No. 08-640

IN THE
Supreme Court of the United States

IN RE TERRORIST ATTACKS ON SEPTEMBER 11, 2001

FEDERAL INSURANCE COMPANY *et al.*,

Petitioners,

v.

KINGDOM OF SAUDI ARABIA *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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INTRODUCTION

The softness of the Government's opposition to certiorari, and its lack of fidelity to the traditional standards governing this Court's review, are hard to overstate. The Government describes at length how the Second Circuit erred in each of the three aspects of the decision at issue here. It agrees, as it must, that a circuit split exists regarding whether the Foreign Sovereign Immunities Act ("FSIA") governs claims against individual officials. It acknowledges that the Second Circuit's due process test is inconsistent with this Court's decisions, and effectively confirms the circuit split that exists over the scope of FSIA's non-commercial tort exception. Ignoring its prior, contrary filings, the Government uses the barest of pretexts to assert that the Second Circuit's errors and the circuit conflicts do not merit this Court's review.

The Government also provides this Court with no legal or policy basis to follow its apparent effort to appease a sometimes ally, filed on the eve of the President's trip to Saudi Arabia. The Government invokes no interest of state or diplomacy in recommending against review. Its core assessment that the legal issues presented here are unimportant ignores its prior assertions to the contrary, and its brief devotes not even a single sentence to the harm suffered by the 9/11 victims, the public interest in permitting the victims their day in court, Congress's intent to authorize state tort claims against foreign states and civil enforcement of counter-terrorism laws, or the consequences of closing courthouse doors to future victims of terrorist attacks in the United States. The Government makes no effort to describe the events of September 11, 2001 or their national

significance, or to defend the obvious non-legal factors that cause it to bow to respondents. The Government's legal analysis confirms that this case satisfies the usual standards justifying review, and therefore the Court should grant the petition.

ARGUMENT

1. *FSIA's Application to Individual Officials.* The Government explains at length why the Second Circuit erred in concluding that FSIA determines the scope of suits against foreign officials. U.S. Br. 6-8. It concedes that the courts of appeals are deeply split over this issue, with the Fourth and Seventh Circuits in conflict with the Second and Ninth Circuits in particular. *Id.* 8. It even points to the practical harm caused by the Second Circuit's decision. *Id.* 7 (Congress did not "intend[ ], as would follow from the court of appeals' ruling, that the personal property of every official or employee ... would be available for execution to satisfy a ... judgment against the state"); *id.* ("the FSIA's focus on the status of an entity ... at the time suit was filed would mean ... that a plaintiff could circumvent that immunity by waiting until an official left office" (citation omitted)).

The Government's claim that review is nonetheless unwarranted because the circuit split "appears to be of limited practical consequence," *id.* 8, is wrong for three reasons. *First*, the courts of appeals are not consuming pages of the Federal Reporter in a pointless exercise. As they understand, FSIA, if it applies, creates broad exceptions to officials' immunity that often did not exist for officials under the common law and creates immunity where no common law immunity existed. *Chuidian* v. *Philippine Nat'l Bank*, 912 F.2d 1095, 1102 (9th Cir. 1990), which several other circuits have applied without elaboration and which the Second Circuit

followed here, clearly holds that FSIA displaces common law immunity altogether. Thus, for example, a foreign official sued in a commercial dispute or for a tort is subject to suit under FSIA's exceptions to immunity, see 28 U.S.C. § 1605(a)(2), (5), but would generally be immune from suit under the Seventh and Fourth Circuits' tests. As noted, FSIA does not extend to former officials. The Government acknowledges these effects. U.S. Br. 9-10. Conversely, the Ninth and Second Circuits' approach provides immunity to all officials without regard to the various exceptions applicable to common law immunity, as in this case (see *infra* 4-5). In sum, the source of any immunity carries extremely important consequences that support, rather than counsel against, review by this Court.

Second, the Government itself has repeatedly argued to other courts that the *Chuidian* approach has very significant practical consequences, including risks to U.S. personnel. In *Chuidian*, and then in three recent filings, the Departments of State and Justice outlined the adverse consequences of adopting the Ninth (and, now, Second) Circuit's reasoning. See Pet. 17-20, 247a-298a. Those filings warned of the "problematic results" and "troubling practical consequences" of the Ninth Circuit's approach, *id.* 251a, 275a, 295a, and pointed to the Executive Branch's reduced role in determining immunity, the inequity of attaching foreign officials' personal assets, the possible exposure to punitive damages, the erosion of immunity, and the inconsistency between international law and FSIA liability. *Id.* 255a-257a, 275a-283a, 295a-298a. Most importantly, the Government warned that the *Chuidian* approach posed risks to U.S. personnel when foreign states act reciprocally and lessen U.S. officials' protections

against foreign suits, and the "critical importance" of avoiding that result. *Id.* 281a-283a (also invoking, to the same effect, *Boos* v. *Barry*, 485 U.S. 312, 323-24 (1988)), 296a. It is shocking that the Government now fails to defend that interest before this Court, without even mentioning the threat to U.S. personnel or its prior, contrary filings.

Third, the Government is wrong even if the focus were appropriately limited to further proceedings in this case alone. The Government simply asserts, incorrectly, that the Saudi princes would receive immunity because "the Executive also would recognize such immunity." U.S. Br. 8; see *id.* 9 n.3. That immunity determination is ultimately a *judicial* one, influenced but not determined by the Executive's recommendation. See *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 486-88 (1983). As the Government has elsewhere argued, *e.g.*, *infra* 14a-15a, these issues are complex and require detailed judicial consideration, particularly in this case: officials' entitlement to immunity for *jus cogens* violations, including supporting terrorism, is highly contested, and even the Government admits that foreign officials who run quasi-commercial entities, such as certain of the "charities" at issue here, may well not be entitled to immunity. See U.S. Br. 10.

As importantly, the Executive has made no formal immunity recommendation in this case, and a bare *amicus* brief statement of the likelihood of doing so is hardly the same. Traditionally, the Executive's immunity recommendation follows contested proceedings and is supported by ample justification subject to public and judicial scrutiny. See, *e.g.*, *Ex Parte Peru*, 318 U.S. 578, 581 (1943); *Sovereign Immunity Decisions*, 5 Digest U.S. Prac. Int'l L. 1017, 1019 (State Dep't 1977). Here, the Government seeks

the benefit of the immunity conclusion without assuming the burdens of proceedings or defending its analysis. The Government would be far less cavalier in its immunity assessment if forced to explain in open court why uncertain immunity principles require dismissal of claims regarding the worst terrorism attack committed on American soil. Presumably for this reason, the Government chose not to recommend immunity despite the district court's request, earlier in this very case, for its participation.

2. *The Non-Commercial Tort Exception.* The Second Circuit's holding regarding the scope of § 1605(a)(5) is indefensible: Congress could not have intended to preclude all tort claims for terrorism-related harm in the U.S. pursued against any but the few foreign states designated as state sponsors of terror. See Pet. 21-25. Understandably, the Government attacks the Second Circuit's reasoning and flatly rejects its holding. U.S. Br. 12-13. Less understandably, the Government never explains why the implications of that gross error for victims of terrorism do not warrant review.

Instead, the Government declines to recommend review because it believes petitioners would not prevail under a different construction of § 1605(a)(5), whereby only claims based on officials' acts within the U.S. are authorized. *Id.* 14-15. The Second Circuit did not remotely rely upon this theory, which should suffice to rebut the Government's entire treatment of whether this Court should review the *Second Circuit's* interpretation of § 1605(a)(5). Review is merited because the decision below on that question is wrong and conflicts with other courts of appeals.

Beyond that, the Government's construction provides no basis for declining review for several additional reasons. *First*, the statute's language provides absolutely no basis to conclude that § 1605(a)(5) stops at the nation's borders. It authorizes recovery for harm "occurring in the United States," and does not distinguish between a foreign official who arranges the bombing of Washington, D.C. from Beirut and one who does so from Chicago. Congress expressly chose to bar certain tort claims, see § 1605(a)(5)(B), but there is no exception for claims asserting secondary liability.

Second, the Government's theory does not reflect established law. Terrorism decisions of the Ninth Circuit and the D.C. district courts are squarely to the contrary. See *infra* 8-9; Pet. 22-23. The Government's view has been adopted, in part, in only one decision, unrelated to terrorism and subject to review by this Court. See *O'Brien* v. *Holy See*, 556 F.3d 361 (6th Cir. 2009), *cert. filed*, No. 08-1384 (May 7, 2009). That decision could be read as precluding recovery under § 1605(a)(5) for acts committed abroad, even where a tort is committed in the U.S. The same is not true for the other cases the Government invokes. Those cases, and especially *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), hold only that a tort committed abroad cannot support a suit under § 1605(a)(5) even if victims are indirectly harmed in the United States. See Pet. Reply 6-7. They simply do not hold that § 1605(a)(5) is inapplicable where, as here, a complete tort occurs in the United States (*i.e.*, hijacked domestic flights are deliberately crashed into U.S. buildings) and state tort law recognizes secondary liability based in part on acts occurring abroad. Even

respondents do not misread *Amerada Hess* in this manner.

Third, decisions of this Court and other courts are to the contrary. The Government's theory that § 1605(a)(5) truncates secondary liability under state tort law directly contradicts this Court's injunction that FSIA is "not intended to affect the substantive law determining the liability of a foreign state." *First Nat'l City Bank* v. *Banco Para el Comercio*, 462 U.S. 611, 620 (1983); see *Kilburn* v. *Libyan Arab Jamahiriya*, 376 F.3d 1123, 1128-29 (D.C. Cir. 2004).

Fourth, the Government fails to mention its previous assurance to the courts that § 1605(a)(5) supports claims in precisely the circumstances here. In *Kilburn*, Libya argued (much as the Second Circuit held) that § 1605(a)(7) provided the exclusive mechanism for terrorism victims' redress and thereby preempted state law claims. The Government disagreed:

> The potential for overlap between Sections 1605(a)(5)—domestic torts—and 1605(a)(7) offers further reason to reject Libya's argument that state common law has been preempted as a source for causes of action in litigation under Section 1605(a)(7). *For example, in cases of terrorism on U.S. territory, such as the September 11 attacks, jurisdiction might properly be founded on both paragraphs (a)(5) and (a)(7).*

Infra 7a (emphasis added).

Fifth, petitioners' claims survive even under the Government's theory because petitioners *do* allege, with considerable specificity, that Saudi agents operating in the U.S. contributed to the 9/11 attacks. See U.S. Br. 16 n.4. Although the Second Circuit did not address this issue, the Government asserts that

this Court must disregard these allegations because the Government prefers its own evidence, see *id.*, or because the pleadings are inadequate. Actually, considerable support for the allegation exists, even beyond the claims the Government struggles to discount.[1] Those claims are hardly the "'formulaic recitation'" of legal elements condemned in *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937, 1949 (2009). No reason exists for the Court to prejudge issues that are not before it and that the Court would leave on remand if it reverses.

Separately, the Government confirms that a conflict exists between the Second and Ninth Circuits regarding the scope of § 1605(a)(5). The Government acknowledges that both *Liu* v. *Republic of China*, 892 F.2d 1419 (9th Cir. 1989), and *Letelier* v. *Chile*, 488 F. Supp. 665 (D.D.C. 1980), involved terrorism-related claims brought under § 1605(a)(5). U.S. Br. 17. It states that "those cases are distinguishable because they involved acts in the United States directly attributable to the foreign governments," *id.*, but this has nothing to do with the reasoning of either court, which in fact rested liability on foreign officials' acts abroad. See *Liu*, 892 F.2d at 1422-23, 1431-32; *Letelier*, 488 F. Supp. at 674 (Chilean officials' actions were "carried out entirely within" Chile); see also *Doe* v. *bin Laden*, 580 F. Supp. 2d 93 (D.D.C. 2008). Nor did the Second Circuit suggest that petitioners could rely on § 1605(a)(5) to the extent that Saudi officials acted in the U.S. Quite the contrary: the Government correctly notes that the Second Circuit broadly held that § 1605(a)(5) does not authorize terrorism-related claims against foreign states other than designated

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[1] *See, e.g.*, the First Amended Complaint (¶¶ 115, 169) and hundreds of pages of substantiation accompanying the opposition to the Kingdom's motion to dismiss.

state sponsors of terror, see U.S. Br. 12-13, thus confirming rather than dispelling the circuit split between the Second and Ninth Circuits.

3. *Due Process and Material Support of Terrorism.* The Second Circuit held that the Due Process Clause requires dismissal of claims, as legally insufficient, that the Saudi princes "could and did foresee that recipients of their donations would attack targets in the United States" and "intended to fund al Qaeda through their donations" knowing of al Qaeda's "jihad against the United States." Pet. 43a-44a. The Government agrees with petitioners that this conclusion "is incorrect" and inconsistent with *Calder* v. *Jones*, 465 U.S. 783 (1984). U.S. Br. 19.

The Government declines to recommend review, however, based on a disingenuous and incorrect assertion that the Second Circuit's decision could possibly be read as "focus[ing] on the inadequacy of the particular allegations before it," thus "comport[ing] with the opinions of the district court." *Id.* 19-20. The Second Circuit could not have been clearer that it rejected the district court's reasoning and was *not* resting its decision on the complaint's insufficiency. The panel "accept[ed] [the complaint] as true at the pleading stage," Pet. 3a, and, for the point most relevant here, found that "[t]hese allegations include 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." *Id.* 5a. The panel fully accepted, for purposes of its decision, that the princes "caused money to be given to the Muslim charities ... with the knowledge that the charities would transfer the funds to al Qaeda," *id.* 6a, and otherwise supported the charities knowing that they were funding terrorist

groups that targeted the U.S. *Id.* 6a-8a. No portion of the opinion calls into question the adequacy of petitioners' allegations.[2]

Nor is there merit to the Government's assertion that a "circuit split is doubtful" because cases cited by petitioners involved "primary wrongdoer[s]." U.S. Br. 20. Circuit splits are established by decisions' holdings, which here rested on whether defendants engaged in tortious actions that caused injuries in the U.S., not primary versus secondary liability. See *Mwani* v. *bin Laden*, 417 F.3d 1 (D.C. Cir. 2005); *Panavision Int'l* v. *Toeppen*, 141 F.3d 1316 (9th Cir. 1998); *Janmark, Inc.* v. *Reidy*, 132 F.3d 1200 (7th Cir. 1997). Each of those holdings would clearly have yielded outcomes at odds with the Second Circuit's if applied to this case; hence a circuit split exists. Combined with *Janmark*, the Seventh Circuit's recent conclusion that supporters of terrorism are themselves primary wrongdoers, and its treatment of intention and harm, make the existence of a conflict especially clear. See *Boim* v. *Holy Land Found.*, 549 F.3d 685 (7th Cir. 2008) (en banc); Pet. Reply 9-11; *infra* 17a-18a (Government previously argued in *Boim* that no distinction exists in terrorism context between primary and secondary tortfeasors).

The Government's dismissal of the counter-terrorism implications of the Second Circuit's

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[2] The Government cites two portions of the opinion, but both actually contradict the Government's point: it refers to "causal chain," which the balance of the same sentence confirms as meaning "the Princes supported Muslim charities knowing that their money would be diverted to al Qaeda," Pet. 42a-43a, and to "indirect funding of al Qaeda," which immediately follows the statement that the analysis assumes the princes "intended to fund al Qaeda through their donations to Muslim charities" knowing that al Qaeda targeted U.S. interests. *Id.* 43a-44a.

decision is particularly troubling. The Government professes no concern that the Second Circuit has imposed, as a constitutional matter, a heightened notice standard that benefits material supporters of terrorism abroad. U.S. Br. 21. Although the Government has largely prevailed against increasing due process challenges from terrorism financiers, defendants, and extraditees, it misjudges their ability to deploy such a powerful new principle.

The Government also is clearly wrong in suggesting that the Second Circuit's decision does not limit "the legislative jurisdiction of Congress to apply federal law extraterritorially." *Id.* The Second Circuit did precisely that in this very case. Through 18 U.S.C. § 2333, Congress authorized civil suits arising from incidents of terrorism as an important component of the nation's counterterrorism efforts, focused in large measure on ending extraterritorial support for terrorism. Indeed, petitioners have brought just such a § 2333 claim against the Saudi princes in their individual capacities. See *infra* 17a-26a (Government previously argued § 2333 extends to secondary liability). For this and subsequent cases, the Second Circuit has created a constitutional bar to use of § 2333 against supporters of terrorism who act abroad.

In a striking departure from its traditional role, the Government has thus declined to defend a federal statute against significant constitutional limitation. Indeed, it fails even to mention the issue before this Court.

CONCLUSION

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

Respectfully submitted,

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