No. 12-574

IN THE
Supreme Court of the United States

ANTHONY WALDEN,
Petitioner,
v.

GINA FIORE, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE NEW ENGLAND LEGAL FOUNDATION AND ASSOCIATED INDUSTRIES OF MASSACHUSETTS IN SUPPORT OF PETITIONER

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June 3, 2013

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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INTEREST OF AMICI CURIAE

Amici curiae New England Legal Foundation ("NELF"), and Associated Industries of Massachusetts ("AIM"), seek to present their views, and the views of their supporters, on the issue presented in this case, namely whether the Due Process Clause permits a court to assert personal jurisdiction over an out-of-State defendant merely because he knew of the plaintiff's connections with the forum State.[1] Otherwise put, at issue is whether personal jurisdiction can lie when it is merely foreseeable that the plaintiff may feel the effects of the defendant's extra-territorial actions in the forum State.

NELF is a nonprofit, nonpartisan, public interest law firm, incorporated in Massachusetts in 1977 and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF's members and supporters

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[1] Pursuant to Supreme Court Rule 37.6, NELF and AIM state that no counsel for a party authored this brief in whole or in part, and no person or entity, other than amici, made a monetary contribution to the preparation or submission of the brief.

Pursuant to Supreme Court Rule 37.3(a), NELF and AIM state that, on March 7 and on March 12, 2013, counsel for the petitioner and counsel for the respondents filed respectively a general written consent with this Court to the filing of amicus briefs, in support of either or neither party.

include both large and small businesses located primarily in the New England region.

AIM is a 97-year-old nonprofit association, with over 5,000 employer members doing business in the Commonwealth. AIM's mission is to promote the well-being of its members and their employees, and the prosperity of the Commonwealth of Massachusetts, by improving the economic climate of Massachusetts, advocating fair and equitable public policy proactively, and by providing relevant and reliable information and excellent services.

NELF and AIM are committed to the importance and preservation of the due process protections afforded businesses when they are sued in unanticipated, remote, and inconvenient fora. In this connection, NELF recently filed an amicus brief on behalf of the business defendant in *DaimlerChrysler AG v. Bauman*, *cert. granted*, 2013 WL 1704716 (U.S. Apr. 22, 2013) (No. 11-965), arguing for reasonable due process limits on a court's exercise of general jurisdiction over a foreign corporation. Moreover, NELF has filed many other amicus briefs before this Court, advocating for important protections afforded businesses under the Constitution and federal law. *See, e.g., Spirit Airlines, Inc. v. Dep't of Transp.*, *cert. denied*, 133 S. Ct. 1723 (Apr. 1, 2013) (No. 12-656) (First Amendment protection of airline price advertising); *Univ. of Texas Sw. Med. Ctr. v. Nassar, cert. granted*, 133 S. Ct. 978 (Jan 18, 2013) (No. 12-484) (standard of causation in Title VII retaliation claims); *Oxford Health Plans LLC v. Sutter***,** *cert. granted,* 133 S. Ct. 786 (December 07, 2012) (No. 12-135) (contractual basis for imposing class arbitration under Federal Arbitration Act); *Am. Express. Co. v. Italian Colors*

Restaurant, cert. granted, 133 S. Ct. 594 (Nov. 9, 2012) (No. 12–133) (enforcement under FAA of class action waivers in arbitration of federal statutory claims); AT&*T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (FAA preemption of state law requiring class arbitration); *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011) (First Amendment protection of sale and use of prescriber-identifiable data).

In this case, NELF and AIM oppose the exercise of personal jurisdiction over an out-of-state defendant who has not established the minimum contacts with the forum State that due process requires to provide him with fair warning that he may sued in that State. As this Court has held, where, as here, the defendant has not expressly aimed his extra-territorial conduct at the forum State, nor made it the focal point of his actions, he has not established minimum contacts with that State, and personal jurisdiction cannot lie. *See Calder v. Jones*, 465 U.S. 783 (1984) (specific jurisdiction lay over Florida journalist and editor who "expressly aimed" defamatory article at California and made that State "the focal point" of tort).

In this case, however, the Ninth Circuit has impermissibly conflated the rigorous "expressly aimed" requirement under *Calder v. Jones* with a mere foreseeability-of-effects standard, which this Court has rejected as insufficient to ground personal jurisdiction. If allowed to stand, the Ninth Circuit's decision would effectively eliminate the minimum contacts requirement of the Due Process Clause by basing personal jurisdiction erroneously on the *plaintiff*'s forum connections, rather than the

defendant's own purposeful contacts with that State. Such a misguided approach would expose NELF's and AIM's business constituents impermissibly to the risk of personal jurisdiction in unanticipated and remote fora whenever they are sued for such common business torts as fraud, breach of fiduciary duty, misappropriation of trade secrets, unfair competition, or tortious interference with business relations. In left uncorrected, the Ninth Circuit's decision will have effectively deprived the alleged intentional tortfeasor of the notice and fairness protections guaranteed under the Due Process Clause.

For these and other reasons discussed below, NELF and AIM believe that their brief would provide an additional perspective to aid this Court in deciding the issues presented in this case.

SUMMARY OF ARGUMENT

Due process does not permit a court to assert personal jurisdiction over an out-of-state defendant solely because he knew that the plaintiff had connections to the forum State. A defendant's mere knowledge of the plaintiff's connections with the forum State cannot establish the direct and purposeful contacts between the *defendant* and the forum State that due process requires. The essential purpose of the minimum contacts requirement here is to provide the defendant with fair warning as to where he may be sued for claims arising from those contacts. It is inconceivable how the mere knowledge of a plaintiff's connections to the forum State could provide the defendant with sufficient notice that he may be sued there.

The Ninth Circuit has also misinterpreted *Calder v. Jones*, 465 U.S. 783 (1984), in which this Court specified the minimum contacts necessary to assert personal jurisdiction over a defendant sued for intentional torts. Such a defendant must have "expressly aimed" his extra-territorial conduct at the forum State and made it the "focal point" of his actions to establish minimum contacts there. That is, the alleged intentional tortfeasor must have targeted his conduct both at the plaintiff and *at the forum State*, and not merely at a plaintiff with known forum connections. The forum State must be the *intended* locus and center of the harm, and not merely a foreseeable place where the plaintiff might feel some of the effects of the defendant's actions, as in this case. Therefore, a defendant has "expressly aimed" his tortious conduct at the forum State only when he has intended to cause harm to the plaintiff specifically and primarily in that State. Only the defendant who has acted with such a specific intent could reasonably anticipate being haled into a court of the forum State to defend his actions there.

By contrast, in this case there is no such deliberate targeting of the forum State, and therefore no specific intent to cause harm primarily in that State. The Ninth Circuit has erroneously imposed personal jurisdiction based solely on the petitioner's knowledge of the respondents' forum contacts, as if personal jurisdiction could be established vicariously. This Court has rejected any such personal jurisdiction "by association" under the Due Process Clause.

In particular, the Ninth Circuit has conflated the rigorous "express aiming" requirement under *Calder v. Jones* with a mere foreseeability-of-effects standard, which the Court expressly rejected in that case, and in other decisions, as insufficient to establish personal jurisdiction. The lower court apparently concluded that, since the petitioner allegedly knew about respondents' forum connections when he prepared an allegedly false and misleading affidavit to support the potential forfeiture of respondents' money in Georgia, then he must have known that respondents would feel the financial consequences of any resulting delay in the return of their money in the forum State of Nevada. According to the Ninth Circuit, this knowledge alone satisfies the "express aiming" requirement.

But the Ninth Circuit has in fact concluded that it was merely *foreseeable* to the petitioner that respondents would feel the effects of his affidavit in the forum State. The Ninth Circuit has thus apparently misunderstood that, under *Calder v. Jones*, the defendant must deliberately target the forum State and make it the intended focal point of his actions and their consequences. Mere knowledge of a plaintiff's connections with the forum State is not proof of a defendant's specific intent to cause harm primarily in that State. If allowed to stand, then, the Ninth Circuit's decision would reduce the minimum contacts requirement under *Calder v. Jones* to a constitutionally inadequate foreseeability-of-effects standard, which misdirects the jurisdictional inquiry from the *defendant's* relationship with the forum State to the plaintiff's independent relationship with that State.

ARGUMENT

I. PERSONAL JURISDICTION CANNOT LIE AGAINST AN OUT-OF-STATE DEFENDANT SUED FOR INTENTIONAL TORTS UNLESS HE EXPRESSLY AIMED HIS EXTRA-TERRITORIAL CONDUCT AT THE FORUM STATE AND THEREBY INTENDED TO CAUSE HARM SPECIFICALLY AND PRIMARILY IN THAT STATE.

At issue in this case is whether the Due Process Clause of the Fourteenth Amendment to the United States Constitution permits a court to assert personal jurisdiction over an out-of-state defendant who is sued for extra-territorial conduct, solely because the defendant directed his conduct at an individual with known connections to the forum State.[2] The Ninth Circuit in this case so held,

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[2] The Fourteenth Amendment provides, in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law[.]" U.S. Const. amend. XIV, § 1. While this case concerns the constitutional limits on a federal court's exercise of personal jurisdiction, it is the Due Process Clause of the Fourteenth Amendment, and not the Fifth Amendment, that applies here. This is so because, absent a federal statute to the contrary, a federal district court may only exercise personal jurisdiction to the same extent as a State court of general jurisdiction in the State where the district court sits. *See* Fed. R. Civ. P. 4(k)(1)(A), (C). *See also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 464 (1985) ("The question presented is whether this exercise of long-arm jurisdiction [by a federal district court] offended traditional conceptions of fair play and substantial justice embodied in the

concluding that a nonresident defendant's mere knowledge of a plaintiff's forum connections establishes the necessary minimum contacts between the defendant and the forum State to satisfy due process.

In particular, the lower court subjected petitioner, Anthony Walden, a Drug Enforcement Administration ("DEA") agent on duty at the Atlanta, Georgia airport, to personal jurisdiction in Nevada for a *Bivens* action arising from his confiscation, in Atlanta, of approximately $97,000 belonging to respondents, Gina Fiore and Keith Gipson. *Fiore v. Walden*, 688 F.3d 558, 570-71 (9th Cir. 2012). Respondents are professional gamblers who were passing through the Atlanta airport, en route from Puerto Rico to Las Vegas. *Id*. Walden confiscated their money because he believed that it may have been involved in an unlawful drug transaction. *Id*., 688 F. 3d at 571. Petitioner's actions were confined to the State of Georgia and were directed solely at the seizure and forfeiture of respondents' money in that State.[3]

Due Process Clause of the Fourteenth Amendment.") (citation and internal quotation marks omitted).

[3] In particular, respondents allege that petitioner wrongfully seized their money in the Atlanta airport, and then provided a false and misleading probable cause affidavit to the United States Attorney in the Northern District of Georgia, in support of the potential forfeiture of respondents' money. *Fiore v. Walden*, 688 F. 3d at 571-72. Respondents do not allege that petitioner knew about their Nevada connections when he seized their money. *Id*., 688 F. 3d at 577-78. Instead, Walden allegedly became aware of their Las Vegas ties only when he prepared the affidavit. *Id*. at 578.

The Ninth Circuit has erred in asserting personal jurisdiction over the defendant in this case. Under this Court's clear precedent, an out-of-state defendant's mere knowledge of the plaintiff's connections with the forum State cannot establish the direct and purposeful contacts between the *defendant* and the forum State that due process requires. Indeed, it is inconceivable how the mere knowledge of a plaintiff's connections to the forum State could provide the defendant with sufficient notice that he may be sued there, consistent with "traditional notions of fair play and substantial justice.'" *Int'l Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945) (citation and internal quotation marks omitted). After all, "[t]he constitutional touchstone [under the Due Process Clause] . . . remains whether the defendant *purposefully established* minimum contacts in the forum State." *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 108-09 (1987) (citations and internal quotations omitted) (emphasis added). *See also Shaffer v. Heitner,* 433 U.S. 186, 204 (1977) (minimum contacts requirement "focuses on the relationship among the *defendant*, the forum, and the litigation . . .") (emphasis added).

In cases of specific jurisdiction, such as this one, the essential purpose of the minimum contacts requirement is to provide the defendant with sufficient notice as to where he may be sued for claims arising from those contacts. "[T]he defendant's conduct and connection with the forum State are such that he should *reasonably anticipate* being haled into court there." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985) (citation and internal quotation marks omitted) (emphasis added). Due process therefore protects a defendant's

reasonable expectations "[b]y requiring that individuals have *fair warning* that a particular activity may subject them to the jurisdiction of a foreign sovereign . . . ." *Burger King*, 471 U.S. at 472 (citation and internal quotation marks omitted) (emphasis added).

To serve this essential notice function under the Due Process Clause, the minimum contacts requirement focuses, by necessity, on the *defendant's* purposeful contacts with the forum State, contrary to the Ninth Circuit's approach in this case. "The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no *meaningful contacts, ties, or relations*." *Burger King*, 471 at 471-72 (citation and internal quotation marks omitted) (emphasis added). Only a defendant who has established such meaningful contacts with the forum State could reasonably expect to be sued in that State for claims arising from those contacts. In short, due process protects a defendant from being haled into an unanticipated and remote forum. *See U.S. v. Morton,* 467 U.S. 822, 828 (1984) ("[P]ersonal jurisdiction protects the individual interest that is implicated when a nonresident defendant is haled into a distant and possibly inconvenient forum."). The Ninth Circuit has apparently lost sight of this basic purpose of the Due Process Clause.

The Ninth Circuit has also misinterpreted this Court's key precedent addressing the due process protections afforded the out-of-state defendant who is sued for intentional torts, such as the petitioner in this case. Such a defendant must have "expressly aimed" his extra-territorial conduct at the forum State and made it the "focal point" of his actions to

establish minimum contacts there. *Calder v. Jones*, 465 U.S. 783, 789 (1984) (specific jurisdiction lay over Florida journalist and editor who "expressly aimed" defamatory article at California by describing Hollywood entertainer's alleged drinking and unprofessionalism within her industry, thereby making California "the focal point" of tort).

As *Calder v. Jones* illustrates, the alleged intentional tortfeasor must have targeted his conduct both at the plaintiff and *at the forum State*, and not merely at a plaintiff with known forum connections. Under *Calder v. Jones*, the forum State must be the *intended* locus and center of the harm, and not merely a foreseeable place where the plaintiff might feel some of the effects of the defendant's actions, as in this case. *See id*., 465 U.S. at 789.

In fact, this Court made it especially clear in *Calder v. Jones* that the "express aiming" requirement is definitionally distinct from a mere foreseeability-of-effects standard. In that case, the Court addressed the petitioners' argument that "[t]he mere fact that they can 'foresee' that the article will be circulated and have an effect in California is not sufficient for an assertion of jurisdiction." *Calder v. Jones*, 465 U.S. at 789. The Court flatly rejected the petitioners' characterization of the minimum contacts requirement as constituting a mere foreseeability standard. "[P]etitioners are not charged with mere untargeted negligence. Rather, their intentional, and allegedly tortious, actions were *expressly aimed at* California." *Id*. (emphasis added). That is, the petitioners' actions in *Calder v. Jones*, unlike the petitioner's conduct in this case, showed that they *intended* to

cause harm in the forum State, thereby exposing themselves to personal jurisdiction in that state to defend their actions there.

Therefore, a defendant has "expressly aimed" his tortious conduct at the forum State under *Calder v. Jones* only when he has intended to cause harm to the plaintiff specifically and primarily in that State. In effect, *Calder v. Jones* creates an additional jurisdictional element of proof to the underlying intentional tort. To establish personal jurisdiction over the out-of-state defendant, the plaintiff must show that the defendant deliberately targeted his conduct at the forum State and, in so doing, had the specific intent to harm the plaintiff in that State. Only the defendant who has acted with such an intent could reasonably anticipate being haled into a court of the forum State to defend his actions there. Such a tortfeasor has effectively implicated the sovereign authority of the forum State itself and is therefore on notice that he may be sued there. *C.f. J. McIntyre Mach., Ltd. v. Nicastro,* 131 S. Ct. 2780, 2787 (2011) ("[I]n some cases, as with an *intentional tort*, the defendant might well fall within the State's authority by reason of his attempt to obstruct its laws.") (emphasis added).

By contrast, in this case there is no such deliberate targeting of the forum State, and therefore no specific intent to cause harm primarily in that State. The petitioner seized respondents' money in Georgia and then prepared, in Georgia, an allegedly false and misleading affidavit to support the potential forfeiture of respondents' money in Georgia. *See Fiore v. Walden*, 688 F. 3d at 577-78. That is, the petitioner aimed his conduct expressly and exclusively at the State of Georgia and not at

the forum State of Nevada.[4] Accordingly, the petitioner has not, by his conduct, established the minimum contacts with the forum State, if any contacts at all, that Due Process requires to put him on notice that he could be sued there.

And yet, despite the clear lack of minimum contacts, and despite this Court's repeated emphasis on the bedrock notice and fairness principles inhering in the Due Process Clause, the Ninth Circuit has nonetheless asserted personal jurisdiction against the out-of-state defendant in this case. The lower court has imposed personal jurisdiction based solely on the petitioner's knowledge of the respondents' forum contacts, as if personal jurisdiction could be established vicariously. However, this Court has clearly rejected any such notion of personal jurisdiction "by association" under the Due Process Clause. "The unilateral [forum] activity of those [plaintiffs] who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State." *Burger King*, 471 U.S. at 474 (citation and internal quotation marks omitted).

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[4] Moreover, forfeiture proceedings are typically actions *in rem*, because they target the property itself, and not the property's owner. Therefore, the petitioner could reasonably anticipate being sued in the jurisdiction where he seized respondents' property, and not where respondents were living at the time. "Congress specifically structured these forfeitures to be impersonal by *targeting the property itself*, . . . 'with jurisdiction dependent upon *seizure of a physical object*.'" *United States v. Ursery*, 518 U.S. 267, 289 (1996) (quoting *United States v. One Assortment of 89 Firearms,* 465 U.S. 354, 363) (1984) (emphasis added)).

In particular, the Ninth Circuit has based its decision solely on the fact that the petitioner allegedly knew about respondents' Nevada connections when he filed an allegedly false and misleading probable cause affidavit, in Georgia, to support the potential forfeiture of respondents' money that he had seized in Georgia. *See Fiore v. Walden*, 688 F. 3d at 577-78. The lower court apparently concluded that, since the petitioner allegedly knew about respondents' forum connections when he prepared the affidavit, then he must have known that respondents would feel the financial consequences of any resulting delay in the return of their money in the forum State. *See id.*, 688 F. 3d at 578-79, 580-81. According to the Ninth Circuit, this knowledge alone satisfies the "expressly aimed" requirement under *Calder v. Jones*. *Id.*, 688 F. 3d at 581.

But the Ninth Circuit has merely concluded that the defendant could reasonably *foresee* that respondents would feel the effects of his actions in the forum State. And this Court in *Calder v. Jones* clearly rejected the sufficiency of a mere foreseeability-of-effects standard under the Due Process Clause, as discussed above. *See id.*, 465 U.S. at 789. In a subsequent case, the Court elaborated on the inadequacy of a mere foreseeability-of-effects standard under the Due Process Clause:

> Although it has been argued that foreseeability of causing *injury* in another State should be sufficient to establish such [minimum] contacts there when policy considerations so require, the Court has consistently held that *this kind of foreseeability is*

> *not a sufficient benchmark for exercising personal jurisdiction*. . . . Instead, the foreseeability that is critical to due process analysis is that the *defendant's conduct and connection with the forum State* are such that he should reasonably anticipate being haled into court there.

Burger King, 471 U.S. at 474 (citation and internal quotation marks omitted) (second and third emphases added).

The Ninth Circuit has therefore conflated the rigorous "expressly aimed" requirement under *Calder v. Jones* with a mere foreseeability-of-effects standard, even though the lower court observed correctly "that the express aiming requirement is not satisfied where it is merely foreseeable that there will be an impact on individuals in the forum." *Fiore v. Walden*, 688 F. 3d at 577. Despite this accurate statement of the law, however, the Ninth Circuit has erred in *applying* the law to the allegations in this case. The Ninth Circuit has apparently misunderstood that, under *Calder v. Jones*, the defendant must deliberately target the forum State and make it the intended focal point of his actions and their consequences. *See id.*, 465 U.S. at 789. Mere knowledge of a plaintiff's connections with the forum State is not enough to establish personal jurisdiction because it is not proof of a defendant's specific intent to cause harm primarily in that State.

If allowed to stand, then, the Ninth Circuit's decision would reduce the minimum contacts requirement under *Calder v. Jones* to a

constitutionally inadequate foreseeability-of-effects standard. The lower court's approach misdirects the jurisdictional inquiry from its proper focus--the defendant's purposeful contacts with the forum State--to the plaintiff's contacts there. In so doing, the lower court has effectively eliminated the minimum contacts requirement applicable to the out-of-state defendant sued for intentional torts. As a result, the lower court has deprived the out-of-state defendant of the notice and fairness protections afforded him under the Due Process Clause. Personal jurisdiction cannot lie under those circumstances, and the Ninth Circuit's decision should therefore be reversed.

CONCLUSION

For the reasons stated above, NELF and AIM respectfully request that this Court reverse the judgment of the Ninth Circuit.

Respectfully submitted,

NEW ENGLAND LEGAL FOUNDATION
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June 3, 2013