NO. 12-574

In the
Supreme Court of the United States

ANTHONY WALDEN,

Petitioner,

v.

GINA FIORE AND KEITH GIPSON,

Respondents.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

This case cleanly presents two questions worthy of this Court's review. Respondents' attempts to deny that reality crumble under scrutiny.

A. The Personal-Jurisdiction Issue Warrants Review

1. The circuits are split over the express-aiming requirement in *Calder v. Jones*, 465 U.S. 783 (1984). Pet. 13–22. Although the Ninth and Eleventh Circuits hold that a defendant's intent to harm a plaintiff with known forum-state connections suffices, most circuits hold that "*Calder* requires more." *Mobile Anesthesiologists Chi., LLC v. Anesthesia Assocs. of Hous. Metroplex, P.A.*, 623 F.3d 440, 447 (7th Cir. 2010). The majority view, as Judge O'Scannlain and four other judges explained below, is that "a defendant must expressly aim the conduct forming the basis of the claim *at the forum state*—not just at a known forum resident." App. 84a.

a. Seeking to explain away the split, respondents contend that the distinction between aiming conduct at a state and aiming conduct at a known resident is "merely semantic." BIO 12. As they have it, "because states are composed of individuals, defendants must be able to satisfy *Calder*'s requirements by targeting individuals." *Id.*

Respondents are wrong. A state is no mere conglomeration of prospective plaintiffs; it is a distinct, sovereign entity. The question in personal-jurisdiction cases is not what the defendant's relationship with *the plaintiff* is, but whether the defendant has, by his actions, "submit[ted] to the

judicial power of" the forum state, "an otherwise foreign sovereign." *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2788 (2011) (plurality op.); see also *id*. at 2793 (Breyer, J., joined by Alito, J., concurring in the judgment); Pet. 24–25. For this reason, due process does not permit a state to exercise jurisdiction over a defendant based on nothing more than a connection to the plaintiff. *Ibid*. Instead, the forum state itself must have been the "focal point" of the defendant's conduct, because only then has the defendant "'entered' the state in some fashion." *Imo Indus., Inc. v. Kiekert AG*, 155 F.3d 254, 265 (3d Cir. 1998).

b. Apart from denying the difference between aiming at a state and aiming at a person who happens to be a resident, respondents' opposition to certiorari consists of denying that the courts that have said the former is required meant what they said.

Respondents first contend that *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063 (10th Cir. 2008), "confirms that a defendant's intent to injure someone with significant connections to the forum state" is enough. BIO 13. That is how the Tenth Circuit described the Ninth Circuit's approach of holding *Calder*'s express-aiming requirement "satisfied when the defendant 'individually target[s] a known forum resident.'" 514 F.3d at 1074 n.9 (quoting *Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000)). But far from adopting that approach, the Tenth Circuit noted that it has "taken a somewhat more restrictive approach, holding that the forum state itself must be

the 'focal point of the tort.'" *Id.* And *Dudnikov* found *Calder* satisfied not merely because the defendants targeted the plaintiffs but because they had "reached into Colorado" to "cancel[] plaintiffs' auction in Colorado." *Id.* at 1075.

Respondents next assert that *Tamburo v. Dworkin*, 601 F.3d 693 (7th Cir. 2010), shows that "[t]he Seventh Circuit would also reach the same result as the Ninth Circuit in this case." BIO 14. But *Tamburo* itself acknowledged the split that respondents deny. 601 F.3d at 704 (contrasting Ninth Circuit's approach with that of Third, Fourth, and Tenth Circuits). As for *Mobile Anesthesiologists*, respondents stress that "the defendant did not even know of the plaintiff's *existence*, much less that it was located in Illinois, when it registered the domain name." BIO 15. Respondents fail to mention that the defendants later learned the plaintiff's "identity, location, and ownership of a similar mark," 623 F.3d at 444, and the plaintiff argued, like respondents here, that "[f]rom that time forward . . . [the defendant] was intentionally directing its tortious activities at Illinois." *Id.* at 446. That was enough for the Ninth Circuit, which equated conduct aimed at respondents with conduct aimed at Nevada. App. 47a ("Walden intentionally targeted persons and funds with substantial connections to Nevada. He thus expressly aimed his conduct at that state . . . ."). But it was not enough for the Seventh Circuit, which recognized that *Calder* requires more than "the plaintiff's mere residence in the forum state." 623 F.3d at 447.

The Third Circuit's precedent is the next victim of respondents' whitewashing efforts. According to respondents, *Remick v. Manfredy*, 238 F.3d 248 (3d Cir. 2001), found express aiming "based solely on the defendants' intention to injure the plaintiff in the forum state." BIO 16. In truth, however, *Remick* held that the alleged tortious interference was aimed at Pennsylvania not merely because the plaintiff suffered injury there, but because the contract at issue was performed there. 238 F.3d at 260. What is more, the court made clear that the location of the contractual relationship was critical by finding *no* express aiming on the plaintiff's defamation claim: Although the defendants aimed their statements at the plaintiff in Pennsylvania and "the brunt of the harm" was suffered there, *id*. at 258, "it cannot be said that the defendants here expressly aimed their conduct at Pennsylvania so that Pennsylvania was the focal point of the tortious activity." *Id.* at 259. If "intention to injure the plaintiff in the forum state" truly sufficed, BIO 16, *Remick* would have upheld jurisdiction over that claim too. Instead, it reiterated *Imo Industries*' admonition that simply "asserting that the defendant knew that the plaintiff's principal place of business was located in the forum [is] insufficient . . . ." *Remick*, 238 F.3d at 258; see Pet. 17.

Respondents' arguments go further downhill from there. They claim that *ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617 (4th Cir. 1997), reflects the supposedly "uniform approach" embodied by the decision below. BIO 17. In fact, the Fourth Circuit made clear that intending to harm a known forum resident is *not* enough, as "such knowledge and

intent is too attenuated to constitute a 'substantial connection' with [the forum]." 126 F.3d at 625. Respondents correctly report the court's conclusion that "the defendant's North [*sic*; South] Carolina connections were too 'attenuated and insubstantial' for its actions to have been expressly aimed there," BIO 17, but omit the reason: the defendant had no connection to South Carolina other than having allegedly targeted a known resident—precisely the "connection" that the Ninth Circuit held sufficient.

Equally egregious is respondents' claim that *Johnson v. Arden*, 614 F.3d 785 (8th Cir. 2010), "rested on the application of the same test [as applied by the Ninth Circuit] to different facts." BIO 18. If the circuits really "agree[d] that intentionally targeting a known forum resident is sufficient," BIO 12, *Johnson*, too, would have come out the other way: the defendant's allegedly defamatory "statements were aimed at the Johnsons" with obvious knowledge of their Missouri connections, as the statements themselves noted that the Johnsons' business was located there. 614 F.3d at 796. Yet the Eighth Circuit distinguished between aiming at known Missourians and aiming "at Missouri" and held jurisdiction lacking because the Johnsons failed to show the latter. *Id.*

Respondents submit that their "uniform approach" prevails in the Fifth Circuit as well. They tell the Court that *Central Freight Lines Inc. v. APA Transport Corp.*, 322 F.3d 376 (5th Cir. 2003), "held that the defendant's intent to harm the plaintiff, with knowledge that he would feel the harm in Texas, was sufficient to support jurisdiction there." BIO 19.

Contrary to respondents' misleading description, the Fifth Circuit relied not merely on the defendant's knowledge, but rather on its "interference with the contractual relationship of two Texas-based companies whose business dealings are based in Texas." 322 F.3d at 384. Indeed, the Fifth Circuit distinguished between conduct directed toward the plaintiff and conduct "purposefully directed toward the forum state," *id.* at 383—the distinction that respondents reject as "merely semantic"—and took pains to clarify that the "fortuity" that a victim of an intentional tort resides in the forum state is insufficient, *id.* at 384 n.7.

In short, the split is real, as both the dissenting judges below and other circuits have recognized. That respondents can argue to the contrary only by mischaracterizing key cases simply underscores that reality.

2. As for respondents' arguments on the merits, it largely suffices here to note that *Calder*'s susceptibility to such sharply contrasting readings shows why certiorari is needed. Nonetheless, respondents' assertion that "[t]his case is on all fours with *Calder*," BIO 23, cannot be taken seriously. If mere intent to harm a known forum resident were enough, *Calder* would not have emphasized the numerous other ways that the defendants' conduct was focused on California. See 465 U.S. at 788–89; Pet. 23. Although respondents contend that *Calder* emphasized those facts solely to show that "the defendants knew that the story would harm the plaintiff there," BIO 23, that is not a fair reading of

the opinion, nor is it how most lower courts have read it.

Respondents also miss the mark in complaining that petitioner "never explains what would be involved in 'aiming conduct at the state itself.'" BIO 25. The cases described above furnish examples of conduct with a nexus to the forum state itself going beyond knowledge of the eventual plaintiff's residence. For example, "reach[ing] into Colorado" to force the cancellation of an auction there may well constitute aiming conduct at Colorado. *Dudnikov*, 518 F.3d at 1075. Respondents, however, do not allege that petitioner took any action in Nevada, directed anyone to take any action in Nevada, or had any connection to Nevada other than allegedly intending to injure respondents while knowing that *they* had connections to Nevada. Here, accordingly, it is dispositive whether that "connection" between petitioner and Nevada is sufficient. Pet. 22–25.

3. Respondents finally argue that the decision below is unimportant, downplaying the risk that airport employees "can be haled into court in any state around the country" under the Ninth Circuit's approach. BIO 26. But that is exactly the upshot of the decision below. In many encounters between a law-enforcement officer and a citizen—from TSA agents performing airport security checks to local police officers making traffic stops—the officer will check the citizen's identification, thereby learning where he lives. In the Ninth Circuit, that knowledge suffices to drag the officer across the country to defend his good name and personal finances whenever a plaintiff alleges an intentional tort.

B. The Venue Issue Warrants Review

1. There is a square split regarding how to determine whether a district is one "in which a substantial part of the events or omissions giving rise to the claim occurred" under 28 U.S.C. § 1391(b)(2): three circuits look exclusively to acts and omissions *by the defendant*, while the Ninth Circuit considers also the place of the *plaintiff's injury*. Pet. 31–33. Respondents can call this split "overstated" (BIO 28) only by misstating the case law.

Respondents concede that *Woodke v. Dahm* "focused on the defendant's activities," but dismiss it as factually distinguishable, stressing the court's observation that "the plaintiff had not adduced 'any other evidence' that the events 'giving rise' to his claim 'occurred in the forum that he chose.'" BIO 29 (quoting 70 F.3d 983, 985 (8th Cir. 1995)) (emphasis omitted). The Eighth Circuit made that observation, however, only after decisively rejecting the argument that the plaintiff's injury could constitute an "event[]" "giving rise to" a claim under § 1391(b)(2). That Woodke pointed to no relevant events or omissions in the forum district—*i.e.*, nothing other than his injury—explains why he lost. It does not explain away the split over whether the plaintiff's injury counts as a relevant "event" or "omission."

As to *Jenkins Brick Co. v. Bremer*, 321 F.3d 1366 (11th Cir. 2003), respondents assert that there is "no tension between the ruling below and *Jenkins*" because "here, the Ninth Circuit held that venue was proper because a substantial part of the events or omissions giving rise to the claim occurred in Nevada." BIO 29 (internal quotation marks omitted).

But that whistles past the real issue: The Ninth Circuit found the statute satisfied by focusing on the location of respondents' alleged injury, while the Eleventh Circuit held that only the defendant's conduct counts as a relevant "event" or "omission." See 321 F.3d at 1371–72 (approving of *Woodke*'s holding that Congress "'meant to require courts to focus on relevant activities of the defendant, not of the plaintiff'").

Respondents similarly try to distinguish *Daniel v. American Board of Emergency Medicine*, 428 F.3d 408 (2d Cir. 2005), on the ground that it held that "the actual inquiry is whether significant events or omissions material to the plaintiff's claims have occurred in the district in question." BIO 30 (brackets and quotation marks omitted). But no one disputes that that is the "actual inquiry" under § 1391(b)(2); it is what the statute's text says. The real question, which respondents continue to beg, is *what counts* as an "event" or "omission"? *Daniel* aligned the Second Circuit with the Eighth and Eleventh Circuits in holding that only the defendant's actions count. See 428 F.3d at 432–34 (quoting *Woodke* and *Jenkins Brick* approvingly). Respondents misunderstand *Daniel*'s reference to a "half-dozen letters" that one defendant had sent into the forum district. *Id.* at 434; BIO 30. The court considered those letters only insofar as they constituted part of the "series of actions *by defendants*" that the plaintiffs challenged, concluding that their transmission "constitute[d] only an insignificant and certainly not 'a substantial part of the events or omissions giving rise to [plaintiffs' claims].'" 428 F.3d at 434 (emphasis added).

2. On the merits, rather than defend the Ninth Circuit's reasoning that the plaintiff's injury is an "event[] or omission[] giving rise to the claim," respondents change the subject. First, they seek to rehabilitate the decision below by stating that it "also considered the actions by petitioner that gave rise to respondents' claims." BIO 28. But not even respondents suggest that the decision below considered any actions by petitioner that—as § 1391(b)(2) requires—"occurred" in Nevada, for it is undisputed that there were no such actions. The Ninth Circuit may have considered actions by petitioner that occurred in Georgia, but that hardly justifies its decision that venue lay in Nevada.

Next, in search of some event that occurred in Nevada, respondents argue that "the Ninth Circuit was correct to consider facts such as the return of respondents' funds to Nevada." BIO 32. But the "events" and "omissions" that "g[ave] rise" to respondents' claim are the seizure of the cash and the failure to return it sooner. Getting their money back is the *opposite* of what respondents are complaining about. The court below stated that "[t]he arrival of the funds in Nevada was the event that caused [respondents'] cause of action to mature," App. 42a, but even if that is true for statute-of-limitations purposes it cannot transform the money's return from an event that benefited respondents into an event that gave rise to their claim. And in any case, petitioner played no role in the return of the money, so—as three circuits hold—it is legally irrelevant to the venue analysis. See Am. Compl. ¶¶ 106, 109 (alleging that Assistant U.S. Attorney decided to

return the cash and that petitioner had refused to return it).

3. Respondents finally assert that the venue question is unimportant because "other safeguards remain: defendants—including petitioner—may still argue that venue is improper under 28 U.S.C. § 1406(a) . . . ." BIO 33. What respondents mean is a mystery. Section 1406(a) imposes no venue requirements separate from § 1391(b)(2); instead, it merely authorizes courts to dismiss or transfer cases for which venue is improper. Venue cannot be "improper" under § 1406(a) if it is proper under § 1391(b)(2).

In short, bereft of legitimate reasons why certiorari is unwarranted, respondents stoop to fictional ones.

C. No Vehicle Problems Exist

Respondents conclude with a half-hearted attempt, occupying less than a page, to manufacture vehicle problems. They argue that petitioner's "real complaint" is that the decision below merely "misapplied" the express-aiming standard. BIO 33. As the petition makes clear, petitioner's complaint is that the Ninth Circuit eviscerated that standard by equating intentional conduct directed at the plaintiff with express aiming at the forum state. Some personal-jurisdiction cases may be complicated or fact-bound, but the dispute here is purely legal and could not be more cleanly presented given that the only "connection" between petitioner and Nevada was petitioner's knowledge that *respondents* had connections to Nevada.

Respondents next argue that the case is "interlocutory." BIO 33. Why that is a reason to deny certiorari here is unclear; nothing that could happen on remand will change the Ninth Circuit's erroneous legal standards. Moreover, venue and personal-jurisdiction issues are routinely resolved at the pleading stage, see Fed. R. Civ. P. 12(b)(2)–(3), and this Court has not hesitated to take cases arising in this identical posture. See, *e.g.*, *J. McIntyre*, *supra*.

Respondents' final suggestion that certiorari is unwarranted because petitioner may be entitled to qualified immunity, BIO 34, is misconceived. To be sure, because respondents' allegations of misconduct by petitioner are false, petitioner fully expects to win on qualified-immunity or other grounds if he is forced to litigate in Nevada. But the point of personal-jurisdiction and venue rules is to protect defendants from having to defend in distant forums in the first place. It is no answer to the Ninth Circuit's erroneous rulings on those important threshold issues to say that petitioner may ultimately prevail on other grounds.

Finally, it bears noting that respondents' unsolicited BIO substantially refines the arguments they made below. Compare, *e.g.*, BIO 21–26 with Opening C.A. Br. 22–30. That assures that the issues would be fully developed in any merits briefing. It also reveals that respondents recognize that the case for certiorari is stronger than they wish to let on.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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