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

REPLY BRIEF FOR PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

The Rule 29.6 Statement in the petition remains accurate.

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REPLY BRIEF

I. Introduction

Rather than directly address the question presented, Respondent attempts to sidestep the circuit split at issue and—using obfuscation and procedural sleight of hand—muddy the waters of the issue before this Court by arguing that Petitioners have somehow "admitted" "regular sales" into Arizona and claiming the only circuit split is on an inapplicable issue. Neither is true.

This case arose because Petitioners listed products for nationwide sale on Amazon and, after receiving letters from Respondent stating that it resides in and may sue in Arizona, Petitioners received orders that caused Amazon to ship at least one of their products into Arizona.

Although Respondent attempts to narrow the issue to avoid the significant circuit split on the question presented, the issue is not expressly about the number of items shipped, but rather about whether the simple act of having a product shipped into a jurisdiction demonstrates the type of purposeful conduct by the seller this Court has previously required to sustain personal jurisdiction. Stated differently, does the allegation of a sale into the jurisdiction, without more, show that a seller with nationwide sales has expressly targeted the jurisdiction?

The Ninth Circuit opinion expressly held that the sale of even one product into the forum state is the "something more" required to satisfy the *Calder* effects test's express aiming prong. *See* Pet. App. at 14a-15a, 20a. That decision conflicts with this Court's precedent. And in rendering that decision, the Ninth Circuit joined the Second and Seventh Circuit in a circuit split contrary to holdings by the Fifth and Eighth Circuits, which honor this Court's jurisprudence by requiring more to establish jurisdiction.

Allowing the Ninth Circuit opinion to stand diminishes online sellers' due process protections, increases retailers' costs, and harms consumers. This Court should reverse the decision below.

II. Review is Necessary to Resolve the Circuit Split Acknowledged by Respondent and by the Ninth Circuit

As discussed in the Petition, five circuits are divided over whether a "substantial connection" exists for a non-resident defendant whose only contact with the forum is the sale of products that may be purchased by buyers nationwide—some of whom happen to reside in the forum. Pet. at i. The Ninth Circuit acknowledged this split in the decision below. *See* Pet. App. 21a (citing decisions of the Second, Fifth, Seventh, and Eighth Circuits but "not attempt[ing] to reconcile the split among the circuits"). Despite their efforts to minimize the circuit split, Respondent acknowledges it exists. *See* Opp. 12 (conceding circuit split on the "issue of whether a single sale into the

forum can be sufficient" to exercise personal jurisdiction), 15 (noting "discrepancy in the decisions" and suggesting "this Court may eventually choose to address" the split).

Although this Court's jurisprudence is well-established and the circuit split is clear, Respondent minimizes the split by suggesting that "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." *Id.* at 12. This formulation both trivializes the issue and suggests this Court is being asked to set a numerical floor for sales required to establish jurisdiction. The Ninth Circuit claimed it was declining to engage in arbitrary line drawing but, nonetheless, did so by finding a single sale satisfied the express aiming test. *See* Pet. App. 19a ("If 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."). But the question presented is not now—nor has it ever been—about establishing a minimum number of required sales. Rather, the circuit split is whether *Calder* and its progeny require actions expressly aimed, or uniquely targeted, at the forum—as the Fifth and Eighth Circuits hold—or whether personal jurisdiction can be supported merely by *any* sales in the forum—as the decision below held in

joining the Second and Seventh Circuits regarding this foundational due process[1] issue.

The circuits were already split, and had reached starkly different results regarding what contacts are sufficient to establish "minimum contacts" and, specifically, whether the sale and delivery of a product via a nationally accessible third-party website, from which products are shipped nationwide, satisfies "minimum contacts." The circuit split at issue here is now between the Fifth and Eighth Circuits, on one hand, and the Second, Seventh, and Ninth on the other.

Respondent correctly acknowledges that the Fifth and Eighth Circuits have held that simply alleging a product has been sold and shipped into a state is not sufficient to establish personal jurisdiction. *See* Opp. 12 (discussing *Admar Int'l, Inc. v. Eastrock, L.L.C.*, 18 F.4th 783 (5th Cir. 2021); *Bros. & Sisters in Christ, LLC v. Zazzle, Inc.*, 42 F.4th 948 (8th Cir. 2022)). Respondent, however, then faults Petitioners' analysis of the Fifth and Eighth Circuit jurisprudence because the cited cases did not go on to analyze hypothetical situations based on facts not presented in those cases. *See id.* at 14 (noting that

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[1] Personal jurisdiction is generally analyzed under the Fourteenth Amendment's Due Process Clause. Although the language of the Fifth Amendment's Due Process Clause is nearly identical, this Court has left open the question of whether the Fifth Amendment imposes the same restrictions. *Bristol-Myers Squibb Co. v. Superior Ct. of Cal., San Francisco Cnty.*, 582 U.S. 255, 269 (2017).

Zazzle did not opine on whether "jurisdiction would still have been lacking" "had the plaintiff alleged or presented evidence of any additional sales"). This Court has long held that the Constitution prohibits courts from rendering such advisory opinions. *See*, *e.g.*, *Golden v. Zwickler*, 394 U.S. 103, 108 (1969) ("For adjudication of constitutional issues 'concrete legal issues, presented in actual cases, not abstractions' are requisite.") (quoting *United Public Workers of America (C.I.O.) v. Mitchell*, 330 U.S. 75, 89 (1947) (collecting cases)).

Nonetheless, contrary to Respondent's assertions, *Zazzle* did find the sale alleged was no more than "random, isolated, or fortuitous," and did not establish that the defendant had either "*uniquely or expressly aimed* its alleged tortious act" at the forum or "*specifically targeted* [forum] consumers or the [forum] market." *Zazzle*, 42 F.4th at 954 (cleaned up) (emphasis added). That finding was made despite the *Zazzle* defendant admitting its website "sells and ships lots of goods" into the state. *Id.* at 952. Likewise, although the *Admar* Court did not issue the advisory opinion Respondent suggests would be necessary, the Fifth Circuit was clear that, for the exercise of personal jurisdiction to be proper, the defendant must "target the forum state" and the alleged sale was "the type of isolated act that does not create minimum contacts." *Admar*, 18 F.4th at 787-88.

Respondent does not take issue with Petitioners' characterizations of Second and Seventh Circuit decisions included in the circuit split. *See* Opp. 12-13 (discussing *Chloe v. Queen Bee of Beverly*

Hills, LLC, 616 F.3d 158 (2d Cir. 2010); *NBA Props., Inc. v. HANWJH*, 46 F.4th 614 (7th Cir. 2022), *cert. denied*, 143 S. Ct. 577 (2023)). The parties agree that those circuits found a sale into a jurisdiction was sufficient to confer personal jurisdiction. *See id.*; Pet. 6-7.

It is important to note none of these cases are simply about the number of items shipped. Each case involved vendors engaged in nationwide sales. *Admar*, 18 F.4th at 785 (noting defendant's products were available on its own website "as well as on three third-party sites: Amazon.com, Target.com, and buybuybaby.com"); *Zazzle*, 42 F.4th at 952 (plaintiff alleged defendant "uses a webpage, available to those in Missouri and elsewhere," and defendant conceded its website "sells and ships lots of goods" into the state); *Chloe*, 616 F.3d at 162 (noting defendants' website "offered to ship bags anywhere in the continental United States and to select locations worldwide"); *NBA Props.*, 46 F.4th at 617 (noting defendant sold products through Amazon). The question is what is required in light of nationwide sales to justify personal jurisdiction. As discussed in the Petition, three circuits found simply making a sale into the jurisdiction is sufficient, while the Fifth and Eighth Circuits correctly required something more.

Thus, the circuit split turns on whether a defendant must target the jurisdiction with its actions, as the Fifth and Eighth Circuits found, or whether simply making a sale into the jurisdiction is sufficient, as the Second, Seventh, and Ninth Circuits found. Respondent expressly suggests that "this Court

may eventually choose to address" this issue but argues the issue has no bearing on this case by misrepresenting the facts before the lower court. *See* Opp. 15. But, as discussed *infra*, the facts are not as Respondent represents, and this case is the ideal case to address this issue—precisely because the facts are assumed to be undisputed at the procedural stage at which the district court decided the case. In other words, the question presented—which Respondent concedes should be answered "eventually"—should be answered now.

III. The Decision Below Is Wrong and Respondent's Attempt to Wave Away the Conflict with this Court's Decisions is Unavailing

Despite Respondent's focus on the Ninth Circuit's dicta, the decision below squarely conflicts with this Court's jurisprudence. Respondent attempts to overcome this conflict by citing various factors the Ninth Circuit could have found negated jurisdiction. *See* Opp. 16-17. But those factors were not argued here. Furthermore, although the Ninth Circuit's dicta suggested potential defendants could argue lack of personal jurisdiction because jurisdiction would be unreasonable based on the small number of sales, that suggestion did nothing to stop the Ninth Circuit from finding that nationwide shipping resulting in the sale of a single product into the forum was sufficient to confer jurisdiction. *Compare id.* at 16-17 *with* Pet. App. 14a-15a, 24a.

Likewise, Respondent notes this Court's disapproval of "talismanic jurisdictional formulas." Opp. 19. Yet, it fails to see the conflict between that disapproval and the Ninth Circuit's ruling that "one sale" is "enough." Pet. App. 19a. A "single shipment" is no less a talismanic bright line rule than any other number the court below could have picked.

The Ninth Circuit opinion conflicts with this Court's jurisprudence, which protects non-resident defendants from jurisdiction based on "random, fortuitous, or attenuated contacts" with the forum by requiring "minimum contacts" that are based on a substantial connection with, or express targeting of, the forum. *See*, *e.g.*, *Calder v. Jones*, 465 U.S. 783 (1984); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984).

In its effort to sidestep this conflict, Respondent suggests *Calder* and *Keeton* apply only to libel cases. *See* Opp. 18-21. This is demonstrably incorrect. Even the Ninth Circuit opinion acknowledges the applicability of those cases. *See* Pet. App. at 10a, 15a. And this Court has held that *Calder* applies "when intentional torts are involved," *Walden v. Fiore*, 571 U.S. 277, 286 (2014), rather than only to libel cases. *See also Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1027 (2021) (applying *Keeton* in the context of products liability claim).

Respondent attempts to minimize this Court's jurisprudence by asserting that "there is no language in either decision" requiring that the jurisdiction be the "focal point" of a defendant's action. *See* Opp. 19-

20. This is simply untrue. *See*, *e.g.*, *Calder*, 465 U.S. at 789 (holding jurisdiction was proper because "California is the *focal point* both of the story and of the harm suffered") (emphasis added).

Respondent further mischaracterizes the applicability of these cases by suggesting that Petitioners are asserting that *Keeton* requires some minimum quantity like the "10,000 to 15,000 copies" discussed there. *See* Opp. 19-20. While that quantity is based on the facts of *Keeton*, *Keeton* does *not* set a minimum requirement—nor did Petitioners make any such suggestion. Rather, *Keeton* found continuous and deliberate forum contacts. *See Keeton*, 465 U.S. at 781. Whatever sales volume may be found to be continuous and deliberate for any particular magazine, there is no evidence in the record here of continuous and deliberate sales in Arizona.

There is no credible argument that *Calder* is inapplicable here. *See* Pet. App. at 10a-21a (analyzing personal jurisdiction under the *Calder* effects test). The question is whether merely selling a product into the jurisdiction is sufficient to satisfy *Calder*. The Ninth Circuit's departure from this Court's jurisprudence was its categorical holding that the sale of even one product into the forum state is the "something more" required to satisfy the *Calder* effects test's express aiming prong. *Id*. at 14a-15a, 20a; *see also id.* at 18a ("[T]he express aiming inquiry does not require a showing that the [Petitioners] targeted [their] advertising or operations at the forum."); *id.* at 14a ("[T]here is no evidence that the [Petitioners] specifically targeted that forum."). But as the district

court recognized: "[i]f [Petitioners] can be haled into Arizona courts, then virtually any seller who places products for sale on Amazon can be haled into Arizona courts as well." *Id.* at 34a. It is this result of personal jurisdiction being proper *everywhere*, despite no intention to target the forum, that is contrary to this Court's precedent. This Court's intervention is required to correct the Ninth Circuit's error.

IV. This Case is an Ideal Vehicle to Answer This Critically Important Question

As explained in the Petition, this case is the ideal vehicle to resolve this important issue because it will not be clouded by factual disputes. In an attempt to overcome that fact, Respondent misrepresents the facts of the case below by repeatedly claiming that Petitioners have admitted they "regularly sold" products into Arizona. *See*, *e.g.*, Opp. 15 (citing Pet. App. 19a). This clever play on the words of the lower court's opinion misrepresents the case's procedural posture.

This case was originally decided by the district court granting Petitioners' motion to dismiss. Pet. App. 6a, 35a. As required by the Federal Rules of Civil Procedure, that motion was filed in lieu of an Answer. *See* FED. R. CIV. P. 12(b). No Answer was filed. Thus, Petitioners have not admitted anything—despite Respondent's contrary representations throughout its brief.

The instant case was decided on a motion to dismiss, no discovery was taken, and thus no

extraneous facts that may otherwise render this case a less ideal vehicle to answer the question presented cloud the record. Pet. App. 4a. The decisions of both the district court and the Ninth Circuit were based entirely on allegations in the Complaint. Therefore, this Court will not need to address disputed factual issues—making this case an ideal vehicle to resolve the question presented.

Even accepting as true all well-pled factual allegations in the Complaint, Respondent's representation is wrong. Respondent never even alleged multiple sales into Arizona. Rather, all of its allegations regarding Petitioners' sales are either conclusory or general references to sales nationwide. *See*, *e.g.*, Dist. Ct. Dkt. 1 ¶¶ 33, 158, 193, 202-04, 214-23, 242-43, 283-86, 301-08, 329-35. Only a few allegations mention Arizona, and none of those include any allegation regarding the number of Arizona sales. *See*, *e.g.*, *id.* ¶¶ 33, 222. The allegations regarding sales numbers are allegations of nationwide sales. *See*, *e.g.*, *id.* ¶ 220. It is clear the primary alleged connection to Arizona is Respondent's residence there. *See*, *e.g.*, *id.* ¶¶ 214, 216.

Specifically, there is not even an allegation Petitioners "regularly sold" products into Arizona. The only allegations involving Petitioners and the word "regular" are allegations that the sales at issue occurred through Petitioners' "regular course of business." *See id.* ¶¶ 33, 222. In keeping with this pattern of alleging nationwide sales with only passing references to Arizona, the district court and the Ninth Circuit below each acknowledged the nationwide

sales. *See*, *e.g.*, Pet. App. 32a, 34a (district court opinion noting "nationwide" sales), 19a (Ninth Circuit noting shipping to "all fifty states"). Thus, there has been no allegation—let alone an admission—that Petitioners "regularly sold" products into Arizona. *See* Opp. 15. Making sales that happen to be shipped to Arizona as part of one's regular course of business of nationwide sales is different than regularly selling products into Arizona.

This Court's personal jurisdiction test "protects the defendant against the burdens of litigating in a distant or inconvenient forum" and ensures that the States "do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-92 (1980). The proper standard for determining when a court has personal jurisdiction over non-resident defendants is a threshold issue for every case involving out-of-state defendants. It is critical that parties to such cases—and, indeed, all e-commerce sellers—have clear guidance on where they are subject to personal jurisdiction.

As the *amici* explained, the question presented by this case has clear legal and practical significance for commerce in the United States. Allowing the Ninth Circuit decision to stand allows online sellers to be sued almost anywhere, thereby encouraging forum shopping. *See* Br. *Amicus Curiae* Atlantic Legal Foundation ("ALF Amicus Br.") at 4-8. Such a holding deprives online sellers of due process by, *inter alia*, creating uncertainty for online sellers. *Id.* at 8-11; *see also* Br. *Amicus Curiae* DRI Ctr. Law & Pub. Policy at

5-10. Finally, the Ninth Circuit's holding harms consumers by both decreasing competition and increasing sellers' costs. *See* ALF Amicus Br. at 11-13. Respondent has made no effort to address the *amici*'s concerns.

Judge Christen noted at oral argument before the Ninth Circuit that "this is a really important case, and it's a very important issue." Oral Argument at 1:58, *Herbal Brands, Inc. v. Photoplaza, Inc.*, 72 F.4th 1085 (9th Cir. 2023), https://www.youtube.com/watch?v=vGcFHPKhjzQ. The question presented should be resolved to bring clarity to this area of law. This Court should reaffirm its personal jurisdiction jurisprudence and prevent the Second, Seventh, and Ninth Circuits from rolling back due process rights.

CONCLUSION

This Court should grant certiorari.

Date: December 28, 2023

Respectfully Submitted,

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