

No. 23-504

**In the
Supreme Court of the United States**

PHOTOPLAZA, INC., GOLDSHOP 300, INC.,
GOLDSHOP, INC., INSTOCK GOODIES, INC.,
TZVI HESCHEL, SHLOMA BICHLER
AND LALI DATS,

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 THE DRI CENTER FOR LAW AND
PUBLIC POLICY AS *AMICUS CURIAE* IN
SUPPORT OF PETITIONERS**

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INTEREST OF THE AMICUS

The DRI Center for Law and Public Policy¹ is the public policy “think tank” and advocacy voice of DRI, Inc.—an international organization of approximately 14,000 attorneys who represent businesses in civil litigation. DRI’s mission includes enhancing the skills, effectiveness, and professionalism of defense lawyers; promoting appreciation of the role of defense lawyers in the civil justice system; and anticipating and addressing substantive and procedural issues germane to defense lawyers and the fairness of the civil justice system. The Center participates as an amicus curiae in this Court, federal courts of appeals, and state appellate courts in an ongoing effort to promote fairness, consistency, and efficiency in the civil justice system.

The instant case is appropriate for the Center’s amicus participation. For online retailers, the Ninth Circuit’s decision creates further uncertainty as to whether they could be subjected to suit in jurisdictions across the country regardless of minimum contacts with those particular forums. Over the last several decades, courts have struggled with how to apply the jurisdictional due process principals outlined in *International Shoe* to businesses that operate exclusively on the internet. Specifically, there is no uniform set standard as to

¹ No counsel for any party authored this brief in whole or in part. No person or entity other than amicus, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief. Petitioners’ and Respondent’s counsel were provided timely notice in accordance with Supreme Court Rule 37.2.

whether the online sale of a physical product subjects the seller to jurisdiction of courts within the state to which the product was delivered. Circuits are divided on whether such activity establishes sufficient connection to the forum state that would satisfy the tests derived from *Keeton, Calder*, and their progeny. DRI members' clients that conduct some or all of their business online, have a keen interest in knowing whether selling products through an online marketplace will subject them to lawsuits throughout the country regardless of the seller's connection with those forum states. This case will provide the Court an opportunity to help bring about needed clarification. That, in turn, will allow DRI members to provide better advice to their clients.

SUMMARY OF ARGUMENT

The Court's "minimum contacts" test has served as the touchstone for analyzing whether a forum can exercise specific jurisdiction over a foreign defendant for almost seventy-five years. This test, and the subsequent frameworks that derive from the *International Shoe* decision, serve as a clear and effective guide for courts when faced with examples of traditional interstate commerce.

Technological advances over that period, however, have strained the analytical tools developed by the Court. Presently, an ever-increasing number of retailers operate largely or exclusively on the internet and through third party e-commerce platforms such as Amazon Marketplace. These mechanisms create further separation between sellers and their buyers, who are often in jurisdictions

far removed from each other and perhaps even from where the product originates.

The traditional tests for determining personal jurisdiction for e-commerce defendants, therefore, need updating by the Court. In the absence of specific guidance, the circuits have developed a wide range of tests and guidelines that expand upon what constitutes “minimum contacts” beyond what was outlined in *International Shoe* and by the Court’s succeeding cases dealing with specific jurisdiction. Unfortunately, this has created uncertainty for online retailers that rely on the use of interactive websites that are accessible throughout the United States. This uncertainty has been created, in part, by a split amongst the circuits as to whether these retailers have sufficient contacts with forums where the only connection to the forum is the sale of physical items through a third-party fulfillment company.

Accordingly, the amicus urges this Court to decide that the sale and shipment of products through a broadly accessible website, without more, is not enough to demonstrate that the defendant expressly aimed its activities towards the forum market and reverse the judgment below. In so doing, the Court would preserve its “minimum contacts” jurisprudence while updating it for the needs of modern e-commerce.

ARGUMENT

There have been significant changes to how the stream of commerce flows from seller to buyer since 1945, when the Court explained that the Fourteenth Amendment’s Due Process Clause limits a state court’s power to exercise jurisdiction only when a

defendant has sufficient minimum contacts with the forum State. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Over time, the “minimum contacts” referenced in *International Shoe* have evolved into a differentiation between general jurisdiction and specific jurisdiction. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011) (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984)). Specific jurisdiction depends on the particular activities of a defendant within the forum State that are purposeful and that relate to the plaintiff’s claims. *Ford Motor Co. v. Mont. Eighth Judicial Dist. Court*, 141 S. Ct. 1017, 1025-26 (2021).

Where, as here, jurisdiction is based upon the sale of physical items via an interactive website, which are then shipped nationwide, the “minimum contacts” analysis begins to fray. The internet by its nature is accessible to everyone. Thus, if one applies the most liberal reading of the “minimum contacts” jurisprudence, an e-commerce retailer would subject itself to courts throughout the nation simply by operating an interactive website. That result clearly does not comport with notions of fair play and justice that are the backbone of *International Shoe*.

Absent clear direction from the Court, the various circuits have developed their own tests and guidelines for dealing with the issue of online retailers. This is untenable for the retailers themselves, as they are hobbled by uncertainty as to whether sales made on the internet to residents of different states could result in being hauled into court within those states. The Court should grant the

petition in this matter to resolve the fracture amongst the circuits and provide a uniform standard for adjudicating specific jurisdiction over online sellers.

I. Lack of clarity concerning application of the “purposeful direction” test to online retailers creates uncertainty.

Businesses that engage in online retail sales, while having a much broader potential reach than traditional brick and mortar storefronts, are equally entitled to predictability regarding application of laws to their sales. Indeed, such predictability is one of the primary goals of minimum contacts jurisprudence.

This predictability imperative is founded upon the Due Process Clause, which “gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.” *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). This has been characterized as a “fair warning” requirement, which is satisfied where a defendant has “purposefully directed” its activities at residents of the forum and the resulting litigation arises out of those activities. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1994) and *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984)). It is not enough to merely allege that the defendant could “foresee” that its actions could have an effect in the forum state. *Calder v. Jones*, 465 U.S. 783, 789 (1984) (citing *Woodson, supra*, at 296).

The Court has continued to elaborate upon the “minimum contacts” standard originally found in *International Shoe*. It has purposefully moved away from concerns over an individual State’s sovereignty, instead stating that courts must focus on “the relationship among the defendant, the forum, and the litigation.” *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977). It is “essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.” *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

In 1985, the Court explained that for specific jurisdiction to apply, the defendant must have “purposefully directed’ his activities at residents of the forum, *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984), and the litigation results from alleged injuries that arise out of or relate to those activities.” *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985). This “purposefully directed” requirement was further narrowed in *Walden v. Fiore*, where the Court held that the defendant’s relationship to the forum state must arise out of contacts that the “defendant himself” created with the forum state, and that courts should look to the defendant’s contacts and conduct with the forum state itself, not the defendant’s contacts with persons who reside there. 571 U.S. 277, 284-85 (2014).

The contacts must be the defendant’s own choice and not “random, isolated, or fortuitous.” *Keeton v. Hustler Magazine, Inc.*, 465 U. S. 770, 774,

104 S. Ct. 1473, 79 L. Ed. 2d 790 (1984). The plaintiff must also show that the defendant deliberately “reached out beyond” its home—by, for example, “exploit[ing] a market” in the forum state or entering a contractual relationship centered there. *Ford Motor Co. v. Mont. Eighth Judicial Dist. Court*, 141 S. Ct. 1017, 1025 (2021) (quoting *Walden v. Fiore*, 571 U. S. 277, 285 (2014)).

The current split amongst the circuits does not provide that minimum assurance to online retailers required by the Due Process Clause, but instead makes jurisdictional analysis itself random and arbitrary. For example, the circuits have offered different opinions about how the number of sales to a specific forum would affect their analysis. The subject opinion issued by the Ninth Circuit expressly rejects any reliance on the number of sales made to the forum in deciding minimum contacts. *Herbal Brands, Inc. v. Photoplaza, Inc.*, 72 F.4th 1085, 1095 (9th Cir. 2023). The Eighth Circuit, on the other hand, has said that a single suit-related contact would likely not provide an adequate basis for jurisdiction over an out-of-state defendant. *Bros. & Sisters in Christ, LLC v. Zazzle, Inc.*, 42 F.4th 948, 953 (8th Cir. 2022).

Courts have also struggled with the broad reach of internet storefronts. The Fifth Circuit explicitly rejected the premise that websites being universally accessible means that the website operators are subject to personal jurisdiction within any state in which the content is accessed. *Admar Int'l, Inc. v. Eastrock, L.L.C.*, 18 F.4th 783, 787 (5th Cir. 2021) (“[W]e now expressly hold, a defendant does not have sufficient minimum contacts with a forum

state just because its website is accessible there.”). The *Eastrock* opinion also noted that other circuits have come to the same conclusion related to widely accessible websites. *See, e.g., be2 LLC v. Ivanov*, 642 F.3d 555, 559 (7th Cir. 2011) (“If the defendant merely operates a website, even a 'highly interactive' website, that is accessible from, but does not target, the forum state, then the defendant may not be haled into court in that state without offending the Constitution.”); *Shrader v. Biddinger*, 633 F.3d 1235, 1241 (10th Cir. 2011) (“The maintenance of a web site does not in and of itself subject the owner or operator to personal jurisdiction, even for actions relating to the site, simply because it can be accessed by residents of the forum state.”); *GTE New Media Servs. Inc. v. BellSouth Corp.*, 199 F.3d 1343, 1350, 339 U.S. App. D.C. 332 (D.C. Cir. 2000) (rejecting argument that the “mere accessibility of the defendants' websites establishes the necessary 'minimum contacts' with [the] forum”).

The circuits have similarly split in determining whether the operation of an interactive website contributes to establishing that a defendant expressly aimed its conduct toward the forum in question. In *Bros. & Sisters in Christ, LLC v. Zazzle, Inc.*, the Eighth Circuit found that a Missouri consumer accessing the defendant’s national website and purchasing a shirt through that website was insufficient to show that the defendant expressly aimed its allegedly tortious actions at consumers in Missouri, citing *Calder* and its progeny. 42 F.4th at 954.

The Ninth Circuit, in the underlying opinion, also utilized the *Calder* “effects test,” but with a different outcome. *Herbal Brands, Inc. v. Photoplaza, Inc.*, 72 F.4th at 1091. In determining whether the defendant had “expressly aimed” its conduct at the forum state, the court explained that “operating a website in conjunction with ‘something more’—conduct directly targeting the forum—is sufficient to satisfy the express aiming prong.” *Id.* at 1092 (citing *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1229 (9th Cir. 2011) (quotations omitted). It then reasoned that sales of a product to forum residents constitute “something more” sufficient to establish express aiming. *Photoplaza*, 72 F.4th at 1092-93. The Second and Seventh Circuits came to similar conclusions without relying on the Ninth Circuit’s “something more” requirement. *See Chloe v. Queen Bee of Beverly Hills, LLC*, 616 F.3d 158, 167 (2d Cir. 2010) and *NBA Props, Inc. v. HANWJH*, 46 F.4th 614, 624-25 (7th Cir. 2022).

These opinions, while well-intentioned, do nothing to assuage the concerns of online retailers about the likelihood of them being haled into every forum in which their websites are accessed. If each circuit has a slightly different test, then the goal of uniformity/predictability is completely unattainable. The clearest discussion of this issue comes from the Fifth Circuit, which seeks the greatest level of predictability in outcomes for online retailers. *See Pervasive Software, Inc. v. Lexware GMBH & Co. KG*, 688 F.3d 214, 228 (5th Cir. 2012). Fifth Circuit precedent explicitly requires a showing that the defendant “purposefully targeted” the forum. *Id.* This

is a more clear and precise standard than the “something more” relied upon by the Ninth Circuit.

The Court should grant the petition in this matter to establish a single standard for adjudicating minimum contacts for online retailers. The Due Process Clause, as well as the practicalities of online commerce, demands it.

II. Specific jurisdiction is especially inappropriate for third parties using e-commerce platforms such as Amazon Marketplace.

Use of the established tests for specific jurisdiction is even more inadequate when applying them to sellers like the Petitioners who utilize third party e-commerce platforms such as Amazon Marketplace. The potential for uncertainty within this online marketplace is enormous. In 2022, there were nearly two million selling partners worldwide that sold products through Amazon.² More than 600,000 sellers in the United States utilized Fulfillment By Amazon, the third-party fulfillment service utilized by the instant Petitioners, in 2021. *Id.* This service allows independent sellers to have Amazon provide the storage, packing, fulfillment, and customer service for their orders.³ Retailers such as

² See *Amazon Small Business Empowerment Report*, Published November 2022, <https://assets.aboutamazon.com/56/ff/42fe2d294620b21432c7bb59d1e/amzn-small-business-empowerment-2022-final.pdf> (last visited Dec. 7, 2023).

³ See *Amazon 2022 Small Business Empowerment Report*, Published May 2023, <https://assets.aboutamazon.com/18/e4/5da1cc13463eb9e5df9c3c>

the Petitioners ship their products to Amazon facilities, which in turn receive, process, and ship orders to consumers with limited or no involvement from the originating seller. *Id.*

This mechanism not only fails the Ninth Circuit’s test requiring express aiming plus “something more,” it is indeed something less than what is found in traditional commercial transactions. In this third-party fulfillment scheme, there is a level of removal between buyer and seller and, consequently, between the seller and the buyer’s forum. There are trade-offs made in this arrangement. For example, the seller relinquishes control over the warehousing, processing, and shipping of its products to Amazon, in exchange for greater access to customers and logistical ease. The seller also relinquishes control over the forums to which its products are shipped, which certainly invokes the due process concerns discussed above.

In the current jurisprudential landscape, online retailers engaging with third-party fulfillment companies are left with even less certainty as to which jurisdictions they would potential be subject to suit. Clear direction is needed from the Court, specifically direction that comports with its original justification for “minimum contacts” analysis. Uncertainty in commerce leads to random and capricious outcomes based solely on the location of customers that decide to order products. That is antithetical to the goal of specific jurisdiction, which has long required specific actions taken by the defendant in the forum state.

876309/amazon-sbreport2022-published5-31-23.pdf (last visited Dec. 7, 2023).

Relying on the actions of the consumers within the forum state contravenes decades of jurisprudence from the Court. Therefore, the Court should grant the petition in this matter to resolve the uncertainty faced by online retailers.

CONCLUSION

The Court should reverse the judgment below and dismiss the suit brought against Petitioners for lack of personal jurisdiction.

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Respectfully submitted,

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