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 A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is an out-of-state defendant subject to specific personal jurisdiction when it has regularly sold physical products to consumers in the forum state through a website while knowing that the sales allegedly cause harm in the forum and give rise to a forum resident's claims?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Respondent Herbal Brands, Inc. states that it is a Delaware corporation located in Arizona and is a direct wholly owned subsidiary of Clever Leaves Holdings Inc., a publicly traded company.

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INTRODUCTION

The Court should deny review. There is no circuit split on the dispositive issue. There is no basis for the petition's mistaken recitation of the dispositive facts. There has been no departure from the relevant precedents of this Court.

The Ninth Circuit simply held that Petitioners are subject to personal jurisdiction in Arizona because they admitted that they regularly sell to Arizona consumers products that give rise to Respondent's claims for trademark infringement, while knowing that Respondent is located in Arizona and their sales cause harm in Arizona. This unremarkable holding is consistent with this Court's familiar edict that "if the sale of a product . . . is not simply an isolated occurrence, but arises from the efforts of the [seller] to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States" if the sale gives rise to claims of a forum resident. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

The only remarkable thing about the petition is the extent to which it deviates from the intractable realities of this case. Petitioners assert that products were "sold and shipped by a third-party (Amazon)." Pet. 12. In reality, *Petitioners* have always been the sellers of their products and receive payment from consumers when their products are purchased. The decisions that Petitioners present as constituting a supposed "circuit split" are also almost entirely in unison.

They differ only on the narrow issue of whether a single sale into the forum by an out-of-state seller, with nothing more, can subject the seller to jurisdiction on claims arising from the sale. That issue is not relevant in this case because Petitioners conceded that they regularly sell products giving rise to Respondent's claims into Arizona and argued instead that their product sales, despite being substantial, cannot subject them to jurisdiction because Respondent did not allege that Petitioners specifically targeted Arizona over other states with their sales.

Petitioners likewise misstate this Court's precedent. They argue that courts may exercise personal jurisdiction over out-of-state online sellers only if the sellers have sold thousands of products into the forum each month that give rise or relate to the plaintiff's claims ("claim-linked products") or made the forum the "focal point" of their sales. This Court has held no such thing, as the Ninth Circuit noted, and there is no conflict between the Ninth Circuit's decision and this Court's precedent. Accordingly, this Court should deny the petition.

STATEMENT OF THE CASE

A. Factual background and proceedings in the district court.

Respondent is a Delaware corporation, located in Arizona, that sells health, wellness, and nutrition products. App. 5a. Petitioners are New York residents

who have sold products bearing Respondent's trademarks ("Infringing Products") through two online storefronts on www.amazon.com ("Amazon"). *Id.*

Respondent sued Petitioners in Arizona federal court for trademark infringement under the Lanham Act and related claims based on Petitioners' sales of Infringing Products to consumers in Arizona and other states. App. 6a. Respondent alleged that Petitioners are subject to jurisdiction because they have "purposefully directed and expressly aimed their tortious activities toward the State of Arizona and established sufficient minimum contacts with Arizona by, among other things, advertising and selling infringing products bearing [Respondent's] trademarks to consumers within Arizona through a highly interactive commercial website, through the regular course of business, with the knowledge that [Respondent] is located in Arizona and is harmed in Arizona as a result of [Petitioners'] sales of infringing products to Arizona residents." Dist. Ct. ECF No. 1 ¶¶ 33, 222.

Respondent alleged further that: (1) Petitioners know that Respondent is located in Arizona because they received multiple cease-and-desist letters informing them that Respondent is located in Arizona and harmed there by their sales of Infringing Products; and (2) Respondent's claims "arise out of [Petitioners'] sales of [Infringing Products] to Arizona residents through the regular course of business." *Id.* at ¶¶ 33, 214-19; App. 5a-6a. Finally, Respondent alleged that Petitioners had sold more than 23,000 Infringing Products through their Amazon storefronts, according to Respondent's

monitoring software, but explained that their software cannot filter or estimate Petitioners' sales into specific states. Dist. Ct. ECF No. 1 ¶¶ 220-21; App. 5a.

Petitioners moved to dismiss for lack of personal jurisdiction but did not submit any evidence to contradict the allegations in Respondent's complaint. App. 6a. Despite conceding that they had regularly sold Infringing Products to Arizona consumers, Petitioners argued that they were nonetheless not subject to jurisdiction because Respondent did not allege that they had specifically "targeted" Arizona over other states with their sales. Dist. Ct. ECF No. 8 at 9-12. Petitioners also argued that they could not be subject to jurisdiction, despite their admitted sales of Infringing Products to Arizona residents, because Respondent did not allege that "dietary supplements are an Arizona-centered industry," that "Arizona is an integral component of [Petitioners'] business model or profitability," or that "the economic value of [Petitioners'] Amazon storefronts turns on their appeal to Arizonans." Dist. Ct. ECF No. 20 at 3-4.

With its opposition, Respondent submitted evidence that although Petitioners use a service in which they pay Amazon to ship products to consumers that are purchased from Petitioners' Amazon storefronts, Petitioners retain ownership of all their products and thus directly sell their products to consumers (*i.e.*, ownership of the goods never transfers to Amazon). Dist. Ct. ECF No. 19 at 5-7; Dist. Ct. ECF No. 19-1. Respondent also submitted evidence showing that Petitioners could easily print and submit reports that

would show the exact quantity of Infringing Products that they had sold into Arizona and other states, but Petitioners again did not submit any evidence with their reply brief. *See id.*; App. 6a.

The district court granted Petitioners' motion to dismiss without holding an evidentiary hearing or permitting jurisdictional discovery that Respondents requested in the alternative. App. 26a-35a. Despite acknowledging that Respondents' allegations and evidence must be accepted as true because Petitioners submitted no evidence, the court held that Petitioners had "not expressly aimed their activities at Arizona." App. 28a, 32a. The court also stated that "[Petitioners'] sales of products in Arizona are completely unconnected to [Respondent's] claims" because those claims "did not arise solely as a result of sales of their products to Arizona consumers, but rather, due to the fact that [Petitioners] sold their products illegally as an unauthorized seller nationwide on Amazon." App. 32a. Finally, the court concluded that jurisdictional discovery "would be a waste of time and resources" because, the court surmised, it would not "turn up anything more than a record of a sporadic smattering of sales to consumers in Arizona, which would be 'random, fortuitous, and attenuated.' " App. 34a-35a.

B. Reversal and remand by the Ninth Circuit.

The Ninth Circuit reversed and held that, "[t]aking [Respondent's] uncontroverted allegations as true," the district court has personal jurisdiction

over Petitioners. App. 25a. The court held that "[Respondent's] claims—which allege harm caused by [Petitioners'] sales of products—***clearly arise out of and relate to*** [Petitioners'] conduct of selling those same products to Arizona residents." App. 22a (discussing *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017 (2021)) (emphasis added). The Ninth Circuit further held that Respondent's allegations establish that Petitioners engaged in an "intentional act" by selling Infringing Products to Arizona consumers and that Petitioners knew "their actions were causing harm in Arizona" because of their receipt of Respondent's cease-and-desist letters. App. 11a & n.2.

The Ninth Circuit further ruled that, by regularly selling Infringing Products to Arizona residents, Petitioners had purposefully directed claim-linked acts toward Arizona and made contacts with Arizona that are not "random, isolated, or fortuitous." App. 9a-21a. The court stated that if Petitioners' contacts with Arizona consisted solely of Arizona residents viewing content that Petitioners had passively displayed on a website and the "website itself is [thus] the only jurisdictional contact," then analysis would "turn[] on whether the site had a forum-specific focus or the defendant exhibited an intent to cultivate an audience in the forum." App. 13a (citing cases where defendants operated websites that merely displayed adult content or images of celebrities that forum residents had viewed). Because Petitioners had used the Amazon website to actually sell Infringing Products to Arizona residents, however, the Ninth Circuit held that Petitioners had "expressly

aimed" acts at Arizona and Respondent was not required to show that Petitioners had "specifically targeted" Arizona over other states with their sales, advertising, or other operations. App. 14a.-21a. The court further held that "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 'expressly aimed' its conduct at that forum." App. 14a-15a.

The Ninth Circuit explained that its holdings prevent online sellers from being subject to jurisdiction because of forum contacts that are "random, isolated, or fortuitous" because "[w]hen an online sale occurs as part of a defendant's regular course of business, it 'arises from the efforts of the [seller] to serve directly or indirectly[ ] the market for its product . . . ,' and the defendant 'should reasonably anticipate being haled into court' where the product is sold." App. 17a (quoting *World-Wide*, 444 U.S. at 297) (other quotations omitted). The court also explained that its holdings prevent a defendant from being subject to jurisdiction by merely "placing its products into the stream of commerce," without more, and having no "control over the ultimate distribution of its products." App. 18a.

The Ninth Circuit noted further that the "outcome of the express-aiming inquiry does not depend on the number of sales made to customers in the forum." App. 18a-19a. The court wrote: "[d]rawing a line based on the number of sales would require an arbitrary distinction that is not preferred in this area of the law. . . . [i]f one sale were not enough to establish that a defendant

expressly aimed its conduct at a forum, we would face the difficult question of how many sales would suffice." App. 19a-20a (citing *Burger King v. Rudzewicz*, 471 U.S. 462, 485-86 (1985)). However, the court stated that the final prong of the "specific jurisdiction inquiry"—that "the exercise of jurisdiction always must be reasonable"—still allows defendants to argue "that the exercise of jurisdiction is not appropriate because a defendant sold only a small number of [claim-linked] products to forum residents." App. 20a, 24a (quotation omitted).

The court hypothesized that if "a Maine resident ran a small business selling New England-themed keychains and made a sale to an Arizona resident, the seller may be able to argue successfully that it would not be reasonable to hale him into court in Arizona because of the limited nature of his purposeful interjection into Arizona's affairs or the excessive burden associated with defending himself in the forum." App. 24a. The court also stated that a defendant could argue under the final prong that jurisdiction is not reasonable because its only sale(s) of claim-linked products into the forum were to the plaintiff itself "in an attempt to manufacture jurisdiction." *Id.*

However, the Ninth Circuit noted that neither of these hypotheticals were relevant because Petitioners admitted that they sold Infringing Products to Arizona consumers through the regular course of their business and did not contend that all (or any) of their Arizona sales were to Respondent. App. 24a-25a.

Regarding the mechanics of Petitioners' sales and Petitioners' relationship with Amazon, the Ninth Circuit noted that, while "[Petitioners] are removed from the process of handling orders," Petitioners still "retain ownership of the goods" that they sell through their online storefronts on the Amazon website and "can choose to end their relationship with Amazon at any time." App. 14a n.4. As a result, the court concluded that Petitioners' "use of Amazon's fulfillment service to handle shipping logistics does not alter our jurisdictional analysis any more than a seller's use of the post office to ship its products would affect the inquiry." *Id.*

Because Petitioners directly sell products to consumers through their Amazon storefronts, the court also stated that it "need not and do[es] not answer the question whether the outcome would be different if a defendant did not sell directly to consumers but instead sold its products to a third party with no knowledge of that third party's intent to sell into a particular forum." App. 20a.

REASONS FOR DENYING THE PETITION

Petitioners fail to present any valid reasons that would justify this Court's review. First, contrary to Petitioners' arguments, there is no "circuit split" on whether claim-linked products sold into the forum that are also sold "nationwide" can cause the product seller to be subject to personal jurisdiction. *No court* has held that forum sales are "insufficient" if products are also

sold nationwide. The decisions that Petitioners present as "reaching starkly different results" are nearly entirely in unison and disagree only on the narrow issue of whether a single sale into the forum can be sufficient to subject the seller to jurisdiction on claims arising from the sale. That issue is not relevant in this case because Petitioners admitted that they regularly sell Infringing Products into Arizona and declined to present any evidence of their exact sales volume.

Second, no decision from this Court or any other court has held that courts may exercise specific personal jurisdiction over out-of-state online sellers only if they have "continuously" sold thousands of products into the forum that give rise or relate to the plaintiff's claims or made the forum the "focal point" of their sales. This Court has instead repeatedly stated that: (1) the critical question is whether "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there"; and (2) it is not unreasonable for an out-of-state seller to be subject to jurisdiction in a state where it has sold products that give rise to the plaintiff's claims if the sales are "not simply an isolated occurrence, but arise[ ] from the efforts of the [seller] to serve, directly or indirectly, the market for its product in other States." *See*, *e.g.*, *World-Wide*, 444 U.S. at 297. There is no conflict between the Ninth Circuit's decision and this Court's precedent. On the contrary, this Court's precedent forecloses Petitioners' minimalist view of personal jurisdiction.

A. There is no "circuit split" on whether products sold nationwide can give rise to specific jurisdiction and the minimal division in other decisions is not relevant to this case.

Petitioners argued below that they could be subject to jurisdiction only if they had somehow specifically "targeted" Arizona over other states with their sales of Infringing Products, advertising, or other activities. Dist. Ct. ECF No. 8 at 9-12; Dist. Ct. ECF No. 20 at 3-4; C.A. ECF No. 15 at 15-19. Petitioners submitted no evidence contradicting Respondent's allegations that they have sold more than 23,000 Infringing Products through their Amazon storefronts and have regularly sold Infringing Products to Arizona consumers, App. 5a-6a, presumably because Petitioners knew the evidence would show considerable sales into Arizona. (Petitioners also opposed any jurisdictional discovery into the extent of their sales. Dist. Ct. ECF No. 7.) However, Petitioners argued that the precise volume of their regular sales of Infringing Products to Arizona consumers—whatever it is—does not matter because Respondent did not allege that Petitioners "specifically targeted" Arizona over other states with their sales. *See* Feb. 8, 2023 Ninth Circuit oral argument, available at https://www.youtube.com/watch?v=vGcFHPKhjzQ, at 20:16-25:30 (arguing that Petitioners "targeted" their sales to no states by virtue of selling "everywhere" and therefore can be sued only in their home state of New York).

The "circuit split" that Petitioners now allege has nothing to do with the "specific targeting" arguments they have advanced in this case. Instead, circuit courts have differed only on the narrow issue of whether a single sale into the forum can be sufficient to allow a court to exercise specific jurisdiction over the seller. In *Admar Int'l, Inc. v. Eastrock, L.L.C.*, 18 F.4th 783 (5th Cir. 2021), the Fifth Circuit suggested in dicta that a defendant's "delivery of a single $13 product" by the defendant into the forum would be too "isolated" of an occurrence, without anything more, to give rise to jurisdiction. *Id.* at 787-88 & n.1. In *Bros. & Sisters in Christ, LLC v. Zazzle, Inc.*, 42 F.4th 948 (8th Cir. 2022), the Eighth Circuit held that jurisdiction was lacking because the defendant presented undisputed evidence that its only claim-linked contact with the forum was the sale of a T-shirt to "someone affiliated with [the plaintiff]." *Id.* at 951-54 (8th Cir. 2022). The Eighth Circuit stressed that the plaintiff alleged only "a single suit-related contact with Missouri" and did "not allege that other Missouri consumers viewed or purchased any other infringing goods." *Id.* at 952-54 & n.3.

In *NBA Props. v. HANWJH*, 46 F.3th 614 (7th Cir. 2022), *cert. denied*, 143 S. Ct. 577 (2023), in contrast, the Seventh Circuit held that a seller on Amazon was subject to jurisdiction because it had sold one claim-linked product (a pair of allegedly counterfeit shorts) to the plaintiff's investigator in the forum state. *Id.* at 617-18, 624-47. The court rejected an argument that the sale was merely "the unilateral act of the plaintiff" because the defendant had "shipped a product to the

forum only after it had structured its sales activity in such a manner as to invite orders from [the forum] and developed the capacity to fill them." *Id.* at 625. The court also concluded that the defendant's single sale was sufficient to confer jurisdiction because there is no "categorical rule that multiple online sales, as opposed to a single online sale, are required to establish a sufficient basis for personal jurisdiction." *Id.*

In *Chloe v. Queen Bee of Beverly Hills, LLC*, 616 F.3d 158 (2d Cir. 2010), while the Second Circuit held that a defendant was subject to specific jurisdiction because it had sold "at least one" claim-linked product into the forum, the court also appeared to base its holding on the fact that the defendant had sold other products into the forum that were unrelated to the plaintiff's claims. *See id.* at 165-67, 171-72. Exercising specific personal jurisdiction in part because of a defendant's contacts with the forum that are unrelated to the plaintiff's claims violates this Court's holding and analysis in *Bristol-Myers Squibb Co. v. Superior Court*, 582 U.S. 255 (2017), and the Second Circuit has not remarked on this friction since *Bristol-Myers* was issued.

That is the full extent of Petitioners' claimed "circuit split" relating to the exercise of specific jurisdiction based on online sales of claim-linked products into the forum. Contrary to Petitioners' arguments, the Eighth and Fifth Circuits have *not* held that jurisdiction cannot be exercised over online sellers if their only contacts with the forum are sales of products that are also sold "nationwide." Pet. 5 ("The Eighth and Fifth

Circuits: Nationwide Shipping is Insufficient to Satisfy the Purposeful Direction Test").

In *Zazzle*, the Eighth Circuit did not state or suggest that, had the plaintiff alleged or presented evidence of any additional sales of claim-linked products into the forum beyond the defendant's single sale to plaintiff's agent, jurisdiction would still have been lacking because the defendant sold products "nationwide" and did not specifically "target" the forum over other states. *See* Pet. 5 (erroneously stating that "The Circuit Courts are Split on Whether Sales Into a Forum Via an Interactive Website, From Which Products are Shipped Nationwide, are Sufficient to Establish 'Minimum Contacts'").

The same is true in *Admar*, where the Fifth Circuit also highlighted that the defendant's undisputed single delivery of a claim-linked product into the forum occurred when a third party located outside the forum purchased the product but had it shipped into the forum. *See* 18 F.4th at 785, 788 n.1.[1]

[1] Petitioners also mischaracterize the analysis in *Admar* by stating that, in rejecting a "greater includes the lesser" theory that the plaintiff advanced, the Fifth Circuit concluded that sales of products into the forum that are also sold nationwide cannot give rise to specific jurisdiction because products sold nationwide cannot be "targeted" at any specific state. Pet. 6, 14. The plaintiff's "theory" was confined to an argument that operators of "interactive" websites are subject to jurisdiction in all 50 states because their websites can be accessed in all 50 states and thus "target" all 50 states. *Admar*, 18 F.4th at 787. The court rejected that argument and held that "a defendant does not have sufficient minimum contacts with a forum state just because its website is

The only discrepancy in the decisions presented by Petitioners is that the Seventh Circuit concluded that a single sale into the forum was enough for specific jurisdiction and the Eighth Circuit (considering a single sale to the plaintiff's agent) and the Fifth Circuit (considering a single delivery following a purchase by a third party located outside the forum) concluded that an undisputed single product delivery, without anything more, was not quite enough.

While this Court may eventually choose to address this "single sale" issue, this case does not present a vehicle for consideration of that issue—much less an "ideal vehicle," Pet. 15—because the question has no bearing on whether Petitioners are subject to jurisdiction in Arizona. Petitioners admitted that they have regularly sold Infringing Products into Arizona, App. 19a, and so their only path to a holding that they are not subject to jurisdiction in Arizona would be for this Court to conclude that something more is needed for jurisdiction over online sellers even beyond regular sales of products into the forum that sellers know are allegedly causing harm in the forum and giving rise to a forum resident's claims. No circuit has reached that conclusion or anything close to it, and there is accordingly no "circuit split" on any issues that are relevant to this case.

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accessible there." *Id.* Nothing in the Fifth Circuit's discussion suggests that it would reject jurisdiction based on online sales of claim-linked products into the forum if the same products were also sold into other states.

B. The Ninth Circuit's decision does not conflict with this Court's precedent.

There is also no support for Petitioners' argument that the Ninth Circuit's decision conflicts with this Court's precedent.

1. Petitioners overstate the Ninth Circuit's holdings.

Petitioners assert that "[u]nder the rule promulgated by" the Ninth Circuit, "any seller who ships its products nationwide is subject to personal jurisdiction *in every forum* into which it ships even a single product." Pet. 7. That is patently untrue.

The Ninth Circuit carefully explained that, under its decision, an online seller's sale of physical products into the forum can subject it to specific jurisdiction only if: (1) the products are sold into the forum state in the seller's regular course of business; (2) the seller causes the products to be delivered in the forum and "exercise[s] some level of control over the ultimate distribution of its products beyond simply placing [them] into the stream of commerce"; (3) the sales "caus[e] harm that the [seller] knows is likely to be suffered in the forum state"; (4) the plaintiff's claims "arise out of or relate to" the seller's sales into the forum; (5) the products are directly sold by the seller into the forum rather than to a third party that then sells them into the forum; and (6) the exercise of jurisdiction is reasonable. App. 10a-11a, 14a-20a, 22a-25a.

These requirements are far more complex and demanding than Petitioners' glib mischaracterization of the Ninth Circuit's "rule." For example, under the Ninth Circuit's decision, an out-of-state seller could be subject to jurisdiction only if it chose to sell products into a state despite knowing that the specific products it was selling were allegedly causing harm in the state. In this case, it was critical to the Ninth Circuit's decision to reverse that Petitioners had received cease-and-desist letters warning them that their sales of Infringing Products were allegedly causing harm in Arizona and that Respondent is located in Arizona, and yet Petitioners continued to sell Infringing Products into Arizona through the regular course of their business. App. 6a-7a, 11a & n.2. If a seller chose to not sell products into the forum after learning of alleged harm, or if the plaintiff was otherwise unable to show that a seller knew its sales were causing harm in the forum, then jurisdiction would not exist under the Ninth Circuit's decision. *See id.*

The Ninth Circuit also stated that sellers who have sold only a "small number of products to forum residents" or whose sales into the forum were exclusively to the plaintiff may be able to argue that jurisdiction over them is not reasonable under the final prong of the specific jurisdiction inquiry. App. 22a-24a. Further, of course, sellers can be subject to specific jurisdiction only as a result of sales into the forum that give rise or "relate to" the plaintiff's claims, *Ford Motor Co.*, 141 S. Ct. at 1025 (quotation omitted), and not

merely sales of *any* product into the forum as Petitioners erroneously suggest. Pet. 7.

A plain reading of the Ninth Circuit's decision shows that it does not remotely confer personal jurisdiction over sellers "in every forum into which [they] ship[ ] even a single product."

2. Petitioners misstate the application of *Keeton* and *Calder*.

Petitioners also mischaracterize this Court's precedent in asserting that "together, *Calder* and *Keeton* control when a non-resident defendant, whose products are shipped into a forum, is subject to personal jurisdiction." Pet. 8-11; *see Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984); *Calder v. Jones*, 465 U.S. 783 (1984).

Petitioners base their arguments on the faulty premise that *Keeton* and *Calder*, issued on the same day almost 40 years ago and both featuring libel claims against magazine publications and their employees, established: (1) all-encompassing rules governing the exercise of specific jurisdiction in any case where the alleged basis of jurisdiction is "products . . . shipped into a forum," no matter the facts or legal claims at issue; and (2) a very high threshold for the volume of sales an out-of-state resident must make into the forum for the sales to serve as a basis for specific jurisdiction. Pet. 10 (asserting that, if the *Calder* "rule" cannot be satisfied because the forum is not the "focal point" of a seller's sales, then specific jurisdiction can

exist only if the *Keeton* "rule" is satisfied by the seller shipping "tens of thousands of claim-linked products into the forum each month"). However, there is simply no support for these arguments in any authority and this application of *Keeton* and *Calder* would contradict authority of this Court.

First, at a basic level, this Court has stressed that personal jurisdiction is a highly fact-specific inquiry, that courts cannot use "talismanic jurisdictional formulas," and that "'the facts of each case must [always] be weighed' in determining whether personal jurisdiction would comport with 'fair play and substantial justice.'" *Burger King*, 471 U.S. at 485-86 (quoting *Kulko v. California Superior Court*, 436 U.S. 84, 92 (1978)); *see also Apple Inc. v. Zipit Wireless, Inc.*, 30 F.4th 1368, 1378 (Fed. Cir. 2022) ("Supreme Court precedent . . . has made clear that jurisdictional inquiries cannot rest on such bright-lines rules"); *Ganis Corp. of California v. Jackson*, 822 F.2d 194, 197 (1st Cir. 1987) ("The United States Supreme Court has not, and refuses to, set down any mechanical or automatic test to determine whether a court's exercise of jurisdiction over a nonresident party is violative of the due process clause."). The unique facts and claims of each case continue to make a difference.

Second, *Keeton* and *Calder* themselves—issued well before the rise of the Internet and online sales—do not purport to establish "talismanic" rules that will govern all future cases involving sales of materials that give rise to legal claims. There is no language in either decision suggesting that: (1) the forum must be

the "focal point" of an out-of-state resident's sales in any case where sales into the forum are an alleged basis for specific jurisdiction; or (2) if the forum is not the "focal point," the seller must have shipped at least the same quantity of claim-linked products into the forum each month as the defendant did in *Keeton*. 465 U.S. at 772 (stating that defendant sold "some 10,000 to 15,000 copies of Hustler Magazine" into forum state each month). This Court has also not held or stated in any subsequent decision that *Keeton* or *Calder* established minimum thresholds for jurisdiction (let alone in cases related to Internet sales). Petitioners do not cite any decision of this Court in support of their arguments except for *Keeton* and *Calder*, where they recite only the facts of each case. Pet. 8-11.

Third, not even the two decisions from lower courts that Petitioners cite provide support for Petitioners' arguments. Both *Fielding v. Hubert Burda Media, Inc.*, 415 F.3d 419 (5th Cir. 2005), and *Huizenga v. Gwynn*, 225 F. Supp. 3d 647 (E.D. Mich. 2016), involved libel claims based on allegedly defamatory stories in publications circulated in the forum state. Although the courts in each case held that jurisdiction was lacking because the circulation of the publication in the forum was far below the circulation in *Keeton*, *see Fielding*, 415 F.3d at 422, 425-26 (weekly circulation of German publication in Texas was only 70 issues out of 750,000 issues sold each week worldwide, with 97% of issues sold in Germany); *Huizenga*, 225 F. Supp. 3d 647, 658-60 (non-"national publication" was "sold to less than 250 subscribers in [forum]"), both courts

noted that *Keeton* had an elevated role in their analysis because *Keeton* featured the same basic jurisdictional facts and type of claim. *See Fielding*, 415 F.3d at 425 (identifying *Keeton* as significant authority when analyzing "[s]pecfic jurisdiction for a suit alleging the intentional tort of libel"); *Huizenga*, 225 F. Supp. 3d at 658 ("[I]n a libel/defamation case against a publication, the reasonableness analysis must start with [*Keeton*].") (quotation marks and citation omitted).

Finally, *Keeton* itself concluded that the high gross volume of magazine sales into the forum was well above any undefined, minimum threshold that may have been necessary to subject the defendant to specific jurisdiction on the plaintiff's libel claim. This Court stated that "[s]uch regular monthly sales of thousands of magazines cannot by any stretch of the imagination be characterized as random, isolated, or fortuitous" *Id.* at 774. The Court concluded that "[i]t is, therefore, unquestionable that New Hampshire jurisdiction over a complaint based on those contacts would ordinarily satisfy the requirement of the Due Process Clause that a State's assertion of personal jurisdiction over a nonresident defendant be predicated on 'minimum contacts' between the defendant and the State." *Id*. The Court used the word "ordinarily" because the lower court had raised other concerns that this Court addressed (and rejected) in the body of its decision, *see id.* at 775-81, but the clear takeaway is that this Court saw the question of specific jurisdiction based on the volume of magazines sold into the forum as not remotely close.

Thus, even if *Keeton* were somehow binding in cases involving online sales of allegedly infringing products rather than circulation of allegedly libelous magazine articles—which this Court has never held or suggested—any minimum "threshold" of sales that *Keeton* could stand for would be well below the "tens of thousands" of monthly sales that Petitioners present as *Keeton*'s "rule." Pet. 10.

3. The Ninth Circuit's decision is consistent with this Court's precedent.

Petitioners are also wrong in claiming that the Ninth Circuit's decision is "unfaithful to" this Court's precedent, including *Keeton* and *Calder*. Pet. 11-12. To be subject to specific personal jurisdiction, a defendant need only "take 'some act by which [it] purposefully avails itself of the privilege of conducting activities within the forum State.'" *Ford Motor Co.*, 141 S. Ct. at 1024-25 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). "The contacts must be the defendant's own choice and not 'random, isolated, or fortuitous.'" *Id.* (quoting *Keeton*, 465 U.S. at 774). It is necessary that the plaintiff's claims "'must arise out of or relate to the defendant's contacts' with the forum," *id.* (quoting *Bristol-Myers*, 582 U.S. at 262), but when they do, the defendant is properly subject to jurisdiction when "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *World-Wide*, 444 U.S. at 297.

These principles work together to "provide defendants with 'fair warning'—knowledge that 'a particular activity may subject [them] to the jurisdiction of a foreign sovereign.'" *Ford Motor*, 141 S. Ct. at 1025 (quoting *Burger King*, 471 U.S. at 472). This Court has reasoned that "[w]hen a [defendant] 'purposefully avails itself of the privilege of conducting activities within the forum State, it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State." *World-Wide*, 444 U.S. at 297 (quotation omitted).

If a defendant chooses to not take any of these steps and continues to avail itself of the privileges of conducting activities within a state, it is not unfair or reasonable for the state to exercise specific jurisdiction over the defendant on claims related to the defendant's forum activities. *See Ford Motor Co.*, 141 S. Ct. at 1025 ("When (but only when) a company 'exercises the privilege of conducting activities within a state'—thus 'enjoy[ing] the benefits and protection of [its] laws'—the State may hold the company to account for related misconduct.") (quoting *Int'l Shoe Co. v. Wash.*, 326 U.S. 310 (1945)); *World-Wide*, 444 U.S. at 297 ("[I]f the sale of a product . . . is not simply an isolated occurrence, but arises from the efforts of the [seller] to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if [the sold product] has there been the source of injury to its owner or to others.").

The Ninth Circuit's decision is consistent with these principles. Citing *Keeton* and other authority, the court stated that "[i]f a defendant chooses to conduct a part of its general business in a particular forum, it is fair to subject that defendant to personal jurisdiction in that forum [on claims related to its forum contacts]." App. 15a-16a (citations and quotation marks omitted). The Ninth Circuit also relied on *World-Wide* in requiring sales into the forum to be part of a defendant's "regular course of business" rather than "random, isolated, or fortuitous" in order for the sales to serve as a basis for jurisdiction. App. 17a-18a (citing *World-Wide*, 444 U.S. at 297).

Importantly, while Petitioners argue that *Keeton* means that states can exercise specific jurisdiction over an out-of-state defendant only if the defendant has "continuously and deliberately exploited the forum market," Pet. 9-13, this Court has never interpreted *Keeton* in that way and *Keeton* itself concluded that the forum sales were sufficient because they were not "random, isolated, or fortuitous." 465 U.S. at 774. This Court has reiterated the "random, fortuitous, or attenuated" standard many times, *see*, *e.g.*, *Ford Motor Co.*, 141 S. Ct. at 1025; *Walden v. Fiore*, 571 U.S. 277, 286 (2014), and there can be no question that a defendant's sales of claim-linked products into the forum through its regular course of its business are *not* "random, fortuitous, or attenuated." To the extent that a seller is selling products into a state through its regular course of business that could give rise to claims and the seller wishes to avoid the possibility of being haled into court

in the state, the seller is free to take the protective steps this Court listed in *World-Wide* (including ceasing its sales of particular products into the state). *See* 444 U.S. at 297.

In a futile effort to persuade this Court that the Ninth Circuit's decision conflicts with this Court's precedent, Petitioners distort and then openly misstate their responsibility for their own product sales. Pet. 3 ("Respondent claimed personal jurisdiction was proper because the products at issue were shipped—by Amazon—to consumers nationwide, including Arizona."), 12 ("Petitioners are a step further removed from this analysis as Petitioner's goods were sold and shipped by a third party (Amazon)."). As Respondent showed with evidence before the district court, and the Ninth Circuit noted in its decision, the products in this case were sold *by Petitioners*, not Amazon. Dist. Ct. ECF No. 19 at 5-7; Dist. Ct. ECF No. 19-1; App. 14a n.4, 20a.

The basis for jurisdiction is that Petitioners *directly sold* Infringing Products to consumers in Arizona and caused the products to be delivered in Arizona. Dist. Ct. ECF No. 1 ¶¶ 33, 222. This is not a case in which a "third party" was responsible for sales. The Ninth Circuit reasonably and correctly concluded that a seller's use of a fulfillment service to ship products sold by the seller—whether run by Amazon or "the post office"—does not mitigate the seller's responsibility for its sales or its purposeful availment of the privilege of conducting activities in the states where its products are sold. App. 14a n.4.

There is no conflict between the Ninth Circuit's decision and this Court's precedent.

CONCLUSION

The Court should deny the petition for certiorari.

Respectfully submitted,

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