No. 22-82

IN THE

Supreme Court of the United States

CHARLES JOHNSON,

Petitioner,

v.

THEHUFFINGTONPOST.COM, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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Petitioner replies on the following issues raised in Respondent's Brief in Opposition. First, Respondent's claim that Petitioner did not allege a link between the Article and Respondent's purposeful activities of news publishing in Texas is provably false. Third, Respondent falsely claims harmony amongst the circuits on the question of internet libel jurisdiction presented in this case. Finally, contrary to Respondent's suggestions, no factors in this case militate against granting review.

I. Respondent Falsely Claims That Petitioner Did Not Allege A Connection Between The Article And Respondent's Purposeful Activities In Texas.

Respondent repeatedly suggests in its Brief that Petitioner's basis for jurisdiction is Respondent's "business activities" in Texas, which supposedly have no connection to the Article. But this is misleading.

As evidenced by the live Complaint and in briefing in the Fifth Circuit, the purposeful availment alleged was that Respondent "regularly conducted its online publishing and other business through its website". Complaint at ¶ 4. Thus, there is no dichotomy between the Website containing the libelous Article and the "business activities" because they are one in the same. It is Respondent's online publishing business *and* other business that are the basis for jurisdiction. The uncontroverted allegations are that, pursuant to this online publishing business, Respondent targets Texas through targeted advertising by gathering geolocation data of Texas residents accessing the Website/Article, selling that data to advertisers, and thus deriving revenue from exploiting the Texas market.

In fact, this underscores the Respondent's antiquated arguments adopted by the panel majority of the Fifth Circuit. They pretend that the news articles published on a news website are purely passive and thus "acommercial". The commercial aspects of the Website, we are told, have "nothing to do" with the Article. The panel majority and Respondent would have us believe that large media conglomerates who publish online derive their business revenue from selling "HuffPost" coffee cups and shirts in the online store and not from advertisers seeking to market goods in services in a forum based on the types of targeted marketing and advertising that Respondent does on its Website.

These are arguments out of touch with the reality of modern—almost exclusively online—media and show a lack of judicial common sense in favor of strict adherence to the fact set of physical presence and circulation of paper publications in *Keeton* as opposed to the spirit of the jurisprudence reflected in that case. If Respondent has exploited the Texas market through online publishing, the fact that is physical presence occurs on microchips and not paper is a trivial distinction without a difference.

Moreover, Respondent speciously claims there is no relationship between the conduct complained of—a libelous Article—and the purposeful activity of commercial targeting its news publishing Website that contains the Article. But again, this argument relies on the fiction that the targeting activity of the Website and the news articles appearing on it are not part of the same business enterprise. The Website: (1) publishes news stories; that (2) attract an online audience; that (3) collects geolocation-specific data (in this case Texas); that

is then (4) used to sell to advertisers who then pay money to advertise to readers who access the Website in the relevant forum state.

As the En Banc dissent recognized, there is really no question that the Article is "related" to the Website's purposeful targeting of Texas by collecting and selling data through publishing its news stories. Respondent makes that mistake—as pointed out by the 5th Circuit dissenters and Petitioner—of conflating the *Calder* effects test with the *Keeton* circulation/market exploitation test. The Website is the vehicle through with Respondent circulated the libelous Article and exploited the Texas market through targeted advertising and, therefore, the Article is necessarily related to the purposeful availment.

II. Respondent Falsely Claims Harmony Amongst The Circuits.

Respondent also claims that the Fifth Circuit dissent and Petitioner are delusional in seeing a circuit split created by the majority opinion.

However, much like the arguments attempting to distinguish *Keeton*, Respondent's distinguishing of the cases from the Fourth, Seventh, and Ninth Circuits is one of form over substance. Just like Respondent attempts to distinguish *Keeton* because it involved paper circulation, Respondent attempts to distinguish these cases because they do not involve libel. So what? The relevant issues are that in those cases—like here—the forum-specific conduct involved a website using targeted marketing and geo-location data. The causes of action are irrelevant to the jurisdictional analysis in those cases.

Further, Respondent's arguments that multiple other courts have agreed with the Fifth Circuit's majority are also false. Respondent cites to a footnote from *Blessing v. Chandrasekhar*, 988 F.3d 889, 905 n.15 (6th Cir. 2021), which contains essentially a string-cite standing for the proposition that multiple circuits have held that "posting allegedly defamatory comments or information on an internet site does not, **without more**, subject the poster to jurisdiction wherever the posting could be read". *See id.* (emphasis added). But the "more" here is, as repeatedly pointed out in briefing, the Website collected and sold user data specific to the target forum. The Website is not passive, it is proactively collecting and selling user data and exploiting the Texas market. As such, Respondent's arguments that there is no circuit split fail.

III. This Case Is Not Unworthy Of Review.

Finally, Respondent argues that this is not a good case for review of the question presented. Respondent makes two specious claims in support of this argument.

First, Respondent claims that Petitioner has not shown that internet libel claim arise with great frequency. This is a bizarre claim because it essentially suggests that we are not in the internet age and would require Petitioner to adduce evidence of what everyone living in 2022 knows by common sense and experience – that Americans almost exclusively read news stories from the computers, tablets, or smartphones. Libel claims will necessarily track the state of publishing, which is now overwhelming digital and for Respondent to suggest otherwise demonstrates the weakness of its argument.

Second, Respondent claims that Petitioner conceded that the Article did not target Texas. This is true, but the context of that admission (as Respondent halfway concedes in a footnote) is that the *substance* of the Article does not target or mention Texas for purposes of the *Calder* effects test. Petitioner, as discussed in detail above and in the Petition for Certiorari, clearly pleaded that the Website—that contains the webpage for the Article—targeted Texas through online publishing and targeted marketing. If the Article is part of the Website—which Petitioner pleaded and is undisputed—and the Website targets Texas through its proactive collection and sale of data (which also pleaded and undisputed), then the webpage containing the Article necessarily targets Texas in like manner.

Although it is not necessary to the jurisdictional analysis since the Website (and thus the Article) target Texas through Texas-specific data collection and commercial exploitation of that data, Petitioner also included a link to the Article in his live pleading and in his briefing, which was thereby incorporated by reference. This clearly demonstrates that, in addition to collecting data from users to sell advertising, the webpage for the Article displays multiple advertisements targeted at the user. *See* *https://www.huffpost.com/entry/gop-reps-host-chuck-johnson-holocaust-denying-white-nationalist_n_5c40944be4b0a8dbe16e670a.*

As such, Respondent's arguments are without merit.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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