

No. 23-504

In The
Supreme Court of the United States

—————◆—————
PHOTOPLAZA, INC., ET AL.,

Petitioners,

v.

HERBAL BRANDS, INC.,

Respondent.

—————◆—————

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

—————◆—————

**BRIEF OF ATLANTIC LEGAL FOUNDATION AS
AMICUS CURIAE IN SUPPORT OF PETITIONERS**

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INTEREST OF THE *AMICUS CURIAE*¹

Established in 1977, the Atlantic Legal Foundation (ALF) is a national, nonprofit, nonpartisan, public interest law firm. ALF's mission is to advance the rule of law and civil justice by advocating for individual liberty, free enterprise, property rights, limited and responsible government, sound science in judicial and regulatory proceedings, and effective education, including parental rights and school choice. With the benefit of guidance from the distinguished legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists who serve on its Board of Directors and Advisory Council, ALF pursues its mission by participating as *amicus curiae* in carefully selected appeals before the Supreme Court, federal courts of appeals, and state supreme courts. See atlanticlegal.org.

* * *

ALF is a steadfast advocate for a civil justice system that is fair to all parties, including corporate defendants. The question presented by the petition for a writ of certiorari—whether an online seller whose products ship nationwide is subject to personal jurisdiction in every State to which even one of its products is shipped—implicates what the Court in *International Shoe Co. v. Washington*, 326 U.S. 310,

¹ Petitioners' and Respondent's counsel were provided timely notice in accordance with Supreme Court Rule 37.2. No counsel for a party authored this brief in whole or part, and no party or counsel other than the *amicus curiae* and its counsel made a monetary contribution intended to fund preparation or submission of this brief.

316 (1945), and many times since, has described as “traditional notions of fair play and substantial justice.” This question is especially important given the explosive growth of online shopping, both directly through product manufacturers’ and distributors’ interactive websites, and through online, third-party “storefronts” operated by companies such as Amazon.

As a practical matter, the Ninth Circuit’s holding, similar to holdings by the Second and Seventh Circuits—but contrary to the Fifth and Eighth Circuits—expands specific personal jurisdiction over corporate defendants so vastly, it essentially creates *nationwide* personal jurisdiction. To the detriment of consumers as well as online sellers, the Ninth Circuit’s ruling not only obliterates this Court’s “minimum contacts” personal jurisdiction principles, but also facilitates forum shopping, which significantly undermines due process of law. The Court should grant certiorari and reverse the Ninth Circuit.

SUMMARY OF ARGUMENT

This case raises an important and recurring, Internet-age personal jurisdiction question that has divided the circuits: Where can a company that offers its products nationwide—either directly through its interactive website, or indirectly through a third-party online platform such as Amazon—be sued? Can such a company be sued in *any* State to which its products are shipped, despite the company’s lack of other contacts with the forum State? Or do the Court’s carefully articulated, minimum-contacts personal

jurisdiction principles apply to prevent nationwide forum shopping? The Court needs to answer these questions now to protect due process, establish predictability for the countless number of businesses whose products are sold online, and prevent harm to consumers.

The Ninth Circuit’s ruling, which allows Arizona to exercise personal jurisdiction over Petitioners even though they have no purposeful contacts with that State, creates capricious expectations concerning where online sellers can be sued. This uncertainty drives up premiums for liability insurance (to the extent such insurance is available), and in view of the nationwide forum shopping that the Ninth Circuit’s ruling encourages and facilitates, significantly increases the risk of being sued, held liable, and assessed “nuclear” damages, in a hostile forum.

The exponential growth of online retail sales underscores the enormous dimensions of the question presented. For example, there has been record-breaking holiday season online spending this year, “with Cyber Monday growing 9.6% year-over-year (YoY) to \$12.4 billion, and Cyber Week up 7.8% YoY to \$38 billion.” Adobe News, *Media Alert: Adobe: Cyber Monday Surges to \$12.4 Billion in Online Spending, Breaking E-Commerce Record* (Nov. 28, 2023).² And it is not just holiday shopping that has grown online. During the COVID-19 pandemic, e-commerce became

² Available at <https://tinyurl.com/mrw8rkz4>.

predominant, with online sales exceeding \$1 trillion in 2022. See Adobe News, *U.S. Consumers Spent \$1.7 Trillion Online During the Pandemic, Rapidly Expanding the Digital Economy* (Mar. 15, 2022).³

The warp-speed growth of online sales makes it critical that the Court decide how personal jurisdiction principles should apply to online sellers of products and services. This is an ideal case to resolve the entrenched circuit split on this question.

ARGUMENT

Allowing Online Sellers To Be Sued Almost Anywhere Encourages Forum Shopping, Thereby Depriving Defendants of Due Process and Harming Consumers

A. The Ninth Circuit’s ruling encourages forum shopping by turning *Calder*’s “express aiming” requirement on its head

To establish specific personal jurisdiction, *Calder v. Jones*, 465 U.S. 783 (1984), requires a plaintiff to demonstrate, *inter alia*, that a defendant has engaged in conduct “expressly aimed” at the forum State. *Id.* at 789. This well-established “express aiming” requirement is consistent with *International Shoe*’s seminal “minimum contacts” due process standard for exercise of personal jurisdiction. See 326 U.S. at 316.

³ Available at <https://tinyurl.com/3c4b7jae>.

But the Ninth Circuit has violated *International Shoe's* and *Calder's* teaching by subjecting online sellers to personal jurisdiction in *any* and *every* State to which its products have been shipped—even by an arms-length third-party such as Amazon.

Respondent alleges that Petitioners “sold products to Arizona residents.” Pet. App. 5a. This oversimplification erroneously implies that Petitioners “purposefully directed” their alleged trademark-infringing products at Arizona residents. *Id.* 10a (citing *Calder*). To the contrary, Petitioners’ sole “contact” with Arizona was their *nationwide* offering of products via the universally accessible, Amazon “virtual storefront.” Without any further involvement by Petitioners, Amazon allegedly offered, sold, processed, and shipped products nationwide, including to an “unknown number” of purchasers in Arizona. *Id.* 7a. The Ninth Circuit held that this independent, third-party conduct by Amazon somehow was sufficient to satisfy *Calder's* express aiming standard to establish specific personal jurisdiction in Arizona over Petitioners. *See id.* 11a-17a.

According to the court of appeals, “if a defendant, in its regular course of business, sells a physical product via an interactive website and causes that product to be delivered to the forum, the defendant has purposefully directed its conduct at the forum such that the exercise of personal jurisdiction may be appropriate.” *Id.* 4a-5a. The practical consequence of this holding is that any company that places an item

for sale on a publicly accessible, interactive website can be subjected to tort or other litigation wherever the product may have been shipped despite there being “no evidence that the [seller] specifically targeted [the] forum.” *Id.* 14a.

The court of appeals acknowledged that *Calder* establishes the controlling test for exercise of specific personal jurisdiction here. *See id.* 10a. In *Calder* this Court articulated a test for specific personal jurisdiction, commonly known as the “*Calder* effects test,” part of which is the express-aiming requirement. *See Walden v. Fiore*, 571 U.S. 277, 287-88 & 288 n.7 (2014). The *Calder* opinion was careful to emphasize that the predominant part of the defendants’ alleged tortious conduct—published defamatory statements about a forum resident—occurred in the forum State. *See Calder*, 465 U.S. at 788-89 (“The allegedly libelous story concerned the California activities of a California resident. . . . the brunt of the harm . . . was suffered in California”); *Walden*, 571 U.S. at 288 (explaining that “[t]he crux of *Calder* was that the reputation-based effects of the alleged libel connected the defendants to California, not just to the plaintiff.”). As the Court explained in *Calder*, California, the forum State in that case, “is the focal point both of the story and the harm suffered.” *Calder*, 465 U.S. at 789.

In contrast, Arizona, the forum State here, is not “the focal point of the story.” *Id.* The court of appeals acknowledged that “Plaintiff does not allege that Defendants specifically directed their website or their products at Arizona.” Pet. App. 13a-14a; *see also id.*

7a (“Plaintiff alleges that Defendants, in their regular course of business . . . made an unknown number of sales to Arizona residents”). Instead, the court of appeals merely assumed that Petitioners made sales to Arizona residents “by choosing to operate on a universally accessible website [an Amazon ‘storefront’] that accepts orders from residents of all fifty states and delivers products to all fifty states.” *Id.* 19a. The Ninth Circuit’s (and Respondent’s) speculation that at least one of Petitioners’ products was shipped to Arizona does not establish that their allegedly tortious conduct was “purposefully directed” or “expressly aimed” at Arizona. *See id.* 9a-10a.

Yet, under the Ninth Circuit’s holding, a forum-shopping plaintiff can establish personal jurisdiction over an online seller simply based on the assumption that by utilizing a universally available, interactive website, the product at issue has been shipped to a purchaser in the forum State.

“[A]n opportunity for forum shopping exists whenever a party has a choice of forums that will apply different laws.” *Ferens v. John Deere Co.*, 494 U.S. 516, 527 (1990); *cf. Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). By allowing a plaintiff to manufacture personal jurisdiction over an online seller simply as a result of ordering a product through a website—even, as here, through a third-party website—or, again as here, merely by assuming that the product has been shipped to a customer in a particular State, the Ninth Circuit essentially has enabled a plaintiff to choose *any* State as a forum.

This holding eviscerates the Court’s carefully calibrated principles governing exercise of personal jurisdiction and enables nationwide forum shopping.

Under a proper reading of *Calder*, the Ninth Circuit should have asked whether Arizona was the “focal point” of Petitioners’ alleged tortious conduct. *Calder*, 465 U.S. at 789. The answer is no: Petitioners’ actions—offering their alleged infringing products for sale to anyone through Amazon—were not expressly aimed at, and indeed, did not have a connection to, that forum State.

B. By encouraging forum shopping, the Ninth Circuit’s ruling deprives online sellers of due process

The nationwide forum-shopping facilitated by the Ninth Circuit’s holding seriously undermines the due process of law to which every defendant is entitled. Indeed, in its opinion below, the court of appeals recognized that “subjecting [an online seller] to specific personal jurisdiction in every forum in which the website was visible, whether or not the seller actually consummated a sale . . . would be too broad to comport with due process.” Pet. App. 12a. But this is exactly what the Ninth Circuit has done.

The Due Process Clause is intended to ensure that all defendants face a predictable level of risk and receive appropriate procedural protections. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980) (the Due Process Clause’s minimum

contacts requirement “protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.”); *Walden* 571 U.S. at 284 (“For a State to exercise jurisdiction consistent with due process, the *defendant’s* suit-related conduct must create a substantial connection with the forum State.”) (emphasis added).

Forum shopping undermines due process because it is the antithesis of “fair play and substantial justice.” *Int’l Shoe*, 326 U.S. at 316. Instead, forum shopping involves “taking an unfair advantage of the opposing party.” Richard Maloy, *Forum Shopping – What’s Wrong with That*, 24 *Quinnipiac L. Rev.* 25, 28 (2005).

This Court has a long history of attempting to curb such unfair conduct on the part of a litigant. Indeed, at least since *Erie*, the Court, in many contexts, has decried various forms of forum shopping. *Hanna v. Plumer*, 380 U.S. 460, 468 (1965) (“discouragement of forum-shopping” is one of the “aims of the *Erie* rule”); see, e.g., *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 455 (2015) (rejecting a state judge recusal rule “that would enable transparent forum shopping”); *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 670 (2014) (“The federal limitations period governing copyright suits serves . . . to prevent the forum shopping invited by disparate state limitations periods”); *Atl. Marine Constr. Co. v. U.S. Dist. Ct.*,

571 U.S. 49, 65 (2013) (federal change-of-venue statute “should not create or multiply opportunities for forum shopping” where parties have agreed to a contractual forum-selection clause) (internal quotation marks omitted); *Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 415 (2010) (“We must acknowledge the reality that keeping the federal court-door open to class actions that cannot proceed in state court will produce forum shopping.”); *Southland Corp. v. Keating*, 465 U.S. 1, 15 (1984) (“The interpretation given to the Arbitration Act by the California Supreme Court would . . . encourage and reward forum shopping.”); see also Note, *Forum Shopping Reconsidered*, 103 Harv. L. Rev. 1677, 1681 (1990) (“The Supreme Court has relied on the ‘danger of forum shopping’ in reaching many decisions”).

Here, the Ninth Circuit has created such a low bar for exercise of personal jurisdiction over online sellers that degradation or deprivation of due process attendant to forum shopping is inevitable.

The Ninth Circuit’s lax standard for personal jurisdiction over online sellers creates incentives for even more injustice. As one scholar has explained, “[l]oose jurisdictional rules that allow plaintiffs to choose among many potential courts give judges an incentive to be pro-plaintiff in order to attract litigation.” Daniel Klerman, *Rethinking Personal Jurisdiction*, 6 J. of Legal Analysis 245, 247 (2014). More specifically, “the fact that plaintiffs choose the most favorable forum may give some courts an

incentive to make their laws, procedures, and institutions especially favorable to plaintiffs.” *Id.* at 259. In other words, one “problem with forum shopping is that it can lead to ‘forum selling,’ the creation of excessively pro-plaintiff law by judges who want to hear more cases.” *Id.* at 247; *see also* Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. Cal. L. Rev. 241, 243 (2016).

C. The Ninth Circuit’s ruling also harms consumers

Under the Ninth Circuit’s forum shopping-facilitating holding, online sellers have, at best, limited control over their potential liability exposure. As a practical matter, their options are to try to minimize risk by attempting to avoid product sales to States with hostile jurisdictions, to attempt to maintain profits by increasing prices to consumers, or to incur the real-world risks, and attendant deprivation of due process, that results from forum shopping.

Savvy businesses try to protect themselves from exposure to litigation risks and potential liability, especially in the many hostile federal and state forums that undermine the nation’s civil justice system. Annual surveys highlight the risks of being subjected to litigation in such jurisdictions, especially those accurately referred to as “judicial hellholes.” *See* Am.

Tort Reform Found., *Judicial Hellholes 2022/23*;⁴ see also *Ranking the States, A Survey of the Fairness and Reasonableness of State Liability Systems*, U.S. Chamber Inst. for Legal Reform (Sept. 2019).⁵ This type of information impacts business decisions. For example, many business decisionmakers indicate that a forum's litigation environment impacts choices such as where to do business. See *2019 Lawsuit Climate Survey: Ranking the States*, U.S. Chamber Inst. for Legal Reform (2019).⁶

Insofar as online sellers, for logistical or other reasons, are unable or unwilling to try to minimize their liability exposure by withholding product shipments to hostile jurisdictions, consumers literally will pay the price for the forum shopping encouraged by the Ninth Circuit's opinion. See, e.g., Timothy Capowski et al., *Ahead to the Past (Part III of III) The Evolution of New Rules of Engagement in the Age of Social Inflation and Nuclear Verdicts*, N.Y.L.J. (July 27, 2020) ("Nuclear verdicts (and routinely excessive verdicts) drive insurers from the market and increase premiums. The twin pressures of decreasing competition and increased insurance costs are ultimately passed through to the consumer.").⁷ Granting certiorari and rejecting the Ninth Circuit's

⁴ Available at <https://tinyurl.com/y7fne4y2>.

⁵ Available at <https://tinyurl.com/2s4z74ht>.

⁶ Available at <https://tinyurl.com/y2j56p2z>.

⁷ Available at <https://tinyurl.com/2u86r6rv>.

expansive view of personal jurisdiction over online sellers (and the similar views of the Second and Seventh Circuits, *see* Pet. at 6-7) will protect the interests of consumers as well as the due process rights of defendants.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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