No. 19-910

IN THE
Supreme Court of the United States

K. G. S., INDIVIDUALLY AND AS GUARDIAN AND NEXT FRIEND OF BABY DOE, A MINOR CHILD,
Petitioner,

v.

FACEBOOK, INC.,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Alabama Supreme Court correctly held, in a unanimous decision, that Facebook is not subject to personal jurisdiction in Alabama merely because it declined to remove a user-generated Facebook page that discussed persons and events located in Alabama.

RULE 29.6 DISCLOSURE STATEMENT

Facebook, Inc. is a publicly traded company. Facebook does not have a parent corporation, and no publicly traded company holds 10% or more of Facebook, Inc.'s stock.

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BRIEF IN OPPOSITION

INTRODUCTION

In 2015, a Facebook user in New York created a publicly available page relating to certain events involving K.G.S. that were also written about by various national, local, and online news outlets. K.G.S. sent Facebook a letter asking that it disable the page. Facebook reviewed the request and removed some, but not all, of the page's content.

Unhappy with that decision, K.G.S. sued Facebook—not in California (where Facebook is headquartered), or in Delaware (where Facebook is incorporated), or anywhere else that Facebook had offices, employees, or property. Rather, K.G.S. sued Facebook in Alabama, simply because that is where K.G.S. lives and because the Facebook page at issue

discussed events that took place there. K.G.S. also sought a preliminary injunction ordering Facebook to disable the page.

Facebook moved to dismiss the case on multiple grounds, including lack of personal jurisdiction. In a pair of largely unreasoned orders, the trial court denied the motion and granted a preliminary injunction. The Alabama Supreme Court, however, unanimously reversed. It held that, because Facebook engaged in no suit-related conduct directed toward Alabama, this Court's decision in *Walden* v. *Fiore*, 571 U.S. 277 (2014), bars Alabama courts from exercising personal jurisdiction.

That straightforward decision does not warrant this Court's review. First, there is no division in the lower courts on the question presented. Of the handful of loosely analogous cases K.G.S. identifies that have been decided since *Walden*, every one has articulated the same basic rule and reached a result consistent with the decision below. K.G.S. can only create the semblance of a split by lumping in several cases plainly irrelevant to the issue at hand.

Second, the decision below is correct. *Walden* makes clear that a defendant can only be subject to specific jurisdiction based on suit-related contacts that it formed with the forum State, and here Facebook has none. K.G.S.'s reliance on *Calder* v. *Jones*, 465 U.S. 783 (1984), is squarely foreclosed by *Walden*, which rejected the expansive reading of that precedent K.G.S. presses here.

Third, this case is an unsuitable vehicle to review the question presented. K.G.S. failed to preserve her principal arguments in the Alabama courts; the factual record is threadbare; and this case arises on

interlocutory review of the grant of a preliminary injunction.

Fourth, cases involving similar facts are unlikely to recur. We are aware of no other case in any state high court or federal court of appeals involving a similar attempt to subject an Internet platform to personal jurisdiction based on content posted by one of its users. And such a suit would virtually always be foreclosed by the Communications Decency Act and the First Amendment.

The petition should be denied.

STATEMENT

A. Factual Background

Facebook is a Delaware corporation that has its headquarters and principal place of business in Menlo Park, California. Pet. App. 9a. Facebook's online platform is accessible anywhere in the country (and virtually anywhere in the world) where individuals can access the Internet. *Id.* Facebook has users and advertisers in all fifty States. *Id.* At all times relevant to this lawsuit, Facebook did not have employees, offices, or property in Alabama. *Id.*

In July 2015, the Huffington Post, a "prominent media outlet," published two articles by a "well-known critic of the United States' adoption system" about an adoption controversy in Alabama. *Id.* at 70a. The articles reported that after signing a pre-birth consent to allow K.G.S. to adopt Baby Doe, Baby Doe's birth mother unsuccessfully attempted to prevent the adoption. *Id.* at 5a-6a. The articles "criticize[d] the adoption system" for permitting this result and characterized K.G.S.'s adoption of Baby Doe as "[w]rongful." *Id.* at 70a-71a. The articles

included photographs of Baby Doe and identified K.G.S., Baby Doe, and the birth mother by name. *Id.* at 5a.

These articles spurred extensive online discussion about Baby Doe's adoption and the U.S. adoption system more broadly. *Id.* at 71a. Claudia D'Arcy, a "popular blogger" located in New York, created a Facebook page entitled "Bring Baby [Doe] Home," which attached both Huffington Post articles and, like those articles, included pictures of Baby Doe and identified K.G.S. by name. *Id.* at 67a, 71a. At least three other bloggers produced blog posts, Facebook posts, and "lengthy YouTube videos" about the controversy. *Id.* at 67a-68a, 71a. Thousands of individuals also commented on D'Arcy's post, some of whom used it as a vehicle to discuss the problem of "'predatory' adoptions in the United States." *Id.* at 72a.

On July 28, 2015, K.G.S.'s lawyer sent Facebook a letter asking it to remove D'Arcy's Facebook page. *Id.* Facebook sent back a response stating that it would review K.G.S.'s complaints. *Id.* at 11a. After reviewing the page, Facebook removed the page's cover photo but did not otherwise alter its content. *Id.* at 11a, 72a.

B. Procedural History

1. In July 2017, almost two years after raising her complaints about the page, K.G.S. filed suit in Alabama Circuit Court against D'Arcy, several other bloggers who commented on the adoption, and Facebook itself. *Id.* at 6a-7a. K.G.S. alleged that the defendants violated the Alabama Adoption Code and various common-law duties by "disclos[ing] and/or permitt[ing] the disclosure of" information relating to

Baby Doe's adoption. *Id.* at 75a; *see id.* at 74a-79a. She also claimed that the articles and commentary caused her to be subjected to cyber-bullying "from random individuals and organizations inside and outside the State of Alabama," and that her "business associates, friends, and certain family members * * * now view K.G.S. in a different light than before." *Id.* at 73a. K.G.S. moved for a preliminary injunction requiring Facebook and D'Arcy to disable D'Arcy's Facebook page. *Id.* at 9a.

Facebook moved to dismiss the complaint and opposed the preliminary injunction. *Id.* at 8a, 10a. It argued that Alabama lacked personal jurisdiction over Facebook; that K.G.S.'s claims against Facebook were barred by the Communications Decency Act and the First Amendment; that venue in Jefferson County, Alabama, was improper; and that the standards for a preliminary injunction were not satisfied, among other defects. *Id.* at 8a-10a. Facebook also produced an uncontested affidavit from one of its employees describing the nature of its business and the locations of its business operations. *Id.* at 9a.

2. In two brief, largely unreasoned orders, the trial court denied Facebook's motion to dismiss and granted a preliminary injunction ordering Facebook and D'Arcy to deactivate the Facebook page. *Id.* at 55a-57a, 58a-59a. The court's jurisdictional analysis consisted of a single sentence: "Based on the minimum contacts that the Defendant has with the State of Alabama, venue is proper in Jefferson County, AL and therefore the Court has jurisdiction over the Defendant." *Id.* at 58a. As for the merits, the trial court stated simply that "[t]he Plaintiff has stated a claim upon which relief can be granted." *Id.* Face-

book filed an interlocutory appeal of the order granting the preliminary injunction. *Id.* at 12a.

3. The Alabama Supreme Court unanimously reversed. *Id.* at 51a-52a. It found that the trial court lacked personal jurisdiction over Facebook, and so did not consider Facebook's other arguments for reversal. *Id.*

The Alabama Supreme Court first concluded that the trial court lacked general jurisdiction over Facebook. Facebook, it explained, "is not incorporated in Alabama," "does not maintain its principal place of business in Alabama," and "presented undisputed evidence that it had no offices, property, or employees located in Alabama." *Id.* at 18a. Accordingly, it concluded, Facebook is not "'at home' in Alabama." *Id.* at 21a (quoting *Daimler AG* v. *Bauman*, 571 U.S. 117, 127 (2011)).

The Alabama Supreme Court next concluded that the trial court lacked specific jurisdiction over Facebook. In *Walden*, it explained, this Court held that specific jurisdiction requires a "relationship among the defendant, the forum, and the litigation," and that "[i]t is the defendant, not the plaintiff or third parties, who must create contacts with the forum State." *Id.* at 32a-33a (quoting *Walden*, 571 U.S. at 291) (emphasis omitted). K.G.S. argued that, under *Calder*, a court may assert jurisdiction whenever "the defendant knew or should have known that its tortious conduct would have effects on certain individuals in the forum state." *Id.* at 33a-34a (quoting K.G.S. Br. 21). But the Alabama Supreme Court explained that, in *Walden*, this Court "expressly rejected the notion that specific jurisdiction may be exercised based on the foreseeability of harm suf-

fered in the forum state." *Id.* at 34a (citing *Walden*, 571 U.S. at 289). As *Walden* explained, "[t]his approach to the 'minimum contacts analysis impermissibly allows a plaintiff's contacts with the defendant and forum to drive the jurisdictional analysis.'" *Id.* (quoting *Walden*, 571 U.S. at 289). The Alabama Supreme Court noted that "K.G.S. d[id] not mention *Walden* in her brief on appeal * * * despite the fact that it is a unanimous decision of the United States Supreme Court applying and clarifying *Calder*." *Id.* at 33a.

Applying the standards set forth in *Walden*, the Alabama Supreme Court concluded that K.G.S. had not "demonstrated that Facebook's suit-related conduct created a 'substantial connection' with Alabama." *Id.* at 34a. The "only 'conduct' of Facebook" alleged by K.G.S. in her complaint was that Facebook responded to K.G.S.'s request to take down D'Arcy's page and then removed the page's cover photo but otherwise left the page intact. *Id.* 25a-26a. But Facebook's "contacts with Alabama that were made merely in response to K.G.S.'s or her attorney's contact with Facebook are 'precisely the sort of unilateral activity of a third party that cannot satisfy the requirement of contact with the forum State.'" *Id.* at 34a-35a (quoting *Walden*, 571 U.S. at 291) (internal quotation marks omitted). And "Facebook's failure to act to remove the Facebook page" was "expressly aimed at K.G.S. herself, and not at Alabama as a forum." *Id.* at 35a.

Finally, the court found that K.G.S. could not establish specific jurisdiction based on "the general fact that the Facebook Web site and mobile application are available for users in Alabama to access." *Id.* at 27a n.11. For one thing, it noted, "K.G.S. ha[d] not

asked [the Alabama Supreme Court] to consider" this fact. *Id.* And, in any event, the general availability of Facebook in Alabama is not "*suit-related* conduct that was 'purposefully directed' to the forum." *Id.* The Alabama Supreme Court noted that every other court to "address[] the question" had reached a similar conclusion. *Id.* (citing cases).

REASONS FOR DENYING THE PETITION

The Alabama Supreme Court unanimously held that Alabama courts cannot exercise personal jurisdiction over Facebook merely because it declined to remove a Facebook page that commented on events associated with a person who resides in Alabama. That decision does not implicate any division of authority; the handful of lower courts to address analogous questions have all taken a similar approach and reached comparable conclusions. Nor was there any error in the Alabama Supreme Court's judgment, which reflects a straightforward and correct application of this Court's recent opinion in *Walden*. And this case would be an extremely poor vehicle to consider the question presented in any event: K.G.S. failed to press her principal arguments below; her jurisdictional allegations are conclusory and underdeveloped; this case arises on interlocutory review of a preliminary injunction; and the circumstances are unlikely to recur. Certiorari should be denied.

I. THE ALABAMA SUPREME COURT'S DECISION DOES NOT IMPLICATE ANY DIVISION OF AUTHORITY.

K.G.S. contends that this case implicates a split of authority over the application of this Court's decision in *Calder* v. *Jones* to "intentional misconduct carried

out online." Pet. 12-13. By her telling, this Court's 2014 decision in *Walden* created a "significant divide" as to how courts should interpret *Calder*. *Id.* at 12-13, 21. Some courts, she claims, hold that the dissemination of a website that causes "known and foreseeable harm within the forum" is sufficient to establish personal jurisdiction under *Calder*. *Id.* at 26. Yet other courts, she contends—including the Alabama Supreme Court here—have "effectively render[ed] *Calder* inapplicable in the modern era" by holding that "web activity" gives rise to personal jurisdiction only where "there is some evidence of targeted advertising on the website, or similar activity, in the forum state." *Id.* at 25, 27-28.

This split is—to put it bluntly—nonexistent. As evidence of her claimed split, K.G.S. cites a grand total of seven cases decided since *Walden*. *See id.* at 26-28. Three of those cases did not apply *Calder* to online conduct at all, let alone adopt the rule K.G.S. advocates. The remaining four cases, meanwhile, each advanced the same interpretation of *Calder* and *Walden* as the decision below. K.G.S. fails to identify any respect in which another court would have decided this case differently than the unanimous Alabama Supreme Court.

1. Three of the cases K.G.S. relies on for her claimed split are irrelevant. K.G.S. contends that the First Circuit, the Second Circuit, and the Texas Supreme Court have all interpreted *Calder* to mean that a national website causing "known and foreseeable harm within the forum" suffices to establish jurisdiction. Pet. 26-27. But two of those cases did not even cite *Calder*, and none relied on harm as a basis for jurisdiction.

In *Plixer International, Inc.* v. *Scrutinizer GmbH*, 905 F.3d 1 (1st Cir. 2018), the First Circuit held that a German company was subject to specific jurisdiction in the United States on a claim alleging that its corporate name infringed the plaintiff's trademark. *Id.* at 4-5. The First Circuit rested that holding on the fact that the company "used [its] website to engage 'in sizeable and continuing commerce with United States customers,'" thereby "purposefully avail[ing]" itself of the U.S. market. *Id.* at 8 (citation omitted). The court did not rely on any allegation that the plaintiff suffered foreseeable harm in the forum; indeed, the word "harm" does not appear once in its opinion. Nor did the court discuss—or even cite—this Court's opinion in *Calder*. And the First Circuit repeatedly "emphasize[d]" that its decision was "specific to the facts of this case" and did not establish "any general guidelines" or "broad rules." *Id.* at 4, 8.

The Second Circuit's decision in *EMI Christian Music Group, Inc.* v. *MP3tunes, LLC*, 844 F.3d 79 (2d Cir. 2016), is equally irrelevant. There, the court held that New York could exercise jurisdiction over the CEO of MP3tunes on claims alleging that his company "infringed * * * copyrights in thousands of sound recordings and musical compositions." *Id.* at 85, 99. The court explained that "[j]urisdiction is appropriate in New York because MP3tunes has developed and served a market for its products there," and so has "purposefully availed itself of the privilege of conducting activities within New York." *Id.* at 98 (brackets omitted). The court did not rely on an allegation of harm within the forum. It did not invoke *Calder*, even in passing.

The Texas Supreme Court's decision in *TV Azteca, S.A.B. de C.V.* v. *Ruiz*, 490 S.W.3d 29 (Tex. 2016), rounds out the count. That case did not even involve the Internet; it concerned a complaint about television programs broadcast from Mexico into Texas. *Id.* at 34. And, yet again, the court did not rely on *Calder*, nor find jurisdiction based on any alleged harm in the forum. Rather, it exercised jurisdiction because the defendants "purposefully availed themselves of the benefits of conducting activities in Texas," by "physically 'enter[ing] into' Texas to produce and promote their broadcasts, deriv[ing] substantial revenue and other benefits by selling advertising to Texas businesses, and ma[king] substantial efforts to distribute their programs and increase their popularity in Texas." *Id.* at 52.[1]

K.G.S. gives little hint of why she deems these cases relevant to her claimed split, beyond noting that two of them relied on a website in establishing jurisdiction. *See* Pet. 26. But no one disputes that a

[1] K.G.S. observes that the Texas Supreme Court expressed support for the Fifth Circuit's "subject-and-sources test," Pet. 27, but that test has no relevance to this case. As the Texas Supreme Court described it, the subject-and-sources test holds that a plaintiff may establish specific jurisdiction "in a defamation case" if both "(1) the subject matter of and (2) the sources relied upon for the [defamatory] article were in the forum state." *TV Azteca*, 490 S.W.3d at 47 (quoting *Clemens* v. *McNamee*, 615 F.3d 374, 380 (5th Cir. 2010)). That test does not resemble the rule K.G.S. is advocating, which turns on "*harm* in the forum state." Pet. i (emphasis added). And it would not help her in any event, given that this case does not involve defamation, and there is no allegation that Facebook (or D'Arcy) relied on "sources" in Alabama.

website *can* constitute a "relevant contact" with the forum, *id.*—for instance, where the defendant uses it to direct business at the forum. *See, e.g.*, *Plixer*, 905 F.3d at 8. K.G.S.'s contention, however, is that the bare fact that a website causes "known and foreseeable harm in the forum state" is sufficient to establish jurisdiction under *Calder* and *Walden*. Pet. 26; *see id.* at i. None of these cases lends support to that proposition.

2. K.G.S.'s remaining four cases do at least involve the application of *Calder* and *Walden* to alleged torts committed online. But contrary to K.G.S.'s depiction, there is no conflict among these decisions. In each case, the courts applied the same, straightforward understanding of *Calder* and *Walden*: that a state may assert jurisdiction over the defendant if it engaged in tortious conduct *targeted at* the forum, but not if the defendant merely maintained a website that allegedly *caused harm* in the forum.

The Alaska Supreme Court articulated this approach in *Harper* v. *BioLife Energy Systems, Inc.*, 426 P.3d 1067 (Alaska 2018)—a case that, surprisingly, K.G.S. claims supports her position, *see* Pet. 27. In *Harper*, the court considered whether it could exercise personal jurisdiction over a company, BioLife, that posted a brochure on the Internet that allegedly invaded the privacy of an Alaska resident, Harper. 426 P.3d at 1069-70. After reviewing *Calder* and *Walden*, the Alaska Supreme Court stated the following rule: "[I]t is not enough for Harper to allege that BioLife took actions aimed at her *or actions that harmed her*. Rather, she would need to allege some action or conduct by BioLife, related to her claims, *that was purposefully directed at the State of Alaska*." *Id.* at 1075 (emphases added). Thus, the court held

that it was irrelevant that Harper was an "Alaska residen[t]" and that "the brochure * * * mention[ed] [her]." *Id.* Instead, Harper needed to identify some conduct by which "BioLife * * * targeted Alaska when publishing the brochure"—such as by mailing or emailing copies to the State, or drawing on Alaska sources to write the brochure. *Id.* at 1075-76. Because Harper alleged none of those things, personal jurisdiction in Alaska was improper. *Id.* at 1076.

The Tenth Circuit followed the same approach in *Old Republic Insurance Co.* v. *Continental Motors, Inc.*, 877 F.3d 895 (10th Cir. 2017). There, a defendant published a service manual on its website that a Colorado resident read and allegedly suffered injuries as a result of. *Id.* at 900. The court explained that, under *Calder* and *Walden*, the defendant could be subject to personal jurisdiction only if it "deliberately directed its message at an audience in the forum state and intended harm to the plaintiff occurring primarily or particularly in the forum state." *Id.* at 917 (citation omitted). In contrast, "the mere *foreseeability* of causing an injury in the forum state is, standing alone, insufficient." *Id.* (emphasis added; citation omitted). Applying those principles, the Tenth Circuit held that the defendant's "mere awareness" that persons in Colorado would read the manual was not enough to support jurisdiction, in the absence of evidence that the manual was "deliberately directed at Colorado, either in terms of its content or its intended audience." *Id.* Just like the Alaska Supreme Court, the Tenth Circuit therefore denied jurisdiction. *Id.* at 917-918.

The Seventh Circuit's decision in *Advanced Tactical Ordnance Systems, LLC* v. *Real Action Paintball, Inc.*, 751 F.3d 796 (7th Cir. 2014), is to similar effect.

There, too, the court held that "the maintenance of an interactive website" cannot establish jurisdiction under *Calder* and *Walden*, unless the defendant has "targeted [the forum] somehow." *Id.* at 802-803. And, like Alaska and the Tenth Circuit, it held that the fact that a website is "accessible in the forum state" is not enough. *Id.* at 803 (citation omitted).

The Ninth Circuit's unpublished opinion in *Alpha Phoenix Industries, LLC* v. *SCI International, Inc.*, 666 F. App'x 598 (9th Cir. 2016)—which K.G.S. inexplicably counts in her favor, Pet. 27—is no different. In that case, the defendants "purposefully reached out beyond Texas and into Arizona by posting allegedly defamatory statements about [the plaintiff's business] online." 666 F. App'x at 600 (brackets and internal quotation marks omitted). The Ninth Circuit found that jurisdiction in Arizona was proper because the defendants "acted with the stated intent to affect Plaintiff's business, which is based and operates in Arizona," and because their "allegedly harmful acts were 'expressly aimed' towards Arizona." *Id.* Like the Tenth Circuit, then, the Ninth Circuit did not rest its holding on "the mere foreseeability" of harm in the forum; it relied on the fact that the defendants "deliberately directed" their conduct at the forum and "intended harm" there. *Old Republic*, 877 F.3d at 917 (citation omitted); *see also Axiom Foods, Inc.* v. *Acerchem Int'l, Inc.*, 874 F.3d 1064, 1070 (9th Cir. 2017) (holding that "[t]he foreseeability of injury in a forum" due to the distribution of emails to forum residents "is not a sufficient benchmark for exercising personal jurisdiction" (internal quotation marks and citation omitted)).

If there is a difference between the approaches taken by these four jurisdictions, it is imperceptibly subtle. In each one, courts found that online activity gives rise to specific jurisdiction only where the defendant purposefully directed the activity at the forum. *See Harper*, 426 P.3d at 1075; *Old Republic*, 877 F.3d at 917; *Advanced Tactical Ordnance Sys.*, 751 F.3d at 802-803; *Alpha Phoenix*, 666 F. App'x at 600. And in each jurisdiction, courts rejected the notion that foreseeability of harm or the accessibility of the website in the forum is sufficient to establish jurisdiction. *See Harper*, 426 P.3d at 1075-76; *Old Republic*, 877 F.3d at 917; *Advanced Tactical Ordnance Sys.*, 751 F.3d at 803; *Axiom Foods,* 874 F.3d at 1069-70. Not a single court adopted the rule K.G.S. advocates.

3. In the decision below, the Alabama Supreme Court followed the same approach as these other circuits and state high courts. It explained that, under *Calder* and *Walden*, specific jurisdiction may not "be exercised based on the foreseeability of harm suffered in the forum state." Pet. App. 34a. Rather, the defendant must have taken actions "expressly aimed * * * at [the] forum." *Id.* at 35a. The court found no evidence that Facebook had engaged in such conduct: The only conduct K.G.S. alleged—Facebook's decision not to remove the page in response to K.G.S.'s request—was directed "at K.G.S. herself," not Alabama. *Id.* Accordingly, the court found personal jurisdiction lacking.

K.G.S. tries but fails to identify some respect in which the decision below departs from the holdings of other courts. She suggests that the Alabama Supreme Court split from other courts by "[d]isregarding Facebook's Alabama user base." Pet.

28. But the two courts that K.G.S. reckons fall on the other side of the split—the Alaska Supreme Court and the Ninth Circuit—have also made clear that this fact is insufficient to establish jurisdiction. In *Harper*, the Alaska Supreme Court denied jurisdiction even though the offending website was "viewable in Alaska." *Harper*, 426 P.3d at 1076. And in *Alpha Phoenix*, the Ninth Circuit rested jurisdiction not on the mere availability of the website in the forum, but on the fact that the defendants' defamatory comments were "expressly aimed" at Arizona and intended to harm a business located there. 666 F. App'x at 600.

In any event, the Alabama Supreme Court found that "K.G.S. has not asked us to consider *** the general fact that the Facebook Web site and mobile applications are available for users in Alabama to access." Pet. App. 27a n.11. K.G.S. cannot fault the court for declining to assign weight to that forfeited consideration.

K.G.S. also contends that the Alabama Supreme Court departed from other courts by "failing to recognize that the content of a page that 'wholly pertained to an Alabama adoption' is itself a relevant contact." Pet. 28 (quoting Pet. App. 26a). That is doubly incorrect. First, Facebook did not create the "content of [the] page"—D'Arcy and other third parties did—and K.G.S. cites no case from any other court deeming the content of a user-generated page a basis for asserting jurisdiction over the company that hosts the underlying platform. *Cf. Harper*, 426 P.3d at 1070 (defendant itself produced content and posted it on its own website); *Alpha Phoenix*, 666 F. App'x at 600 ("*Defendants* *** post[ed] allegedly defamatory statements about API online." (emphasis

added)). Second, K.G.S. does not cite any post-*Walden* case holding that a defendant targeted the forum merely by posting content (let alone maintaining a platform on which third parties posted content) that "pertains" to the forum. On the contrary, courts have made clear that "[t]he foreseeability of injury" in the forum is not sufficient to establish a forum contact. *E.g.*, *Axiom Foods*, 874 F.3d at 1070.

Finally, K.G.S. faults the Alabama Supreme Court for "rejecting the decisions of other courts of appeals" that predated *Walden*. Pet. 28 (citing Pet. App. 33a & n.12). But the court below did not simply reject pre-*Walden* decisions. It explained that, even assuming those decisions remained good law, they were distinguishable from this case. *See* Pet. App. 33a n.12.[2]

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[2] K.G.S. likewise fails to turn up a single example of a case predating *Walden* in which courts reached a result inconsistent with the decision below. Several of K.G.S.'s pre-*Walden* cases found jurisdiction because the defendant expressly targeted the forum through marketing or similar measures. *See, e.g.*, *Mavrix Photo, Inc.* v. *Brand Techs., Inc.*, 647 F.3d 1218, 1230-31 (9th Cir. 2011) (advertising). Other cases found jurisdiction because the defendant's online conduct was aimed at the forum and was intended to inflict harm there. *See, e.g.*, *Kauffman Racing Equip., L.L.C.* v. *Roberts*, 930 N.E.2d 784, 796 (Ohio 2010). And a number of the cases denied jurisdiction because the defendant did not specifically target the forum, despite the fact that the plaintiff suffered foreseeable harm in the forum. *See, e.g.*, *Shrader* v. *Biddinger*, 633 F.3d 1235, 1244-45 (10th Cir. 2011). None of those holdings is inconsistent with the decision below, in which K.G.S. produced no evidence of forum targeting and has relied centrally on the alleged foreseeability of harm in the forum.

Regardless, as K.G.S.'s own framing implicitly acknowledges, cases decided prior to *Walden* cannot establish a live division of authority. *Walden* is now the governing precedent in this area: It substantially clarified the meaning of *Calder*, *see Walden*, 571 U.S. at 286-288, and rejected the view that courts may exercise personal jurisdiction where a defendant simply caused "foreseeable harm in [the forum]," *id.* at 289. That is why every decision that K.G.S. herself cites applying *Calder* since 2014 has heavily relied on *Walden*. It is, accordingly, irrelevant how courts interpreted and applied *Calder* before *Walden;* those precedents cannot demonstrate that courts would reach a different result than the Alabama Supreme Court if presented with the same question today.

II. THE ALABAMA SUPREME COURT'S DECISION IS CORRECT.

In addition to being consistent with the decisions of other courts, the Alabama Supreme Court's decision is correct. The court engaged in a straightforward application of this Court's holding in *Walden*, and rightly refused K.G.S.'s request to resurrect the capacious understanding of *Calder* that *Walden* itself rejected.

In *Walden*, this Court held that "[f]or a State to exercise jurisdiction consistent with due process, the defendant's suit-related conduct must create a substantial connection with the forum State." 571 U.S. at 284. The Court emphasized "[t]wo related aspects of this necessary relationship." *Id.* "First, the relationship must arise out of contacts that the 'defendant *himself*' creates with the forum State"; "contacts between the plaintiff (or third parties) and the forum

State" are immaterial. *Id.* "Second, [this Court's] 'minimum contacts' analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there." *Id.* at 285. Thus, the Court held that a defendant's conduct "d[oes] not create sufficient contacts with [the forum] simply because he allegedly directed his conduct at plaintiffs whom he knew had [forum] connections." *Id.* at 289.

In light of these principles, the Alabama Supreme Court correctly held that it lacked jurisdiction over Facebook. The only "suit-related conduct," *id.* at 284, that K.G.S. alleged in her complaint was that (1) Facebook informed K.G.S. that it would look into her complaint about D'Arcy's page, and (2) Facebook removed the cover photo but did not take down the page. Pet. App. 72a; *see id.* at 25a-26a. Facebook's "'form' response" to K.G.S., *id.* at 26a, however, was just that; it was not directed at Alabama "itself." *Walden*, 571 U.S. at 285. Furthermore, Facebook did not "reach[] out *** into [Alabama]," *id.* (internal quotation marks omitted), by declining to take down the "Bring Baby [Doe] Home" Facebook page. That decision was made outside of Alabama and concerned a Facebook page created and published by a resident of New York; in no respect was that "action (or inaction)" targeted at the forum. Pet. App. 25a; *see id.* at 26a n.10 (noting that "K.G.S. presented no evidence *** to demonstrate that Facebook's removal of the cover photograph from the Facebook page or its decision not to delete the Facebook page occurred in Alabama").

This Court's decision in *Calder* does not support a contrary result. In *Calder*, the Court held that California courts could assert jurisdiction over a

reporter and an editor who wrote an allegedly libelous story about a California actress for publication in the National Enquirer. 465 U.S. at 784-785. As *Walden* explained, the Court rested that decision on "the various contacts the defendants had created with California (and not just with the plaintiff) by writing the allegedly libelous story." 571 U.S. at 287. Among other things, "[t]he defendants relied on phone calls to 'California sources' for the information in their article," the "allegedly libelous article *** was widely circulated in the State," and "the 'brunt' of th[e] injury was suffered by the plaintiff in that State." *Id.* (quoting *Calder*, 465 U.S. at 788-789). Critically, *Walden* explained that "the reputation-based 'effects' of the alleged libel connected the defendants to California, not just to the plaintiff," because of the unique "nature of the libel tort," which makes "publication to third persons *** a necessary element of libel." *Id.* at 287-288. "That connection, combined with the various facts that gave the article a California focus, sufficed to authorize the California court's exercise of jurisdiction." *Id.* at 288.

This case is unlike *Calder* in every pertinent respect. Facebook did not "wr[i]te" the page that allegedly caused K.G.S. injury; an individual Facebook user did. *Calder*, 465 U.S. at 785. It did not contact Alabama "sources" or otherwise reach out to Alabama in connection with that page. *Id.* at 785, 790. It did not actively "circulat[e]" the page in Alabama. *Id.* at 785. And distribution of the page to third persons is not an element of any of the claims K.G.S. has brought against Facebook. *Walden*, 571 U.S. at 287-288; *see* Pet. App. 74a-79a.

K.G.S.'s attempts to paper over these distinctions are not persuasive. K.G.S. notes that, like the article

at issue in *Calder*, D'Arcy's page concerned events and persons located in the forum. Pet. 29-30, 31-32. But the content of the page was the result of the "'unilateral activity' of *** third part[ies]"—D'Arcy and other users—not of Facebook itself. *Walden*, 571 U.S. at 291. Nor is Facebook analogous to the "editor" in *Calder*. Pet. 30. Unlike Facebook, that editor was intimately involved in the formulation and writing of the article: "He reviewed and approved the initial evaluation of the subject of the article and edited it in its final form." *Calder*, 465 U.S. at 786. Facebook carried out none of these actions by which the editor "*himself* create[d]" connections with the forum State. *Walden*, 571 U.S. at 284 (internal quotation marks omitted).

K.G.S. also argues that, as in *Calder*, the failure to remove D'Arcy's page inflicted harm on K.G.S. in Alabama. Pet. 30. *Walden*, however, expressly held that "mere injury to a forum resident is not a sufficient connection to the forum," even if that injury is "foreseeable." 571 U.S. at 289-290. "Regardless of where a plaintiff lives or works, an injury is jurisdictionally relevant only insofar as it shows that the defendant has formed a contact with the forum State." *Id.* at 290. And unlike in *Calder*, this is not the unique case in which the "nature of" the plaintiff's legal claims make distribution an integral part of the cause of action. *Id.* at 287.

Last, K.G.S. faults the Alabama Supreme Court for its "refusal to consider Facebook's availability in Alabama." Pet. 32. But, again, K.G.S. itself forfeited reliance on that consideration. Pet. App. 27a n.11 ("K.G.S. has not asked us to consider ***."). And the fact that Facebook makes the "Bring Baby [Doe] Home" page available in Alabama, along with virtu-

ally every other place in the world that has an Internet connection, does not demonstrate that Facebook has "expressly aimed" its conduct at Alabama. *Calder*, 465 U.S. at 789.

III. THIS CASE IS A POOR VEHICLE TO CONSIDER THE QUESTION PRESENTED.

Even if the question presented merited certiorari, this case would be an exceptionally poor vehicle to review it.

First, K.G.S. failed to press below the principal arguments on which she now rests her petition. K.G.S.'s lead arguments for certiorari are that the Alabama Supreme Court "erred by its overly expansive application of *Walden,*" Pet. 29 (capitalization omitted), and that this Court should "answer the question left open in *Walden*," *id.* at 3; *see id.* at i. But as the Alabama Supreme Court observed, "K.G.S. d[id] not mention *Walden* in her brief on appeal, and none of the authorities cited in K.G.S.'s brief appl[ied] *Walden*." Pet. App. 33a. K.G.S. cannot now fault the Alabama Supreme Court for supposedly misapplying a controlling precedent that K.G.S. herself failed to address. If this Court wishes to resolve any unsettled questions concerning the scope of *Walden* (of which K.G.S. identifies none), it should wait for a case in which the parties actually joined issue on those questions below.

K.G.S. also forfeited a key factual premise of her case. In this Court, K.G.S. repeatedly alleges that Facebook's user base in Alabama is a jurisdictionally relevant contact with the forum; her question presented refers to the fact that "the relevant online activity is equally accessible nationwide," and she relies on that same consideration numerous times in

the body of her petition. Pet. i; *see also id.* at 3, 13, 26, 28, 29. But the Alabama Supreme Court expressly found that "K.G.S. has *not* asked us to consider * * * the general fact that the Facebook Web site and mobile application are available for users in Alabama to access." Pet. App. 27a n.11 (emphasis added). It is, at minimum, highly improper for K.G.S. to attempt to resurrect that forfeited contention in this Court. Indeed, the fact that the Alabama Supreme Court found that K.G.S. failed to preserve this claim likely presents an adequate and independent state ground barring its consideration here.

Second, the record is virtually bereft of allegations or facts that support K.G.S.'s claim of jurisdiction. Despite repeatedly being given the opportunity to produce facts supportive of her jurisdictional arguments—including when she amended her complaint, Pet. App. 7a-9a, and when Facebook opposed her motion for a preliminary injunction, *see id.* at 10a-11a—K.G.S. failed to supplement her complaint's jurisdictional allegations in a timely manner. *See id.* at 19a (noting that "K.G.S. did not provide any evidence to rebut Facebook's evidence" on personal jurisdiction); *id.* at 3a-4a (rejecting K.G.S.'s attempts to belatedly supplement the record on appeal). Accordingly, the only record support for K.G.S.'s claim of jurisdiction are the threadbare allegations in her complaint—namely, that Facebook was "notified" of the page that D'Arcy created and, after a brief review, "removed the Page's cover photo, but refused to delete the page." *Id.* at 72a. Those unadorned allegations stand in sharp contrast with the detailed evidence that courts typically consider when deciding disputed questions of personal jurisdiction. *See, e.g.*, *Old Republic*, 877 F.3d at 909-917. And they provide

little context or detail that would assist this Court in understanding the complexities raised by "evolv[ing] * * * technology." Pet. 12.

Third, this case arises on interlocutory review of an order granting a preliminary injunction. *See* Pet. App. 12a. This Court looks with disfavor upon interlocutory petitions in general, *see, e.g.*, *DTD Enters., Inc.* v. *Wells*, 558 U.S. 964 (2009) (statement of Kennedy, J., respecting denial of certiorari), and this case presents an even greater problem than the mine-run interlocutory petition. Only three of the five defendants appealed the District Court's order, Pet. App. 12a & n.7, and the Alabama Supreme Court remanded the claims against the remaining two appellants for further consideration, *id.* at 51a. It is thus possible that, while proceedings in this Court are ongoing, the Alabama courts will conclude that K.G.S.'s claims against the defendants fail on the merits, thereby rendering this appeal moot. In the unlikely event that anything remains of the merits of this case after final judgment, K.G.S. will have an opportunity to seek review of the Alabama Supreme Court's jurisdictional determination then.

IV. THE QUESTION PRESENTED IS OF LIMITED SIGNIFICANCE AND RARELY ARISES.

Finally, despite K.G.S.'s claim that this case presents an epochal opportunity to "grapple[] with the changes wrought by th[e] digital revolution," Pet. 2-3, this case is not sufficiently important to merit the Court's review. As noted above, courts are in broad agreement as to the standard for applying *Calder* to Internet torts in the wake of *Walden*. That approach is correct and consistent with this Court's prece-

dents. There is no need for the Court to wade into an issue that the lower courts have resolved consistently and without evident difficulty.[3]

Moreover, the specific issue presented by this case is unlikely to recur with any frequency. To our knowledge, no other state high court or federal court of appeals has considered whether a company that manages a social media platform is subject to personal jurisdiction merely because it declined to take down content that discussed persons and events in the forum State.

The dearth of similar cases likely reflects, in part, the fact that such claims face insurmountable barriers on the merits. Courts have widely held that the Communications Decency Act immunizes a platform like Facebook against claims—like this one—that seek to hold it liable as a publisher of content created by its users. 47 U.S.C. § 230(c)(1).[4] Furthermore,

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[3] There is also no reason for the Court to hold the petition pending resolution of *Ford Motor Co.* v. *Montana Eighth Judicial District Court ("Gullett")*, No. 19-368, and *Ford Motor Co.* v. *Bandemer*, No. 19-369. Those cases present the distinct question whether a claim "aris[es] out of or relate[s] to" a defendant's forum contacts if the defendant's forum contacts were not a cause of the plaintiff's claims. *Gullett* Pet i. The resolution of that question would have no bearing on this case: The Alabama courts already require a causal connection. *See id.* at 16. And this case concerns the logically antecedent question whether Facebook had any forum contacts in the first place, which would be outcome-determinative regardless of how *Gullett* and *Bandemer* are resolved.

[4] *See, e.g.*, *Klayman* v. *Zuckerberg*, 753 F.3d 1354 (D.C. Cir. 2014) (Facebook entitled to CDA immunity from negligence and assault claims for comments posted by third-party users);

claims like the one K.G.S. raises here present grave First Amendment problems that would generally discourage the filing of such suits or compel their quick dismissal. K.G.S. seeks an injunction that would require Facebook to disable a page containing extensive public discussion and commentary concerning matters of significant public interest—the merits of Alabama adoption law and the use of pre-birth consent orders—because the content of that speech is offensive to her. That sort of content-based restriction on speech of public concern would be subject to the most serious First Amendment scrutiny. *See Reed* v. *Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015); *Snyder* v. *Phelps*, 562 U.S. 443, 451-452 (2011). K.G.S., however, has not attempted to demonstrate that the injunction she seeks is narrowly tailored to achieve a compelling interest. On the contrary, censoring the content of the Facebook page would achieve little if anything to protect her privacy, given that the underlying Huffington Post articles and related posts reveal the same information about K.G.S. and Baby Doe, and would remain publicly available regardless of the outcome of this case.

Consequently, the Court's resolution of the personal-jurisdiction question on these facts would be unlikely to have relevance for other cases. And the

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Johnson v. *Arden*, 614 F.3d 785, 792 (8th Cir. 2010) (internet service provider entitled to CDA immunity in defamation suit for comments posted to message board by third-party users); *see also Caraccioli* v. *Facebook, Inc.*, 167 F. Supp. 3d 1056, 1066 (N.D. Cal. 2016), *aff'd*, 700 F. App'x 588 (9th Cir. 2017); *La'Tiejira* v. *Facebook, Inc.*, 272 F. Supp. 3d 981, 992-993 (S.D. Tex. 2017).

resolution of that question would almost certainly be academic here, given that K.G.S.'s suit is doomed to dismissal on the merits. If this Court deems it appropriate to address the application of *Calder* and *Walden* to "virtual contacts," *Walden*, 571 U.S. at 290 n.9, it should wait to do so in a typical factual circumstance in which the question is likely to be of real practical significance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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