e.g.*, *Kauffman*, 930 N.E.2d at 796 (explaining that even when "effects * * * may be felt in many" forums, *Calder* requires "a particular focal point" (internal quotation marks omitted)).

For example, the Fourth Circuit found no jurisdiction in South Carolina when the defendants were alleged to have participated in a conspiracy to interfere with nationwide sales made by a company headquartered in South Carolina, because the alleged misconduct was directed at "customers located throughout the United States and Canada" and not "intentionally targeted at and focused on South Carolina." *ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617, 625 (4th Cir. 1997); *see also, e.g.*, *Arocho* v. *Lappin*, 461 F. App'x 714, 718, 719 n.3 (10th Cir. 2012) (finding no personal jurisdiction over director of the Bureau of Prisons (BOP) based on allegedly unconstitutional policy that applied "within BOP facilities countrywide" because the policy, although it could cause harm to inmates in many states, was "not aimed specifically at the particular forum state"). Because the Ninth Circuit eschewed the focal-point analysis that other courts have deemed necessary under *Calder*, certiorari is warranted.

4. Respondents also flounder in justifying the Ninth Circuit's decision to credit their conclusory jurisdictional allegations. The Wisconsin Respondents pluck phrases from disparate paragraphs of the complaint to suggest that their allegations were specific. Wis. Opp. 23 (combining allegation in ¶ 28 that Petitioners reported trades that never occurred,

Pet. App. 193a, with allegation in ¶ 70 that the "purpose and effect" of the conspiracy was to "inflate the price of natural gas paid by commercial entities in Wisconsin," Pet. App. 232a). But Respondents have not cited, nor could they cite, any specific facts demonstrating that traders in Ohio were in any way focused on these particular forums when the alleged misconduct occurred. The Ninth Circuit, in conflict with other courts, thus erred by giving weight to generic allegations that the conspiracy was intended to have an effect in the forums. Pet. 19.

Rather than confront this split, the Missouri Respondents maintain the claim is waived. Mo. Opp. 22. But the Ninth Circuit's improper reliance on these conclusory allegations surprised both sides. The Missouri Respondents did not invoke these bare assertions of intent at the circuit level, instead focusing on whether allegations that Petitioners sold gas to other entities in the forum supported jurisdiction. Mo. CA9 Br. 58. As soon as the Ninth Circuit announced its erroneous view that boilerplate allegations of an intended effect suffice, Petitioners sought rehearing, explaining that these allegations were "unsupported and conclusory." CA9 Rehearing Pet. 2. There was no waiver here.

That leaves the Missouri Respondents contending that this Court's decisions in *Bell Atlantic Corp.* v. *Twombley*, 550 U.S. 544 (2007), and *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009), do not apply to allegations of personal jurisdiction. Mo. Opp. 22. The Ninth Circuit apparently agreed. But that just demonstrates the conflict between its analysis and decisions from other circuits holding that jurisdictional allegations must "go beyond 'labels and conclusions.' " *Dudnikov*, 514 F.3d at 1073 (quoting

Twombley, 127 S. Ct. at 1965); *see also, e.g.*, *Palnik* v. *Westlake Entm't, Inc.*, 344 F. App'x 249, 252 (6th Cir. 2009) (relying on *Twombley* to evaluate personal jurisdiction allegations); Pet. 19-20 (citing additional cases). Certiorari is warranted to determine whether the naked assertion of an intended effect in the forum satisfies *Calder*'s express-aiming requirement.

III. THIS COURT SHOULD RESOLVE THE SPLIT CONCERNING THE NEXUS PRONG OF PERSONAL JURISDICTION.

Recognizing the flaws in the Ninth Circuit's holding, Respondents continue to insist, as they did below, that jurisdiction exists based on Petitioners' sales to other entities in the forum. Wis. Opp. 5, 17, 21, 22; Mo. Opp. 16-17. This asserted alternative basis for jurisdiction squarely presents the question whether Respondents' claims arise out of Petitioners' forum conduct, given that "Respondents still would have been harmed in their own transactions" had sales to unrelated entities not occurred. Pet. App. 94a.

1. Respondents suggest the Court should avoid this issue, which has produced a deep and entrenched split, because the Ninth Circuit did not address it. Mo. Opp. 23; *see* Wis. Opp. 24. Not so. The Ninth Circuit stated that it applies "a 'but for' test" to determine if the requisite nexus exists. Pet. App. 55a. Indeed, it has applied that test for years—which prompted this Court to grant review of a prior Ninth Circuit decision to resolve the disagreement on whether the appropriate nexus is but-for causation, proximate cause, something between the two, or a mere relatedness test. *See Carnival Cruise Lines, Inc.* v. *Shute*, 499 U.S. 585, 589-590 (1991) (not

reaching issue because case could be decided on non-constitutional grounds). Nor does this Court need any guidance from the Ninth Circuit regarding how the but-for test would apply here. As the District Court explained, there is no causal connection because Respondents' alleged injuries would have been "precisely the same in both character and scope" even if the sales had not occurred. Pet. App. 102a. Because the fault lines among the circuits are well established and Respondents continue to press these unrelated sales as relevant forum conduct, the nexus question is ripe for resolution.

2. On the merits of that question, Respondents' main bid is to fight the facts. The Wisconsin Respondents repeat their erroneous contention that they bought gas from Petitioners, with their claims supposedly "aris[ing] directly out of" those sales. Wis. Opp. 25a. And the Missouri Respondents fall back on their unsupported allegation that sales in the forums were reported to the indices and so purportedly increased prices Respondents paid. Mo. Opp. 24. As previously noted, neither of these assertions has any grounding in the record (or reality). *See supra*, at 3-4. As the case arrives in this Court, therefore, there is no question that Petitioners' sales to third parties lack any causal connection to Respondents' claims. Review is warranted to determine whether jurisdiction is proper in the absence of that connection.

3. Finally, the Missouri Respondents weakly suggest the circuits are simply "employing differently-worded tests with little, if any, substantive difference." Mo. Opp. 24. But Respondents sang a different tune below, critiquing other courts' proximate-cause test as "unnecessarily

limit[ing] the ordinary meaning of the 'arising out of' language." Mo. CA9 Br. 60 (internal quotation marks omitted). The lower courts, too, have correctly recognized that these different standards produce different outcomes. *See* Pet. 27-32. This Court should take the opportunity to bring uniformity to this important area of the law.

CONCLUSION

The petition should be held pending the decision in *OneOK, Inc.* v. *Learjet*, No. 13-271. Should the Court affirm the Ninth Circuit's preemption ruling, this petition should be granted.

Respectfully submitted,

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