No. 08- 08-640 NOV 12 2008

IN THE
Supreme Court of the United States

IN RE TERRORIST ATTACKS ON SEPTEMBER 11, 2001

FEDERAL INSURANCE COMPANY *et al.*,

Petitioners,

v.

KINGDOM OF SAUDI ARABIA *et al.*,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, for purposes of the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1603(a), a claim against an "agency or instrumentality" of a foreign state encompasses a claim against an individual foreign official;

2. Whether tort claims brought against foreign states and officials based on acts of terrorism committed in the United States must meet the conditions of the FSIA's "state sponsor of terrorism" exception, 28 U.S.C. § 1605A, and cannot be brought under the FSIA's exception for non-commercial tort claims, 28 U.S.C. § 1605(a)(5); and

3. Whether the Due Process Clause precludes U.S. courts from exercising personal jurisdiction over individuals who provide material support to terrorists outside the United States, knowing those terrorists intend to commit terrorist attacks in the United States.

PARTIES TO THE PROCEEDINGS

There are over 6,000 petitioners in these proceedings. They are listed in the appendix at Pet. App. K (299a-489a). A separate corporate disclosure statement for the corporate petitioners is included at Pet. App. L (490a-494a).

Respondents are the Kingdom of Saudi Arabia; the Saudi High Commission for Relief of Bosnia and Herzegovina; and Crown Prince Sultan bin Abdulaziz al-Saud, Prince Naif bin Abdulaziz al-Saud, Prince Salman bin Abdulaziz al-Saud, Prince Turki al-Faisal bin Abdulaziz al-Saud, and Prince Mohamed al Faisal al Saud.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners are thousands of victims of the September 11, 2001 terrorist attacks on the United States. They respectfully petition this Court for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 538 F.3d 71 (2d Cir. 2008), Pet. App. 1a-47a.

The opinions of the United States District Court for the Southern District of New York are reported at 349 F. Supp. 2d 765 (S.D.N.Y. 2005), Pet. App. 117a-238a, and 392 F. Supp. 2d 539 (S.D.N.Y. 2005), Pet. App. 54a-116a.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1603, 1605(a), and 1605A(a), are reproduced in the appendix at Pet. App. 239a-246a.

STATEMENT OF THE CASE

This petition is brought by thousands of victims of the September 11, 2001 attacks on the United States. It presents three related and important issues that have divided the courts of appeals concerning the ability of victims of terrorist attacks committed in this country to seek redress from foreign states and

officials who provide material support to terrorist organizations. In the course of dismissing the September 11th victims' tort claims against Saudi Arabia and five Saudi princes, the Second Circuit dramatically limited the scope of claims that victims of terrorism can assert under the Foreign Sovereign Immunities Act ("FSIA") and broadly limited federal courts' jurisdiction over persons who provide material support to terrorism.

Specifically, the Second Circuit held that (1) the FSIA provision limiting claims against a foreign state's "agency or instrumentality" also limits claims against foreign officials sued individually for their official actions; (2) no tort claims relating to terrorist activity may be brought under the FSIA provision authorizing tort claims for harm caused in the United States, 28 U.S.C. § 1605(a)(5), and such claims must instead be brought only under the FSIA provision meant to authorize claims for harm caused principally *outside* the United States by a handful of countries deemed state sponsors of terrorism, *id.* § 1605A;[1] and (3) the Due Process Clause bars U.S. courts' jurisdiction over persons who provide material support abroad to terrorist organizations—even those who know the organizations they are funding intend to attack the United States—unless those persons also directly carry out or command the specific terrorist attack at issue.

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[1] When this case was filed, the FSIA exception for state-sponsored terrorism was codified at 28 U.S.C. § 1605(a)(7). Congress repealed that provision on January 28, 2008 with respect to certain suits and reenacted it, with modifications, as § 1605A. Because the Second Circuit relied solely on § 1605A in reaching its decision, we refer to that section herein. By the terms of the 2008 Act, § 1605(a)(7) should govern this case if it is remanded.

Review of these issues is warranted because each presents a conflict with the decisions of other courts of appeals, and the Second Circuit's decision undermines Congress' efforts to provide redress for U.S. citizens harmed by the actions of foreign governments and officials and to prevent and punish those who provide material support to terrorism. The Second Circuit acknowledged that its first holding, concerning suits against foreign officials, deepened an existing split between the circuits and yielded an interpretation of the FSIA that the United States has long opposed (and has characterized as of "crucial importance"). The second holding, concerning FSIA §§ 1605(a)(5) and 1605A, is in direct conflict with the Ninth Circuit and other courts, which have held that the tort exception in § 1605(a)(5) does support terrorism-based tort claims, and is contrary to the D.C. Circuit's construction of the "state sponsor of terrorism" exception as addressing extraterritorial harm caused by acts of state-sponsored terror. The Second Circuit's third holding, construing the Due Process Clause to bar jurisdiction over those who provide material support to terrorists who target the United States, is in tension with several decisions of this Court and conflicts with decisions of the Seventh, Ninth, and D.C. Circuits. It also undermines important components of the United States' counterterrorism efforts that authorize criminal and civil proceedings directed at precisely the material support to terrorism that the Second Circuit ruled to be beyond U.S. courts' jurisdiction. This Court should grant this petition and resolve these conflicts.

A. The September 11th Victims' Claims

Petitioners are victims of the September 11, 2001 terrorism attacks. They include family members of the nearly 3,000 people killed in the attacks,

thousands of individuals who were severely injured as a result of the attacks, and governmental and commercial entities that incurred billions of dollars of property damage and other losses as a result of the attacks (collectively, the "victims" or "petitioners").

These victims brought suit against the nations, organizations, companies and individuals who deliberately channeled resources to al Qaeda in the years preceding September 11th, knowing that al Qaeda intended to use those resources to attack the United States and its citizens. The victims seek to hold responsible those who knowingly helped al Qaeda build and sustain its global infrastructure and thereby made possible the September 11th attacks.

This petition concerns petitioners' tort claims against the Kingdom of Saudi Arabia, five Saudi princes, and the Saudi High Commission for Relief of Bosnia and Herzegovina (SHC) for their roles in directing significant financial and logistical support to al Qaeda. Four of the princes are officials of the Saudi government, sued individually for actions undertaken in both their governmental and personal capacities. A fifth, Prince Mohamed al Faisal al Saud, is not a government official and is sued for actions taken in his personal capacity. The SHC is ostensibly a charity and is an acknowledged agent of the government of the Kingdom.

The close relationship between al Qaeda and Saudi "charitable" organizations, and between those organizations and the Saudi Government and its officials, is well documented. The 9/11 Commission noted that "Saudi Arabia has long been considered the primary source of al Qaeda funding." *The 9/11 Commission Report* 171 (2004). That funding was derived from "financial facilitators who raised money ... particularly in Saudi Arabia," many of

whom were instrumental in creating the "Golden Chain" that funded Osama bin Laden's jihadist activities, first in Afghanistan and later worldwide. *Id.* at 55, 66, 170. The Commission noted that "entire charities," and "employees of corrupt charities," "participated in funneling money to al Qaida." *Id.* at 170. These "charities" "were a source of money and also provided significant cover, which enabled operatives to travel undetected under the guise of working for a humanitarian organization." *Id.* at 171. The victims have alleged that several of these charities were dominated and controlled by the Saudi Government, and were therefore agents and alter-egos of the Kingdom.

The United States government has named several of these charities as providers of material support to al Qaeda and other terrorist organizations that target the United States.[2] In the years since the September 11th attacks, the U.S. Government has also repeatedly expressed concerns about the terrorist aims of the Saudi charities, and about Saudi Arabia's failure to use its authority over them to rein in their terrorist conduct.[3]

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[2] *See* Exec. Order 13,224, 66 Fed. Reg. 49,079, 49,082 (Sept. 23, 2001); 31 C.F.R. ch. V, app. A; *see also* Additional Designation of an Entity Pursuant to Exec. Order 13,224, 73 Fed. Reg. 37,529, 37,530 (July 1, 2008); Additional Designation of Individuals and Entities Pursuant to Exec. Order 13,224, 71 Fed. Reg. 45,599, 45,600 (Aug. 9, 2006); Additional Designations of Terrorism-Related Blocked Persons, 68 Fed. Reg. 399 (Jan. 3, 2003).

[3] *See, e.g., Starving Terrorists of Money—The Role of Middle Eastern Financial Institutions: Joint Hearing Before the House Comms. on Fin. Servs. & Int'l Relations*, 109th Cong. 78-79 (May 4, 2005) (testimony of Paul Simons, Deputy Assistant Sec'y of State) ("concerned U.S. government agencies" pushed the Saudi Government to rein in charities after September 11th, and the

Petitioners' claims against Saudi Arabia in this case concern the attributable actions of charities under the Saudi government's control and actions of Saudi officials who used their offices to support al Qaeda's global jihad. The victims have alleged that "[o]stensible charitable organizations, and in particular, Islamic charities under the control of the Kingdom of Saudi Arabia ... are fully integrated components of al Qaida's organizational structure, and are actively involved at every level of al Qaida's operations, from recruitment and training of new members, to the planning and conduct of terrorist attacks." See First Amended Compl. of Plaintiffs Federal Ins. Co. *et al.* ¶ 79, No. 1:03-md-1570 (S.D.N.Y., filed Mar. 10, 2004) (hereinafter "Compl."). These "charities" have "served as the primary vehicle for raising, laundering and distributing funds on behalf of al Qaida from its inception," and "have provided arms, false travel documentation, physical assets and logistical support to al Qaida." *Id.*; see also *id.* ¶ 80. As the court of appeals acknowledged, the victims' allegations "include a wealth of detail (conscientiously cited to published and unpublished sources) that, if true, reflect close working arrangements between ostensible charities and terrorist networks, including al Qaeda." Pet. App. 5a.

U.S. "continue[s] to stress in our discussions with the Saudis the need for full implementation" of those efforts); *Money Laundering and Terror Financing Issues in the Middle East: Hearing Before the Sen. Comm. on Banking, Housing & Urban Affairs*, 109th Cong. 43-44 (July 13, 2005) (testimony of Stuart Levey, Under Sec'y of Terrorism & Financial Intelligence, Treasury Dep't) (Saudi charities remain "a significant source of terrorist financing" and "continue to cause us concern," and the Saudi Government must continue to address "vulnerabilities" in its control of these groups); *see generally* Cong. Research Serv., Report to Congress, *Saudi Arabia: Terrorist Financing Issues* (Dec. 8, 2004).

The complaint also describes in detail the extensive support provided to al Qaeda by each of the Kingdom's controlled charities, Compl. ¶¶ 84-216, including exhaustive allegations and evidence of the Kingdom's rigid control of the operations and activities of those charities, *id.* ¶¶ 79, 85, 114-115, 131-132, 151-152, 168-169, 181, 191, 203, 208-209, 399, 408, 410, 427, 435-437. Several of the charities acknowledged in district court pleadings that they are instrumentalities of the Saudi Government, and the SHC admitted to the court of appeals that it "is an agency of" and is "control[led] by" the Kingdom. Br. of Defendant-Appellee Saudi High Comm'n, at 5, 24. The uncontested allegations and evidence establish that the charities are dominated and controlled by the Kingdom, and are agents and alter-egos of the Saudi state.

The September 11th victims also explained how the government official defendants, each of them a Saudi prince, used their government positions to channel financial and logistical support to al Qaeda through the Kingdom's controlled charities. Compl. ¶¶ 426-464. These government officials supported al Qaeda largely through their activities as members of the Supreme Council of Islamic Affairs, a governmental body established to oversee and direct the Kingdom's controlled charities, or through their roles as officials of the charities themselves. *Id.*

Saudi officials also knew of al Qaeda's use of terrorism, including its intent and practice of targeting U.S. citizens and interests, well before September 2001. The charities in question were repeatedly implicated in terrorist plots and attacks in

the years preceding the September 11th attacks,[4] and the Saudi Government closely monitored these developments. *Id.* ¶¶ 114-115, 131-132, 151, 168-169, 181, 191, 203, 208, 399. Saudi government officials were also aware, for several years prior to September 11, 2001, that these charities were al Qaeda fronts, not least because U.S. and allied officials met with them repeatedly to discuss the charities' extensive terrorist ties. *Id.* ¶¶ 400, 429, 431, 435-441, 443, 445, 456, 463. The complaint notes that Osama bin Laden's *fatwa* in 1998 was widely reported and publicly announced al Qaeda's intent to kill Americans—civilian or military—wherever possible, *id.* ¶ 42, and many of the Saudi-controlled charities participated directly in furthering these goals, see, *e.g.*, *id.* ¶¶ 122, 138-140, 169-173, 186, 458. Al Qaeda's capacity to execute those threats became abundantly clear through a series of terrorist attacks in the 1990s, including the 1998 bombings of the U.S. embassies in Kenya and Tanzania and the 2000 bombing of the *U.S.S. Cole*.

The September 11th victims asserted tort claims against the Kingdom of Saudi Arabia, sued four of the five Saudi princes individually for supporting al Qaeda in their capacities as officials of the Kingdom, and sued all five princes for the material support they personally provided to al Qaeda. These latter claims were based principally on personal contributions the princes made to al Qaeda through its known charity fronts. *Id.* ¶¶ 430-431, 442-443, 451-452, 461-463.

In response to the victims' complaint, Saudi Arabia and the SHC moved to dismiss the claims asserted against them on the ground that they were immune

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[4] *See* Compl. ¶¶ 110, 117-123, 126, 137-140, 143, 147, 159-160, 162-163, 173-174, 176, 193, 197-198, 200, 204.

from suit under the FSIA. The four Saudi princes who are government officials each separately moved to dismiss the claims based on their official conduct under the FSIA. All five princes moved to dismiss the claims based on their personal conduct, arguing that the court lacked personal jurisdiction over them.

The September 11th victims argued in response that the FSIA authorized their tort claims under the exception to sovereign immunity it provides for claims for damages caused by "the tortious act or omission of that foreign state." 28 U.S.C. §1605(a)(5). Certain of the September 11th victims argued that the FSIA did not bar any of the claims advanced against the Saudi officials individually because "officials" are not included within the definition of the term "foreign state" under the FSIA. The victims further argued that the district court possessed jurisdiction over the Saudi princes because their support for al Qaeda was necessarily directed at the United States in light of al Qaeda's public declarations of jihad against the United States, and that the defendants could therefore reasonably anticipate being haled into a U.S. court to respond to claims based on the attacks within the United States.

B. The District Court's Decisions

On January 18, 2005, the district court granted the motions to dismiss of Saudi Arabia and two Saudi officials. The court held that "'[i]mmunity under the FSIA extends also to agents of a foreign state acting in their official capacities,'" Pet. App. 135a, and that the FSIA's tortious act exception did not provide subject matter jurisdiction for plaintiffs' tort claims against the Kingdom or against the Saudi officials for their official acts. The court found that the defendants' support for al Qaeda—even if tortious within the meaning of the FSIA provision—was

"grounded in social, economic, and political policy," and therefore involved the exercise of discretionary governmental conduct excluded from the FSIA authorization. *Id.* at 148a, 164a, 167a.

The court also ruled that it lacked personal jurisdiction over the two Saudi officials and thus dismissed the victims' claims based on those officials' private sponsorship of al Qaeda. Although the judicial record contained "many examples of Osama bin Laden's and al Qaeda's public targeting of the United States," the court nonetheless found that plaintiffs had failed to present sufficient "specific facts" to establish that the officials knew the charities enjoying their support were funneling money to al Qaeda. Pet. App. 161a, 172a, 187a. The court similarly ruled that it lacked personal jurisdiction over a third Saudi prince, Prince Mohamed, who is not a Saudi official, reasoning that plaintiffs failed to establish that the acts of financial institutions he controlled should be imputed to him. *Id.* at 193a-194a.

On September 21, 2005, the district court extended the reasoning of its earlier decision to the claims against SHC and the two additional Saudi officials. Pet. App. 54a-116a.

C. The Court of Appeals' Opinion

On August 14, 2008, the Second Circuit affirmed the district court's decision, albeit on largely different grounds.

First, the panel held that the FSIA's protections apply not only to Saudi Arabia itself and to the SHC as an "agency or instrumentality" of Saudi Arabia, but also to claims against the Saudi officials acting in their official capacities. The panel acknowledged that the Second Circuit had not determined whether such officials are immune from suit as an "agency or

instrumentality" of the state, and expressly acknowledged the split among the circuits on this issue. It observed that the Seventh Circuit had held that the FSIA does not include state officials within the protection afforded an "agency or instrumentality" because, had Congress intended that result, "'it would have done so in clear an unmistakable terms.'" Pet. App. 15a (quoting *Enahoro* v. *Abubakar*, 408 F.3d 877, 881-82 (7th Cir. 2005)). The panel noted that the United States, through the Departments of Justice and State, had also argued elsewhere that the FSIA extends only to states, not individuals. *Id.* at 18a-19a.

The panel emphasized, however, that the Fourth, Fifth, Sixth, Ninth, and D.C. Circuits had reached the opposite conclusion. Pet. App. 14a; see *infra* at 15-16. The panel determined that it would "join the majority of Circuits" and broadly construed "agency or instrumentality" in the FSIA to include individuals. Pet. App. 19a. It reasoned that "[t]his reading of 'agency' is consistent with the evident principle that the state cannot act except through individuals," and analogized its ruling to the protections against suit provided by the act of state doctrine, the scope of immunity from suit alleging a violation of 42 U.S.C. § 1983, and the immunity afforded to a Senator's aides. *Id.* at 20a-21a (citing *Monell* v. *Dep't of Social Servs.*, 436 U.S. 658 (1978), and *Gravel* v. *United States*, 408 U.S. 606 (1972)). And, the panel noted that a separate, subsequently enacted provision of the FSIA addressed the immunity of "an official, employee, or agent of [a] foreign state" in certain circumstances, see 28 U.S.C. § 1605A(a)(1), and thus Congress must have intended the same result (albeit *sub silentio*) in other provisions of the statute. Pet. App. 21a-22a.

Second, the panel held that the September 11th victims' claims against Saudi Arabia and the four government officials did not fall within the FSIA's non-commercial tort exception, which authorizes claims for "money damages ... for personal injury or death, or damage to or loss of property, occurring in the United States and 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). The panel reasoned that this provision could not be extended to acts of terrorism or where "tortious conduct took the form of providing material support to terrorists." Pet. App. 28a. The panel primarily relied on a separate, subsequently enacted FSIA provision, 28 U.S.C. § 1605A, which authorizes claims for damages principally incurred *outside* the United States caused by terrorist actions facilitated by countries designated by the U.S. government as state sponsors of terrorism.

The panel held that section 1605A, which it termed the FSIA's "terrorism exception," exclusively addresses recovery for acts such as the September 11th attacks. According to the panel, "to apply the Torts Exception where the conduct alleged amounts to terrorism within the meaning of the Terrorism Exception would evade and frustrate the key limitation[s] on the Terrorism Exception." Pet. App. 31a. Section 1605A by its terms applies "in any case not otherwise covered by this chapter," which includes the FSIA tort exception, but the panel construed this provision as *precluding* any terrorism-related claims under other FSIA provisions and as confirming that "the Terrorism Exception stands alone." *Id.* at 33a. Thus, the panel held that the FSIA precludes claims against foreign states or their

officials for any terrorist actions or other similar tortious conduct undertaken in the United States, unless the perpetrator was affiliated with one of the few governments designated as state sponsors of terrorism by the U.S. government.

Third, the panel held that no personal jurisdiction existed over any of the Saudi princes, thus requiring dismissal of the victims' claims against them in their personal capacities. The panel held that "[e]ven assuming that the [princes] were aware of Osama bin Laden's public announcements of jihad against the United States and al Qaeda's attacks on the African embassies and the U.S.S. Cole, their contacts with the United States would remain far too attenuated to establish personal jurisdiction in American courts." Pet. App. 43a-44a. "[T]hat acts of violence committed against residents of the United States were a foreseeable consequence of the princes' alleged indirect funding of al Qaeda" was insufficient because the September 11th victims would have to show "that the [princes] 'expressly aimed' intentional tortious acts at residents of the United States." *Id.* at 44a (quoting *Calder* v. *Jones*, 465 U.S. 783, 789 (1984)).

The panel did acknowledge that "five opinions from other circuits" had found personal jurisdiction over terrorists and their supporters who directed their actions against U.S. interests. Pet. App. 41a-42a; see *infra* at 29-30. Even so, the panel distinguished those cases on the ground that the September 11th victims did not "allege that the [Saudi princes] directed the September 11 attacks or commanded an agent (or authorized al Qaida) to commit them." Pet. App. 42a. The panel concluded that the Due Process Clause precluded U.S. courts from asserting jurisdiction over defendants who provided material support to terrorists, even where the defendants

"could and did foresee that recipients of their donations would attack targets in the United States." *Id.* at 43a.

REASONS FOR GRANTING THE PETITION

I. THE SECOND CIRCUIT'S DECISION EXTENDING FSIA IMMUNITY TO FOREIGN OFFICIALS SUED FOR THEIR OFFICIAL ACTS DEEPENS A CONFLICT AMONG THE COURTS OF APPEALS AND ADOPTS A POSITION OPPOSED BY THE UNITED STATES AS CONTRARY TO NATIONAL INTERESTS OF "CRITICAL IMPORTANCE."

This case presents an acknowledged conflict among the circuits over whether the FSIA's provisions governing suits against foreign *states* also applies to suits against foreign *officials* for their official actions. That conflict addresses a discrete and important issue of statutory construction: whether such foreign officials are, for purposes of the FSIA, an "agency or instrumentality of a foreign state." Concurring with the Fourth, Fifth, Sixth, Ninth, and D.C. Circuits, the Second Circuit answered that foreign officials are "an agency or instrumentality." The Seventh Circuit has answered that they are not, as has the United States in litigation involving suits against foreign officials. The Second Circuit's reasoning is also in considerable tension with decisions of the Tenth and Eleventh Circuits.

This conflict concerns the central provision of the FSIA determining the scope of foreign sovereign immunity. The FSIA precludes claims against a "foreign state" unless those claims fall within a specific FSIA exception. See 28 U.S.C. § 1604; *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 355 (1993). A foreign

state, for this purpose, is the state itself, a "political subdivision," or "an agency or instrumentality of a foreign state." 28 U.S.C. § 1603(a).[5]

The Second Circuit concluded 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 FSIA." Pet. App. 14a; see *supra* at 10-11. In this respect, it canvassed and followed the reasoning of the Ninth Circuit, which concluded that the FSIA completely displaced common law immunity and "rejected the view, advanced by the Department of Justice [before the Ninth Circuit], that the foreign state is protected by the FSIA while its officials are otherwise protected by common law immunity," subject to "'the discretionary role of the State Department'" in determining the scope of that common law immunity. Pet. App. 18a-19a (addressing and quoting *Chuidian* v. *Philippine Nat'l Bank*, 912 F.2d 1095, 1101 (9th Cir. 1990)). The Ninth Circuit in *Chuidian* recognized that § 1603 "more readily connot[es] an organization or collective" than individuals, but concluded that because the legislative history did not demonstrate "an intent to exclude individual officials," they should be included.

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[5] "[A]n agency or instrumentality of a foreign state," is defined as "any entity"

> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States ... nor created under the laws of any third country.

28 U.S.C. § 1603(b).

912 F.2d at 1101.[6] Four other circuits have followed the Ninth Circuit's lead, citing *Chuidian* with little or no discussion. See *Velasco* v. *Gov't of Indonesia*, 370 F.3d 392, 399 (4th Cir. 2004); *Keller* v. *Cent. Bank of Nigeria*, 277 F.3d 811, 815 (6th Cir. 2002); *Byrd* v. *Corporacion Forestal y Industrial de Olancho S.A.*, 182 F.3d 380, 388 (5th Cir. 1999); *Jungquist* v. *Sheikh Sultan bin Khalifa al Nahyan*, 115 F.3d 1020, 1027 (D.C. Cir. 1997).

The Seventh Circuit, in contrast, has rejected *Chuidian*'s reasoning and held that the FSIA's reference to "agency or instrumentality" clearly does not include "natural person[s]," and instead encompasses only "legal person[s]" like corporations and agencies. *Enahoro* v. *Abubakar*, 408 F.3d 877, 881-82 (7th Cir. 2005). "If Congress meant to include individuals acting in the[ir] official capacity in the scope of the FSIA," the court noted, "it would have done so in clear and unmistakable terms." *Id.* The Seventh Circuit criticized *Chuidian* and its progeny, stating it was "troubled" by that case because "saying Congress did not exclude individuals[,] therefore they are included [is] upside down as a matter of logic, [and] ignores the traditional burden of proof on immunity issues under the FSIA." *Id.* at 882 ("The ultimate burden of proving immunity rests with the foreign state.").

In a related context, the Tenth and Eleventh Circuits have also determined that such "inclusion by

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[6] *But see* H.R. Rep. No. 94-1487, at 15-16 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6614 ("[A]n 'agency or instrumentality of a foreign state' could assume a variety of forms, including a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, an export association, a governmental procurement agency or a department or ministry.").

omission" is inappropriate in construing the scope of the FSIA. See *Southway* v. *Central Bank of Nigeria*, 198 F.3d 1210, 1214 n.4 (10th Cir. 1999) ("because the FSIA does not address criminal sovereign immunity, Defendants' argument that they enjoy criminal sovereign immunity under the FSIA ... necessarily fails"); *United States* v. *Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997) (same).

The United States has consistently urged before federal courts that the phrase "agency and instrumentality" does *not* extend to foreign officials acting in their official capacity. Those views—expressed by the Departments of State and Justice in statements of interest filed before the Ninth Circuit in *Chuidian* and, more recently, in two cases in the Second Circuit, *Kensington Int'l Ltd.* v. *Itoua*, 505 F.3d 147 (2d Cir. 2007), and *Matar* v. *Dichter*, No. 07-2579-cv (2d Cir., filed June 14, 2007) ("*Dichter II*"), on appeal from *Matar* v. *Dichter*, 500 F. Supp. 2d 284 (S.D.N.Y. 2007) (*Dichter I*)—confirm the importance of this issue.

The United States has explained that construing FSIA § 1603 to apply to individual foreign officials "runs contrary to the statute's text and legislative history, post-FSIA case law, and customary international law." U.S. Statement (*Dichter I*) (Nov. 17, 2006), Pet. App. 259a. "[C]ommon-law immunity for foreign officials," the United States has argued, "endures as a vital complement to the FSIA's grant of immunity to foreign states." *Id.* at 260a. In *Kensington*, the United States argued that "the immunity of individual foreign officials is not governed by the FSIA. Rather, the immunity available to such officials stems from longstanding common law that the FSIA did not displace." U.S. Statement (*Kensington*) (May 23, 2007), Pet. App.

251a. It also criticized *Chuidian* and the cases that followed it as "unsound and yield[ing] problematic results," and based upon a "flawed rationale that ... is inconsistent with [the FSIA's] text and legislative history." *Id.* at 251a, 254a; see also U.S. Statement (*Chuidian*) (Mar. 21, 1988), Pet. App. 247a-248a (Congress intended that the FSIA "'deal[] only with the immunity of foreign states,'" and thus "the FSIA is not the controlling authority to determine the question of sovereign immunity" for individuals) (quoting H.R. Rep. No. 94-1487, at 21 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6620).

The United States has explained that it is of "critical importance" that FSIA § 1603 not be construed to include foreign officials; such a construction would potentially "bring U.S. sovereign immunity law into conflict with customary international law," U.S. Statement (*Dichter I*), Pet. App. 278a, 282a, and could place U.S. officials at greater risk of suit abroad. Making foreign officials subject to the FSIA's rigid statutory regime—and not the common-law regime under which the State Department weighs foreign policy considerations in determining whether to waive immunity in a given case—is "rife with potential to disturb foreign relations." Br. of the United States as *Amicus Curiae* (*Dichter II*) (Dec. 19, 2007), Pet. App. 286a-288a, 297a. It is thus "of critical importance that American courts recognize the same immunity defense for foreign officials" that is recognized at common law, "as any refusal to do so could easily lead foreign jurisdictions to refuse such protections for American

officials in turn." U.S. Statement (*Dichter I*), Pet. App. 282a.[7]

The United States' focus on the scope of the FSIA compared to common law immunity points to another source of tension among the courts of appeals. The Second Circuit's decision and the rest of the *Chuidian* line of cases do not recognize any continuing role for common law immunity and thus run squarely against decisions of other circuits recognizing that common law immunity for heads of state, consular officers, and other government leaders survived the FSIA's passage. The Second Circuit noted, for example, that its decision extending FSIA immunity to individuals resolved earlier "'doubt as to whether the FSIA was meant to supplant the 'common law' of head-of-state immunity.'" Pet. App. 13a (quoting *Tachonia* v. *United States*, 386 F.3d 205, 220 (2d Cir. 2004)). The Eleventh Circuit has held the opposite: the FSIA was never intended to displace common law "head-of-state" immunity, which remains the only source of immunity for such officials. *Noriega*, 117 F.3d at 1212; *accord Wei Ye* v. *Jiang Zemin*, 383 F.3d 620, 625 (7th Cir. 2004) ("The FSIA refers to foreign states, not their leaders," and thus immunity for such individuals "remains vested where it was prior to 1976—with the Executive Branch.").[8] The United

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[7] The question whether the princes would be entitled to common-law immunity for their actions in this case was not considered by the courts below, nor has the State Department considered whether to waive such immunity if it exists. If the Second Circuit's decision is reversed, these questions would be addressed on remand.

[8] *See also Doe* v. *Roman Catholic Diocese*, 408 F. Supp. 2d 272, 277-78 (S.D. Tex. 2005) (foreign official liability, including head-of-state and diplomatic immunity, continues to be governed by the pre-FSIA, common law framework); *Plaintiffs A, B, C, D, E,*

States has argued such cases were correctly decided, and "[t]he same reasoning applies to the immunity of individual officials other than heads of state: the FSIA did not address their immunity, and so did not supplant it as it previously existed at common law." U.S. Statement (*Kensington*), Pet. App. 254a-255a.

The square conflict among the circuits concerning whether the FSIA applies to individual foreign officials is reason enough to warrant review by this Court. The view of the United States that the issue is of central importance makes review of the question presented compelling.

II. THE SECOND CIRCUIT'S NARROW CONSTRUCTION OF THE FSIA'S "NON-COMMERCIAL TORT EXCEPTION" CONFLICTS WITH DECISIONS OF OTHER CIRCUITS AND DRAMATICALLY LIMITS VICTIMS' ABILITY TO RECOVER FOR ACTS OF TERRORISM COMMITTED IN THE UNITED STATES.

The Second Circuit construed the FSIA's "non-commercial tort exception" to exclude all claims against foreign states based on acts of terrorism, and construed FSIA's "state sponsor of terrorism exception" as the exclusive basis for asserting tort claims for such acts, including acts of terrorism committed in the United States. As a result, only the handful of countries designated as state sponsors of terrorism and their agencies can be sued for supporting acts of terrorism undertaken in the United States. The Second Circuit's decision conflicts with decisions of courts, including the Ninth Circuit, that have held that the tort exception authorizes

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F v. *Jiang Zemin*, 282 F. Supp. 2d 875, 881 (N.D. Ill. 2003) (same).

claims based on terrorism in the United States, and with other decisions, including those of the D.C. Circuit, that recognize that the FSIA's exception for state sponsors of terror exclusively governs only claims based on acts of terrorism resulting in injuries *outside* the United States.

The non-commercial tort exception, enacted in 1976, authorizes claims seeking "money damages ... for personal injury or death ... occurring in the United States and caused by the tortious act or omission of [a] foreign state or any official or employee of that foreign state." 28 U.S.C. § 1605(a)(5). On its face, that language describes precisely the claims of the September 11 victims. In 1996, Congress enacted a separate exception for state-sponsored terrorism, which it then updated and replaced in 2008. *Id.* § 1605A(a) (superseding *id.* § 1605(a)(7)). This section applies to "any case *not otherwise covered* by this chapter" for claims based on certain terrorist acts undertaken by a "designated ... state sponsor of terrorism" and causing harm anywhere in the world. *Id.* (emphasis added).

The Second Circuit held that *all* terrorism-related claims must meet § 1605A's stringent requirements, and that § 1605(a)(5)'s tort exception does not support any claim arising from acts of terrorism. Pet. App. 31a-33a. Thus, victims of terrorist acts committed in the United States can assert claims against only the few countries (and agencies of those countries) that the State Department has formally designated as state sponsors of terrorism: currently Iran, Cuba, Sudan, and Syria, but not, for example, China,

Russia, Pakistan, Libya, North Korea, Somalia, Yemen, Afghanistan, Venezuela—or Saudi Arabia.[9]

In direct conflict with the Second Circuit, the Ninth Circuit and the District of Columbia District Court have held that the FSIA non-commercial tort exception expressly authorizes claims based on acts of terrorism in the United States, including claims against any foreign country that supports those acts. In *Liu* v. *Republic of China*, 892 F.2d 1419 (9th Cir. 1989), the Ninth Circuit considered whether the FSIA authorized tort claims brought against the Republic of China for the assassination of Henry Liu in California. The complaint alleged "that the [Republic of China] was involved in the conspiracy to kill" Liu, a journalist who had been critical of the Republic. *Id.* at 1421-22. The Ninth Circuit held that the plaintiff had asserted tort claims for a politically motivated murder "which occurred within the United States," and thus fulfilled the unambiguous requirements of the FSIA's tort exception. *Id.* at 1424-25.[10]

More recently, the District of Columbia District Court rejected the Second Circuit's reasoning and held that the non-commercial tort exception "seems facially to apply" to terrorist acts committed in this country, including the same terrorist acts at issue in this case. *Doe* v. *bin Laden*, __ F. Supp. 2d __, 2008 WL 4416735, at *3 (D.D.C. Sept. 30, 2008) (addressing tort claims against Afghanistan and its officials for the 9/11 attacks). The court applied § 1605(a)(5)'s tort exception as written and reasoned

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[9] *See* U.S. Dep't of State, State Sponsors of Terrorism, http://www.state.gov/s/ct/c14151.htm (last visited Nov. 10, 2008).

[10] There can be no doubt that extrajudicial killing is an act of terrorism; indeed, 28 U.S.C. § 1605A (and its predecessor, § 1605(a)(7)) defines foreign terrorism to include such acts.

that it would be "peculiar" and "absurd" to think that § 1605A was meant to limit liability for terrorist attacks, even those committed in the United States, to those few countries designated as "state sponsors"—a result Congress "clearly did not intend." *Id.* (quotation marks omitted). The same court, in *Letelier* v. *Republic of Chile*, 488 F. Supp. 665 (D.D.C. 1980), earlier held that the tort exception provided jurisdiction for claims against Chile arising from the assassination of a former Chilean ambassador and foreign minister in Washington, D.C. The plaintiffs alleged that Chile and its intelligence agency had conspired with and aided the individuals who carried out the assassination, and the court concluded that the language of the tort exception unambiguously covered such conduct. *Id.* at 672-73; see also *Flatow* v. *Islamic Republic of Iran*, 999 F. Supp. 1, 15 (D.D.C. 1998) (citing *Liu* and *Letelier* as establishing that "28 U.S.C. § 1605(a)(5) already provides jurisdiction over state-sponsored terrorist acts in the United States").

The Second Circuit's holding that the "state sponsor of terrorism" exception is the exclusive basis for claims against foreign states based on acts of terrorism committed in the United States also is directly contrary to the D.C. Circuit's recognition that Congress designed that exception to *expand* the scope of recovery for victims of terrorism. As the D.C. Circuit held, the state sponsor of terrorism exception was designed to remedy the fact that "[u]nder the original FSIA, ... terrorism, torture, and hostage taking committed abroad were immunized forms of state activity." *Price* v. *Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 88 (D.C. Cir. 2002). But terrorism committed in *this* country was never so immune because it "occurr[ed] in the United States" and was thus subject to the tort exception. 28 U.S.C.

§ 1605(a)(5). Section 1605A (and its predecessor, § 1605(a)(7)), in contrast, applies to certain terrorist actions *regardless* of where they occur; "the only required link between the defendant nation and the territory of the United States is the nationality of the claimant." *Price*, 294 F.3d at 90; see *Doe*, 2008 WL 4416735, at *2-3 & n.2; *Flatow*, 999 F. Supp. at 15 (the state sponsor of terrorism exception supports claims based on "extraterritorial conduct, [and] one of its express purposes is to affect the conduct of terrorist states outside the United States, in order to promote the safety of United States citizens traveling overseas").

The Second Circuit's decision also contradicts the D.C. Circuit's decision in *Price* by holding that excluding acts of terrorism from the scope of the non-commercial tort exception serves the separation of powers by allowing the Executive Branch to determine which foreign states should be subject to suit. The Second Circuit cited *Price* to support this theory, see Pet. App. 31a, but the D.C. Circuit's decision provides no support. As the D.C. Circuit explained, because judicial systems traditionally address wrongdoing within a country's borders, only the extension of liability for *extraterritorial* acts presents diplomatic sensitivities that require Executive Branch determinations, and the Executive Branch initially opposed extending the FSIA to encompass *overseas* acts on the ground that this extension "might cause other nations to respond in kind, thus potentially subjecting the American government to suits in foreign countries for actions taken in the United States." *Price*, 294 F.3d at 89. The resulting compromise limited the FSIA's extension of liability for extraterritorial terrorism to claims against only those few countries designated by

the State Department as state sponsors of terrorism, but this does not suggest that Congress intended to narrow claims for terrorism *in the United States* or to have the Executive Branch determine the scope of those claims.

Finally, the Second Circuit's counterintuitive construction of § 1605A(a)(1)—which states that the state sponsor of terrorism exception applies only to claims "not otherwise covered" by other provisions of the FSIA, including § 1605(a)(5)'s tort exception—creates considerable tension with decisions of other circuits that have construed a parallel FSIA provision to mean the opposite. The Second Circuit construed the term "not otherwise covered" to mean that terrorism claims could *not* be brought under any other provision of the FSIA, rather than to mean that some terrorist acts are "otherwise covered" by the FSIA, and § 1605A applies only to those that are not. See Pet. App. 33a. The Second Circuit's construction is an obvious misreading of the statute.

It also conflicts with several circuits' longstanding interpretation of the tort exception, which by its terms applies to cases "not otherwise encompassed" by the FSIA's exception for commercial activity. 28 U.S.C. § 1605(a)(5). Other circuits have consistently construed that language to create a hierarchy of claims under which subsection (a)(2) is the dominant provision, and subsection (a)(5) applies only to the extent a claim does not fairly come within the terms of (a)(2). See *El-Hadad* v. *United Arab Emirates*, 216 F.3d 29, 35 (D.C. Cir. 2000); see also *Southway*, 198 F.3d at 1219 (10th Cir); *Export Group* v. *Reef Indus., Inc.*, 54 F.3d 1466, 1473, 1477 (9th Cir. 1995); *Vermeulen* v. *Renault U.S.A., Inc.*, 985 F.2d 1534, 1544 n.13 (11th Cir. 1993); see also *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S.

428, 439 (1989) (§ 1605(a)(5) applies only to "*non-commercial* torts") (emphasis added).

III. THE SECOND CIRCUIT'S HOLDING THAT THE DUE PROCESS CLAUSE BARS PERSONAL JURISDICTION OVER MATERIAL SUPPORTERS OF TERRORISM IS INCONSISTENT WITH THIS COURT'S PRECEDENTS, CONFLICTS WITH THE HOLDINGS OF OTHER COURTS, AND IMPERILS NUMEROUS U.S. COUNTERTERRORISM MEASURES.

The Second Circuit held that the Constitution permits federal courts to assert personal jurisdiction over only those who "directed" terrorist attacks or "commanded an agent ... to commit them," but bars jurisdiction over persons who "could and did foresee that recipients of their donations would attack targets in the United States." Pet. App. 42a-43a. Even a showing that a defendant "intended to fund al Qaeda" and did so with full knowledge of "Osama bin Laden's public announcements of jihad against the United States and al Qaeda's attacks on [U.S. interests]" would be "far too attenuated to establish personal jurisdiction in American courts." *Id.* at 43a-44a. In holding that U.S. courts cannot adjudicate claims against persons who provide material support abroad to terrorists known to target the United States, the Second Circuit distorted the Due Process decisions of this Court, created a conflict with the Seventh, Ninth, and D.C. Circuits, and adopted a rule with the potential to undermine some of this country's most important counterterrorism measures directed against those who provide material support to terrorist organizations.

A. The Second Circuit's analysis departs markedly from this Court's precedents. The Due

Process Clause permits an assertion of jurisdiction where the defendant's conduct is "such that he should reasonably anticipate being haled into court" in the forum. *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 297 (1980). Where actions involving the defendant "were expressly aimed" at the forum, and the defendant knew "that the brunt of that injury would be felt" in the forum, a court has jurisdiction over claims against the defendant arising from that conduct. *Calder* v. *Jones*, 465 U.S. 783, 789-90 (1984); see *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 472 (1985) (a defendant need only have "'fair warning that a particular activity may subject [him] to the jurisdiction of a foreign sovereign'").

The Second Circuit's bar on jurisdiction based on a defendant's provision of material support to terrorism directed at the forum establishes a rule at odds with this Court's precedents. Although it is true that merely foreseeing a possible injury is not alone sufficient to establish jurisdiction, "[t]his is not to say ... that foreseeability is wholly irrelevant" to the inquiry. *World-Wide Volkswagen*, 444 U.S. at 297. Instead, the relevant question is whether the defendant could reasonably foresee that his purposeful actions might give rise to liability in the forum. *Id.*; *Burger King*, 471 U.S. at 472; *Calder*, 465 U.S. at 789-90. That standard is certainly met here.

This is not a case where a third party's "unilateral act" is the only connection to the forum. See *Asahi Metal Indus. Co.* v. *Super. Court*, 480 U.S. 102, 109-10 (1987) (citing *World-Wide Volkswagen*, 444 U.S. at 295-98). Rather, as petitioners have alleged (and as the Second Circuit assumed), the defendants *knowingly* funneled money to al Qaeda *knowing* al Qaeda intended to use those funds to attack U.S. civilians in the United States. See, *e.g.*, Pet. App.

43a-44a; Compl. ¶¶ 430-431, 442-443, 451-452, 461-463. It is thus hardly unfair or unforeseeable that the princes would face court proceedings in this country when al Qaeda did precisely what it committed to do with the princes' money. The provision of material support to terrorists whose express aim is to kill the citizens of another country surely gives a person "'fair warning that [that activity] may subject [him] to the jurisdiction of a foreign sovereign.'" *Burger King*, 471 U.S. at 472.

B. The Second Circuit's decision also conflicts with decisions of the Seventh, Ninth, and D.C. Circuits, and other federal courts. In *Janmark, Inc.* v. *Reidy*, 132 F.3d 1200 (7th Cir. 1997), for example, the Seventh Circuit, per Judge Easterbrook, held that when suing in tort "the state in which the injury (and therefore the tort) occurs may require the wrongdoer to answer for its deeds even if events were put in train outside its borders." *Id.* at 1202. "[T]here can be no serious doubt after *Calder* v. *Jones*," the court continued, "that the state in which the victim of a tort suffers the injury may entertain a suit against the accused tortfeasor." *Id.*

The Ninth Circuit held to like effect in *Panavision International, L.P.* v. *Toeppen*, 141 F.3d 1316 (9th Cir. 1998): under *Calder*'s "'effects test,'" "jurisdiction may attach if the defendant's conduct is aimed at *or has an effect in* the forum state." *Id.* at 1321 (emphasis added); see *id.* at 1321-22 (defendant knew his website infringed the plaintiff's trademark, and he "knew Panavision would likely suffer harm" in California, thus establishing personal jurisdiction). The Second Circuit (without citing these cases) held the opposite: the princes are accused of tortious conduct knowingly directed against the United States

and causing injury here, and yet jurisdiction is lacking.

This split extends to D.C. Circuit precedent arising directly in the context of actions against terrorists who target the United States. In *Mwani* v. *bin Laden*, 417 F.3d 1 (D.C. Cir. 2005), the D.C. Circuit held that personal jurisdiction exists over individuals (like the princes) who participate in a "conspiracy to attack the United States, with overt acts occurring within this country's borders." *Id.* at 13. The court flatly rejected the view that the defendants must actually have committed or directed the acts; instead, it applied *International Shoe*, *Burger King* and *World-Wide Volkswagen* and found that those who "engage[] in unabashedly malignant actions directed at [and] felt in this forum" should "reasonably anticipate being haled into court" in the United States. *Mwani*, 417 F.3d at 12-13 (quotation marks omitted). Providing material support to al Qaeda readily satisfies this standard.

Other courts have followed the D.C. Circuit's rule and are in conflict with the Second Circuit's rule. In *Morris* v. *Khadr*, 415 F. Supp. 2d 1323 (D. Utah 2006), for example, the defendant (like the princes here) "provided substantial financial support and personnel assistance to help [al Qaeda] achieve its international terrorism objectives," including encouraging his sons to join. *Id.* at 1327. The court, applying *Mwani*, held that this was a "textbook example[]" of personal jurisdiction under *Calder*'s effects test. *Id.* at 1335-36 ("In terrorism cases ... jurisdiction may attach if the defendant's conduct is aimed at or has an effect in the forum.") (quotation marks omitted). The court held that such conduct "creates personal jurisdiction even when a defendant did *not* personally participate in the attack itself." *Id.*

at 1336 (emphasis added). "Terrorist attacks require more than a triggerman—they also require financing, planning, and coordinating before a bomb detonates or a plane flies into a building," and thus "personal 'participation in al Qaeda's terrorist agenda'" is sufficient to create jurisdiction over a defendant. *Id.*; see also *Pugh* v. *Socialist People's Libyan Arab Jamahiriya*, 290 F. Supp. 2d 54, 59 (D.D.C. 2003) (individuals who "conspired" to commit acts of terrorism against foreigners in Africa could "expect they might be haled into the courts of those nations whose citizens would die"); *Daliberti* v. *Republic of Iraq*, 97 F. Supp. 2d 38, 53-54 (D.D.C. 2000) (those who "sponsor terrorism [have] been given adequate warning that terrorist acts against United States citizens, no matter where they occur, may subject them to suit in a United States court").

The Second Circuit purported to distinguish certain of these cases on the ground that they concerned "primary participants in terrorist acts," which the panel defined as someone who perpetrated or "commanded" the act. Pet. App. 41a-42a. Initially, that is simply inaccurate—*Morris*, for example, involved a financier of al Qaeda who did not participate in or "command" the attack. But more importantly, none of the cases cited by the Second Circuit says anything about such a distinction, nor does it appear in any of this Court's personal jurisdiction precedents. Indeed, the D.C. Circuit in *Mwani* (and the district courts in *Morris*, *Pugh*, and *Daliberti*) rejected the argument that only those who actually direct or carry out attacks may be sued in U.S. courts, holding instead that those who "conspire," "sponsor," or in some way "participat[e] in al Qaeda's terrorist agenda," see *supra* at 29-30, should anticipate defending themselves in U.S.

courts. This applies directly to the princes, who are alleged to have materially supported al Qaeda knowing that it would use the support to attack U.S. interests.

C. The United States does, in fact, use enforcement actions in U.S. courts as important tools for combating terrorism and ending terrorists' support, and the Second Circuit's rule limiting jurisdiction over those alleged to have provided extraterritorial support to terrorists has the potential to undermine a broad range of counterterrorism measures.

Criminal and civil prohibitions against the provision of material support for terrorism, including support provided by foreigners abroad, lie at the center of the United States' counterterrorism policies. For example, 18 U.S.C. § 2339B imposes criminal penalties upon "[w]hoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so," knowing "that the organization has engaged or engages in terrorism." 18 U.S.C. § 2339B(a)(1). Congress specifically provided U.S. courts with broad "extraterritorial Federal jurisdiction." *Id.* § 2339B(d). Similarly, the prohibition against financing terrorism imposes criminal penalties upon "[w]hoever ... directly or indirectly, unlawfully and willfully provides or collects funds ... with the knowledge that such funds are to be used ... in order to carry out ... any other act intended to cause death or serious bodily injury to a civilian." *Id.* § 2339C(a)(1)(B). Congress extended jurisdiction over such offenses even when the funding takes place outside the United States if the act "was directed toward or resulted in the carrying out of a predicate act" against U.S. nationals, persons or property within the United

States, or property of U.S. persons or government agencies. *Id.* § 2339C(a)-(b).

Congress also provided a civil remedy to "[a]ny national of the United States injured in his or her person, property, or business by reason of an act of international terrorism," *id.* § 2333, and intended this provision to extend liability to those whose conduct would fall within the criminal provisions addressing material support to terrorism.[11] See *Boim* v. *Quranic Literacy Inst.*, 291 F.3d 1000, 1012-16 (7th Cir. 2002). Section 2333 imposes liability on those who provide financial support abroad to terrorists and who aid or abet acts of terrorism, as long as "the defendants knew about the organization's illegal activity, desired to help that activity succeed and engaged in some act of helping." *Id.* at 1028. Congress "impose[d] liability on those who knowingly and intentionally supply the funds to the persons who commit the violent acts" because "there would not be a trigger to pull or a bomb to blow up without the resources to acquire such tools of terrorism and to bankroll the persons who actually commit the violence." *Id.* at 1021.

By creating a constitutional barrier to jurisdiction in U.S. courts over those who facilitate but do not directly commit or command acts of terrorism, the Second Circuit sharply limited the scope and enforceability of these and other criminal and civil statutes designed to address financial and other support provided to terrorist organizations. The Second Circuit has held that the Due Process Clause places beyond the reach of federal courts precisely the conduct—material support of terrorism and terrorist organizations—that most threatens the United States

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[11] Petitioners have expressly pled a cause of action against the respondents under § 2333. Compl. ¶¶ 634-638.

and that the United States government vigorously seeks to prevent and punish.

CONCLUSION

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

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