No.

IN THE
Supreme Court of the United States

MELISSA GROO,

Petitioner,

v.

MONTANA ELEVENTH JUDICIAL DISTRICT COURT, *et. al.*,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Montana

PETITION FOR A WRIT OF CERTIORARI

DAVID B. COTNER
Counsel of Record
ANNA C. CONLEY, Of Counsel
COTNER RYAN LAW, PLLC
321 W. Broadway, Suite 500
Missoula, MT 59802
(406) 541-1111
dcotner@cotnerlaw.com
Counsel for Petitioner

QUESTION PRESENTED

The Due Process Clause requires that in order to exercise specific personal jurisdiction, the defendant must have "purposefully directed its conduct into the forum state." *Bristol-Myers Squibb Co. v. Superior Court*, 582 U.S. 255, 272 (2017). For cases alleging intentional torts, "the proper question is not where the plaintiff experienced a particular injury or effect but whether the defendant's conduct connects him to the forum in a meaningful way." *Walden v. Fiore*, 571 U.S. 277, 290 (2014). In *Walden*, the Court left the applicable purposeful direction standard for intentional torts based on internet contacts "for another day." *Id.* at 290, n.9.

The question presented is:

Whether the Due Process Clause permits a state court to exercise specific personal jurisdiction over a non-resident defendant in an intentional tort case based solely on a negative social media post about a business in the forum state, which tags forum state residents and non-residents who may do business with the forum state business.

PARTIES TO THE PROCEEDING

Petitioner Melissa Groo is an individual resident of the State of New York.

The Montana Eleventh Judicial District Court and the Honorable Amy Eddy presiding, respondents on review, were the nominal respondents below.

Triple D Game Farm, Inc., Lorney "Jay" Deist, and Kimberly Deist, respondents on review, were the real parties in interest below and plaintiffs in the trial court.

CORPORATE DISCLOSURE STATEMENT

Petitioner Melissa Groo is an individual person.

RELATED PROCEEDINGS

Montana Supreme Court:

Groo v. Montana Eleventh Judicial District Court, Hon. Amy Eddy, Presiding, No. OP 22-0587 (October 11, 2023) (reported at 537 P.3d 111) (granting a writ of supervisory control and affirming the denial of Groo's motion to dismiss for lack of personal jurisdiction)

Montana Eleventh Judicial District Court:

Triple D Game Farm, Inc. a/k/a Triple D Wildlife; Lorney "Jay" Deist and Kimberly Deist v. Heather Lynn Keepers; Justine Hayes Glasman; Jeanette Tartaglino; Melissa Groo; John Does 1-4; and Corporations A - D (district court proceeding)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

TREATISES

CONSTITUTIONAL PROVISIONS

IN THE

Supreme Court of the United States

No.

MELISSA GROO
Petitioner,
v.
MONTANA ELEVENTH JUDICIAL DISTRICT COURT, *et. al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Montana

---

PETITION FOR A WRIT OF CERTIORARI

Melissa Groo respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Montana in this case.

OPINIONS BELOW

The Montana Supreme Court's opinion is reported at 537 P.3d 111. Pet. App. 1a-54a. The Eleventh Judicial District Court's opinion is not reported. Pet. App. 58a-76a.

JURISDICTION

The Montana Supreme Court's Judgment was entered on October 11, 2023. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment, U.S. Const. amend. XIV, § 1, provides, in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

Montana Rule of Civil Procedure 4(b)(1)(B) provides:

All persons found within the state of Montana are subject to the jurisdiction of Montana courts. Additionally, any person is subject to the jurisdiction of Montana courts as to any claim for relief arising from the doing personally, or through an employee or agent, of the commission of any act resulting in accrual within Montana of a tort action.

INTRODUCTION

In a 4-3 decision, the Montana Supreme Court allowed the Montana district court to exercise specific personal jurisdiction over Melissa Groo. The decision below erred in concluding Groo purposefully directed activity to the State of Montana through a negative Facebook post regarding a Montana business that tagged three Montana-based photographers and eight

photographers outside of Montana who may do business with the Montana business. The decision below erodes well-established due process protections by lowering the specific personal jurisdiction standard solely because social media is the medium used.

The Due Process Clause requires that the defendant has "'purposefully availed itself of the privilege of conducting activities with a forum state' or [] purposefully directed its conduct into the forum state." *Bristol-Myers Squibb Co. v. Superior Court*, 582 U.S. 255, 272 (2017) (internal quotation marks, brackets, and citations omitted). For cases alleging intentional torts, "[t]he proper question is not where the plaintiff experienced a particular injury or effect but whether the defendant's conduct connects him to the forum in a meaningful way." *Walden v. Fiore*, 571 U.S. 277, 290 (2014). This analysis "focuses on the 'relationship among the defendant, the forum, and the litigation.'" *Id.* at 284 (citations omitted). Specifically, the defendant's own "intentional conduct" must "create[] the necessary contacts with the forum." *Id.* at 286. Accordingly, a court must analyze "the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there." *Id.* at 285. The decision below violates this Court's mandate in *Walden* that specific personal jurisdiction is only allowable where a defendant targets the forum state.

In *Walden*, one party expressed concerns regarding ramifications of the holding "in cases where intentional torts are committed via the Internet or other electronic means" *Id.* at 290, n.9. The Court

responded that "this case does not present the very different questions whether and how a defendant's virtual 'presence' and conduct translate into 'contacts' with a particular state. * * * We leave questions about virtual contacts for another day." *Id.* As a result, state and federal courts take conflicting approaches to specific personal jurisdiction based on internet contacts. A lack of certainty exists regarding what online behavior will potentially subject a defendant to personal jurisdiction outside of his home state, as evidenced by the Montana Supreme Court's error in this case. When personal jurisdiction over a defendant for social media activity comports with due process is an important recurring issue in state and federal courts. The Court should answer the question it left for another day in *Walden.*

The Court should grant the writ, rule that specific jurisdiction in intentional tort cases based on social media activity requires conduct targeting the forum state, and reverse the decision below.

STATEMENT

1. Melissa Groo is a self-employed photographer who lives in New York. Pet. App. 4a, 59a, 60a. Groo is a well-known expert and leader in wildlife photography ethics and has written articles criticizing photography game parks in various locations, including Plaintiff Triple D Game Farm, Inc. ("Triple D") in the State of Montana. *Id.* at 60a. Groo has won awards for her conservation advocacy and nature photography. *Id.* at 3a, 60-61a.

Groo is a citizen and resident of New York. 4a, 59a. She has never been a citizen or resident of Montana nor domiciled in Montana. *Id.* at 59a. She has never been an owner, operator or employee of a Montana business, had a registered agent in Montana, or owned any property or assets in Montana. *Id.* at 59a-60a. She has never received mail, opened a bank account, paid taxes, initiated litigation or maintained a phone account in Montana. *Id.* at 60a.

Groo has only visited Montana four times since 2018, and only once since August 2020. *Id.* In June 2021, she stayed at the home of an owl researcher and personal friend in Charlo, Montana for 12 days to photograph wildlife in the Charlo area. *Id.* She has never visited Triple D Game Farm. *Id.*

In August 2020, Heather Keepers, a former employee of Triple D, sent a private Facebook message to Groo while Keepers was outside of Montana. *Id.* at 4a-5a. Keepers explained concerns she had about "illegal, unethical, and just absolutely morally wrong and dishonest" acts by Triple D, and stating her goal of saving the animals from Jay Diest, owner of Triple D, many of whom she stated are "now just sitting and rotting." *Id.* Keepers asked Groo if stopping Triple D's operation "entirely" and "forever" was something that interested Groo. Groo responded with a private message, stating "absofuckinglutely" and expressed her concerns about Triple D and gratitude for Keepers reaching out. *Id.* at 5a-6a. In response to Keeper's concerns about violating a nondisclosure agreement with Plaintiffs, Groo sent Keepers links to publicly available information regarding nondisclosure

agreements and offered Keepers support based on Groo's connections. *Id.* at 6a-8a.

Neither Groo nor Keepers were in Montana when these Facebook messages were exchanged. *Id.* at 4a, 65a. These were private messages not posted publicly, not sent to or from a Montana resident, not sent in Montana, and not sent to anyone with current or prospective contracts with Plaintiffs. *Id.* at 35a.

Groo posted a comment to a Facebook post by Keepers regarding an inspection report of Plaintiff Triple D's game farm facility. *Id.* "At the time, Keepers was not a resident of Montana and Groo's comment made no mention of Montana and was not directed at Montana residents." *Id.*

Additionally, Groo reposted an article from Roadsidezoonews.org titled "Photography game farm Triple D Wildlife cited 6 times for keeping animals in squalor." *Id.* at 8a, 35a. Her post included the following comment: "More on Triple D photo game farm. What a disgrace to treat these magnificent animals so poorly. It's time for these wildlife brothels to be done. Photo by Susan Fox from a visit years ago to Triple D. Please share." *Id.* at 8a, 66a. There is no evidence in the record of Groo tagging anyone when sharing this article on Facebook. "While mentioning Triple D, Groo's post did not mention Montana and was not targeted to Montana residents." *Id.* at 35a.

On August 2, 2021 Groo posted a comment one time to a Facebook post: "I hope very much that those photographers and companies listed as holding future workshops there would cancel them immediately. It would be unconscionable to continue to support this

facility." *Id.* at 8a, 35a-36a, 66a. Groo tagged "individuals from the wildlife photography industry from Utah, California, Idaho, Tennessee, North Carolina, Virginia, Canada, Florida and Montana." *Id.* at 36a. Some or all of these individuals were "Triple D clients and group leaders." *Id.* at 9a, 37a.

"Three of the tags went to Montana residents. There is no record that these three residents ever read the post that Groo tagged." *Id.* at 9a, n.2, 36a. Eight photographers tagged were not located in Montana. *Id.* The Montana Supreme Court concluded that the non-resident wildlife photographers tagged were doing business in Montana with Triple D. *Id.* at 9a, n.2. However, the dissenting justices observed "there is simply no record evidence that any of the other persons tagged were actually doing business with Triple D." *Id.* at 37a.

2. On January 25, 2022 Plaintiffs Triple D Game Farm, Inc. and its owners, Lorney "Jay" Diest and Kimberly Diest, filed suit against Groo and other defendants, alleging Tortious Interference with Contractual Relations and Tortious Interference with Prospective Economic Advantage against Groo. *Id.* at 2a, 10a, 67a. On April 18, 2022 Groo filed a Motion to Dismiss pursuant to Montana Rule of Civil Procedure 12(b)(2) and 12(b)(6), alleging lack of personal jurisdiction and failure to state a claim upon which relief can be granted. *Id.*

On July 22, 2022, the Montana State District Court entered an Order denying Groo's motion to dismiss. *Id.* at 10a, 58a. With regard to the purposeful direction requirement for personal

jurisdiction, the Montana District Court held "there is no question Groo took voluntary action to have an effect in Montana – the sole purpose of her social media campaign was to put Triple D out of business – and that the first element is satisfied." *Id.* at 72a. Under the "related to" prong of the personal jurisdiction test, the District Court analogized to stream of commerce to find Groo "specifically targeted a Montana audience. " *Id.* The court further held because her "comments target a Montana business, with the specific intent to put Triple D out of business" there "is a nexus between Groo's social media campaign and Triple D and it was reasonably foreseeable to Groo her campaign would reach Montana and have an impact in Montana – and was in fact designed to do so." *Id.* at 72a-73a.

The Court concluded personal jurisdiction over Groo was reasonable because "modern technological advances blunt any burden" to Groo having to defend in Montana, no conflict with New York's sovereignty exists, Montana provides the "most efficient resolution" of the controversy "considering the alleged interrelated conduct of Groo and the other defendants" and "New York likely would not be able to exercise jurisdiction over the other defendants." *Id.* at 74a.

3. The Montana Supreme Court considered Groo's writ of supervisory control. *Id.* at 55a. On December 22, 2022, the Montana Supreme Court issued an Order noting: "This matter concerns to what extent social media activity can serve as a basis to exercise specific personal jurisdiction," which "appears to be

one of first impression in Montana, and perhaps nationally as well." *Id.* at 56a.

After additional briefing and oral argument, in a 4-3 decision, a slim majority of the Montana Supreme Court affirmed the Montana District Court. *Id.* at 1a. The Montana Supreme Court framed the question as: "Does Montana have specific personal jurisdiction over Groo regarding Triple D's intentional tort claims when the tortious activity allegedly accrued in Montana despite Groo only interacting with the forum via social media." *Id.* at 3a.

After finding the state long-arm statute satisfied, the Montana Supreme Court held that exercising specific personal jurisdiction over Groo was consistent with the Due Process Clause. *Id.* at 31a-32a. The court concluded "Groo identified and targeted a Montana audience and had the specific intent of inflicting economic pain on a Montana business." *Id.* at 22a. Applying *Walden*, the court held that specific jurisdiction in a tort action required "two overlapping lines of inquiry," including (1) "whether the relationship among the defendant, the forum, and the litigation arises out of contacts that the defendant created with the forum state," and (2) "whether the plaintiff is the only link between the defendant and the forum or whether the defendant's conduct forms the connection with the forum state that is the basis for jurisdiction over them." *Id.* at 24a.

The court distinguished *Walden* on the basis that "[h]ere, unlike in *Walden*, Groo created the contacts that established a relationship between herself, the forum, and the litigation." *Id.* at 25a. Specifically, the

court concluded "[a]s alleged, Groo repeatedly, intentionally and with the aim of causing certain actions in Montana used social media to contact known and prospective clients of a Montana-based business and its Montana-based operator." *Id.* The court reasoned "[a]n alternative conclusion would greatly diminish the ability of states to protect the interests of their residents in the digital era." *Id.* at 27a. The court acknowledged that this Court "has not decided a case directly addressing the limits imposed by the Due Process Clause when personal jurisdiction is premised on a defendant's online conduct." *Id.* The court concluded "Groo offers no case law that due process serves to protect out-of-state actors who intentionally target and aim to cause harm in a specific forum." *Id.*

The dissenting justices observed "[t]he key question is did Groo intentionally target Montana or a Montana audience, not whether she intentionally targeted a specific Montana resident or business." *Id.* at 47a. The dissent concluded "Groo may have targeted Triple D, but she has no relationship to Montana and did not target the State of Montana." *Id.* at 34a. After discussing the state long-arm statute, the dissent addressed due process and observed that *Walden* rejected the argument that a defendant creates sufficient minimum contacts with a forum by intentionally targeting a known resident of the forum to impose injury to be suffered in the forum state. *Id.* at 48a-51a.

The dissent further observed "there is not a single case in which a court has extended, without more,

personal jurisdiction based on a defendant's allegedly tortious postings on social media." *Id.* at 51a. The dissent cited to extensive federal court authority that "supports a conclusion contrary to" the majority. *Id.* at 51a-53a. Ultimately, the dissent concluded "[t]he error in the Court's analysis is its failure to distinguish between targeting a specific individual and targeting the State of Montana." *Id.* at 53a.

This petition follows.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW DEEPENS AN ENTRENCHED SPLIT AMONG FEDERAL COURTS OF APPEALS AND STATE COURTS

There is a deep conflict among federal and state courts over the applicable standard for asserting specific personal jurisdiction over non-resident defendants based on online activity, also referred to as internet contacts, including social media. Courts are divided as to whether *Walden* distinguished or modified *Calder v. Jones*, 465 U.S. 783 (1984). Uncertainty also exists as to whether *Walden* limited *Calder* to apply only to reputational torts, or whether *Calder* applies to all intentional tort cases. Courts are further divided regarding the continued applicability of the "*Zippo* sliding scale test" from *Zippo Manufacturing Company v. Zippo Dot Com, Inc.*, 952 F.Supp. 1119 (W.D. Pa. 1997). While some courts still apply *Zippo* to internet contacts cases, others explicitly reject it, and others have adopted an adaptation of it. Other courts have explicitly refused to adopt a standard for specific personal jurisdiction

based on internet contacts, in part due to lack of guidance from the Court.

Without guidance by the Court, a lack of certainty exists regarding what online behavior will potentially subject social media users to personal jurisdiction outside of their home state. The Court should answer the question it left open in *Walden* as to what constitutes purposeful direction in intentional tort cases based on a non-resident defendant's social media activity.

A. Purposeful direction in intentional tort cases arising from internet contacts.

Since *International Shoe v. Washington*, 326 U.S. 310 (1945), the Court has developed a specific approach for intentional tort cases in which a non-resident defendant has allegedly targeted the plaintiff in the forum state. In 1984, the Court affirmed a California court's exercise of personal jurisdiction in a libel action by California residents over Florida residents for publishing an Enquirer article about Plaintiffs in *Calder*. 465 U.S. 783. The "*Calder* effects test" provided that a defendant's tortious acts can serve as the basis for personal jurisdiction if the plaintiff alleged defendant's acts were (1) intentional, (2) expressly aimed at the forum state, and (3) caused foreseeable harm in the forum state. *See e.g., IMO Indus. v. Kiekert AG*, 155 F.3d 254, 268 (3d Cir. 1998) (discussing "*Calder* effects test"); *Sussman v. Playa Grande Resort, S.A. DE C.V.*, 839 Fed. Appx. 166, 167 (9th Cir. 2021) (same); *Old Republic Ins. Co. v. Cont'l*

Motors, Inc., 877 F.3d 895, 907 (10th Cir. 2017) (same).

In 1997, the U.S. District Court for the Western District of Pennsylvania established the "*Zippo* test" for personal jurisdiction based on website activity. *Zippo Mgf. Co. v. Zippo Dot Com, Inc.*, 952 F.Supp. 1119. This test categorized website activity for the purposes of personal jurisdiction into three categories – passive, active and interactive. *Id.* at 1124. The *Zippo* test has been widely used by courts assessing specific personal jurisdiction arising from a non-resident defendant's internet contacts.

Circuit courts began applying the *Calder* effects test in intentional tort cases involving all types of communications, including internet contacts. *See e.g., Revell v. Lidov*, 317 F.3d 467 (5th Cir. 2002); *Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir. 2002); *Cadle Co. v. Schlichtmann*, 123 Fed. Appx. 675 (6th Cir. 2005). Most post-*Calder* cases construed its holding in intentional tort cases to "require[] more than a finding that the harm caused by the defendant's intentional tort is primarily felt within the forum." *IMO Indus.*, 155 F.3d at 265.

In 2014, *Walden* confirmed that targeting a forum state resident is insufficient to create personal jurisdiction over non-resident defendants in intentional tort cases. 571 U.S. 277. *Walden* clarified that in such cases, "a defendant's relationship with a plaintiff or a third party, standing alone, is an insufficient basis for jurisdiction." *Id.* at 286. *Walden* held that "[t]he proper question is not where the plaintiff experienced a particular injury or effect but

whether the defendant's conduct connects him to the forum in a meaningful way." *Id.*

One party expressed concerns regarding ramifications of the holding "in cases where intentional torts are committed via the Internet or other electronic means." *Id.* at 290, n.9. The Court responded: "This case does not present the very different questions whether and how a defendant's virtual 'presence' and conduct translate into 'contacts' with a particular State. * * * We leave questions about virtual contacts for another day." *Id.*

Federal and state courts have grappled with the question left open in *Walden*. When the Montana Supreme Court ordered additional briefing after Groo's initial petition for a writ of supervisory control, it stated: "This matter concerns to what extent social media activity can serve as a basis to exercise specific personal jurisdiction. It appears to be one of first impression in Montana, and perhaps nationally as well." Pet. App. 56a. In support of its holding, the court acknowledged that this Court "has not decided a case directly addressing the limits imposed by the Due Process Clause when personal jurisdiction is premised on a defendant's online conduct" *Id.* at 27a.

The Tenth Circuit recently observed the unique challenges that personal jurisdiction in the internet context creates, and noted "The Supreme Court has only alluded to these issues, 'leav[ing] questions about virtual contacts [via the Internet] for another day.' * * * Thus, for now, development of personal-jurisdiction law in the Internet context has been left to the lower courts." *XMission, L.C. v. Fluent LLC*, 955 F.3d 833,

844 (10th Cir. 2020). *See also Walker v. Adams*, 2016 Mass. App. Div. 143, 146, 2016 Mass. App. Div. LEXIS 40 (Mass. Ct. App. 2016) (*Walden* "expressly declined to confront the question of personal jurisdiction in Internet defamation cases"); § 1073 Personal Jurisdiction and the Internet, 4A Fed. Prac. & Proc. Civ. § 1073 (4th ed.) ("New appellate precedents are constantly appearing, showing the subject is still in a state of flux.").

At least one circuit has expressed reluctance to answer the question the Court left open in *Walden*. The First Circuit observed that this Court "has not definitively answered how a defendant's online activities translate into contacts for purposes of the minimum contacts analysis." *Plixer Int'l v. Scrutinizer GmbH*, 905 F.3d 1, 7 (1st Cir. 2018). The First Circuit then stated "[i]n the absence of Supreme Court guidance, we are extremely reluctant to fashion any general guidelines beyond those that exist in law, so we emphasize that our ruling is specific to the facts of this case." *Id.* at 8.

This open question has led to a split among federal and state courts regarding when a court can assert specific personal jurisdiction over a non-resident defendant for online activity in intentional tort cases.

B. Courts interpret purposeful direction in internet contacts cases differently.

Without guidance from the Court, federal and state courts use multiple approaches to purposeful direction for specific personal jurisdiction in intentional tort cases involving internet contacts.

Fewer circuit cases have discussed social media activity specifically, and those that have generally rely on similar principles set forth in internet contacts cases. *See e.g., Johnson v. Griffin*, 85 F.4th 429, 433 (6th Cir. 2023); *Janus v. Freeman*, 840 Fed. Appx. 928, 930-31 (9th Cir. 2020).

1. Circuit courts differ as to whether *Walden* (a) limited *Calder* by clarifying that targeting of the forum state itself, as opposed to targeting a plaintiff in the forum state, is required; (b) set forth a separate more stringent test for non-reputational intentional torts, or (c) simply distinguished *Calder* without revisiting the standard it set forth.

a. *Walden* Clarifying *Calder* Approach The Ninth and Eleventh Circuits generally apply *Calder* as clarified by *Walden* to internet contacts cases. *See e.g., Janus*, 840 Fed. Appx. at 930 (*Walden* "expressly rejected the view that *Calder*'s effects test is satisfied merely by the defendant's commission of an intentional tort that is aimed at a person known to be a resident of the forum state."); *Skyhop Techs., Inc. v. Narra*, 58 F.4th 1211, 1229 (11th Cir. 2023) ("[Defendant] responds by citing *Walden* for the proposition that 'the plaintiff cannot be the only link between the defendant and the forum.' We agree that that is an accurate statement of the law"). *See also Majumdar v. Fair*, 567 F.Supp.3d 901, 909 (N.D. Ill. 2021) ("after *Walden*, it is no longer possible, if it ever was, to interpret *Calder* to mean that, when a plaintiff suffers a tort injury in a particular state, the fact that he suffered the injury in that state necessarily suffices to permit the exercise of jurisdiction over the accused defendant there").

b. *Walden* Non-Reputational Tort Approach *Walden* stated "[t]he crux of *Calder* was that reputation-based 'effects' of the alleged libel connected the Defendants to California, not just to the plaintiff. The strength of that connection was largely a function of the nature of the libel tort." 571 U.S. at 287. The Seventh, Ninth and Tenth Circuits have suggested that *Walden* limited the *Calder* effects test to reputational torts. *See Old Republic Ins. Co.*, 877 F.3d at 916 n.34 (*Walden* "suggested that the *Calder* effects test does not extend beyond the defamation context"); *Curry v. Revolution Labs., LLC*, 949 F.3d 385, 397 (7th Cir. 2020); *Janus*, 840 Fed. Appx. at 931.

c. *Walden* Distinguished *Calder* Approach The Sixth Circuit and Alaska courts have adopted an approach assuming *Walden* simply distinguished *Calder*. Most recently, the Sixth Circuit reasoned: "Two cases 'bookend' this application of personal jurisdiction to intentional torts. * * * *Calder* [] establishes that the effects of intentional torts sometimes may establish personal jurisdiction. * * * *Walden* [] identifies the other side of the line." *Johnson*, 85 F.4th at 433 (citations omitted). *See also Harper v. BioLife Energy Sys.*, 426 P.3d 1067, 1075-76 (Ala. 2018) ("[U]nlike *Keeton* and *Calder*, there is no indication that [Defendant] in any way targeted Alaska when publishing the brochure. Rather, like in *Walden*, [Defendant's] publication appears to be entirely out-of-state conduct that happened to affect a person with connections to Alaska").

Which interpretation of *Walden* and *Calder* is correct? The answer has significant implications for cases like this one, where the defendant is facing non-reputational tort claims for conduct arising solely

from social media activity outside the forum state. The Court should provide clarification to resolve these inconsistent approaches to *Walden* and *Calder* in internet contacts cases.

2. A circuit split also exists regarding the continued applicability of the *Zippo* test. While some courts apply *Zippo* to internet contacts cases generally, others have explicitly rejected it, and still others have adopted an adaptation of it.

a. *Zippo* Sliding Scale Test The Third Circuit, D.C. Circuit, and Texas state courts generally apply the *Zippo* test. *See e.g., Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 452-53 (3d Cir. 2003) (noting *Zippo* "has become a seminal authority regarding personal jurisdiction based upon the operation of an Internet web site" and discussing circuit court decisions "consistent with the principles articulated in the Zippo line of cases"); *Fatouros v. Lambrakis*, 627 Fed. Appx. 84, 88 (3d Cir. 2015) (following *Toys "R" Us, Inc.*); *Gorman v. Ameritrade Holding*, 293 F.3d 506, 513 (D.C. Cir. 2002) ("on the record before this court, it is quite possible that, through its website, Ameritrade is doing business in the District of Columbia by continuously and systematically 'entering into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet.'") (citing *Zippo Mgf. Co.*, 952 F.Supp. at 1124); *Huerta v. Zhongtian Int'l Trade Co.*, No. 14-21-00564-CV, 2023 Tex. App. LEXIS 2232, *8-9 (Tex. Ct. App. 2023) (relying on *Experimental Aircraft Ass'n v. Doctor*, 76 S.W.3d 496, 506 (Tex. Ct. App. 2002), which applied

the *Zippo* test, to require evaluation of "nature and quality" of internet contacts on a "sliding scale" based on "interactivity of the exchange").

b. Rejection of *Zippo* Sliding Scale The First and Seventh Circuits and Illinois and Massachusetts courts have explicitly rejected the *Zippo* test. *See Chen v. United States Sports Acad., Inc.*, 956 F.3d 45, 55, n.3 (1st Cir. 2020) ("This court has never embraced that sliding scale analysis, and we have no occasion to consider the matter today. * * * where, as here, purposeful availment is plainly lacking, * * * the sliding scale adds nothing of consequence to the specific jurisdiction analysis"); *Illinois v. Hemi Group LLC*, 622 F.3d 754, 758 (7th Cir. 2010) ("We wish to point out that we have done the entire minimum contacts analysis without resorting to the sliding scale approach first developed in [*Zippo*]. This was not by mistake. Although several other circuits have explicitly adopted the sliding scale approach, * * * our court has expressly declined to do so."); *Innovative Garage Door Co. v. High Ranking Domains, LLC*, 981 N.E.2d 488, 496 (Ill. Ct. App. 2012) ("We agree that a specific test for internet cases is unwarranted. Instead, we view the *Zippo* test as a guiding factor"). *See also Walker*, 2016 Mass. App. Div. at 146 ("the focus was on Zippo principles unsuitable to this case").

The Eleventh Circuit has expressly not determined *Zippo*'s applicability. *See Oldfield v. Pueblo De Bahia Lora, S.A.*, 558 F.3d 1210, 1219, n.26 (11th Cir. 2009) (internet contacts case involving website in which court held "[a]lthough we pause briefly to discuss the *Zippo* decision and the debate surrounding it, we

express no opinion as to its applicability to the case at hand.").

c. Adaptation of the *Zippo* Test The Fourth and Tenth Circuits and Tennessee courts have adopted an adaptation of the *Zippo* test first set forth in *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707 (4th Cir. 2002). *See Fidrych v. Marriott Int'l, Inc.*, 952 F.3d 124, 142 (4th Cir. 2020); *Shrader v. Biddinger*, 633 F.3d 1235, 1240-41 (10th Cir. 2011); *EnhanceWorks, Inc. v. Dropbox, Inc.*, No. M2018-01227-COA-R3-CV, 2019 Tenn. App. LEXIS 129, *31, 2019 WL 1220903 (Tenn. Ct. App. 2019).

Pursuant to this test, specific personal jurisdiction over a non-resident defendant is allowable when "that person (1) directs electronic activity into the State, (2) with the manifested intent of engaging in business or other interactions within the state, and (3) that activity creates, in a person within the State, a potential cause of action cognizable in the State's courts." *ALS Scan*, 293 F.3d at 714. Consistent with other circuits and state courts, "a person who simply places information on the Internet does not subject himself to jurisdiction in each State into which the electronic signal is transmitted and received." *Id.*

Where social media posts are involved, should courts consider *Zippo*, reject *Zippo* or adopt a variation of it? How does *Zippo* interrelate with *Calder* and *Walden*? It is clear that federal and state courts are in need of guidance on these questions.

3. Beyond the varying interpretations of *Calder*, *Walden* and *Zippo* discussed above, the Second, Fifth and Eighth Circuits take other approaches to specific

personal jurisdiction based on internet contacts. The Second Circuit has not yet adopted an approach. The Fifth Circuit has adopted a hybrid test using both *Zippo* and *Calder*. The Eighth Circuit has referred to the *Calder* effects test as an "additional factor" in its minimum contacts analysis.

a. Second Circuit The Second Circuit has expressly declined to adopt a test for specific personal jurisdiction based on internet contacts. *See Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 255 (2d Cir. 2007) (discussing the interconnectedness of the New York long-arm statute analysis and Due Process Clause analysis, but finding no personal jurisdiction under the long-arm statute and clarifying its holding should not "be interpreted to indicate our position with respect to due process principles recently developed in the internet context by other circuits").

b. Fifth Circuit The Fifth Circuit applies both the *Zippo* sliding scale test and *Calder* when considering specific personal jurisdiction over internet contacts cases. *Johnson v. TheHuffingtonPost.com, Inc.*, 21 F.4th 314, 318 (5th Cir. 2021) (explaining the court first analyzes interactivity, and if the site is interactive the court then applies "our usual tests" to determine "purposeful targeting").

c. Eighth Circuit The Eighth Circuit applies *Calder* as an "additional factor" in its minimum contacts analysis. *See Bros. & Sisters in Christ, LLC v. Zazzle, Inc.*, 42 F.4th 948, 954 (8th Cir. 2022) ("We 'use[] the Calder test merely as an additional factor to consider when evaluating a defendant's relevant contacts with the forum state,' and we construe the test narrowly,

meaning that 'absent additional contacts, mere effects in the forum state are insufficient to confer personal jurisdiction'") (citations omitted).

The lack of a uniform standard across circuits is untenable and could be remedied by the Court granting this petition.

C. Lack of guidance allows courts to undermine bedrock due process principles.

Clarification of *Walden*'s open question would facilitate consistent predictable application of bedrock principles underlying due process and personal jurisdiction. If not reversed, the decision below effectively lowers the standard for purposeful direction in intentional tort cases when the defendant utilizes social media, as opposed to other forms of communication. A social media carve-out runs counter to the individual liberty protections and interstate federalism principles underlying the due process clause.

Limits on state courts' exercise of personal jurisdiction "derive from and reflect two sets of values – treating defendants fairly and protecting 'interstate federalism.'" *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S.Ct. 1017, 1025 (2021) (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980)). Due process limitations on personal jurisdiction "protect[] the defendant against the burdens of litigating in a distant or inconvenient forum" and "ensure that States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal

system." *World-Wide Volkswagen*, 444 U.S. at 292. These core principles are not legal history relics, but current tenets of specific jurisdiction analyses that courts must apply when considering personal jurisdiction, including in cases involving social media activity.

1. When analyzing personal jurisdiction, "the 'primary concern' in assessing personal jurisdiction is 'the burden on the defendant.'" *Bristol-Myers Squibb Co.*, 582 U.S. at 263 (citing *World-Wide Volkswagen*, 444 U.S. at 292). "The Due Process Clause protects an individual's right to be deprived of life, liberty or property only by the exercise of lawful power" and "[t]his is no less true with respect to the power of a sovereign to resolve disputes through the judicial process than with respect to the power of a sovereign to prescribe rules of conduct for those within its sphere." *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 879 (2011).

Due process "constrains a State's authority to bind a non-resident defendant to a judgment of its courts." *Walden*, 571 U.S. at 283. *See also Int'l Shoe v. Washington*, 326 U.S. 310; *World-Wide Volkswagen*, 444 U.S. at 291. "As a general rule, neither statute nor judicial decree may bind strangers to the State." *Nicastro*, 564 U.S. at 880. This is "a matter of individual liberty" because "due process protects the individual's right to be subject only to lawful power." *Id.* at 884. Personal jurisdiction analyses are designed to determine "whether a defendant has followed a course of conduct directed at the society or economy existing within the jurisdiction of a given sovereign,

so that the sovereign has the power to subject the defendant to judgment concerning that conduct." *Id.* "'[A] state court's assertion of jurisdiction exposes defendants to the State's coercive power'" and therefore, considering a defendant's contacts "encompasses the more abstract matter of submitting to the coercive power of a State that may have little legitimate interest in the claims in question." *Bristol-Myers Squibb Co.*, 582 U.S. at 261, 263 (citations omitted).

Accordingly, only the defendant's contacts with the forum state can be a basis for jurisdiction, not the plaintiff's, other parties, or third-parties. *Walden*, 571 U.S. at 284 ("the relationship must arise out of contacts that the 'defendant *himself*' creates with the forum State") (citations omitted). *Walden* explained "[d]ue process limits on the State's adjudicative authority principally protect the liberty of the nonresident defendant – not the convenience of plaintiffs or third parties." *Id.* Courts have "consistently rejected attempts to satisfy the defendant-focused 'minimum contacts' inquiry by demonstrating contacts between the plaintiff (or third parties) and the forum state." *Walden*, 571 U.S. at 284; *Calder*, 465 U.S. at 790 ("[e]ach defendant's contacts with the forum State must be assessed individually").

2. The Court has consistently reiterated the importance of interstate federalism, which is the observance of the sovereign powers of states by other states. *World-Wide Volkswagen* stated "we have never accepted the proposition that state lines are

irrelevant for jurisdictional purposes, nor could we, and remain faithful to the principles of interstate federalism embodied in the Constitution." 444 U.S. at 293. While the framers desired and foresaw "economic interdependence of the States," they "intended that the States retain many essential attributes of sovereignty, including, in particular, the power to try causes in their courts." *Id.* "The sovereignty of each state, in turn implies a limitation on the sovereignty of all its sister States – a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment." *Id.* *See also Ford Motor Co.*, 141 S.Ct. at 235 ("One state's 'sovereign power to try' a suit, we have recognized may prevent 'sister States' from exercising their like authority.") (citing *World-Wide Volkswagen*, 444 U.S. at 293).

3. Defendants' liberty interest and interstate federalism limitations on state courts' exercise of personal jurisdiction have not changed with technological and economic development, including the internet and social media. *World-Wide Volkswagen* emphasized that personal jurisdiction restrictions "are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States." *World-Wide Volkswagen*, 444 U.S. at 294. *See also Best Van Lines, Inc.* 490 F.3d at 252 ("'traditional statutory and constitutional principles remain the touchstone of the [personal jurisdiction] inquiry'") (citations omitted); *ALS Scan, Inc.*, 293 F.3d at 711 ("technology cannot eviscerate the constitutional limits on a State's power to exercise

jurisdiction over a defendant"); *GTE New Media Servs. v. Bellsouth Corp.*, 199 F.3d 1343 (D.C. Cir. 2000) ("[w]e do not believe that the advent of advanced technology, say, as with the Internet, should vitiate long-held and inviolate principles of federal court jurisdiction"); *TheHuffingtonpost.com, Inc.,* 21 F.4th at 325 ("clicks, visits, and views from forum residents cannot alone show purposeful availment. They are not evidence that 'the defendant has formed a contact with the forum state.'") (citations omitted).

Clarification by the Court that changes in technology cannot undermine the key principles of individual liberty and interstate federalism that the due process clause protects is needed.

II. THE DECISION BELOW IS INCORRECT.

The Montana Supreme Court answered *Walden*'s open question of when social media activity justifies specific personal jurisdiction in a significantly-flawed manner. As succinctly stated by the dissent, the majority failed to "distinguish between targeting a specific individual and targeting the state of Montana." Pet. App. 53a. In so doing, the decision below stretched applicable precedent from this Court beyond its plausible scope. The fact that Groo tagged three photographers who reside in Montana and eight photographers outside of Montana who may do business with a Montana business is not targeting the State of Montana.

1. *Walden* is clear that targeting a Montana business alone is insufficient for personal jurisdiction purposes. 571 U.S. at 286 ("A defendant's relationship

with a plaintiff or third party, standing alone, is an insufficient basis for jurisdiction"). As such, whether Groo engaged in a "targeted campaign against a Montana business" is immaterial for purposes of personal jurisdiction. Pet. App. 21a. The Montana Supreme Court repeatedly emphasized Groo's intent to injure a Montana business despite the irrelevance of such intent for purposes of personal jurisdiction. *Id.* at 8a, 17a, 20a-21a, 21a, 23a, 25a, 27a, 30a, 32a. The Montana Supreme Court states: "How trying to 'absofuckinglutely' take down a Montana business is not a contact with the forum state itself is a difficult question to answer." *Id.* at 26a. However, *Walden* made clear this is not a difficult question, and the answer is "mere injury to a forum resident is **not** a sufficient connection to the forum." 571 U.S. at 290 (emphasis added).

The Montana Supreme Court strained to find targeting of Montana by concluding Groo

> "(1) directed electronic activity into the state by tagging Montana residents and those doing business in Montana; (2) with the manifested intent of engaging in interactions within the state by encouraging those tagged to not do business with Triple D, and (3) that activity created, in a person within Montana, a potential cause of action cognizable in Montana."

Pet. App. 30a.

In fact, Groo's tags alone cannot pass the threshold this Court set in *Walden* of targeting the state without eviscerating the forum state targeting requirement. Taking steps intending to injure a Montana business is not enough. If they were, personal jurisdiction would become an interstate free-for-all where social media posts were involved. The decision below is an unprecedented expansion of personal jurisdiction and must be corrected.

2. The Montana Supreme Court wrongly based its conclusion that Groo targeted Montana in part on a faulty understanding of tagging. The Court citing to a National Center of State Court's informational sheet on tagging. Pet. App. 9a, n.1. That information sheet states: "if you or a friend tags someone in your post and the post is set to Friends or more, the post **could** be visible to the audience you selected plus friends of the tagged person." [1] It further clarifies that "[t]ags in photos and posts from people you aren't friends with **may** appear in timeline review where **you can decide if you want to allow them on your timeline**. **You can also choose to review tags by anyone, including your friends.**"[2]

Despite this, the Montana Supreme Court held "any Facebook friends of those residents" tagged by Groo "also would have seen the post through that person's timeline." Pet. App. 9a, n.2. This is simply wrong. There is no evidence in the record that the

---

[1] Tagging on Facebook, National Center of Federal Courts, cited at Pet. App. 9a, n.1, available at https://perma.cc/7B3G-ZF8Y (emphasis added).
[2] *Id.* (emphasis added).

people Groo tagged were her Facebook friends, allowed her post to be visible to their audience, that their audience included any Montanans, or that they even read it. The decision below not only violated existing personal jurisdiction due process protections, but compounded the problem through faulty analysis of the social media used.

III. THIS CASE IS AN IDEAL VEHICLE TO ANSWER THE IMPORTANT AND REOCCURRING QUESTION LEFT OPEN IN *WALDEN*.

1. The proper standard for purposeful direction in intentional tort cases involving internet contacts is important and will remain so as social media and internet-based technology proliferates. *Walden* expressly recognized the question was left for another day nearly ten years ago. Since then, courts have filled this gap with various conflicting tests, which creates uncertainty and allows unprecedented expansion of the exercise of personal jurisdiction as seen in the case below. With Facebook (now Meta) alone having approximately 2.8 billion users monthly,[3] courts will continue to be faced with the question of when due process allows the exercise of personal jurisdiction over non-resident defendants for social media activity.

2. This case offers the Court the ideal vehicle to bring uniformity to courts' approaches by answering the question left open by *Walden* for several reasons. First, the decision below is wholly based on a non-

[3] Pew Research Center, 10 facts about Americans and Facebook, June 1, 2021, available at https://www.pewresearch.org/short-reads/2021/06/01/facts-about-americans-and-facebook/.

resident defendant's social media activity, and therefore, is an opportunity for the Court to state whether *Walden* applies to internet contact cases. Second, this case involves only non-reputational intentional tort claims. As such, it is an opportunity for this Court to clarify whether *Walden* held *Calder* applies only to reputational torts or whether *Walden* clarified the standard for all intentional torts, whether reputational or not.

Additionally, this case's facts involve a social media post and tagging both forum state residents and non-residents. This gives the Court an opportunity to clarify that *Walden*'s purposeful direction test is not satisfied when a non-resident defendant tags another non-resident of the forum state, and therefore, any number of non-residents tagged would not constitute targeting of the forum state.

The Court can also clarify when tagging forum state resident constitutes targeting the forum state. If tagging three Montana residents constitutes targeting the State of Montana, then the restraint this Court mandates in *Walden* will be substantially undermined. Tagging friends you visited on a bad review of a restaurant you went to, tagging three friends you attended a basketball game with in a post about a local referee's questionable calls, and any number of similar acts would constitute purposeful direction. The courts need clarification on whether a social media carveout from due process protections relating to personal jurisdiction exists, and if so, what applicable standard applies.

Importantly, the question whether Groo purposefully directed conduct to the State of Montana for purposes of personal jurisdiction is outcome-determinative here. All agree that Groo is not subject to general jurisdiction in Montana. Pet. App. 69a. The issue presented is purely legal given that personal jurisdiction was decided at the motion to dismiss stage, meaning there are no disputed facts. This case involves simple straightforward facts and involves none of the procedural quirks that could muddy review. By taking this case, the Court can resolve the purposely direction question on a set of facts that lower courts commonly face.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVID B. COTNER
Counsel of Record
ANNA C. CONLEY, Of Counsel
COTNER RYAN LAW, PLLC
321 W. Broadway, Suite 500
Missoula, MT 59802
(406) 541-1111
dcotner@cotnerlaw.com
Counsel for Petitioner