No. 20-503

In The Supreme Court of the United States

TOFIG KURBANOV,

Petitioner,

v.

UMG RECORDINGS, INC.; CAPITOL RECORDS, LLC; WARNER BROS RECORDS INC.; ATLANTIC RECORDING CORPORATION; ELEKTRA ENTERTAINMENT GROUP INC.; FUELED BY RAMEN LLC; NONESUCH RECORDS, INC.; SONY MUSIC ENTERTAINMENT; SONY MUSIC ENTERTAINMENT US LATIN LLC; ARISTA RECORDS LLC; LAFACE RECORDS LLC; and ZOMBA RECORDING LLC,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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"*Mañana, Mañana, Mañana, is soon enough for me*."
- Peggy Lee

INTRODUCTION

In 1947, Capital Records[1] recording artist Peggy Lee recorded what would become one of her biggest hits, *Mañana* (*Is Soon Enough For Me*),[2] the lyrics of which advocate never-ending procrastination. Some 73 years later, Respondents appear to have adopted the song's central premise as a primary theme for their opposition to a grant of *certiorari* in the present case – urging this Court to defer yet again consideration of the proper jurisdictional test for cases in which a defendant's contacts with a forum are entirely virtual in nature. The lower courts, however, have struggled with this crucial concept for the last 30 years, ever since commercial use of the internet was first sanctioned by the National Science Foundation.[3] The confusion and uncertainty created by inconsistent lower court decisions cries out for resolution and the present case presents an ideal vehicle for the Court to speak to the issues.

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[1] Presumably, Respondent Capital Records will understand the fair use of its lyrics in the present context.

[2] *Mañana* would later be covered by such greats as The Mills Brothers and Dean Martin.

[3] Alan Trammel & Derek Bambauer, *Personal Jurisdiction and the Interwebs*, 100 CORNELL L. REV. 1129, 1143 (2015).

Unable to fully defend the Fourth Circuit's legal reasoning, which is inconsistent both with this Court's precedent and the holdings of other circuits, Respondents have instead conjured a mythical bogeyman in the hope that the Court will ignore the legal issues (namely the wholesale lack of meaningful contacts between Mr. Kurbanov and the United States or Virginia), and instead hold that personal jurisdiction should be determined based on the severity of the *allegations* against a defendant, constitutional due process concerns be damned.

Respondents' bogeyman has no basis in reality.[4] Mr. Kurbanov is not *himself* alleged to have

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[4] To further the fear-mongering aspect of their argument, Respondents cite to the inclusion of Petitioner's websites in the U.S. Trade Representative's *2018 Out-of-Cycle Review of Notorious Markets* ("*Review*"). Opposition Brief, p. 7. This is – to put it mildly – highly misleading. As Respondents are well-aware, the process by which entities get named in the Review is by "nomination," primarily from self-interested industry groups. *See Review*, p. 13, at https://ustr.gov/sites/default/files/2018_Notorious_Markets_List.pdf. What Respondents have not mentioned in their Opposition is that Petitioner's websites were "nominated" for inclusion in the report by Respondents' own lobbying arm, the Recording Industry Association of America. *See*, *e.g.*, https://www.riaa.com/wp-content/uploads/2017/10/RIAA-Notorious-Markets-Submission-To-USTR.pdf and https://torrentfreak.com/images/Notorious_Markets_Submission_for_2019_final.pdf. In other words, Respondents themselves (through their lobbying arm), managed to get the websites included in the government report and now point to the same report as "proof" that the websites are somehow engaged in massive copyright infringement. As the *Review* itself acknowledges, however, inclusion in the report "does not constitute a legal finding of a violation or an analysis of the general IP

downloaded any of Respondents' copyrighted works, but rather to have created (from Russia) a website (owned and operated entirely from Russia) that enables website visitors from around the world to download the audio from videos posted online. Respondents nevertheless insist that the Court must *assume* (in its jurisdictional analysis) that website visitors from the United States are downloading *Respondents'* content simply because, in their words, "no one could seriously believe" that visitors might be downloading anything else. Opposition, p. 26. Respondents attempt to make their fictional version of Mr. Kurbanov more frightening by sprinkling their brief liberally with the word "massive." *See*, *e.g.*, Opposition, p. 1 ("Tofig Kurbanov's massive copyright infringement"), p. 2 ("massive U.S. customer base"), p. 4 ("the U.S. and Virginia markets are massive"), p. 5 ("massive infringement of U.S. copyrights"), p. 8 ("Petitioner's websites operate on a massive scale"). In doing so, Respondents urge this Court to ignore its precedent and find non-claim related contacts to be relevant for a specific jurisdiction inquiry. *Bristol-Myers Squibb Co. v. Super. Ct. of Cal., S.F. Cty.*, 137 S.Ct. 1773, 1781 (2017).

Moreover, this case presents this Court with the opportunity to finally address the relevance (or irrelevance) of various internet-specific "contacts" that a person may enter into with a forum by virtue of the operation of a website, such as the use of geographically-relevant ads and the registration of websites

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protection and enforcement environment in any country or economy." *Review*, p. 13.

within the ".com" and ".biz" domains. It is an analysis that all but the Respondents agree is long overdue. As some commentators have explained:

> the Court has remained conspicuously silent about one of the most vexing and urgent questions in this area: when (if ever) virtual conduct, often through the Internet, can justify the exercise of judicial power.
>
> Most courts are still flummoxed by these questions. They remain tethered to anachronistic approaches that reflect a profound confusion about the technology of the medium, deviate from normal civil procedure precedent, bear little relation to the doctrine's underlying principles, and fail to generate consistent results. Current approaches remain stuck in the days of the "Interwebs" and betray the same lack of sophistication that the tongue-in-cheek malapropism captures.

Trammel, *supra* at 1130.

And yet, Respondents ask this Court to continue to sing "Mañana" because the status quo of judicial confusion about technology, split circuits, and a general failure to properly apply this Court's precedent, has inured to their benefit, particularly with respect to foreign defendants who, often lacking the ability to contest jurisdiction, find themselves on the wrong end of a default judgment. *See* Petition, pp. 36-39.

Meanwhile, the lower courts and commentators have been consistently singing a classic Beatles tune:

"Help me get my feet back on the ground. Won't you please, please help me. Help me. Help me."[5]

Thirty years is long enough. The Court should grant the petition.

ARGUMENT

I. The Lower Courts' Decisions Demonstrate Chaos and Disarray, Leading to Inconsistent and Unpredictable Results, Which Often Clash With This Court's Precedent and One Another.

In an attempt to convince this Court to again "leave questions about virtual contacts for another day," *Walden v. Fiore*, 571 U.S. 277, 290 n.9 (2014), Respondents suggest that there isn't really much confusion or conflict in the decisions of the lower courts and what confusion might exist isn't really all that problematic. This position, however, runs contrary to the pronouncements of virtually every court or commentator to have spoken on the issue. *See* Petition, pp. 7-12. *See also* Margaret McKeown, *The Internet and the Constitution: A Selective Retrospective*, 9 WASH. J.L. TECH. & ARTS 133, 143-46 (2014) ("I begin with what is admittedly the 'mess and confusion' arena. To my mind, the most significant change wrought by the Internet has been with respect to personal jurisdiction. The constitutional principle of due process underlies

[5] The Beatles, *Help!* (Universal Media Group 1965).

our jurisprudence in this area. But it is an area where the Supreme Court has yet to weigh in, despite confusion and conflicts among the lower courts. . . . So where does that leave us with Internet jurisdiction? Almost nowhere."); Elma Delic, *Cloudy Jurisdiction: Foggy Skies in Traditional Jurisdiction Create Unclear Legal Standards for Cloud Computing and Technology*, 50 SUFFOLK U. L. REV. 471, 487-88 (2017) ("[S]trong inconsistencies remain in the Internet jurisdiction context, making it unlikely that a cohesive approach to jurisdictional dilemmas in cloud computing will emerge. Courts have added ambiguity through vague decisions, making it challenging for businesses to develop strategies for technological advancement because they do not know where they could be open to litigation."); Saxon Shaw, *There is no silver bullet: solutions to Internet jurisdiction*, 25 INT. J. LAW INFO. TECH. 283 (2017) ("The determination of jurisdiction over Internet activities is a critical legal issue. It has become the central forum of the battle to 'establish the rule of law in the Information Society'. Clear and consistent rules are essential to the rule of law and so, these fundamental precepts should underpin the way in which jurisdiction is asserted in Internet disputes. This clash is not without violence, and the victim of such confrontation is the medium itself, the Internet."); Trammel, *supra* at 1131-33 ("Since at least the mid-1990s, courts have been aware of the conundrum that the Internet poses to personal jurisdiction analysis. . . . Legal scholars who study Internet law have struggled with these questions of jurisdiction from the earliest days of the field. . . . Despite intense scholarly interest in this

problem at the turn of the century, it remains intractable. Even the best contributions are dated or narrow, or they give insufficient attention to at least one aspect of the problem (that is, either the technology or the procedural nuances).").

Even more inexplicable is Respondents' insistence that the frequently-cited, but oft-derided, *Zippo* decision (*Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F.Supp. 1119 (W.D. Pa. 1997)) has been uniformly applied and has not caused a split amongst the circuits. The split amongst the circuits in their application of *Zippo* is well-documented. *Petition*, pp. 32-35. *See also* Trammel*, supra* at 1149-50 and Figure 1 thereof ("Put bluntly, the *Zippo* court's highly influential test is both wrong and useless. It fails to take account of the normative underpinnings of personal jurisdiction doctrine, and it fails to help courts decide the difficult cases for Internet-based information exchange. Despite these flaws, Zippo remains exceedingly influential, even as some courts have begun to question its utility. Of the thirteen federal circuits, two use the original *Zippo* or a *Zippo*-like test to resolve these issues; two use a '*Zippo* plus' approach, typically the sliding scale plus 'something more'; five circuits employ standard purposeful availment methodology (sometimes relying on *Zippo*, although two circuits have rejected the interactivity metric); and four have yet to rule definitively (although two of these have pro-*Zippo* language in either dicta or district court rulings).").

II. Respondents' Continued Focus on the Raw Number of Visitors to the Websites – and the Fourth Circuit's Reliance on the Same – Runs Contrary to This Court's Precedent, Splits With the Holdings of Other Circuits and Lower Courts, and Produced the Wrong Result.

Respondents argue in favor of the Fourth Circuit's reasoning that the sheer number of visitors to the websites from the United States was sufficient to establish jurisdiction over Mr. Kurbanov because he should not be surprised to be haled into court here based on the popularity of his websites in the United States. Respondents' Brief, p. 32. Such reasoning flies in the face of this Court's decision in *Bristol-Myers Squibb*, where the Court rejected the argument that Defendants' substantial contacts with California should be considered for specific jurisdiction purposes because those contacts did not relate directly to the claims actually brought by the non-resident plaintiffs:

> Our settled principles regarding specific jurisdiction control this case. In order for a court to exercise specific jurisdiction over a claim, there must be an "affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State." . . . When there is no such connection, specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State.

137 S.Ct. at 1781.

Respondents' attempt to distinguish *Bristol-Myers Squibb*, alleging that their claims arise directly from visits to the websites from the United States. Such a distinction, however, requires a logical leap unsupported by fact: namely, that *every single person who visited the websites from the United States also used it to unlawfully downloaded an audio track belonging to Respondents*. In reality, though, Respondents (who bear the burden of establishing jurisdiction) have not shown that a single one of these visitors downloaded their copyrighted works, much less that *all* or even most did so. Respondents simply assert that the visitors to the websites must have done so.

The Fourth Circuit's endorsement of this logical leap is in direct conflict with the Ninth Circuit's holding in *AMA Multimedia, LLC v. Wanat*, 970 F.3d 1201 (9th Cir. 2020).

There, as here, the defendants operated "an internationally available website" which hosted content that the plaintiffs alleged infringed their copyrights. Nevertheless, the Ninth Circuit found personal jurisdiction to be lacking:

> although, according to AMA, ePorner "features a significant portion of U.S.-based content from producers like AMA and U.S.-based models," this does not mean ePorner's subject matter is aimed at the U.S. market . . . and the popularity or volume of U.S.-generated adult content does not show that Wanat expressly aimed the site at the U.S. market. . . . Although Wanat may have foreseen that ePorner

> would attract a substantial number of viewers in the United States, this alone does not support a finding of express aiming. . . .
>
> Here, nearly 20% of ePorner's traffic comes from U.S. users. But this does not establish that Wanat expressly aimed at the U.S. market. . . . ePorner's forum-based traffic, absent other indicia of Wanat's personal direction, does not establish that Wanat tailored the website to attract U.S. traffic.

Id. at 1210-11.

The raw number of visitors to Petitioner's websites does not demonstrate either claim-related contacts or forum-directed activity and, as such, the Fourth's Circuit's focus on such numbers was erroneous.[6]

III. This Case Provides a Unique Vehicle to Address an Issue That Often Otherwise Evades Review and Further Delay Would Render Meaningless the Protections Afforded by the Due Process Clause.

Finally, Respondents again press this Court to delay resolution of the crucial and recurring issues presented in this case while the Court awaits some unicorn presentation of facts and law. As Respondents are well aware, however, such a case is unlikely to

[6] As previously noted, numerous district courts have similarly rejected the argument that a foreign defendant may be subject to personal jurisdiction in the United States based simply on the amount of visitors originating from the United States generated by their website. *See* Petition, pp. 27-28 n.4.

present itself (at least any more than it has in the present matter). As the Electronic Freedom Foundation noted in its *amicus* brief before the Fourth Circuit:

> Over the last several years, major copyright and trademark holders, including many of the Appellants here and their amici, have sued foreign website owners who are unlikely, or indeed unable, to appear in a U.S. court to respond. Upon the inevitable default, the plaintiffs request staggeringly broad injunctions that purport to bind nearly every type of intermediary business that forms part of the Internet's infrastructure, enlisting them to help make the foreign website disappear from the Internet. . . .
>
> The due process limits on federal courts' exercise of personal jurisdiction are part of a legal framework that encourages the resolution of important legal questions through adversarial litigation. Mr. Kurbanov's appearance through counsel in this case to challenge personal jurisdiction is unusual, but it serves to illustrate the importance of preserving the limits of personal jurisdiction to encourage sound development of the substantive law.

Fourth Circuit Docket No. 48-1, pp. 13-14.

In short, Respondents are asking this Court to endorse a litigation strategy expressly designed to thwart meaningful judicial review of the constitutional limits on personal jurisdiction: sue foreign defendants in the United States, knowing that such defendants frequently cannot mount a defense in the United States,

with the expectation of seizing the defendants' domains (and thereby their businesses) when the foreign defendants fail to appear in the United States and are subject to default judgments.

The present case is, as the EFF stated, unusual in that Mr. Kurbanov has managed to engage counsel to object to an improper exercise of personal jurisdiction over him. It is a scenario unlikely to repeat itself any time soon and this Court should take the opportunity to address questions that the lower courts have struggled with now for three decades.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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