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

PETITION FOR WRIT OF CERTIORARI

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March 23, 2023

QUESTION PRESENTED

For courts to exercise personal jurisdiction, due process requires that defendants have sufficient "minimum contacts" with the forum "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (cleaned up). Federal Rule of Civil Procedure 4(k)(2) does not water down those constitutional requirements. To the contrary, it expressly allows for personal jurisdiction over foreign defendants for federal claims in federal courts only if those defendants are not subject to jurisdiction in any state's courts of general jurisdiction *and* exercising jurisdiction is consistent with the Constitution. This Court has yet to weigh in on how those constitutional requirements apply to jurisdiction based on either defendants' internet contacts or Rule 4(k)(2), but appellate and district courts have—and have split on both questions.

The questions presented are:

1. Whether traditional due process principles apply to the exercise of specific personal jurisdiction over defendants based on their universally accessible website or mobile application.

2. Whether traditional due process principles apply to the exercise of specific personal jurisdiction under Federal Rule of Civil Procedure 4(k)(2).

CORPORATE DISCLOSURE STATEMENT

No publicly held company owns 10% or more of the stock of Petitioner VNG Corporation.

RELATED PROCEEDINGS

Lang Van, Inc. v. VNG Corp.,
40 F.4th 1034 (9th Cir. 2022), judgment entered on July 21, 2022; petition for rehearing denied on November 23, 2022

Lang Van, Inc. v. VNG Corp.,
2019 WL 8107873 (C.D. Cal. Nov. 21, 2019)

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PETITION FOR WRIT OF CERTIORARI

This petition raises two open questions. First, in *Walden v. Fiore*, 571 U.S. 277, 290 n.9 (2014), this Court left "questions about virtual contacts" and specific personal jurisdiction "for another day." That day has come. In the nearly ten years since *Walden*, lower courts have developed conflicting answers to those questions, which deserve a consistent, uniform response. Second, this Court has never addressed how specific jurisdiction principles apply to Federal Rule of Civil Procedure 4(k)(2), although it has recognized that "[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field." *Asahi Metal Indus. Co. v. Super. Ct.*, 480 U.S. 102, 115 (1987) (cleaned up). Here too, in the absence of this Court's guidance, lower courts have developed conflicting answers that also warrant resolution.

In this case, for example, the Ninth Circuit decided that a district court can constitutionally exercise personal jurisdiction over VNG, a Vietnamese company, based on its worldwide virtual contacts, even though the conduct underlying the alleged claims occurred in Vietnam and was directed to an overwhelmingly Vietnamese audience. In the process, it ignored three core due process requirements.

As this Court has repeatedly reminded lower courts, specific jurisdiction (1) can only lie if the defendant purposefully availed itself of the forum, (2) depends on a defendant's contacts with the forum, not with the plaintiff, and (3) requires that defendant's purposeful contacts with the forum be related to the claims in the lawsuit. None of those requirements

were satisfied here. Instead, the Ninth Circuit relied on plaintiff's and third parties' contacts with the forum, as well as defendant's entirely unrelated contacts. And it took this Court's presumption against specific jurisdiction absent proof of the defendant's purposeful availment and converted it into a presumption in favor of specific jurisdiction absent proof of purposeful avoidance. Neither virtual contacts nor Rule 4(k)(2) warrant this departure from settled principles.

While every appellate court agrees that due process requires plaintiffs to show something more than defendants having universally accessible websites, they fundamentally disagree over what that something more is. In defining that requirement loosely (and in conflict with this Court's teachings), the Ninth Circuit compounded the existing dissension over what sorts of virtual contacts satisfy specific personal jurisdiction, and how nationwide jurisdiction can apply when a foreign defendant lacks constitutionally sufficient minimum contacts with any one state. This Court should grant certiorari, address these questions, and confirm that traditional principles of specific jurisdiction apply with equal force both in nontraditional contexts and under Rule 4(k)(2).

OPINIONS BELOW

The opinion of the Ninth Circuit is reported at 40 F.4th 1034 and reproduced at App.1-16. The opinion of the U.S. District Court for the Central District of California is unpublished but available at 2019 WL 8107873 and reproduced at App.21-31.

JURISDICTION

The Ninth Circuit issued its opinion on July 21, 2022, and denied panel rehearing and rehearing en banc on November 23, 2022. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth and Fourteenth Amendments to the U.S. Constitution and Federal Rule of Civil Procedure 4(k)(2) are reproduced at App.48-50.

STATEMENT OF THE CASE

A. Legal Background

Under the Fifth and Fourteenth Amendments' due process clauses, courts may exercise personal jurisdiction only when defendants have sufficient "minimum contacts" with the forum "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (cleaned up). Rule 4(k)(2) expressly incorporates those constitutional principles, authorizing nationwide federal-court specific jurisdiction for federal claims if due process is satisfied *and* defendants are not subject to jurisdiction in any state's courts of general jurisdiction.

1. This Court has recognized "two kinds of personal jurisdiction: general (sometimes called all-purpose) jurisdiction and specific (sometimes called case-linked) jurisdiction." *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1024 (2021). A court may constitutionally exercise general

jurisdiction only if defendants are "essentially at home" in the forum, but can do so as to all claims against them. *Id.* at 1024 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)). By contrast, specific jurisdiction "covers defendants less intimately connected" with a forum, "but only as to a narrower class of claims." *Id.*

For specific jurisdiction, due process requires that (1) the defendant "purposefully availed" itself of or "purposefully direct[ed]" its activities toward the forum; and (2) the claim "arises out of or relates to the defendant's forum-related activities." *Axiom Foods, Inc. v. Acerchem Int'l, Inc.*, 874 F.3d 1064, 1068 (9th Cir. 2017) (cleaned up); *see also Johnson v. TheHuffingtonPost.com, Inc.*, 21 F.4th 314, 317-18 (5th Cir. 2021), *cert. denied*, 143 S. Ct. 485 (2022) (mem.). If those prongs are satisfied, defendants can overcome jurisdiction by showing its exercise wouldn't be reasonable. *Johnson*, 21 F.4th at 318.

2. *Calder v. Jones*, 465 U.S. 783 (1984), set forth a framework for applying the purposeful-direction requirement to intentional torts and analytically similar claims like trademark and copyright infringement. Lower courts subsequently distilled *Calder*'s holding into a three-part "*Calder* effects test," requiring (1) an intentional act, (2) expressly aimed at the forum, (3) causing harm in the forum state. *Shrader v. Biddinger*, 633 F.3d 1235, 1239-40 (10th Cir. 2011).

As this Court clarified in *Walden*, express aiming "focuses on the relationship among the defendant, the forum, and the litigation." 571 U.S. at 283-84 (cleaned up). For that relationship to satisfy due process,

"*defendant's* suit-related conduct must create a substantial connection with the forum." *Id.* (emphasis added).

Walden identified "[t]wo related aspects of this necessary relationship." *Id.* at 284. First, the defendant's own "intentional conduct" must "create[] the necessary contacts with the forum." *Id.* at 286; *Johnson*, 21 F.4th at 317 (defendant itself must have "purposefully forged" its ties to the forum). "Second, [the] analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there." *Walden*, 571 U.S. at 285. Plaintiff's contacts with the forum or defendant's contacts with the plaintiff, by contrast, do not count.

Walden, however, left "questions about virtual contacts for another day." *Id.* at 290 n.9. Left to their own devices, lower courts have grappled with "whether, when, and how such peculiarly non-territorial activities as web site hosting, internet posting, and mass emailing can constitute or give rise to contacts that properly support jurisdiction." *Shrader*, 633 F.3d at 1240. For years, courts have fashioned their own idiosyncratic rules, resulting "in a state of flux." *XMission, L.C. v. Fluent LLC*, 955 F.3d 833, 844 (10th Cir. 2020) (quoting 4A Wright & Miller, Federal Practice and Procedure § 1073 (4th ed.)); *Advanced Tactical Ordnance Sys., LLC v. Real Action Paintball, Inc.*, 751 F.3d 796, 802-03 (7th Cir. 2014).

While circuits agree that a universally accessible website by itself does not subject a defendant to jurisdiction everywhere, *Cybersell, Inc. v. Cybersell,*

Inc., 130 F.3d 414 (9th Cir. 1997),[1] they disagree over what more is required. The First, Fourth, and now Ninth Circuits have made that requirement of "more" meaningless by counting contacts that add nothing to a defendant's jurisdictional ties because they are simply a function of a website's universal accessibility. Specifically, they have relied on the fact that defendants do not geoblock (*i.e.*, affirmatively block users from universally accessible websites based on those users' perceived locations), and/or that defendants' websites display third parties' geotargeted advertising (*i.e.*, ads based on algorithms that tailor the ads shown to *each and every* location where the website is accessible). But those forum "contacts"—either not preventing a website from being universally accessible or receiving revenue from brokers (outside the forum) who use an algorithm to place third-party ads on defendants' websites—don't actually do any more work than universal accessibility in establishing purposeful direction. In holding otherwise, the First, Fourth, and Ninth Circuits departed from the traditional specific-jurisdiction principles that led courts to agree that a universally accessible website was not enough for jurisdiction in the first place.

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[1] That "something more" requirement, derived from Justice O'Connor's plurality opinion in *Asahi Metal Industry Co.*, 480 U.S. at 111, was initially applied to analyze jurisdiction based on "passive" websites (*i.e.*, websites that just post information), but has since been applied to "interactive" websites (*i.e.*, where "users can exchange information with the host computer," *Cybersell*, 130 F.3d at 418), too, as the vast majority of websites are now "interactive" and the distinction no longer meaningful.

Basing jurisdiction on defendants *not* blocking website access to users in the forum, as the First, Fourth, and Ninth Circuits do, contravenes *Walden* and *Calder* by focusing on what the defendant did *not* do, rather than what it did. *Plixer Int'l, Inc. v. Scrutinizer GmbH*, 905 F.3d 1, 6 (1st Cir. 2018); *UMG Recordings, Inc. v. Kurbanov*, 963 F.3d 344, 354 (4th Cir. 2020); App.12-13. By contrast, the other circuits have found *no* specific jurisdiction notwithstanding evidence or allegations of website users in the forum, implicitly rejecting the notion that defendants must purposefully avoid a forum lest they be haled into court there. *Bros. & Sisters in Christ, LLC v. Zazzle, Inc.*, 42 F.4th 948, 953 (8th Cir. 2022); *Hepp v. Facebook*, 14 F.4th 204, 208 (3d Cir. 2021); *DeLorenzo v. Viceroy Hotel Grp., LLC*, 757 F. App'x 6, 9 (2d Cir. 2018); *Old Republic Ins. Co. v. Cont'l Motors, Inc.*, 877 F.3d 895, 915 (10th Cir. 2017); *Triple Up Ltd. v. Youku Tudou Inc.*, 235 F. Supp. 3d 15, 26 (D.D.C. 2017); *Cmty. Tr. Bancorp, Inc. v. Cmty. Tr. Fin. Corp.*, 692 F.3d 469, 472 (6th Cir. 2012); *be2 LLC v. Ivanov*, 642 F.3d 555, 559 (7th Cir. 2011); *Oldfield v. Pueblo De Bahia Lora, S.A.*, 558 F.3d 1210, 1221-23 (11th Cir. 2009); *Johnson*, 21 F.4th at 319; *Campbell Pet Co. v. Miale*, 542 F.3d 879, 884 (Fed. Cir. 2008).

And basing jurisdiction, as the Fourth and Ninth Circuits do, on a defendant's display of ads that are automatically tailored through algorithms to *every* location where the website is accessible, App.3, 14; *Kurbanov*, 963 F.3d at 354; *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1230 (9th Cir. 2011), is equally problematic because it departs from the due process requirements that the defendant itself expressly aim intentional contacts at the forum and

that those contacts relate to the claims. *Calder*, 465 U.S. at 789-90. By contrast, the Fifth and D.C. Circuits, the other circuits to squarely address this issue, applied those constitutional requirements to hold that selling geotargeted advertising does *not* prove purposeful direction at a particular forum any more than universally accessible websites do. *Johnson*, 21 F.4th at 319; *Triple Up Ltd. v. Youku Tudou Inc.*, 2018 WL 4440459, at *3 (D.C. Cir. July 17, 2018) (per curiam). That's because geographic-specific ads are automatically populated without any affirmative conduct by defendants, who neither contract with the advertiser nor select the ads. *Johnson*, 21 F.4th at 319; *Triple Up*, 2018 WL 4440459, at *3.

3. *Ford* emphasized a second jurisdictional condition, namely, that the claims in the lawsuit must arise out of or relate to the same contacts that satisfy the purposeful-direction requirement. *Ford*, 141 S. Ct. at 1026.

Ford involved product liability suits stemming from car accidents in Minnesota and Montana, where plaintiffs sued. *Id.* at 1022, 1028. *Ford* held that the defendant's contacts were sufficiently related to the claims because by "every means imaginable," it "systematically served a market in [the forums] for the very vehicles that the plaintiffs allege malfunctioned and injured them in those States," even if those vehicles were bought elsewhere. *Id.* at 1028. Although *Ford* rejected a strict causal theory of relatedness, it also rejected the idea that "anything goes," and, like *Walden*, looked to the requisite relationship between

the defendant, the forum, and the litigation. *Id.* at 1026.

Circuits have generally agreed that *Ford*'s relatedness requirement "must be satisfied even where all the defendant's ties to the forum are virtual," *Johnson*, 21 F.4th at 319, but have diverged over that requirement's application. The First and Fourth Circuits found that failing to geoblock a website relates to *any* claim for which the predicate act is carried out on that website. Similarly, the Fourth Circuit held plaintiff's copyright claims "related" to geotargeted advertising that appeared on the same website as the allegedly copyrighted works. *Kurbanov*, 963 F.3d at 348, 353. And the Ninth Circuit found VNG's internet contacts satisfied due process here, without even mentioning *Ford*.

This relaxed application of "relatedness" (or the outright omission of its application) goes far beyond *Ford*. *Ford* allowed jurisdiction where the defendant engaged in the same core conduct in the forum state as the lawsuit challenged, just not involving plaintiffs' specific vehicles. The First, Fourth, and Ninth Circuits approach to virtual conduct, however, allows for jurisdiction based on *different, unrelated* conduct.

By contrast, in *Johnson,* the Fifth Circuit faithfully applied *Ford* to geotargeted advertising, finding no jurisdiction in Texas over a libel claim despite defendant's display of ads from Texas-based advertisers on its website, its use of "visitors' location data to tailor advertising to them," and its resulting online sales to Texans. 21 F.4th at 320. That's because plaintiff's claim arose from defendant's libelous article, not the ads that appeared alongside it or the

advertisers' citizenship. *Id.*; *see also Hepp*, 14 F.4th at 208 (no specific jurisdiction over online platforms who used geotargeted advertising where misappropriation claim did not allege defendants used the plaintiff's likeness to sell the advertising); *Triple Up*, 2018 WL 4440459, at *4 (jurisdictional discovery not warranted where plaintiff failed to "plausibly allege[] any connection between [defendant's] VIP service or its business dealings in the United States and its free streaming services and user-uploaded video platforms" at issue in the claims).

4. Rule 4(k)(2) does not relax these jurisdictional principles.[2] It permits federal courts in any state to exercise personal jurisdiction over foreign defendants when: (1) the claim arises under federal law; (2) the defendant is not subject to personal jurisdiction in any state court of general jurisdiction; *and* (3) the federal court's exercise of personal jurisdiction comports with due process. Fed. R. Civ. Proc. 4(k)(2); *Plixer*, 905 F.3d at 6.

Although this Court has left open whether the Fifth Amendment imposes the same restrictions on federal courts' exercise of personal jurisdiction as the Fourteenth Amendment does on state courts, *Bristol-Myers Squibb Co. v. Super. Ct.*, 137 S. Ct. 1773, 1783-84 (2017), circuit courts have analyzed specific jurisdiction under Rule 4(k)(2) applying due process standards. *See, e.g.*, *CGC Holding Co. v. Hutchens*, 974

[2] As the advisory committee notes to the 1993 amendment creating subsection (k)(2) explained, the addition "enables district courts to exercise jurisdiction, *if permissible under the Constitution*." Fed. R. Civ. P. 4 Comm. Notes (1993) (emphasis added).

F.3d 1201, 1209 (10th Cir. 2020) (applying Fourteenth Amendment minimum contacts framework to analyze constitutionality of jurisdiction under Rule 4(k)(2)); *Douglass v. Nippon Yusen Kabushiki Kaisha*, 46 F.4th 226, 240-41 (5th Cir. 2022) (citing cases). Under that majority approach, courts may only exercise Rule 4(k)(2) jurisdiction when the due process principles it expressly incorporates are satisfied. The Ninth Circuit is an outlier, finding Rule 4(k)(2) jurisdiction without diligently applying those principles.

B. Factual Background

Defendant VNG is a Vietnamese company, headquartered in Vietnam, with no physical presence in the U.S. It produces websites and software including ZingMP3, a music-streaming service available through zingmp3.com ("Website") and a mobile application ("Application") (collectively, "ZingMP3"). CA9-SER-85. ZingMP3's servers are located exclusively in Vietnam. *Id.*

Although available worldwide, ZingMP3 is overwhelmingly used by Vietnamese people in Vietnam—between 86 and 97 percent of users in the relevant time period were Vietnam-based, while only between 1 and 4 percent of users were U.S.-based. CA9-SER-51; CA9-SER-54; CA9-SER-61; CA9-SER-71; CA9-SER-74; CA9-SER-77.

VNG never tried to develop a U.S. market for ZingMP3. CA9-SER-50-51. During the relevant period, VNG wasn't registered to do business in the U.S., did no direct marketing or advertising of ZingMP3 to U.S. consumers, and received no revenue for ZingMP3 directly from U.S. users. CA9-SER-50-51;

CA9-SER-82-83. Although Vietnamese advertisers and a Singapore-based advertising broker paid VNG for geotargeted advertisements on the Website, VNG had no advertising arrangements with U.S. companies. CA9-SER-82; CA9-SER-19.

The Ninth Circuit primarily based jurisdiction on VNG's efforts in the U.S. to get permission to distribute content *outside* of it. As reflected in a 2015 letter to the U.S. Trade Representative ("USTR") (*i.e.*, after the jurisdictionally relevant period), VNG obtained licenses from certain U.S.-based music studios to distribute content outside the U.S., but didn't seek a license to or distribute it *inside* the U.S. CA9-5-ER-736-41. Similarly, sometimes VNG licensed other content available on ZingMP3, including content purportedly owned by plaintiff Lang Van, for distribution outside the U.S. CA9-SER-7.

Plaintiff Lang Van is a California-headquartered music label that produces and distributes re-recordings of Vietnamese music. CA9-2-ER-53-54; CA9-SER-89. In 2014, Lang Van sued VNG, claiming copyright infringement based on certain sound recordings' (and album artwork's) availability on ZingMP3. CA9-2-ER-62.

Although a small percentage of VNG's customers downloaded the *Application* in the U.S., Lang Van submitted no evidence that any person (other than its employees for purposes of this litigation) downloaded or streamed its *songs* in the U.S. Instead, it argued that simply "making available" songs to ZingMP3 users universally (including in the U.S.) infringed its copyrights.

C. The Decisions Below

The district court twice dismissed Lang Van's claims for lack of personal jurisdiction. App.21-22, 30-31. After Lang Van appealed the first dismissal, the Ninth Circuit remanded for jurisdictional discovery without reaching the jurisdictional merits. App.19-20. After discovery, briefing, and argument, the district court again dismissed on jurisdictional grounds because Lang Van had offered only "tenuous connections" between VNG and the forum, and those connections were unrelated to Lang Van's claims. App.28.

The Ninth Circuit again reversed in a published opinion, finding personal jurisdiction under Rule 4(k)(2), based on Plaintiff Lang Van's contacts with the forum and Defendant VNG's aggregated (but unrelated) contacts with the U.S. generally. App.14-16.

Although the relevant inquiry is whether VNG purposefully targeted the forum, not a plaintiff who happens to be in it, *Walden*, 571 U.S. at 285, the panel found "VNG purposefully targeted American companies and their intellectual property," App.12.

Although VNG's primary audience was in Vietnam and VNG had never tried to develop a U.S. market, the panel reasoned that jurisdiction could nonetheless be predicated on VNG's failure to avoid the U.S., because VNG "did not choose to opt out of" the U.S. or "geoblock access to Lang Van's content" in it. App.12-13.

And although the evidence showed that VNG used the default worldwide release for its Application,

rather than affirmatively selecting not to release it in the U.S., the panel held that making the application accessible worldwide, including "to those living in the United States" was purposeful because "[a]bsent release by VNG," the Application "was not available in the United States." App.3, 12. The panel's adoption of a "purposeful avoidance" standard aligned the Ninth Circuit with the First, *Plixer*, 905 F.3d at 9, and Fourth Circuits, *Kurbanov*, 963 F.3d at 354, and against the explicit holding of the Fifth, *Johnson*, 21 F.4th at 323 (defendant "need not block [forum residents] from visiting its site, receiving relevant advertising, or buying [merchandise] to escape the ability of [] courts [in the forum] to hear [plaintiff's] claim"), and implicit holdings of every other circuit. *See supra* pp. 7-8.

Despite *Ford*'s requirement that contacts be related to the underlying claims to have jurisdictional significance, the panel also relied on contacts that were *unrelated* to Lang Van's claims, like a U.S. trademark application where VNG noted that its VNG company trademark was used in commerce in the U.S., even though Lang Van's claims didn't relate to VNG's mark and VNG didn't use its mark to promote ZingMP3 in the U.S. App.14-15. Similarly, the panel relied on VNG's "contract[s] with U.S. businesses in conjunction with Zing MP3," including with U.S. music studios for content not at issue in the litigation, and Google and Apple, to make the Application available in those companies' online stores in Vietnam. App.12-13.

Finally, the panel implied that geotargeted advertising to forum-based users supports jurisdiction

over claims that do not stem from that advertising, confirming the Ninth Circuit's alignment with the Fourth, *Kurbanov*, 963 F.3d at 348, 353, and contra the Third, *Hepp*, 14 F.4th at 208, Fifth, *Johnson*, 21 F.4th at 320-23, and D.C. Circuits, *Triple Up*, 2018 WL 4440459, at *4. The panel observed that users apparently in the U.S. viewed VNG's website and downloaded its Application, and VNG "created geotargeted ads" specific to the location where they were viewed. In fact, VNG did not create those advertisements, which were for other entities, selected by a third-party broker based in Singapore, and not related to the claims in this litigation. The panel then based jurisdiction in part on VNG's purported acknowledgment "that 10% of its revenue comes from 'selling traffic to advertisers' [for] 'Western and other Asian content.'" App.13-14 (alteration by panel).

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari to answer the question *Walden* deferred: how traditional specific jurisdiction requirements apply to virtual contacts. The lack of guidance on this critical and recurring question has produced irreconcilable circuit splits. While every circuit agrees that a website alone is not enough to establish jurisdiction, they have splintered over what *is* enough. That splintering is particularly evident over issues of geoblocking and third-party geotargeted advertising.

By finding purposeful-direction satisfied by defendants' failure to purposefully avoid a forum or by third-party algorithm-directed advertising equally tailored to *any* forum where the website is accessible, the First, Fourth, and Ninth Circuits have negated

important constitutional safeguards for any foreign defendant with an online presence. These circuits credit contacts that go hand-in-hand with a website's universal accessibility without defendant directing any affirmative or intentional conduct at the forum. What's more, by giving short shrift to the relatedness requirement, they allow such contacts to form the basis of specific jurisdiction over anything the defendant does online. By contrast, the remaining circuits require that virtual contacts—just like any others—be (1) the product of defendant's intentional conduct and (2) related to the underlying claims. If those two requirements are not met, such contacts are not jurisdictionally significant, let alone sufficient.

This petition also presents a second question that takes on particular urgency in the virtual world: whether courts can use Rule 4(k)(2) to find jurisdiction based on constitutionally insufficient contacts. Although Rule 4(k)(2) cannot override the Constitution, some courts, including the Ninth Circuit here, have used it to do just that. The result is to convert specific jurisdiction into general jurisdiction over virtually every foreign entity doing business over the internet.

Whether traditional constitutional principles apply with equal force in an increasingly virtual world is a question of critical importance. But right now that question has different answers depending on the court addressing it. Whether specific personal jurisdiction exists thus depends on the Circuit where a case is brought. That is particularly problematic for Rule 4(k)(2) jurisdiction, which exists—if at all—equally across federal courts nationwide. This Court should

address the questions it previously left open, grant certiorari, and resolve the split in the lower courts. Both issues are cleanly presented, thoroughly briefed before the lower courts, and squarely addressed in the Ninth Circuit's decision.

I. The Ninth Circuit's opinion decided important questions of federal law and conflicts with decisions by this Court and other appellate courts.

A. The circuits are split over the application of specific jurisdiction to virtual contacts.

For nearly eighty years, the Court has reaffirmed that due process requires that defendants have sufficient "minimum contacts" with a forum. *Int'l Shoe*, 326 U.S. at 316. But this Court has left questions about analyzing "virtual contacts for another day." *Walden*, 571 U.S. at 290 n. 9.

As lower courts have tried to answer those questions themselves, a circuit split has emerged, with the First, Fourth, and Ninth Circuits on one side, and the remaining circuits on the other. The majority have made clear that the "personal-jurisdiction inquiry should not change just because a defendant operates a web publication instead of a physical one." *Johnson*, 21 F.4th at 325; *see also NexLearn, LLC v. Allen Interactions, Inc.*, 859 F.3d 1371, 1378 (Fed. Cir. 2017) ("We evaluate [defendant's] website as we would any other contact under a specific jurisdiction theory.").

Although courts initially classified websites on a sliding-scale from "interactive" to "passive" to determine whether website-based forum contacts

conferred personal jurisdiction, courts now recognize that "[t]he interactivity of a website is [] a poor proxy for adequate [forum] contacts." *Advanced Tactical*, 751 F.3d at 803. That's because in "today's internet, it is an extraordinarily rare website that is not interactive at some level," *Fidrych v. Marriott Int'l, Inc.*, 952 F.3d 124, 141 n.5 (4th Cir. 2020) (cleaned up), and "[i]nteractivity reflects only a website's *capacity* to avail itself of a place." *Johnson*, 21 F.4th at 319; *see Advanced Tactical*, 751 F.3d at 803 (an "interactive website" inquiry "hardly rules out anything in 2014"). Now, courts generally agree that an interactive website alone is not enough to satisfy specific jurisdiction. *See, e.g.*, *Shrader*, 633 F.3d at 1241 (citing cases). Interactivity is instead "treated ... as a prerequisite to [the] standard jurisdictional inquiry." *Johnson*, 21 F.4th at 319.

Courts, however, disagree about what more is required. The First, Fourth, and Ninth Circuits have fudged the traditional due process inquiry in deciding that question, basing jurisdiction on virtual contacts that are neither the result of a defendant's intentional conduct directed at the forum (as required by *Walden*) nor related to the claims (as required by *Ford*).

1. The purposeful direction "'inquiry boils down to this: has [defendant] purposefully exploited the [forum] market' beyond simply operating an interactive website accessible in the forum state and sending emails to people who may happen to live there?" *Advanced Tactical*, 751 F.3d at 802-03 (quoting *be2 LLC*, 642 F.3d at 558-59).

All but the First, Fourth, and Ninth Circuits faithfully apply traditional jurisdictional principles to

this question. The Fifth Circuit, for example, distinguished "substantial physical circulation of print media" to a forum, "an affirmative act that displays the publisher's specific intent to target that" forum, from websites, which are "'circulated' to the public by virtue of their universal accessibility, which exists from their inception." *Johnson*, 21 F.4th at 325. "That's why clicks, visits, and views from forum residents cannot alone show purposeful availment" under *Walden*'s requirement that the *defendant* have formed a contact with the forum. *Id.*

Similarly, the Seventh Circuit explained that the mere "operation of an interactive website does not show that the *defendant* has formed a contact with the forum state" sufficient to find minimum contacts. *Advanced Tactical*, 751 F.3d at 803. Virtual contacts support jurisdiction under *Walden* only insofar as "the focus [is not] on the *users* who signed up, but instead on the *deliberate actions by the defendant* to target or direct itself toward the forum state." *Id.* (emphasis added).

The Eighth Circuit has also held that a defendant's operating a "nationally accessible" website to advertise, sell, and "carry out the transaction for trademark infringing goods" doesn't support finding purposeful direction without allegations that the defendant "uniquely or expressly aimed its allegedly tortious act—the offering for sale and selling of infringing goods—at [the forum]." *Bros. & Sisters in Christ*, 42 F.4th at 952, 954 (cleaned up). Absent a defendant's "purposeful, targeted action towards" the forum, a purchase by a consumer in the forum on the defendant's nationally available website

was not enough—defendant had to use the website to "*specifically* target[]" forum consumers or the forum market. *Id.* at 953-54 (emphasis added).

The Tenth Circuit has explained that to prevent the "untenable result" of making a website operator subject to specific jurisdiction in every state, the emphasis must be "on the [operator] or site *intentionally directing* his/her/its activity or operation *at* the forum state rather than just having the activity or operation accessible there." *Shrader*, 633 F.3d at 1240. This "emphasis on intentionally directing internet content or operations at the forum state has its grounding in the 'express aiming' requirement the Supreme Court developed in *Calder*." *Id.* at 1241; *see also XMission, L.C. v. Fluent LLC,* 955 F.3d 833 (10th Cir. 2020). Under *Calder* and *Walden*, "the forum state itself must be the focal point of the tort." *Shrader*, 633 F.3d at 1244 (emphasis omitted).

And the Sixth Circuit found no specific jurisdiction in Kentucky for tort claims arising out of defendants' tweets about Kentucky-based plaintiffs where defendants "took no affirmative steps to direct any communications to the plaintiffs or to anyone else in Kentucky," and there was "no evidence that the defendants posted the tweets hoping to reach Kentucky specifically as opposed to their Twitter followers generally." *Blessing v. Chandrasekhar,* 988 F.3d 889, 906 (6th Cir. 2021). In so holding, the court cited the Eighth and Tenth Circuits, noting that "[o]ur sister circuits have routinely held that posting allegedly defamatory comments or information on an internet site does not, without more, subject the poster to personal jurisdiction wherever the posting could be

read (and the subject of the posting may reside)." *Id.* at 905 nn.15-16 (cleaned up) (citing Fifth and Fourth Circuits).

Consistent with well-settled jurisdictional principles these Circuits declined to find jurisdiction absent some evidence of defendants' purposeful exploitation of the forum, like advertising its website specifically to users within the forum, *Advanced Tactical*, 751 F.3d at 803, or making significant sales to consumers in the forum through the website, *compare Del Valle v. Trivago GMBH*, 56 F.4th 1265, 1273, 1276 (11th Cir. 2022) (finding purposeful direction where defendant websites specifically targeted and sold reservations for at-issue properties to forum residents); *Chloe v. Queen Bee of Beverly Hills, LLC*, 616 F.3d 158, 171 (2d Cir. 2010) (finding purposeful availment where defendant's website offered and sold handbags, including at least one counterfeit bag, to New York consumers); *Neogen Corp. v. Neo Gen Screening, Inc.*, 282 F.3d 883, 890-91 (6th Cir. 2002) (finding purposeful availment where defendant granted passwords to Michigan residents as part of a contract for its genetic testing services and had 14 yearly contracts with Michigan residents (cleaned up)); *with NexLearn*, 859 F.3d at 1377 (no jurisdiction over defendant whose website allowed users to select "Kansas" when ordering allegedly infringing product, absent evidence of actual sales to Kansas); *Nuance Commc'ns, Inc. v. Abbyy Software House*, 626 F.3d 1222, 1235 (Fed. Cir. 2010) (no purposeful direction even though defendant's website "promote[d] the sale of [infringing] products in California"); *GTE New Media Servs. Inc. v. BellSouth Corp.*, 199 F.3d 1343, 1350 (D.C. Cir. 2000) (no

purposeful direction over defendants with interactive websites absent evidence that forum residents "actually engage[d] in any business transactions with the defendants"). With evidence of defendants' deliberate acts to target the forum, courts applying traditional due process principles have found jurisdiction. *Advanced Tactical*, 751 F.3d at 803. Without it, they have not.

The First, Fourth, and Ninth Circuits, however, depart from the traditional due process inquiry for internet contacts. They have found jurisdiction based on contacts that are part of having a universally accessible website, but that don't satisfy the purposeful direction requirement—specifically, (a) the failure to geoblock the website from the forum, and (b) the use of third-party algorithm-based advertising to tailor all ads to the location where they are viewed.[3]

a. By allowing jurisdiction based on defendants' failure to geoblock forums, the First, Fourth, and Ninth Circuits allow jurisdiction based on a defendant's *failure* to act. In so doing, they convert the requirement that plaintiffs show defendants purposefully availed themselves of a forum to establish jurisdiction into a requirement that defendants show that they *purposefully avoided* a forum to defeat it.

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[3] In an unpublished decision, the Ninth Circuit previously correctly recognized that uploading videos to a universally accessible website from Canada was not an act expressly aimed at the U.S., *Werner v. Dowlatsingh*, 818 F. App'x 671 (9th Cir. 2020).

A failure to act cannot support jurisdiction under *Walden*, 571 U.S. at 286, and *Calder*, 465 U.S. at 789. Most courts thus do not require a defendant to geoblock its universally accessible website based on the user's perceived location to demonstrate that it has *not* expressly aimed an act at the forum and thus avoid jurisdiction. *See, e.g.*, *supra* 7-8.

Indeed, the Fifth Circuit specifically rejected the proposition that a defendant was required to "*block* Texans from visiting its site, receiving relevant advertising, or buying T-shirts to escape the ability of Texas courts to hear [the plaintiff's] libel claim." *Johnson*, 21 F. 4th at 323 (emphasis added). The court observed that "[f]airness [] dictates that a defendant must have some chance to limit or avoid its exposure to a particular state's courts," and stressed that defendants needn't "wall themselves off from the world." *Id.* at 322. Instead, defendants "may avoid the authority of Texas's courts by not purposefully directing at Texas the conduct that produced [the plaintiff's] suit." *Id.* at 323. Even though the allegedly libelous article was available in Texas alongside advertisements targeted to Texans, the court found no jurisdiction there under traditional notions of due process because the defendant "did not aim the alleged libel at Texas or reach into Texas to share it there." *Id.*

But the First, Fourth, and Ninth Circuits found a defendant's failure to geoblock its website in the forum did constitute purposeful direction. The First Circuit, examining nationwide contacts in *Plixer*, held that a defendant's "*failure to implement* [accessibility] restrictions, coupled with its substantial U.S. business, provides an objective measure of its intent to

serve customers in the U.S. market and thereby profit." *Plixer*, 905 F.3d at 9 (emphasis added). The court reasoned that "[i]f a defendant tries to limit U.S. users' ability to access its website, [] that is surely relevant to its intent not to serve" the U.S., so the "converse is true," too. *Id.* But that reasoning ignores specific jurisdiction's constitutional requirement of intentional, affirmative conduct. *Walden*, 571 U.S. at 286.

The Fourth Circuit similarly found specific jurisdiction in Virginia where the defendant "knew the Websites were serving Virginia visitors and yet *took no actions to limit or block* access." *Kurbanov*, 963 F.3d at 354 (emphasis added). That analysis incorrectly focused on the users' conduct, not defendant's: "[the defendant] made two globally accessible websites and *Virginia visitors used them* for alleged music piracy." *Id.*

So too here: the Ninth Circuit based jurisdiction on a finding that "VNG clearly *did not attempt to limit* U.S. users' ability to access its website." App.13 (emphasis added). Like the First and Fourth Circuits, it focused on the U.S.-based individuals' use of VNG's universally accessible platform and on what VNG did *not* do, rather than what it did.

Such holdings, which "equate[] a *failure to geoblock* with purposeful availment," "effectively mandate geoblocking for any website operator wishing to avoid suit in the United States." *Triple Up*, 235 F. Supp. 3d at 25. The result is to "replace the purposeful availment standard with a requirement of purposeful avoidance." *Id.* at 26 (cleaned up). As the majority of circuits correctly recognize, that is not the law.

b. The Fourth and Ninth Circuits also stand alone in considering "geotargeted advertising" on a universally accessible website—that is, using "visitors' location data to tailor advertising to them," *Johnson*, 21 F.4th at 320—as jurisdictionally relevant. That directly conflicts with holdings of the Fifth and D.C. Circuits.

As the Fifth Circuit explained, the defendant's decision to contract with a third-party agency to select and show other companies' geographically relevant ads to users on defendant's website based on those users' perceived location meant the defendant's website "shows ads to all comers; it treats Texans like everyone else," rather than "target[ing] Texas specifically." *Id.* at 321, 326. Geotargeted advertising does not satisfy purposeful direction because "[t]o target every user everywhere, as those ads do, is to target no place at all." *Id.* at 321-22 (footnote omitted). "Accessibility alone cannot sustain [] jurisdiction. If it could, lack of personal jurisdiction would be no defense at all." *Johnson*, 21 F.4th at 320.

The D.C. Circuit also held that under *Walden*, the defendant's use of third-party agencies to place ads on its website did not support jurisdiction absent facts plausibly showing that the *defendant* "played a material role in pairing advertisements with specific videos based on viewership." *Triple Up*, 2018 WL 4440459, at *3. That the defendant "indisputably derive[d] revenue" from "geographically targeted" advertisements accompanying its videos and "act[ed] to maximize usage of its websites" was not enough to show purposeful availment. *Id.* (cleaned up).

By contrast, the Fourth Circuit held that by contracting with a third-party broker to sell ad space to advertisers for "location-based advertising," the defendant had purposefully availed itself of Virginia. *Kurbanov*, 963 F.3d at 355. The court reasoned that such advertising involved collecting personal data from Virginia visitors, selling that data and ad spaces to advertising brokers, and using location-based advertising "to pique visitors' interest and solicit repeated visits." *Id.* Yet the court made no finding that any of these actions were specific to Virginia users, who were treated the same as users from all the other global locations from which the defendant's universally accessible website could be accessed, let alone to the forum. Nor did it find that the *defendant* advertised the website or its ad space in Virginia or controlled ad selection on its website. *Id.* In other words, the Fourth Circuit based purposeful availment on the conduct of advertising brokers, not defendant, and that applied generally to defendant's universally accessible website, not specifically to the forum.

The decision here similarly emphasized VNG's revenue from geotargeted advertising controlled by a third-party broker in Singapore, over whom VNG exercised no control other than prohibiting advertisements that would be illegal in Vietnam. CA9-1-SER-82. By finding that location-based advertising that applied to every location in the world supported jurisdiction in the U.S., the decision aligns with *Kurbanov*, and, within the Ninth Circuit, with *Mavrix*, which found jurisdiction in California based on third-party advertisers' targeting of Californians because the defendant knew "actually or constructively ... about its California user base" and "exploit[ed] that

base for commercial gain by selling space on its website for advertisements." 647 F.3d at 1230. It conflicted, however, with the Fifth and D.C. Circuits, *supra*, as well as with *AMA Multimedia, LLC v. Wanat*, which held that "[i]f such geo-located advertisements constituted express aiming, [defendants] could be said to expressly aim at *any* forum in which a user views the website," 970 F.3d 1201, 1211 (9th Cir. 2020).

2. Circuits have also split over whether the relatedness requirement applies with equal force when evaluating specific jurisdiction based on internet contacts. On the one hand, the Third, Fifth, Seventh, and D.C. Circuits have expressly required that virtual contacts relate to the underlying claims. The Fourth and Ninth have not. The contrast is particularly stark when it comes to geotargeted advertising and geoblocking.

As the Fifth Circuit explained, because "a defendant must have some chance to limit or avoid his exposure to the courts of a particular" forum, a court "cannot use a defendant's forum contacts—even purposeful ones—to invent jurisdiction over claims that do not relate to or arise from those contacts." *Johnson*, 21 F.4th at 320 (citing *Ford*, 141 S. Ct. at 1025). This prevents specific jurisdiction over website operators from becoming "[g]eneral jurisdiction for every state where [the website] is visible." *Id.* at 324. The Fifth Circuit thus definitively rejected the proposition that courts have jurisdiction over defendants with respect to any claim arising from the defendants' use of their website, simply "because [they] erected a website where [forum users] can visit

and click ads." *Id.* at 326. While it's true ad clicks generate revenue, "[m]ere market exploitation will not suffice" to satisfy the relatedness requirement, and the geotargeted ad sales there "neither produced nor related to [the plaintiff's] libel claim." *Id.* at 321, 324. Allowing a defendant's website marketing ads and merchandise to the forum to satisfy the relatedness requirement as to unrelated claims "would collapse the distinction between specific and general jurisdiction." *Id.* at 323 ("[W]e can imagine few claims against a website that would fall beyond the reach of "claim-specific" jurisdiction.").

The Third Circuit similarly confirms that virtual contacts, like physical ones, must satisfy the relatedness prong. *Hepp v. Facebook*, 14 F.4th at 208. In *Hepp*, the plaintiff alleged specific jurisdiction in Pennsylvania over Imgur and Reddit for misappropriation-of-likeness claims on their online platforms because those companies targeted their advertising business to Pennsylvania, sold merchandise to Pennsylvanians on-line, and/or offered a premium membership business and online community organized around Philadelphia. *Id.* Nonetheless, the court held that relatedness was not satisfied because "none of these contacts forms a strong connection to the misappropriation of [plaintiff's] likeness" because plaintiff "did not allege the merchandise featured her photo" or the defendants "used her likeness to sell advertising." *Id.*

The D.C. Circuit also applied traditional relatedness principles in affirming the denial of a request for jurisdictional discovery into the defendant's "geo-coding and geo-blocking capabilities,

policies, and activities; … the location of its servers; and [its] business dealings with United States companies and investment activities" because the plaintiff failed to "plausibly allege[] any connection between … [defendant's] business dealings in the United States and its free streaming services and user-uploaded video platforms" involved in the claims. *Triple Up*, 2018 WL 4440459, at *3-4 (cleaned up).

And while geoblocking and geotargeted advertising were not at issue in the case, the Seventh Circuit similarly reaffirmed that the relatedness requirement applies equally to internet activity. There, defendant had fulfilled orders in the forum "after putting the allegedly infringing message on its website and in emails," but plaintiff failed to link those sales to the claims by, for example, showing that forum residents saw the defendant's infringing post before making their purchases. *Advanced Tactical*, 751 F.3d at 801.

Unlike these circuits, the Fourth Circuit found that geotargeted advertising satisfied the relatedness prong even though the alleged copyright claims did not arise from or relate to the advertising. *Kurbanov*, 963 F.3d at 348, 353.

Worse, the Ninth Circuit below *skipped relatedness entirely* by not analyzing whether the alleged forum-related contacts it identified—whether virtual or not—had *any nexus at all* to Lang Van's copyright claims. Instead, it concluded specific jurisdiction existed because "substantial evidence of intentional direction into the United States market" satisfied the purposeful direction prong, and exercising jurisdiction would be reasonable. App.14-

15. But finding two of the three required prongs satisfied is not a passing grade for purposes of personal jurisdiction. Had the Ninth Circuit analyzed relatedness here, it would have had to conclude that due process is not satisfied. None of the purposeful contacts the Ninth Circuit identified—VNG's use of geotargeted advertising or the VNG mark, or entering into contracts with unrelated studios—relate to the alleged copyright infringement claim. Just as in *Triple Up*, "some English-language advertisements placed by third party advertising agencies, along with a miniscule percentage of monthly internet views coming from the United States," does not "suffice[] to establish personal jurisdiction" given "the absence of any [VNG] business operations in the United States relevant to the alleged harm." 2018 WL 4440459, at *3.

In sum, at least four Circuits do not exempt online contacts from the relatedness requirement, but two do. As a result, cases that would come out one way in the Third, Fifth, Seventh, and D.C. Circuits would come out another in the Fourth and Ninth. That split calls out for resolution.

B. The Ninth Circuit applied Rule 4(k)(2) to do what *Daimler*, *Walden,* and *Ford* prohibit.

This Court has repeatedly had to curtail lower courts' attempts to expand jurisdiction over defendants whose ties to the forum are not enough to give them "fair warning ... that a particular activity may subject [them] to [] jurisdiction" in a U.S. court. *Ford*, 141 S. Ct. at 1026 (cleaned up) (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)).

Nothing about Rule 4(k)(2) suggests that the constitutional strictures this Court recognized in *Walden, Daimler,* and *Ford* apply with lesser force to foreign defendants. This case cannot be squared with those cases, or the Rule itself, and this Court should correct the Ninth Circuit's jurisdictional overreach here.

Those three cases set forth jurisdictional guardrails that the Ninth Circuit's application of Rule 4(k)(2) elided. *Walden* reversed the Ninth Circuit's holding that a Nevada court could exercise specific jurisdiction over a Georgia police officer based on a search and seizure in Atlanta before plaintiffs boarded an airplane to Nevada where they resided. *Walden*, 571 U.S. at 280-81. The Court held that defendant had "no jurisdictionally relevant contacts with Nevada" and that the Ninth Circuit had improperly "shift[ed] the analytical focus from [defendant]'s contacts with the forum to his contacts with [plaintiffs]." *Id.* at 289.

Daimler unanimously reversed a Ninth Circuit opinion finding general jurisdiction in California over German company Daimler AG based on its U.S. subsidiary's distribution of Daimler-manufactured vehicles to independent dealerships throughout the United States. *Daimler AG v. Bauman*, 571 U.S. 117, 121 (2014). The Court held due process precluded jurisdiction over Daimler given "the absence of any California connection to" the allegations in the complaint. *Id.* "Such exorbitant exercises of all-purpose jurisdiction would scarcely permit out-of-state defendants 'to structure their primary conduct with some minimum assurance as to where that

conduct will and will not render them liable to suit.'" *Id.* (quoting *Burger King*, 471 U.S. at 472).

Finally, *Ford* confirmed that contacts must be related to the underlying claims in litigation to be jurisdictionally significant. 141 S. Ct. at 1026.

Although the Ninth Circuit recited the applicable constitutional principles, it credited *all* of VNG's U.S. contacts in favor of jurisdiction, whether or not they qualified as "minimum contacts" under this Court's Fourteenth Amendment jurisprudence. It relied on VNG's targeting of the *plaintiff*, not the forum, its *failure to opt out* of making its Application and website available in the U.S. where they were accessed, and its unrelated contacts, including its contracts with U.S. businesses "in conjunction" with its online platform, and its use of the VNG mark on its website in commerce in the U.S. App.12. This reasoning cannot be squared with this Court's caselaw requiring intentional acts by the defendant (not by the plaintiff), expressly aimed at the forum (not at the plaintiff), and related to the claims (not to defendant's activity generally). Nor can it be reconciled with how other circuits have applied that authority in Rule 4(k)(2) cases. *E.g., Unspam Techs., Inc. v. Chernuk*, 716 F.3d 322, 330 (4th Cir. 2013) ("Rule 4(k)(2) does not justify the exercise of personal jurisdiction over the [defendants] because exercising jurisdiction over them would not, in the circumstances here, be 'consistent with the United States Constitution and laws.'"); *Burke v. Woods*, 85 F.3d 640, 1996 WL 223731, at *3 (10th Cir. 1996) (holding argument that "the enactment of Fed R. Civ. P. 4(k)(2) has made minimum contact analysis irrelevant" "clearly wrong").

Just as Daimler's subsidiary's sales into the forum did not support jurisdiction over Daimler in California for claims that didn't relate to those sales, VNG's contracts with U.S. studios do not support jurisdiction over VNG in the United States for claims that don't relate to those contracts. Just as Walden's knowledge that a plaintiff from whom he seized money would suffer "foreseeable harm" in Nevada was not an intentional act by Walden, VNG's knowledge that Lang Van is based in the United States and might foreseeably suffer harm there from copyright infringement is not an intentional act by VNG. And unlike Ford's engaging in the same activity in the forum state that was the basis for plaintiffs' claims, just not as to the specific vehicles at issue, the activity on which the Ninth Circuit relied here had nothing to do with the underlying claims.

Although this Court has not yet addressed Rule 4(k)(2), circuit courts have applied its Fourteenth Amendment specific-jurisdiction jurisprudence to hold that "[p]leading specific personal jurisdiction under Rule 4(k)(2) requires demonstrating a close nexus between the United States, the foreign defendant's conduct, and the plaintiff's claim," just as it does for traditional specific jurisdiction. *Bernhardt v. Islamic Republic of Iran*, 47 F.4th 856, 864-65 (D.C. Cir. 2022). A lack of the requisite relationship between the claims and the defendant's forum contacts, like here, thus "dooms [a plaintiff's] effort to establish specific personal jurisdiction" under Rule 4(k)(2)." *Herederos De Roberto Gomez Cabrera, LLC v. Teck Res. Ltd.*, 43 F.4th 1303, 1311 (11th Cir. 2022), *cert. denied*, 2023 WL 192008 (U.S. Jan. 17, 2023).

In *Bernhardt*, for example, the plaintiffs were family members of victims of an al-Qaeda attack in Afghanistan who sued United Kingdom-based HSBC and its affiliates. *Bernhardt*, 47 F.4th at 864-65. Plaintiffs alleged that the foreign defendants purposefully directed their conduct at U.S. markets by coordinating with domestic affiliates to facilitate financial transactions with HSBC customers who had terrorism ties, in violation of U.S. sanctions. *Id.* at 864. The D.C. Circuit assumed those allegations satisfied the purposeful-direction requirement, but held they did not "support an inference that the injuries from the [] bombing arose out of or related to the foreign [] defendants' sanctions evasion" because the allegations only "show[ed] possible connections between" those HSBC customers "and terrorism generally." *Id.* at 864-65. They were insufficient to allow the court "to infer the necessary connection to al-Qaeda specifically, or that the foreign HSBC defendants' conduct was related to [the victims'] injuries at al-Qaeda's hand." *Id.* at 865.

Before *Ford*, too, Circuit courts applied the "minimum contacts" test to Rule 4(k)(2) cases. *See, e.g.*, *GCIU-Emp. Ret. Fund v. Coleridge Fine Arts*, 808 F. App'x 655, 663 (10th Cir. 2020) (no specific jurisdiction based on nationwide contacts under Rule 4(k)(2) for failure to satisfy purposeful-direction and relatedness requirements). In *Quick Technologies, Inc. v. Sage Group PLC*, 313 F.3d 338 (5th Cir. 2002), for example, the Fifth Circuit found no Rule 4(k)(2) jurisdiction over a U.K.-based defendant for a trademark infringement claim even though the defendant had opposed the plaintiff's trademark application by asserting that it had used its mark in

commerce in the U.S., had filed an intent-to-use application for the mark with the USPTO, operated a website with information about the defendant and links to its U.S. subsidiaries, and used the mark in publications circulated in the United States and in advertisements used by its U.S. subsidiaries. *Id.* 345. The Fifth Circuit held that these contacts did not sufficiently relate to the plaintiff's infringement claim to support Rule 4(k)(2) jurisdiction. *Id.*

In these cases, courts applied due process principles to the defendants' U.S. contacts, and where those contacts failed to meet either the purposeful-direction or relatedness requirement, found specific jurisdiction lacking even under Rule 4(k)(2). By contrast, the Ninth Circuit seized upon Rule 4(k)(2) to make an end-run around *Daimler* and effectively exercise general jurisdiction over a foreign defendant under the guise of a specific jurisdiction analysis that contradicts *Walden*'s purposeful-direction and *Ford*'s relatedness requirements.

II. The questions presented are important and recurring and this case presents an excellent vehicle for answering them.

The questions raised by these conflicts require answers. Absent this Court's resolution of those issues, cases that would not proceed in some circuits will in others, not because of case-specific factual differences, but circuit-specific legal ones—something that is likely happen with more and more frequency given an increasingly global and virtual economy.

Consistent answers to those questions are also important because sovereignty and burden concerns

warrant particular restraint when applying personal jurisdiction principles to the international context. *See, e.g.*, *Asahi Metal Indus. Co., Ltd.* 480 U.S. at 115. As *Daimler* observed, endorsing an "uninhibited approach to personal jurisdiction" has real-world consequences: "The Solicitor General informs us, in this regard, that foreign governments' objections to some domestic courts' expansive views of general jurisdiction have in the past impeded negotiations of international agreements on the reciprocal recognition and enforcement of judgments." 571 U.S. at 141-42 (cleaned up).

This Court should grant certiorari in this case because the Ninth Circuit's decision cleanly raises two cert-worthy questions, the key jurisdictional facts are undisputed, and the issues fully briefed over two rounds of appeals. In addition, this case presents a rare opportunity for this Court to resolve important questions of the application of Rule 4(k)(2) because of the burdens and barriers foreign defendants face litigating in the U.S. It may be a long time before another case that presents these issues so clearly wends its way to the Court, leaving lower courts to continue to grapple with the intersection of the application of Rule 4(k)(2) and internet contacts without this Court's guidance.

CONCLUSION

The Court should grant this petition.

Respectfully submitted,

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March 23, 2023