

No. _____

In the
Supreme Court of the United States

VNG CORPORATION,
a Vietnamese corporation,
Petitioner,

v.

LANG VAN, INC.,
a California corporation,
Respondent.

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

**APPLICATION TO JUSTICE ELENA KAGAN FOR AN EXTENSION OF
TIME TO FILE A PETITION FOR WRIT OF CERTIORARI**

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February 10, 2023

TO: THE HONORABLE ELENA KAGAN, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT

Pursuant to Supreme Court Rule 13.5, VNG Corporation respectfully seeks a 30-day extension of the time for filing a petition for a writ of certiorari to and including March 23, 2023.¹ The decision of the United States Court of Appeals for the Ninth Circuit for which review is sought was issued on July 21, 2022, and is attached as Exhibit A. The Ninth Circuit's order denying rehearing and rehearing en banc was issued on November 23, 2022, and is attached as Exhibit B. Under Rules 13.1, 13.3, and 30.1 of the Rules of this Court, absent an extension, a petition for a writ of certiorari is due to be filed on or before February 21, 2023. This Court has jurisdiction over any such petition under 28 U.S.C. § 1254(1). This application is timely because it has been filed more than ten days before the date on which a petition is otherwise due. S. Ct. R. 13.5. Counsel for Respondent does not oppose the requested extension.

1. This litigation raises important issues of specific personal jurisdiction. Specifically, it presents two sets of questions: (1) whether and how a defendant's virtual presence via the Internet translates into "contacts" with a forum for purposes of satisfying due process, which *Walden v. Fiore*, 571 U.S. 277, 290 n.9 (2014), expressly left open; and (2) whether due process requires courts to exercise specific personal jurisdiction under Federal Rule of Civil Procedure 4(k)(2) only based on (a) defendants', rather than plaintiff's, contacts with the forum, per *Walden v. Fiore*,

¹ Pursuant to Rule 29.6, VNG Corporation discloses that it has no parent company and that no publicly held corporation owns 10% or more of its stock.

571 U.S. 277 (2014), and (b) contacts that are related to the claims at issue, per *Ford Motor Co. v. Montana Eighth Judicial District Court*, 141 S. Ct. 1017 (2021), or whether, as the Ninth Circuit did, courts can rely on an amalgamation of plaintiffs' related contacts and defendants' unrelated ones. Those issues are ones over which lower courts have split, and which call out for this Court's consideration.

2. Respondent filed a copyright infringement action against VNG, a Vietnamese company with no physical presence in the United States. Respondent asserted specific personal jurisdiction based on VNG's website's and mobile application's universal accessibility, notwithstanding that VNG's users were overwhelmingly located in Vietnam.

3. The district court dismissed Respondent's claims for lack of personal jurisdiction, holding that Respondent had offered only tenuous connections between VNG and the forum, which were not related to the claims. Ex. A at 5.

4. On appeal, the Ninth Circuit reversed. *Id.* at 5, 11-16. It found specific personal jurisdiction over VNG because VNG (a) "did not choose to opt out of the United States" or "geoblock access" to the website or mobile application in the United States, and (b) "contracted with U.S. businesses in conjunction with" its website and mobile application, even though the claims did not arise out of those contracts.

5. The Ninth Circuit's decision misapplied, and therefore raises significant questions about the proper interpretation of, this Court's specific personal jurisdiction decisions in *Walden* and *Ford*. That decision continues a trend in which the Ninth Circuit expands specific jurisdiction beyond its constitutional limits, in

contradiction to the rulings of the Supreme Court and the due process clause. In so doing, it improperly blurs the lines between specific and general personal jurisdiction, allowing for jurisdiction in cases where neither the test for general nor specific jurisdiction can be satisfied.

6. The decision also answers incorrectly the question *Walden* left for “another day”—namely, how virtual contacts impact the specific jurisdiction analysis—and does so in a way that exacerbates splits among the lower courts. Like the Fourth Circuit in *UMG Recordings, Inc. v. Kurbanov*, 963 F.3d 344 (4th Cir. 2020), the Ninth Circuit took an expansive view of personal jurisdiction based on internet contacts. The Ninth Circuit decision allows for specific personal jurisdiction in a forum based on the universal applicability of a defendant’s website or mobile application unless the defendant takes affirmative steps to block use in the forum. That converts this Court’s requirement that to establish jurisdiction, a plaintiff must show the defendant purposefully availed itself of a forum into the very different requirement that, to avoid jurisdiction, a defendant purposefully avoid the forum.

7. Moreover, that holding marks a split with those circuits that reject that a defendant who with virtual contacts to a forum can be hauled into court in that forum because its website is accessed there, *Johnson v. TheHuffingtonPost.com, Inc.*, 21 F.4th 314, 321 (5th Cir. 2021), *cert. denied*, 143 S. Ct. 485 (2022), or because virtual contacts are received by someone located there, *Pederson v. Frost*, 951 F.3d 977, 980 (8th Cir. 2020). As the D.C. Circuit held, a jurisdictional theory that “because the defendants have acted to maximize usage of their websites in the [forum], mere

accessibility of the defendants' websites establishes the necessary 'minimum contacts' with [the] forum . . . simply cannot hold water." *GTE New Media Servs. Inc. v. BellSouth Corp.*, 199 F.3d 1343, 1350 (D.C. Cir. 2000). But the Ninth Circuit held that it could.

8. Following the Ninth Circuit's decision denying rehearing and rehearing en banc, the Ninth Circuit granted VNG's unopposed motion to stay the mandate. VNG has worked diligently to prepare its petition for certiorari. Counsel, however, asks for an additional 30 days to allow adequate time to research and complete the petition.

9. Undersigned counsel experienced an illness and death in the family that resulted in unexpected out-of-state travel on two occasions during the last four weeks. Lead trial counsel also experienced the death of two friends in December 2022, and January 2023.

10. The lawyers representing VNG have had a number of recent and upcoming deadlines in other matters. Counsel filed a reply brief in *Gamez v. USA, et al.*, No. 20-16180 (9th Cir.) on January 27, 2023. Counsel must draft an opening brief in *Simmons v. Leissner, et al.* (California Courts of Appeal B322160). Other team members' obligations included filing a petition for rehearing on February 3, 2023 in *Luis Pino v. Cardone Capital, LLC, et al.*, No. 21-55564 (9th Cir.); an answering brief due on February 10 in *Ameenjohn Stanikzy v. Progressive Direct Insurance Co.*, No. 22-35524 (9th Cir.); an opening brief due on March 9, 2023 in *United States v. Jazzmon Russell*, No. 22-50056 (9th Cir.); an opening brief due on March 14 in *United*

States v. Vincent Garcia, No. 22-10291 (9th Cir.); and an answering brief due March 20, 2023 in *Lynwood Investments CY Limited v. Maxim Konovalov, et al.*, No. 22-16399 (9th Cir.). Other recent and ongoing obligations in trial and district court include opposing three class certification motions this month, filing a *Daubert* motion, and defending four expert depositions in *Carter, et al. v. Harbor Freight Tools USA, Inc.*, CD Cal. 2:20-cv-05451-DMG-KK, and *Ketayi v. Health Enrollment Group, et al.*, SD Cal. 20-cv-1198-RSH-KSC; depositions in *Carrero v. Molina Healthcare of Puerto Rico, Inc.*, Case No. 3:21-cv-01605 (D. PR), and *Irving S. Braun v. Ontrak, Inc. et al.*, Case No. 22STCV07174 (LASC); and discovery-related matters in *Zinsky v. Michael Russin, et al.*, Case No. 2.22-cv-547 (W.D. Pa.), *WhatsApp, LLC, et al v. NSO Group Technologies Ltd., et al.*, 4:19-cv-07123 (N.D. Cal.), *Zvi Sperling v. Jacob Sperling*, Case No. 21STCV37502 (LASC), as well as briefing in four other cases. Lead trial counsel has also been involved in witness preparation for a fast-track arbitration in the ICC in which she is also lead counsel. Finally, there is an upcoming hearing and pre-hearing filing deadlines in a pro bono matter, *In the matter of: Irene Chavez De-Estrada*, File No. 092-073-510 in Immigration Court.

12. Counsel for Respondent consents to this request.

CONCLUSION

For the foregoing reasons, Applicant respectfully requests that this Court grant an extension of 30 days, up to and including March 23, 2023.

Respectfully submitted,

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