

No. 22-411

IN THE

Supreme Court of the United States

KEO RATHA, SEM KOSAL, SOPHEA BUN, YEM BAN,
NOL NAKRY, PHAN SOPHEA, AND SOK SANG,
Petitioners,

v.

PHATTHANA SEAFOOD CO., LTD. AND
S.S. FROZEN FOOD CO., LTD.,
Respondents.

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

**BRIEF OF LEGAL SCHOLARS AS *AMICI*
CURIAE IN SUPPORT OF PETITIONERS**

William J. Aceves
CALIFORNIA WESTERN
SCHOOL OF LAW
225 Cedar Street
San Diego, CA
(619) 515-1589
wja@cwsl.edu

Marco Simons
Counsel of Record
Richard Herz
Sean Powers
EARTHRIGHTS INTERNATIONAL
1612 K Street, N.W., Ste. 800
Washington, D.C. 20006
(202) 466-5188
marco@earthrights.org

Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE*

This Brief of *Amici Curiae* is respectfully submitted in support of the Petition for Writ of Certiorari and pursuant to Supreme Court Rule 37(2).¹

Amici are legal scholars at law schools throughout the United States.² They specialize in the legal issues presented in this case, including civil procedure and human trafficking. *Amici* have no personal interest in the outcome of this case but write to share their professional views regarding the need for this Court's review, given the Ninth Circuit's errors on a fundamental area of civil procedure and a clear Circuit split.

William C. Banks is the College of Law Board of Advisors Distinguished Professor of Law at Syracuse University College of Law. Professor Banks has authored numerous articles and has written or edited several books, including NATIONAL SECURITY LAW (2020), CONSTITUTIONAL LAW: STRUCTURE AND RIGHTS IN OUR FEDERAL SYSTEM (2019), and SOLDIERS ON THE HOME FRONT:

¹ No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, or their counsel, made a monetary contribution to its preparation or submission. Counsel for both parties received timely notice of the intent to file this brief and granted their consent for this submission.

² Affiliations are only provided for information purposes.

THE DOMESTIC ROLE OF THE AMERICAN MILITARY (2016). Professor Banks has previously served as a Special Counsel to the U.S. Senate Judiciary Committee.

Erwin Chemerinsky is the Dean and Jesse H. Choper Distinguished Professor of Law at the University of California, Berkeley School of Law. He previously served as the founding Dean at the University of California, Irvine School of Law. Professor Chemerinsky has authored numerous law review articles and has written or edited several books, including *FEDERAL JURISDICTION* (8th ed. 2020) and *CONSTITUTIONAL LAW* (6th ed. 2019). He is a Fellow for the American Academy of Arts and Sciences. In 2022, Professor Chemerinsky is serving as the President of the Association of American Law Schools.

Aaron Fellmeth is the Dennis S. Karjala Professor of Law, Science, and Technology at the Arizona State University, Sandra Day O'Connor College of Law. Professor Fellmeth has authored numerous law review articles and has written or edited several books, including *GUIDE TO LATIN IN INTERNATIONAL LAW* (2d ed. 2021), *INTRODUCTION TO INTERNATIONAL BUSINESS LAW* (2020), and *PARADIGMS OF INTERNATIONAL HUMAN RIGHTS LAW* (2016). Before joining Arizona State University, Professor Fellmeth clerked for the Office of the General Counsel of the U.S. International Trade Commission and at the United Nations Office of Legal Affairs.

Dina Francesca Haynes is a Professor of Law and Director of the Immigration Law Certificate Program at New England Law. Professor Haynes has written extensively in the fields of immigration law and international law. She specializes in the study of human trafficking. Before entering legal education, Professor Haynes served as director general of the Human Rights Department for the Organization for Security and Cooperation in Europe in Bosnia-Herzegovina and as a protection officer with the United Nations High Commissioner for Refugees.

Helen Hershkoff is the Herbert M. and Svetlana Watchtell Professor of Constitutional Law and Civil Liberties and the Co-Director of the Arthur Garfield Hays Civil Liberties Program at New York University School of Law. Professor Hershkoff has authored numerous law review articles and has written or edited several books, including *CIVIL PROCEDURE: CASES AND MATERIALS* (13th ed. 2022) and *CIVIL LITIGATION IN COMPARATIVE CONTEXT* (2d ed. 2017). She is also a member of the author team for *WRIGHT & MILLER FEDERAL PRACTICE AND PROCEDURE* (2022). Professor Hershkoff is a Fellow of the American Bar Foundation.

Adam Steinman is the Sidley Austin-Robert D. McLean Visiting Professor of Law at Yale Law School (Fall 2022) and the Robert W. Hodgkins Endowed Chairholder in Law at the University of Alabama School of Law. He has authored numerous articles and has co-written several books, including *CIVIL PROCEDURE: CASES AND MATERIALS* (West

13th ed. 2022), FEDERAL COURTS: CASES, COMMENTS AND QUESTIONS (West 9th ed. 2022), and the WRIGHT & MILLER FEDERAL PRACTICE & PROCEDURE (2022).

Beth Stephens is a Distinguished Professor of Law at Rutgers Law School. Professor Stephens has authored numerous articles and has written or edited several books, including INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS (2d ed. 2008). She served as an Adviser to the American Law Institute’s RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (2018).

Amici believe their submission will assist the Court in its deliberations.

SUMMARY OF ARGUMENT

The Court should grant this petition for certiorari because the Ninth Circuit’s broadly written holding will erroneously rework personal jurisdiction law. It is contrary to recent Supreme Court authority and as well as case law from other Circuits. And, it will significantly curtail the ability of federal and state courts to hear disputes implicating important U.S. interests.

This case involves Cambodian Petitioners allegedly trafficked into Thailand and forced to work for Respondents in violation of the Trafficking Victims Protection Act (TVPRA). The Ninth Circuit dismissed the TVPRA claims against the Respondents for failing to satisfy the “present in” requirement of 18 U.S.C. § 1596. *See Ratha v.*

Phatthana Seafood Co., 35 F.4th 1159 (9th Cir. 2022). In so doing, the Ninth Circuit assumed that Section 1596 incorporates the “minimum contacts” test for assessing the constitutionality of personal jurisdiction, but erroneously held that Respondents—despite not contesting personal jurisdiction—lacked the contacts with the United States necessary to satisfy that standard.³

The Ninth Circuit erred in its minimum contacts analysis for two primary reasons.

First, the Ninth Circuit refused to consider whether Respondents had purposefully availed themselves or deliberately sought benefits from the United States. According to the Ninth Circuit, tort cases could only be assessed using a three-part “purposeful direction” approach to “minimum contacts” that grew out of *Calder v. Jones*, 465 U.S. 783 (1984). *Ratha*, 35 F.4th at 1171–72. This was clear error.

The Supreme Court has frequently looked to a defendant’s commercial exploitation of a forum when upholding jurisdiction in tort cases involving personal injury. Although the *Calder* test is useful for assessing minimum contacts in certain kinds of

³ With respect to the facts relevant to the minimum contacts test, Respondents did not dispute that they did substantial business in and obtained benefits from commerce with the United States, that they tried (albeit unsuccessfully) to sell seafood produced by trafficked workers here, and that they caused such seafood to be physically present in the United States.

intentional tort cases, it does not foreclose other well-established routes for obtaining personal jurisdiction over defendants who seek to profit from the market in the forum state.

Second, the Ninth Circuit's approach to "purposeful direction" erroneously requires that tort plaintiffs suffer their injury in the forum. *Id.* at 1172. However, a plaintiff's connection to the forum does not control the due process inquiry. Instead, the proper focus is on the defendant's contacts with the forum.

Under the Ninth Circuit's rule, no forum could exercise specific jurisdiction in many tort cases. The court's rule requires that tort plaintiffs bring their claims in the forum where they are injured. *Id.* But *Walden v. Fiore*, 571 U.S. 277 (2014), makes clear that a plaintiff's forum injury alone does not create jurisdiction. *Id.* at 290. The Ninth Circuit's approach wrongly and unnecessarily creates the perverse result that a tort plaintiff's injury in the forum can be both necessary and insufficient to establish specific jurisdiction.

Ultimately, the Ninth Circuit's forum-injury requirement creates a jurisdictional hurdle that is divorced from the primary objective of the "minimum contacts" test: ensuring fairness and providing defendants notice of potential amenability to suit. The consequences of such a constitutional requirement are profound. The Ninth Circuit's decision would thus prevent disputes

involving manifest forum interests from being heard in state or federal courts.⁴ Accordingly, this Court should grant certiorari to correct these errors.

ARGUMENT

The Ninth Circuit held that Respondents lacked minimum contacts with the United States because they did not “purposefully direct” their tortious conduct at the United States. *Ratha*, 35 F.4th at 1172. Applying a test that purports to come from *Calder*, the Ninth Circuit held that a tort defendant is subject to jurisdiction only where it: “(1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state.” *Id.* (citing *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 805 (9th Cir. 2004)). While the Ninth Circuit assumed Respondents committed intentional acts expressly aimed at the United States, it found no evidence of harm in the forum because the trafficking occurred outside the United States. *Id.* at 1172 & n.13. That holding conflicts with Supreme Court and Circuit precedent and misapplies the “minimum contacts” test in two significant ways.

⁴ Take, for example, a case against a bank that processes transactions in the United States for a foreign terrorist organization that kills Americans outside of the United States. That case would fail the Ninth Circuit’s test because the injury was suffered outside this forum.

First, the Ninth Circuit’s decision incorrectly held that *Calder*’s effects test is the exclusive route to personal jurisdiction over tort defendants, overlooking the well-established principle that a defendant also establishes minimum contacts when it purposefully avails itself of the forum. *Id.* This was significant because the Ninth Circuit’s forum-injury requirement was a product of the “purposeful direction test derived from *Calder*.” *Id.* at 1171 (internal quotation marks omitted). It was also clear error because the Supreme Court has repeatedly used a purposeful availment analysis in tort and personal injury cases.

Second, even if tort plaintiffs could only establish jurisdiction under a purposeful direction approach, it was error to have that analysis turn on the existence of a forum injury. As with all minimum contacts analyses, the plaintiff’s connection to the forum should not be the focus of the personal jurisdiction inquiry.

I. The minimum contacts analysis for specific jurisdiction turns on the defendant’s contacts with the forum.

International Shoe v. Washington, 326 U.S. 310 (1945), laid down the general rule that jurisdiction over absent defendants is constitutionally permissible so long as they have “certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.” *Id.* at 316 (internal quotation marks omitted).

After *International Shoe*, two lines of jurisdiction developed: general (all purpose) jurisdiction, which is appropriately exercised only where a defendant is “essentially at home,” and specific (claim-based) jurisdiction, which is permissible when the defendant has lesser contacts with the forum, but those contacts relate to the underlying dispute. *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1020, 1024 (2021). This case involves specific jurisdiction, which is “the centerpiece of modern jurisdiction theory” and allows tribunals “to hear claims against out-of-state defendants when the episode in-suit occurred in the forum or the defendant purposefully availed itself of the forum.” *Daimler AG v. Bauman*, 571 U.S. 117, 128 (2014) (internal quotation marks omitted).

The specific jurisdiction analysis has three parts. Did the defendant have purposeful contact with the forum? Is there a nexus between plaintiff’s claims and those contacts? And, is exercising jurisdiction reasonable? The Ninth Circuit’s decision implicates the first part: did the defendant have purposeful contacts with the forum?⁵ That requirement ensures that non-resident defendants are only haled into a foreign court if they

⁵ The Ninth Circuit did not address the nexus prong or the reasonableness of jurisdiction—which is unsurprising as Respondents did not object to jurisdiction—but neither present an issue: Petitioners’ claims relate to the goods Respondents sought to sell in the United States; and there is no suggestion of undue burden or unfairness. Nor could there be when Respondents deliberately sought out this forum.

themselves create a relationship with the forum. Jurisdiction is therefore permissible where a defendant has acted in, benefited from, or knowingly affected the forum. In these situations, a defendant is reasonably on notice of the possibility of suit in the forum and can structure their affairs accordingly. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297–98 (1980).

In the parlance of the test, the first requirement can be satisfied in several ways: by purposeful availment of the privilege of doing business in the forum; by purposeful direction of activities at the forum; or by some combination thereof. The central question, however, is always the same: did the defendant deliberately create a connection with the forum? *Ford*, 141 S. Ct. at 1025 (“The contacts must be the defendant’s own choice . . .”). *See also Bristol-Myers Squibb Co. v. Super. Ct. of Cal.*, 137 S. Ct. 1773, 1779 (2017) (“The primary focus of our personal jurisdiction inquiry is the defendant’s relationship to the forum State.”).

Therefore, the connections that a third party or plaintiff have to the forum are of limited relevance. They do not suffice to create jurisdiction. *Walden*, 571 U.S. at 291 (“And it is the defendant, not the plaintiff or third parties, who must create contacts with the forum State”). And, they do not defeat jurisdiction. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779 (1984) (“[W]e have not to date required a plaintiff to have minimum contacts with the forum State before permitting that State to assert personal jurisdiction over a nonresident defendant. On the contrary, we have upheld the

assertion of jurisdiction where such contacts were entirely lacking.”) (internal quotation marks omitted).

II. Tort defendants that purposefully avail themselves of a forum are subject to jurisdiction in personal injury disputes.

The Ninth Circuit took a circumscribed and categorical approach to analyzing the first requirement of purposeful contact, holding that tort cases involving personal injuries must be analyzed under a three-part “purposeful direction test” derived from *Calder*.” *Ratha*, 35 F.3d at 1171. The Ninth Circuit thus refused to consider whether the defendant purposefully availed itself of the forum.

The Supreme Court, however, has never made a categorical or constitutional distinction between contract-type cases (governed under a purposeful availment approach) and tort cases (governed by the purposeful direction or effects-based approach). Quite the opposite: the Supreme Court has frequently looked to or upheld jurisdiction in tort cases where the defendant purposefully availed itself of or benefited commercially from the forum’s market.

For example, *World-Wide Volkswagen* was a products liability case involving severe personal injuries. 444 U.S. at 288. In that tort suit, the Court looked to whether the “corporation ‘purposefully avail[ed] itself of the privilege of conducting activities within the forum State[.]’” *Id.* at 297 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)); see also *Ford*, 141 S. Ct. at 1025-32

(jurisdiction in personal injury case proper based on commercial activities in the forum).⁶

Calder's recognition of effects-based jurisdiction over tort defendants did not exclude jurisdiction in cases (like *Ford*) where defendants have purposefully connected themselves to or benefited from the forum in other ways. *Calder* involved libel claims brought in California against a magazine publisher and two individuals who worked on the libelous story. Even though the individual defendants did not control the magazine's distribution nor benefit directly from its circulation in California, 465 U.S. at 789, the effect of their out-of-state acts in the forum was enough when

⁶ In *World-Wide Volkswagen*, suit was brought in Oklahoma against a foreign automobile manufacturer, a domestic importer, a regional distributor, and a retail dealer. However, only the distributor and dealer challenged jurisdiction. 444 U.S. at 288–89. While the Court refused to authorize jurisdiction over them—because neither had any purposeful contacts with or sales in Oklahoma—it recognized that jurisdiction would be permissible “if the sale of a product . . . is not simply an isolated occurrence, but arises from the efforts of the [defendant] to serve, directly or indirectly, the market for its product in other States.” *Id.* at 297–98. Thus, personal jurisdiction was clearly proper in Oklahoma over the foreign manufacturer and the national distributor, who had deliberately sought to serve the market in that state. *See also Ford*, 141 S. Ct. at 1027 (describing why “Audi, the car’s manufacturer, and Volkswagen, the car’s nationwide importer” were subject to personal jurisdiction based on their purposeful availment of the Oklahoma market).

“their intentional, and allegedly tortious, actions were expressly aimed at California” and “they knew that the brunt of that injury” would be felt there. *Id.* at 788-90. But *Calder* did not suggest that this was the only way to establish minimum contacts in tort cases. Personal jurisdiction over the publisher was based on its commercial activity in the market, without considering the “effects” test innovation; indeed, jurisdiction over the publisher went unchallenged. *Id.* at 784.

In sum, the “purposeful availment” and “purposeful direction” approaches are not exclusive and separate tests for tort and contract cases. *Calder* merely recognized an additional theory for establishing jurisdiction in cases where a party’s intentional tort was expressly aimed at the forum state and caused injury there.

Although many tort plaintiffs want to litigate their cases in the forum where their injury was suffered, the Ninth Circuit’s decision would require it. Similarly, it may be more “typical” for some tort defendants, such as the libel defendants in *Calder*, to have obtained no benefits from the forum and thus tort plaintiffs need to establish jurisdiction using a purposeful direction approach. The lower court, however, turned what may be “typical” into a prerequisite.

The Ninth Circuit’s decision is out of step with the decisions of other Circuits as well. For example, both the District of Columbia and Second Circuits have upheld jurisdiction over Anti-Terrorism Act claims involving foreign injuries based on the

defendant’s commercial activities in, and purposeful availment of, the United States. *See Licci v. Lebanese Canadian Bank*, 732 F.3d 161 (2d Cir. 2013). As the Second Circuit correctly held, “the ‘effects test’ [is not] a prerequisite to the constitutional exercise of personal jurisdiction . . . in cases where the conduct on which the alleged personal jurisdiction is based occurs within the forum” as long as “this in-forum activity sufficiently reflects the defendant’s ‘purposeful availment.’” *Id.* at 173 (emphasis in original, internal quotation marks omitted). *See also Atchley v. Astrazeneca UK Ltd.*, 22 F.4th 204, 233 (D.C. Cir. 2022). The Ninth Circuit’s rule would foreclose such cases.

III. A tort plaintiff need not be injured in the forum in which tortious acts occur or effects are felt.

Even if tort plaintiffs had to proceed under a “purposeful direction” approach—and could not rely on a defendant’s commercial connections to the forum—the Ninth Circuit’s strict forum injury requirement would still be wrong. The due process inquiry always turns on the defendant’s connections to the forum, not the plaintiff’s.

Having the “purposeful direction” inquiry turn on whether the plaintiff suffered a forum injury makes little sense. It runs counter to the primary aim of due process inquiry: notice and fairness to defendants. Whether a plaintiff suffers its injury in the forum says little (and certainly nothing conclusive) about whether a defendant’s own conduct puts it on notice that it may be subject to

suit in the forum. It is long-established that whether a defendant should reasonably expect to answer suit in the forum turns on its own deliberate acts and contacts with the forum. *See Ford*, 141 S. Ct. at 1025.

As this Court has stated, “[t]he proper question is not where the plaintiff experienced a particular injury or effect but whether the defendant’s conduct connects him to the forum in a meaningful way.” *Walden*, 571 U.S. at 290. A defendant’s tortious acts can meaningfully connect it to the forum without necessarily causing a forum injury to the plaintiff. Indeed, the Supreme Court’s decisions strongly suggest that the tortious effects of the defendant’s acts on the forum need to be considered separately from the injury to the plaintiff.

In *Calder*, for example, the plaintiff was libeled in California, but the effect of the libelous statements on the forum’s market and consumers was treated as most significant in the jurisdictional inquiry. 465 U.S. at 788. While the forum injury was not absent from the analysis, it was the broader effects of the tortious activity on the forum that permitted jurisdiction.

This principle was also recognized in *Keeton*, another libel case that the Supreme Court decided the same day as *Calder*. In *Keeton*, personal jurisdiction was upheld for injuries that occurred almost entirely outside the forum based on the publishers’ exploitation of the forum market. 465 U.S. at 775–81. The Supreme Court acknowledged that “[f]alse statements of fact harm both the

subject of the falsehood and the readers of the statement.” *Id.* at 776 (emphasis in original). And there, jurisdiction swept well beyond the plaintiff’s forum injury, extending to her libel claims and injuries in all fifty States. *Id.* at 780 (permitting jurisdiction in New Hampshire over nationwide libel claims even where “the bulk of the harm done to petitioner occurred outside New Hampshire”).

This type of forum interest is not limited to libel cases. U.S. consumers are affected when they unknowingly purchase and consume goods produced by trafficking. U.S. businesses are impacted when they compete with corporations that use trafficked labor. The “effects” on the United States of bringing goods produced by trafficking into our market meaningfully connect a trafficking defendant to this forum. *Cf. J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 884 (2011) (plurality opinion of Kennedy, J.) (“[T]he question is whether a defendant has followed a course of conduct directed at the society or economy existing within the jurisdiction of a given sovereign, so that the sovereign has the power to subject the defendant to judgment concerning that conduct.”).

IV. A forum-injury requirement would restrict personal jurisdiction across a wide range of cases.

The ramifications of a constitutional forum-injury requirement are significant. Civil tort cases are routinely litigated where relevant conduct occurred even if the injury arose elsewhere. In

some cases, that may be the only place where they could be litigated.

A closely analogous example involves cases under the Anti-Terrorism Act. That statute covers and provides a cause of action to the victims of “international terrorism,” which is defined as “violent acts or acts dangerous to human life” that *inter alia* “occur primarily outside the territorial jurisdiction of the United States.” 18 U.S.C. § 2331. These cases, by definition, involve injuries outside the United States. However, courts have exercised personal jurisdiction over foreign defendants where the defendant transferred dollars to the terrorist groups through the United States. *See, e.g., Licci*, 732 F.3d at 173. Courts have also exercised jurisdiction where the defendant sourced products provided to terrorist groups from the United States. *See, e.g., Atchley*, 22 F.4th at 233.

Another example involves this Court’s decision in *Nicastro*. There, the plaintiff was injured in New Jersey by a metal shearing machine made by a U.K. company. The U.K. company did not sell in the United States directly or New Jersey specifically, but it did intentionally exploit the U.S. market through a U.S. distributor. 564 U.S. at 878. The plurality opinion held that the U.K. company could not be sued in New Jersey where the forum injury occurred because the company did not target that market or purposefully avail itself of that forum. *Id.* at 886–87. But under the holding of the Ninth Circuit in this case, no other forum would be available because New Jersey, as the forum of injury, would be the only place a plaintiff could sue.

Thus, if the Ninth Circuit is correct, there would be no forum with specific jurisdiction—not even the state where the distributor accepted the goods and with which the U.K. company had deliberate contacts.

A similar problem arises after *Walden*. That decision makes clear that “mere injury to a forum resident” is an insufficient basis for personal jurisdiction. Rather, the defendant’s conduct must also create a “meaningful” connection to the forum. 571 U.S. at 290. If tort plaintiffs cannot show that their injury meaningfully ties the defendant to the forum, as was the case in *Walden*, they would need to find another forum. Typically, this would be where the defendant has deliberately acted or connected itself, but the Ninth Circuit’s decision would foreclose this option. Thus, if tort plaintiffs are constitutionally required to litigate their cases only where they are injured, but a forum injury is insufficient for personal jurisdiction, there may well be no forum in the United States that can exercise specific jurisdiction over disputes exclusively involving U.S. conduct.

CONCLUSION

For these reasons, *Amici* respectfully urge this Court grant the petition for certiorari.

Respectfully submitted,

William J. Aceves
CALIFORNIA WESTERN
SCHOOL OF LAW
225 Cedar Street
San Diego, CA
(619) 515-1589
wja@cwsl.edu

Marco Simons
Counsel of Record
Richard Herz
Sean Powers
EARTHRIGHTS INTERNATIONAL
1612 K Street, N.W., Ste. 800
Washington, D.C. 20006
(202) 466-5188
marco@earthrights.org

Counsel for *amici curiae*

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