No. 19-910

In The
Supreme Court of the United States

K.G.S., INDIVIDUALLY AND AS GUARDIAN AND NEXT FRIEND OF BABY DOE, A MINOR CHILD,

Petitioner,

v.

FACEBOOK, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

REPLY BRIEF FOR THE PETITIONER

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INTRODUCTION

Walden v. Fiore, 571 U.S. 277 (2014), could hardly "squarely foreclose[]," BIO 2, an unanswered question: how the effects test of *Calder v. Jones*. 465 U.S. 783 (1984), applies to a case like this; on all-fours with *Calder* but for the tortious distribution of forum-focused information being virtual. Not until the very last page (BIO 27) does Facebook even acknowledge that *Walden* left this question open. But disregarding the actual question presented cannot mask the pressing need for this Court's guidance.

As the Petition showed—and Facebook's "harm-only" strawman fails to disprove—the lower courts have divided on how to apply *Calder's* effects test to virtual conduct and *Walden* only made things worse. The split is outcome-determinative and this record can resolve the question presented. No vehicle problems counsel against review. The virtual-contact jurisdictional question has long been recognized as important and it will only become more so. Now is the time to answer it.

ARGUMENT

I. Courts Are Divided On The Important And Recurring Question Left Open By *Walden*.

A. Facebook does not dispute (BIO 17–18) that, before *Walden*, most courts followed a content-plus-brunt-of-harm framework that permitted states to exercise jurisdiction over tortious acts committed online if the tortious web page focused on the forum

state and the defendant knew that the brunt of the harm would be suffered there. Pet. 21–25.

In several courts, that framework remains good law—and sensibly so, because *Walden* expressly declined to address "whether and how a defendant's virtual 'presence' and conduct translate into 'contacts' with a particular State." 571 U.S. at 290 n.9. As the Petition explained (Pet. 26–27), the First, Second, and Ninth Circuits and the Alaska and Texas Supreme Courts have maintained, post-*Walden,* that due process permits jurisdiction in a virtual contacts case based on the presence of one or more of three factors: foreseeable and intended harm in the forum, known users in the forum, and forum-focused content. The Question Presented here (Pet. i) is whether jurisdiction lies when all three factors are present—not, as Facebook would have it, whether jurisdiction is conferred by the "bare fact" that a website causes known harm in the forum. BIO 11 n.1, 12.

Under many courts' content-plus-brunt-of-harm framework, this case—featuring Alabama-focused content, drawn from Alabama sources, distributed to an Alabama audience and causing within-Alabama harm—would have come out differently. Facebook may not have written the page (BIO 16), but it did review the page, edit it, and disseminate it to its acknowledged Alabama user base (among others). Pet. 6a. As a result, K.G.S. was "inundated with appallingly malicious and persistent cyber-bullying," *id.*, including "hateful messages" from other Alabamians who read the page, and suffered reputational harm in her community, Pet. 73a (FAC ¶¶ 30, 32). K.G.S. and Baby Doe "were adversely

affected in virtually every aspect of their lives." Pet. 73a (FAC ¶ 28).

Facebook insists that pre-*Walden* and post-*Walden* cases finding jurisdiction are distinguishable, because those courts concluded that the "defendant's online conduct was aimed at the forum," BIO 17 n.2, or required "tortious conduct *targeted at* the forum," BIO 12. But this distinguishes away the question presented.

No court disputes that "aiming at" or "targeting" the forum is required; the question that lower courts have divided on—an important and recurring one that this Court has raised but not yet answered—is which virtual activities qualify as forum-targeted. Courts on the correct side of the split recognize that knowing internet dissemination of forum-focused content to users within the forum is conduct "targeted at" the forum; the Alabama Supreme Court and those courts that share its approach (Pet. 27–28) do not.

After *Walden*, the Texas Supreme Court reaffirmed that jurisdiction could be premised on the subject matter and sources of a video. *TV Azteca v. Ruiz*, 490 S.W.3d 29, 47 (Tex. 2016). Alaska's highest court similarly explained that if a defendant "drew on Alaska sources," "knew of any connection its [online] brochure would have to Alaska," and Alaskans had read it, then the defendant likely would have "targeted Alaska when publishing the brochure" online. *Harper v. BioLife Energy Sys., Inc.*, 426 P.3d 1067, 1075–76 (Alaska 2018) (finding no jurisdiction absent such factors).

The Ninth Circuit likewise held that defendants "expressly aimed" their conduct at Arizona by "posting

allegedly defamatory statements about [the plaintiff's business] online" and intending to affect the business, "which is based and operates in Arizona." *Alpha Phoenix Indus., LLC v. SCI Int'l, Inc.*, 666 F. App'x 598, 600 (9th Cir. 2016). Express aiming was not an additional requirement (*contra* BIO 14) but the result of combining Arizona-focused content and harm within Arizona. *Alpha Phoenix* is thus a post-*Walden* case finding jurisdiction based on online posting of forum-focused content, disproving Facebook's contention (BIO 17) that no such case exists.[1]

There are also such cases pre-*Walden*, *see* Pet. 21–25. Those cases remain good law (*contra* BIO 17–18), because *Walden* (i) expressly refrained from providing guidance for virtual-contact cases, 571 U.S. at 290 n.9, and (ii) reaffirmed *Calder*'s central teaching that where "the 'effects' caused by the defendants' article" stemmed from dissemination to third-parties within the state, and the "article [had] a [forum] focus," that suffices for jurisdiction, *id.* at 288.

Nor is it "inexplicable[]" (BIO 14) to count the defamation cases in K.G.S.'s favor. Facebook's counterpoints (BIO 11 n.1, 16–17)—that this is not a defamation case; there is no allegation about Alabama sources; and no other cases involve third-party content on internet platforms—fall flat.

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[1] *Axiom Foods, Inc. v. Acerchem Int'l, Inc.*, 874 F.3d 1064 (9th Cir. 2017) does not prove otherwise (*contra* BIO 14). *Axiom* confirms that *Alpha Phoenix* correctly reflects circuit law by recognizing that jurisdiction would lie if, as here, the forum state had been the "focal point both of the [virtual content] and of the harm suffered." 874 F.3d at 1071.

K.G.S. has alleged that Facebook intentionally caused emotional distress within Alabama by unlawfully disseminating confidential information, drawn from Alabama sources, within Alabama. Pet. 70a–73a (FAC ¶¶ 16–17, 19–20, 25, 30–32). There is no reason why the jurisdictional framework should be different for these torts than for defamation, as unlawful dissemination of Alabama-focused content and intended harm within Alabama are elements common to both defamation and the torts claimed here. The "online platform" distinction also dissolves, because Facebook did more than permit users to post content without intervention; it reviewed the page, made selective edits, and continued dissemination to Alabama users despite notice of harm. *See infra* Part III.

Facebook insists (BIO 9–12) the First and Second Circuit decisions, focusing largely on the known-users factor, are inapposite because they did not use "the word 'harm,'" BIO 10, but rather addressed websites "use[d] … to direct business at the forum," BIO 12. Not so. The First Circuit discussed within-forum harm. *Plixer Int'l, Inc. v. Scrutinizer GmbH*, 905 F.3d 1, 12 (1st Cir. 2018) ("[T]he United States has an interest in remedying an alleged injury that occurs in the United States.").

And the Second Circuit case closely maps the allegations here. There, the court approved New York jurisdiction over a copyright infringement claim against an online platform that provided predominantly free accounts to users worldwide, allowing users to upload songs that the platform then shared with other users. *See EMI Christian Music Grp., Inc. v. MP3tunes, LLC*, 844 F.3d 79, 86–87 (2d

Cir. 2016). The Second Circuit affirmed jurisdiction based on "at least 400 users located in New York." *Id.* at 98. So, too, here. Facebook provides accounts to users worldwide (including in Alabama) that permit users to upload information—including tortuous disclosures of confidential information—that Facebook then shares. Because sharing information is the primary service that Facebook provides, claims of tortious information disclosure are directly related to Facebook's business in the forum state.

In sum, if Alabama had followed the approach of the cases discussed above, it would have found jurisdiction, given the trifecta of (i) Alabama-focused content (ii) knowingly disseminated to Alabama users (iii) causing known harm within Alabama. Instead, misreading *Walden* (as Facebook apparently does) to decide the virtual-contacts question it expressly left open, the Alabama Supreme Court held that disseminating a page about Alabama to an Alabama audience is not enough because that virtual contact is "intentional conduct … expressly aimed at K.G.S. herself, and not at Alabama as a forum." Pet. 35a. This divide in applying *Calder* to virtual information-based torts, post-*Walden*, cries out for this Court's guidance.

B. The confusion across the lower courts is unsurprising. The actual question presented—not Facebook's artificially-narrowed harm-only-variant—is of growing importance, as elaborated in Part I of the Petition. Litigants and courts across the country continue to wait for this Court to explain how the "target[ing] the forum" standard applies in a virtual world. *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 890 (2011) (Breyer, J., concurring in the judgment). *Walden* was no help, as it managed to draw

a bright line between targeting the forum and targeting the plaintiff only by carving out virtual conduct.

This categorical distinction between a defendant's contacts "with the forum State itself" and its contacts "with persons who reside there," *Walden*, 571 U.S. at 285—a distinction driving *Walden's* jurisdictional analysis—blurs when all the contacts are electronic. *See* Julie Cromer Young, *The Online-Contacts Gamble After* Walden v. Fiore, 19 LEWIS & CLARK L. REV. 753 (2015) (describing judicial confusion post-*Walden*); Allan Erbsen, *Personal Jurisdiction Based on the Local Effects of Intentional Misconduct*, 57 WM. & MARY L. REV. 385, 386 (2015) (discussing the "jurisdictional dilemma" post-*Walden*).

Absent this Court's guidance, these knotty questions will continually recur, yielding divergent result across jurisdictions. And framing the universe narrowly as cases involving a "social media platform" that "declined to take down content that discussed … events in the forum State," BIO 24–25, will not make this pressing issue disappear. Facebook's blinkered recasting of Facebook's alleged tortious acts—that scoffs at the seriousness of the harm suffered by K.G.S. and Baby Doe—is no substitute for the actual legal question presented: whether and when distributing forum-focused content to forum users, and intentionally causing known harm within the forum confers specific jurisdiction.

This question recurs frequently, and cases will only increase as more and more business and personal activity moves online—especially now as we physically distance ourselves to protect public health. As virtual-contact issues proliferate, this Court's guidance is

essential both to preserve some degree of uniformity and to ensure that the right jurisdictional balance is struck—allowing states adjudicatory authority over defendants that violate their laws by intentionally injuring their citizens through virtual conduct.

II. The Question Presented Is Preserved And Cleanly Presented.

A. K.G.S. made the same argument below that she makes here. *See* Pet. 26a. Facebook does not dispute the issue is generally preserved but insists (BIO 22–23) that K.G.S. forfeited arguments about *Walden*'s meaning and Facebook's user base within Alabama. As for *Walden*, it was only the Alabama Supreme Court's determination that *Walden* resolved an issue it expressly did not decide—how to evaluate virtual contacts, 571 U.S. at 290 n.9—that made *Walden* central to the case. K.G.S. can thus hardly be faulted for not citing it. In any event, the issue is preserved because the court fully considered *Walden* and this Court typically "permit[s] review of an issue not pressed so long as it has been passed upon." *United States v. Williams*, 504 U.S. 36, 41 (1992).

Ditto for Facebook's Alabama user base. The relevance of Alabama users was implicit in K.G.S.'s argument that Facebook knew its continued dissemination of the page caused harm, as the alleged harm hinges on circulation of the page within her community. Pet. 73a (FAC ¶¶ 30–32). And having used Facebook's global availability (including within Alabama) against K.G.S. for general jurisdiction, Pet. 20a n.9, the Alabama Supreme Court could not plausibly close its eyes to that availability when it came to specific jurisdiction. Finally, despite its

characterization of K.G.S.'s arguments, the court passed on the question anyway, holding that Facebook's Alabama users did not matter. Pet. 27a n.11. The Alabama Supreme Court having passed on the issue, there is no bar to this Court's review, much less an adequate and independent state ground precluding certiorari.

B. The operative complaint amply covers the necessary facts: the Facebook page focused on an Alabama adoption and drew on Alabama sources. Pet. 70a–72a (FAC ¶¶ 17, 19–20, 25). It was delivered by Facebook to Alabama users, who sent hateful messages to K.G.S. and caused her reputational harm. Pet. 73a (FAC ¶¶ 30–32). Facebook reviewed and edited the page but continued to disseminate it, even after notice that it violated Alabama law and caused harm to K.G.S. and Baby Doe. Pet. 72a (FAC ¶¶ 23–24). On these facts, other courts would have found jurisdiction: Alabama content, from Alabama sources, distributed to Alabama users, causing known harm in Alabama. The factual record is thus far from "threadbare." BIO 23–24.

C. This is not an "interlocutory" petition (*contra* BIO 24). Although the Alabama appeal was taken from a preliminary injunction, the court's decision required a final judgment dismissing all claims against Facebook. Pet. 53a. Final judgments were entered against two defendants before filing of the petition, Pet. ii–iii, and the remaining two defendants have since entered settlement agreements, fully

resolving the claims against all defendants other than Facebook.[2]

D. In a final effort to diminish the importance of resolving the jurisdictional question, Facebook suggests (BIO 25–27) that K.G.S.'s suit (and others like it) face "insurmountable barriers" on the merits. But the application of "publisher" immunity under the Communications Decency Act is a far more hotly contested question than Facebook lets on, and one this Court has yet to reach. *See generally Stuart Force v. Facebook, Inc.*, No. 19-859.

And the jurisdictional question here is not *how* the merits should be resolved, but which forum gets to decide them. The countervailing interests highlighted by Facebook—like privacy and public debate—are precisely the sort of concerns that state courts should resolve when their residents are harmed and state law would otherwise be thwarted. Only this Court can clarify that Alabama has the adjudicatory authority (and obligation to its injured citizens) to reach these questions.

III. The Alabama Supreme Court Got It Wrong.

Walden described the following four "forum contacts" in *Calder* as "ample": making phone calls to California sources, writing an article about the plaintiff's California activities, causing "reputational injury" in California by "widely circulat[ing]" the article in California, and the plaintiff suffering the

[2] A formal dismissal order has already been entered for the claims against Renee L. Gelin (Doc. 590) and a similar order is anticipated for the claims against Kim Mcleod, which are likewise fully covered by a settlement agreement.

brunt of the harm in California. 571 U.S. at 287. In shorthand, "California [wa]s the focal point both of the story and of the harm suffered." *Id.* (alteration in original). Here, Alabama was similarly the focal point of both the story and the harm. A straightforward application of *Calder* to internet media thus shows how the Alabama Supreme Court's jurisdictional rule is flat wrong.

As Facebook does not dispute, the page focused on an Alabama adoption and Alabama law. It also relied on Alabama sources. The Alabama information may have been gathered by Facebook through internet-based means, not by phone. But obtaining it required reaching into Alabama as much as—if not more than—making phone calls to California. Pet. 72a (FAC ¶ 25) (describing how the page relied on videos physically filmed in Alabama).

Facebook insists (BIO 20–21) that *it* did not reach out to any Alabama sources, and *it* did not write the page. But neither did the editor in *Calder*, who reviewed and approved the subject for the article, edited it, and declined to print a retraction. 465 U.S. at 786. Facebook performed similar editorial functions. It did not approve the page in advance, but it did so after notice that the page unlawfully revealed confidential information by editing and continuing to disseminate it to Facebook users. Pet. 72a (FAC ¶¶ 23–24). Facebook might have edited with a light touch compared to the *Calder* editor—indeed, the gravamen of the claims is that Facebook did not make as many edits as it should have—but it was undisputedly involved with curating the harmful and Alabama-focused content of the page.

Facebook also widely circulated the page in Alabama (*contra* BIO 20). Widespread circulation within Alabama is evidenced by the many hateful messages that K.G.S. received from Alabamians and the reputational harm she suffered within her local community. Pet. 73a (FAC ¶¶ 30–32). *Calder* involved the physical distribution of magazines, but the shift from physical to virtual media should not change the jurisdictional calculus.

Distribution through widespread virtual "circulation" is no less of a deliberate contact with the forum and this information dissemination forms an essential element of a claim against Facebook. The operative complaint alleged that Facebook, "in direct violation of the Alabama Adoption Code, disclosed and/or permitted the disclosure of facts … related to a private, contested adoption." Pet. 75a (FAC ¶ 38). The nature of the tort—requiring dissemination to third parties—means the in-state effects "connected the defendants to [Alabama], not just to the plaintiff," *Walden*, 571 U.S. at 287, just like the libel tort in *Calder*.

Given these "ample" contacts with Alabama, courts properly applying *Calder* to tortious online dissemination of content, before and after *Walden*, would have found specific jurisdiction here. The Alabama Supreme Court's contrary decision requires review.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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