No. 12-574

IN THE

Supreme Court of the United States

ANTHONY WALDEN,
Petitioner,

v.

GINA FIORE AND KEITH GIPSON,
Respondents.

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

BRIEF OF *AMICUS CURIAE* WORKERS' INJURY LAW & ADVOCACY GROUP IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus Curiae Workers' Injury Law & Advocacy Group [WILG] is an organization dedicated to protecting and advocating the rights of injured workers throughout the United States. WILG has substantial common interests in ensuring that the rights of injured employees are not diminished further by their inability to bring a suit against a foreign defendant in the jurisdiction where the injury occurs and/or where the injured employee resides. When a foreign defendant's purposeful acts cause economic injuries in the forum state, then that foreign defendant must be subject to the jurisdiction of the court in the forum state, whether in tort or under the workers' compensation system in a particular state.

"Workers' compensation is an unfortunate example of how a seemingly fair program can be manipulated by political forces into a nightmare for those it was originally meant to help. Once an area of law is removed from the civil justice system, it becomes vulnerable to money, politics, and influence-peddling. This happens either through aggressive industry lobbying of legislators, political influence on the agencies charged with implementing the system, or orchestrated media efforts. All have happened to workers' compensation." A. Widman, *Workers' Compensation: A Cautionary Tale*, p. 3 (2006). To further

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[1] The parties' letters of consent to the filing of this brief have been filed with the Clerk. Under S. Ct. Rule 37.6, *amicus curiae* states that no counsel for a party has authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to this brief's preparation or submission.

limit the rights of any party to the forum of a foreign defendant, could have a far reaching effect upon the workers' compensation programs across the country and on the rights of injured employees. The narrow application of personal jurisdiction in an intentional tort action in a foreign jurisdiction could be expanded to preclude coverage when a work accident occurs in a foreign jurisdiction.

In this case, the Supreme Court's resolution will have a direct impact on the ability of future victims to obtain access to justice in their forum state, including employees injured by intentional torts. In our mobile society, employees are relocated to perform work in foreign jurisdictions on a regular basis, the most significant of which are interstate truck drivers, employees on oil rigs, and construction employees. Employees must travel through airline hubs, be subjected to TSA agents, DEA agents, immigration agents, and other federal and state agents, and run the risk of injury due to intentional or negligent torts of others during travel through airline hubs. The rights of injured employees continue to legislatively diminish in the workers' compensation arena. Preserving the rights of injured employees requires vigilant protection. Constitutional challenges to the *quid pro quo* are mounting at the state level with the politicized and legislated reduction in workers' compensation benefits and/or deforms in the workers' compensation system occurring since 1990. Thus, the subtraction of even more normally available and previously contemplated tort claims is unconscionable – this is exactly what will occur if jurisdiction is denied. The right to sue is a cherished right, and further it is an inalienable right. Dramatically narrowing the "minimum contacts" analysis that forum courts routinely apply to determine if personal jurisdiction may be exercised

over foreign defendants will deny justice to these victims.

SUMMARY OF ARGUMENT

Nevada's long-arm statute is interpreted to reach the limits of federal constitutional due process, thus, absent a due process violation, personal jurisdiction exists. Nevada's long-arm statute is liberally construed to reach the outer limits of federal constitutional due process. The Ninth Circuit properly concluded that Nevada has personal jurisdiction over Petitioner, and that venue is proper in the district of Nevada. If a forum state is prohibited from exercising personal jurisdiction over a foreign defendant when the unlawful conduct occurs outside the forum state, but the defendant knows or should reasonably know that the victim is a resident of the forum state and will suffer harm there, it is a short step to preclude injured employees who are truck drivers, or construction employees, or oil rig employees who perform work outside the state where they live, or where the contract of employment occurred, from bringing a workers' compensation action in their forum state. Similarly, employees regularly must fly through airline hubs, and are subjected to circumstances or acts involving TSA agents, DEA agents, immigration agents, and/or other federal or state agents, which may result in tortious conduct or intentional injury. There is no ability to avoid such encounters when traveling. Therefore, on these facts, to limit the ability to bring a cause of action against the foreign defendant in the forum state, would be at odds with this Court's longstanding precedents, and would force victims of intentional torts to litigate in the defendant's home forum. This option is not only costly but it would also

chill the right to justice and deter the victim's access to the court.

Furthermore, to limit venue under 28 U.S.C. § 1391(b)(2) to judicial districts in which the defendant's allegedly unlawful acts or omissions occur would severely limit personal jurisdiction and close our courts to many victims passing through airports, without an expectation that flying through hubs limits their access to justice if a TSA agent, DEA agent, immigration agent, and/or other federal or state agent at the airport allegedly commit unlawful acts or omissions. A narrow and restrictive construction of 28 U.S.C. § 1391(b)(2), would impose a substantial and unfair burden on a victim's right to a convenient judicial forum for redress of his or her injuries. If this Court precludes a state from exercising personal jurisdiction over an out-of-state defendant when the unlawful conduct occurs outside the state, but the defendant knows or should reasonably know that the victim is a resident of the forum state and will suffer harm there, the ramifications of such a decision will reach far beyond the case at bar, and permeate jurisdictional issues in state workers' compensation claims, in personal injury claims, in class actions, and in federal tort claims. Only tort claims provide a full and possibly fair recovery of the type forfeited by injured employees when the *quid pro quo* establishing workers' compensation systems were originally established. Furthermore, with the *quid pro quo* bargain between the employees and the employers questioned due to the continuous legislative reduction in workers' compensation benefits, the natural progression of commerce cannot be allowed to further deteriorate the rights of the injured employees. Furthermore, the employers, insurance companies, and ultimately the consumers, will be excessively burdened when they

must bear the cost of the inability of victims to sue foreign defendants in the local forum and, thereby, must absorb the total loss to the United States work force incurred as a result of the tortious act. Additionally, foreign defendants should be liable for injuries due to their allegedly unlawful acts or omissions either where the acts occurred, so long as the purposeful conduct creates a substantial connection with the victim's forum state.

ARGUMENT

I. A STATE MAY CONSTITUTIONALLY EXERCISE PERSONAL JURISDICTION OVER AN OUT-OF-STATE DEFENDANT WHEN THE UNLAWFUL CONDUCT OCCURS OUTSIDE THE STATE, BUT THE DEFENDANT KNOWS THAT THE VICTIM IS A RESIDENT OF THE FORUM STATE AND WILL SUFFER HARM THERE

A. Nevada's Long-Arm Statute Permits Personal Jurisdiction

Nevada's long-arm statute provides that: "A court of this state may exercise jurisdiction over a party to a civil action on any basis not inconsistent with the constitution of this state or the Constitution of the United States." Nev. Rev. Stat. 14.065(1). Nevada's long-arm statute is interpreted to reach the limits of federal constitutional due process, thus, absent a due process violation, personal jurisdiction exists. *Judas Priest v. Second Judicial Dist. Court,* 104 Nev. 424, 760 P.2d 137, 138 (Nev. 1988). Nevada's long-arm statute is liberally construed to reach the outer limits of federal constitutional due process. *Certain-Teed Prods. v. District Court*, 87 Nev. 18, 479 P.2d 781 (1971). In this case, the due process analysis centers

on whether Walden has "minimum contacts" with Nevada, such that the exercise of jurisdiction "does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

B. The Ninth Circuit Correctly Held that Defendant Purposefully Directed Conduct at the Forum State

The Due Process Clause of the Fourteenth Amendment to the United States Constitution permits personal jurisdiction over a defendant in any State with which the defendant has "certain minimum contacts . . . such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). In judging minimum contacts, a court properly focuses on "the relationship among the defendant, the forum, and the litigation." *Shaffer v. Heitner,* 433 U.S. 186, 204 (1977). Minimum contacts exist when there is "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Asahi Metal Indus. Co., Ltd. v. Superior Court of Cal.*, 480 U.S. 102, 109 (1987). A defendant's contacts with the forum state must be assessed individually. *Moneygram Payment Sys., Inc. v. Consorcio Oriental, S.A.*, 65 Fed. Appx. 844, 850 (3d Cir. 2003). The reasonableness of subjecting a nonresident defendant to the courts of a given forum depend upon the "quality and nature of the defendant's activity" in the forum state. *Hanson v. Denckla*, 357 U.S. 235 (1958). The plaintiff must establish that the defendant has "purposefully availed itself of the privilege of conducting activities within the forum state, thus

invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235 (1958). Ultimately, "the existence of minimum contacts turns on the presence or absence of intentional acts of the defendant to avail itself of some benefit of a forum state." *Waste Mgmt., Inc. v. Admiral Ins. Co.,* 138 N.J. 106, 649 A.2d 379, 388-89 (N.J. 1994).

In this case, the Ninth Circuit was presented with a DEA agent, who individually targeted the respondents, at the Atlanta Airport, an airline hub, through which the respondents, and others must pass to reach their final destination. The Court held that personal jurisdiction and venue is proper because a substantial portion of the events giving rise to the claim occurred in Nevada: and 1) all of respondents' economic injuries were suffered in Nevada; 2) a substantial portion of the seized funds originated in Nevada; 3) petitioner's fraudulent Probable Cause Affidavit was designed to institute forfeiture proceedings against respondents after they returned to Nevada; and 4) the case became ripe only when respondents' funds were returned to Nevada. These contacts were sufficient under these facts for Nevada to exercise personal jurisdiction over Petitioner. Petitioner knew his acts would cause harm to respondents in Nevada and respondents were harmed in Nevada. Petitioner's conduct satisfied the "expressly aiming" requirement for personal jurisdiction. *Calder v. Jones,* 465 U.S. 783 (1984).

So long as the purposeful conduct creates a "substantial connection" with the forum, even a single act can support jurisdiction. *Burger King Corp. v. Rudzewicz,* 471 U.S. 462 (1985) (defendants who reach out beyond one state and create continuing relationships and obligations with citizens of another state are subject to regulation and sanctions in the other state

for the consequences of their activities). In this case, TSA agents, DEA agents, immigration agents, and/or other federal and state agents, who interact with travelers passing through an airline hub, such as Atlanta, in this case, create continuing relationships and obligations with citizens of other states. There is no rational expectation when a DEA agent approaches passengers in an airline terminal that his or her actions would cause harm solely in Atlanta, when the majority of the passengers are living in other jurisdictions.

Intentional torts may support the exercise of personal jurisdiction over a non-resident defendant who has no other contacts with the forum. *Licciardello v. Lovelady,* 544 F.3d 1280, 1285 (11th Cir. 2008) (commission of an intentional tort by a nonresident expressly aimed at a resident, the effects of which were suffered by the resident in the forum, satisfied the "effects" test established in *Calder v. Jones*). Thus, personal jurisdiction is proper over a defendant who commits an intentional and allegedly tortious act expressly aimed at the plaintiff in the forum state. *Licciardello v. Lovelady,* 544 F.3d 1280, 1288 (11th Cir. 2008) ("effects" test provides that due process is satisfied when the plaintiff brings suit in the forum where the "effects" or "brunt of the harm" caused by the defendant's intentional tortious activity was suffered); *see generally, Brennan v. Roman Catholic Diocese of Syracuse N.Y., Inc.*, 322 Fed. Appx. 852 (11th Cir. Fla. 2009) (exercise of jurisdiction over the diocese comports with fair play and substantial justice because Brennan was injured by the alleged intentional misconduct of the diocese in Florida, and Florida has a very strong interest in affording him a forum to obtain relief); *Horizon Aggressive Growth, L.P. v. Rothstein-Kass, P.A.,* 421 F.3d 1162, 1168 (11th

Cir. Fla. 2005) (reversing district court's dismissal for lack of personal jurisdiction under Florida's long-arm statute where complaint alleged defendant's communications from California to plaintiff in Florida intended to deceive and defraud plaintiff); *Acquadro v. Bergeron*, 851 So. 2d 665, 671 (Fla. 2003) (finding jurisdiction under Fla. Stat. § 48.193(1)(b) where an out-of-state defendant allegedly defamed a Florida resident during a single phone call made into Florida). In this case, the Ninth Circuit correctly found on these facts personal jurisdiction.

In *IMO Industries, Inc. v. Kiekert AG,* 155 F.3d 254 (1998) the United States Court of Appeals for the Third Circuit, interpreting *Calder*, set forth the following three-prong test in cases involving intentional torts: (1) defendant must have committed an intentional tort; (2) plaintiff must have felt the brunt of the harm caused by the tort in the forum, such that the forum can be said to be the focal point of the harm suffered by the plaintiff as a result of the tort; and (3) defendant must have expressly aimed his tortious conduct at the forum, such that the forum can be said to be the focal point of the tortious activity. *IMO Industries, Inc. v. Kiekert AG,* 155 F.3d 254, 256 (1998). The *Amici Curiae* briefs argue, *inter alia*, that this Court must protect law enforcement officers. However, when state and federal agents act outside their authority, as Walsh did in this case, and cause intentional harm to passengers traveling through an airline hub, in this case in Atlanta, it should be left to the States to apply their long-arm statutes to the facts of each particular case in light of the Constitution and established precedent. This case turns specifically on its facts. The Ninth Circuit Court of Appeals properly determined personal jurisdiction and venue.

There should be no territorial limits on the power of the states to exercise adjudicatory jurisdiction. Therefore, foreign defendants should be held to the same standard of liability and responsibility for tortious activity. Jurisdictional forbearance would dramatically limit the application of long-arm statutes and narrow the "minimum contacts" analysis that courts routinely apply to determine if personal jurisdiction may be exercised over foreign defendants. Unintended consequences would apply to employees injured by intentional torts, and limit the ability to have the third party intentional torts heard in the same forum as the jurisdiction for the workers' compensation claim. No further limitations should be applicable to such claims. It is the right of every State to exercise jurisdiction for its citizens within the limits of federal constitutional due process and allow its citizens to have equal access to justice in these United States in the victim's choice of forum. This Court should affirm the Ninth Circuit Court of Appeals.

II. VENUE UNDER 28 U.S.C. § 1391(B)(2) IS PROPER IN NEVADA BECAUSE A SUBSTANTIAL PORTION OF THE EVENTS GIVING RISE TO THE CLAIM OCCURRED IN NEVADA

Venue is governed by 28 U.S.C. § 1391(b), which provides that venue is proper in any judicial district where any defendant resides if all defendants reside in the same state, or in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred. 28 U.S.C. § 1391(b)(1), (2). If there is no district in which the action may otherwise be brought, venue is proper in any judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced. 28 U.S.C.

§ 1391(a)(3). Pursuant to 28 U.S.C. § 1391(b)(2), . . . "Venue in general. A civil action may be brought in—(2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated;" 28 U.S.C. § 1391(b)(2). The pendent-venue doctrine gives a court discretion to find venue proper where a pendent claim arises from the same nucleus of operative facts as a claim with proper federal venue. *Travis v. Anthes Imperial Ltd.*, 473 F.2d 515, 529 (8th Cir. 1973) (finding pendent venue where there was pendent subject-matter jurisdiction of common-law claims derived from same nucleus of operative fact as claims resting upon Securities Exchange Act.); *Sierra Club v. Johnson*, 623 F. Supp. 2d 31 (D.D.C. 2009); *Cold Spring Harbor Lab. v. Ropes & Gray LLP*, 762 F. Supp. 2d 543 (E.D.N.Y. 2011).

A plaintiff's choice of forum is entitled to significant weight, and unless the balance is strongly in favor of a different forum, that choice "should rarely be disturbed." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947); *Scheidt v. Klein*, 956 F.2d 963, 965 (10th Cir. 1992) (plaintiff's choice of forum should rarely be disturbed, "unless the balance [of factors] is strongly in favor of the movant"); *but see, Tyson v. Pitney Bowes Long-Term Disability Plan*, 2007 U.S. Dist. LEXIS 90842, 2007 WL 4365332 (D.N.J. Dec. 11, 2007) (plaintiff's choice of forum is afforded less deference when their choice of forum 'has little connection with the operative facts of the lawsuit'). For Nevada to be the appropriate venue under § 1391(b)(2), "a substantial part of the events or omissions giving rise to the claim" must have occurred in Nevada. *Doe v. Mitchell,* 2009 U.S. Dist. LEXIS 29928 (D. Nev. Mar. 26, 2009). Here, the Ninth Circuit correctly balanced its application of 28 U.S.C. §1391(b)(2) and considered the place

where the respondents experienced the economic harm as one relevant factor in its broader, multifactor determination that the District of Nevada is a proper venue for respondents' lawsuit because it is a "judicial district in which a substantial part of the events or omissions giving rise to the claim occurred."

The doctrine of *forum non conveniens* is nothing more or less than a supervening venue provision, permitting displacement of the ordinary rules of venue when, in light of certain conditions, the trial court thinks that jurisdiction ought to be declined. But venue is a matter that goes to process rather than substantive rights – determining which among various competent courts will decide the case. *American Dredging Co. v. Miller*, 510 U.S. 443 (1994); *see also*, *U.S.O. Corp. v. Mizuho Holding Company, et al*., 547 F.3d 749 (7th Cir. 2008) (applying *forum non conveniens* to an international dispute and not interstate). The Ninth Circuit Court of Appeals properly analyzed the factors and relevant considerations, and specifically held that venue was proper in Nevada.

CONCLUSION

It is inevitable, in this age of internationalization of commerce, that employees who work in the United States will travel and it is logical to expect that at airport hubs, such as Atlanta, TSA agents, DEA agents, immigration agents, and other federal and state agents will encounter passengers, the majority of which are residents from other jurisdictions. When these agents commit intentional or negligent torts on the passengers, and specifically on the facts of this case, they should be subject to personal jurisdiction in the forum state of the passenger. This is logical. This is foreseeable. Under these facts, an injury is

reasonably foreseeable. A law suit is reasonably foreseeable. Personal jurisdiction is fundamental and quintessential to satisfy the rights afforded the citizens of the United States under the United States Constitution. To fail to so find offends all notions of equity and justice. Both venue and personal jurisdiction are proper under the Ninth Circuit's analysis. For the foregoing reasons, the judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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