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IN THE SUPREME COURT OF THE UNITED STATES

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ANTHONY WALDEN, :  
 :  
Petitioner : No. 12-574  
 :  
v. :  
 :  
GINA FIORE, ET AL. :

- - - - - x

Washington, D.C.  
Monday, November 4, 2013

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States  
at 10:03 a.m.

APPEARANCES:

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of Petitioner.

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Petitioner.

THOMAS C. GOLDSTEIN, ESQ., Washington, D.C.; on behalf  
of Respondents.

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1 P R O C E E D I N G S

2 (10:03 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear  
4 argument first this morning in Case 12-574,  
5 Walden v. Fiore.

6 Mr. Bucholtz.

7 ORAL ARGUMENT OF JEFFREY S. BUCHOLTZ

8 ON BEHALF OF THE PETITIONER

9 MR. BUCHOLTZ: Mr. Chief Justice, and may it  
10 please the Court:

11 In holding that the -- in holding that  
12 Respondents could bring this Bivens lawsuit against  
13 Officer Anthony Walden in Nevada, the Ninth Circuit made  
14 two errors that independently require a reversal.

15 First, as to personal jurisdiction, the  
16 Ninth Circuit held that it was sufficient that  
17 Respondents have connections to Nevada, and that Officer  
18 Walden allegedly targeted his conduct at them, knowing  
19 of their contacts with Nevada. That plaintiff-centered  
20 approach is inconsistent with this Court's precedence  
21 which emphasize that the defendant himself must have  
22 meaningful contacts with the forum State.

23 Second, as to venue, the Ninth Circuit  
24 relied on the fact that the Respondents felt in Nevada  
25 the effects of Officer Walden's alleged conduct in

1 Georgia. That, similarly, Plaintiff-centered approach  
2 is in conflict with the text of the venue statute,  
3 1391(b)(2), which focuses on where the events or  
4 omissions giving rise to the claim occurred, not where  
5 the impact of those events or omissions may be felt.

6 JUSTICE SCALIA: Do you have any preference  
7 as to which of those errors you would like us to rely  
8 on?

9 MR. BUCHOLTZ: Well, Justice Scalia, I  
10 think, for the reasons set out in the Federal Law  
11 Enforcement Officers' amicus brief, which I will try to  
12 explain, I think that it would be preferable for the  
13 Court to address personal jurisdiction and not just  
14 venue, that the reason is that venue in removed cases  
15 works differently. There really is no venue, per se, in  
16 removed cases.

17 And so if the Court only reaches venue here,  
18 holds that venue is improper, in theory -- and maybe  
19 there are limitations problems with this, but in theory,  
20 the plaintiffs could refile the same lawsuit in State  
21 court in Nevada. It would be a Bivens lawsuit; it would  
22 arise under Federal law, so we would remove it.

23 But then removal would mean, under 1441(a),  
24 venue would be proper, per se, in the district of  
25 removal because that's the way removal works, and this

1 Court so held in Polizzi half a century ago.

2 And then there would be no personal  
3 jurisdiction, and then the personal jurisdiction would  
4 be under the Ninth Circuit's decision, and we'd be back  
5 exactly where we are now.

6 JUSTICE SCALIA: Of course, the venue  
7 question does not -- does not bring into the Court a  
8 constitutional question and the jurisdictional -- the  
9 jurisdictional one does.

10 MR. BUCHOLTZ: That's true.

11 JUSTICE SCALIA: And we usually try to avoid  
12 constitutional questions.

13 MR. BUCHOLTZ: That's true. And the  
14 avoidance canon is certainly one factor the Court could  
15 take into account in deciding which issue to reach -- or  
16 which issues to reach or in what order.

17 On the other hand, the personal jurisdiction  
18 question is -- is a constitutional question, but it's  
19 not a constitutional question in the strong sense of the  
20 term because the only reason that the -- the personal  
21 jurisdiction question, as applied in this case, is a  
22 constitutional one is because Congress hasn't provided  
23 for nationwide service of process for Bivens claims.

24 And as the Court pointed out in Omni  
25 Capital, the Congress has the power to do that. It's

1 not for the Court to do that on its own, to fill a  
2 perceived policy gap in personal jurisdiction law.

3 And so, even though it is a constitutional  
4 question as currently configured, if Congress thought  
5 that it were a problem to apply the existing personal  
6 jurisdiction jurisprudence to Bivens claims and wanted  
7 to provide for nationwide service of process based on  
8 the idea that what counts is contacts with the U.S. as a  
9 whole, as opposed to any particular State.

10 JUSTICE GINSBURG: It's not likely, is it,  
11 considering that the Bivens claim was created by this  
12 Court and not Congress.

13 MR. BUCHOLTZ: I'm not suggesting that  
14 Congress should do that. I think Congress should not do  
15 that. I think Bivens claims, for the reason that Your  
16 Honor just stated, is -- is sort of the last place  
17 that -- that anyone should start to create a more  
18 plaintiff-friendly version of personal jurisdiction.  
19 The Court has gone -- I'm sorry, Your Honor.

20 JUSTICE GINSBURG: You -- you would not have  
21 any problem about -- assuming we agree with you that  
22 it's -- there's no personal jurisdiction, it's the wrong  
23 venue, for the district court in Nevada to transfer the  
24 case to the Federal district court in Georgia?

25 MR. BUCHOLTZ: Well, I think,

1 Justice Ginsburg, in the ordinary course, in a -- in a  
2 case starting in district court, under Section 1631  
3 or -- or the venue statute, that would be an appropriate  
4 course.

5 Here, the district court asked Respondents  
6 specifically, if I agree with Officer Walden on personal  
7 jurisdiction or venue, do you want me to transfer, or do  
8 you want me to dismiss? Because the statute gives the  
9 district court discretion and -- and says, in the  
10 interest of justice, transfer is -- is permissible in  
11 lieu of dismissal.

12 The Respondents said, emphatically, we don't  
13 want you to transfer. We want you to dismiss. I guess  
14 they -- they decided they would rather have an appeal to  
15 the Ninth Circuit and take their -- their chances  
16 with -- with an appeal, then pursue the case in Georgia.  
17 So I think under the unusual --

18 CHIEF JUSTICE ROBERTS: That's probably --  
19 it turned out to be a good -- good strategy, at least to  
20 the extent they got to the Ninth Circuit.

21 Isn't Calder against Jones in considerable  
22 tension with your proposition that you don't look to the  
23 plaintiff's contacts with the forum?

24 MR. BUCHOLTZ: I don't think so, Your Honor.  
25 I think there -- there is definitely some language in

1 Calder that could be read in a variety of ways. I think  
2 the key language in Calder -- excuse me -- as the Court  
3 states its conclusions, it says, "In sum, California was  
4 the focal point both of the article and of the harm  
5 suffered by the plaintiffs."

6 And then the Court later says that -- that  
7 the defendants expressly aimed their conduct at  
8 California. It doesn't say at the plaintiff, who  
9 happened to be in California; it says at California.  
10 And I think that's not an accident, that the Court used  
11 those formulations.

12 In all of the personal jurisdiction cases  
13 before Calder and since -- and, for that matter, decided  
14 the same day, in Keeton -- decided the same day as  
15 Calder, the Court has emphasized that random,  
16 attenuated, and fortuitous contacts with the forum State  
17 are insufficient and that, in particular, contacts  
18 between the defendant and the -- and the forum that are  
19 created by the unilateral activity of the plaintiff are  
20 not sufficient. So --

21 JUSTICE ALITO: What do you think the Court  
22 meant when it said that the -- the article was aimed at  
23 California?

24 MR. BUCHOLTZ: I think what the Court meant,  
25 Justice Alito, is that the article was distributed in



1 California, and California was, by far, the largest  
2 market for the National Enquirer. The article recounted  
3 events or -- or alleged events, that happened in  
4 California. And the article was drawn from California  
5 sources.

6 So it's not fortuitous that the effect of  
7 the article was felt in California. That was -- that  
8 was -- nothing about that was fortuitous because the --  
9 the defendants knew that the article would be  
10 distributed widely in California, that it was the  
11 largest market, and they --

12 JUSTICE ALITO: When it was distributed, it  
13 was distributed everywhere. It was the National  
14 Enquirer, so it was probably in every supermarket in the  
15 country.

16 And why does California, as an abstract  
17 entity, care about an article that makes allegedly  
18 defamatory statements about things that people  
19 supposedly did in California? I don't quite understand  
20 that.

21 MR. BUCHOLTZ: Well, let me try to answer  
22 the first part of your question first, Justice Alito.  
23 It's true that the National Enquirer was national; it  
24 was distributed throughout the country. But the Court  
25 went -- went to pains in the opinion to emphasize that

1 California was the largest market.

2 And so when the Court said the brunt of the  
3 harm -- that -- this is right after the Court's  
4 reference to express aiming, where the Court says --

5 JUSTICE SCALIA: It's the largest market for  
6 everything, isn't it?

7 MR. BUCHOLTZ: Well, I think particularly for the  
8 National Enquirer, when you're talking about articles  
9 about celebrities, about actresses in particular, that  
10 allegedly injure their professional reputation and  
11 prevent them from getting future acting jobs.

12 CHIEF JUSTICE ROBERTS: I don't understand.  
13 Are you suggesting if this -- everything was the same,  
14 except Ms. Jones was in New York, there'd be a different  
15 result in that case?

16 MR. BUCHOLTZ: No, I'm not suggesting that.  
17 I think that --

18 CHIEF JUSTICE ROBERTS: Well, I thought,  
19 several times, you said California was the biggest  
20 market.

21 MR. BUCHOLTZ: Right. I think -- I think  
22 the way that -- that Calder reads, I think that there  
23 are a number of factors. One of them is plaintiff's  
24 residence in California. That's where she was when she  
25 suffered the emotional distress from -- from reading

1 the article about herself and where her job prospects  
2 were -- were allegedly adversely affected.

3 But it's also true the Court points out that  
4 not only is -- when the Court says the defendants  
5 expressly aimed their conduct at California, the next  
6 passage after that, where the Court explains what  
7 that -- what express aiming at California means, it says  
8 California was not only where -- where Ms. Jones  
9 suffered the brunt of the harm, but where the defendants  
10 knew that the Enquirer had its largest circulation.

11 So I don't think you can disentangle the  
12 fact that that's where she was, which, of course, was a  
13 relevant factor in that case because it was true, from  
14 the fact that the defendants, in a broader sense, in a  
15 more -- in a sense not based on her unilateral activity,  
16 but in a sense based on their own contacts, aimed at  
17 California.

18 They drew their --

19 JUSTICE KAGAN: Well, what does it mean --  
20 what does it mean, in the context of an intentional  
21 tort, which is what we're talking about here, to aim at  
22 a particular State, if it doesn't mean to aim at a  
23 person who you know to be within that State?

24 I mean, nobody conducts an intentional tort  
25 intending to injure California, per se. You're

1 intending to injure a person who resides in California.  
2 So what would it actually mean to aim conduct at a  
3 State, irrespective of a person?

4 MR. BUCHOLTZ: Well, Justice Kagan, I think  
5 the answer is that it could take a few forms. It  
6 depends on the type of case. It would be very difficult  
7 to try to come up with the single -- you know, sort of  
8 comprehensive unitary answer to that question that would  
9 govern all types of cases.

10 I think the way that the plurality put it in  
11 J. McIntyre, for intentional tort cases, is that maybe  
12 you're intending to obstruct the laws of the forum  
13 State. That would be more meaningfully aimed at the  
14 forum State qua State and not just somebody who happens  
15 to be in it or have a connection to it.

16 Another way that conduct could be aimed at a  
17 State would be if -- if it's a species of purposeful  
18 availment or purposeful direction, where you're  
19 projecting your conduct into that State, whether  
20 that's -- whether that's physical and literal or whether  
21 it's -- it's through some indirect or technological  
22 means for --

23 JUSTICE KAGAN: Well, suppose -- suppose --  
24 and I'm sorry. Please.

25 MR. BUCHOLTZ: -- for some benefit, for some

1 reason, where you're projecting your conduct into that  
2 State, not just because that's where the plaintiff  
3 happens to be, which is incidental and irrelevant to you  
4 that the plaintiff is there, as opposed to anywhere  
5 else, but because you're seeking that State out.

6 That could be -- it could be, in a case like  
7 J. McIntyre, the Court, of course, divided over whether  
8 in a -- in a very broad sense, sending your product into  
9 the stream of commerce, intending that it in some  
10 sense -- you know, go to the U.S. as a whole, without  
11 any particular focus on a given State, was sufficient.

12 But at least there -- at least there, you  
13 have the intent to serve the U.S. market as a whole.  
14 And so you at least are on notice that your own conduct  
15 is putting you at risk of being haled into court in any  
16 one of the States.

17 JUSTICE KAGAN: Yes. I mean, I guess I  
18 just -- the -- the McIntyre example is a very different  
19 kind of example because, in those cases, you really are  
20 talking about a company seeking to serve a general  
21 market in a State.

22 But intentional tort cases don't usually  
23 have that quality. You're going after a particular  
24 person in an intentional tort case. And it's odd to  
25 think of going after an intentional -- a particular

1 person, whether it's a defamation suit or it's a fraud  
2 suit or -- or what have you, as -- as targeting the  
3 State itself.

4 MR. BUCHOLTZ: Well, I think if it's a  
5 defamation suit, Justice Kagan, if you project your  
6 defamation into the forum State, then it's fair to say  
7 that you've, in a sense, entered the forum State,  
8 whether that's electronic or physical, as in Calder.

9 JUSTICE KENNEDY: But in -- in this case, it  
10 was known -- or should have been known that these were  
11 gamblers; they were in Nevada. That's where a lot of --  
12 that's where their gambling takes place. They were  
13 residents of Nevada. So in that sense, they were like  
14 the plaintiff in -- in Calder. The injury was there,  
15 and the defendant arguably knew or should have known  
16 that that's where its major impact would be.

17 I recognize your point that, when you take  
18 money away, then you're inconvenienced in any State  
19 where you happen to be, but there was an argument  
20 here -- it seems to me there is an argument here that  
21 this was gambling, and these people were from Nevada,  
22 and so you've -- this -- this curtails their right or --  
23 or their option to conduct -- to conduct their  
24 activities in -- in Nevada.

25 MR. BUCHOLTZ: Well, Justice Kennedy, the

1 complaint alleges that the plaintiffs had contacts with  
2 Nevada, were residents of Nevada. Of course, they  
3 showed Officer Walden California licenses. That's what  
4 the complaint alleges, not Nevada licenses. And so at  
5 the time of their actual --

6 JUSTICE GINSBURG: But didn't they say they  
7 were residents in both places, in both California and  
8 Nevada?

9 MR. BUCHOLTZ: They do say that. But  
10 there's no reason to think -- and even they don't allege  
11 this, that Officer Walden knew that at the time that he  
12 actually interacted with them. And so there's no  
13 allegation that he --

14 JUSTICE KENNEDY: Let me ask this -- and  
15 it's probably clear in the briefs. Is -- is the  
16 gravamen of the complaint the seizure at the airport or  
17 the later false affidavit? Because, to the extent it's  
18 the later false affidavit, that cuts against you  
19 marginally.

20 MR. BUCHOLTZ: Well, I would emphasize  
21 "marginally," Justice Kennedy, because I think the  
22 gravamen of the complaint is both. I don't think  
23 there's a way to separate them. The effect that the  
24 plaintiffs are -- the reason for their lawsuit --  
25 they're claiming damages based on the allegedly false

1 affidavit, is that it took them longer than it otherwise  
2 would have to get their money back.

3 It's the same money that was seized in  
4 Atlanta. So it's a continuation of the effect of the  
5 seizure. You can't separate them cleanly. And the  
6 affidavit --

7 JUSTICE KAGAN: Well, would you -- would  
8 your answer be different -- suppose that the -- the  
9 officer had said, you can keep -- you can keep your  
10 money, go on to Nevada with it.

11 And then, once Fiore -- the Fiores had reached  
12 Nevada, the officer said -- the officer filed a false  
13 affidavit, which, let's say, froze the Fiores' bank  
14 accounts. Would your -- would your answer be different?  
15 The affidavit was filed in Georgia, but the money was  
16 not seized in Georgia; instead, the money has gone on to  
17 Nevada. Is there personal jurisdiction in Nevada?

18 MR. BUCHOLTZ: Well, Justice Kagan, I think  
19 if -- if what Officer Walden allegedly had done -- of  
20 course, that's not this case -- is freeze a bank account  
21 in Nevada, then --

22 JUSTICE KAGAN: Well, he did it by filing an  
23 affidavit in Georgia, and then it froze a bank account.

24 MR. BUCHOLTZ: No, I understand that. I  
25 understand the question. But if what he had done is



1 freeze a bank account in Nevada, then maybe it would be  
2 fair to say that he had entered into Nevada by freezing  
3 the bank account in Nevada.

4 But, here, the cash was in Atlanta. The  
5 plaintiffs brought the cash to Atlanta. Officer Walden  
6 didn't seek them out, knowing that they had any  
7 connection to Nevada. They -- he didn't go to Nevada.  
8 He didn't direct anyone in Nevada to do anything. He  
9 didn't seize a -- or freeze a bank account in Nevada or  
10 direct anyone to do anything like that.

11 He never had any contact with Nevada at all,  
12 except for the very intangible contact, if you can call  
13 it that, of -- of allegedly writing this affidavit to  
14 keep the plaintiffs from getting the money back sooner  
15 than they would have.

16 But the plaintiffs would have gotten the  
17 money back wherever they happened to be or, really, more  
18 precisely, wherever their lawyer happened to be. The  
19 fact that they chose a lawyer in Nevada, and that's  
20 where they asked the government to send them their money  
21 back, ultimately, is the very definition of fortuitous  
22 contact between Walden and Nevada.

23 JUSTICE SOTOMAYOR: Could you tell me -- you  
24 started by saying that our personal jurisdiction and  
25 venue provisions and jurisprudence center on a -- on a

1 defendant's action, not on the plaintiff's action or  
2 injury. Calder suggests otherwise.

3 But how do you respond, not only to  
4 Justice -- I'll do this after, but let me just pose the  
5 question, and you can answer it on your rebuttal.

6 MR. BUCHOLTZ: Thank you.

7 JUSTICE SOTOMAYOR: I'm worried about the  
8 internet effects from somebody's account in Vermont by  
9 someone in Illinois -- the hypothetical on page 19, who  
10 steals something from a store in California.

11 MR. BUCHOLTZ: Thank you, Justice Sotomayor.  
12 If I may, I'll reserve the balance of my time and, as  
13 you suggested, address that on rebuttal.

14 Thank you.

15 CHIEF JUSTICE ROBERTS: Okay. Thank you,  
16 counsel.

17 Ms. Sherry.

18 ORAL ARGUMENT OF MELISSA ARBUS SHERRY,

19 FOR UNITED STATES, AS AMICUS CURIAE,

20 SUPPORTING THE PETITIONER

21 MS. SHERRY: Mr. Chief Justice, and may it  
22 please the Court:

23 If I could start with this Court's decision  
24 in Calder because the facts of this case stand in stark  
25 contrast to Calder. In Calder, the article was all

1 about the State of California. It was about the  
2 California activities of a California resident whose  
3 career was centered in California, based on California  
4 sources, and in a magazine that its -- where its primary  
5 publication was in California.

6 Here, even if you were to focus just on the  
7 affidavit, the affidavit is, in every real sense,  
8 focused on the State of Georgia. According to  
9 Respondents' own allegation, it recounts what happened  
10 in the Atlanta airport in Georgia.

11 It was based on information that was  
12 received by Officer Walden in Georgia. It's about funds  
13 that were seized in Georgia, that remained in Georgia.  
14 It was prepared in Georgia, forwarded to an AUSA in  
15 Georgia, for forfeiture proceedings in Georgia.

16 And so the two cases could not be more  
17 different. Just as the focal point of the tortious  
18 activity in Calder was on the State of California, here,  
19 the focus of the tortious activity was on the State of  
20 Georgia.

21 JUSTICE SCALIA: Did the affidavit ever get  
22 to Nevada?

23 MS. SHERRY: It didn't get to Nevada. Based  
24 on Respondents' own allegations, it was sent to an AUSA  
25 in Georgia for forfeiture proceedings in Georgia. And,

1 notably, had Respondents wanted to regain their property  
2 during the 6 months' period of seizure, they would have  
3 had to go to Georgia to do so.

4 JUSTICE KENNEDY: Do we know how much of the  
5 information -- the supplemental information that was  
6 prepared in Nevada and then was forwarded to Georgia,  
7 how much of that information was in the affidavit?

8 MS. SHERRY: Based on the current record, I  
9 don't know that we do. If you look at the complaint  
10 allegations, they suggest that the -- what they call the  
11 "exculpatory information" was left out of the affidavit.  
12 The affidavit itself, if it even exists, is not in the  
13 record in this case.

14 And then -- you know, by focusing -- you asked  
15 the question, Your Honor, about what the gravamen of  
16 this case is. I think, in a very real way, the gravamen  
17 of the case is the initial seizure. The Ninth Circuit  
18 focused exclusively on the affidavit, and Respondents do  
19 so here as well.

20 But I think it's a quintessential example of  
21 the tail wagging the dog. The affidavit is, at best, a  
22 thin and artificial read. Even if you were to focus  
23 exclusively on the affidavit, as I explained --

24 JUSTICE GINSBURG: But it was -- it was  
25 stated as a separate claim, and I think Judge Grisholm

1 read it that way, and I don't think Petitioner has taken  
2 issue with that, that there's -- one claim is for the  
3 seizure, another claim is for the false affidavit. So  
4 the seizure stops the funds immediately, and then the  
5 false affidavit keeps them there.

6 So I didn't think there was a -- a genuine  
7 difference between the parties on whether the  
8 affidavit -- knowingly composing a false affidavit is an  
9 independent claim.

10 MS. SHERRY: There isn't for purposes of --  
11 of this case in this Court, and I don't mean to suggest  
12 otherwise, but while there may be a distinct claim,  
13 there is no distinct injury. The injury that  
14 Respondents allege based on the affidavit is simply that  
15 the initial seizure continued beyond the time that it  
16 otherwise would have.

17 And for that reason, the harm -- the same  
18 economic harm that they were already feeling in Nevada,  
19 continued beyond a certain person point in time.

20 JUSTICE KAGAN: But imagine a case where  
21 everybody agreed that the initial seizure was lawful, so  
22 that that wasn't part of the complaint at all, and the  
23 only complaint was that a false affidavit had been  
24 filed, so that, after making the preliminary  
25 investigation, the officer hadn't transferred the money,

1 but had, instead, kept it.

2 MS. SHERRY: And, again, I -- obviously,  
3 that's not this case, but I don't think that case would  
4 be any different because, assuming that the affidavit  
5 looks the same as it's alleged to look in this case, it  
6 would still be focused -- that money in Georgia and  
7 everything about it would still be related to Georgia.

8 Again, the only connection to Nevada would  
9 be the fact that Respondents felt some harm in that  
10 State. It's not a harm that's unique in any respect to  
11 Nevada. It's a harm that they would have felt no matter  
12 where they traveled. If they had gone to their other  
13 residence in California, if they had left on another --

14 JUSTICE ALITO: And that would be true, even  
15 if the Respondents had never been in Georgia?

16 MS. SHERRY: No. I think it's -- I think  
17 it's significant, here, that the Respondents did go to  
18 Georgia. I mean, here, we are talking about a traveling  
19 Plaintiff -- a mobile Plaintiff, who voluntarily left  
20 their home State and traveled to other States, traveled  
21 to New Jersey, traveled to San Juan, and traveled to  
22 Walden's home State, the place where he lives and works,  
23 and brought their cash with them there.

24 And so I think it is significant that they  
25 did travel to the State of Georgia, and I think it shows

1 how broad the Ninth Circuit ruling really is. As far as  
2 law enforcement officers, go, Federal, State, or  
3 local, this is a really problematic decision because  
4 they interact with travelers from all 50 States and  
5 beyond on a daily basis.

6 The idea that, based on those interactions,  
7 that they can be hauled into a far-away and distant  
8 forum, based on nothing more than their interaction with  
9 a traveler and finding out where that person is from,  
10 which, of course, unlike this case -- the facts here are  
11 somewhat unique, in that the drivers' licenses that were  
12 showed were not from the State of Nevada.

13 In most cases, when travelers show a  
14 driver's license, it's from their State of residence.

15 JUSTICE ALITO: Do you think it's relevant  
16 in a case like this whether the -- the Federal officer  
17 who is sued is represented by the Justice Department?

18 MS. SHERRY: I don't think it's relevant at  
19 all. I would point Your Honor to the Court's decision  
20 in *Stafford v. Briggs*. In that case -- it's a venue  
21 case. It's about 1391(e). In that case, the dissent  
22 made an argument that that provision should extend to  
23 personal capacity cases against government officials.

24 And one of the arguments made is there's  
25 really not much of a burden on them because they have

1 DOJ representation and because they have  
2 indemnification. And the majority there rejected that  
3 argument.

4 I think it's equally implausible here, and I  
5 think it's significant that, not only did the Ninth  
6 Circuit rely on the fact of DOJ representation, which,  
7 mind you, is not a guarantee, it's a discretionary  
8 determination; but not only did they rely on it, they  
9 relied on it to say that there would be personal  
10 jurisdiction here because this is a Federal official --  
11 or, really, a State official deputized as a Federal  
12 official.

13 JUSTICE KAGAN: Ms. Sherry, just to try to  
14 figure out how far your argument goes, suppose there's  
15 an IRS agent sitting in Washington, D.C., and she  
16 maliciously does something, files an affidavit, does  
17 whatever she does, to impose a tax penalty on somebody  
18 in Nevada, and everything that she does happens in  
19 Washington, D.C.

20 Does the person in Nevada, who is the victim  
21 of this malicious attempt to impose a tax penalty, have  
22 to go to Washington, D.C., to sue her?

23 MS. SHERRY: I think there's more difficult  
24 questions there, where the individual hasn't left the  
25 State at all and where it's targeted at the State. I



1 think that comes to Your Honor's question about what it  
2 means --

3 JUSTICE KAGAN: Well, she's a very mobile  
4 person. She lives in Nevada, but she goes other places,  
5 and -- and this could -- you know, harm her wherever she  
6 goes. Isn't that what you said? So why should she be  
7 able to bring suit in Nevada, under your view?

8 MS. SHERRY: That is what I said and I  
9 think maybe it goes to Your Honor's other question,  
10 earlier, about what it means to expressly aim your  
11 conduct at the forum State, as opposed to just the forum  
12 resident, when we're talking about an intentional tort.

13 In the cases that have looked at this,  
14 they've -- they have looked for something more besides  
15 simply aiming your conduct at a forum resident, some  
16 indication that the -- that the defendant is trying to  
17 reach into the forum State. And some of the examples  
18 that have come up is when they've actually sent  
19 something into the forum State, whether it's a  
20 defamatory article or a letter, the bullet example  
21 that's in the restatement and mentioned in the briefs.

22 In those cases, the defendant is actually sending  
23 something physically into the State or, for example,  
24 directing activity in the forum State -- directing  
25 something to happen in the forum State.

1           Whatever the answer is to the -- to that  
2 hypothetical, the facts here are really quite different.  
3 Walden didn't do anything to reach into the State of  
4 Nevada. And as my colleague pointed out, the only  
5 connection to Nevada and the idea that the money was  
6 going to be returned there and eventually was returned  
7 there is entirely fortuitous.

8           It's based entirely on the unilateral acts  
9 of the plaintiff, the fact that they happened to hire a  
10 Las Vegas attorney. If they hired --

11           JUSTICE SCALIA:           Ms. Sherry, you -- would  
12 you want us to decide this case on the jurisdictional  
13 question or the venue question?

14           MS. SHERRY:           The Court, I think, can do  
15 either. My preference would be --

16           JUSTICE SCALIA:           I -- I understand that.  
17 That's why I asked the question.

18           (Laughter.)

19           MS. SHERRY:           My -- my preference would be  
20 that -- the same as Petitioner's, that the Court decide  
21 it on personal jurisdiction grounds, and the reasons are  
22 the ones expressed in the Federal Law Enforcement  
23 Officer brief.

24           CHIEF JUSTICE ROBERTS:           What -- what type of  
25 action would the United States have brought if they

1 decided to bring an action? It would have been in  
2 personam or in rem against the assets?

3 MS. SHERRY: It would have been an in rem  
4 action against the assets. It would have been a  
5 forfeiture complaint that would have been filed in  
6 Georgia. And in those proceedings, the Respondents  
7 would have had an opportunity to contest the forfeiture.

8 If during either the pendency of those  
9 proceedings or even before those proceedings, if they  
10 had wanted to seek to regain control of their property,  
11 they would have had to file a motion or a petition in  
12 the State of Georgia. They wouldn't have been able to  
13 file one in their home State. And, again, those are the  
14 statutes that we cite at page 31 of our brief.

15 The consequence of the Ninth Circuit's  
16 decision here really is to allow personal jurisdiction,  
17 as well as venue, to travel with a mobile plaintiff in a  
18 way that it cannot travel with mobile chattel.

19 We've talked mostly about personal  
20 jurisdiction here, but could I -- if I could just take a  
21 quick moment on venue and point the Court to this -- to  
22 the Leroy decision in 1979. Nobody contests that there  
23 would be no venue in the District of Nevada under the  
24 Leroy decision.

25 The language change in 1990 does nothing to

1 change that and does nothing to change the result in  
2 Leroy. Respondents avoid the statutory text, and I  
3 think it resolves this case.

4 Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.

6 Mr. Goldstein.

7 ORAL ARGUMENT OF THOMAS C. GOLDSTEIN

8 ON BEHALF OF THE RESPONDENTS

9 MR. GOLDSTEIN: Mr. Chief Justice, and may  
10 it please the Court:

11 You are being asked by the other side to  
12 write an opinion about personal jurisdiction that is  
13 going to try and slice the salami very, very, very thin,  
14 that is going to create a huge amount of confusion about  
15 these facts versus the facts in Calder and that is going  
16 to be very, very difficult to reconcile with the  
17 internet cases and the cases that the lower courts are  
18 constantly confronting, about where a person in State A  
19 intentionally injures a person in State B.

20 And that person frequently doesn't shoot a  
21 gun into the other State. They sit at their computer,  
22 and they steal money under the bank account. They take  
23 the person's ID. They use their credit cards and the  
24 like.

25 I think, in truth, the way the case is most

1 likely to be resolved --

2 JUSTICE SCALIA: They didn't really injure a  
3 person in State B here. I mean, these people were in  
4 Georgia when the injury occurred.

5 MR. GOLDSTEIN: Justice Scalia, we disagree,  
6 and so let me focus on your point and Justice Kennedy's  
7 question about which claim it is. The claim here -- the  
8 complaint states two complaints, Judge Berzon  
9 recognized. One is about the seizure.

10 It's exactly what you are describing. The  
11 other is about the false affidavit. And those really  
12 are different as a matter of law. I have a couple of  
13 citations to give you to explain how this legal process  
14 works.

15 What happens is the DEA seizes the money at  
16 the Atlanta Hartsfield Airport. He takes the cash and  
17 turns it in to a locker. Then what happens is that we  
18 have to state a claim to the money. And when we state a  
19 claim to the money, they either have to do one of two  
20 things: They have to give it back to us as a matter of  
21 law, or they have to start a forfeiture process as a  
22 matter of law.

23 And if you start the forfeiture process, you  
24 have to provide to the assistant U.S. attorney a factual  
25 basis for the forfeiture. And the way to look at this,

1 I think, is the way that Justice Kagan's hypothetical  
2 asked, and that is imagine that there were two officers  
3 here, not one.

4 Officer A -- we'll call him Walden -- is at  
5 the Atlanta Hartsfield Airport, and he seizes our money.  
6 And just assume that that's perfectly lawful. We then  
7 state a claim to the money, and then we provide factual  
8 information about why it is that the money is not  
9 subject to seizure. They have to return it to us at  
10 that point, or they have to start the forfeiture  
11 process.

12 And when that second officer creates a false  
13 affidavit to start the forfeiture process, we are not in  
14 Georgia. We have no ongoing contacts with Georgia. And  
15 we are losing access to the money only in Nevada.  
16 That's the only place we're in --

17 JUSTICE ALITO: Well, suppose that the  
18 plaintiffs in this case were not professional gamblers.  
19 Let's say they were Major League umpires, or they are  
20 members of a rock group that's going on a tour of 25  
21 cities.

22 Where would there be personal jurisdiction  
23 there? In every place where the umpire was going to  
24 appear at a game? Every place where the group was going  
25 to perform?

1           MR. GOLDSTEIN:           No, sir. The lower courts  
2 have tackled this question because people go visit their  
3 mother-in-law. They do travel around. It's a mobile  
4 society, and they have taken, from your opinion in  
5 Calder and Jones, the focus on where it is that the  
6 plaintiff lives and works. And there is a good reason  
7 for that.

8           Personal jurisdiction is trying to tackle  
9 the question of where does the defendant reasonably  
10 believe that he will be haled into court. It's a  
11 fairness principle. And that is, we need to have a  
12 predictable rule that allows the would-be defendants to  
13 know, okay, if I do this --

14          JUSTICE ALITO:           Well, here, the -- here, the  
15 plaintiffs apparently lived in two places, right?  
16 California and Nevada.

17          MR. GOLDSTEIN:           That is --

18          JUSTICE ALITO:           And suppose my hypothetical  
19 rock performer has five houses, one in California, one  
20 in Montana, and so forth. He -- personal jurisdiction  
21 everywhere?

22          MR. GOLDSTEIN:           No, sir. The -- and let me  
23 just start with the premise of this case, all right? My  
24 friend said that this officer was shown the  
25 California -- California driver's license. That's not

1 correct. He wasn't shown a California driver's license.

2 The officer in San Juan, Puerto Rico, was  
3 shown one. They only -- their principal residence, the  
4 complaint alleges, I think, in paragraph 2, is in  
5 Nevada. We do have situations -- and that's where they  
6 lived and worked. We have situations --

7 JUSTICE ALITO: Well, they were sufficiently  
8 residents of California to get California driver's  
9 licenses, were they not?

10 MR. GOLDSTEIN: That is true, at one point,  
11 and they had moved.

12 I'm going to step outside the record, just  
13 so I can accurately answer your question. But it will  
14 give you a sense of how these cases actually operate.

15 Most often, you have the situation where  
16 they're college students -- you know, you have a college  
17 student who lives at home with their parents, but they  
18 go off to college, and they may be injured where it is  
19 that they live and go to school in that case.

20 And what the lower courts do is, sensibly,  
21 they say, if you know where the person's principal  
22 residence is -- and this case is simplified by the fact  
23 that the district court understood and assumed that the  
24 defendant knew that they lived in Nevada. It's never  
25 been contested in the case.



1           And Judge Berzon said, quite correctly, what  
2   you have to do is you have to make it a prima facie case  
3   because there's no evidence in this case that the --  
4   that the principal residence was Nevada and that the  
5   defendant knew that.

6           JUSTICE SCALIA:           So you're really arguing  
7   for a very broad principle. Whenever there is an  
8   intentional tort, you can be haled into court at the  
9   place of residence of the person against whom the tort  
10  is committed.

11          MR. GOLDSTEIN:           No, sir. I'm sorry --

12          JUSTICE SCALIA:           No, that's what I thought  
13  you were saying.

14          MR. GOLDSTEIN:           Okay. Then I've -- I've  
15  misled you, and let me state our test, which I haven't  
16  done yet, and that may help you. Our rule is as  
17  follows: When the defendant intentionally targets the  
18  plaintiff for injury in State A, where the injury  
19  arises -- and that's going to be the big difference.  
20  Does the injury arise there?

21           Justice Scalia, your impression in your  
22  earlier question was that this injury didn't arise in  
23  Nevada. But our test requires that it arise in Nevada,  
24  and the defendant knows that it's going to arise in  
25  Nevada.

Official

1 I'll contrast our -- our false seizure  
2 claim, right? We were in the airport. We lose the  
3 \$97,000. If we then go back to Nevada and then file  
4 suit, our injury can't travel with us. And that's the  
5 big concern of --

6 JUSTICE BREYER: Well, I don't see how it  
7 arises in Nevada. What they're saying is that some  
8 people in Georgia didn't give back some money that they  
9 took in Georgia. To take your example, my question is  
10 this: There could -- you say there are many, many, many  
11 cases. We could get this all mixed up if we don't  
12 follow your rules.

13 All I want you to do is cite me a few, but  
14 the few that I want you to cite me will meet certain  
15 criteria.

16 MR. GOLDSTEIN: Okay.

17 JUSTICE BREYER: For example, a college  
18 student goes into the bookstore, and it's also a  
19 pharmacy, by the way. And he breaks his finger in the  
20 door. Which he thinks is his fault. He says, I am going home; send  
21 me some bandages. The store never does. Send me some  
22 books, I just bought them. The store never does. They  
23 know his home address, all right? Injury -- now, what  
24 about those?

25 Cite me some lower cases where they say

1 there is jurisdiction in cases like that.

2 MR. GOLDSTEIN: I have not seen --

3 JUSTICE BREYER: Oh, I lost my billfold. I  
4 lost it here in the store. When you find it, will you  
5 send it back? They never send it back, though they  
6 found it. All right. So just give me some lower court  
7 cases that finds jurisdiction in that kind of situation.

8 MR. GOLDSTEIN: In that kind of situation,  
9 where the injury actually -- and you have named several  
10 situations.

11 JUSTICE BREYER: No, no, the injury -- my  
12 goodness, he lost his billfold. There was money in it.  
13 And by the way, when he gets home, his parents are away,  
14 and he's not going to have any money to spend on food or  
15 even, like, CDs or anything.

16 (Laughter.)

17 MR. GOLDSTEIN: So, Justice Breyer, it is  
18 our position that, in that situation, there is not  
19 personal jurisdiction. And let me try --

20 JUSTICE BREYER: There is no jurisdiction in  
21 those cases where he lost his billfold in the bookstore  
22 in the college town, 1,000 miles away from home, and  
23 he's going home, and everybody knows he's never going to  
24 have any money, and they keep the money.

25 Okay. What's the difference? If there are

1 no cases on those, what is the difference between that  
2 case and yours?

3 MR. GOLDSTEIN: Okay. The difference is  
4 that the defendant in that instance, the injury arises  
5 at the bookstore. Okay? And the fact that it has a  
6 continuing effect, as a practical matter, the lower  
7 courts uniformly treat the injury arising as in the  
8 bookstore.

9 But there are situations that you can  
10 imagine the following: And that is, he loses the  
11 billfold in the store. Okay. That injury arose there.  
12 Now, someone takes the credit card from the billfold  
13 after he has gone home, knows that he's at home, and  
14 starts spending his money with it. That injury arises  
15 where he lives.

16 JUSTICE BREYER: Okay. Now, give me the  
17 case that says that.

18 MR. GOLDSTEIN: Okay. The cases that are  
19 closest to that -- two of them are at page 25a of the  
20 petition appendix. They are the Bancroft case, and  
21 that -- these are not going to be billfold cases. Okay?  
22 Billfold cases, people tend not to -- if you lose \$100,  
23 people don't file a lawsuit. These are bigger cases.

24 And it's the petition appendix. You've  
25 pulled open the red brief, so I am asking you for the

1 cert petition. The Bancroft case at 25a is where a  
2 Georgia resident writes to a Virginia registrar, and the  
3 registrar misappropriates the website of a California  
4 company. And that is, they never set foot in  
5 California. They don't -- you know, do anything in  
6 California at all.

7 And there, there is jurisdiction in  
8 California because they know that the person's going to  
9 be hurt in California.

10 The next one is Metropolitan Life, that --  
11 the same page, an Alabama resident writes to an  
12 insurance company, and they say, Ah, I'm entitled to the  
13 insurance proceeds. But the actual proceeds belong to  
14 someone in California. And they never get the money.  
15 So it's like this case. The money never gets sent into  
16 California.

17 And these remote injury cases --

18 JUSTICE BREYER: Is this a case -- is this a  
19 case like -- I'll look at those cases.

20 MR. GOLDSTEIN: Okay.

21 JUSTICE BREYER: But is your case a case  
22 like where the -- a credit card is used, somebody finds  
23 it in a bookstore and starts spending the money and did  
24 the agents here, who were outside Nevada and they were  
25 keeping the money, were they going and spending it?

1 MR. GOLDSTEIN: They weren't going and  
2 spending it. They were --

3 JUSTICE BREYER: Was there a credit card  
4 that they were using?

5 MR. GOLDSTEIN: No, sir. I -- I am giving  
6 you -- I was trying to take a billfold example and --  
7 I'm -- I'm trying to --

8 JUSTICE BREYER: I was trying to figure out  
9 just which cases I should read carefully, and I will  
10 read those cases.

11 MR. GOLDSTEIN: Okay. And there's a case  
12 that's discussed in several of the briefs called  
13 Dudnikov, and that involves an -- an eBay -- eBay-like  
14 auction, and someone in one State blocks an auction in  
15 another State.

16 So one of the impressions --

17 JUSTICE SCALIA: Was the money here in  
18 Georgia the whole time?

19 MR. GOLDSTEIN: The money here was --

20 JUSTICE SCALIA: Was it still there in that  
21 locker?

22 MR. GOLDSTEIN: No. Here's the thing about  
23 it, this is no longer about the cash. And this -- the  
24 actual answer to your question is he turns the money in  
25 at a locker, okay? Then it's deposited into an account.

1 It's not about the physical money in any way, shape, or  
2 form at that point.

3 We weren't -- when we got the money, nobody  
4 sent us a duffle bag full of cash. There was a check,  
5 of course.

6 JUSTICE KAGAN: Well, if it were about  
7 them --

8 MR. GOLDSTEIN: Yes.

9 JUSTICE KAGAN: So -- so suppose they seized  
10 a gold watch --

11 MR. GOLDSTEIN: Okay.

12 JUSTICE KAGAN: -- and then they refused to  
13 return the gold watch.

14 MR. GOLDSTEIN: Yes.

15 JUSTICE KAGAN: But the gold watch really is  
16 still sitting there in Georgia.

17 MR. GOLDSTEIN: Yes.

18 JUSTICE KAGAN: Okay? Would you say that --  
19 that then there's -- there's personal jurisdiction in  
20 Nevada?

21 MR. GOLDSTEIN: Okay. Okay. And same  
22 facts, and that is a false affidavit, it's not just they  
23 seized it, it's they make a false --

24 JUSTICE KAGAN: Yeah, they seize it, and  
25 then there's a false affidavit keeping it.

1 MR. GOLDSTEIN: Right. Yes. That --

2 JUSTICE KAGAN: And the complaint is only  
3 about the false affidavit, but it's in reference to  
4 property that is indisputably in Georgia.

5 MR. GOLDSTEIN: Yes. I do think, if you can  
6 prove an injury, which I think is very hard from the  
7 gold watch -- let's say a computer, just to make it a  
8 little bit more plausible, that they would be hurt in  
9 Nevada, then, yes, I do think if you can make out an  
10 injury, which isn't -- the tort doesn't arise until the  
11 injury occurs.

12 That's why the lower courts treat these  
13 cases as the tort occurring where the victim is.

14 JUSTICE GINSBURG: Mr. Goldstein, can I take  
15 you back to the origins of all of this?

16 MR. GOLDSTEIN: Yes.

17 JUSTICE GINSBURG: The main move for  
18 personal jurisdiction, traditionally, is the plaintiff  
19 must go to where the defendant is, no matter how  
20 inconvenient that is for the plaintiff. Jurisdiction is  
21 defendant-centered. You're trying to hold a defendant,  
22 you have to go where he is.

23 Then the long-arm age comes about, and we  
24 have specific jurisdiction, which, by the way, is what  
25 you're urging.



1 MR. GOLDSTEIN: Yes.

2 JUSTICE GINSBURG: You're certainly not saying  
3 they have all-purpose jurisdiction over Walden.

4 MR. GOLDSTEIN: No. Correct.

5 JUSTICE GINSBURG: And this Court, as the  
6 McIntyre decision indicates, has been pretty careful  
7 about specific jurisdiction. And Miguel wasn't enough  
8 that machine blew up or cut somebody's fingers in New  
9 Jersey. They had to purposely avail themselves of  
10 wherever the -- the standard words are.

11 And here, you're asking for -- really  
12 pushing this specific jurisdiction to the limit. The  
13 defendant has acted only in Georgia. He hasn't set foot  
14 outside the State.

15 MR. GOLDSTEIN: Okay. So I don't think we  
16 are trying to push the bounds -- let me make one point  
17 about McIntyre and then try and correct the  
18 misimpression that I think that's been left, that there  
19 are a few contacts between Nevada and this case and  
20 hopefully prove to you that there are far more contacts  
21 between this tort and this forum than will be true in  
22 the overwhelming majority of cases that the lower courts  
23 confront.

24 And the point I would make, Justice  
25 Ginsburg, and it's made by the plurality in McIntyre, is

1 that there have always been special rules for  
2 intentional tort cases. That's the distinction, and  
3 that's why Calder comes out the way it does, citing  
4 restatement Section 32nd of the second -- the second  
5 restatement of the conflict of laws, and that is the  
6 reason -- it's not just made up.

7 The reason there's a special rule for  
8 intentional torts is that the defendant knows he's  
9 hurting someone somewhere else and, therefore, expects  
10 to be haled into court. The view of the McIntyre  
11 plurality, of course, was that the overseas manufacturer  
12 there wasn't, itself, doing anything directed at the  
13 forum.

14 But if I could just get to the very  
15 important point about --

16 JUSTICE ALITO: Before you move on from that  
17 point --

18 MR. GOLDSTEIN: Yes.

19 JUSTICE ALITO: -- your -- your argument is  
20 dependent on the fact that the officer here knew that  
21 the -- the plaintiffs were residents of Nevada; is that  
22 right?

23 MR. GOLDSTEIN: That they lived and worked  
24 there.

25 JUSTICE ALITO: Why should that make any

1 difference? The conduct is the same; the injury is the  
2 same. What if he didn't know? Then there would be no  
3 personal jurisdiction.

4 MR. GOLDSTEIN: That -- that is actually,  
5 generally, what the lower courts hold, and their reason  
6 is that the defendant is doing something, knowing that  
7 he may be haled into that court. It is a  
8 defendant-favoring rule that intends -- attempts to give  
9 predictability.

10 Now, if that's wrong, it doesn't hurt my  
11 case because, as the case comes to you, it's not --

12 JUSTICE SCALIA: Well, you could say that  
13 about whatever rule we adopt. Once we adopt the rule,  
14 when -- the defendant will know that, if he violates  
15 that rule, he's going to be haled into court.

16 MR. GOLDSTEIN: Justice Scalia, there is  
17 a --

18 JUSTICE SCALIA: I mean, it's sort of a  
19 self-fulfilling point you're making.

20 MR. GOLDSTEIN: Right. It's almost like the  
21 Fourth Amendment reasonable expectations to privacy.  
22 There is a circularity here. But it's not entirely  
23 circular because we're talking about a specific State  
24 here. It's not that he knows that the plaintiffs might  
25 be -- live in Georgia or might live anywhere in the

1 United States, it's a very specific State, and that's  
2 why it's not circular.

3 Now, if I could just help you understand our  
4 view that there are a lot more contacts between this  
5 tort and Nevada than in the great, great -- at least  
6 90 percent of the cases the lower courts are  
7 confronting. So here are the points that I would make  
8 about those contexts, and there are six, and I will try  
9 and be brief.

10 The case involves money owned by Nevada  
11 residents, \$30,000 of which originated in Nevada, and  
12 all of which was on its way to Nevada.

13 Second, the defendant intentionally hurt the  
14 plaintiffs, knowing that they would lose access to the  
15 money in Nevada, where they lived and worked.

16 Third, we will use documents in Nevada to  
17 prove that his action was intentional because it omitted  
18 the information that the defendant requested. This is  
19 not a -- us unilaterally sending money. At the Atlanta  
20 airport, he said, send us the proof that the funds are  
21 legitimate, that he requested and received from the  
22 plaintiffs in Nevada and that he learned in searching a  
23 Nevada law enforcement database, which is paragraph 79  
24 of the complaint.

25 The two last points I would make is that the

1 plaintiffs will show that they were deprived of the  
2 money in Nevada until the Nevada lawyer they had to hire  
3 used records in Nevada to persuade the government to  
4 send the money to Nevada.

5 And the plaintiffs in their case, of course,  
6 will show, because it is the fact that they are gamblers  
7 working in Las Vegas, that the economic injury occurred  
8 to them there.

9 Now, if you think that's not enough, if you  
10 conclude that's not enough, you are closing the door  
11 absolutely to all of the internet cases because those  
12 are cases where someone sits at the computer and targets  
13 someone in another State. This --

14 JUSTICE ALITO: But, when you're talking  
15 about the internet, you're in a different world. But  
16 this is a -- the facts here are old-fashioned.  
17 Everything that happened here could have happened in  
18 1920.

19 MR. GOLDSTEIN: Yes.

20 JUSTICE ALITO: Could have happened in -- in  
21 the 19th century.

22 MR. GOLDSTEIN: Yes.

23 JUSTICE ALITO: So I don't see what the  
24 internet has to do with this.

25 MR. GOLDSTEIN: Justice Alito, you always

1 tell us that you've got to write a legal rule, and there  
2 is no special personal jurisdiction rule, and the lower  
3 courts --

4 JUSTICE BREYER: Yes. Well, there seems to  
5 be because it's hard to think of an internet case where  
6 a defendant wouldn't be having communications with  
7 people in the foreign State, wouldn't be inviting  
8 business, wouldn't be doing all kinds of things.

9 So there are many kinds of internet cases,  
10 but I don't -- I don't automatically see, in deciding  
11 this, that we're deciding any on --

12 MR. GOLDSTEIN: Justice Breyer, the kinds of  
13 internet cases -- and it's wrong for me to just say,  
14 "internet" -- the kinds of cases that I'm talking about  
15 are the fraud cases, the intentional tort cases --

16 JUSTICE BREYER: Like what?

17 MR. GOLDSTEIN: You steal -- you're sitting  
18 in Georgia -- you don't, but someone is sitting in  
19 Georgia, and they steal the identity of someone who's in  
20 Nevada.

21 JUSTICE BREYER: I wouldn't do that.

22 (Laughter.)

23 MR. GOLDSTEIN: I'm -- exactly -- that's why  
24 I took it immediately back, recognizing the error.

25 JUSTICE SOTOMAYOR: He wouldn't know how.

1 (Laughter.)

2 MR. GOLDSTEIN: But there are bad people in  
3 the world, obviously, and those people do, with  
4 increasing and distressing frequency at -- with these  
5 new tools of communication, they are very, very capable  
6 of causing significant harm to someone else without  
7 actually do -- setting foot in the State.

8 Now, I have to offer you a solution. Let me  
9 just be clear. I recognize that this can go either way  
10 because if I say, "internet cases," well, then I'm  
11 opening the door to potentially a very wide-ranging set  
12 of cases going into Nevada, and we have here the special  
13 case of the law enforcement officer, and I believe that  
14 I do have the solution.

15 And that is, this is actually a case about  
16 transfer. It is not a case about jurisdiction and  
17 venue. This is the unusual case where the defendant  
18 filed a motion to dismiss and did not file a 1404 motion  
19 to transfer.

20 And this case is a lot -- you should treat  
21 it like Atlantic Marine because what you need to do is  
22 recognize, I think, that there's the big category of  
23 jurisdiction. Where there is jurisdiction, there's a  
24 subset, there is venue. That's where you can file a  
25 lawsuit. That is not where the case is going to be

1 litigated.

2 And in these cases, what defendants  
3 uniformly do -- and the lower courts pay incredible  
4 attention to the fact that law enforcement officers are  
5 going to be witnesses or are the defendant. In these  
6 cases, the defendant comes in and says, okay, I  
7 recognize, technically, there's jurisdiction and venue,  
8 but let me tell you how disruptive it will be if I  
9 actually have to litigate the case here.

10 JUSTICE ALITO: Well, I don't understand  
11 what you're saying. You're saying that we should  
12 reverse the Ninth Circuit's dismiss -- the dismissal and  
13 send it back for the district court to consider whether  
14 the case should be transferred?

15 MR. GOLDSTEIN: No, sir. I would not --  
16 this is my judgment. I do not want it reversed. What  
17 I'm saying --

18 JUSTICE ALITO: I know that, so that's why  
19 I'm confused by what you're saying about transfer.

20 MR. GOLDSTEIN: I'm trying to describe an  
21 opinion that you would write, and the opinion that I  
22 think you would write is this -- and it says, look,  
23 personal jurisdiction in the wake of Calder,  
24 particularly where there are contacts here, exists.  
25 Venue exists because several of these are events and



1 omissions, including the injury that occurs in Nevada.

2 But what we expect the lower courts to do in  
3 a case like this is to pay particular attention at the  
4 beginning of the case, as we do with qualified immunity,  
5 to have an efficient process in which the defendant can  
6 say --

7 JUSTICE GINSBURG: But you are asking the  
8 Court to decide a big-ticket item, personal  
9 jurisdiction, and what -- the theory that you are  
10 proposing would apply not to -- just to Officer Walden,  
11 but it would be about as far out as any specific  
12 jurisdiction case I know.

13 So the Court shouldn't say, well,  
14 jurisdiction, okay, venue, okay, but consider it  
15 transferring it to Georgia. That seems, to me, wild.

16 MR. GOLDSTEIN: Justice Ginsburg, I am not  
17 trying to just skip over. I have talked for this entire  
18 time about why I think we are right on jurisdiction and  
19 venue, and I am pleased to return to the issue. What  
20 I'm suggesting to you is that I recognize that we can't  
21 have -- there are two ways of dealing with the prospect  
22 of a broad personal jurisdiction rule.

23 One is to narrow it substantially. The  
24 second is to recognize that it doesn't determine where  
25 the case is going to ultimately be litigated.

1 I will tell you, Justice Ginsburg, from  
2 personally reviewing all of the post-Calder cases in the  
3 Federal courts and the State courts, that the contacts  
4 here are much, much greater between Nevada and this tort  
5 than exists in the great majority of cases that the  
6 lower courts are confronting.

7 And so if you --

8 JUSTICE GINSBURG: Did -- did Calder have  
9 something to do with the notion that every defamation  
10 is -- that every publication is a tort where it occurs?  
11 There is something special about the libel cases. There  
12 was that theory that, wherever the paper that contains  
13 the libelous article -- wherever it is sent, each one of  
14 those places, the tort occurs there.

15 MR. GOLDSTEIN: Two things about that. That  
16 is the rule for torts, not specifically -- it does -- it  
17 is true of libel, but it is true, as well, of fraud.  
18 The fraud occurs where the person is defrauded. This is  
19 straight from the Restatement. It's the ordinary common  
20 law rule. So the tort does happen where the victim is  
21 injured in libel and in a case like --

22 JUSTICE SCALIA: Well, but you are libeled  
23 wherever it is published. You don't have to be there  
24 where it's published. You are libeled wherever it is  
25 published.

1           MR. GOLDSTEIN:           And, Justice -- that's  
2 correct. And, Justice Scalia, this is exactly why --  
3 you were asking the question, why is it that  
4 then-Justice Rehnquist's opinion in Calder has the  
5 discussion that the other side is focusing on about how  
6 the article was centered on California and how it came  
7 from California sources.

8           Now, none of the holding of the case  
9 describes it, but you wondered -- and he has emphasized,  
10 my friend has, why is it in the opinion? And it's for  
11 the reason you have just given. And that is defamation  
12 and libel cases, when you are talking about the  
13 publication to the internet or publication nationwide  
14 like the National Enquirer, the lower courts have  
15 rightly focused on the fact, can we say that this isn't  
16 just directed to the United States?

17           JUSTICE SCALIA:           So -- so you could say that  
18 Calder, far from being an expansive decision, was a  
19 narrowing decision. It said -- you know, there's  
20 jurisdiction not necessarily everywhere where the libel  
21 was published, which is where the injury occurs, but  
22 there is jurisdiction only -- only in California, where  
23 these other connections existed.

24           MR. GOLDSTEIN:           We are saying the same  
25 thing. I'm just not explaining my view of it well

1 enough, and that is - the

2 JUSTICE SCALIA: Except it's harder for you  
3 to establish that the injury occurred in Nevada.

4 MR. GOLDSTEIN: I don't think so, and let me  
5 try my best. All right. The reason these defamation  
6 cases about internet and national publications -- say  
7 the New York Times is sued for defamation.

8 The Court was very concerned and the lower  
9 courts are very concerned that the publisher can't be  
10 sued in all 50 States. And so what the lower courts  
11 have done in the wake of Calder is say, I know you  
12 published it to the whole country, National Enquirer,  
13 but is it fair to say you expected to be haled into  
14 court in California because there were special features  
15 about this defamation.

16 Now, defamation and nationwide publication  
17 is very different from the other torts the lower courts  
18 confront, which, as was suggested in the first 30  
19 minutes of questioning, I think, by Justice Kagan, are  
20 directed at a person, the "shoot the gun" example, the  
21 "defraud the victim" example.

22 JUSTICE SCALIA: But our jurisdiction cases  
23 have not been based on where you expected to be sued.  
24 You could expect to be sued anywhere if the State says  
25 you are going to be sued here.

1           Our cases have focused on whether the State  
2           has jurisdiction, whether the State has enough  
3           connection with it to assert its power; not the  
4           expectation of the defendant, but the power of the  
5           State. That's what's going on here.

6           MR. GOLDSTEIN:           Justice Scalia, I agree with  
7           you, but I will say in my defense that, when the Court  
8           has said -- when we are trying to figure out if there  
9           are minimum contacts and whether it's consistent with  
10          fair play and substantial justice, the language the  
11          Court has used is, is it fair, because the defendant  
12          could reasonably be expected -- could reasonably expect  
13          to be haled into the court.

14          That's true of purposeful availment cases  
15          like McIntyre. It's true of intentional tort cases.  
16          And that is, we measure fairness and whether you are  
17          getting process that is due to you procedurally by  
18          whether this is something that you could expect to  
19          happen to you --

20          JUSTICE SCALIA:           That's your new test, just  
21          whether you could expect this to happen?

22          MR. GOLDSTEIN:           No, sir. No, sir. I have  
23          given you a specific test about where you have to  
24          intentionally injure the person, knowing that they will be  
25          injured there, and the injury has to arise there.

1           And as I've said, the way in intentional  
2 tort cases that has to work is that the lower courts  
3 recognize that a tort has a wrong and an injury, and the  
4 injury is what makes the tort complete and the tort  
5 occurs where the victim is.

6           Just take the "shoot the gun" example,  
7 right? The reason is that the person is injured there.  
8 It doesn't have to be that you shoot the gun, that the  
9 bullet travels across the State line, because the same  
10 thing can happen when money is taken out of your bank  
11 account.

12           JUSTICE BREYER:           What is the -- what are the  
13 elements of the -- of the second tort?

14           MR. GOLDSTEIN:           Yes. It is essentially a  
15 fraud claim. And that --

16           JUSTICE BREYER:           And what is the element?

17           MR. GOLDSTEIN:           That he knowingly submitted  
18 information that caused the government not to send us  
19 the money. False --

20           JUSTICE BREYER:           Injury element?

21           MR. GOLDSTEIN:           Yes. That is --

22           JUSTICE BREYER:           How do I find that?  
23 Because you see, in the fraud case, the element includes  
24 the victims being misled.

25           MR. GOLDSTEIN:           Yes. That's --

1 JUSTICE BREYER: But that's not necessarily  
2 true here. I wonder --

3 MR. GOLDSTEIN: No, it's actually not the  
4 case that the victim has to be misled in fraud,  
5 Justice Breyer, so for example --

6 JUSTICE BREYER: It has to be a  
7 misrepresentation --

8 MR. GOLDSTEIN: Yes, a knowing  
9 misrepresentation.

10 JUSTICE BREYER: -- material to.

11 MR. GOLDSTEIN: Yes.

12 JUSTICE BREYER: Material to?

13 MR. GOLDSTEIN: Here, to the government's  
14 decision --

15 JUSTICE BREYER: Not here, but material  
16 to -- normally, it has to be material to the obtaining  
17 the, say, of property.

18 MR. GOLDSTEIN: Right. Or the refusal to  
19 return.

20 JUSTICE BREYER: Now, where do I find the  
21 elements of the tort that you are alleging here?

22 MR. GOLDSTEIN: The tort that we are  
23 alleging here is essentially common law fraud under  
24 Bivens. I can give you citations --

25 JUSTICE BREYER: I don't see anything in the

1 complaint that says anything like that. It just says --  
2 where -- where do I look to see it?

3 MR. GOLDSTEIN: Okay. The citations to the  
4 complaint about -- it would be paragraphs 99 to 101.  
5 "It's alleged to violate the Fourth Amendment and our  
6 due process rights to have submitted the false affidavit  
7 that caused the government not to send us the money."

8 And if you were to conclude, Justice Scalia,  
9 that this injury doesn't arise here -- let me just tell  
10 you what the consequences of that are. And that is  
11 there are a large number of cases that arise constantly  
12 where people lose access to money, where they don't have  
13 the insurance proceeds sent to them or the Social  
14 Security checks or the IRS refunds.

15 JUSTICE KAGAN: But, Mr. Goldstein, as I  
16 understood what Mr. Bucholtz was saying, he was saying  
17 there is a distinction between an officer who commits a  
18 fraud in Georgia, when your money is in Nevada, and so  
19 he commits a fraud and he freezes your bank accounts in  
20 Nevada, versus he commits a fraud by filing this  
21 affidavit.

22 But it is as to money that is located where  
23 he is, not where you are, but where he is in Georgia.  
24 That's the distinction that I understood him to be  
25 drawing.



1 MR. GOLDSTEIN: Right.

2 JUSTICE KAGAN: What do you think about  
3 that?

4 MR. GOLDSTEIN: It doesn't make any  
5 practical sense to me, and the money wasn't in Georgia.  
6 The money was in an account in Quantico, Virginia that  
7 belonged to the DEA.

8 What difference does it make as a matter of  
9 personal jurisdiction between the following two cases  
10 and that is the defendant sitting in Georgia steals  
11 money from my bank account in Nevada or the defendant  
12 sitting in Georgia causes the government not to send me  
13 the money in Nevada --

14 JUSTICE BREYER: Because one of the elements  
15 of the crime in the -- in the second case, no element of  
16 the crime or no element of the tort, it's only the  
17 injury, which isn't an element of the actual underlying  
18 behavior that gives rise to, and in the first case, it's  
19 the other. There is an element that takes place there.  
20 That's what I'm looking for.

21 MR. GOLDSTEIN: Okay.

22 JUSTICE BREYER: I'm looking for that. I'm  
23 not saying that I have it. That's why I asked you the  
24 question I did.

25 MR. GOLDSTEIN: Right. I believe that the

1 elements of the tort that Justice Kagan is describing  
2 are the same elements that I am talking about here.  
3 It's just where the money starts.

4 CHIEF JUSTICE ROBERTS: What -- what if the  
5 plaintiffs in this case didn't leave Georgia?

6 MR. GOLDSTEIN: Yes.

7 CHIEF JUSTICE ROBERTS: They said, look, I'm  
8 not leaving until I get my money back, and I'm going to  
9 get my money back as soon as the lawyer sends us the  
10 receipts or whatever it is. Is that a different case?

11 MR. GOLDSTEIN: Yes, it is a different case,  
12 Mr. Chief Justice. And the lower courts say the real  
13 question is, where -- is this the kind of injury that  
14 will arise where the Plaintiff lives and works. And any  
15 case --

16 CHIEF JUSTICE ROBERTS: I thought your  
17 arguments were, basically, it does arise where he lives  
18 and works because it is in Nevada. And he still lives  
19 and works in Nevada, even if he stays in Georgia and  
20 says, I'm not leaving until I get the money.

21 MR. GOLDSTEIN: No, I -- that is -- for  
22 example, on our seizure claim, we acknowledge that, at  
23 the very least, there wouldn't be venue. And there's  
24 another difference, in addition to the fact that they  
25 had returned to Nevada and they had returned to living

1 and working.

2 And that is, in our actual case, we have the  
3 documents that are sent at his request from Nevada. We  
4 have the fact that he searches the Nevada law  
5 enforcement databases. And we have the fact that the  
6 money is going to be sent by the government to Nevada.

7 It's requested by their Nevada lawyer,  
8 sending documents from Nevada. And so those are -- if  
9 we think of Calder as a case in which there's not merely  
10 injury in California, but a few extra factors that were  
11 in California, that's much more this case than it is any  
12 of the other cases that the lower courts are  
13 confronting.

14 I would just discourage the Court, if I  
15 could, from --

16 JUSTICE GINSBURG: Except, Mr. Goldstein --

17 MR. GOLDSTEIN: Yes.

18 JUSTICE GINSBURG: -- it -- it is of no  
19 consequence to Walden whether this person is from Alaska  
20 or Nevada. In Calder, the article was about a person in  
21 California. The sources came from California. The  
22 paper had its principal circulation in California. It  
23 seems to me there's nothing resembling that in this  
24 case.

25 MR. GOLDSTEIN: Justice Ginsburg, to my

1 mind, what resembles it are the documents that go from  
2 Nevada to the defendant, and we think that's a --  
3 specific to the fact that it was a libel and defamation  
4 case.

5 Thank you.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.

7 Mr. Bucholtz, you have four minutes  
8 remaining.

9 REBUTTAL ARGUMENT OF JEFFREY S. BUCHOLTZ

10 ON BEHALF OF THE PETITIONER

11 MR. BUCHOLTZ: There was a lot of talk about  
12 intentional torts being different, and -- and how there  
13 should be a different rule in intentional torts. And I  
14 want to start just by -- by emphasizing the implications  
15 of that. The other side is putting all their eggs in  
16 the basket of what's in Officer Walden's mind,  
17 triggering some different personal jurisdiction inquiry.

18 And my friend even referred to qualified  
19 immunity by analogy, but I think that analogy is very  
20 important. And it shows why it would be unworkable to  
21 make personal jurisdiction turn on what's allegedly in  
22 the defendant's mind.

23 This Court initially created qualified  
24 immunity on that model as a -- as a -- based on  
25 subjective good faith. That turned out not to work

1 because subjective good faith --

2 JUSTICE SOTOMAYOR: Write a -- counsel,  
3 write a holding that takes care of your case without  
4 putting at risk the internet cases that he's talking  
5 about.

6 MR. BUCHOLTZ: Justice Sotomayor, I think  
7 there is absolutely no reason the Court needs to address  
8 internet cases or any other cases involving modern  
9 technology. This case is -- the most modern technology  
10 involved in this case, I think, is a dog sniff at the  
11 airport. There's just no reason for the Court to  
12 address any of those --

13 JUSTICE SOTOMAYOR: Counsel, your adversary  
14 is right. We write rules that get applied to different  
15 concepts.

16 MR. BUCHOLTZ: Right.

17 JUSTICE SOTOMAYOR: So write the holding for  
18 me that can't be just plaintiff -- defendant's  
19 activities because Calder did more than just defendant's  
20 activities, so write a different -- write the holding.

21 MR. BUCHOLTZ: Of course, Justice Sotomayor.  
22 I understand there has to be a rule, and the rule is  
23 here there is -- there's tangible property. This isn't  
24 a case about property with no real-world presence that  
25 only exists on a server somewhere.

1           This is a case about cash that was in a bag,  
2           and the bag was in Atlanta, on the plaintiff's person in  
3           Atlanta. It was seized in Atlanta. And the only  
4           effect --

5           JUSTICE KAGAN:           I'm sorry. So there'd be a  
6           difference if the bag had been shipped to Washington,  
7           D.C.? And -- you know, money is -- is fungible. Money  
8           is everywhere and nowhere. So it -- it seems as though  
9           money is a bit different from a gold watch, that -- that  
10          it was -- it's only contingent that the money remained  
11          in Atlanta, rather than being shipped to a bank  
12          someplace else.

13          MR. BUCHOLTZ:           Well, I think it's not  
14          contingent -- and from Officer Walden's perspective, I  
15          think it's incidental and contingent that the plaintiffs  
16          happened to be from Nevada, and that's where the effects  
17          of the seizure or the continued seizure or the delay in  
18          return were felt.

19          But I think to -- to try to answer, Justice  
20          Sotomayor, your question and your question earlier about  
21          freezing a bank account in other kind of electronic  
22          cases or internet cases, where different technologies  
23          are involved, maybe there's a difference between  
24          freezing a bank account in Nevada.

25          Maybe that can be said to be something that

1 occurs in Nevada -- that's reaching into Nevada to cause  
2 a real effect in Nevada, to cause something to happen in  
3 Nevada, which is different from seizing cash in Atlanta,  
4 knowing and failing to return it, knowing that the  
5 failure to return it is going to have an impact wherever  
6 the plaintiffs are, which presumably will include where  
7 they live, which is Nevada and California.

8           So maybe there's a way to draw a line  
9 between freezing a bank account in Nevada, or in  
10 Bancroft and Masters and Dudnikov, the cases that my  
11 friend relied on, there were real-world activities  
12 happening in the forum State.

13           In Dudnikov, there were goods.           There  
14 were -- there were fabric prints that existed in the  
15 real world. And they were being -- they were in  
16 Colorado, and they were to be sold in Colorado. And the  
17 defendant --

18           JUSTICE KENNEDY:           Could this record or these  
19 complaints be read to support the conclusion that the  
20 injury was substantially altered by the false affidavit,  
21 based on the misuse of the information received from  
22 Nevada?

23           MR. BUCHOLTZ:           Well, Justice Kennedy, I  
24 think the complaint -- again, we're not challenging  
25 the -- the reading by the lower courts that there's a

1 claim based on the affidavit that's distinct from the  
2 claim based on the seizure. On the other hand, the  
3 complaint only has a Fourth Amendment claim in it.  
4 That's the only source of law that the complaint relies  
5 on.

6 And the Fourth Amendment injury was complete  
7 upon the seizure -- upon the search and seizure which  
8 occurred in Atlanta. The quantum of damages wasn't  
9 known yet at that time because the plaintiffs didn't  
10 know whether they'd get the money back or when or what  
11 might happen in-between.

12 But that Fourth Amendment injury occurred  
13 then and there. And so the fact that maybe their  
14 consequential damages are higher because they didn't  
15 have the use of the money for longer, as opposed to  
16 shorter, I suppose that could increase their damages.

17 But it doesn't fundamentally change the  
18 nature of this case as one that has no meaningful  
19 connection between Officer Walden's conduct, all of  
20 which occurred in Atlanta and -- and Nevada.

21 JUSTICE SCALIA: You say the affidavit  
22 wouldn't give rise to a Fourth Amendment claim.

23 MR. BUCHOLTZ: I think Judge Ikuda made that  
24 point below, Justice Scalia, and I would agree with  
25 that, that -- that, however, is what the complaint



1 alleges, and we're here on personal jurisdiction and  
2 venue and not on the merits of the -- of the complaint.

3 So, again, the complaint alleges that  
4 there's this affidavit -- may I finish,  
5 Mr. Chief Justice?

6 CHIEF JUSTICE ROBERTS: You can finish your  
7 sentence.

8 MR. BUCHOLTZ: The complaint alleges that  
9 there is this affidavit written in Georgia for the  
10 purpose of seizing funds that were seized in Georgia,  
11 that were to be forfeited in Georgia. The only  
12 connection to Nevada is the fact that the plaintiffs  
13 allegedly felt the impact there. Under any of this  
14 Court's precedents, that's not sufficient.

15 Thank you, Your Honors.

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
17 Counsel.

18 The case is submitted.

19 (Whereupon, at 11:04 a.m., the case in the  
20 above-entitled matter was submitted.)

21

22

23

24

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