No. 16-1071

IN THE

Supreme Court of the United States

MARK SOKOLOW, *et al.*,

Petitioners,

v.

PALESTINE LIBERATION ORGANIZATION AND PALESTINIAN AUTHORITY (AKA PALESTINIAN INTERIM SELF-GOVERNMENT AUTHORITY AND OR PALESTINIAN COUNCIL AND OR PALESTINIAN NATIONAL AUTHORITY),

Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Second Circuit correctly applied settled standards of jurisdictional due process explicated most recently in *Daimler* and *Walden*—and in full accord with a subsequent D.C. Circuit decision, and the views of the United States as previously conveyed to this Court—to hold that personal jurisdiction cannot be exercised over non-sovereign foreign government entities on claims arising from overseas terrorist attacks when the factual record confirms that the suit-related conduct was neither expressly aimed at nor substantially connected with the United States.

PARTIES TO THE PROCEEDING

Petitioners, who were plaintiffs-appellees/cross-appellants below, are: Mark I. Sokolow, Rena M. Sokolow, Jamie A. Sokolow, Lauren M. Sokolow, Elana R. Sokolow, Dr. Alan J. Bauer, individually and as natural guardian of plaintiff Yehuda Bauer, Revital Bauer, individually and as natural guardian of plaintiff Yehuda Bauer, Yehonathon Bauer, Binyamin Bauer, Daniel Bauer, Yehuda Bauer, minor, by his next friend and guardians Dr. Alan J. Bauer and Revital Bauer, Shmuel Waldman, Henna Novack Waldman, Morris Waldman, Eva Waldman, Rabbi Leonard Mandelkorn, Shaul Mandelkorn, Nurit Mandelkorn, Oz Joseph Guetta, Varda Guetta, Nevenka Gritz, individually, and as successor to Norman Gritz, and as personal representative of the Estate of David Gritz, Shayna Eileen Gould, Ronald Allan Gould, Elise Janet Gould, Jessica Rine, Katherine Baker, individually and as personal representative of the Estate of Benjamin Blutstein, Rebekah Blutstein, Richard Blutstein, individually and as personal representative of the Estate of Benjamin Blutstein, Larry Carter, individually and as personal representative of the Estate of Diane ("Dina") Carter, Shaun Choffel, Dianne Coulter Miller, Robert L. Coulter, Jr., Robert L. Coulter, Sr., individually and as personal representative of the Estate of Janis Ruth Coulter, Chana Bracha Goldberg, Eliezer Simcha Goldberg, Esther Zahava Goldberg, Karen Goldberg, individually, as personal representative of the Estate of Stuart Scott Goldberg, and as natural guardian of plaintiffs Yaakov Moshe Goldberg and Tzvi Yehoshua Goldberg, Shoshana Malka Goldberg, Tzvi Yehoshua Goldberg, minor, by his next friend and guardian Karen Goldberg, Yaakov Moshe Goldberg, minor, by his next friend and guardian Karen Goldberg, and Yitzhak Shalom Goldberg.

Respondents, who were defendants-appellants/ cross-appellees below, are the Palestine Liberation Organization ("PLO") and the Palestinian Authority ("PA") (aka Palestinian Interim Self-Government Authority and or Palestinian Council and or Palestinian National Authority).

In addition, the following were defendants before the district court but were not parties before the court of appeals: Mohammed Sami Ibrahim Abdullah, Majid Al-Masri, Hussein Al-Shaykh, Mahmoud Al-Titi, Yasser Arafat, Abdel Karim Ratab Yunis Aweis, Nasser Mahmoud Ahmed Aweis, Ahmed Taleb Mustapha Barghouti, Marwin Bin Khatib Barghouti, Estate of Said Ramadan, deceased, Estate of Mazan Faritach, deceased, Estate of Mohammed Hashaika, deceased, Estate of Muhanad Abu Halawa, deceased, Estate of Wafa Idris, deceased, Faras Sadak Mohammed Ghanem, Mohammed Abdel Rahman Salam Masalah, Munzar Mahmoud Khalil Noor, Hassan Abdel Rahman, Kaira Said Ali Sadi, Nasser Jamal Mousa Shawish, Sana'a Muhammed Shehadeh, John Does 1-99, and Toufik Tirawi.

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RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The court of appeals' opinion is reported at 835 F.3d 317 (2d Cir. 2016). Pet. App. 1a. The court of appeals' order denying rehearing and rehearing *en banc (id.* at 139a) is unreported. The relevant opinions and orders of the district court *(id.* at 52a, 75a, 81a, 82a, 124a, 131a) are unreported, but three of its relevant orders are available at No. 04-cv-00397, 2015 WL 10852003 (S.D.N.Y. Oct. 1, 2015), No. 04-cv-00397, 2014 WL 6811395 (S.D.N.Y. Dec. 1, 2014), and No. 04-cv-00397, 2011 WL 1345086 (S.D.N.Y. Mar. 30, 2011).

JURISDICTION

The court of appeals entered its judgment on August 31, 2016, and denied a timely petition for rehearing and rehearing *en banc* on October 19, 2016. Pet. App. 139a. Justice Ginsburg extended the time for filing a petition for a writ of certiorari until March 3, 2017. No. 16A617. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are reproduced at Pet. App. 143a and Resp't. App. 67a-68a.

INTRODUCTION

1. Petitioners do not present the requisite "compelling reasons" for review, and ultimately challenge only the case-specific application of settled jurisdictional due process standards. S. Ct. Rule 10. To begin with,

this Court twice has declined to review the same Question Presented in two other Antiterrorism Act cases ("*Terrorist Attacks* cases"),[1] consistent with the views of the United States that applicable jurisdictional due process standards have long been settled. Notably, the *Terrorist Attacks* cases were decided by the same court of appeals, which applied the same settled jurisdictional due process standards as it did here. *See Edwards* v. *Hope Med. Grp.*, 115 S. Ct. 1, 2 (1994) (Scalia, J., Circuit Justice) ("We have already denied certiorari in two of those [similar] cases, and it is in my view a certainty that four Justices will not be found to vote for certiorari on the . . . question unless and until a conflict in the Circuits appears."); *Miroyan* v. *United States*, 439 U.S. 1338, 1339 (1978) (Rehnquist, J., Circuit Justice) (same).

The *Terrorist Attacks* cases arose from the September 11th attacks on the United States and implicated the Nation's antiterrorism interests at their apex. By contrast, this case arises from attacks in Israel which, as Petitioners admitted at trial, randomly and "indiscriminately" targeted "people from all over the world." Pet. App. 9a, 38a. The more attenuated U.S. connection here makes this case a weaker vehicle for review of the Question Presented than the *Terrorist Attacks* cases.

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[1] *In re Terrorist Attacks on September 11, 2001*, 538 F.3d 71, 95 (2d Cir. 2008), *cert. denied*, *Fed. Ins. Co.* v. *Saudi Arabia*, 557 U.S. 935 (2009) ("*Federal Insurance Company*") *abrogated on other grounds by Samantar* v. *Yousuf*, 560 U.S. 305 (2010); *O'Neill* v. *Asat Trust Reg. (In re Terrorist Attacks on September 11, 2001 (Asat Trust Reg.)*), 714 F.3d 659, 674 (2d Cir. 2013), *cert. denied*, *O'Neill* v. *Al Rajhi Bank*, 134 S. Ct. 2870 (2014) ("*O'Neill*") (together, "*Terrorist Attacks* cases").

Also, as in the *Terrorist Attacks* cases, Petitioners and their Amici promote this case as a vehicle to create a new rule of breathtaking scope that no court has ever accepted: that Fifth Amendment due process allows universal personal jurisdiction, save only when it would be "unreasonable in circumstances that cause genuine unfairness."[2] Born of a well-meaning desire to combat terrorism, this *ad hoc* new rule undoubtedly would become the law of unintended consequences because it necessarily would govern all other federal-question cases.[3] A rule of universal jurisdiction developed in the heated context of a terrorism case inevitably would spawn jurisdictional overreach when applied in standard-fare federal-question cases under securities, antitrust, and intellectual property laws.

2. There is no circuit split concerning the settled jurisdictional due process standards at issue, which the Second Circuit has applied consistently since the *Terrorist Attacks* cases. After Petitioners sought review here, the District of Columbia Circuit, in a "substantially similar" ATA case against Respondent PA, expressly aligned itself with the Second Circuit's decision, and thereafter unanimously denied rehearing *en banc*. *Livnat* v. *Palestinian Auth.*, 851 F.3d 45, 52 (D.C. Cir. 2017), *reh'g en banc denied*, Order, *Livnat* v. *Palestinian Auth.*, No. 15-7024 (D.C. Cir. May 16, 2016). The Second Circuit and D.C. Circuit applied the same settled standards of jurisdictional due process, and did so in conformity with decisions of this

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[2] Brief of Former Federal Officials as Amici Curiae in Support of Petitioners ("FFO Amicus") at 5, *Sokolow* v. *Palestine Liberation Org.,* No. 16-1071 (Apr. 6, 2017); Pet. at 14-15, 19, 33.

[3] *See* Brief for the U.S. House of Representatives as Amicus Curiae Supporting Certiorari ("House Amicus") at 20, *Sokolow* v. *Palestine Liberation Org.,* No. 16-1071 (Apr. 6, 2017).

Court and other courts of appeals. This Term, the United States expressed continuing adherence to the same understanding of jurisdictional due process that the Second and D.C. Circuits applied, and that the United States had earlier expressed in the *Terrorist Attacks* cases.[4]

3. This case is a poor vehicle for certiorari, additionally, because it presents due process issues unlikely to recur in other cases. As both the Second Circuit and D.C. Circuit recognized, Respondents comprise a non-sovereign foreign government that is effectively in a category of one; there will be only "episodic" future application of the one-off conclusion that the Palestinian government is a "person" for Due Process purposes. *Rice* v. *Sioux City Mem'l Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955).

4. This case likewise does not implicate "separation of powers" concerns because it is settled law that Congress cannot legislate to circumvent due process requirements. The Second Circuit here—in accord with the antecedent views of the United States in the *Terrorist Attack* cases—adhered to the uncontroversial principle that the case-specific application of settled jurisdictional due process standards does not encroach on Legislative Branch jurisdiction to prescribe laws, or on Executive Branch authority to enforce the Nation's antiterrorism laws and policies. The subsequent D.C. Circuit decision is in accord.

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[4] Brief for the U.S. as Amicus Curiae Supporting Petitioner at 31-32, *Bristol-Myers Squibb Co.* v. *S.F. Cnty.*, No. 16-466 (Mar. 8, 2017) ("Bristol-Myers U.S. Amicus"); Brief for the U.S. as Amicus Curiae Supporting Petitioner at 31 n.4, *BNSF Ry. Co.* v. *Tyrrell*, No. 16-405 (Mar. 6, 2017) ("BNSF U.S. Amicus").

It is Petitioners who blur the separation of powers by asking this Court to encroach on exclusive Executive Branch authority to recognize foreign sovereigns. Petitioners' approach compels *de facto* recognition of Palestine as a foreign sovereign state, contradicting the determinations of successive Administrations. Review of that issue here would be particularly awkward given ongoing Executive Branch efforts to broker Israeli-Palestinian peace, during which the President recently "reaffirmed the joint determination of the Palestinian Authority and the United States to combating violence and terrorism."[5]

5. Finally, certiorari is inappropriate because there is an alternative ground requiring reversal of the judgment, even if personal jurisdiction over Respondents were proper. The district court abdicated its role as the gatekeeper of expert-witness testimony under *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993), and allowed highly improper and prejudicial expert testimony. The judgment thus would have to be vacated on grounds independent of the jurisdictional question.

The Petition accordingly should be denied.

STATEMENT OF THE CASE

The PA is the interim government of parts of the West Bank and the Gaza Strip, collectively referred to as "Palestine." The 1993 Oslo Accord created the PA and limited its reach to domestic governance; the PLO,

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[5] The White House Office of the Press Secretary, *Readout of the Meeting between President Donald J. Trump and President Mahmoud Abbas of the Palestinian Authority*, ¶ 2, (May 3, 2017), *available at* https://www.whitehouse.gov/the-pressoffice/2017/05/03/remarks-president-trump-and-president-abbas-palestinian-authority-joint (last visited May 18, 2017).

which joined with Israel in the Oslo Accords, conducts Palestine's foreign affairs, including through a U.S. mission in Washington, D.C. Pet. App. 7a-8a. The PLO is registered with the U.S. government as a foreign agent, but its registration does not provide consent to the jurisdiction of U.S. courts. Pet. App. 7a, 49a-50a.

The PA and PLO together comprise the government of a foreign territory that the United States does not recognize as sovereign. Nevertheless, the U.S. government underscored in a Statement of Interest below that it has long viewed the PA as key to "critical national security and foreign policy interests of the United States," and consequently "has provided billions of dollars in assistance to strengthen Palestinian institutions, promote security in the West Bank, expand Palestinian economic growth and help create the conditions for peace." Resp't. App. 2a, 9a. The United States stressed, further, that "the PA is essential to key U.S. security and diplomatic interests, including advancing peace between Israel and the Palestinians, supporting the security of U.S. allies such as Israel, Jordan, and Egypt, combatting extremism and terrorism, and promoting good governance." Resp't. App. 8a-9a.

Petitioners alleged violations of the ATA for seven attacks committed in Israel during a wave of violence known as "the al Aqsa Intifada," by nonparties who Petitioners alleged were assisted by Respondents. Pet. App. 9a. The PA and PLO repeatedly and timely moved to dismiss for lack of personal jurisdiction, renewing their jurisdictional challenge after this Court's decision in *Daimler AG* v. *Bauman*, 134 S. Ct. 746 (2014). Pet. App. 14a.

The district court was skeptical of Petitioners' specific jurisdiction argument, which centered on Respondents' U.S.-based discussions related to achieving peace between Israel and Palestine. The district court believed that U.S.-based peace advocacy could not create a suit-related connection to the U.S. forum for claims stemming from terrorist attacks in Israel. JA 1119-21.[6]

The district court held that the PA and PLO were "at home" in the United States, however, and exercised general jurisdiction, because Respondents "had failed to identify an alternative forum where [Petitioners'] claims could be brought . . . and where the foreign court could grant a substantially similar remedy." SPA 16.

During a seven-week trial, Petitioners did not submit any evidence that the attackers had specifically targeted Americans or the United States. To the contrary, Petitioners offered the opinion of their experts that the "killing was indeed random" and targeted "Christians and Jews, Israelis, Americans, people from all over the world." JA 3836. Petitioners' experts admitted that the terrorists fired their guns "indiscriminately," and chose sites for their attacks that were full of people because they sought to kill "as many people as possible." JA 3944.

The jury found Respondents liable for six attacks and awarded $218.5 million, which was trebled under 18 U.S.C. § 2333(a) to $655.5 million. SPA 61-67.

In the meantime, the District Court for the District of Columbia dismissed three similar cases against

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[6] "JA" cites reference the Joint Appendix filed in the court of appeals. "SPA" cites reference the Special Appendix, also filed in the court of appeals.

Respondents, holding that there was no general or specific jurisdiction over them under this Court's decisions in *Daimler* and *Walden* v. *Fiore*, 134 S. Ct. 1115 (2014). *Livnat* v. *Palestinian Auth.*, 82 F. Supp. 3d 19, 30 (D.D.C. 2015); *Safra* v. *Palestinian Auth.*, 82 F. Supp. 3d 37, 48 (D.D.C. 2015); *Estate of Klieman* v. *Palestinian Auth.*, 82 F. Supp. 3d 237, 244, 248 (D.D.C. 2015), *appeal docketed*, *Estate of Klieman* v. *Palestinian Auth.*, No. 15-7034 (2d Cir. Apr. 8, 2015).[7] The D.C. Circuit affirmed *Livnat* and *Safra*, expressly aligning itself with the Second Circuit's decision here. *Livnat*, 851 F.3d at 52, 55. The D.C. Circuit unanimously denied rehearing *en banc*. *Id.*, *reh'g en banc denied*, No. 15-7024 (D.C. Cir. May 16, 2017).

During post-trial proceedings here, Respondents sought reconsideration on jurisdiction, based in part on the D.C. courts' decisions, but the trial court reaffirmed its exercise of general jurisdiction. Pet. App. 124a-30a. Respondents also sought a stay pending appeal, which the United States supported in a Statement of Interest emphasizing the critical importance of the PA to United States foreign policy and national security interests, and the injury to U.S. interests that a large bond would cause. *See supra* at 6; Resp't. App. 6a-8a. The district court granted a stay pending appeal with a minimal bond requirement, which the court of appeals affirmed. JA 10608; Order, *Sokolow*

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[7] The *Klieman* appeal was held in abeyance while the D.C. Circuit resolved *Livnat* and *Safra*, which presented substantively identical jurisdictional issues. Order, *Estate of Klieman* v. *Palestinian Auth.*, No. 15-7034 (2d Cir. May 28, 2015). The PA and PLO have sought summary affirmance in *Klieman* based on the D.C. Circuit's decision in *Livnat*. Motion for Summary Affirmance, *Estate of Klieman* v. *Palestinian Auth.*, No. 15-7034 (2d Cir. May 12, 2017).

v. *Palestine Liberation Org.*, No. 15-2739 (2d Cir. Oct. 14, 2015).[8]

In their merits appeal, Petitioners largely abandoned their general jurisdiction argument.[9] Petitioners instead argued that the PA and PLO were not entitled to jurisdictional due process, and alternatively that the court could exercise specific jurisdiction based on Respondents' alleged "intent to . . . influence U.S. policy to achieve Israeli concessions." Brief for the Plaintiffs-Appellees-Cross Appellants at 9, *Waldman* v. *Palestine Liberation Org.*, No. 15-3135 (2d Cir. Dec. 11, 2015).

The Second Circuit reversed and directed dismissal of the case, applying long-settled due process law from this Court to conclude that there is neither general nor specific personal jurisdiction under *Daimler* and *Walden*. *See* Pet. App. 36a-41a.

On the question of general jurisdiction, which Petitioners do not contest in this Court, the Second Circuit evaluated the sufficiency of Respondents' affiliations with the United States. The court of appeals applied precedent ranging from *International Shoe* to *Daimler* to conclude that, on the extensive factual record, the district court could not exercise general jurisdiction. Pet. App. 24a, 27a. ("The

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[8] The case at issue is referred to in this brief as "*Sokolow,*" its name in this Petition, in the district court, and at the Second Circuit bond appeal. In the merits appeal, the case was captioned *Waldman* v. *Palestine Liberation Org.*, 835 F.3d 317 (2d Cir. 2016).

[9] Brief for Plaintiffs-Appellees-Cross Appellants at 51-52, *Waldman* v. *Palestine Liberation Org.*, No. 15-3135 (2d Cir. Dec. 11, 2015) (devoting two pages to the argument that this constitutes an "exceptional case" under *Daimler*).

overwhelming evidence shows that the defendants are 'at home' in Palestine, where they govern.") (relying on *International Shoe Co.* v. *Washington*, 326 U.S. 310, 317 (1945)).

As to specific jurisdiction, the court of appeals held that the PA and PLO could not be excluded from the category of "persons" under the Fifth Amendment's Due Process Clause because Palestine (which Respondents govern) is not a U.S.-recognized sovereign state. Pet. App. 24a, 27a. The Second Circuit then relied on its decisions in the *Terrorist Attacks* cases to hold that Fifth Amendment due process standards emulate those under the Fourteenth Amendment, adjusted only to consider *nationwide* "minimum contacts." *Id*. at 20a-23a.

The court of appeals reiterated that "[t]he proper focus of the 'minimum contacts' inquiry in intentional-tort cases is 'the relationship among the defendant, the forum, and the litigation,'" and that the forum must be the "focal point both of the [tort] and of the harm suffered," such that the forum is the place where "the brunt of that harm" was suffered. *Id.* at 32a, 43a, (quoting *Walden,* 134 S. Ct. at 1123, 1126, in turn quoting *Calder* v. *Jones*, 465 U.S. 783, 788-89 (1984)). Eschewing "random, fortuitous, or attenuated" grounds for specific jurisdiction, the court of appeals relied on *Walden* and its progenitors to underscore that "the defendant's suit-related conduct must create a substantial connection" with the forum by engaging in conduct that was "expressly aimed" or "purposefully directed" at the forum. Pet. App. 37a, 40a, 41a, 42a, 44a (quoting *Walden,* 134 S. Ct. at 1121, 1123); *see also In re Terrorist Attacks*, 538 F.3d at 93-94; *O'Neill*, 714 F.3d at 674, 676.

The Second Circuit examined Respondents' contacts with the *forum* as the driver of this analysis, rather than Respondents' ostensible "knowledge of [Petitioners'] strong forum connections," *Walden*, 134 S. Ct. at 1124 (internal citations omitted). Reviewing the extensive trial record, the Second Circuit found "no basis to conclude" that Respondents took any relevant actions in the United States and, further, that the attacks "affected United States citizens only because they were victims of indiscriminate violence that occurred abroad." Pet. App. 36a. The court of appeals held, further, that "the plaintiffs point us to no evidence that these indiscriminate terrorist attacks were specifically targeted against United States citizens, and the mere knowledge that United States citizens might be wronged in a foreign country goes beyond the jurisdictional limit set forth in *Walden*." *Id.* at 44a, 46a.

The Second Circuit thus determined that "the terror attacks in Israel at issue here were not expressly aimed at the United States," and "the deaths and injuries suffered by the American plaintiffs in these attacks were 'random [and] fortuitous.'" *Id*. at 50a (quoting *Walden,* 134 S. Ct. at 1121, 1123). The court of appeals accordingly vacated the judgment and remanded for dismissal.

REASONS TO DENY THE PETITION

I. The Same Question Has Been Twice Presented To This Court, and Review Has Been Twice Denied In Accord With The Views Of The United States.

Petitioners proffer the same jurisdictional due process question that was twice presented to this Court in the *Terrorist Attacks* cases against alleged supporters

and perpetrators of the September 11th attacks. This Court denied certiorari in both *Terrorist Attacks* cases, in accord with the views of the United States. *See supra* n.1. Denial of certiorari is likewise warranted here.

The Second Circuit did nothing new in this case; it applied the same settled due process standards to the jurisdiction questions as it did in the *Terrorist Attacks* cases. Further, this case presents a far more attenuated connection to the United States than the *Terrorist Attacks* cases, making denial of certiorari *a fortiori* appropriate here. *See Edwards*, 115 S. Ct. at 2; *Miroyan*, 439 U.S. at 1338-39.

In the *Terrorist Attacks* cases, the Second Circuit held that personal jurisdiction could not be exercised over foreign defendants whose alleged overseas actions were not "expressly aimed" or "purposefully directed" at the United States. In doing so, the Second Circuit applied this Court's longstanding rule that "[m]ere foreseeability of harm in the forum state is insufficient" to show the "defendant took 'intentional, and allegedly tortious, actions . . . expressly aimed' at the forum state." *In re Terrorist Attacks*, 538 F.3d at 93 (quoting *Calder*, 465 U.S. at 789; *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 474 (1985)).

The Second Circuit undertook the same analysis here. Relying on the well-developed factual record, the court of appeals held that, "[u]nlike in *Calder*, it cannot be said that the United States is the focal point of the torts alleged in this litigation. *In this case*, the United States is not the nucleus of the harm—Israel is." Pet. App. 43a (emphasis added) (citing *Safra*, 82 F. Supp. 3d at 51). Because "the terror attacks in Israel at issue here were not expressly aimed at the United States," but rather were "random [and]

fortuitous," the court of appeals concluded that specific personal jurisdiction could not be exercised. *Id.* at 50a (quoting *Walden*, 134 S. Ct. at 1121, 1123).

Just as the petitioners did in the *Terrorist Attacks* cases, Petitioners here assert that the Second Circuit improperly inserted a specific intent requirement into the personal jurisdiction test. *Compare* Pet. at 3, 4, 16, 17, 28 *with* Pet. Br. at 30, *O'Neill,* No. 13-318 (Sept. 9, 2013) *and* Supp. Br. of Pet. at 7-9, 11, *O'Neill*, No. 13-318 (Jun 9, 2014). But, just as it had in the *Terrorist Attacks* cases, the Second Circuit used "targeting" language here solely to articulate the "expressly aimed" specific-jurisdiction requirement of *Calder*. Pet. App. 42a-43a (using "expressly aimed" and "targeted" interchangeably to determine whether specific jurisdiction existed over the PA and PLO).

The United States also addressed the same specific-intent argument in the *Terrorist Attacks* cases. Urging denial of certiorari, the Solicitor General demonstrated that the Second Circuit's "targeting" language was designed to illustrate the material difference between the petitioners' imagined requirement of "specific intent" to commit or support a particular attack on the United States, and the actual due process requirement of "purposeful direction," which demands intentionally tortious actions be "expressly aimed" at the forum, with knowledge that the "brunt of the injury" would be suffered in the forum. Resp't. App. 36a, 61a-64a. The Solicitor General explained that the court of appeals had not required the plaintiffs to demonstrate "specific intent," but instead to show that the defendants "acted with the requisite knowledge that their [actions] would result in an injury that would be felt in the United States." Resp't.

App. 63a; *see* Pet. App. 39a. The Solicitor General's rationale applies equally here.

Also instructive here is the position of the United States in the *Terrorist Attacks* cases that the Second Circuit had properly applied "settled standards" of jurisdictional due process established in Fourteenth Amendment cases and routinely applied (with adjustment for a nationwide-contacts inquiry) to Fifth Amendment cases. Resp't. App. 61a-63a. The United States also emphasized that "[t]he court of appeals' decision concern[ed] only personal jurisdiction," and did "not speak to the legislative jurisdiction of Congress to apply federal law extraterritorially." Resp't. App. 37a. It therefore was not "likely to interfere with the government's ability to combat terrorism through criminal prosecutions" because "personal jurisdiction is based on the physical presence of the defendant in the forum, independent of any minimum-contacts analysis." *Id*. (internal citations omitted); *cf.* Pet. at 3, 28. Again, the Solicitor General's rationale applies with equal force here.

Petitioners seek to elide these hurdles by proposing a "foreseeability" test for specific jurisdiction that would provide express "universal jurisdiction" over foreign defendants in any terrorism case, "regardless of where the attacks occur." Pet. at 14-15, 19, 33. Universal personal jurisdiction is plainly foreclosed by *Walden* and *Daimler*, but Petitioners posit that universal jurisdiction should be available whenever forum residents are harmed by terrorists, even when, as here, the attacks were not expressly aimed or purposefully directed at the forum itself. The Second Circuit correctly "rejected that suggestion," as it had done in the past. Pet. App. 23a n.10 (relying on *United States* v. *Yousef*, 327 F.3d 56, 107-08 (2d Cir. 2003) (per

curiam) ("[T]errorism—unlike piracy, war crimes, and crimes against humanity—does not provide a basis for universal jurisdiction.")).

Universal personal jurisdiction over defendants whose actions allegedly harm Americans—even when Americans were not targeted as such, and wherever in the world they were injured—would contravene *Walden*'s dictate that relevant suit-related conduct be substantially connected to the *forum*, 134 S. Ct. at 1124, and *Daimler*'s reasoning that respect for foreign policy interests and foreign governments reinforces the need for personal jurisdiction limits, 134 S. Ct. at 763. Observing in *Daimler* that the Ninth Circuit had overlooked the risks to international comity by applying "an expansive view" of personal jurisdiction, this Court cautioned:

> Other nations do not share the uninhibited approach to personal jurisdiction advanced by the Court of Appeals in this case. . . . The Solicitor General informs us, in this regard, that "foreign governments' objections to some domestic courts' expansive views of general jurisdiction have in the past impeded negotiations of international agreements on the reciprocal recognition and enforcement of judgments." U.S. Brief 2. Considerations of international rapport thus reinforce our determination that subjecting Daimler to the general jurisdiction of courts in California would not accord with the "fair play and substantial justice" due process demands. *International Shoe*, 326 U.S. at 316.

Id. (internal citations omitted).

Despite *Daimler*'s warning, Petitioners' Amici propose—in their words—"an even more expansive" scope of personal jurisdiction, whereby due process would be satisfied if there is any impact on "U.S. interests" or "U.S. persons abroad." Brief of U.S. Senators as Amici Curiae ("Sen. Amicus") at 11-12, 14, *Sokolow* v. *Palestine Liberation Org.,* No. 16-1071 (Apr. 6, 2017). Petitioners and their Amici would casually upset a half-century of Fifth and Fourteenth Amendment due process jurisprudence establishing that intentionally tortious action must be expressly aimed by the defendant at the *forum* itself, not merely at the forum's residents or its "interests." *Walden*, 134 S. Ct. at 1118; *see also World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 297 (1980).

No court has ever accepted Petitioners' and Amici's extreme argument that Fifth Amendment Due Process allows "universal [personal] jurisdiction," save only when it would be "unreasonable in circumstances that cause genuine unfairness." FFO Amicus at 5, 7.[10] Even when Congress has exercised its legislative *jurisdiction to prescribe* by giving courts *subject matter jurisdiction* under statutes that have extraterritorial (or "universal") effect, constitutional due process principles bounding the courts' *jurisdiction to adjudicate*

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[10] *See, e.g., Sarei* v. *Rio Tinto, PLC*, 671 F.3d 736, 805 (9th Cir. 2011) (Kleinfeld, J., dissenting) (writing that the "assertion of universal jurisdiction over private claims, unlike executive branch decisions, can embroil our country in diplomatic and military disputes entirely unchecked by the elected branches of our government") (rejecting the majority's holding, which was later vacated in *Kiobel* v. *Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013)).

still govern whether a court can exercise *personal jurisdiction* over a defendant.[11]

For good reason, this Court twice previously declined to review the same question presented here, in line with the views of the United States. The more attenuated U.S. connection makes this case an even weaker vehicle for review of that same question, and denial of certiorari is *a fortiori* appropriate.

II. There Is No Circuit Split Over The Principle That Fifth and Fourteenth Amendment Due Process Standards Are Congruent.

Undermining Petitioners' argument here, the D.C. Circuit, in a "substantially similar" ATA case against the PA, recently aligned itself with the Second Circuit in holding that Fifth Amendment jurisdictional due process standards are congruent with the Fourteenth Amendment jurisdictional standards crystallized in *Daimler* and *Walden* (adjusted only to consider a nationwide scope of forum-contacts in Fifth Amendment cases). Pet. App. 22a-23a; *accord Livnat,* 851 F.3d at 55 n.5. In doing so, the D.C. Circuit relied on authority from this Court, and the Second, Sixth, Seventh, Eleventh, and Federal Circuits, as well as its own. *See Livnat,* 851 F.3d at 54-55. Given the absence of a circuit split, and the uniform view of the courts of appeals that the jurisdictional due process requirements of the two Amendments are equivalent (save for

[11] *See Kiobel*, 133 S. Ct. at 1677-78 (Breyer, J., concurring) (differentiating subject matter jurisdiction over extraterritorial actions from the separate personal jurisdiction inquiry based on minimum contacts, as clarified in *Goodyear*).

the scope of relevant forum-contacts), review by this Court is unwarranted.

Here, the court of appeals held that "the minimum contacts and fairness analysis is the same under the Fifth Amendment and Fourteenth Amendment in civil cases." Pet. App. 22a, 23a. Noting its own "precedents [that] clearly establish the congruence of due process analysis under the Fourteenth and Fifth Amendments," the Second Circuit emphasized that the only difference between the two is that Fifth Amendment cases consider the defendant's contacts with the Nation as a whole, rather than with an individual State. *Id.* (citing *Chew* v. *Dietrich*, 143 F.3d 24, 28 n.4 (2d Cir. 1998)).

Petitioners argue that the court of appeals "imported restrictive personal-jurisdiction standards from Fourteenth Amendment case law," when, instead, "those protections must flow" from the Fifth Amendment. Pet. at 27, 28. As an initial matter, Petitioners destabilize their own argument that Fifth and Fourteenth Amendment due process standards differ by failing to challenge the *general jurisdiction ruling* below, to which the court applied *Daimler*'s Fourteenth Amendment due process jurisprudence.

In any event, the D.C. Circuit has rebuffed Petitioners' same "newly devised theory of the Fifth Amendment, . . . that the Fifth Amendment is less concerned with circumscribing the power of courts than is the Fourteenth Amendment." *Livnat*, 851 F.3d at 54. The D.C. Circuit declined to "depart from this uniform precedent" on Fifth and Fourteenth Amendment congruence:

> That argument buckles under the weight of precedent. *No court has ever held* that the

> Fifth Amendment permits personal jurisdiction without the same "minimum contacts" with the United States as the Fourteenth Amendment requires with respect to States. To the contrary, both the Supreme Court and this court have applied Fourteenth Amendment personal-jurisdiction standards in Fifth Amendment cases.

Id. at 55 (emphasis added).

The D.C. Circuit also noted that this Court, in *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607, 619 (1992), applied Fourteenth Amendment due process standards to assess personal jurisdiction in a Fifth Amendment case. *Id.; see also Mathews* v. *Eldridge*, 424 U.S. 319, 332-35 (1976) (relying on Fourteenth Amendment cases to determine foundational requirements for due process under Fifth Amendment); *Malloy* v. *Hogan*, 378 U.S. 1, 10-11 (1964) (rejecting "the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights") (internal quotation omitted).

Petitioners base their argument on "federalism concerns." Pet. at 28. As did the Second Circuit here, the D.C. Circuit rejected this same argument because "personal jurisdiction is not just about federalism." *Livnat*, 851 F.3d at 55. Instead, personal jurisdiction standards are in place both "to ensure[] fairness to the defendant" and "to protect the sovereign concerns of other nations whose courts might otherwise adjudicate the claims. Those considerations weigh at least as heavily in the Fifth Amendment context." *Id.* (internal citations omitted, citing *Daimler*, 134 S. Ct. at 763); *see also* Pet. App. 21a, 23a.

Petitioners' proposed *ad hoc* "flexible due process inquiry" for Fifth Amendment federal question cases is squarely at odds with the aligned holdings of the Second and D.C. Circuits. Pet. at 29. Petitioners' "flexible" test cannot produce a consistent rule, and would have unintended jurisdictional consequences in other federal question cases involving the extraterritorial application of U.S. law, such as in antitrust, securities, RICO, and intellectual property disputes. *See Daimler*, 134 S. Ct. at 760 ("Simple jurisdictional rules . . . promote greater predictability.").

The D.C. Circuit identified this same critical flaw: "It is hardly clear what separate Fifth Amendment personal-jurisdiction standards would consist of, and how exactly they would differ from Fourteenth Amendment standards. Without any compelling justification for developing a new personal-jurisdiction doctrine, we decline to send courts and litigants on that journey." *Livnat*, 851 F.3d at 56.

The recently expressed views of the United States in two cases this Term are consistent not only with the position of the Second and D.C. Circuits, but also with the earlier expressed views of the United States in the *Terrorist Attacks* cases. *See supra* n.4 (discussing *BNSF* and *Bristol-Myers*); *supra* at 13-14 (*Terrorist Attacks* cases). The United States explained in *BNSF Railway Co.* that the only salient difference between Fifth and Fourteenth Amendment jurisdictional due process is that, under the Fifth Amendment, "a defendant may have sufficient contacts with the Nation as a whole, or the requisite relationship with the United States, for purposes of personal jurisdiction, even though it does not have such contacts or the requisite relationship with a particular State." *BNSF* U.S. Amicus Br. at 31-32; *see also Bristol-Myers* U.S.

Amicus Br. at 31 n.4 (noting that Congress occasionally authorizes personal jurisdiction through nationwide service of process in federal-question cases governed by the Fifth Amendment, but that this Court has reserved formally endorsing Fifth Amendment personal jurisdiction based on "an aggregation of the defendant's contacts with the Nation as a whole, rather than on its contacts in the State in which the federal court sits") (citing *Omni Capital Int'l* v. *Rudolf Wolff & Co.*, 484 U.S. 97, 102 n.5 (1987)).

Here, as in the D.C. Circuit's *Livnat* decision, the court of appeals applied the broader nationwide scope of forum-contacts in assessing personal jurisdiction, such that the question reserved in *Omni* is not at issue in this case.

The prevailing view among the courts of appeals, and shared by the United States, is that jurisdictional due process requirements under the Fourteenth and Fifth Amendments are congruent, but for the geographic scope of relevant forum contacts. Given Petitioners' express aim of unsettling decades of precedent that is consistent across the circuits and with the views of the United States, review of the question presented here is unwarranted.

III. There Is No Circuit Split On The Issue That The PA and PLO Are "Persons" Entitled To Due Process.

The appellate courts uniformly hold that only *sovereign* foreign states are excluded from the category of "persons" protected by the Due Process Clause because only *sovereign* foreign states are "juridical equals in the eyes of the United States." *Livnat,* 851 F.3d at 51. The dispositive element in the "person" test is *sovereignty*. Neither Palestine itself, nor the

PA and PLO as its government, is recognized by the U.S. as sovereign.

Extending jurisdictional due process to non-sovereign foreign governments has not created practical problems or unforeseen consequences in other settings.[12] *See Livnat,* 851 F.3d at 52 ("[N]o such problems have arisen thus far, even though courts have assumed that non-sovereign governments have due-process rights."). Despite this equilibrium, Petitioners ask this Court to declare that *all* foreign governments are ineligible for due process. *See* Pet. at 22-23. But, review here of whether non-sovereign governments are entitled to due process would be improvident for three reasons:

First, it would invite precisely the same type of conflict between the Executive and Judicial Branches that this Court ruled out in *Zivotofsky* v. *Kerry*, 135 S. Ct. 2076 (2015). Petitioners urge the Judiciary to declare Palestine as the *de facto* equivalent of a

[12] For example, "unrecognized regimes are generally precluded from appearing as plaintiffs in an official capacity without the Executive Branch's consent." *Klinghoffer* v. *S.N.C. Achille Lauro Ed Altri-Gestione, etc.*, 937 F.2d 44, 48 (2d Cir. 1991) (citing *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 410-11 (1964)). Further, non-U.S. "persons" may only pursue affirmative due process-based claims in U.S. courts when they have "substantial connections" with the United States. *See Nat'l Council of Resistance of Iran* v. *Dep't of State*, 251 F.3d 192, 201 (D.C. Cir. 2001)); *see also Price* v. *Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 98 (D.C. Cir. 2002) (noting that sovereign foreign states are only allowed to bring suit in U.S. court on the basis of comity). As such, an unrecognized foreign government that prevails on a minimum contacts-driven jurisdictional due process defense, as Respondents did here, necessarily forgoes any claim to the "substantial connection" that is a prerequisite to pursuing procedural due process rights as a claimant.

sovereign despite repeated Executive Branch refusals to recognize Palestine as a sovereign state.

Second, it would entail resolution of a constitutional question that would have only "episodic" future application to cases involving the government of Palestine. *Rice*, 349 U.S. at 74. It would be particularly awkward to review this issue now, given the current Administration's efforts to broker Israeli-Palestinian peace that would resolve the final status of Palestine. *See supra* at 4.

Third, Petitioners would relegate Palestine, and Respondents along with it, to a form of constitutional purgatory—protected neither by due process, nor by sovereign immunity, comity or international law—contrary to the fundamental principle that, "[i]n federal and state courts alike, defendants should face suit only under fair circumstances." *Livnat*, 851 F.3d at 55.

The D.C. Circuit recently rejected Petitioners' same argument in a case against the PA, expressly agreeing with the Second Circuit here that "only . . . foreign *sovereigns*" are excluded from the ambit of the Due Process Clause. *Livnat*, 851 F.3d at 53 (citing *Price*, 294 F.3d at 82) (emphasis added); *see also Livnat*, 851 F.3d at 52 (relying on *Waldman*, 835 F.3d at 329); *Frontera Res. Azer. Corp.* v. *State Oil Co. of the Azer. Republic*, 582 F.3d 393, 399 (2d Cir. 2009) (limiting the due process exception to "sovereigns").

Petitioners would expand this rule exponentially to declare that entities that "function" like a government are effectively sovereign, and therefore should be excluded from Due Process protections. *See* Pet. at 24-25 (relying on *Price*, 294 F.3d at 95-100). The D.C.

Circuit rejected precisely the same mistaken reading of *Price* that Petitioners advocate here:

> [T]he appellants . . . urge us to extend *Price* to the Palestinian Authority by holding that *Price* applies not just to sovereign foreign states, but to *any foreign entity that "functions as a government." We reject appellants' reading of Price*. . . . The rule in *Price*—that foreign states are not "persons" under the Due Process Clause—*applies only to sovereign foreign states*. Nothing in *Price*, other precedent, or the appellants' arguments compels us to extend the rule in *Price* to all foreign government entities.

Livnat, 851 F.3d at 48-49 (emphasis added).

This Court has determined that the exclusive power to recognize a foreign state as sovereign lies with the Executive, and that the Judiciary and Congress may not contradict the Executive's decision. *See Zivotofsky*, 135 S. Ct. at 2091 (holding that "the Judiciary is not responsible for recognizing foreign nations"). "Recognition is a topic on which the Nation must "'speak . . . with one voice.'" *Id*. at 2086 (quoting *Am. Ins. Ass'n* v. *Garamendi*, 539 U.S. 396, 424 (2003), in turn quoting *Crosby* v. *Nat'l Foreign Trade Council*, 530 U.S. 363, 381 (2000)). This Court was unequivocal: "That voice must be the President's. Between the two political branches, only the Executive has the characteristic of unity at all times." *Zivotofsky*, 135 S. Ct. at 2086; *see also United States* v. *Lumumba*, 741 F.2d 12, 15 (2d Cir. 1984) ("In other words, recognition by the executive branch—not to be second-guessed by the judiciary—is essential to establishing diplomatic status.").

Petitioners disagree with this established authority and assert—without any support—that "[w]hether the Executive has extended diplomatic recognition to a foreign government that exercises control over foreign territory has no bearing on whether the government is a 'person' under the Fifth Amendment." Pet. at 25. But, sovereignty "'*in the eyes of the United States*'" is the sole and longstanding basis for excluding a foreign government from the definition of "persons" under the Fifth Amendment's Due Process Clause. *Livnat*, 851 F.3d at 51 (quoting *Zivotofsky*, 135 S. Ct. at 2084).

Petitioners predicate their argument that no government is a "person" only on case law pertaining to the States of the Union and municipalities. *See* Pet. at 24 (citing *City of East St. Louis* v. *Circuit Court*, 986 F.2d 1142, 1144 (7th Cir. 1993)). Once again, the D.C. Circuit correctly rejected this same argument, because States are co-equal sovereigns with the central government and "municipalities are creatures of a State and therefore lack any constitutional rights against the State." *Livnat*, 851 F.3d at 53 (correcting plaintiffs' "inapposite" reliance on *City of East St. Louis*, 986 F.2d at 1142).

Petitioners' "government function" test also disregards the reason why sovereign governments do not receive due process protection: Sovereign recognition has legal consequences, including immunity in the U.S. courts, comity, and deference under the Act of State doctrine. *See Zivotofsky*, 135 S. Ct. at 2090 ("Recognition is an act with immediate and powerful significance for international relations, so the President's position must be clear."); *Livnat*, 851 F.3d at 51 (quoting *Zivotofsky*, 135 S. Ct. at 2084) ("Significantly, direct dispute-resolution mechanisms are generally available only to entities that are juridical equals *in*

the eyes of the United States, because political recognition 'is a precondition of regular diplomatic relations.'").

In contrast, an entity that performs "core government functions" will not be entitled to these legal protections unless it is part of a foreign state recognized by the United States as sovereign. *See Zivotofsky*, 135 S. Ct. at 2084, 2090-91 (quoting 1 John B. Moore, *A Digest of International Law* § 27, at 72 (1906), for the proposition that "[r]ecognition at international law, furthermore, is a precondition of regular diplomatic relations. Recognition is thus 'useful, even necessary,' to the existence of a state"); *Livnat*, 851 F.3d at 51 ("Because they lack the full range of rights and obligations that sovereigns have under international law, non-sovereigns—unlike the defendant in *Price*—cannot rely on comity and international-law protections to the exclusion of domestic law.").

Sovereignty "in the eyes of the United States" has long been the litmus test for excluding a foreign government from the definition of "persons" under the Fifth Amendment's Due Process Clause. *Livnat,* 851 F.3d at 51. Although this issue may be addressed in further peace talks, the Executive Branch—consciously and expressly—thus far has refused to recognize Palestine as sovereign.[13] Accordingly, Palestine lacks the privileges of sovereigns on the international plane.

Only U.S.-recognized sovereignty, not merely "government function," ensures that Palestine will be afforded jurisdictional immunity, comity, and the ability to interact with the United States as a co-equal under international law. Only when these mechanisms are

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[13] *See supra* n.5 (joint White House statement regarding the two-state peace solution).

made available is due process protection unnecessary for a foreign government. Without sovereign recognition, Respondents are beneficiaries of the "general rule that the Due Process Clause protects all litigants in our courts, especially by limiting the power of courts to hale defendants before them." *Livnat*, 851 F.3d at 48.

IV. Congress Cannot Legislate Around The Due Process Clause.

This case does not present a "separation of powers" question, Pet. at 20-21, because the case-specific application of settled jurisdictional due process standards does not encroach on Legislative Branch jurisdiction to prescribe laws, or on Executive Branch authority to enforce the Nation's antiterrorism laws and policies. To the contrary, it is Petitioners' effort to obtain *de facto* judicial recognition of Palestine as sovereign in order to deprive it of due process that encroaches on the Executive's exclusive sovereign-recognition authority. *See supra* Part III.

Petitioners' focus on congressional and presidential intent ignores the Judiciary's exclusive role in applying constitutional due process limits in specific cases to specific defendants. *See generally* Pet. at 14-21 (conflating jurisdiction to prescribe with jurisdiction to adjudicate). The Second Circuit broke no new ground in holding that the "federal courts cannot exercise jurisdiction in a civil case beyond the limits prescribed by the due process clause of the Constitution." Pet. App. 50a-51a; *see also United States* v. *Windsor*, 133 S. Ct. 2675, 2695 (2013); *Quill Corp.* v. *North Dakota*, 504 U.S. 298, 305 (1992) (noting that Congress "does not . . . have the power to authorize violations of the Due Process Clause"); *Price*, 294 F.3d at 92 ("It is well settled that a statute cannot grant

personal jurisdiction where the Constitution forbids it.") (internal citations omitted).

There is no dispute among the courts of appeals about this established rule. *See, e.g., Glencore Grain Rotterdam B.V.* v. *Shivnath Rai Harnarain Co*., 284 F.3d 1114, 1121 (9th Cir. 2002) ("It is a bedrock principle of civil procedure and constitutional law that a statute cannot grant personal jurisdiction where the Constitution forbids it.") (internal citations omitted); *Republic of Panama* v. *BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935, 939 (11th Cir. 1997) ("[T]he Due Process Clause of the Fifth Amendment provides an independent constitutional limitation on the court's exercise of personal jurisdiction over a . . . defendant served pursuant to a federal statute's nationwide service of process provision.").

Due process has always constrained jurisdiction to adjudicate claims against specific defendants in specific cases, and has always limited the case-specific application of Congress's jurisdiction to prescribe laws that apply extraterritorially. *See, e.g., Helicopteros Nacionales de Columbia S.A.* v. *Hall*, 466 U.S. 408 (1984); *see also Galvan* v. *Press*, 347 U.S. 522, 531 (1954) (noting that the political branches must respect "the procedural safeguards of due process" even when addressing "[p]olicies pertaining to the entry of aliens"). Federal courts do not conduct trials in *absentia*, but instead require in criminal cases the "physical presence" of a defendant (often brought into custody by extradition or arrest), and in civil cases that the exercise of personal jurisdiction is fair and

reasonable based on the defendant's contacts with the forum.[14]

Petitioners and their Amici focus on congressional intent, but the ATA's legislative history gives "no indication that Congress thought ordinary due-process requirements would not apply here. And regardless, Congress cannot wish away a constitutional provision." *Livnat*, 851 F.3d at 53. ATA legislative history also confirms that Congress expected personal jurisdiction would be bounded by due process limits. *See* 137 Cong. Rec. S4511 (daily ed. April 16, 1991) (statement of Sen. Grassley) ("Last June, a New York Federal District Court ruled in the *Klinghoffer* versus *PLO* case . . . that the U.S. courts have jurisdiction over the PLO . . . *S. 740 would codify this ruling*") (emphasis added). By adopting court rulings as the guideposts marking the boundaries of personal jurisdiction, Congress did not assume specific jurisdiction could always be exercised in "paradigm" ATA scenarios, *see* Pet. at 16, 18, but instead recognized that courts have the last word on jurisdiction, in part because of constitutional due process requirements. In fact, Senator Grassley explicitly recognized that the inability to establish personal jurisdiction over foreign defendants could render ATA claims "symbolic" in many cases. *See Antiterrorism Act of 1990: Hearing on S. 2465 Before the S. Comm. on the Judiciary,* 101st Cong. 2 (1990) (statement of Sen. Chuck Grassley, Member, S. Comm. on the Judiciary).[15]

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[14] *See*, *e.g.*, Resp't. App. 37a (Br. of U.S. as *amicus curiae*); *United States* v. *Perez*, 752 F.3d 398, 407 (4th Cir. 2014) ("[P]ersonal jurisdiction in a criminal case is still based on physical presence.").

[15] In contrast, the Justice Against Sponsors of Terrorism Act ("JASTA"), *see* Petition at 31, does not implicate the same

Congress also acknowledged the constitutional limits on jurisdiction to adjudicate when it approved Federal Rule of Civil Procedure 4(k)(2), which requires that "exercising jurisdiction [must be] consistent with the United States Constitution and laws"; Rule 4(k)(2) thus embraces the reality that constitutional due process limits apply in all federal-claims cases that rely on a statutory authorization of jurisdiction, such as the ATA. *See Livnat*, 82 F. Supp. 3d at 47-48; *see also* Fed. R. Civ. P. 4(k)(2) advisory committee's notes 1993 ("There remain constitutional limitations on the exercise of territorial jurisdiction by federal courts over persons outside the United States.").

The Second Circuit's case-specific application of settled jurisdictional due process standards does not create an "insuperable barrier" to the adjudication of future ATA cases. Pet. at 14. Specific jurisdiction remains appropriate and available in paradigmatic ATA civil cases that involve attacks "expressly aimed" or "purposefully directed" at the United States, including U.S. territory, embassies, diplomats, military bases and other direct extensions of the United States itself. *See, e.g.*, *O'Neill*, 714 F.3d at 679-81; *Mwani* v. *Bin Laden*, 417 F.3d 1, 13 (D.C. Cir. 2005) (finding specific jurisdiction over perpetrators of bombing of the American Embassy in Kenya); *Morris* v. *Khadr*, 415 F. Supp. 2d 1323, 1336 (D. Utah 2006) (establishing specific jurisdiction over individual that attacked American soldiers in Afghanistan); *Rein* v. *Socialist*

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jurisdictional questions presented here, because the relevant provision of the statute applies only to recognized foreign sovereign states, which indisputably are not entitled to due process. *See* Resp't. App. 67a-68a (Pub. L. 114-222 § 3, 130 Stat. 852 (2016) (establishing responsibility of foreign states for international terrorism against the United States)).

People's Libyan Jamahiriya, 995 F. Supp. 325, 330 (E.D.N.Y. 1998) (finding specific jurisdiction based on the intentional destruction of United States flag aircraft).

Further, "adher[ence] to the status quo of personal-jurisdiction doctrine" in civil ATA cases "do[es] not diminish any law-enforcement tools that currently exist." *Livnat*, 851 F.3d at 56. The Solicitor General took the same position in the *Terrorist Attacks* cases. *See* Resp't. App. 37a. ("Nor, contrary to the petitioners' suggestion, is the court's error likely to interfere with the government's ability to combat terrorism . . . . The court of appeals' decision concerns only personal jurisdiction. It does not speak to the legislative jurisdiction of Congress to apply federal law extraterritorially.").

The Executive Branch has a robust arsenal of antiterrorism tools unconstrained by traditional due process limits on jurisdiction in ATA civil cases, including criminal prosecutions, asset freezes, export controls, and even the "use of force," which the legislative sponsors of the ATA acknowledged. *See* Sen. Amicus Br., at 7, 9, 13-14. Similarly, legislative history reflects congressional recognition that ATA criminal cases more directly advance the government's interests in antiterrorism law enforcement than their civil counterparts. *See* 138 Cong. Rec. S17260 (daily ed. Oct. 7, 1992); *Antiterrorism Act of 1990: Hearing on S. 2465 Before the S. Comm. on the Judiciary*, 101st Cong. 46-47 (1990).

The Second Circuit acted entirely within the proper role of the Judiciary in applying settled due process standards limiting jurisdiction to adjudicate. By contrast, Petitioners would have the Judiciary exceed that role by defying the Executive Branch determination of

successive Administrations that U.S. recognition of Palestine's sovereignty should await a final Palestinian-Israeli peace agreement.[16] By pressing for *de facto* judicial recognition of Palestine as a sovereign state, Petitioners would have this Court usurp, and contradict, the Executive's non-recognition decision. *See Zivotofsky*, 135 S. Ct. at 2080 (explaining that separation-of-powers prohibits acts that "*in effect* . . . exercise the recognition power"); *Banco Nacional de Cuba*, 376 U.S. at 410 ("[T]he refusal to recognize has a *unique legal aspect*. It signifies this country's unwillingness to acknowledge that the government in question speaks as the sovereign authority for the territory it purports to control. Political recognition is exclusively a function of the Executive.") (citations omitted, emphasis added); *see also Zivotofsky*, 135 S. Ct. at 2091 ("the Judiciary is not responsible for recognizing foreign nations . . . 'Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but is a political question'") (quoting *Oetjen* v. *Cent. Leather Co.*, 246 U. S. 297, 302 (1918)).

Petitioners' arguments contradict their professed view that federal courts should not become "embroil[ed] . . . . in disputes over sensitive foreign-policy matters." Pet. at 27. The Petition should be denied because no separation of powers question is presented and it

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[16] *See, e.g.*, Statement of Susan Rice, U.S. Permanent Representative to the United Nations (Nov. 29, 2012), https://2009-2017-usun.state.gov/remarks/5601 (last visited May 18, 2017) (stating the United States has "long been clear that the only way to establish such a Palestinian state and resolve all permanent-status issues is through the crucial, if painful, work of direct negotiations between the parties....This [U.N.] resolution does not establish that Palestine is a state."); *see also* Pet. at 21 (acknowledging that "the Executive has *declined* to recognize [the PA and PLO] diplomatically") (emphasis in original).

would be improvident for this Court to inject itself into this highly-charged foreign affairs debate.

V. Certiorari Is Unwarranted Because Petitioners Challenge Only The Case-Specific Application Of Settled Due Process Standards, and Because There Is An Alternative Ground To Affirm.

Because the court of appeals applied settled jurisdictional due process standards, at the core of the Petition is simply a request to review the court of appeals' fact-specific application of those settled standards. *See* Pet. at i (limiting the Question Presented to review of the decision "*in this case*") (emphasis added), at 22 (challenging "[t]he Second Circuit's holding that due-process principles bar personal jurisdiction *in this case*") (emphasis added), at 30 ("*In this case* there can be no question that respondents' purposeful activity was aimed at the United States in such a way that calling it to account in U.S. courts is fair and just.") (emphasis added), at 30-34 (challenging the court of appeals' case-specific application).

When the *Terrorist Attacks* cases petitioners made an equivalent fact-bound argument, the United States explained that the Second Circuit had applied (as here) settled jurisdictional standards,[17] and advised against certiorari. Resp't. App. 64a. ("Petitioners' fact-specific disagreement with the court of appeals' application of the *Calder* standard to the allegations in this case . . . does not warrant this Court's review"). Certiorari likewise is not appropriate here, because

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[17] *Compare In re Terrorist Attacks on September 11, 2001*, 538 F.3d 71, 93 (2d Cir. 2008), *and O'Neill* v. *Asat Trust Reg. (In re Terrorist Attacks on September 11, 2001 (Asat Trust Reg.))*, 714 F.3d 659, 674-75 (2d Cir. 2013), *with* Pet. App. 41a-42a.

this Court is not "a court for correction of errors in fact finding." *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949).

Further, there is an independent ground requiring reversal of the judgment, making review of the jurisdiction question improvident. The district court abdicated its role as the gatekeeper of expert-witness testimony under *Daubert* v. *Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579, 597 (1993), and allowed highly improper and prejudicial expert testimony that comprised almost the entirety of Petitioners' case on liability. For example, the district court allowed Petitioners' experts to speculate that the PA deployed "Soviet"-style techniques "to control the[] minds and thoughts [of Palestinians] and lead them in a specific way" to wage terrorist attacks; that the PA intended to use social welfare programs to turn Palestinians into terrorists; about the state of mind of the attackers and PA officials; and, used inflammatory rhetoric in front of the jury regarding the decades-old military conflict between Palestinians and Israelis. *See, e.g*., JA 5329, JA 4374, JA 4385, JA 4957-98. Those prejudicial and provocative opinions so dominated the trial that they became the centerpiece of Petitioners' closing arguments to the jury. *See* JA 4285, 4374, 4385, 5329.

The Second Circuit did not reach the improper expert testimony issue, given its determination that the district court did not have personal jurisdiction. Pet. App. 7a. Because the pervasive misuse of expert testimony provides a basis for vacating the judgment that is independent of the jurisdiction question, however, review of the jurisdictional issue would be improvident.

CONCLUSION

For all of the foregoing reasons, the Court should deny the Petition.

Respectfully submitted,

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May 23, 2017

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Filed 08/10/15]

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04 Civ. 397 (GBD) (RLE)
ECF Case

MARK I. SOKOLOW, *et al.*,

Plaintiffs,

v.

PALESTINE LIBERATION ORGANIZATION, *et al.*,

Defendants.

STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

The United States submits this Statement of Interest, pursuant to 28 U.S.C. § 517,[1] to apprise the Court of its interests as they relate to the Rule 62 Motion to Stay Execution of the Judgment and to Waive the Bond Requirement (ECF No. 897) filed by defendants Palestinian Authority and Palestine Liberation Organization.

In deciding whether to stay execution of a judgment without a supersedeas bond or to reduce the bond

[1] 28 U.S.C. § 517 provides that: "The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States."

amount, courts may consider a number of factors, including the public interest. *See In re Nassau Cnty. Strip Search Cases*, 783 F.3d 414, 417-18 (2d Cir. 2015) (providing a list of "non-exclusive factors that a district court may consider" in assessing a Rule 62 motion); *Morgan Guar. Trust Co. v. Republic of Palau*, 702 F. Supp. 60, 65-66 (S.D.N.Y. 1988) (considering the public interest in ruling on a Rule 62 motion). This Statement of Interest, including the attached declaration from Deputy Secretary of State Antony J. Blinken addresses critical national security and foreign policy interests of the United States that should be considered as the Court determines whether to impose a bond requirement in this case and, if so, in what amount. The United States strongly supports the rights of victims of terrorism to vindicate their interests in federal court and to receive just compensation for their injuries. *See* 18 U.S.C. § 2333 (providing U.S. national victims of international terrorism with a cause of action, with treble damages and attorney fees, against terrorists and those who actively support terrorism that harms Americans abroad); Attached Declaration of Deputy Secretary of State Antony J. Blinken ¶¶ 3-6, 12 (Aug. 10, 2015); *see also*, *e.g.*, *Brabson v. The Friendship House of West. New York, Inc.*, 2000 WL 1335745, at *2 (W.D.N.Y. Sept. 6, 2000); *Harris v. Butler*, 961 F. Supp. 61, 63 (S.D.N.Y. 1997). At the same time, the declaration notes that the United States has significant concerns about the harms that could arise if the Court were to impose a bond that severely compromised the Palestinian Authority's ("PA") ability to operate as a governmental authority. *See* Attached Declaration of Deputy Secretary of State Antony J. Blinken ¶¶ 7-11; *see*, *e.g.*, *Morgan Guar.*, 702 F. Supp. at 66; *Teachers Ins. & Annuity Ass'n v.*

Ormesa Geothermal, 1991 WL 254573, at *4 (S.D.N.Y. Nov. 21, 1991).

The United States respectfully urges the Court to take into account these factors as it considers the evidence regarding the PA's financial situation. The Court and the parties made clear at the July 28, 2015 hearing that they are aware of the issues regarding the PA's financial stability, and the need to have some mechanism for plaintiffs to secure payment if the Court's judgment is affirmed.

The United States does not herein express a view on the ultimate merits of defendants' Rule 62 motion (or any other issue in the case). The United States files this Statement of Interest solely to inform the Court of its interests as the Court considers where the public interest lies in ruling on defendants' Rule 62 motion.

Respectfully submitted this 10th day of August, 2015.

/s/ Kathleen R. Hartnett
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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

[Filed 08/10/15]

Civil Action No. 1:04 Civ. 397 (GBD) (RLE)

MARK I. SOKOLOW, *et al.*,

Plaintiffs,

v.

PALESTINE LIBERATION ORGANIZATION, *et al.*,

Defendants.

DECLARATION OF ANTONY J. BLINKEN

I, Antony J. Blinken, hereby declare pursuant to 28 U.S.C. § 1746:

1. I am the Deputy Secretary of State. I make this declaration based on my personal knowledge and on information I have received in my official capacity. I have served as Deputy Secretary of State since January 9, 2015. In my capacity as Deputy Secretary of State, I serve as principal adviser to the Secretary of State and assist the Secretary in the formulation and conduct of U.S. foreign policy and in giving general supervision and direction to all elements of the Department.

2. This declaration addresses critical national security and foreign policy interests of the United States that should be considered as the Court determines whether to impose a bond requirement in this case and, if so, in what amount. It does not address the judgment on the merits that was entered in favor of

the plaintiffs or any issues that may be raised by the parties on appeal. As detailed below, the United States strongly supports the rights of victims of terrorism to vindicate their interests in federal court and to receive just compensation for their injuries. At the same time, the United States has significant concerns about the harms that could arise if the Court were to impose a bond that severely compromised the Palestinian Authority's ("PA") ability to operate as a governmental authority.

U.S. Commitment to Victims of Terrorism

3. The United States strongly supports U.S. victims' efforts to seek and receive just compensation from the terrorists and sponsors of terrorism responsible for attacks that kill and injure Americans abroad. In enacting the Antiterrorism Act ("ATA"), 18 U.S.C. § 2333, Congress provided U.S. citizen victims of international terrorism with a cause of action against terrorists and those who actively support terrorism that harms Americans outside of the United States.

4. The ATA promotes the public interest in providing just compensation to terrorism victims, and limiting recovery without due cause would undermine a central purpose of the law. While no amount of money can truly compensate terrorism victims for what they have suffered, obtaining financial recompense for terrorism victims in civil litigation is part of the process of achieving justice.

5. The ability of victims to recover under the ATA also advances U.S. national security interests. The law reflects our nation's compelling interest in combatting and deterring terrorism at every level, including by eliminating sources of terrorist funding and holding sponsors of terrorism accountable for their actions.

Imposing civil liability on those who commit or sponsor acts of terrorism is an important means of deterring and defeating terrorist activity. Further, compensation of victims at the expense of those who have committed or supported terrorist acts contributes to U.S. efforts to disrupt the financing of terrorism and to impede the flow of funds or other support to terrorist activity.

6. The United States is also committed to using a variety of law enforcement tools to bring those who have engaged in acts of terror to justice. The cooperation of victims of terror is crucial to U.S. efforts to prosecute perpetrators of terror, particularly in cases of international terrorism. Their cooperation with the United States in these matters often comes at substantial personal cost, financial and otherwise. These burdens may be ameliorated to some extent through mechanisms like the ATA, easing the burden of cooperation and thereby enhancing the law enforcement interests of the United States.

U.S. Foreign Policy and National Security Interests in Continued PA Governance

7. On the limited issue of setting a bond amount in this case, the United States respectfully urges the Court to carefully consider the impact of its decision on the continued viability of the PA in light of the evidence about its financial situation. In furtherance of U.S. foreign policy interests, the United States has provided billions of dollars in assistance to strengthen Palestinian institutions, promote security in the West Bank, expand Palestinian economic growth and help create the conditions for peace. An event that deprives the PA of a significant portion of its revenues would likely severely compromise the PA's ability to operate as a governmental authority. As I explain below, the collapse of the PA would undermine several decades of

U.S. foreign policy and add a new destabilizing factor to the region, compromising national security. Senior U.S. officials have made clear to other governments that if the PA were to collapse, we would be faced with a crisis that would not only impact the security of Israelis and Palestinians, but would potentially have ripple effects elsewhere in the region.

8. Impact on Efforts to Achieve Peace: A PA insolvency and collapse would harm current and future U.S.-led efforts to achieve a two-state solution to the Israeli-Palestinian conflict. If the PA were to collapse, the Palestinian leadership would find itself without an institutional vehicle with which to govern, maintain order, and provide basic services for the Palestinian people in the West Bank. The current Palestinian leadership would likely find its legitimacy and authority undermined. The vacuum in governance and security could be filled by violent Palestinian groups that seek Israel's destruction and reject the goal of a two-state solution. The instability and violence that would result from the loss of the PA's governing authority would likely fuel anger and frustration, and could lead to widespread violence in the West Bank. In such a political environment, it would be extremely difficult for any Palestinian leader to marshal domestic political support to enter into and sustain peace negotiations.

9. Impact on Stability and Security in the Region: The PA and Israel currently have mechanisms and channels for security coordination, helping to maintain security for Palestinians and Israelis living in the West Bank, and identifying and thwarting potential terrorist attacks in Israel. The collapse of the PA would break this channel of coordination. Economic insecurity and instability in the West Bank also risks seeping into neighboring Jordan, a country with a

significant Palestinian refugee population and its own acute economic and social problems, compounded by the Syrian refugee crisis and the international effort to counter the Islamic State. The combination of a security vacuum, economic downturn, unemployment, and social frustration could create a dangerous atmosphere that could make the West Bank fertile ground for terrorist and extremist recruitment. At a time when the United States is leading international efforts to counter extremism and degrade and defeat the Islamic State, the collapse of the PA could potentially create a new vulnerability for terrorists to exploit. A worsening of the security situation in the West Bank could also have negative implications for the security situation of neighboring Israel, Jordan, and Egypt—key U.S. allies in the Middle East.

10. Humanitarian Crisis: The PA is in the midst of a deteriorating economic and political environment, generating a slow-onset humanitarian crisis in the West Bank that threatens to unravel the economic, security, and humanitarian gains of the past ten years. In Gaza, where the situation is far more dire, a worsening economic situation could be exploited by Hamas to create an atmosphere for violent conflict. Further, the collapse or near-collapse of the PA would plunge the Palestinian economy into a deep recession including a sudden dramatic increase in the already high unemployment rate, and failure of critical social services.

11. In sum, the continued viability of the PA is essential to key U.S. security and diplomatic interests, including advancing peace between Israel and the Palestinians, supporting the security of U.S. allies such as Israel, Jordan, and Egypt, combatting extremism and terrorism, and promoting good governance. In

furtherance of U.S. foreign policy interests, the United States has provided billions of dollars in assistance to strengthen Palestinian institutions, promote security in the West Bank, expand Palestinian economic growth and help create the conditions for peace.

12. In making this declaration, I would like to stress that the Department of State shares in the grief and outrage over all terrorist attacks, including the grievous injuries and losses suffered by the American victims of the attacks at the heart of this case. Indeed, as discussed above, I believe it is in our national security interest to support fair compensation for American victims of terrorism from those responsible for their losses.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Date: August 10, 2015

/s/ Antony J. Blinken
Antony J. Blinken

APPENDIX B

IN THE SUPREME COURT OF THE UNITED STATES

No. 08-640

FEDERAL INSURANCE CO., ET AL., PETITIONERS

v.

KINGDOM OF SAUDI ARABIA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the immunity from suit of foreign governmental officials for acts within their official capacity is governed by the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. 1330, 1602 *et seq.*, or by principles of immunity recognized by the Executive Branch in the exercise of its authority over foreign affairs.

2. Whether tort claims may be asserted against a foreign state under the FSIA's tort exception, 28 U.S.C. 1605(a)(5), where the foreign state's asserted liability is based on donations to charitable institutions outside the United States that were allegedly diverted to a terrorist group that committed acts of terrorism within the United States.

3. Whether courts in the United States may, consistent with the Due Process Clause, exercise personal jurisdiction over civil claims against foreign nationals on the ground that those individuals made donations abroad to charitable institutions that foreseeably diverted some of those funds to a group that intended to commit terrorist attacks against the United States.

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IN THE SUPREME COURT OF THE UNITED STATES

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

A. The Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. 1330, 1602 *et seq*., provides the sole basis for obtaining jurisdiction over a foreign state in a civil case brought in a United States court. *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-435 (1989). Under the FSIA, foreign states and their agencies and instrumentalities are immune unless a claim falls within one of the specified exceptions to that immunity. 28 U.S.C. 1604. The exceptions

permit, *inter alia*, certain actions arising out of a foreign state's commercial activities, 28 U.S.C. 1605(a)(2), certain tort actions, 28 U.S.C. 1605(a)(5), and certain actions arising out of terrorist activities by designated state sponsors of terrorism, 28 U.S.C. 1605A(a)(1).[1]

B. This multi-district litigation encompasses numerous cases brought by persons injured in the September 11, 2001 terrorist attacks against the United States. Pet. App. 1a, 117a. The complaints allege in relevant part that the Kingdom of Saudi Arabia, the Saudi High Commission for Relief to Bosnia and Herzegovina (SHC), and four Saudi Princes, acting both in their capacities as high-level government officials and also in their personal capacities, made donations to ostensibly charitable organizations with knowledge that those charities were diverting funds to al Qaeda. *Id.* at 2a, 5a-8a. They also allege that a fifth Prince knowingly provided material support, including banking and financial services, to Osama bin Laden and al Qaeda. *Id.* at 8a.

The district court dismissed the claims against Saudi Arabia, SHC, and the Princes. Pet. App. 56a-82a, 144a-194a. The court held that the FSIA afforded immunity to Saudi Arabia and SHC as well as to the Princes for their official acts and that none of the FSIA's exceptions applied. *Id.* at 72a-75a, 135a-168a.

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[1] The terrorism exception was enacted in 1996. Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, § 221(a)(1), 110 Stat. 1241 (28 U.S.C. 1605(a)(7) (Supp. II 1996)). In 2008, Congress repealed that provision and enacted an amended terrorism exception. National Defense Authorization Act for Fiscal Year 2008 (NDAA), Pub. L. No. 110-181, § 1083(a), 122 Stat. 338 (to be codified at 28 U.S.C. 1605A (Supp. II 2008)). All references to the NDAA here are to Supplement II (2008) of the United States Code.

The court also held that it lacked personal jurisdiction over the Princes for their personal actions. *Id.* at 80a-82a, 185a-194a.

C. The court of appeals affirmed. Pet. App. 1a-47a. The court held that the FSIA "protects an individual official of a foreign government acting in his official capacity" as well as the state itself. *Id.* at 13a. Petitioners' claims could not, the court held, proceed under the FSIA's domestic tort exception, 28 U.S.C. 1605(a)(5), because Congress specifically addressed terrorism-related claims in a separate exception expressly limited to states designated by the Secretary of State as sponsors of terrorism, 28 U.S.C. 1605A(a)(1). If the tort exception were applied to acts of terrorism, "[a]n important procedural safeguard [of the terrorism exception]—that the foreign state be designated a state sponsor of terrorism—would in effect be vitiated." Pet. App. 31a. The court of appeals also affirmed the dismissal for lack of personal jurisdiction of the claims against the Saudi Princes for their private acts. Pet. App. 39a-47a.

DISCUSSION

Petitioners ask the courts of the United States to hold Saudi Arabia and several of its high-ranking officials responsible for the September 11 terrorist attacks, asserting jurisdiction on the basis of foreign actions by or on behalf of the Kingdom concerning funding for ostensible charities. Petitioners link the defendants to the September 11 attacks by alleging that respondents knew their charitable donations would be used to provide financial support to al Qaeda. The lower courts correctly concluded that Saudi Arabia and its officials are immune from suit for governmental acts outside the United States. Although the United States disagrees in certain respects with the

analysis of the court of appeals, further review by this Court to determine the best legal basis for that immunity is unwarranted. Nor is review warranted as to whether petitioners' allegations concerning the Princes' support of al Qaeda permit the exercise of personal jurisdiction over those defendants.

A. The Saudi Princes Are Immune From Suit For Their Official Acts That Form The Basis Of Petitioners' Suit

1. The United States has long recognized the principle that foreign sovereigns are generally immune from suit in our courts. *The Schooner Exchange* v. *M 'Faddon*, 11 U.S. (7 Cranch) 116, 137 (1812). Wrongs perpetrated by foreign sovereigns generally have been recognized as appropriate "for diplomatic, rather than legal," resolution. *Id.* at 146. In addition, the Court has upheld "[t]he immunity of individuals from suits brought in foreign tribunals for acts done within their own States, in the exercise of governmental authority." *Underhill* v. *Hernandez*, 168 U.S. 250, 252 (1897). In fact, "the immunity which all civilized nations allow to foreign ministers" when representing their sovereigns was an established practice from which the Court extrapolated broader principles of state sovereign immunity in *The Schooner Exchange*, 11 U.S. (7 Cranch) at 138.

In light of the potentially significant foreign relations consequences of subjecting another sovereign state to suit, the Court historically looked to "the political branch of the government charged with the conduct of foreign affairs" for an indication whether immunity should be recognized. *Republic of Mexico* v. *Hoffman*, 324 U.S. 30, 34 (1945). The Executive similarly provided the judiciary with suggestions of immunity for foreign *officials* sued for their governmental

acts, based on the Executive's judgments regarding customary international law and reciprocal practice. *E.g.*, *Greenspan* v. *Crosbie*, No. 74 Civ. 4734 (GLG), 1976 WL 841, at *2 (S.D.N.Y. Nov. 23, 1976); *Waltier* v. *Thomson*, 189 F. Supp. 319, 320-321 (S.D.N.Y. 1960). Where the Executive made no specific recommendation about immunity in a case, the courts decided the question "in conformity to the principles" the Executive had previously articulated. *Republic of Mexico*, 324 U.S. at 35 (state immunity); *Heaney* v. *Government of Spain*, 445 F.2d 501, 504-506 (2d Cir. 1971) (official immunity).

For much of the Nation's history, the Executive followed a theory of absolute foreign sovereign immunity, "under which 'a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign.'" *Permanent Mission of India to the U.N.* v. *City of New York*, 127 S. Ct. 2352, 2356 (2007) (quoting Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State, to Philip B. Perlman, Acting Att'y Gen. (May 19, 1952), *reprinted in Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 711-715 (1976)). In 1952, however, the State Department adopted the "restrictive" theory of foreign sovereign immunity, under which foreign states would be granted immunity only for their sovereign or public acts, and not for their commercial acts. See *Alfred Dunhill*, 425 U.S. at 698. Significantly, even after endorsing the restrictive theory of immunity for foreign *states*, the Executive continued to recognize the immunity of foreign *officials* for their official acts in circumstances in which

the state would not itself be immune. See *Greenspan*, 1976 WL 841, at *2.[2]

In 1976, Congress enacted the FSIA, which, "[f]or the most part, * * * codifies, as a matter of federal law, the restrictive theory of sovereign immunity." *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 488 (1983). By its terms, the FSIA governs the immunity of a "foreign state," which is defined to include an "agency or instrumentality" of the state. 28 U.S.C. 1603(a). The statute makes no reference to the immunity of foreign officials. The Executive recently has reiterated that it "generally recognizes foreign officials to enjoy immunity from civil suit with respect to their official acts—even including, at least in some situations, where the state itself may lack immunity under the FSIA." U.S. Amicus Br. at 21, *Matar* v. *Dichter*, 563 F.3d 9 (2d Cir. 2009) (No. 07-2579).

2. The court of appeals held that the Princes are immune under the FSIA for their official acts, reasoning that "an individual official of a foreign state acting in his official capacity is the 'agency or instrumentality' of the state, and is thereby protected by the" statutory immunity. Pet. App. 14a (quoting 28 U.S.C. 1603(a)). The United States agrees with the court's conclusion that the Princes are immune from petitioners' claims. But in the view of the United States, that immunity is properly founded on non-statutory principles articulated by the Executive, not the FSIA. That difference of opinion on the correct legal basis for the individual defendants' official immunity does not, however, warrant this Court's review.

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[2] The immunity of federal officials for official acts similarly extends beyond the immunity of the federal government. 28 U.S.C. 2679(b)(1).

a. The text, structure, and history of the FSIA demonstrate that it was not intended to address the immunity of foreign officials. Section 1603(a) provides that the phrase "foreign state" includes an "agency or instrumentality." 28 U.S.C. 1603(a). Congress's use of the terms "agency" and "instrumentality" rather than "agent" suggests they were not intended to encompass natural persons. That conclusion is reinforced by Subsection (b)'s definition of "agency or instrumentality" as an "entity" that "is a separate legal person, corporate or otherwise," which indicates an exclusive concern with non-natural "entit[ies]." 28 U.S.C. 1603(b).

Other features of the FSIA confirm that understanding. For example, the statute makes "the property of an agency or instrumentality of" a designated terrorist state subject to execution to satisfy a terrorism-related judgment against the state itself. See 28 U.S.C. 1610(g)(1). It is difficult to believe that Congress intended, as would follow from the court of appeals' ruling, that the personal property of every official or employee of a state sponsor of terrorism would be available for execution to satisfy a terrorism-related judgment against the state. Similarly, the FSIA's focus on the status of an entity as an agency or instrumentality at the time suit was filed, see *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 478 (2003), would mean, if applied in the same fashion to the immunity of officials, that a plaintiff could circumvent that immunity by waiting until an official left office. Congress is unlikely to have conferred a time-limited immunity of this nature.

The FSIA's legislative history further demonstrates that Congress did not intend to supplant existing principles regarding the immunity of foreign officials. In clarifying that the FSIA would not affect diplomatic

or consular immunity, notwithstanding the tort exception's reference to torts committed by foreign officials acting within the scope of their authority, the House report explained that the statute would "deal[] only with the immunity of foreign states." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 21 (1976) (*House Report*). Further, the report noted that with regard to discovery, "official immunity," of a kind existing separate from and outside of the FSIA, would apply if a litigant sought to depose a "high-ranking official of a foreign government." *Id.* at 23.

b. As petitioners note (Pet. 15-16), the courts of appeals disagree over whether the FSIA governs the immunity of foreign officials. Compare Pet. App. 19a (applying FSIA), *Belhas* v. *Ya'alon*, 515 F.3d 1279, 1284-1288 (D.C. Cir. 2008), *Keller* v. *Central Bank of Nigeria*, 277 F.3d 811 (6th Cir. 2002), *Byrd* v. *Corporacion Forestal y Industrial de Olancho*, 182 F.3d 380 (5th Cir. 1999), and *Chuidian* v. *Philippine Nat'l Bank*, 912 F.2d 1095, 1101 (9th Cir. 1990), with *Yousef* v. *Samantar*, 552 F.3d 371, 381 (4th Cir. 2009) (holding FSIA inapplicable, remanding for consideration of other sources of immunity), and *Enahoro* v. *Abubakar*, 408 F.3d 877, 882 (7th Cir. 2005), cert. denied, 546 U.S. 1175 (2006). But that disagreement appears to be of little practical consequence, and is of no consequence where, as here, respondents would be immune from suit under both the FSIA and principles articulated by the Executive.

Notably, the Ninth Circuit, the first of the courts of appeals to adopt the FSIA as the framework for analyzing foreign official immunity, did so in order to *protect* foreign officials from suit and to prevent the FSIA from "be[ing] vitiated if litigants could avoid

immunity simply by recasting the form of their pleadings" to name individual foreign officials as defendants. *Chuidian*, 912 F.2d at 1102. Where, as in *Chuidian* and this case, the lower courts apply the FSIA to provide immunity and the Executive also would recognize such immunity, the different approaches produce the same result, and the divergence in rationales becomes irrelevant. Indeed, in a case subsequent to this one, the Second Circuit held that the two sources of immunity are complementary, rather than mutually exclusive. See *Matar*, 563 F.3d at 13 (holding that "whether the FSIA applies to former officials or not, they continue to enjoy immunity under common law"). The *Matar* holding suggests that a defendant never could be subject to suit under the FSIA where the principles of immunity recognized by the Executive afford a broader immunity, thus eliminating the possibility of this kind of conflict.[3]

Questions have emerged in two contexts in which the FSIA might provide a less expansive immunity than the principles recognized by the Executive, but whether there is any genuine divergence is still unclear. First, as noted above, application of the FSIA framework raises the problematic prospect that, under *Dole Food*, foreign officials could lose immunity upon leaving office. See *Yousef*, 552 F.3d at 383 (holding that FSIA does not protect former officials, but remanding for consideration of non-FSIA immunity). But that potential anomaly so far has not led to untoward results. In *Matar*, the Second Circuit found it unnecessary to decide how *Dole Food* would apply to official immunity under the FSIA because, as noted above,

[3] Although the Executive retains the authority to decline to recognize immunity in a case in which the FSIA would provide immunity, that issue is not presented in this case.

"whether the FSIA applies to former officials or not, they continue to enjoy immunity under common law." 563 F.3d at 13. And in *Belhas*, the D.C. Circuit concluded that the temporal rule of *Dole Food* does not apply to foreign officials in light of differences between a foreign state's relationship to its officials and the state's relationship to corporate entities, as in *Dole Food*. 515 F.3d at 1286. That holding again eliminated any practical difference between the FSIA and Executive principles as the source of official immunity.

A second situation of possible divergence has arisen when foreign officials are sued individually for official acts falling within the FSIA's commercial activities exception. Two appellate decisions have upheld jurisdiction over foreign government officials in this circumstance, raising the possibility that the FSIA approach to official immunity would have a narrower scope than that based on principles recognized by the Executive Branch. See *Byrd*, 182 F.3d at 382, 384-385, 389-391 (alleged conspiracy by state-owned corporation to take control of sawmill); *Keller*, 277 F.3d at 816-817 (alleged conspiracy of officials at state bank to defraud plaintiff). But, in fact, principles recognized by the Executive also might have allowed those two suits to go forward. In neither case did the Executive recommend immunity, nor did the courts consider non-statutory immunity. Recently, moreover, the Executive has indicated that "it is not clear whether (and if so, to what extent) [non-statutory] immunity applies to corporate officers of a state owned commercial enterprise." U.S. Ltr. Br. at 10, *Kensington Int'l Ltd.* v. *Itoua*, 505 F.3d 147 (2d Cir. 2007) (No. 06-1763). That issue is not, in any event, presented here, where the challenged activity is not commercial in nature. See Pet. App. 39a.

Because the judgment of the court of appeals upholding the individual officials' immunity was correct, further review by this Court regarding the precise basis of that immunity—a question that may be of limited practical significance—is unwarranted.

B. The Court Of Appeals Correctly Held That Petitioners' Claims Do Not Satisfy The Domestic Tort Exception

1. When Congress adopted the FSIA in 1976, it included an exception to immunity for certain non-commercial claims involving injuries "occurring in the United States and caused by the tortious act or omission of [the] foreign state." 28 U.S.C. 1605(a)(5). The tort exception is limited in several significant respects. It retains immunity with respect to "discretionary function[s]" as well as particular torts likely to concern public activity, such as "malicious prosecution." 28 U.S.C. 1605(a)(5)(A) and (B). In addition, although the text "is susceptible of the interpretation that only the effect of the tortious action need occur" in the United States, *Asociacion de Reclamantes* v. *United Mexican States*, 735 F.2d 1517, 1524 (D.C. Cir. 1984) (Scalia, J.), cert. denied, 470 U.S. 1051 (1985), this Court has clarified that the tort exception "covers only torts occurring within the territorial jurisdiction of the United States," *Amerada Hess*, 488 U.S. at 441.

In 1996 and again in 2008, Congress adopted a further exception to immunity expressly addressed to terrorism-related claims. 28 U.S.C. 1605A. In contrast to the domestic tort exception, the terrorism exception has no territorial limitation; it was specifically intended to permit United States victims to sue for injuries sustained from certain acts of terrorism abroad. See, *e.g.*, 28 U.S.C. 1605A(a)(2)(A)(iii) (addressing "a case in which the act occurred in the foreign state against

which the claim has been brought"). The terrorism exception permits claims based on "torture, extrajudicial killing, aircraft sabotage, [and] hostage taking." 28 U.S.C. 1605A(a)(1). The exception also applies where the foreign state provided "material support or resources for such an act" of terrorism. *Ibid.* The material-support provision has been construed to permit the exercise of jurisdiction in United States courts "based on a state's general 'material support' for a terrorist organization," as long as that support was a "proximate cause" of the plaintiff's injury. *Kilburn* v. *Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1129 (D.C. Cir. 2004). The terrorism exception contains, however, a critical political check. Such claims can only be brought against a country that has been "designated as a state sponsor of terrorism" by the Secretary of State. 28 U.S.C. 1605A(a)(2)(A)(i)(I). Saudi Arabia has never been so designated.

2. The court of appeals held that "claims based on terrorism must be brought under the Terrorism Exception, and not under any other FSIA exception." Pet. App. 33a. In fact, contrary to the court's analysis, the tort and terrorism exceptions are not mutually exclusive. But the court was correct that the tort exception's territorial limitation cannot be avoided by pleading the kind of "material support" claim that falls within the terrorism exception when brought against a country designated by the Secretary of State. To satisfy the domestic tort exception, petitioners must allege that Saudi Arabia, its officials, or employees, committed tortious acts within the United States. Petitioners' complaints do not satisfy that requirement. The court of appeals' decision is the first to consider the interplay of the domestic tort and terrorism exceptions in circumstances such as these, and its

holding on this question does not warrant this Court's review.

a. The domestic tort exception is not categorically unavailable for claims that might be brought under the terrorism exception if the foreign state were designated by the Secretary of State. The court of appeals' reliance (Pet. App. 33a) on language that the terrorism exception applies only in a "case not otherwise covered by this chapter," 28 U.S.C. 1605A(a)(1), was misplaced. The court reasoned from this language that "there would be no need for plaintiffs ever to rely on the Terrorism Exception" unless that provision were exclusive. Pet. App. 31a. But that conclusion is mistaken, because the tort exception is more limited than the terrorism exception in a critical respect. The tort exception "covers only torts occurring within the territorial jurisdiction of the United States," *Amerada Hess*, 488 U.S. at 441. By contrast, the terrorism exception contains no geographic limitation. This difference provides the key to understanding Congress's passage of the terrorism exception. As reflected in the legislative history of earlier versions of the legislation, Congress's concern was not to impose new limits on the domestic tort exception, but instead to expand jurisdiction to cover a narrow class of claims based on conduct abroad. See, *e.g.*, H.R. Rep. No. 702, 103d Cong., 2d Sess. 3, 5 (1994) (explaining that the bill would "expand" jurisdiction to include claims by "an American who is grievously mistreated abroad by a foreign government"). The court erred in concluding that Congress intended in 1996 to narrow the tort exception so as to exclude from its scope acts of terrorism committed within the United States.

b. The United States agrees with the court of appeals, however, that the FSIA should not be construed to allow circumvention of the important limitations Congress imposed on both the domestic tort and the terrorism exceptions to immunity. Petitioners do not allege that officials or employees of the Kingdom of Saudi Arabia personally committed tortious acts in the United States or directed others to do so. The act of Saudi Arabia that forms the central basis of petitioners' claims is that, outside the United States, it donated funds to ostensible charities. *Id.* at 5a. Such acts taken by a foreign government outside the United States, without more, would fall outside the scope of the domestic tort exception. Petitioners seek to overcome the territorial limit on the tort exception by alleging that Saudi Arabia funneled money through those charities to al Qaeda, thereby providing "material support to [the] terrorists" who committed the September 11 attacks in the United States. *Id.* at. 28a; see Pet. 4 (claim concerns Saudi Arabia's alleged "role[] in directing significant financial and logistical support to al Qaeda"). Such allegations of "material support" could establish jurisdiction under the terrorism exception over a state designated as a state sponsor of terrorism by the Secretary of State. But as the court of appeals recognized, if all allegations of extraterritorial "material support" by a state to a terrorist organization were permitted to satisfy the domestic tort exception, "[a]n important procedural safeguard [of the terrorism exception]—that the foreign state be designated a state sponsor of terrorism—would in effect be vitiated." Pet. App. 31a.

The domestic tort exception, moreover, requires not merely that the foreign state's extraterritorial conduct have some causal connection to tortious injury in the United States, but that "the tortious act or omission of

that foreign state or of any official or employee" be committed within the United States. 28 U.S.C. 1605(a)(5). In *Amerada Hess*, the Court considered and rejected the argument that domestic effects of a foreign state's tortious conduct abroad satisfy the exception. 488 U.S. at 441. The Court noted that, in contrast to the FSIA's commercial activity exception, 28 U.S.C. 1605(a)(2), the tort exception "makes no mention of 'territory outside the United States' or of 'direct effects' in the United States." *Amerada Hess*, 488 U.S. at 441. See *Asociacion de Reclamantes*, 735 F.2d at 1524 ("[W]here Congress intended" domestic effects to suffice "it said so more explicitly," as in Section 1605(a)(2)); *House Report* 21 (to come within the exception, "the tortious act or omission of a foreign state or its officials or employees * * * must occur within the jurisdiction of the United States"). The tort exception's territorial limitation protects against conflict that would arise from asserting jurisdiction over a foreign government's actions taken in its own territory, and also serves to deter foreign courts from exercising jurisdiction over the United States for actions taken in the United States.

Accordingly, the courts of appeals have recognized that jurisdiction under the tort exception must be based entirely on acts of the foreign state within the United States. See *Asociacion de Reclamantes*, 735 F.2d at 1525 ("the entire tort" committed by the foreign state must "have occurred here"); *Persinger* v. *Islamic Republic of Iran*, 729 F.2d 835, 842 (D.C. Cir. 1984) ("Iran is immune from tort suits here for actions taken by it on its own territory."), cert. denied, 469 U.S. 81 (1984). For example, in *O'Bryan* v. *Holy See*, 556 F.3d 361 (2009), petition for cert. pending, No. 08-1384 (filed May 7, 2009), the Sixth Circuit held that "any portion of plaintiffs' claims that relies upon acts

committed by the Holy See abroad cannot survive," including "negligent supervision" abroad of clergy in the United States. *Id.* at 385.

Petitioners do not argue that jurisdiction under the tort exception could be premised entirely on acts by Saudi Arabia and its officers or employees in the United States, as the cases just cited require. Rather, petitioners contend that the domestic acts of the September 11 hijackers should be ascribed to Saudi Arabia under a concerted-action theory. Pet. Reply Br. 7 (relying on "conspiracy and aiding and abetting claims" to satisfy territoriality requirement). Jurisdiction under the tort exception, however, cannot be based on the tortious acts of third parties, even if the applicable substantive law would permit holding the foreign state liable for those acts under a theory of secondary liability. The jurisdictional inquiry is one of federal law, and the FSIA tort exception strips foreign states of immunity only for injuries "caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment." 28 U.S.C. 1605(a)(5). It is the foreign state's act or omission—not that of any third party—that must occur in the United States.[4]

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[4] The Federal Insurance complaint does allege that "a Saudi intelligence official named Omar al Bayoumi provided direct assistance to * * * two of the September 11th hijackers" to facilitate their settlement in San Diego in early 2000. C.A. App. 2004 (¶ 411). That allegation, though it does satisfy the territoriality requirement, does "not permit the court to infer more than the mere possibility of misconduct," and is therefore inadequate to sustain petitioners' burden. *Ashcroft* v. *Iqbal*, No. 07-1015 (May 18, 2009), slip op. 15. Indeed, the National Commission on Terrorist Attacks Upon the United States (9/11 Commission) found, after considering that connection and others, that al

The court of appeals' decision is the first to grapple with the interplay between the FSIA's terrorism and domestic tort exceptions in a factual circumstance of this kind. Although petitioners assert a conflict with appellate decisions permitting suit under the domestic tort exception for acts of extrajudicial killing, those cases are distinguishable because they involved acts in the United States directly attributable to the foreign governments. See *Liu* v. *Republic of China*, 892 F.2d 1419, 1421-1422 (9th Cir. 1989) (Taiwanese intelligence agent, acting in the United States, recruited

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Bayoumi was "an unlikely candidate for clandestine involvement with Islamic extremists." *9/11 Commission Report* 218 (visited May 27, 2009) <http://www.9-11commission.gov/report/911Report.pdf>.

The same complaint alleges that certain charities used offices in the United States to provide financing to al Qaeda. See, *e.g.*, C.A. App. 1942 (¶ 108) (alleging Benevolence International Foundation laundered over $1 million for al Qaeda). The claims against those charities remain pending in the district court. See Pet. App. 4a; *id.* at 165a-166a & n.30. Petitioners contend (Pet. 7) that the charities were sufficiently controlled by Saudi Arabia that their acts should be ascribed to Saudi Arabia itself. Especially in light of the law's respect for corporate personality, which the FSIA recognizes, see *Dole Food*, 538 U.S. at 474-476, the complaint's "formulaic recitation," *Iqbal*, slip op. 17 (quoting *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 555 (2007)), of incidents of control by Saudi Arabia—repeated verbatim with respect to eight charities, see C.A. App. CA. App. 1934-1964 (¶¶ 85, 114, 131, 151, 168, 181, 191, 208)—provides an insufficient basis for deeming the acts of the charities to be those of Saudi Arabia. Without further factual allegations supporting a conclusion that Saudi Arabia directed acts by the charities in the United States that assisted the September 11 attacks, the complaint fails to satisfy the FSIA's territoriality requirement. In any event, the sufficiency of these allegations to satisfy the FSIA's territoriality requirement as to Saudi Arabia itself presents a fact-bound issue that does not warrant review by this Court.

assassins); see also *De Letelier* v. *Republic of Chile*, 748 F.2d 790, 791 (2d Cir. 1984) (noting one assassin was "an American citizen working for Chilean intelligence"), cert. denied, 471 U.S. 1125 (1985). No other court of appeals has considered how to apply the domestic tort exception to allegations of extraterritorial material support for terrorism on the part of a state that has not been designated a sponsor of terrorism. Although the court of appeals' analysis has certain flaws, the court correctly identified the danger that a complaint making this kind of allegation would evade the limitations of the domestic tort and terrorism exceptions. Most important, the court's conclusion that petitioners had not overcome Saudi Arabia's immunity was correct. Further review by this Court is therefore unwarranted.

C. The Court Of Appeals' Personal Jurisdiction Holding, The Scope Of Which Is Still Unclear, Does Not Warrant This Court's Review

1. The touchstone under the Due Process Clause for exercising personal jurisdiction in a civil case is the "requir[ement] that individuals have 'fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign.'" *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 472 (1985) (second pair of brackets in original) (quoting *Shaffer* v. *Heitner*, 433 U.S. 186, 218 (1977) (Stevens, J., concurring)). Although due process is not satisfied merely because a defendant can "foresee" that his actions will "have an effect" in the foreign jurisdiction, one who undertakes "intentional, and allegedly tortious, actions" that are "expressly aimed" at the forum is subject to suit there. *Calder* v. *Jones*, 465 U.S. 783, 789 (1984). It does not matter in such circumstances that the individual

defendant is not "able to control" the means by which the tortious injury is caused in the foreign jurisdiction, as long as he acted with the "kn[owledge] that the brunt of th[e] injury" from his tortious act "would be felt" in the foreign forum. *Ibid.* Where the defendant acted with such knowledge, he "must 'reasonably anticipate being haled into court there' to answer for" his actions. *Id.* at 790 (quoting *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 297 (1980)).

2. It is unclear precisely what legal standard the court of appeals applied in affirming the district court's holding that it lacked personal jurisdiction over the Princes for their personal actions. Petitioners focus (Pet. 26) on the court of appeals' statement that allegations that the Princes "intended to fund al Qaeda through their donations to Muslim charities," "[e]ven assuming that [they] were aware of Osama bin Laden's public announcements of jihad against the United States," could not form the basis of jurisdiction. Pet. App. 43a-44a. 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. *Calder*, 465 U.S. at 789-790.

The court of appeals' decision, however, is subject to a more limited construction, which focuses on the inadequacy of the particular allegations before it. At several points, the court of appeals stressed that petitioners' claims were based on "the princes' alleged *indirect* funding of al Qaeda." Pet. App. 44a (emphasis added). See *id.* at 42a-43a (stressing the "causal chain" petitioners rely upon). Where the connection between

the defendant and direct tortfeasor is separated by intervening actors, the requirement of showing an "intentional, * * * tortious, act[]" on the part of the defendant, *Calder*, 465 U.S. at 789, demands more than a simple allegation. Petitioners would need to allege facts that could support the conclusion that the defendant acted with the requisite intention and knowledge. See *Ashcroft* v. *Iqbal*, No. 07-1015 (May 18, 2009), slip op. 16-19.

Read in that fashion, the court of appeals' opinion comports with the opinions of the district court that were under review. That court stressed the inadequacy of petitioners' conclusory allegations to show that the Princes had knowledge that their donations to the charities were being diverted to support international terrorism. See, *e.g.*, Pet. App. 187a (despite "conclusory allegations that Prince Sultan aided and abetted terrorism," petitioners did "not offer any facts to lend support to their allegation that Prince Sultan purposefully directed his activities at this forum by donating to charities that he knew at the time supported international terrorism"); *id.* at 188a ("Conclusory allegations that [Prince Turki] donated money to charities, without specific factual allegations that he knew they were funneling money to terrorists, do not suffice."). Thus, the district court rightly focused on the sufficiency of the allegations to establish that the defendants' intentional acts of funding the charities were done with the knowledge that they would support al Qaeda's jihad against the United States. Regardless whether those conclusions of insufficiency were correct, the court's case-specific holdings on this score do not warrant review by this Court.

3. Even assuming that the court of appeals intended to establish a new legal standard for personal jurisdiction in this case, the presence of a circuit split is doubtful. In each of the three appellate cases cited by petitioners as evidence of a conflict (Pet. 28-29), the defendant was a primary wrongdoer—not, as here, a person whose alleged tortious act consisted of providing material support to another party engaged in tortious conduct. See *Mwani* v. *bin Laden*, 417 F.3d 1, 13 (D.C. Cir. 2005) (Osama bin Laden and al Qaeda "orchestrated the bombing of the American embassy in Nairobi" and other attacks against the United States.); *Panavision Int'l, L.P.* v. *Toeppen*, 141 F.3d 1316, 1322 (9th Cir. 1998) (defendant sought to extort money from plaintiff); *Jan-mark, Inc.* v. *Reidy*, 132 F.3d 1200, 1202 (7th Cir. 1997) (defendant threatened plaintiff's customers in an "effort[] to ruin [plaintiff's] business"). Whatever uncertainties inhere in the court of appeals' decision, it should not be construed to extend to cases of this different kind and thus to create a circuit conflict.

Nor, contrary to the petitioners' suggestion (Pet. 31-32), is the court's error likely to interfere with the government's ability to combat terrorism through criminal prosecutions under the material support provisions of 18 U.S.C. 2339B or terrorism financing provisions of 18 U.S.C. 2339C. The court of appeals' decision concerns only personal jurisdiction. It does not speak to the legislative jurisdiction of Congress to apply federal law extraterritorially. Pet. App. 39a. Moreover, in a criminal case, personal jurisdiction is based on the physical presence of the defendant in the forum, independent of any minimum-contacts analysis. See *Ker* v. *Illinois*, 119 U.S. 436, 443-444 (1886).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2009

APPENDIX C

IN THE SUPREME COURT OF THE UNITED STATES

No. 13-318

JOHN PATRICK O'NEILL, JR., ET AL., PETITIONERS

v.

AL RAJHI BANK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

Petitioners filed suit under the Antiterrorism Act of 1990 (ATA), 18 U.S.C. 2331 *et seq*., against hundreds of defendants, including the respondents before this Court, for injuries suffered as a result of the September 11, 2001, terrorist attacks. The district court dismissed the claims against certain defendants for failure to state a claim, and against others for lack of personal jurisdiction. The court of appeals affirmed the dismissals for failure to state a claim and some, but not all, of the dismissals for lack of personal jurisdiction. The questions presented are:

1. Whether the ATA's civil remedy provision establishes a cause of action for aiding and abetting acts of international terrorism, and requires a plaintiff to allege that the defendant's actions proximately caused the plaintiff's injuries.

2. Whether the court of appeals correctly held that the district court lacked personal jurisdiction over certain defendants.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

Petitioners are persons and entities that suffered injuries and losses as a result of the September 11, 2001, terrorist attacks against the United States. Pet. App. 2a. Petitioners filed multiple lawsuits asserting various claims against hundreds of defendants, including foreign states, financial institutions, other organizations, and private individuals. *Id*. at 20a. The lawsuits were consolidated in the United States

District Court for the Southern District of New York. *Id*. at 32a. The respondents before this Court consist of certain defendants who were dismissed from the case on the ground that petitioners failed to state a claim against them (the Rule 12(b)(6) respondents) and certain defendants who were dismissed on the ground that the district court lacked personal jurisdiction over them (the personal-jurisdiction respondents).

1. Petitioners filed their complaints between 2002 and 2005. Pet. 5. In 2005, the district court dismissed several foreign sovereigns and foreign sovereign entity defendants, including the Kingdom of Saudi Arabia and members of the Saudi royal family acting in their official capacities, under the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1602 *et seq*. The court also held that it lacked personal jurisdiction over members of the Saudi royal family for their personal actions. Pet. 6. In 2008, the Second Circuit affirmed in a decision referred to by the parties as *Terrorist Attacks III*. Pet. App. 38a, 185a-231a; see Pet. 6.

Petitioners sought this Court's review of the FSIA and personal-jurisdiction questions. The Court invited the views of the Solicitor General. See 08-640 U.S. Amicus Br. (filed May 29, 2009). The government recommended that the Court deny certiorari, and the Court did so.[1]

2. a. Between 2005 and 2010, the district court dismissed claims against certain other defendants for failure to state a claim under the Antiterrorism Act of

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[1] The Second Circuit recently held that the judgments in favor of the Kingdom of Saudi Arabia and another entity should be reopened. 741 F.3d 353 (2013). Those parties have filed a petition for certiorari. See *Kingdom of Saudi Arabia v. Federal Ins. Co.,* petition for cert. pending, No. 13-1146 (filed Mar. 19, 2014).

1990 (ATA), 18 U.S.C. 2331 *et seq*., which creates a damages action for "[a]ny national of the United States injured in his or her person, property, or business by reason of an act of international terrorism." 18 U.S.C. 2333(a); see Pet. App. 1a n.*, 116a n.12; Pet. 8 n.5; 11-3294 Docket entry No. (Docket No.) 299, at 12-21 (2d Cir. Apr. 20, 2012) (Pet. C.A. Br.). Petitioners alleged that the defendants in question provided funds to purported charities that channeled money to al Qaeda and provided financial services to organizations and individuals allegedly affiliated with al Qaeda. Pet. App. 8a. The court entered final judgments in the defendants' favor pursuant to Federal Rule of Civil Procedure 54(b). Pet. C.A. Br. 21. Petitioners appealed the dismissal of five of the defendants. Pet. App. 1a n.*.

b. Between 2006 and 2012, the district court dismissed various other defendants for lack of personal jurisdiction and entered Rule 54(b) judgments in their favor. Pet. App. 32a-34a. Petitioners appealed with respect to 37 defendants. *Id*. at 17a n.*.

3. As relevant here, the court of appeals resolved the appeals in two separate opinions issued on the same day.

a. The court of appeals affirmed the district court's dismissal of the claims against five defendants—the Rule 12(b)(6) respondents before this Court—for failure to state a claim under the ATA. Pet. App. 1a-15a. The court explained that petitioners alleged that respondents were "both primarily and secondarily liable" under the ATA based on their alleged provision of financial support to charities that funneled money to al Qaeda. *Id*. at 5a-9a. With respect to petitioners' secondary-liability claims, the court noted that it had recently held that "a defendant cannot be liable under the ATA

on an aiding-and-abetting theory of liability" because the ATA does not expressly mention secondary actors. *Id*. at 6a (citing *Rothstein v. UBS AG*, 708 F.3d 82, 97 (2d Cir. 2013)).

Turning to the standard of causation on the claims of primary liability, the court of appeals invoked its holding in *Rothstein* that the ATA's requirement that a plaintiff must demonstrate her injuries occurred "by reason of" an act of terrorism, 18 U.S.C. 2333(a), encompasses a showing of proximate cause. Pet. App. 7a; see *Rothstein*, 708 F.3d at 95. The court concluded that petitioners' allegations that their injuries were the reasonably foreseeable consequence of respondents' indirect support of al Qaeda through intermediaries were conclusory and therefore insufficient. Pet. App. 8a-9a. The court further observed that it was "not persuaded that providing routine banking services to organizations and individuals said to be affiliated with al Qaeda * * * proximately caused the September 11, 2001 attacks." *Id*. at 8a.

b. The court of appeals affirmed the district court's dismissal of the claims against 25 defendants for lack of personal jurisdiction, and remanded for jurisdictional discovery with respect to 12 others. Pet. App. 16a-54a. The court first explained that a court has "specific" personal jurisdiction over a defendant when the defendant has "'purposefully directed' his activities at residents of the forum" and the injuries "arise out of" those activities. *Id*. at 37a (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472-473 (1985)). The court further explained that under *Calder v. Jones*, 465 U.S. 783 (1984), a defendant must have taken "'intentional, and allegedly tortious, actions . . . expressly aimed' at the forum." Pet. App. 37a (quoting 471 U.S. at 789). In addition, "the fact that harm in

the forum is foreseeable * * * is insufficient for the purpose of establishing specific personal jurisdiction over a defendant." *Ibid*.

Applying that standard, the court of appeals held that petitioners' allegations against several sets of defendants were insufficient to establish personal jurisdiction. First, allegations that certain defendants knowingly maintained bank accounts and provided routine financial services to individuals and charities associated with al Qaeda were insufficient to establish that the provider institutions had expressly aimed their conduct at the United States. Pet. App. 40a-42a. Second, allegations that other defendants provided support to Osama bin Laden and al Qaeda prior to 1993, in the form of shareholder distributions and government contracts, were also insufficient, given the lack of any connection between the defendants' conduct and al Qaeda's attack on the United States. *Id*. at 42a-43a. Third, allegations that certain defendants served as officials in organizations that allegedly supported terrorist groups were insufficient because petitioners failed to allege that those defendants personally "played any role in directing any support to benefit al Qaeda." *Id*. at 44a (emphasis omitted).

The court of appeals held, however, that jurisdictional discovery was warranted with respect to 12 defendants. Pet. App. 45a. The court observed that those "defendants' alleged support of al Qaeda is more direct," *ibid*., because it included direct support for al Qaeda and aid to the September 11 hijackers. *Id*. at 46a-48a. Petitioners' allegations, the court stated, suggested that the defendants may have aided al Qaeda knowing that al Qaeda was targeting the United States. *Id*. at 47a-48a.

DISCUSSION

Petitioners challenge the court of appeals' holdings concerning the substantive scope of liability under the ATA, as well as its holding that the district court lacked personal jurisdiction over the personal-jurisdiction respondents. Further review is not warranted. None of the challenged rulings conflicts with any decision of this Court or another court of appeals.

Private actions under the ATA can be an important means of fighting terrorism because they may disrupt and deter the provision of financing and other support to terrorist organizations. But the Second Circuit's decision does not foreclose plaintiffs from relying on the ATA to obtain redress from those who fund or otherwise provide substantial assistance to terrorists, and the court correctly construed the ATA to require that a defendant's actions have proximately caused the plaintiff's injuries. In its personal-jurisdiction decision, the court of appeals applied settled standards, and petitioners' disagreement with aspects of the court's fact-specific analysis of the sufficiency of the allegations does not warrant review.

A. The Court Of Appeals' Holding That The ATA Does Not Provide A Cause Of Action For Aiding And Abetting Terrorist Acts Does Not Warrant Review

Petitioners challenge (Pet. 11-16) the court of appeals' holding that the ATA does not impose secondary liability for aiding and abetting acts of international terrorism. Although, in the government's view, the ATA is more appropriately construed to impose aiding-and-abetting liability, further review is not warranted. The Second Circuit appears to have

assumed that the ATA imposes *primary* liability on those who provide material support to terrorists. The decision is therefore consistent with the Seventh Circuit's holding in *Boim v. Holy Land Foundation for Relief & Dev.*, 549 F.3d 685 (2008), cert. denied, 558 U.S. 981 (2009), that the ATA imposes material-support liability on individuals and entities who fund or otherwise support terrorists. *Id*. at 690.

1. a. Section 2333(a) creates a tort action for individuals injured "by reason of an act of international terrorism." 18 U.S.C. 2333(a). The scope of liability imposed by Section 2333(a) should therefore generally be determined in light of the principle that "when Congress creates a federal tort it adopts the background of general tort law." *Staub v. Proctor Hosp.*, 131 S. Ct. 1186, 1191 (2011); see 137 Cong. Rec. 8143 (1991) (the ATA "accords victims of terrorism the remedies of American tort law"); cf. *Meyer v. Holley*, 537 U.S. 280, 285 (2003) (construing Fair Housing Act to impose vicarious liability in accord with tort principles, despite statute's silence on the question).

Under background tort principles, a defendant may in certain circumstances be secondarily liable when he has knowingly given substantial assistance to a primary actor's tortious conduct and the primary actor causes injury. See 4 Restatement (Second) of Torts § 876, at 315 (1979); *Central Bank v. First Interstate Bank*, 511 U.S. 164, 181-182 (1994); *Halberstam v. Welch*, 705 F.2d 472, 477 (D.C. Cir. 1983). The government accordingly argued in *Boim* that the ATA is properly construed to incorporate background tort-law principles of aiding-and-abetting liability.[2] See

[2] Contrary to the Second Circuit's reasoning (see Pet. App. 6a-7a), *Central Bank* did not hold that "statutory silence" on secondary liability invariably precludes construing a statute to

Gov't Amicus Br., *Boim v. Quranic Literacy Inst.* (Nos. 01-1969, 01-1970) (7th Cir. 2001); Gov't Amicus Br., *Boim v. Holy Land Found.* (Nos. 05-1815, 05-1816, 05-1821, 05-1822) (7th Cir. 2008) (Gov't 2008 *Boim* Br.). That construction furthers the statute's purpose of permitting the "imposition of liability at any point along the causal chain of terrorism," thereby "interrupt[ing], or at least imperil[ing], the flow of money." S. Rep. No. 342, 102d Cong., 2d Sess. 22 (1992) (Senate Report).

Under that construction, the ATA imposes secondary liability on defendants who provide substantial assistance to terrorist organizations (or their front groups) by contributing funds, knowing that the entities have been so designated or that they engage in terrorism as part of their broader activities. The plaintiff would have to show, however, that the "act of international terrorism" that injured the victim was a reasonably foreseeable consequence of the defendant's contribution. See generally Gov't 2008 *Boim* Br. at 19-20; pp. 12-16, *infra*; cf. *Halberstam*, 705 F.2d at 477.

b. In *Boim*, the Seventh Circuit held that the ATA does not impose aiding-and-abetting liability as such. 549 F.3d at 689. The court adopted a construction of primary liability under the ATA, however, that appears to reach much of the conduct that would constitute aiding and abetting of terrorism. The court explained that Section 2333(a), which permits private

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impose aiding-and-abetting liability. *Central Bank* held that in the context of the implied private right of action under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq*., permitting aiding-and-abetting claims would be inconsistent with Section 10(b)'s focus on direct acts of fraud and Congress's establishment of "some forms of secondary liability" in other provisions of the securities laws. 511 U.S. at 174-178, 184.

actions based on "act[s] of international terrorism," defines that term to include "acts dangerous to human life that are a violation of the criminal laws of the United States." 18 U.S.C. 2331(1)(A). Giving money to terrorist groups, the Seventh Circuit reasoned, is "dangerous to human life," and it may violate 18 U.S.C. 2339A, which makes it a criminal offense to provide "material support or resources" to terrorists, "knowing or intending that they are to be used" in committing or preparing to commit one or more of a list of enumerated criminal offenses. 549 F.3d at 690.

Applying the material-support framework to terrorism funding, the Seventh Circuit held that an individual could be liable under the ATA for providing material support to a terrorist organization if he donated money to the group, knowing that the organization used some of its funds "in preparation for or in carrying out the killing or attempted killing of, conspiring to kill, or inflicting bodily injury on, an American citizen." *Boim*, 549 F.3d at 691. Thus, the court observed, the ATA "expressly impose[s] liability on a class of aiders and abettors," and "[p]rimary liability in the form of material support to terrorism has the character of secondary liability."[3] *Id.* at 691-692.

2. Contrary to petitioners' argument (Pet. 12-13), the decision below does not conflict with *Boim*. Like the Seventh Circuit, the Second Circuit concluded that the ATA does not impose liability for aiding and

[3] A material-support claim may not be completely coextensive with an aiding-and-abetting claim. For instance, Section 2339A(b)(1) exempts provision of "medicine or religious materials" from the definition of "material support or resources," 18 U.S.C. 2339A(b)(1), but an aiding-and-abetting claim could in theory be premised on such assistance.

abetting terrorist acts. Pet. App. 6a-7a. Although the Second Circuit did not explicitly address material-support liability, the court appears to have assumed that it is a valid basis for liability under the ATA. The court acknowledged (*id*. at 5a) that petitioners asserted not only that the Rule 12(b)(6) respondents aided and abetted terrorism, but also that their contributions to ostensible charities rendered them primarily liable under the material-support theory outlined in *Boim*. See Pet. C.A. Br. 68-69. Given that petitioners' claims against the Rule 12(b)(6) respondents rested solely on their alleged provision of aid to terrorists, rather than alleged personal commission of terrorist attacks, the court of appeals would not have needed to address the sufficiency of petitioners' allegations of proximate cause if it had rejected petitioners' material-support theory as well as their aiding-and-abetting theory. In addition, the court recognized that "Congress clearly intended to create impediments to terrorism by the 'imposition of liability at any point along the causal chain of terrorism.'" Pet. App. 9a (quoting Senate Report 22). The import of that statement is that ATA liability should extend to those who provide funding or other assistance to terrorists, even if they do not commit terrorist attacks themselves. The decision below is thus best read as assuming that an individual may be primarily liable under the ATA for knowingly providing material support in the form of funding.

3. In addition, this case would be a poor vehicle for considering whether the ATA is properly construed to impose aiding-and-abetting liability, because there is significant question whether petitioners' allegations would be sufficient to state claims under an aiding-and-abetting theory. See *Ashcroft v. Iqbal*, 556 U.S.

662, 677-680 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-556 (2007).

Petitioners allege that the Rule 12(b)(6) respondents aided and abetted terrorist acts by providing donations and financial services to charities that in turn provided funding to al Qaeda and other terrorist organizations. Pet. C.A. Br. 66-69; Pet. App. 8a. To state a claim based on aiding and abetting, petitioners were required to allege, as relevant here, that the Rule 12(b)(6) respondents provided substantial funds to the charities with knowledge that the charities were funneling money to terrorist groups. See p. 8, *supra*. The district court held, however, that petitioners had not alleged facts supporting an inference that respondents knew, or were deliberately indifferent to the possibility, that purported charities were supporting terrorist groups. See Pet. App. 108a-110a; Pet. C.A. Br. 20 (Rule 12(b)(6) dismissals were primarily based on insufficiency of knowledge allegations); see also 462 F. Supp. 2d 561, 563-564; 349 F. Supp. 2d 765, 831-834. The court's fact-bound conclusions are not obviously incorrect and do not warrant review.[4]

[4] For example, petitioners' most detailed allegations concern respondent Al Rajhi Bank, which allegedly donated to certain charities that were al Qaeda front organizations. Pet. C.A. Reply Br. 57-58 (Docket No. 580) (June 25, 2012). Petitioners' allegations that the charities held themselves out as bona fide organizations that conducted government-sanctioned activities, however, undercut any inference that the Bank was aware of the charities' alleged support for terrorism. Al Rajhi Bank C.A. Br. 18-19 (Docket No. 429) (Apr. 20, 2012). Petitioners allege that the charities were publicly known to fund al Qaeda (Pet. C.A. Reply Br. 68), but that assertion is in tension with petitioners' description of the charities' ostensibly legitimate appearance. The district court also concluded that petitioners' allegations about the Bank's provision of routine banking services to the charities, the private activities of the Al Rajhi family, and a

Because petitioners' allegations are thus likely insufficient in any event to state a claim for aiding and abetting terrorist acts, this case would not be a suitable vehicle to consider the availability of such secondary liability under the ATA.

B. The Court Of Appeals' Holding That The ATA Requires A Showing Of Proximate Causation Does Not Warrant Review

In the context of petitioners' claim that the Rule 12(b)(6) respondents are directly liable for providing material support to terrorist groups, the court of appeals correctly held that the ATA requires petitioners to allege that respondents' material support for terrorism proximately caused their injuries. Contrary to petitioners' argument (Pet. 16-17), that ruling does not conflict with *Boim*.

1. a. The ATA provides that a United States citizen may obtain redress when injured "by reason of an act of international terrorism." 18 U.S.C. 2333(a). The phrase "by reason of" indicates that the ATA requires a plaintiff to demonstrate some degree of causal connection between the "act of international terrorism" and her injuries. *Paroline v. United States*, 134 S. Ct. 1710, 1720 (2014) ("The words 'as a result of' plainly suggest causation."); *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 653-654 (2008) (holding that "by reason of" connotes causation).

As this Court has explained, there are two "separate but related" types of causation: cause in fact and

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United States warning that the Bank's financial services could be manipulated by al Qaeda itself, were insufficient to raise a plausible inference that the Bank knew that the specific charities at issue were supporting terrorism. See 349 F. Supp. 2d at 831-833; *Iqbal*, 556 U.S. at 678-680.

proximate cause. *Paroline*, 134 S. Ct. at 1719. "Cause in fact" refers to the actual cause of an injury, while "proximate cause" is "shorthand for the policy-based judgment that not all factual causes contributing to an injury should be legally cognizable causes." *CSX Transp., Inc. v. McBride*, 131 S. Ct. 2630, 2642 (2011). Although no "consensus" exists "on any one definition of 'proximate cause,'" *ibid.*, "[p]roximate cause is often explicated in terms of foreseeability or the scope of the risk created by the predicate conduct." *Paroline*, 134 S. Ct. at 1719.

The court of appeals correctly construed Section 2333(a) to impose a requirement of proximate causation.[5] "Proximate cause is a standard aspect of causation in criminal law and the law of torts." *Paroline*, 134 S. Ct. at 1720. In light of "proximate cause's traditional role" in tort actions, this Court has "more than once found a proximate-cause requirement built into a statute that did not expressly impose one," when the text and context did not suggest otherwise. *Ibid.*; see *Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters*, 459 U.S. 519, 529-536 (1983) (holding that the "by reason of"

[5] The ATA's "by reason of" language also requires factual causation. The court of appeals did not address the proper standard of factual causation, and so that issue is not presented here. Although "but for" causation is the "traditional" test of factual causation, courts have deviated from that standard "where circumstances warrant, especially where the combined conduct of multiple wrongdoers produces a bad outcome." *Paroline*, 134 S. Ct. at 1723. In the context of terrorist financing, it may be impossible to prove that any one donation was the but-for cause of an attack, and thus an alternative casual standard may be more appropriate in such cases. See *Boim*, 549 F.3d at 695-698 (but-for causation is not the appropriate test in the ATA context).

language in the Clayton Act, 15 U.S.C. 15, incorporated a proximate-cause requirement). It is most consistent with Congress's expectation that tort-law principles would govern ATA actions, see p. 7, *supra*, to construe the ATA to impose the usual tort-law requirement of proximate causation. Cf. *Meyer*, 537 U.S. at 285.

That construction also best effectuates the balance of competing concerns reflected in the ATA. By extending liability to persons who provide financing to terrorist organizations, the ATA enables terrorism victims to obtain redress from those who play an important role in facilitating terrorist activities and who are most likely to have assets. Senate Report 22. At the same time, a proximate cause requirement ensures that liability is limited to defendants whose conduct has a significant causal relationship to the plaintiff's injuries. Absent such a requirement, ATA liability might extend to individuals and entities whose activities have only an attenuated relationship to the plaintiff's injuries: for instance, entities that are only alleged to have provided routine banking services or other assistance to a charity with terrorist ties, considerably before the terrorists themselves carried out the attack in question. Permitting liability to sweep so broadly could reach and inhibit routine activities and, given the ATA's extraterritorial reach, could adversely affect the United States' relationships with foreign Nations.

b. Petitioners claim that the Rule 12(b)(6) respondents directly committed an "act of international terrorism," 18 U.S.C. 2333(a), by providing material support to terrorism. To state a claim that petitioners' injuries occurred "by reason of" that "act of international terrorism," petitioners were required to allege

that their injuries were proximately caused by respondents' provision of material support.[6] It is therefore insufficient to allege that a defendant provided funds to a group with terrorist connections and terrorists later attacked and injured United States citizens. At the same time, given that money is fungible, it is not necessary to allege that the specific funds provided by the defendants were used for terrorist acts. See *Boim*, 549 F.3d at 723. Rather, the ultimate terrorist act must be a reasonably foreseeable consequence of the defendant's contributions—for instance, because the defendant provided substantial funding directly to a terrorist group known to be targeting the United States. Cf. Gov't 2008 *Boim* Br. at 20. Given the variety of circumstances in which proximate-causation issues may arise in ATA suits, courts will further refine the standard by applying it to specific factual scenarios.

2. Contrary to petitioners' contention (Pet. 16-17), the court of appeals' proximate-cause holding does not conflict with *Boim*. There, the Seventh Circuit considered the "proof of causation" necessary to state a claim based on alleged material support. 549 F.3d at 695. The court analogized the causation issues raised by a terrorist organization's receipt of multiple donations, only some of which fund terrorist activity, to those

[6] A similar nexus requirement would have applied had the Second Circuit permitted petitioners to proceed with their aiding-and-abetting theory. As the government explained in *Boim*, Gov't 2008 *Boim* Br. at 20-21, traditional tort-law aiding-and-abetting principles require that the primary tortfeasor's injurious acts be the foreseeable consequence of the secondary defendant's provision of assistance. See, *e.g.*, *Halberstam*, 705 F.2d at 488 (holding that where defendant aided the primary actor's course of conduct, the injury-causing tort must have been reasonably foreseeable to the defendant).

raised by scenarios in which multiple causes—such as two sources of pollution—contribute to a single injury. *Id*. at 696-697. The court concluded that in such situations, demonstrating "'but for' causation" is not necessary, *id*. at 696, and 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." *Id*. at 697. That discussion appears to address causation in fact, rather than proximate cause. See *Paroline*, 134 S. Ct. at 1722-1724 (discussing similar aggregate-causation scenarios under the framework of factual causation). *Boim* thus did not expressly reject a proximate-cause requirement. See 549 F.3d at 692 (suggesting that "the ordinary tort requirement[]" of "foreseeability must be satisfied"); cf. *id*. at 700 (declining to consider whether "temporal remoteness" might bar liability in some cases).

3. Petitioners also challenge (Pet. 20-22) the court of appeals' application of the proximate-cause requirement to the allegations in this case. Contrary to petitioners' assertion (Pet. 20), the Second Circuit did not impose a rigorous standard of proximate causation that would require a plaintiff to demonstrate that the defendant's specific contribution was used for an attack on the United States. Although the court stated that petitioners had not alleged that the "money allegedly donated by the Rule 12(b)(6) defendants to the purported charities actually was transferred to al Qaeda and aided in the September 11, 2001 attacks," Pet. App. 8a, that statement is best read in context as one of the court's critiques of petitioners' specific allegations, rather than an announcement of a generally applicable standard. Indeed, in *Rothstein v. UBS AG*, 708 F.3d 82 (2013), the ATA decision on which the court relied in this

case, the Second Circuit described proximate cause as requiring only that the injury be the reasonably foreseeable consequence of the defendant's conduct. *Id*. at 91, 96.

In this case, the court of appeals appropriately focused on the adequacy of petitioners' allegations as a whole, and reasonably concluded that petitioners failed to plausibly allege that the Rule 12(b)(6) respondents' alleged contributions to purported charities foreseeably caused their injuries. Pet. App. 8a-9a. As the court explained, petitioners' allegation that the September 11, 2001 attack was "a direct, intended and foreseeable product" of the Rule 12(b)(6) respondents' contributions is simply a legal conclusion. *Id*. at 9a (citation omitted); see *Iqbal*, 556 U.S. at 678. In addition, the district court held that petitioners failed to allege that the Rule 12(b)(6) respondents knew that the charities to which they donated supported terrorism, see pp. 11-12, *supra*, and thus petitioners cannot use respondents' alleged knowledge to suggest that the attacks were the foreseeable result of respondents' indirect assistance. See Pet. App. 9a. Petitioners' allegations that the *charities* played an important role in facilitating al Qaeda's operations (Pet. 21), without more, do not indicate that petitioners' injuries were the foreseeable result of *respondents'* provision of assistance and services to those charities. And as the court of appeals observed, petitioners provided no reason to conclude that merely "providing routine banking services to organizations and individuals said to be affiliated with al Qaeda * * * proximately caused the September 11, 2001 attacks." Pet. App. 8a.

In sum, the Second Circuit did not impose a heightened standard of proximate causation, but instead

reasonably concluded that petitioners failed to sufficiently allege that their injuries were the foreseeable consequence of the Rule 12(b)(6) respondents' indirect assistance to ostensible charities. Petitioners' case-specific disagreement with the court's analysis of the allegations does not warrant further review.

C. The Court Of Appeals' Personal-Jurisdiction Decision Does Not Warrant Review

The court of appeals applied settled standards in holding that petitioners' allegations were insufficient to establish personal jurisdiction with respect to certain defendants and sufficient to warrant jurisdictional discovery with respect to others. Further review is unwarranted.

1. The touchstone under the Due Process Clause for exercising personal jurisdiction in a civil case is the "requir[ement] that individuals have fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (second pair of brackets in original; citation and internal quotation marks omitted). It is not sufficient that a defendant can "foresee" that his conduct will "have an effect" in the foreign jurisdiction; he must take intentionally tortious actions that are "expressly aimed" at the forum. *Calder v. Jones*, 465 U.S. 783, 789 (1984). In *Calder*, the Court held that the defendants had "expressly aimed" their conduct at California by committing an intentional tort knowing that the plaintiff would feel the injury there. *Id*. at 789-790; see *Walden v. Fiore*, 134 S. Ct. 1115, 1124 n.7 (2014). Thus, a defendant may be subject to jurisdiction in a foreign forum if she purposefully directed her conduct at the forum by committing a tortious act with

"kn[owledge] that the brunt of th[e] injury would be felt" in the forum.[7] *Calder*, 465 U.S. at 789-790.

2. Petitioners contend (Pet. 23) that the Second Circuit, by citing as authority its previous personal-jurisdiction decision in *Terrorist Attacks III* (see p. 2, *supra*), effectively required petitioners to allege that each respondent "specifically intended to harm the United States." As the government explained in its previous amicus brief in this case, had the Second Circuit held in *Terrorist Attacks III* that personal jurisdiction requires allegations of specific intent, that would be incorrect. 08-640 U.S. Br. 18-19. Rather, one means of establishing that a defendant expressly aimed conduct at a foreign forum is to allege that the defendant took intentionally tortious actions and "knew that the brunt of th[e] injury would be felt" in the foreign forum. *Calder*, 465 U.S. at 789-790. As the government explained, however, *Terrorist Attacks III* could also be read to hold only that petitioners' allegations concerning indirect funding were insufficient to support the conclusion that the defendants acted with the requisite knowledge. 08-640 U.S. Amicus Br. 19-20.

Contrary to petitioners' contention (Pet. 30), the decision below does not "confirm[]" that the Second Circuit requires a showing of specific intent to harm the United States. Although the court of appeals used some language in discussing a particular defendant

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[7] Contrary to petitioners' argument (Pet. 23-24), this Court has not suggested that in intentional tort cases, due process requires only that the defendant have committed a tort that violates the forum's laws. The Court recently confirmed in *Walden* that "when intentional torts are involved," *Calder* requires not only that the defendant committed a tort, but that the defendant "expressly aimed" his conduct at the forum. 134 S. Ct. at 1120, 1123.

that could suggest that the court focused on specific intent to cause injury to individuals in the United States, see Pet. App. 47a-48a, the decision as a whole is best construed as focusing on the inadequacy of petitioners' particular allegations. In considering whether each defendant "expressly aimed" his or its conduct at the United States, *id*. at 37a-38a, the court emphasized that petitioners' claims were largely based on *indirect* funding of al Qaeda through purported charities. Because the connection between the personal-jurisdiction respondents and the direct tortfeasors is separated by intervening actors, petitioners must allege facts supporting the conclusion that, despite the intervening actors and actions, respondents acted with the requisite knowledge that their contributions would result in an injury that would be felt in the United States. See *Iqbal*, 556 U.S. at 678.

The court of appeals therefore appropriately focused on the adequacy of petitioners' allegations to raise an inference that, despite the indirect nature of each defendant's conduct, each knew that the brunt of the injury would be felt in the United States, or otherwise "expressly aimed" their conduct at the United States. The allegations that the court held to be insufficient included allegations that certain defendants knowingly provided routine banking services to individuals associated with al Qaeda, Pet. App. 25a-26a, 41a-42a; that others provided support to Osama bin Laden exclusively before 1993, including through shareholder distributions, *id.* at 42a-43a; and that others "served in various positions of authority within organizations that are alleged to have supported terrorist organizations" but did not "play[] any role in directing any support to benefit al Qaeda," *id.* at 44a-45a (emphasis omitted). The court of appeals

reasonably found that alleged conduct too remote from al Qaeda's targeting of the United States to give rise to an inference that respondents knew that the brunt of any injury from their conduct would be felt in the United States, or that they otherwise directed their conduct at the United States.

By contrast, the court of appeals reversed the district court's dismissal with respect to certain defendants alleged to have aimed their conduct at the United States. Those defendants allegedly provided direct support to al Qaeda knowing that al Qaeda was targeting the United States, Pet. App. 46a-47a; traveled to the United States shortly before the 2001 attacks and chose to stay at the same hotel as some of the hijackers, *id*. at 47a; and provided "cover employment" for an individual who provided funding for two of the hijackers in the United States, *id*. at 32a, 48a. The allegations concerning these defendants, the court concluded, "suggest[ed] a closer nexus between their alleged support of al Qaeda" and the 2001 attacks. *Id*. at 48a.

In short, the court of appeals closely parsed petitioners' allegations to determine whether they raised an inference that the defendants expressly aimed their conduct at the United States. Petitioners' fact-specific disagreement with the court of appeals' application of the *Calder* standard to the allegations in this case (Pet. 29-33) does not warrant this Court's review.

3. Contrary to petitioners' argument, the court of appeals' decision does not conflict with the decision of any other court of appeals. Because the Second Circuit did not require specific intent to cause injury to people in the United States, the decision does not conflict with those decisions requiring only knowledge that the brunt of the injury would occur in the forum. See, *e.g.*,

Washington Shoe Co. v. A-Z Sporting Goods Inc., 704 F.3d 668, 674-676 (9th Cir. 2012). And because petitioners' allegations concern indirect assistance, the decision does not conflict with *Mwani v. bin Laden*, 417 F.3d 1, 4 (D.C. Cir. 2005), which considered the existence of personal jurisdiction over primary wrongdoers—Osama bin Laden and al Qaeda—who directly orchestrated attacks against the United States.[8]

Petitioners also identify (Pet. 26-28) a circuit split concerning whether, when a plaintiff has alleged that the defendant intentionally targeted him, courts in the forum where the plaintiff resides may exercise personal jurisdiction simply because the defendant knows that the plaintiff resides in that forum, or whether the forum must have been the focal point of the defendant's tort. This Court resolved that conflict in *Walden*, holding that a defendant is not subject to personal jurisdiction in a forum "simply because he allegedly directed his conduct at plaintiffs whom he knew had * * * connections" to the forum. 134 S. Ct. at 1125. This case does not implicate *Walden*'s resolution of that issue, however, because the Second Circuit's discussion of the inadequacy of petitioners' allegations indicates that petitioners' allegations were insufficient under either standard. Petitioners did not allege that respondents directed their conduct either at individuals known to be United States residents, or at the United States itself. See Pet. App. 41a-49a.

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[8] The district-court decisions on which petitioners rely (Pet. 29) are distinguishable for the same reason.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX D

JUSTICE AGAINST SPONSORS OF TERRORISM ACT

PUBLIC LAW 114–222—SEPT. 28, 2016

* * *

SEC. 3. RESPONSIBILITY OF FOREIGN STATES FOR INTERNATIONAL TERRORISM AGAINST THE UNITED STATES.

(a) IN GENERAL.—Chapter 97 of title 28, United States Code, is amended by inserting after section 1605A the following:

"§ 1605B. Responsibility of foreign states for international terrorism against the United States

"(a) DEFINITION.—In this section, the term 'international terrorism'—

"(1) has the meaning given the term in section 2331 of title 18, United States Code; and

"(2) does not include any act of war (as defined in that section).

"(b) RESPONSIBILITY OF FOREIGN STATES.—A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which money damages are sought against a foreign state for physical injury to person or property or death occurring in the United States and caused by—

"(1) an act of international terrorism in the United States; and

"(2) a tortious act or acts of the foreign state, or of any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, regardless where the tortious act or acts of the foreign state occurred.

"(c) CLAIMS BY NATIONALS OF THE UNITED STATES.—Notwithstanding section 2337(2) of title 18, a national of the United States may bring a claim against a foreign state in accordance with section 2333 of that title if the foreign state would not be immune under subsection (b).

"(d) RULE OF CONSTRUCTION.—A foreign state shall not be subject to the jurisdiction of the courts of the United States under subsection (b) on the basis of an omission or a tortious act or acts that constitute mere negligence.".

(b) TECHNICAL AND CONFORMING AMENDMENTS.—

(1) The table of sections for chapter 97 of title 28, United States Code, is amended by inserting after the item relating to section 1605A the following:

"1605B. Responsibility of foreign states for international terrorism against the United States.".

(2) Subsection 1605(g)(1)(A) of title 28, United States Code, is amended by inserting "or section 1605B" after "but for section 1605A".

* * *